

DEALING WITH DAs IN 2009

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**Opening Address
The Relevance of the Court's Planning Principles to the DA Process****Tim Moore**

Senior Commissioner

LAND AND ENVIRONMENT COURT OF NSW**Introduction**

This paper discusses the development of planning principles in appeals under ss 96 and 97 of the *Environmental Planning and Assessment Act 1979*¹. These are merit review proceedings in Class 1 of the Court's jurisdiction. It also considers their use and application by the Court and by Councils; comments by the Court of Appeal; and criticisms of these principles. Commissioners of the Court usually hear such appeals.

Merit appeals

In such appeals, the Court exercises all the powers and functions of the original decision maker assessing the application for development or modification of a development against the criteria in s 79C of the EP&A Act.

The hearing is *de novo*. Critically, these matters are merit determinations to be decided on the facts and circumstances of the individual case. On such matters, members of the Court cannot bind another member of the Court to a conclusion on any given site and set of facts.

Indeed, Bignold J, in *Manzie v Willoughby City Council*², cautioned against giving of gratuitous advice to prevent difficulties in any subsequent appeal dealing with the same site.

Introduction to planning principles

However, within this restrictive framework, the Court considers that it is appropriate to provide guidance on how the decision-making process might be applied to the facts and circumstances of particular **types** of case or issue.

¹ EP&A Act

² (1996) NSWLEC 26 (unreported)

To do this, the Court publishes planning principles, primarily in judgments by the Commissioners. All these planning principles are available on the Court's web site³.

Planning principles are developed by a process through the Court dealing with an abstract issue rather than the merits of a particular case. This is achieved by a collegiate process involving the Commissioners of the Court and, from time to time, interested Judges of the Court. This process enables a consensus to emerge before the principle is published.

At the conclusion of this process, the resulting judgment will not merely deal with the merits of the case but will also set out the principle that has emerged from the consultation.

These principles do not involve findings of fact – that consideration lies solely with the Commissioner determining the matter. Thus, in the context of a refusal, they cannot cause difficulties for a subsequent decision maker dealing with the same site.

The Court defines⁴ them as follows:

A planning principle is:

- statement of a desirable outcome from;
- a chain of reasoning aimed at reaching; or
- a list of appropriate matters to be considered in making a planning decision.

While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles are not legally binding and they do not prevail over councils' plans and policies.

Planning principles assist when making a planning decision – including:

- where there is a void in policy; or
- where policies expressed in qualitative terms allow for more than one interpretation; or
- where policies lack clarity.

Categorisation

The Court has published⁵ 42 planning principles (although some involve refinement of earlier principles).

Although these deal with a broad range of topics, they, generally, fall in one of two categories.

³ www.lawlink.nsw.gov.au/lec

⁴ Published by the Court at http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_planningprinciples

⁵ *Ibid*

The first category is both descriptive and prescriptive – in that they include describing what might be regarded as the answer when a planning instrument proposes that an undefined performance criterion must be achieved.

A prime example of such a planning principle is that dealing with access to sunlight.⁶ It reads, relevantly:

To be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5° or more. (This is because sunlight at extremely oblique angles has little effect.) For a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight. For private open space to be assessed as being in sunlight, either half its area or a useable strip adjoining the living area should be in sunlight, depending on the size of the space. The amount of sunlight on private open space should be measured at ground level.⁷

The second category is process orientated. These provide guidance for decision-makers on how to consider an issue where there is no detailed approach in the relevant planning instrument.

By far the most frequently utilised of these, as discussed later, is that in *Tenacity Consulting v Warringah*⁸ dealing with impacts on views. *Tenacity* lists four steps and suggests factors to be considered for each. The introduction and the steps read:

24. *Clause 61 of the LEP states that **development is to allow for the reasonable sharing of views.** It does not state what is view sharing or when view sharing is reasonable.*
25. *The notion of view sharing is invoked when a property enjoys existing views and a proposed development would share that view by taking some of it away for its own enjoyment. (Taking it all away cannot be called view sharing, although it may, in some circumstances, be quite reasonable.) To decide whether or not view sharing is reasonable, I have adopted a four-step assessment.*
26. *The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*
27. *The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries*

⁶ Roseth SC in *Parsonage v Ku-ring-gai* [2004] NSWLEC 347, (2004) 139 LGERA 354

⁷ At para 8

⁸ By Roseth SC – [2004] NSWLEC 140, (2004) 134 LGERA 23

is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

28. *The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*
29. *The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

Although there is a proper place for both categories of planning principle, it is my personal view that those in the second category (that provide assistance to those assessing development applications about the steps that they might reasonably follow in discharging that responsibility) provides, potentially, a greater benefit to the overall planning framework in the State.

Indeed, it has recently been brought to my attention⁹ that an unintended (and undesirable) likely architectural response to the possible application of *Parsonage* would be to make a window (likely to be assessed against that planning principle) smaller by shrinking it in the direction of the portion of the window's surface that will be in sunlight during the relevant times. Such a counterintuitive and unintended response would also be, in my view, contrary to the outcome desired to be sought from the application of *Parsonage*.

⁹ By Michael Neustein in conversation with the author.

Development of planning principles

Roseth SC has described the process of development of principles as follows:

There are ten commissioners in the Court, and all commissioners initiate planning principles as they come across issues that, in their opinion, have general application. Since a planning principle published in a judgment obliges commissioners dealing with similar issues to, at least, consider the principle established earlier, the commissioners find it useful to consult with each other. The practice is to circulate the principle in draft form and invite the others to comment, amend, delete or add to the draft version. Comments from other commissioners are a particularly useful test.¹⁰

This process enables a consensus to emerge before the principle is published. The consultation is not about the case's facts – such consideration lies solely with the Commissioner determining the matter. Indeed, for it to be otherwise would be grounds for appeal.

At the conclusion of this process, the judgment will not merely deal with the merits of the case but will also set out the principle that has emerged from the consultation.

Sometimes the consultation process yields a consensus that it was either unnecessary or not yet appropriate to formulate and publish a principle on a particular topic.

It is also pertinent to note, for completeness, that there have been three instances where planning principles have appeared in judgments but have not been adopted by the Court. The first¹¹ of these concerned access to daylight, the second¹² concerned retention of a single tree possibly representative of an endangered ecological community and the third¹³ concerned how the concept of “the public interest” might be considered. In the first and third instances, notice appeared on the Court's website to alert that the principle had not been adopted. These circumstances are unlikely to arise in the future.

The Court of Appeal

The Court of appeal has endorsed the utility of planning principles in *Segal & Anor v Waverley Council*¹⁴, saying “.... consistency in the application of planning principles is, clearly, a desirable objective. This has been recognised by the Commissioners of the Land and Environment Court”¹⁵.

¹⁰ From a paper delivered to a Joint Conference of the Land and Environment Court and the Victorian Civil and Administrative Tribunal on 6 May 2005

¹¹ *Allan Robert Cooley and Janet Louise Patterson v City of Sydney Council* [2006] NSWLEC 55

¹² *Murlan Consulting Pty Limited v Ku-ring-gai Council and John Williams Neighbourhood Group Inc* [2007] NSWLEC 374

¹³ *Double Bay Marina Pty Ltd v Woollahra Municipal Council* [2009] NSWLEC 1001

¹⁴ [2005] NSWCA 310, (2005) 64 NSWLR 177

¹⁵ Per Tobias JA at para 96 (Beazley and Basten JJA agreeing)

Segal also makes it clear planning principles do not bind Commissioners but provide assistance in consistency of decision making¹⁶. Each case, however, must be decided on its own facts and circumstances.

Use of planning principles by the Court

Analysis¹⁷ of four of the more frequently considered and applied principles shows they are regularly considered and adopted by Commissioners. These cases are:

- *Martyn v Hornsby Shire Council*¹⁸ (location of brothels);
- *Parsonage*;
- *Tenacity*; and
- *Vinson v Randwick Council*¹⁹ (impacts of extended trading hours of licensed premises)

This analysis shows the following:

Name of case	Times cited in a judgment in merit review proceedings in Class 1
<i>Martyn</i>	25
<i>Parsonage</i>	16
<i>Tenacity</i>	80
<i>Vinson</i>	12

Tenacity, as earlier noted, is the exemplar par excellence of the acceptance and application of planning principles. Preston CJ, the Chief Judge of the Court has endorsed²⁰ *Tenacity*.

However, the significant degree of consideration and adoption (of which the others above are a small but representative sample) of planning principles demonstrates that the Court, itself, uses them to pursue the “*desirable objective*” of “*consistency*” endorsed by the Court of Appeal.

In addition, whether expressly cited in a judgment or not, planning principles are regularly referred to by expert witnesses in merit review proceedings in the Court.

An expert is not obliged to agree in whole or in part with a principle but should address it, if relevant to the case, in their evidence²¹.

¹⁶ At para 99

¹⁷ By searching both AustLII and NSW Government CaseLaw databases

¹⁸ [2004] NSWLEC 614, (2004) 139 LGERA 282

¹⁹ [2005] NSWLEC 142, (2005) 141 LGERA 27

²⁰ *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC, (2007) 161 LGERA 1 59 at para 149

²¹ Commentary by Roseth SC in a paper at NEERG Seminar on Planning Principles, 27 July 2005 – available on the Court’s web site at http://infolink/lawlink/lec/ll Lec.nsf/pages/LEC_planningprinciples

Consideration of planning principles in joint expert conferences has, in my experience of reports from such conferences, frequently assisted the experts in the discussion of and reaching resolutions to matters in contention. Such resolutions, prior to a hearing, remove the necessity for the Court to determine an issue and save the parties time and money.

Use of planning principles by Councils and the Department of Planning

Councils widely use the Court's principles in development assessments. Woollahra Council's development assessments web site includes:

There will be cases when a proposal complies with numeric or prescriptive controls, but does not meet the objectives of the development rules, Planning Principles or adopted codes and policies.²²

This Council provides details for accessing principles and reinforces their relevance to the Council's processes – saying:

As an example, we will always assess view sharing by using the planning principle from the *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 case. In the *Tenacity* case the relevant questions we will ask in our assessment can be found in paragraphs 26 to 29 of the judgment.²³

However, Woollahra is not alone. In recent case, I had to deal with the express use by a Council of the *Tenacity* principles²⁴. The planning principle is imported into Manly Council's Residential Development Control Plan²⁵ in the following terms:

The ultimate assessment of views and view loss shall be in accordance the following Planning Principles established by the NSW Land and Environment Court, illustrated in Figure 14²⁶ below.

Tenacity is the most frequently utilised principle. A search of Council web sites, through the Department of Local Government,²⁷ shows that 32 of the 152 Councils in NSW have applied *Tenacity* in assessments.

Tenacity's application is not confined to urban or coastal areas (as might be expected). Yass Valley and Parkes Shire Councils have expressly applied *Tenacity* when assessing view impacts of new dwelling proposals in country towns.

Four further planning principles were also searched. Eight Councils have expressly applied *Martyn* to brothel applications. Seven Councils have expressly applied *Parsonage*. Six Councils have expressly applied *Helou v Strathfield Municipal*

²² http://www.woollahra.nsw.gov.au/building_and_development/how_we_assess_your_da/assessment

²³ http://www.woollahra.nsw.gov.au/building_and_development/development_rules/planning_principles

²⁴ See *Cachia v Manly Council* [2009] NSWLEC 1035

²⁵ At 4.3 *Maintenance of Views*

²⁶ Figure 14 sets out the full text of the four steps in Roseth SC's decision in *Tenacity*

²⁷ http://www.dlg.nsw.gov.au/dlg/dlghome/dlg_LocalGovDirectory.asp?index=1&CN=A

*Council*²⁸ (discussed later) to redevelopment applications. Four Councils have expressly applied *Vinson* to licensed premises.

Department of Planning expressly applies planning principles²⁹ when preparing Director-General's reports³⁰.

Other jurisdictions

There are a number³¹ of examples of citation (with approval) in other jurisdictions of a planning principle published by the Court. Two are of *Tenacity* as set out below.

In the South Australian Supreme Court, DeBelle J discussed and (adopted³²) the *Tenacity* principles, saying:

The factors which will determine that question are outlined in *Tenacity Consulting Pty Ltd v Warringah Council*.

In *App Corporation Pty Ltd v City Of Perth*³³, the Western Australian State Administrative Tribunal said:

55 The four-step assessment adopted by the Land and Environment Court is not strictly in point, as the planning framework in this case does not require development to allow for the reasonable sharing of views. Furthermore, this is not a case of view loss due to substantial solid structures, but rather of interruption of views. Nevertheless, the four-step assessment is of assistance in determining whether the visual impact of the proposed wind turbines is acceptable.

Randall Pty Ltd v Leichhardt Council [2004] NSWLEC 277 and *Vinson* (both concerning impacts of extended trading hours of licensed premises [*Vinson* being a later case adopting and expanding the principle in *Randall*]) have been cited³⁴ by the Western Australian State Administrative Tribunal and *Randall* applied in that case.

No interstate court or tribunal criticism of the Court's planning principles – either general or specific – has been found.

²⁸ [2006] NSWLEC 66, (2006) 144 LGERA 322

²⁹ For example, *Tenacity* was applied in the Reports of February 2007 – Luna Park Site C; and of June 2006 – Restaurant Breakfast Point – River Front Precinct

³⁰ Reports made pursuant to 75I of the EP&A Act

³¹ These examples are not intended to be exhaustive, as time has not permitted research of citation of all 42 planning principles in the preparation of this paper.

³² *Hutchens & anor v City of Holdfast Bay & anor* [2007] SASC 238 from para 18 with adoption in para 20

³³ [2008] WASAT 291

³⁴ *Randall v Town of Vincent* [2005] WASAT 129

Criticism of the Court's planning principles

Planning principles are, however, not without criticism. Two criticisms have been levelled³⁵.

The first is that the Court's process is entirely internal and, therefore, does not involve sufficiently broad consultation.

The second is that one published principle is not an exposition of a widely understood but hitherto unarticulated view on the topic but, in fact, is an approach imposing new restrictions.

As to the criticism of the extent of external input into development of principles, there have been occasions when Commissioners, considering that it was possible that a principle might arise from a particular case, have invited the advocates to make submissions:

- first, on whether a potential principle arose in that case; and
- second, if so, what should be the principle to be derived.

It is difficult to see how, in a framework where these principles are to be published through a Court decision, there could be broader consultation.

It is, in my view, inappropriate to suggest that consultation such as display and advertising for public comment (as for council policies) could be applied.

In more general response, Commissioners are selected from a wide range of backgrounds³⁶. The breadth of experience of the present Commissioners is extensive³⁷ - coupled with their wide-ranging qualifications and backgrounds.

The second criticism is one that is more difficult to answer.

This specific criticism has been articulated about only the principle in *Helou* – dealing with the acceptability of demolition of a contributory item in a heritage conservation area.

This principle is a process one. In it, I posed six sequential questions³⁸ (and provided some guidance about them).

46 The following questions should be addressed in assessing whether the demolition should be permitted:

1. *What is the heritage significance of the conservation area?*

³⁵ Both made by Michael Neustein at a NEERG Seminar in August 2007

³⁶ The range of permissible backgrounds is defined in s 12 of the Court Act

³⁷ See Commissioners' biographies (http://www.lawlink.nsw.gov.au/lec/ll Lec.nsf/pages/LEC_currentdirectory)

³⁸ Ibid at para 46

2. *What contribution does the individual building make to the significance of the conservation area?*

The starting point for these questions is the Statement of Significance of the conservation area. This may be in the relevant LEP or in the heritage study that led to its designation. If the contributory value of the building is not evident from these sources, expert opinion should be sought.

3. *Is the building structurally unsafe?*

Although lack of structural safety will give weight to permitting demolition, there is still a need to consider the extent of the contribution the building makes to the heritage significance of the conservation area.

4. *If the building is or can be rendered structurally safe, is there any scope for extending or altering it to achieve the development aspirations of the applicant in a way that would have a lesser effect on the integrity of the conservation area than demolition?*

If the answer is yes, the cost of the necessary remediation/rectification works should be considered.

5. *Are these costs so high that they impose an unacceptable burden on the owner of the building? Is the cost of altering or extending or incorporating the contributory building into a development of the site (that is within the reasonable expectations for the use of the site under the applicable statutes and controls) so unreasonable that demolition should be permitted?*

If these costs are reasonable, then remediation/rectification (whether accompanied by alteration and/or extension or not) should be preferred to demolition and rebuilding.

6. *Is the replacement of such quality that it will fit into the conservation area?*

If the replacement does not fit, the building should be retained until a proposal of suitable quality is approved.

First, I should note that, although appearing in the decision of a single Commissioner, the principle had had been through the development process discussed earlier.

Second, and perhaps a more satisfactory response to the concerns expressed, is to consider what the planning principles of the Land and Environment Court do not do.

What planning principles are not

In a recent case³⁹ concerning an application for approval for a brothel in Baulkham Hills, senior counsel for the Council proposed that I should interpret, in a statutory construction sense, one of the elements of the planning principle in *Martyn*. As a consequence, I considered it appropriate to set out, at some length, what planning principles were not. I said⁴⁰:

54. *Equally importantly, there are a number of matters that planning principles are not.*
55. *First, planning principles are not immutable. Planning principles are evolutionary and can change or grow as circumstances in particular cases give rise to matters where members of the Court collectively consider a further statement of generality (either by revision to or expansion of an existing planning principle) is desirable rather than merely the making, by those to whom the matter has been assigned by the Chief Judge, of a simple determination confined to the specific merits of the individual application.*
56. *For example, further consideration of the original planning principle dealing with the impact of extending trading hours of licensed premises (published in *Randall Pty Ltd v Leichhardt Council* [2004] NSWLEC 277) led to the refined and expanded planning principle subsequently published in *Vinson v Randwick Council* [2005] NSWLEC 142; (2005) 141 LGERA 27.*
57. *Second, planning principles are not intended to be exhaustive. This is, perhaps, a corollary of the first proposition. Just as members of the Court will consider whether particular cases give rise to general matters which might expand or otherwise build upon an earlier planning principles, so the Court may invite the advocates for the parties, in appropriate cases, to suggest modification or evolution of an already published planning principle. Indeed, a case may canvass whether the establishment of a new principle should be contemplated and, if so, the approach that should be considered to that topic.*
58. *Third, planning principles are not binding. They are not the stone-inscribed commandments that Moses is described, in Exodus Chapter 20, as bringing down from Mount Sinai.*
59. *Planning principles published and adopted by the Court are intended to provide guidance to those who bring similar cases to the Court for determination and are also intended to provide assistance and guidance for local consent authorities. They do not and cannot have*

³⁹ *Alphatex Australia v The Hills Shire Council (No 2)* [2009] NSWLEC 1126

the same force as some form of statutory prescription. They certainly cannot automatically displace or override the provisions of a local environmental plan or a development control plan that deals with the topic of a particular planning principle in a fashion differing from that enunciated by the planning principle itself.

60. Fourth, planning principles are not statutory instruments and are not intended or expected to be the subject of the same statutory interpretation and construction of the words and phrases contained within them as if they had the force of law and were subject to the requirements for statutory interpretation of their intention.

61. Finally, they speak for themselves. Croesus asked Pythia, the sibyl or oracle at Delphi, if he should make war on the Persians and if he should take to himself any allied force. The oracle gave the response, that if he made war on the Persians, he would destroy a mighty empire. Croesus declared war and, indeed, succeeded in destroying a mighty empire – his own. Planning principles are not statements replete with hidden meaning or calculated ambiguity – unlike Delphic prophecies habitually were.

Conclusion

It is clear, from their application by Councils and the Department of Planning coupled with their interstate endorsement (albeit on a limited basis to date), that these planning principles are filling a gap in the development assessment process under s 79C of the EP&A Act.

As a consequence, despite the criticisms, the widespread acceptance and use of planning principles (together with their *obiter* approval by the Court of Appeal) demonstrates they are constructive and useful tools in this process.