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## Hunter v Wyong Shire Council [2012 ] NSWLEC 250 (9 November 2012)

Last Updated: 16 November 2012

Land and Environment Court

New South Wales

Case Title: Hunter v Wyong Shire Council

Medium Neutral Citation: [\[2012\] NSWLEC 250](#)

Hearing Date(s): 9 November 2012

Decision Date: 09 November 2012

Jurisdiction: Class 1

Before: Pepper J

Decision: Separate and preliminary question ordered and consequential orders made.

Catchwords: SEPARATE QUESTION: whether separate and preliminary question should be ordered in Class 1 proceedings - question could determine entire proceedings and result in significant savings in costs and time - separate question ordered.

Legislation Cited: [Civil Procedure Act 2005 s 56](#)  
[Uniform Civil Procedure Rules 2005](#) r 28.2

Cases Cited: Fobitu Pty Limited v Marrickville Council [2012]

NSWLEC 81

Metropolitan Local Aboriginal Land Council v  
Minister Administering the [Crown Lands Act  
\[2006\] NSWLEC 57; \(2006\) 145 LGERA 276](#)

Reysson v Roads and Traffic Authority [\[2011\]  
NSWLEC 153](#)

Wollongong City Council v Vic Vellar Nominees  
Pty Limited [\[2011\] NSWLEC 138](#)

Young v Parramatta City Council [\[2006\]  
NSWLEC 116; \(2006\) 144 LGERA 193](#)

Texts Cited:

Category: Separate question

Parties: William Thomas Hunter (Applicant)  
Wyong Shire Council (Respondent)

Representation

- Counsel: Julia Green (solicitor) (Applicant)  
Brian Glendenning (solicitor) (Respondent)

- Solicitors: Corrs Chambers Westgarth (Applicant)  
Wyong Shire Council (Respondent)

File number(s): 10957 of 2012

Publication Restriction:

## EX TEMPORE JUDGMENT

### The Respondent Submits the Proposed Development is Not Permissible as a Threshold Issue

1. By notice of motion filed 8 November 2012, the applicant, Mr William Hunter, seeks an order pursuant to r 28.2 of the [Uniform Civil Procedure Rules 2005](#) ("UCPR") that there be a separate hearing in respect of the permissibility of the proposed development.
2. The respondent, Wyong Shire Council ("the council"), consents to the making of such an order. Such consent is, of course, not determinative.
3. The separate question has been framed by the parties as follows:

Whether the proposed development is prohibited under the Wyong Local Environmental Plan 1991.

4. Both Mr Hunter and the council relied on affidavits in support of the application that were to similar effect. Mr Hunter relied on an affidavit of Ms Julia Green, solicitor for Mr Hunter,

affirmed 8 November 2012. The council relied on an affidavit of Mr Brian Glendenning, the council's solicitor, sworn 8 November 2012 and on an affidavit sworn by Mr Glendenning on 5 November 2012.

5. For the reasons that appear below, the Court proposes to make the order sought.

### **The Proposed Development**

6. The relevant background appears from the earlier affidavit of Mr Glendenning. The proposed development the subject of the development application is for a BWS liquor store at 447 - 449 The Entrance Road, Long Jetty, New South Wales. The principal objection to the proposed development by the council is on the grounds of the adverse social impact of the development in an area it contends is "at risk" of alcohol-related harm and anti-social behaviour and where there is a high concentration of "vulnerable families".
7. Relevantly to the present application, as stated above, pursuant to contention B1.0 of the council's Amended Statement of Facts and Contentions filed in the Court on 7 November 2012, the council contends that the proposed development is not permissible and the Court has no power to grant development approval. Contention B1.0 states as follows:

B1.0 The proposed development is prohibited under the WLEP, and so the Court has no jurisdiction to grant consent to the subject development application.

### **PARTICULARS**

- (1)The site is within the "Zone 3(b) (Centre Support Zone)" under the WLEP.
- (2)Development for the purposes of a "shop" (as defined in cl. 7 of the WLEP) is prohibited within that Zone.
- (3)Development for the purposes of a "large scale retail establishment" (as defined in cl. 7 of the WLEP) is permissible only with consent within that Zone.
- (4)The proposed development is properly characterised as being for the purpose of a "shop" as defined in cl. 7 of the WLEP.
- (5)The proposed development is not properly characterised as being for the purpose of a "large scale retail establishment" as defined in cl. 7 of the WLEP, as the proposed development is for the purpose of foodstuff sales, where "foodstuff" includes alcoholic beverages.

8. The proposed development falls within Zone 3(b) (Centre Support Zone) under the Wyong Local Environmental Plan 1991 ("the WLEP").
9. The relevant part of the Table in cl 10 of the WLEP states as follows:

### **Zone No 3 (b) (Centre Support Zone)**

#### **1 Objectives of zone**

The objectives are:

- (a)to provide opportunities for development having relatively low traffic-generating characteristics but not high turnover shops and offices that might more properly be located in the Business Centre Zone, and

(b) to provide for relatively low intensity commercial and retail uses with extensive floor space requirements, but not including supermarkets or other food or produce markets, and

(c) to provide for development which does not have the potential to result in a detrimental impact on uses in the Business Centre Zone, and

(d) to create opportunities for development within district and regional business centres which support and enhance the range of retail opportunities within those centres, and

(e) to enable the Council to provide more detailed guidelines about preferred retail distribution and development issues in a development control plan.

## 2 Without development consent

Nil.

## 3 Only with development consent

Any purpose other than a purpose included in item 4 of the matter relating to this zone.

## 4 Prohibited

Abattoirs; aerodromes; agriculture; animal establishments; aquaculture; boarding houses; brothels; caravan parks; depots; detached dual occupancies; dual occupancy buildings; dwellings (other than those used in conjunction with a permitted business and situated on the same land as the permitted business); exhibition homes; extractive industries; general stores; generating works; group homes; hazardous industries; hazardous storage establishments; industries; intensive agriculture; light industries; materials recycling depots; mining; offensive industries; offensive storage establishments; plant hire establishments; residential flat buildings; road transport terminals; roadside stalls; rural industries; sawmills; self storage establishments; shops; stock and sale yards; tourist accommodation; toxic waste incinerators; transitional group homes; transport depots; vehicle body repair workshops; warehouses.

10. Subclause 7(1) of the WLEP includes the following definitions with respect to large scale retail establishment and shop:

**large scale retail establishment** means a building or place, or part of a building or place, which has a minimum gross floor area of 200m<sup>2</sup> and is used for retail sales as a single retail outlet by an individual occupant, but does not include such a building or place used for the purposes of:

(a) a supermarket or other foodstuffs or produce sales (excluding that sold by a restaurant), and

(b) clothing sales or display (other than clothing essential for sporting activity and sold in conjunction with sporting goods).

**shop** means a building or place used for the purpose of the selling (whether by retail or auction), hiring or displaying for the purpose of selling or hiring of items (whether goods or materials), but does not include a building or place elsewhere specifically defined in this clause, or a building or place used for a purpose elsewhere specifically defined in this clause.

11. If the proposed separate question is answered against Mr Hunter, then it is plain that this will wholly dispose of the proceedings. If it is answered in favour of Mr Hunter, then, apart from

contention B1.0, the contentions raised in the parties' respective Statements of Facts and Contentions will fall to be determined by the Court.

### Applicable Legal Principles

12. The legal principles governing whether or not this matter is appropriate for determination by separate question have been summarised by Jagot J in *Metropolitan Local Aboriginal Land Council v Minister Administering the Crown Lands Act [2006] NSWLEC 57; 145 LGERA 276* (at [12]) and repeated by her Honour in *Young v Parramatta City Council [2006] NSWLEC 116; (2006) 144 LGERA 193* (at [6]-[9]). The principles were restated by Biscoe J in *Fobitu Pty Ltd v Marrickville Council [2012] NSWLEC 81* as follows (at [11]):

(11) In this Court, the principles to guide the exercise of the discretion to order the decision of any question separately from any other question in proceedings were identified by Jagot J in *Metropolitan Local Aboriginal Land Council v Minister Administering the Crown Lands Act [2006] NSWLEC 57, 145 LGERA 276* at [12], and have been affirmed in *Young v Parramatta City Council [2006] NSWLEC 116, 144 LGERA 193* (Jagot J) and *Wollongong City Council v Vic Vellar Nominees Pty Ltd [2011] NSWLEC 138* (Craig J). They may be summarised as follows:

(a) Generally speaking, all issues should be tried at the same time. If an issue of law or fact is raised which, if decided in one way, will dispose of the claim then a separate determination of that issue may be appropriate.

(b) Care must be taken to ensure that any such question is "ripe" for separate and preliminary determination. This will be so where the matter is a central issue in contention between the parties, the resolution of which will either obviate the necessity of litigation altogether or substantially narrow the field of controversy.

(c) Where the issue sought to be separated involves a question of law, there should be a clear definition of what the point of law raised is and the facts upon which that question has to be considered should be clearly ascertainable.

(d) Special problems can arise where the question sought to be separated is one of mixed fact and law.

(e) In order to dispose of what may first appear to be a pure question of law, the inquiry might range round questions of fact and the proper inferences to be drawn from the primary facts. Hence, it should be able to be seen with clarity that the determination of the separate question will be beneficial to the conduct of the proceedings and resolution of the dispute.

13. These principles have been endorsed and applied by this Court in a number of decisions (see, for example, *Wollongong City Council v Vic Vellar Nominees Pty Limited [2011] NSWLEC 138* at [19] and *Reysson v Roads and Traffic Authority [2011] NSWLEC 153* at [10]). In particular, the proposed separate question should be one that has the capacity to substantially narrow the field of controversy (*Reysson* at [10]).
14. Two additional matters that have been emphasised by the case law should be noted. First, is the caution that regularly attends the separate determination of a question or issue and the confidence to be had that the determination of this question will in reality involve saving some time and costs. In *Young* Jagot J stated (at [11], embraced by Craig J in *Vic Vellar* at [20]-[22], *Reysson* at [12] and *Fobitu* at [12]-[14] per Biscoe J):

A number of the decisions referred to above identify the appropriate degree of confidence (that the

procedure will be fair and involve real savings in time and cost) to warrant the making of an order for separate determination. In *Tallglen*, the criterion was described as one where the beneficial results should be able to be seen "with clarity". In *Poynting*, the formula adopted was that the procedure ought "far more likely than not be convenient and save significant expense". In *Tepko*, the standard identified as appropriate was that the "utility, economy and fairness to the parties" of the making of the order ought to be "beyond question".

15. Second, the determination of a separate question ought ordinarily be made on the basis of either facts found or agreed (*Vic Vellar* at [23]). Where determination of the question depends on facts about which there is genuine dispute, the efficacy of the separate or preliminary question process is likely to be diminished.

### **It is Appropriate to Order the Determination of a Separate Question**

16. When regard is had to the proposed separate question and the affidavit evidence of Mr Glendenning and Ms Green, it is tolerably clear that a real saving of time and costs will result if the separate question is ordered by the Court.
17. In particular, Ms Green states that the ordering of a separate question will result in a significant savings in costs. In Ms Green's experience in similar Court matters with comparable contentions raised in relation to the social impact of the proposed development, it is her estimate that the cost of engaging a social impact consultant ranges between \$50,000 to \$200,000. At the higher end, Ms Green states that the costs include surveys and studies, in addition to the work that a social impact consultant must necessarily engage in. Moreover, Ms Green estimates that the length of the hearing if both the social impact and permissibility issues are heard together, will be somewhere between three to five days, whereas if the Court simply determines the permissibility issue as a preliminary matter and finds against Mr Hunter on this single issue no more than half a day of hearing time will be necessary, with a resultant marked saving in legal costs to the parties.
18. Mr Glendenning gives a similar estimate in terms of time for the preliminary hearing versus that required for a full hearing dealing with both permissibility and social impact issues. In particular, Mr Glendenning notes that the council has received 18 submissions concerning the proposed development, including two petitions with over 140 signatories, and objections from the New South Wales Police Service and New South Wales Health. It is Mr Glendenning's expectation that a significant number of those who have submitted objections to the council will seek to give evidence at the hearing in relation to the social impact of the proposed development. It is his estimate that the council will incur external costs of between \$82,000 and \$105,000 in respect of the preparation for and hearing of these issues.
19. Although the parties have not presented the Court with a statement of agreed facts governing the hearing of the separate question, I do not think that in the circumstances of this application such a statement is necessary given that the question posed for separate determination is concerned solely with a legal issue of characterisation and the proper construction of the WLEP.
20. For these reasons, it is my opinion that the determination of the preliminary question posed has the prospect of substantially narrowing the field of controversy between the parties with a consequence that there will be a significant saving of costs and time, particularly if the question is resolved in favour of the council. It is therefore appropriate to make the order Mr Hunter seeks. This approach not only accords with the legal principles expressed above but also with the overriding purpose contained in [s 56](#) of the [Civil Procedure Act 2005](#) of the just, quick and cheap resolution of the real issues for determination in the proceedings.

### **Orders**

21. The Court therefore makes the following orders:

(1) that the following question be determined separately from any other question before any further trial in the proceedings:

Whether the proposed development is prohibited under the Wyong Local Environmental Plan 1991.

(2) leave granted forthwith to approach the Registrar for the hearing of a separate question (estimate of a half day), not before 14 December 2012;

(3) the applicant is to file and serve its statement of facts and contentions in reply, if any, in accordance with Practice Note - Class 1 Development Appeals. This statement is not to repeat any facts not in dispute;

(4) by 30 November 2012 the parties are to file an agreed bundle of documents and any agreed statement of facts;

(5) the parties are to promptly notify the Court if there is any material slippage in the timetable;

(6) the parties have liberty to restore on three working days' notice; and

(7) the parties are to file and serve written submissions by 7 December 2012 with respect to the separate question for determination.

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