Developing planning principles

Talk delivered at the NEERG Seminar on Planning Principles,
Wednesday 27 July 2005 by Dr John Roseth,
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What are planning principles?

Two changes have occurred recently in the judgments of the commissioners of the Land and Environment Court. The first is that, starting in September 2003, the judgments are published on the Internet. The second change is that some of the judgments include planning principles.

The word *principle* derives from the Latin *principium*, meaning the *beginning, origin or source*. This has given rise to many meanings of the word; however, I use it in the sense of a general assumption or belief forming the basis of a chain of reasoning. A planning principle applies to circumstances that arise frequently, for example a big two-storey house proposed in a street of small single-storey houses. The principle is stated in general terms, but it can be applied to assist in reaching a decision in a particular case, say, in a dispute about a particular house in a particular street.

While legal principles have always been the basis of decisions by judges, they are a new phenomenon in merit decisions by commissioners. (As far as I can tell, they are a new phenomenon in planning decisions generally; including those made by consent authorities other than the Court.) This is not to say that in the past planning principles were absent in the assessments of development proposals. They hovered in the background of most assessments, but usually they were not explicitly stated.

The issue of compatibility between low and medium density housing is probably the most frequently arising planning issue in Sydney. This is partly because all large cities tend to grow upwards as well as outwards; and partly because several local planning instruments now permit townhouses and villa homes in detached housing areas. Under existing use rights legislation, non-conforming uses such as service stations can be redeveloped without the constraint of densities that apply to the surrounding area. The Seniors Living State Environmental Planning Policy (formerly SEPP 5) permits medium density housing in all residential areas, a long as one occupant is disabled or over 55 years old.

In its 25 years of existence, the Court has determined hundreds, if not thousands, of development applications involving medium density proposals in traditional low-density suburban areas. In most of those cases the major issue was the compatibility of a new compact form of housing with its low-density surroundings. In each case the decision-maker assessed the proposal in its context and reached a decision that was relevant only to the particular case and provided little assistance to future disputes of a similar kind. Where there were

principles underlying the decision, they tended to be submerged within the text and not identified as principles.

In *GPC No 5 v Wollongong City Council* [2003] NSWLEC 268 compatibility between a medium density Seniors Living proposal and a low-density suburb was raised as the major issue. On this occasion the judgment set out four criteria against which not only this, but other similar proposals may be assessed. Published in November 2003, *GPC No 5* was the first judgment of the Court to contain an explicitly stated planning principle.

The point I would like to make is that, even where a decision is expressed only with reference to a particular case, the reasons are likely to be based on criteria that have wider application and are implicit in the decision. When the decision-maker expresses the criteria that were applied in the decision, the decision becomes more transparent.

The application of the same set of criteria in similar planning situations also assists in making decisions more consistent with each other. This is probably the greatest benefit of including principles in merit decisions, since the acceptance and respect with which merit decisions are held depends largely on their consistency.

Planning principles in recent judgments

On the LEC website the Court publishes a table listing all merit judgments that contain planning principles. The list changes continually, as new judgments containing planning principles are published. A copy of the table, as it was on 20 July 2005 is attached.

Themes underlying the planning principles

You will see from the list of principles that there are thirty-odd topics on which the Court has published planning principles. They relate to a wide variety of issues, from the location of brothels to the appropriateness of using zero lot lines. Most of the principles are informed by five themes, or perhaps overarching planning principles.

The first theme is that there is more to the assessment of impacts than applying quantitative criteria (eg development standards) and then ticking off every issue on the basis of whether or not it meets them. I would argue that the existence of quantitative criteria, while necessary, is often a negative influence on the quality of development proposals, and therefore on the creation of new or changing urban environments. Development standards tend to encourage designers to be satisfied with the mediocre. The preoccupation with meeting development standards is inimical to the desire to achieve the best possible design solution. This is because, as soon as the standard is met, the designer thinks that he/she does not need to make an effort to achieve a better result. (How often have I heard experts defend the most inept proposals with the statement that *"it meets the requirements of the development control plan"!)* Moreover, where a planning instrument does not contain a

development standard, there is a tendency for designers to assume that that aspect of the design is not important.

Only recently I had an indication of the extent that designers can become obsessed with meeting planning controls at the expense of following the design imperatives that should have been drilled into them when they were studying for their profession. A proposal for twenty attached dwellings on a flat north-facing site had almost all the windows of the living rooms facing south. The local development control plan contained only one criterion in relation to sunlight, namely that half the courtyards should receive four hours of sunlight at mid-winter. The designer went to great effort to comply with this provision, without the slightest attention to the sunlight that entered the living areas.

The second theme is that change in impact is often as important as the magnitude of impact. If my north-facing living room receives uninterrupted sunlight all day in mid-winter, I am likely to be more angry about a proposal that reduces it to three hours than if my living room now receives three-and-a-half hours of sunlight. Yet, because planning controls are concerned only with the amount of sunlight preserved, in both situations a proposal causing the impact would receive the same tick.

The third theme is that in assessing an impact, one should balance the magnitude of the impact with the necessity and reasonableness of the proposal that creates it. An impact that arises from a proposal within the reasonable development expectations for a site should be assessed differently from an impact of the same magnitude that arises from an unreasonable or unnecessary proposal. For example, adding a balcony to the living room of a dwelling that has no other balconies is quite a different matter to adding a balcony to a bedroom of a dwelling that already has six balconies.

The fourth theme is that the level of design skill applied to a proposal is also relevant to the assessments of its impacts. In my opinion, not even a small impact is acceptable if it arises only from poor design, ie if a change of design could mitigate it without affecting the proposal's size and amenity. It is **always** unreasonable to impact adversely on someone if one can avoid it with more skilful design.

The fifth theme is that an impact that arises from a proposal that does not comply with planning controls is much harder to justify than one that arises from a complying proposal. This is because people affected by the impact of a development proposal (usually the neighbours) have a legitimate expectation that the development on adjoining properties will comply with the planning regime. If there is a two-storey limit on development, they are more likely to accept overshadowing from a two-storey than from a three-storey building, even if the extent of overshadowing is not materially different.

A final point to make on impacts is that those assessing an impact should be aware that the perception of impacts is time and place related. Impacts that were considered unacceptable 50 years ago are now acceptable and vice versa. Impacts that are unacceptable in Australia are not even perceived as impacts in other places. Of course, impacts must be assessed in relation to Australian conditions and the present time. However, keeping in mind that the perception of impacts is not an absolute concept tends to bring a reality-check and some common sense to their assessment.

Planning principle: relationship of density to residential character

I note that the seminar program includes a discussion on four of the principles that the Court has so far established. The most recent principle appeared in early July in *Salanitro-Chafei v Ashfield Council [2005] NSWLEC 366*. It deals with the relationship of density to residential character. Given the trend towards small allotments and giant houses or, as they are popularly referred to, *McMansions*, it is a highly useful principle, though likely to be controversial. For this reason it would benefit from some discussion.

The need for the principle arises because most planning instruments and policies do not contain density or floor space limits for detached housing. This is unlike other kinds of housing, such as flats, for which there is a plethora of planning controls. I put the lack of planning controls relating to detached houses down to a belief, unjustified in my opinion but nevertheless held by many people, that a detached house is always environmentally friendly and never visually obtrusive.

The planning principle states:

> *The upper level of density that is compatible with the character of typical single-dwelling areas is around 0.5:1. Higher densities tend to produce urban rather than suburban character. This is not to say that a building with a higher FSR than 0.5:1 is necessarily inappropriate in a suburban area; only that once 0.5:1 is exceeded, it requires high levels of design skill to make a building fit into its surroundings.*

The judgment notes that the standard of 0.5:1 FSR has found expression in numerous planning instruments and policies whose aim is to integrate increased density housing into low-density residential areas without destroying the existing open character, such as the *Seniors Living State Environmental Planning Policy, State Environmental Planning Policy 53 – Metropolitan Residential Development*, as well as numerous local planning instruments and policies guiding dual occupancy development in suburban areas.

Establishing planning principles

There are ten commissioners in the Court, and all commissioners initiate planning principles. Since consistent decision-making requires that a commissioner consider relevant planning principles in judgments by other commissioners, the existence of a planning principle places a certain constraint on the next commissioner dealing with a similar issue. The commissioners therefore consult with each other on the formulation of planning principles, though, of course, the principle is always discussed in a detached form from the case in which it arises.

My own experience is that the practice to circulate draft principles and invite the other commissioners to comment, amend, delete or add to the draft version always results in an improvement on the

original. I would not claim that integrating the comments from nine people with strong views on planning is always easy, but the result justifies the effort.

Experts and planning principles

Clearly, where an expert is considering an issue on which the Court has established principles, he/she should consider those principles. However, the expert is not obliged to adopt it. Nor is an advocate obliged to adopt it in submissions.

Where an expert agrees with a planning principle, the right approach is to apply the relevant parts to the case in question. Where an expert thinks that the planning principle requires modification, the approach should be to adapt it to a form that the expert does consider appropriate.

Where the expert believes that the planning principle established by the Court is misguided, the approach should be to reject it in whole or in part. For example, the Court has established a principle that it is not sufficient to rely on landscaping alone to overcome problems of overlooking. Where an expert thinks that landscaping is a sufficient response to a privacy issue, he or she should state it. The rejection of principle should be supported with good reasons.

What happens where an expert wants to establish a planning principle in an area in which the Court has not yet established planning principles? Is there a role for planning principles in expert reports other than principles from one of the Court's judgments? Where an expert finds that an opinion is more persuasive when it is supported by a general principle, the principle should be stated. If it is indeed persuasive, it may find its way into the judgment.

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Planning principles established by the Land and Environment Court as at 21 July 2005.

Principle	Specific aspect	Case
Adaptive re-use	Adaptive re-use and public interest	Michael Hesse v Parramatta City Council [2003] NSWLEC 313 revised - 24/11/2003
Aesthetics	Weight to be given to expert opinion on architectural design	Architects Marshall v Lake Macquarie City Council [2005] NSWLEC 78
Aesthetics	Acceptance or not of proposals of court appointed expert witness	PDP (Darlinghurst Apartments) Pty Limited v City of Sydney Council [2005] NSWLEC 41
Brothels	Location of brothels	Martyn v Hornsby Shire Council [2004] NSWLEC 614
Building envelope	Tensions between a prescribed floor space ratio and a prescribed building envelope	PDE Investments No 8 Pty Ltd v Manly Council [2004] NSWLEC 355
Compliance	Responsibility for monitoring compliance with a condition	Dayho v Rockdale City Council [2004] NSWLEC 184
DCPs and Council policies NEW	Weight to be given to Development Control Plans and to policies which had been adopted by councils although not embodied in DCPs.	Stockland Development Pty Ltd v Manly Council [2004] NSWLEC 472 revised - 01/10/2004
FSR NEW	FSR - Compatibility in a suburban context	Salanitro-Chafei v Ashfield Council [2005] NSWLEC 366
General impact	Reasonableness of and necessity for proposal	Super Studio v Waverley Council [2004] NSWLEC 91
Heritage	Impact of adjacent development	Anglican Church Property Trust v Sydney City Council [2003] NSWLEC 353
Licensed premises	Extension of trading hours increase in permitted patron numbers or additional attractions	Vinson v Randwick Council [2005] NSWLEC 142
Master plans	Proposal permissible but inconsistent with Master Plan	Aldi Foods Pty Limited v Holroyd City Council [2004] NSWLEC 253
Noise	Attenuation measures	Stockland Developments v Wollongong Council and others [2004] NSWLEC 470
Open Space	Location of communal open space	Seaside Property v Wyong Shire Council [2004] NSWLEC 600
Plan of management NEW	Adequacy or appropriateness of a plan of management to the particular use and situation	Renaldo Plus 3 Pty Limited v Hurstville City Council [2005] NSWLEC 315
Privacy	General principles	Meriton v Sydney City Council [2004] NSWLEC 313

Privacy	Use of landscaping to protect privacy	Super Studio v Waverley Council [2004] NSWLEC 91
Redevelopment	Isolation of site by redevelopment of adjacent site(s) - general	Melissa Grech v Auburn Council [2004] NSWLEC 40
Redevelopment	Isolation of site by redevelopment of adjacent site(s) - where intensification of development is anticipated	Cornerstone Property Group Pty Ltd v Warringah Council [2004] NSWLEC 189
Redevelopment	Isolation of site by redevelopment of adjacent site(s) - role of Court in assessing consolidation negotiations	Karavellas v Sutherland Shire Council [2004] NSWLEC 251
Redevelopment	Existing use rights and merit assessment	Fodor Investments v Hornsby Shire Council [2005] NSWLEC 71
Seniors living	Seniors living in low density zone	GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council [2003] NSWLEC 268
Setbacks	Building to the side boundary in residential areas	Galea v Marrickville Council [2005] NSWLEC 113
Site dimensions	Small or narrow sites	CSA Architects v Randwick City Council [2004] NSWLEC 179
Staged development	How much information should be provided at Stage 1	Anglican Church Property Trust v Sydney City Council [2003] NSWLEC 353
Subdivision	When a residential subdivision application should impose constraints on future development	Parrott v Kiama Council [2004] NSWLEC 77 revised - 16/03/2004
Sunlight	Access to sunlight	Parsonage v Ku-ring-gai Council [2004] NSWLEC 347
Surrounding development	Compatibility of proposal with surrounding development	Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191
Unusual contemporary design	Basis for assessment	Totem Queens Park Pty Ltd v Waverley Council [2004] NSWLEC 712
Use	Impact of intensification	Randall Pty Ltd v Leichhardt Council [2004] NSWLEC 277
Views	Views – general principles	Tenacity Consulting v Warringah Council [2004] NSWLEC 140
Zones NEW	Weight to be given to the zoning	BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399 revised - 05/05/2005
Zones	Development at zone interface	Seaside Property Developments Pty Ltd v Wyong Shire Council [2004] NSWLEC 117