Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors [2014] QPELR 479

p&e Law successfully acted for Parklands in its appeal against Council's refusal of a development application for a hard rock quarry in Yandina on the Sunshine Coast, Queensland. A group of local residents joined Council in resisting the appeal.

Andrew Williams, the solicitor with carriage of the appeal, considered the Council's reasons for refusal to be flawed and worthy of appeal.

The development application was lodged when the *Integrated Planning Act* 1997 (Qld) (**IPA**) and the Maroochy Plan 2000 were in force. By the time the appeal was heard, the *Sustainable Planning Act* 2009 had replaced IPA and the Sunshine Coast Regional Council Planning Scheme was about to replace Maroochy Plan 2000.

The Court assessed the application against, and having regard to:

- Maroochy Plan 2000;
- the draft new planning scheme;
- historical planning instruments which had planned for the quarry for over 30 years;
- the South East Queensland Regional Plan 2009-2031;
- State Planning Policy 2/07 – Protection of Extractive Resources;
- State Planning Policy 1/02 – Development in the Vicinity of Certain Airports and Aviation Facilities; and
- the State's (then) new single state planning policy was also considered.

Council raised the following issues as reasons for refusal:

Noise	Visual amenity
Dust	Aviation safety and efficiency
Blasting	Geology and quarry operations
Traffic	Economics (need)
Ecology	Town planning

The residents were involved in the noise, dust, traffic and town planning issues.

Expert consultants were engaged to give evidence in relation to each area of dispute. Those experts participated in the joint expert meeting and reporting procedures under the Court's rules. At the conclusion of the joint meeting process, the experts in the following fields had agreed that the development could be approved subject to conditions: noise, dust, blasting, ecology. There was substantial agreement among many of the other experts.

Andrew formed the view that it would have been appropriate for Council, as the model litigant, to have settled the appeal at this point as the parties are substantially bound by the evidence in the joint reports.

Notwithstanding the agreement between the experts, the Council called evidence from its quarry operations expert to the effect that the conclusions of those experts (and most experts in the case) were flawed because the quarry could not operate as proposed. The Court found Council's expert to be unreliable and was critical of the way the Council conducted its case.

Despite agreeing that the haul route could be upgraded to achieve the necessary safety standards, Council's traffic expert contend that the final detailed design of the upgrade and a commitment from Parklands as to the cost of the upgrade, must be considered when deciding whether to issue the approval. Parklands argued that those were matters of detail that could be resolved at the conditions stage. The Court agreed. It is interesting to note that the Council's traffic expert had in fact given evidence in favour of the approval of a quarry on this land 20 years earlier.

The visual amenity experts differed as to the impact the quarry would have on the views of surrounding residents. The evidence was that there would be up to about 41 residences within a 2km radius from which some part of the quarry could be seen. That number was based upon modelling which did not account for things such as, vegetation which might screen the view from a particular residence. Those residences were about 2km from the site and had expansive views of which the quarry would form only a minor part.

In addition to the possible impact upon residents, Council contended that the loss of the subject hill from the skyline, as it receded over a period of about 40 years, would be an unacceptable impact on the character of the area generally.

The Court found that the visual amenity impacts were insufficient to create a conflict with the scheme or warrant refusal.

Economists were called to give evidence about the need for the quarry. They agreed that there was a need, although they differed as to the level of need. The Sunshine Coast is a 'net importer' of quarry products. That is, it does not produce all the quarry product that is required within the local government area. Council's economist relied heavily upon the supply available (potentially) from two, yet to be approved quarries in the neighbouring Gympie region to argue that the subject quarry was not required. Parklands' economist took into account the substantial additional cost involved in transporting product about 100km from Gympie to locations on the Sunshine Coast. He concluded that additional transport cost could effectively double the cost to the consumer. There was, therefore, a benefit to the community in approving the subject application so that consumers could source product locally.

Just days before the hearing was first scheduled to commence, Council applied to raise a new issue in the appeal. Council contended that, if approved, the quarry would pose a risk to aviation safety and operational efficiency at the Sunshine Coast Airport (owned by Council). The issue was only relevant in the event that the Council was able to secure approval and funding to expand its airport by constructing a new runway. If that runway is built, the quarry will be under the flight path as plane take off and land.

Andrew was now required to brief two air safety experts and re-brief the blasting and dust experts who had already completed their reports to address these new issues.

Although Council raised a broad range of concerns in relation to aviation safety, the issue that remained for consideration by the Court, after further joint meeting processes, was the risk to aviation from fly rock. The quarry is 13 km from the proposed runway. Planes will be between 1500 and 5000 ft above the quarry when taking off or landing. The blasting experts gave evidence that the risk of flyrock being projected to 1000ft was extremely low. Given the blasting methods proposed to be used, flyrock could travel to about 1150ft in the worst case – (the worst case being a determined effort to depart from all proper blasting protocol, not mere inadvertence).

The aviation experts agreed that to exclude the remote possibility of a rock and a plane coinciding in space and time, a protocol could be implemented whereby the quarry would plan blasting around the airport's flight schedule and check with the airport before a blast occurred. The experts differed as to the details of that protocol. At Parklands' invitation, the Court left the resolution of that matter to CASA and Air Services Australia.

Council argued that the requirement to liaise with the quarry was too onerous an obligation. It contended that it should be free to operate without constraint. In fact, the constraint applied to the quarry's operations, not the airport's. The Court accepted that the proposed blasting, once a month, would not unreasonably affect the airport's efficiency.

The use of the subject site for extractive industry has been supported by relevant planning controls for more than 30 years, including:

- designation as extractive industry in the 1985 Strategic Plan, the 1996 Strategic Plan and all versions of the planning scheme including the draft scheme;
- designation as a Key Resource Area (KRA) under State Planning Policy 2/07 — Protection of Extractive Resources;
- designation as extractive industry under all versions of the SEQRP;
- designation as extractive industry under the council's draft planning scheme.

Council's town planning expert contended that the time for the quarry had passed because of the encroachment of residential subdivision. In fact, only 3 houses had been built within 500m of the quarry in the past 20 years. Many more houses had been built about 1.5km - 2km away but few if any of them would be affected by the quarry.

The planning scheme specifically required Parklands to demonstrate that the impacts of the quarry would not outweigh the public benefit of winning the resource. The Court found that the impacts were few and able to be managed by appropriate conditions.

The Court concluded that approval of the quarry would not conflict with the planning scheme and that it should be approved subject to conditions. It found there was a benefit to the community in approving the quarry because it would increase competition in the market and would lower the cost of products to consumers. Council's conduct of the case and its quarry expert's conduct was criticised.

Andrew had considered the Council's conduct warranted an application for Parklands to recover some of its costs of the appeal. However, before the costs application could be filed Council applied for leave to appeal to the Court of Appeal against several of the judge's findings.

Council argued that the Court:

- had given too much weight to the Council and State planning instruments which had recognised and planned for this quarry for over 30 years;
- had been unfairly critical of Council for raising issues late and that criticism had affected the Court's judgment;
- improperly relied upon agreements between the aviation experts;
- should have refused the application in the absence of a commitment from Parklands to bear the entire cost of the road upgrade and ongoing maintenance;
- Failed to properly consider all of the impacts of blasting, including the initial blasting required to develop the operational area and the effect of overpressure upon aviation;

- Failed to give proper reasons for his conclusion that there was a need for the development and a public benefit arising from its approval.

Council failed in all of its contentions. The Court of Appeal unanimously found that:

- Many of the Council's allegations involved matters of fact, not law, and were therefore not properly the subject of an appeal;
- The P&E Court judge had properly considered the planning instruments and the evidence, came to appropriate conclusions and gave appropriate reasons for those conclusions;
- The P&E Court judge was right to criticise the Council's conduct because, as a model litigant, it is expected to identify the real issues early with a view to saving costs and court time.

The Court of Appeal refused Council's application for leave to appeal and ordered it to pay Parklands costs.

The conditions of approval and Parkland's application for costs of the P&E Court proceedings are still to be finalised.

Andrew was critical of the Council's approach to the appeal. Rather than assessing the application fully when it had the opportunity, it was refused out of hand. Then in the appeal, Council raised every imaginable issue (and some we hadn't imagined) rather than confining itself to the real issues of concern. When the joint reports of its experts revealed that the proposal, if conditioned appropriately, would not cause unacceptable impacts Council should have acted appropriately and resolved the appeal, or at least a range of issues. Instead, Council sought to undermine its own expert evidence by relying upon the controversial and heavily criticised evidence of its quarry operations consultant. That evidence was found to be prepared with a disregard for the P&E Court rules and biased.

In other quarry matters, Andrew has been able to resolve similar issues without the need for full hearings in the P&E Court once cogent evidence was provided to Council or other opponents that demonstrated the impacts of the quarry could be managed.

If you would like further information about this case, or you would like to speak to Andrew about how he could assist you, please call 5479 0155.