

## Land and Environment Court New South Wales

<b>Medium Neutral Citation</b>	Freshwater Village Developments Pty Ltd v Warringah Council [2011] NSWLEC 5
<b>Hearing Dates</b>	25 January 2011
<b>Decision Date</b>	25/01/2011
<b>Jurisdiction</b>	
<b>Before</b>	Craig J
<b>Decision</b>	<ol style="list-style-type: none"><li>1. The Notice of Motion by the Friends of Freshwater Village Inc (the Friends) is dismissed</li><li>2. I decline to make any directions in accordance with s 38(2) of the Court Act involving the participation of the Friends in the proceedings</li><li>3. Stand over the proceedings to the Registrar's List on Friday 28 January 2011 at 9.30am</li><li>4. No order as to costs</li><li>5. Exhibits may be returned</li></ol>
<b>Catchwords</b>	PRACTICE AND PROCEDURE:- joinder of parties - 'Double Bay Marina' participant - no intention by intervener to call expert evidence - issues addressed in evidence to be led by Council
<b>Legislation Cited</b>	Environmental Planning and Assessment Act 1979 s 97 Land and Environment Court Act 1979 ss 38(2), 39A State Environmental Planning Policy (Infrastructure) 2007 cl 45
<b>Cases Cited</b>	Double Bay marina Pty Ltd v Woollahra Council (1985) 54 LGRA 313 Morrison Design Partnership Pty Ltd v North Sydney Council and the Director-General of the Department of Planning [2007] NSWLEC 802; (2008) 159 LGERA 361
<b>Category</b>	Procedural and other rulings
<b>Parties</b>	Freshwater Village Developments Pty Ltd (Applicant) Warringah Council (Respondent)
<b>Representation</b>	Solicitors: Herbert Geer Lawyers (Applicant) N/A (Applicant for joinder) Wilshire Webb Staunton Beattie Lawyers (Respondent)  Counsel: A E Galasso SC (Applicant) L M Byrne (Applicant for joinder) S H Patterson (Solicitor) (Respondent)
<b>File Number(s)</b>	11007 of 2010

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## EX TEMPORE JUDGMENT

- 1 **HIS HONOUR** : On 9 September 2010, Freshwater Village Developments Pty Ltd (the **Company** ) sought development consent to construct a mixed-use retail and residential development on land located at Lawrence and Albert Streets and Marmora Road, Freshwater. The development site is substantial in size, having an area of about 9,566m . Some 3,414m of retail floor space is proposed. The residential component of the development is to comprise 91 residential units together with 7 townhouses.
- 2 Unsurprisingly, given the site's location in the town centre of Harbord, the development is controversial. As a consequence of the public notification of the proposed development, Warringah Council (the **Council** ) received 1,953 submissions, including a form letter signed by 1,813 people together with 140 individual letters of objection, all opposing the development. At two public hearings held prior to determination of the development application, a total of 64 objectors to the application were heard.
- 3 The development application was determined by the South East Region Joint Regional Planning Panel (the **Planning Panel** ) on 9 December 2010. It resolved to refuse the application. Following notification of that decision, the Company appealed to this Court pursuant to s 97 of the *Environmental Planning and Assessment Act 1979*, its application having been filed with the Court filed on 15 December 2010.
- 4 By notice of motion filed on 10 January 2011 an incorporated association known as the Friends of Freshwater Village Inc (the **Friends** ) sought leave to be joined as a party to the proceedings pursuant to s 39A of the *Land and Environment Court Act 1979* (the **Court Act** ). It is that motion which was listed before me on Tuesday 25 January, 2011 and which is now being determined.
- 5 At the commencement of the hearing, Ms L Byrne of counsel, who appeared for the Friends, indicated that her client no longer sought joinder as a party. Nonetheless, she indicated that her client sought directions in reliance upon s 38(2) of the Court Act allowing it to be separately represented at the hearing and to participate in it as a "Double Bay Marina" participant (see *Double Bay Marina Pty Ltd v Woollahra Council* (1985) 54 LGRA 313). The application by the Friends to participate on this basis was opposed by the Company but was not opposed by the Council.
- 6 The application by the Friends is supported by an affidavit sworn by its President, Mr Peter Harley. His evidence is that the Friends has been active in making submissions to the Council in opposition to the proposed development. The expression of that opposition has included an address by him to the Planning Panel on 9 December 2010 prior to the resolution to refuse the grant of development consent.
- 7 Mr Harley has indicated that there are two issues which the Friends would wish to agitate in the present appeal. First is the impact of traffic generated by the proposed development, particularly its impact upon local residential streets. The second issue of concern is the impact of electromagnetic fields upon occupants and users of the proposed development. The source of those electromagnetic fields is said to be a 33kV electricity substation that adjoins the development site to its west.
- 8 It was indicated by Ms Byrne that the Friends did not intend to retain any expert witness to

- present evidence on these issues at the hearing of the development appeal. Rather, it was its intention to tender documents addressing the issues identified and, if appropriate, to cross-examine witnesses retained by the other parties and to make submissions in opposition to the grant of consent at the conclusion of the evidence.
- 9 The evidence led on behalf of the Company, in effect, recited the history of its development proposals and current application with the Council. Its evidence revealed that an earlier application seeking substantially the same development had been withdrawn. This followed identification by the Council of deficiencies in the material supporting the application, including the inadequacy of the material addressing the two issues that the Friends have identified. The identification of those deficiencies was apparently informed, at least in part, by submissions that had then been made to the Council by or on behalf of the Friends.
- 10 The Company's evidence further reveals that when dealing with the present application, expert evidence in the form of reports has been obtained and provided in support of the application in its present form. This material is said to respond to the Council's earlier observations as to the inadequacies in the previous development application. There has been a detailed exchange of correspondence involving the Company's expert on electromagnetic fields, Energy Australia as the statutory entity responsible for the substation and the Council. This exchange reveals the involvement of Energy Australia in critically assessing the work of the Company's expert and ultimately indicating to the Council that from the perspective of Energy Australia, consent could appropriately be granted to the present development application, provided conditions which it has framed are imposed upon any development consent that might be granted.
- 11 It is important to note Energy Australia's response. Clause 45 of *State Environmental Planning Policy (Infrastructure) 2007* requires that before determining a development application involving development immediately adjacent to an electricity substation, the electricity supply authority (the **authority**) (in this case Energy Australia) must be notified of the application in writing and that the consent authority take into consideration any response that the authority provides to that notice. As I have indicated, the requisite notice has been given and the response of Energy Australia, not only providing its proposed conditions but also including its earlier correspondence indicating the concerns initially expressed, would all be material that the consent authority or the Court on the hearing of the appeal would be required to consider before determining the development application. Indeed, without expressing any final view on the matter, it would seem that failure to take into account that material might well amount to a legal error.
- 12 It must be recorded that the evidence given by Mr Harley, particularly that identifying the issues that the Friends wished to agitate, was contained in an affidavit sworn by him prior to the Council filing its draft statement of facts and contentions. A perusal of the latter document reveals that the traffic issue identified by Mr Harley is squarely raised by the Council. So much is conceded by Ms Byrne. She acknowledges that on the basis of the draft statement of facts and contentions the traffic concerns identified by the Friends are raised and there is no basis upon which it could properly be said that the issue would be left unexplored in the course of the development appeal. For its part, the Council has indicated through its solicitor, Mr Patterson, that the grant of consent will be opposed and that the final statement of facts and contentions will not, on his present instructions, reduce the issues to

be argued by the Council.

- 13 As I have understood the evidence led on behalf of the Friends and the submissions made on its behalf, it does not intend to retain any expert to address the electromagnetic field issue. Rather, it intends to seek the tender of documentary evidence that it has assembled directed to that issue. Ms Byrne acknowledges that the documentary evidence assembled or to be assembled by the Friends can appropriately be provided to the Council, including any current or draft standard that is directed to electromagnetic fields emanating from electricity substations and their consequences for human health. If such documentation is provided by the Friends, it has been indicated on behalf of the Council that the material would be included as part of the documentary evidence proposed by it to be tendered to the Court.
- 14 It does seem to me that the Court should be very slow to allow additional parties to participate in the hearing of a development appeal in respect of non-designated development. This is particularly true where, as in the present case, the proposed intervener does not intend to call any expert evidence directly contradicting the evidence called by another party that addresses, with specificity, the particular impact (if any) upon the particular development in contemplation. No doubt, documents that are filed that address the issue in a general sense will need to be considered by the applicant's expert, but it is assumed that the documentary material, while addressing the impacts of electromagnetic fields, will do so without specifically addressing the impact of the 33kV substation located to the west of the development site upon the particular development proposed.
- 15 On a number of occasions this Court has addressed the principles that should attend either the joinder of a party to a development appeal of this kind or the giving of directions allowing participation of a party upon the "Double Bay Marina" basis. The decisions of the Court indicate that the requirements of s 39A of the Court Act effectively identify the principles to be applied even if application is made for "Double Bay Marina" participation, relying, as it does, upon the provisions of s 38(2) of the Court Act.
- 16 The caution that should be exercised before joinder in circumstances such as the present is, if I may respectfully say so, appropriately identified in the judgment of the Chief Judge of this Court in *Morrisson Design Partnership Pty Ltd v North Sydney Council and the Director-General of the Department of Planning* [2007] NSWLEC 802; (2008) 159 LGERA 361. In particular, I refer to the observations made by his Honour as to the distinction that the legislature has drawn between development appeals involving objectors to designated development and those appeals in respect of development that are not so classified. Neither the power of joinder provided by s 39A nor the utilitarian application of "Double Bay Marina" participation should be seen as the provision of a plenary power to allow, in each and every circumstance, objectors to development to be joined or participate in a development appeal, with separate representation. As has been made clear by the Council's solicitor, those who objected to the development here proposed, including a representative of the Friends, will be invited by the Council to appear as a witness in the Council's case in support of their opposition to the development proposed by the Company.
- 17 It does seem to me that, in the context of the issues sought to be agitated by the Friends, those issues will be adequately addressed. I have already indicated the position taken by the Council in relation to the traffic issue. While the Council has indicated that it does not

intend to oppose the development application on the basis of the electromagnetic field impact, it nonetheless intends that all of the correspondence that has passed to and from Energy Australia dealing with that topic, together with the responses and material provided by the Company, will be tendered to the Court at the appeal hearing.

- 18 As earlier indicated, so much would appear to be mandated by the provisions of cl 45 of *State Environmental Planning Policy (Infrastructure ) 2007*. The provisions of that Policy seem to me to provide adequate safeguard to ensure consideration of the issue, particularly as it addresses material relevant and specific to the particular substation and the particular development.
- 19 For these reasons I propose to dismiss the Notice of Motion.
- 20 The orders that I make, therefore, are these:
1. The notice of motion by the Friends of Freshwater Village Inc (the Friends) is dismissed.
  2. I decline to make any directions in accordance with s 38(2) of the Court Act involving the participation of the Friends in the proceedings.
  3. Stand over the proceedings to the Registrar's List on Friday 28 January 2011 at 9:30 am.
  4. No order as to costs.
  5. Exhibits may be returned.

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Last updated 18 March 2011