

MAKING WAVES? COMMUNITY PARTICIPATION IN COASTAL PLANNING

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Introduction

Communities can participate in coastal planning and hazard management in a number of ways: through community consultation by planning authorities and by undertaking temporary coastal protection works. NSW planning legislation also has 'open standing provisions' which enable any person (whether or not their individual interests are affected) to commence proceedings to remedy or prevent breaches of the planning legislation.

Community participation is a key object of planning legislation in NSW and a failure to properly consult the community can invalidate decisions by planning authorities.

Planning authorities also have obligations to disseminate information through planning certificates which are included in contracts for sale of land, and which might otherwise be acquired by property owners.

The Guidelines for preparing coastal zone management plans recommend extensive community consultation and dissemination of information regarding coastal hazards and a failure to comply with those guidelines can affect a planning authority's ability to defend itself from civil actions in the event of damage from coastal hazards.

However, what do communities' rights and the planning authorities' obligations really entitle the community to do, and how effective are they in ensuring that the community can influence coastal planning and hazard management?

This paper will examine the requirements in NSW legislation and will consider the effectiveness of attempts by landowners to challenge decisions of planning authorities in respect of coastal hazards.

It will also consider the challenges and difficulties faced by planning authorities and give consideration to options for reform.

Coastal Protection Works

'*Coastal protection works*' are defined in s4 of the *Coastal Protection Act 1979* (**Coastal Protection Act**) as '*activities or works to reduce the impact of coastal hazards on land adjacent to tidal waters and includes seawalls, revetments, groynes and beach nourishment.*'

A landowner can seek development consent for the carrying out of coastal protection works, as can local authorities.

There are more relaxed controls in relation to '*temporary coastal protection works*' which are defined as follows:

'works comprising the placement of [sand, or fabric bags filled with sand] in compliance with the requirements of this section, on a beach, or a sand dune adjacent to a beach, to mitigate the effects of wave erosion on land...'

If the temporary works are to be located on a landowner's own property, there is no need for development consent or any other approval. Temporary coastal protection works can also be placed on public land if a certificate is first obtained.

There is no constraint on the period of time during which temporary coastal protection works can remain in place. Their 'temporariness' derives from the nature of the works, rather than how long they can remain in place.

There are a number of requirements in the Coastal Protection Act and the associated regulations regarding the placement of such works.

Clearly, however, the construction of coastal protection works by individuals or groups of landowners is not likely to be a permanent solution to coastal hazards.

Therefore whilst the provisions of the Coastal Protection Act in this respect give landowners some right to participate in the management of threats from coastal hazards, the landowners' use of the provisions is generally reactive, and focused on the preservation of the landowner's individual interests. To that end, they do not adequately address the interests of the broader community in maintaining beach access and amenity, as well as providing more permanent mitigation of significant coastal erosion events.

It is also a right that can be exercised only by those limited members of the community who have land immediately affected by coastal hazards.

Right to make Submissions

The public does, however, have a right to make submissions in respect of coastal zone management plans, environmental planning instruments, development control plans, and development proposals.

Both the *Environmental Planning & Assessment Act 1979* (**Planning Act**) and the Coastal Protection Act have as a key objective community participation.

Section 5 of the Planning Act provides that it is an object of the Act '*to provide increased opportunity for public involvement and participation in environmental planning and assessment*'.

Section 2 of the Coastal Protection Act has as one of its objects:

'to provide for the protection of the coastal environment of the State for the benefit of both present and future generations and, in particular... to recognise the role of the community, as a partner with government, in resolving issues relating to the protection of the coastal environment'.

Whilst the legislation contains these key objectives, what in reality does the legislation entitle the community to do, and to what extent can the community influence decision making, or take action to protect against coastal hazards?

In order to answer that question the specific provisions of the legislation, and how those provisions and the scheme of the legislation in general has been interpreted by the Courts, needs to be examined.

Coastal zone management plans

The Coastal Protection Act deals with the involvement of the community in planning for the coastal zone.

Councils must prepare coastal zone management plans for land within the coastal zone, and the Coastal Protection Act requires a council:

'to give public notice in a newspaper circulating in the locality of the place at which, the dates on which (comprising a period of not less than 21 days), and the times during which, the draft coastal zone management plan may be inspected by the public, and to publicly exhibit the draft plan at the place, on the dates and during the times set out in the notice'.

The council must **consider** all submissions so made and the council **may** amend the draft coastal zone management plan as a result of the submissions.

Environmental planning instruments and development control plans

The key planning decisions made under the Planning Act, are decisions to make environmental planning instruments and development control plans which regulate and control development, and decisions authorising the carrying out of particular projects and development.

The Planning Act provides for the making of state environmental planning policies (**SEPPs**), which are made by the Governor and deal with matters which the Minister for Planning considered to be of state and regional significance, local environmental plans (**LEPs**) which are made by the Minister but generally at the instigation of a local council, and relate to matters within the local government area of the council, and development control plans (**DCPs**) which are made by the council.

In respect of local government areas which contain land within the coastal zone, LEPs must contain provisions regarding additional considerations which must be taken into account when determining development applications for land within the coastal zone.

Importantly however, LEPs dictate what development can be carried out where, and can restrict certain types of development in certain zones. LEPs are most likely to have significant impact on the ability of landowners to develop their land, and would be the instrument in which you would expect to find a prohibition or significant restriction of the development of land affected by significant coastal hazards.

The only community consultation requirement in respect of the making of SEPPs is contained in s38 of the Planning Act which provides:

'Before recommending the making of an environmental planning instrument by the Governor, the Minister is to take such steps, if any, as the Minister considers appropriate or necessary:

- (a) to publicise an explanation of the intended effect of the proposed instrument, and*
- (b) to seek and consider submissions from the public on the matter.'*

This means that SEPPs can be made **without** any community consultation. This seems at odds with the object of community participation in the Planning Act and enables the government to make controls of broad application across the state without first seeking community input (although in practice, input may well be sought).

The process for making an LEP is complex. However, it involves the relevant planning authority (generally the council) seeking a gateway determination from the Minister for Planning in which the Minister sets, amongst other things, the community consultation requirements for the particular LEP.

Section 57 of the Planning Act then provides:

'Before consideration is given to the making of a local environmental plan, the relevant planning authority must consult the community in accordance with the community consultation requirements for the proposed instrument'.

Generally the Planning Minister will require community consultation to take place in respect of LEPs.

However, there is no guarantee that the Planning Minister will require significant consultation.

The case of *D'Angelis v Pepping* [2014] NSWLEC 108 raised the question of whether an LEP was invalid because of a failure to consult with the community in accordance with the published guide in respect of the preparation of LEPs, '*A guide to preparing local environmental plans*' (**Guide**). The Court found that whilst the Guide sets out some community consultation requirements, all it does, on its express wording, is to set out how public exhibition had to be "generally undertaken". Therefore a determination by the Minister that consultation should be in accordance with the Guide did not oblige the Council to undertake all which the Guide indicates is "generally undertaken".

As a result, the Council was not obliged to notify all adjoining landowners.

The *Environmental Planning & Assessment Regulation 2000* (**Planning Reg**) requires councils to provide public notice in newspapers regarding a draft DCP and to invite submissions.

Development proposals

The Planning Act provides for public participation in respect of development proposals.

Almost all development proposals involve some form of community consultation. There are stringent consultation requirements for development proposals that are likely to have a significant environmental impact, and for local development proposals generally only notification of immediately adjoining owners is required.

The Planning Act and Planning Reg contain very specific requirements in respect of public notice including who needs to be notified, the period for notification and the content of the notice, and the Courts have generally interpreted the requirements for statutory notices strictly (see for example *Brown v Randwick City Council* [2011] NSWLEC 172, *Rossi v Living Choice Australia Ltd* [2015] NSWCA 244, *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349).

Significance of the requirement for public consultation

The Courts have confirmed the significance of the requirement to advise the public of proposals and enable submissions to be made. A failure to do so can invalidate decisions.

This is the case even when the period during which a challenge to the decision can be made has technically expired (see *Lesnewski v Mosman Municipal Council* [2005] NSWCA 99.)

The obligation to consider

However, providing an opportunity to make submissions does not require decision makers to give any particular weight to the submissions, or to prioritise public submissions over other considerations which are relevant to the decision to make a plan or permit a development to proceed.

As seen in respect of the above, public submissions need to be ***considered*** by the decision maker.

However, they are generally only one relevant factor.

For example, under s79C of the Planning Act, public submissions made in response to a development proposal must be taken into consideration, along with other specified matters of relevance to the development application such as suitability of the site for the

development, impacts on the environment, and the provisions of relevant planning controls.

The Courts have held that to meet its obligations under s79C the decision maker must give proper and genuine consideration to that matter. 'Proper' is taken to mean that the power must only be used for the purpose for which it is conferred and not for some extraneous purpose, with 'genuine' meaning that the decision-maker must undertake his or her function in good faith: see *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450.

The Courts have also held that to take a matter into consideration calls for more than simply advertent to it or giving it mere lip service: see *Anderson v Director General of the Department of Environmental and Climate Change & Anor* (2008) 163 LGERA 400. There has to be an understanding of the matters and the significance of the decision to be made about them and a process of evaluation: See *Weal v Bathurst City Council & Anor* (2000) 111 LGERA 181.

However, the Courts have consistently held that when it comes to making a development decision and taking into account all relevant factors under s79C, the weight to be given to each specified matter is entirely a matter for the decision maker. Hemmings J in *Everall v Ku-ring-gai Council* (1991) 72 LGRA 369 said "it was for the council and not the Court to decide which of such matters should be accorded greater or lesser weight, or even determining significance, in the exercise of statutory discretion."

Provided that a consent authority has reached a decision that is reasonably open to it on the basis of s79C considerations, it is irrelevant whether the decision is capable, in planning terms, of being described as a "correct" or "incorrect" one: see *Broad Henry v Director-General of the Department of Environment and Conservation* [2007] NSWLEC 722. Whether the opinion of a consent authority is sound or not "is not a question for decision by a court": see *King v Bathurst Regional Council* [2006] NSWLEC 505.

What this means is that provided that the decision maker has properly notified the public of the proposal, and taken into account relevant public submissions, a decision which could be seen as contrary to even the bulk of the submissions, or which the broader community disagrees with, or considers to be incorrect, will not be invalid for that reason alone.

Recourse if the community is dissatisfied with decisions

If an authority makes a decision to adopt a coastal zone management plan, make a planning instrument or DCP, or grant approval to development, what rights does the community have if it is dissatisfied with that decision?

Appeal rights

A person who has sought development consent has a right of appeal against a decision of the consent authority if the person is dissatisfied with the decision (see s97 of the Planning Act).

There are no appeal rights for members of the community generally in respect of the making of CZMPs, planning instruments or controls, or development decisions.

The only exception to this is for *designated development* where an objector has a right of appeal (see s98 of the Planning Act). Designated development is development which has particular potential to impact the environment in a significant way, and environmental impact statements need to be prepared for designated development.

This is possibly the highest that the rights of the community get in respect of involvement in development decisions. Effectively, the objector who lodged a submission in respect to designated development is considered to be a party affected by the decision and therefore is given appeal rights.

However, only the most potentially polluting developments are designated development. The categories of designated development are closed, and developments such as coastal protection works and the types of development normally located in coastal areas, are not designated development, although mines or extractive industries within 200m of the coastline are designated development.

Therefore there is a very limited right for members of the public to appeal decisions involving coastal planning and coastal hazards if they are dissatisfied with those decisions.

If a development application is refused consent, and there is an appeal, objectors can be heard before the Court.

An objector has no legal entitlement to participate in a development appeal.

However, councils almost always call objectors as witnesses to assist their case, and the Court has the power, under s38 of the *Land & Environment Court Act 1979* (**Court Act**) to inform itself on any matter in such manner as it thinks appropriate, and can therefore hear objector's concerns.

Biscoe J of the Land & Environment Court explained the status of objectors in *Newcastle Muslim Association Incorporated v Newcastle City Council* [2012] NSWLEC 20 and stated that they have a status which '*has no equivalent in conventional civil litigation*'.

His Honour noted the following legislation, practice notes and policies of the Court, which provide the context for the participation of objectors in development appeals:

- one of the objects of the Planning Act is to provide increased opportunities for public involvement and participation in planning;

- any person may inspect a development application and make written objections (s91 of the Planning Act);
- the public have legally enforceable rights to access government information, including information regarding development applications, under the *Government Information (Public Access) Act 2009*;
- the usual directions made by the Court pursuant to the Court's *Practice Note - Class 1 Development Appeals*, include a direction that the consent authority files a notice of those objectors who wish to give evidence in the appeal; and
- the Court's *Site Inspections Policy* provides for objectors to give evidence on-site during a site inspection, and provides that a council is to ensure that objectors have a full understanding of the development proposed to ensure that any concerns expressed in their evidence are relevant.

However, despite their special status, objectors are not parties to the proceedings before the Court.

Objectors can seek to be joined as a party to proceedings (see s39A of the Court Act), or seek to have an order made by the Court allowing them to participate as though they were a party to the proceedings. The latter is done by an order made under s38(2) and is called a *Double Bay Marina* order, after the case in which the first such order was made (see *Double Bay Marina Pty Ltd v Woollahra Municipal Council* (1985) 54 LGRA 313).

However, such orders will only be made where the objector can establish that he or she can raise an issue which should be considered by the Court, but which would not be sufficiently addressed if the order was not made.

In the majority of cases, such an order will not be made, and the objectors will not be parties to the proceedings, and therefore cannot participate in all aspects of the proceedings, such as conciliation conferences.

Also, if plans are amended during the Court process, objectors may not be notified (see *V'landys v Land and Environment Court of NSW* [2012] NSWLEC 218).

Challenges to decisions

In the absence of a right of appeal such as exists for designated development, the only way in which a decision can be overturned in the Courts by a community member is through a challenge to the validity of the decision.

There is no scope under the Coastal Protection Act for a member of the public to challenge a decision to make a CZMP.

However, the Planning Act contains what are described as 'open standing' provisions.

Section 123 of the Planning Act enables any person to commence proceedings to remedy or restrain a breach of the Planning Act.

Therefore a member of the public, regardless of how a decision affects that person, and even if it does not affect that person, can commence proceedings in respect of a breach of the Planning Act.

The open standing provisions are a key element of the Planning Act, and are used widely and effectively by community groups and organisations such as the Environmental Defenders Office (although more commonly by neighbours to development or trade competitors) to have decisions struck down.

In early October, the Land & Environment Court handed down judgment in the first matter in NSW of which I am aware brought under the open standing provisions of the Planning Act in respect of coastal hazards by a community group.

In *Positive Change for Marine Life Inc v Byron Shire Council (No 2)* [2015] NSWLEC 157, the applicant sought an injunction to prevent Byron Shire Council (**Council**) from undertaking beach protection works along sections of Belongil Beach.

Council had determined after undertaking an environmental assessment process under Part 5 of the Planning Act that it would carry out the works.

Positive Change for Marine Life Inc relied on the open standing provisions in the Planning Act to challenge the Council's decision, and to seek an injunction to prevent the works being carried out.

Once the proceedings were commenced, three other parties sought to be joined to the proceedings. Two additional parties were joined to the proceedings, being landowners whose properties would be directly affected by the proposed works. One of the joined parties had been previously in a suite of litigation with Council in respect of beach works he proposed to himself undertake to protect his property, works Council proposed to undertake and claims that his property was damaged as a result of Council's failure to carry out protection works.

The parties joined to the proceedings supported the Council's proposed works.

Positive Change for Marine Life Inc challenged the Council's decision on the basis that in its view, the works would have a significant impact on the environment, and that as a result Council was required under the Planning Act to prepare an environmental impact statement, which it did not do. It argued that as a result Council had breached the Planning Act, and its decision was invalid.

As the decision was only in respect of whether Council should be enjoined from carrying out the works, and was not the ultimate hearing of the substantive issues in the case, no determination was made regarding whether the works would significantly affect the environment and whether there had been a breach of the Planning Act.

The Court however, did find that there was a reasonably arguable case. In deciding whether to grant the injunction, the Court had to consider the question of harm. In doing so Craig J said:

'In the present case, there are competing public interests. There is the public interest that the applicant seeks to sustain by securing adherence to the law...there is the potential for harm to the environment...the council must also be taken to represent the public interest. That interest lies in carrying out works intended for the public benefit by arresting further beach erosion along Belongil beach'

Also, of course, the interests of the private landowners add complexity to the long term resolution of such issues, although currently those interests at Belongil Beach align to some extent with the public interest represented by the Council,

In the context of coastal planning and coastal hazard management, the majority of prior cases were commenced by landowners seeking to develop or protect their own land, and not by members of the broader community seeking to protect the broader public interest.

It is to be noted however, that one of the leading cases on the relevance of ecologically sustainable development in the planning process involved a challenge to an approval for a development at Sandon Point due to the failure to consider whether the flooding impacts of the development would be exacerbated by climate change (*see Minister for Planning v Walker* [2008] NSWCA 224).

Community groups and members of the community have also had success in challenging planning instruments, although I am not aware of any such challenge in the context of coastal planning.

Discussion

The Planning Act in particular has a significant focus on public participation in planning decisions. The Court's recognition of the importance of public participation to the validity of development, and the open standing provisions enabling any person to challenge decisions ensure that the public can be involved through the making of submissions, and can hold decision makers to account.

However, there are significant costs associated with exercising ones rights to challenge decisions in Court. In proceedings challenging a decision, the unsuccessful party is generally ordered to pay the successful parties costs.

The Land & Environment Court can determine not to award costs against an unsuccessful party where it is satisfied that the proceedings have been brought in the public interest. However, generally an additional factor will need to be demonstrated in order to avoid a costs order. For example in *Minister for Planning v Walker* (see above), the Court of Appeal considered the point of law to be novel.

Given the potential costs implications it is not surprising that it is more common to see litigation taken where a person has a financial stake in the outcome (such as through protection of their property).

In reality, therefore, members of the public will generally not consider litigation to be an option, and will need to rely on their rights to make submissions in the decision making process.

Whilst this paper has outlined the limits on the requirement for public consultations, and the weight given to submissions, in practice most decisions makers take the community consultation process seriously, and give weight to the views of the community.

However, it is a challenge for decision makers when dealing with issues such as coastal planning to balance the competing public interests, and to also balance the concerns of private landowners. Most decisions are unlikely to be supported by all stakeholders.

It is highly unlikely that there would be any legislative change to provide members of the public with greater rights under the Planning Act. Indeed, there has been pressure over the years to tighten the open standing provisions, the *Planning Bill 2013 - Exposure Draft* had proposed to restrict challenges to planning decisions in certain circumstances, and the current Planning Act restricts such challenges in respect of critical infrastructure.

However the Coastal Protection Act does not contain open standing provisions, and arguably the best point in time for members of public to take action is in the early stages, being the development and adopted of the CZMP, rather than at the later stages of implementing the CZMP through planning decisions.

On 17 November 2014 the Minister for the Environment, the Honourable Rob Stokes MP announced a reform package for coastal hazards involving the repeal of the Coastal Protection Act and a new coastal management act.

The Media Release stated that the 3 major aspects of the proposed reforms are:

- replacing the current laws with less complex laws which are a 'better fit' with land use planning and local government legislation;
- new arrangements to better support council decision making, including a new manual and improved technical advice; and
- developing a clear system for funding and financing of coastal management actions.

Perhaps we now only need to wait a few more days before the detail of the reforms will be known. Integration of the development of CZMPs, coastal hazard management and planning laws could well make it easier for the community to become involved in decision making at the appropriate time, and to use its powers to make submissions and hold decision makers to account in the most efficient manner.

However, in the absence of any such reforms, the most effective tool for the community may well be political.