Case Summary: NSW Land and Environment Court rules on Proposed Developments in a Boatyard at Berrys Bay

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The NSW Land and Environment Court (**NSW LEC**) in *Stannards Marine Pty Ltd v North Sydney Council [2022] NSWLEC 99* (***Stannards Marine Case***) highlights the importance of considering the objectives of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 and the Sydney Harbour Foreshores and Waterways Development Control Plan 2013, and the principles of public trust and intergenerational equity embedded in those statutory instruments, when deciding the outcome of development applications relating to developments within the Sydney Harbour.

The *Stannards Marine Case* concerned two separate appeals. One appeal related to the relocation of an existing shed to Berrys Bay and the modification of this shed to connect it to an air quality pollution control system (**Relocatable Shed Appeal**). The second appeal related to the mooring and use of a floating dry dock in Berrys Bay (**Floating Dry Dock Appeal**). The NSW LEC upheld the Relocatable Shed Appeal, subject to the parties agreeing on conditions of consent, and dismissed the Floating Dry Dock Appeal.

<u>The Relocatable Shed Appeal</u>

Stannards Marine Pty Ltd (**Stannards**) appealed to the NSW LEC under section 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against a deemed refusal by North Sydney Council (**Council**) of a development application for the relocation of an existing shed and the installation of air quality pollution control system.

The relocatable shed was proposed to be located on land zoned IN4 Working Waterfront by the North Sydney Local Environmental Plan 2013 (**NSLEP**), which permitted the development of “boat and repair facilities” with consent.

Chief Justice Preston analysed four contentions pressed by Council, namely, the structural integrity, the acoustic impact, the air quality impact, and the impact on land contamination of the relocatable boat shed. His Honour made the following findings:

1. Firstly, the amended plans, the engineer’s evidence, and the proposed condition by Council that a structural engineers report be submitted to Council were sufficient to demonstrate structural adequacy and integrity of the relocatable shed.

2. Secondly, the acoustic impact of the use of the relocatable shed was acceptable if appropriate conditions of consent were imposed. His Honour identified six matters to be addressed by the conditions, including ensuring that the location is as specified in the amended plans and an acoustic assessment is undertaken to identify the required acoustic upgrading of the relocatable shed.

3. Thirdly, his Honour held that the air quality impact of the use of the relocatable shed could also be adequately managed by appropriate conditions. His Honour identified matters to be addressed by the conditions, including fixing the location at which the relocatable shed could be used and ensuring the installation of the PVC curtains and the encapsulation of the relocatable shed.

4. Fourthly, his Honour held that, though the soil and fill beneath the relocatable shed was likely to be contaminated, it was sealed by concrete, pavers or other sealing material, which isolated the contamination from surface.

Further to the above, Chief Justice Preston held that the visual and heritage impact were acceptable, and the scale, form, design and siting were compatible with the existing building and structures at the boatyard. It was also held that the relocatable boat shed would further the objectives for development in Zone IN4 under clause 2.3(2) of the NSLEP.

Based on the above, the NSW LEC upheld the appeal and held that development consent should be granted for the use of the relocatable shed and the installation of the air quality pollution control system, subject to conditions of consent being settled by the parties.

<u>The Floating Dry Dock Appeal</u>

Stannards also appealed to NSW LEC under section 8.7 of the EPA Act against the refusal by Council of a development application for mooring and use of a floating dry dock.

The floating dry dock was to be moored and used on unzoned waters under the NSLEP, but these waters were zoned W1 – Maritime Waters under the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (**Biodiversity and Conservation SEPP**). Zone W1 – Maritime Waters permitted the development of “boat and repair facilities” with consent.

To determine the appeal, Chief Justice Preston examined whether the mooring and use of the floating dry dock were consistent with the aims of Chapter 10 of the Biodiversity and Conservation SEPP and the objectives of Zone W1 - Maritime Waters under the Biodiversity and Conservation SEPP.

The aims of Chapter 10 of the Biodiversity and Conservation SEPP were to ensure the recognition, protection, enhancement, and maintenance of the specified natural elements of Sydney Harbour as “an outstanding natural asset” and “a public asset of national and heritage significance”. Chief Justice Preston identified Sydney Harbour as a “public asset” with “national and heritage significance”. It was a community asset available to be used and enjoyed by the public generally and “a legacy [inherited] from previous generations” and “to be transmitted from generation to generation”.

The objectives of Zone W1 - Maritime Waters, as set out in the Table to clause 10.14 of the Biodiversity and Conservation SEPP, were to give preference to and protect waters required for the effective and efficient movement of commercial shipping, public water transport and other maritime industrial operations, to allow development where it is compatible with same, and to

promote equitable use of the waterway.

The Foreshores and Waterways Area Development Control Plan 2013 (**Foreshores and Waterways Area DCP**) provided guidance in relation to the aims of Chapter 10 of the Biodiversity and Conservation SEPP. In particular, it divided the Foreshores and Waterways Area into different landscape character types. While Landscape Character Type 11 (which applied to industrial areas of Sydney Harbour) dominated the relevant site, from some viewpoints the floating dry dock could be viewed in the context of Landscape character Type 9 (which applied to the natural foreshores of Sydney Harbour).

Chief Justice Preston also identified principles of public trust and intergenerational equity embedded in the language of the Biodiversity and Conservation SEPP and the Foreshores and Waterways Area DCP. The aims of Chapter 10 of the Biodiversity and Conservation SEPP encapsulated the idea of a public trust, which involved things that all of the public had a right to access and use, which vested in the state as trustee. Chapter 10 of the Biodiversity and Conservation SEPP also accorded with intergenerational equity, that the present generation is to ensure the health, diversity and productivity of the environment is maintained or enhanced for future generations.

In *Stannards Marine Case*, Chief Justice Preston held that the mooring and use of the floating dry dock in the waterway of Berrys Bay would cause “high landscape character impacts and high visual impacts”. His Honour accepted the observations of landscape expert Dr Pollard and made the following findings:

1. The floating dry dock was “monolithic”, a “brutal, building-like vessel” that was a “product of form following function” (as it was built to serve very large vessels).

2. The introduction of a large, building-like vessel in the confined, natural waterway of Berrys Bay could not protect, enhance or maintain the waterway as an outstanding natural asset.

3. The mooring and use of the floating dry dock would affect the waterway’s status as a public asset of national and heritage significance.

4. The floating dry dock would emphasise the alienation of an area of the public resource of Sydney Harbour for private purposes.

5. The intrusion of this vessel will adversely affect the unique visual quality of the intimate and open landscape space of Berrys Bay.

As a result, Chief Justice Preston held that the floating dry dock would not protect, maintain, or enhance the natural assets and unique environmental and visual qualities of Sydney Harbour.

His Honour also considered the statement of character and intent for Landscape Character Type 11, which included a requirement that development be designed and sited with regard to the natural features of the area and to maintain their importance within the landscape character.

It was held that the floating dry dock was not designed with this regard.

Further, the mooring and use of the floating dry dock in the waterway of Berrys Bay was held not be consistent with the principle of intergenerational equity in two ways:

1. Firstly, the high landscape character impact and high visual impact of the floating dry dock was inconsistent with the conservation of quality principle, which required the present generation to maintain the quality of the waterways and foreshores of Sydney Harbour so that they passed onto future generations in no worse condition than they were received from the past generation.

2. Secondly, the high landscape character impacts and high visual impact of the floating dry dock was inconsistent with the conservation of access principle, which required the present generation to give its members equitable rights of access to the legacy of past generations and to conserve this access for future generations.

In conclusion, high landscape character impacts and high visual impacts were held to be unacceptable. Therefore, the NSW LEC ordered that the development consent in relation to the floating dry dock be refused.

If you would like more information or advice in relation to *the Stannards Marine case*, please contact the Matthews Folbigg Local Government team on 02 9635 7966 to speak with one of our Local Government lawyers.