Secretary, Department of Planning, Industry and Environment v Wollongong Recycling (NSW) Pty Ltd [2020] NSWLEC 125

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The above case in the Land and Environment Court reminds us of the crucial role that investigators of a Public Authority, such as Council Officers, play in upholding the foundational principles and goals of the *Environmental Planning and Assessment Act* 1979. The carrying out of development without consent or not in accordance with the consent undermines the objects of the Act, and Council Officers are usually the ones who bring this conduct to the attention of the Court.

"People need to be aware that the offence of carrying out development not in accordance with development consent is a crime, that offenders will be prosecuted and that the Court will impose significant penalties on offenders" Chief Justice Preston

Introduction

It may seem strange to some people that in today's day and age where there are large scale campaigns to encourage more recycling by everyone, that an actual recycling plant should be penalized for recycling more than it is lawfully allowed to do on the site. However, the Land and Environment Court made such a decision recently in relation to an offence by a large recycling company operating in Wollongong.

The defendant was convicted of an offence under section 76(1)(b) (now 4.2(1)(b)) and section 125(1) (now section 9.37) of the *Environmental Planning and Assessment Act* 1979.

In convicting and issuing a fine to the operator, his Honour, Chief Justice Preston stated that in his view *"the only real harm caused by the commission of the offence by the recycling company was to the objectives and integrity of the regulatory system of planning and development control under the Environmental Planning and Assessment Act. Carrying out development without consent or not in accordance with the consent undermines the objects of the Act, and any due processes prescribed."*

The defendant, recycling company was fined $36,000 and ordered to have a notice published in the local newspaper, a trade magazine "In Waste" and on the company website at its expense.

The Facts

The facility the defendant operates in Kembla Grange recovers, recycles and reprocesses construction and demolition waste, commercial and industrial waste. The development consent had been issued by the Secretary of Department of Planning, Industry and Environment (as required under the *State Environmental Planning Policy (Infrastructure)* 2007) but was subject to

a limit on the amount of the waste it could process, until an occupation certificate had been issued. The recycling company did not comply with this limit, and processed 40,023.98 tonnes of waste, being 10,000 tonnes more, than permitted, which meant it was “development otherwise than in accordance with development consent” and so was breach of development consent.

In order to prove an offence has been committed, a prosecutor must prove the elements of the offence having regard to the relevant provision of the Act. It was simple enough in this case that the defendant had breached development consent under section 76(1)(b) and so had committed an offence under section 125. The defendant pleaded guilty and so Chief Justice Preston proceeded to assessing the factors for sentencing.

Negligence and Recklessness

In relation to the state of mind of the defendant, the prosecutor argued that the defendant was aware of the limit set on the volume of waste processed on the site. The prosecutor stated that the defendant had sought records from the Environmental Protection Authority as to the volumes of waste which had been received by the previous operator of the site. Accordingly, the prosecutor then argued that it was reckless or negligent for the defendant to have continued to receive and process waste onsite above and beyond that stipulated. However, his Honour was not convinced that the offence had been committed either negligently or recklessly.

In the context of development consent, recklessness is a reference to the state of mind of an offender who, in carrying out the development, is aware of the risk that is likely to result, being that the development will not be carried out in accordance with the consent, but the offender then carries out the conduct, which amounts to a breach of development consent, nonetheless.

This is to be assessed by the decision maker on an objective, rather than a subjective basis.

In his Honour’s view, the state of mind of the defendant when committing the offence was not reckless as the prosecutor did not establish on the evidence that the recycling facility had knowledge or foresight that the 30,000 tonne limit was likely to be exceeded.

For negligence to be made out in the context of a breach of development, the test is that a reasonable person in the position of the offender would have foreseen or known the risk that the development would not be carried out in accordance with consent .

The defendant had taken over the site from the previous operator and waste records were not provided to the defendant at this time. Accordingly, in his Honour’s view, it could not be expected that the hypothetical reasonable person in the position of the defendant could have known the amount of waste processed in the previous months, which ultimately led to the overall breach of the development consent.

There was no actual means by which the defendant could quantify the waste received on the site prior to taking over the operation.

The penalty

The prosecutor did not seek to prove beyond reasonable doubt that the recycling plant committed the offence intentionally, and that the offence caused or was likely to cause significant harm to the environment. Accordingly, a Tier 1 penalty, being a maximum penalty of up to $5 Million was not considered in sentencing, even though the defendant could have been liable for this amount.

Instead the Court imposed the penalty already outlined in the introduction.