



Land and Environment Court of New South Wales

CITATION :	Jonah Pty Limited v Pittwater Council [2006] NSWLEC 99
PARTIES :	APPLICANT Jonah Pty Limited RESPONDENT Pittwater Council
FILE NUMBER(S) :	10284 of 2000
CORAM:	Preston CJ
KEY ISSUES:	Development Consent :- modification of court-granted development consent for restaurant - deletion of condition restricting use of terrace for dining - past unlawful use of restaurant raised as issue on appeal - motion to strike out issue as irrelevant - fact of unlawfulness of past use not relevant - issue struck out Practice and procedure:-issues on planning appeal - past unlawful use raised as an issue - motion to strike out issue as irrelevant - fact of unlawfulness of past use not relevant - issue struck out
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979 s 79C(1)(e), s 96(2)

CASES CITED:	Auburn Municipal Council v Szabo (1971) 67 LGERA 427; District Council of Mallala v M & B Farmer Nominees Pty Ltd (2000) 107 LGERA 346; Eaton & Sons Pty Ltd v Warringah Shire Council (1972) 129 CLR 270; House of Peace Pty Ltd v Bankstown City Council (2000) 48 NSWLR 498; Hubertus Schuetzenverein Liverpool Rifle Club Ltd v Commonwealth of Australia (1994) 85 LGERA 37; Ireland v Cessnock City Council (1999) 103 LGERA 285; Ireland v Cessnock City Council (1999) 110 LGERA 311; Kouflidis and Jenquin Pty Ltd v Corporation of the City of Salisbury (1982) 29 SASR 321; 49 LGERA 17; Longa v Blacktown City Council (1985) 54 LGERA 422; Low v Swan Cove Holdings Pty Ltd (2003) 127 LGERA 36; Miller-Mead v Minister for Housing and Local Government [1963] 2 QB 196; Ryde Municipal Council v Royal Ryde Homes (1970) 19 LGERA 321; Willoughby City Council v Dasco Design and Construction Pty Ltd (2000) 111 LGERA 422; Windy Dropdown Pty Ltd v Warringah Council (2000) 111 LGERA 299
DATES OF HEARING:	02/03/2006
EX TEMPORE JUDGMENT DATE :	03/02/2006
LEGAL REPRESENTATIVES:	APPLICANT Mr P R Clay (barrister) SOLICITORS BTS Lawyers RESPONDENT Mr R P Lancaster (barrister) SOLICITORS Mallesons Stephen Jaques

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

PRESTON CJ

2 MARCH 2006

10284 of 2000

JONAH PTY LIMITED V PITTWATER COUNCIL

JUDGMENT

1 **HIS HONOUR:** The applicant, Jonah Pty Limited, moves the Court to strike out an issue raised by the respondent, Pittwater Council ("the Council"), in a statement of issues filed in Class 1 proceedings in the Court.

2 The Class 1 proceedings are an application by the applicant under s 96(2) of the *Environmental Planning & Assessment Act 1979* ("the EPA Act") to modify a development consent granted by the Council. The applicant has elected to apply to the Court directly under s 92(8) of the EPA Act rather than to the Council under s 96AA(1) of the EPA Act.

3 The consent granted by the Council was for alterations to Jonah's restaurant/motel at 69 Binya Road, Palm Beach. The application to modify the Council granted consent was dated and was filed in Court on 29 September 2005.

4 The application seeks the deletion of Condition D227 of the Development Consent 10284/2000 to enable the provision of tables, chairs and benches on the external terrace area and use of this area for dining and entertainment purposes.

5 Condition D 227 of the consent provides:

"No tables or chairs or similar structures of any type are to be permitted on the new terrace area adjacent to and on the eastern side of the existing outdoor area. That area may be used for other than

dining, provided that no seating and tables are to be provided on that area”.

6 The Council prepared, initially in draft form, a statement of issues dated 21 November 2005 and filed in Court on 22 November 2005, and a statement of basic facts filed 23 November 2005. On 20 February 2006, the Council filed a final version of each of the statement of basic facts and the statement of issues, both dated 17 February 2006.

7 Paragraph 4 of the draft statement of issues and of the statement of issues dated 17 February 2006 states:

“4. As a matter of discretion, the Court should not approve dining on the outer terrace area in circumstances where the Applicant currently:

- (a) operates its restaurant in breach of approved trading hours in breach of condition 25 of DA Consent 93/177 by serving meals prior to noon;
- (b) provides dining on the open ‘inner terrace area’ (as marked on ‘Annexure A’) in breach on condition 3 of DA Consent 88/302”.

8 The consents referred to in paragraph 4(a) and (b) of the statements of issues are different and earlier consents to that which was granted by the Court and is the subject of the modification application. The “inner terrace area” referred to in paragraph 4(b) is a different area to the “new terrace area” adjacent to and on the eastern side of the existing outdoor dining area referred to in condition D227.

9 On 23 November 2005, the applicant filed a notice of motion moving the Court for orders that:

- “1. Paragraph 4 of the Draft Statement of Issues dated 21 November 2005 be struck out on the grounds that it is not a matter entitled to be raised as an issue.
- 2. Costs.”

10 This notice of motion should be treated as having been amended to refer also to paragraph 4 of the finalised statement of issues dated 17 February 2006 and filed on 20 February 2006.

11 The Council contests the applicant's notice of motion.

12 On 1 December 2005, the proceedings came before me as the Duty Judge. I directed, inter alia, the applicant's notice of motion dated 23 November 2005 be listed for mention before me on 20 February 2006.

13 On 20 February 2006, the notice of motion was fixed for hearing on 22 February 2006. However, Mr Lancaster, counsel for the Council, outlined the submissions of the Council in opposing the applicant's motion.

14 On 22 February 2006, by consent, the further hearing of the motion was adjourned to 2 March 2006.

15 The applicant's motion puts in issue the relevance in the Class 1 proceedings of the Council's pleaded allegations that the applicant has operated its restaurant facility in breach of certain conditions of consents.

16 The Council, in raising the issue, does not contend that the alleged facts, even if true, go to the power of the Court (exercising the power of the consent authority) to modify a development consent under s 96(2) of the EPA Act. Rather, the Council contends such facts, if true, are a relevant consideration in the exercise of the Court's discretion as to whether to exercise the power to modify the development consent.

17 Mr Lancaster for the Council submitted that the facts concerning the past unlawful use by the applicant are relevant for two reasons:

(a) They fall under the heading of the "public interest" under s 79C(1)(e) of the EPA Act. The non-compliance with conditions of consents has been by the same person and in respect of the same restaurant facility. The past non-compliance may be a predictor of future non-compliance. If the current owner/operator of the restaurant facility has not felt "hamstrung" by conditions of consents in the past, the Council submits that it is more likely that the owner/operator would not feel hamstrung to so comply in the future.

(b) The unlawful use of the inner terrace area (if not restrained by the Court) may have a cumulative impact if the Court were to approve the modification of the consent to use for dining in the external terrace area.

18 Mr Clay, counsel for the applicant, submitted:

(a) the Court should be concerned only with the prospective impacts of a proposed land use, regardless of the identity of the landowner. The consent runs with the land;

(b) reasonable conditions can be imposed to address adverse impacts of a proposed land use. The Court should assume that there will be compliance with conditions imposed by the Court,

and that they are capable of being complied with.

19 The issue of the relevance of past unlawful use to determining whether a consent should be granted or modified has been considered by courts in the past. The courts have consistently held that past unlawful use is not a relevant factor.

20 In *Kouflidis and Jenquin Pty Ltd v Corporation of the City of Salisbury* (1982) 29 SASR 321 at 323-324; 49 LGERA 17 at 19-20, King CJ with whom Mohr J agreed, sitting as a Full Court of the South Australian Supreme Court, stated:

“In my opinion, moreover, the past unlawful use is not a relevant factor in determining whether consent should be granted. That decision should be made upon the planning considerations envisaged by the Act and Regulations irrespective of the past or continuing conduct of the applicant. I do not think there is any warrant in the Act or Regulations for refusing or deferring an application or appeal by reason of the unlawful conduct of the applicant.

The learned judge in the Land and Valuation Court was rightly concerned with the activities of a person ‘who, cynically and fraudulently, changes the use of his or her land, and who hopes, by doing so, to present planning authorities with a *fait accompli*, and thus to extract a planning consent to the changed use’. His Honour posed the question: ‘How should such a person fare when his or her application comes to be considered at the administrative and judicial level?’ The answer, it seems to me, is that the unlawful use should be ignored. It does not enter into the planning considerations upon which the planning decision must be made. The punishment of the unlawful conduct should be left to criminal proceedings. The supposed *fait accompli* should not be recognized as such. The unlawful user of the land should gain no advantage from having established an unlawful use. Any argument based

either directly or indirectly upon the unlawful use should be firmly rejected. For instance, the argument put in the present case that the patronage given the unlawful business by the public indicates a local demand for the facility and is a consideration in favour of planning consent, should be rejected as an attempt to gain an advantage from the unlawful use by erecting an argument on the basis of that unlawful use.

Although an applicant for consent should derive no advantage, direct or indirect, from the unlawful use, I do not think that it should be an impediment to the consideration of his application on its planning merits. If on the merits a planning consent should be given, it is desirable in the public interest that it should be given irrespective of the past conduct of the applicant. It is desirable that the position should be regularized leaving the past unlawful conduct to be punished by penal sanctions. Refusal to entertain an application while an unlawful use continues might result in a pointless impasse. A landowner who maintained, contrary to the planning authority's view, that his use of the land did not require consent, but who was willing to seek consent to avoid conflict, would be unable to obtain consent unless he first desisted from the disputed use, perhaps closed his business. If refusal to consider the application were confined to cases of cynical, fraudulent or manipulative conduct, the planning authority and the Planning Appeal Board would be required to inquire into and decide whether the conduct in a particular case answered that description. I do not think that a planning authority such as a Council or an administrative appeals tribunal such as the Board is equipped by its constitution or

procedures to deal with allegations of improper motives. I think that the most expedient course, and that indicated by the Act and Regulations, is for the administrative authorities and the court to deal with the planning application on its planning merits, ignoring any arguments based directly or indirectly upon unlawful use and leaving the punishment of the unlawful conduct to penal proceedings”.

21 In *Ireland v Cessnock City Council* (1999) 103 LGERA 285 at 307 [87], Bignold J stated:

“87. The approach taken in *Kouflidis* has been consistently applied in this Court in the exercise of its comprehensive appellate jurisdiction embracing planning appeals, building appeals, demolition order appeals and building certificate appeals. This is aptly reflected in the contemporaneous decision of Cripps J (as he then was) in *Longa v Blacktown City Council* (1985) 54 LGERA 422”.

22 In *Ireland v Cessnock City Council* (1999) 103 LGERA 285, the applicants had constructed a large farm shed without the necessary development consent and building approval having been obtained. The building had been constructed to lock up stage. The Council brought civil enforcement proceedings against the applicants. The Court made a mandatory order for demolition of the building but stayed that order to provide an opportunity for the planning law position to be regularised.

23 The applicants applied for a building certificate in respect of the building already constructed and development consents for completion of the building and prospective use of the building. The Council refused both applications. The applicants appealed to the Court.

24 In the development appeal, the Council contended that the Council (and on appeal the Court) had no power to grant development consent to the use of the building, the construction of which had been declared to be unlawful and, even if there were to be power, s 79C(1)(e) of the EPA Act (“the public interest”) precluded the giving of consent in light of, inter alia, “the obligation not to sanction an illegality”: at 302 [70].

25 Bignold J rejected the Council’s argument that there was no power to grant consent for the prospective use of an illegally erected building, approving the approach in *Kouflidis and Jenquin Pty Ltd v Corporation of the City of Salisbury* (1982) 29 SASR 321 at 323-324; 49 LGERA 17 at 19-20 and

Longa v Blacktown City Council (1985) 54 LGERA 422 at 308 [96].

26 Bignold J held that s 79C(1)(e) ("the public interest") does not preclude the grant of development consent to allow the prospective use of an illegally erected building. The grant of consent does not sanction an illegality and accordingly the consideration of "the obligation not to sanction the illegality" was not relevant: at 310 [102]-[104] and see 308 [93].

27 In a subsequent judgment in *Ireland v Cessnock City Council* (1999) 110 LGERA 311 dealing with the issue of whether a building certificate should be issued, Bignold J stated at 316 [38]:

"The proper approach to be taken to the available discretion will generally be that outlined in the judgment of King CJ of the South Australia Supreme Court in *Kouflidis v Salisbury City Corporation* (1982) 29 SASR 321; 49 LGERA 17, namely to leave to the criminal law, the punishment of the unlawful conduct involved in the erection of the building and to determine the present application on the merits, but taking care not to allow the wrongdoer to benefit from his wrongdoing".

28 In *District Council of Mallala v M & B Farmer Nominees Pty Ltd* (2000) 107 LGERA 346, an owner of land applied to the relevant council for development consent to construct a dam and a loading pad. The owner had then almost completed construction of the dam. If the dam was development as defined by the relevant planning statute, the *Development Act* 1993 (SA), the owner had failed to obtain consent before commencing construction and had therefore acted in breach of the statute. Debelle J, with whom Doyle CJ and Nyland J of a Full Court of the South Australian Supreme Court agreed, noted at 348 [4]:

"However, the fact of the unlawful activity is not a relevant factor when determining the issues in this appeal: see *Kouflidis and Jenquin Pty Ltd v Corporation of the City of Salisbury* (1982) 29 SASR 321; 49 LGERA 17."

29 In *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299, the applicant obtain development consent for the subdivision of land. The applicant carried out works, including filling of various lots, but such filling was not in accordance with the development consent. The Council brought civil enforcement proceedings to remedy the breach of the EPA Act by an order that the fill be removed and the landscape preservation area be reinstated on the site. The orders were stayed pending the hearing of an appeal against the Council's refusal of an application by the applicant to modify the consent to allow the fill to remain. Talbot J noted on the hearing of the appeal that:

“The carrying out of illegal works generally is not an impediment to the consideration of an application on the merits (*Kouflidis v City of Salisbury* (1982) 29 SASR 321; 49 LGERA 17; *Longa v Blacktown City Council* (1985) 54 LGERA 422; *Ireland v Cessnock City Council* (1999) 103 LGERA 285)”: at 301 [4].

30 In *Willoughby City Council v Dasco Design and Construction Pty Ltd* (2000) 111 LGERA 422, Bignold J again considered the issue of the relevance of a party’s unlawful conduct. In that case, the Council brought civil enforcement proceedings in Class 4 of the Court’s jurisdiction to remedy and restrain a breach of the EPA Act by the respondent erecting a dwelling house not in accordance with approved plans. The respondents requested the Court to exercise its discretion under s 124 of the EPA Act not to grant certain mandatory injunctive relief in relation to the illegally erected works. The respondents argued that their earlier misconduct was irrelevant to the Court’s discretion, citing *Kouflidis and Jenquin Pty Ltd v Corporation of the City of Salisbury* (1982) 29 SASR 321; 49 LGERA 17 in support. Bignold J rejected the respondents’ submissions stating at 439 [77]-[78]:

“77. In my judgment, the evidence of the respondents’ misconduct is relevant to the exercise of the Court’s discretion. The reasoning in *Kouflidis* (which has been consistently applied by this Court in the exercise of its comprehensive appellate jurisdiction embracing planning appeals, building appeals, demolition order appeals and building certificate appeals) does *not* in my judgment, apply to misconduct of a party who seeks the favourable exercise of the Court’s judicial discretion under the EP&A Act, s 124.

78. In the context of the exercise of the statutory discretion conferred by s 124 which is analogous to the equitable remedy of injunction in aid of the enforcement of public law (cf *Enfield City v Development Assessment Commission* (2000) 199 CLR 135; 106 LGERA 419) the conduct of the parties will generally be a relevant consideration in the exercise of the judicial discretion”.

31 In *Low v Swan Cove Holdings Pty Ltd* (2003) 127 LGERA 36, the

appellants had erected a house that differed in material respects from the approved plan. They applied for retrospective planning approval. The relevant local government authority refused the application. The appellants appealed to the Town Planning Appeal Tribunal. The appeal was upheld subject to conditions. The appellants, still being dissatisfied with certain of the conditions, appealed further to the Supreme Court of Western Australia. One of the grounds of appeal was that the Tribunal erred in law in holding that the circumstances in which the house came to be erected without development approval were irrelevant upon an application for retrospective approval.

32 Roberts-Smith J, in determining this ground, discussed *Kouflidis and Jenquin Pty Ltd v Corporation of the City of Salisbury* (1982) 29 SASR 321; 49 LGERA 17, *Ireland v Cessnock City Council* (1999) 110 LGERA 311 and *Willoughby City Council v Dasco Design and Construction Pty Limited* (2000) 111 LGERA 422. Roberts-Smith J concluded at 64 [181]-[182]:

“181 Ultimately, I think the position must be as King CJ explained it in *Kouflidis*, notwithstanding the different provisions of the Scheme which apply here. It may well be (although for present purposes I do not need to decide, and do not do so) that a retrospective approval under cl 3.27.1 would operate to preclude any prosecution or other action in respect of a construction originally without, or contrary to, planning approval. But be that as it may, the fundamental position remains that a development application under the Scheme is an application for planning approval and the only considerations relevant to that are planning considerations, which relate to whether the proposed development is appropriate to the locality and in accordance with the objects of the Scheme and the objectives of the R Codes. The conduct or motivation of the proponent are not such considerations – and neither the council nor the Tribunal is equipped to deal with allegations of that nature.

182 This conclusion is reinforced by the fact that a development approval is not a personal right, but runs with the land. It is a right in rem, which binds the world (*Ocean View Plaza Pty Ltd v Western*

Australian Planning Commission [1999] WATPAT 5). A parcel of land in respect of which a development application has been approved may be sold before any construction takes place. In such a case the approval goes with the land. It would be anomalous for an approval which attaches to the land itself, to be refused because of suggested unlawful conduct or improper motive on the part of the owner, if the proposed development otherwise complied with all relevant planning requirements or could do so with appropriate waiver or variation”.

33 Having regard to these authorities, the mere fact that the applicant may have operated its restaurant facility in breach of conditions of consent is neither a bar to the power of the Court to modify under s 96(2) of the EPA Act the development consent for the restaurant nor a relevant factor by itself in determining whether to exercise that power.

34 It follows that the Council’s first submission that past unlawful use by the current owner/operator is relevant as a predictor of future unlawful use should be rejected. Planning and development consents are concerned with the acts done or to be done and the use, not the identity of the actor or user: *Eaton & Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270 at 293. Consents operate in rem, not in personam: *Miller-Mead v Minister for Housing and Local Government* [1963] 2 QB 196 at 215; *Ryde Municipal Council v Royal Ryde Homes* (1970) 19 LGERA 321 at 324; *Auburn Municipal Council v Szabo* (1971) 67 LGERA 427 at 433-434; *Eaton & Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270 at 293; *Hubertus Schuetzenverein Liverpool Rifle Club Ltd v Commonwealth of Australia* (1994) 85 LGERA 37 at 43-46; *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at 504 [23]; and *Low v Swan Cove Holdings Pty Ltd* (2003) 127 LGERA 36 at 64 [182].

35 Hence, in undertaking the merit determination of whether to grant or modify a development consent, it is irrelevant to enquire as to who is the current owner/operator, or who might be the future owner/operator, or whether the present owner/operator has in the past acted or used the land unlawfully, or whether the future owner/operator is likely in the future to act or carry out any approved use unlawfully.

36 The Council’s second submission that the past unlawful use of the inner terrace is relevant because, if continued, it could lead to cumulative impacts if the Court were to approve the modification sought, should also be rejected. It proceeds on the twin assumptions that the past use of the inner terrace has been unlawful and that such unlawfulness will be permitted to continue in the future. The lawfulness of the past use of the inner terrace is the subject of the Council’s civil enforcement proceedings in Class 4 of the Court’s jurisdiction. No assumption should be made that the Council will be

successful in establishing the unlawfulness of the past use or, if unlawfulness is established, that the Court would restrain that use.

37 The above conclusion that mere unlawfulness of past use is not a relevant factor does not mean, however, that past use – without any consideration of its unlawfulness – cannot ever be relevant.

38 For instance, past conduct (regardless of whether it is unlawful) may have given rise to unacceptable impacts, such as unacceptable acoustic impacts on adjoining properties. The experience of impacts of the past use could be relevant in evaluating, first, the likely impacts of a prospective use for which consent is sought of the same or similar character, extent, intensity and other features as the past use, secondly, the acceptability of the likely impacts and thirdly, if likely impacts are considered to be unacceptable, the appropriate measures that ought to be adopted to mitigate the likely impacts to an acceptable level. Past use would, therefore, be of relevance but it is for proper planning reasons, not because the past use happened to be unlawful. The unlawfulness of the past use is not relevant.

39 Similarly, if it were to be established in this case that the inner terrace might be used for dining in the future (whether because such use is already lawful or because the Court in the exercise of its discretion declines to restrain the use although it is unlawful), the cumulative impact of that use together with the use proposed for the external terrace could properly be taken into account. Again, this is because the cumulative planning impact is a relevant matter to be considered, not because of any characteristic of the unlawfulness of such use.

40 In this case, however, the manner in which paragraph 4 of the draft statement of issues and the finalised statement of issues dated 17 February 2006 has been pleaded does not seek to make the past use of the restaurant relevant in any of these ways. Rather, the issue has been drafted so as to focus merely on the unlawfulness of the past use, namely that the restaurant has operated in the past in breach of approved trading hours and provides dining on the inner terrace area, both being in breach of conditions of consents. Pleased in these terms, the issue is not a relevant factor in determining the application to modify the consent. Accordingly, paragraph 4 of both the draft statement of issues and the finalised statement of issues should be struck out. The applicant's notice of motion is therefore successful.

41 The cost of the motion should follow the event. The applicant who has been successful in a notice of motion should have its costs paid in relation to that notice of motion by the Council.

Orders

42 The orders of the Court are:

1. Paragraph 4 of the draft Statement of Issues dated 21 November 2005 and of the Statement of Issues dated 17 February 2006 are struck out.
2. The Respondent is to pay the Applicant's costs of the Applicant's Notice of Motion dated 23 November

2005.

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Decision last updated: 28 December 2014
