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**Planning Principles and Precedents in Merits Review**

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The focus of this session is on the environmental tribunals and courts (ECTs) whose functions include reviewing, or determining appeals about, land use and environmental decisions. Most Australian jurisdictions have for some time had avenues for review or scrutiny of decisions taken by local authorities and other government agencies, sometimes undertaken by a tribunal, in other instances by a court.<sup>1</sup> The common element of this review process is that the reviewing court or tribunal is able to exercise the same powers and functions as were conferred on the original decision-maker, for example, to decide for itself whether or not a particular application should be approved and if so, on what conditions.

The tension between certainty and flexibility is a recurring theme in planning and land use legislation, policy, and decision-making.<sup>2</sup> It is common to distinguish the formulation of broad policies in the plan making process from a focus on the “merits” of an individual application in the development control process. Attempts to achieve certainty in planning through such measures as inclusion of standards, often numerical, are generally balanced by the capacity of the decision maker to exercise judgment on the application of those standards in the circumstances of the particular case. Making those decisions in an individual case has been described as the exercise of power “expressed in broad terms to which multiple considerations apply and with respect to which the range of permissible opinion is extraordinarily wide – including issues of policy, taste and philosophy...”.<sup>3</sup> The evaluative task of the consent authority may be constrained or directed by legislative directions as to the factors to be considered, and specification of the ones that must be satisfied before an approval can be granted. Accommodating the exercise of discretion and evaluative judgment in the development control process is not straightforward. Not only are there competing values that need to be identified and balanced, but there are often local political or economic pressures (which may not always be explicit). Land use and environmental decision-making generally involves a balancing of interests including broader public interests. Incorporation of the principles of ESD into decision-making is both a recognition and a facilitation of this balancing.

The courts and tribunals engaged in the review process are equally conscious of the need to achieve an appropriate outcome in the individual case, and to ensure consistency and predictability. Seeking this balance is a factor in review of government decision making

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<sup>1</sup> The different forms which specialist environmental courts and tribunals (ECTs) take are discussed in Pring & Pring *Greening Justice: Creating and Improving Environmental Courts and Tribunals* 2009, at part 3.1, pp 21ff. The Australian courts and tribunals exercising the review function which is the subject of this paper are the ACT Administrative Appeals Tribunal, the Land and Environment Court of NSW, the Planning and Environment Court of Queensland, the Environment, Resources and Development Court of South Australia, the Tasmanian Resource Management and Planning Appeals Tribunal, the Victorian Civil and Administrative Tribunal, and the Western Australian State Administrative Tribunal.

<sup>2</sup> L Stein *Principles of Planning Law*, 2008, Oxford University Press, Ch 1 “Underpinnings of Planning Law”.

<sup>3</sup> *McGovern & Anor v Ku-ring-gai Council & Anor* (2008) 161 LGERA 170; [2008] NSWCA 209, at [13] per Spigelman CJ.

more generally, and is not unique to the ECTs. At the centre of the review jurisdiction of the ECTs is a dispute: whether it be a resident who wants to challenge an authority's decision to refuse approval for a hard stand car park at the front of their home, to the group challenging a decision to approve a large scale wind farm in a rural area (to which may be joined other individuals and groups both supporting and opposing the proposal). The parties to the dispute will generally include a government agency whether it be a local authority, a Minister or some other body. The resolution of the dispute will generally involve the interpretation and application of legislation or other rules, which may or may not be framed by the body whose decision is challenged. The Australian specialist ECTs do more than simply adjudicate disputes, however, and most routinely include conciliation, mediation, and other forms of ADR in their dispute resolution processes.<sup>4</sup> The context within which ADR processes operate is, however, framed by the principles generated in adjudication.

Courts and tribunals hearing appeals against development control decisions are required to interpret and apply the law contained in legislation and planning and other instruments that have legislative force. They are also required to take into account statements of policy, whether developed by the decision-maker whose decision is under challenge or by some other agency.

### **Relevance of policy**

The benefits to be gained by a thoughtful adoption of policy were expressed by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640:

*Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.*

These comments were made in the context of a review by the Administrative Appeals Tribunal of a decision made by the Minister to deport a person, and concerned the application of the Minister's policy on the exercise of the discretion to deport non-citizens guilty of serious criminal offences. They have been applied more generally by administrative review tribunals and courts seeking to achieve a balance between consistency and fairness. Fairness demands that there must always be room for departure from a policy in the circumstances of the particular case. Consistency and predictability are also measures of fairness. As the former President of VCAT commented, inconsistency and unpredictability have social and economic costs, as community, business and government should be able to make decisions and order their affairs on the basis that the outcome of a review proceeding is reasonably ascertainable; further, by creating scope for argument in individual cases, the cost of review proceedings can be increased without any discernible benefit.<sup>5</sup> Where relatively few decisions are appealed against, there are sound policy reasons for promoting consistency, and preventing inconsistency, between decisions of a court or tribunal and the decisions of the executive.<sup>6</sup>

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<sup>4</sup> See for example, Hon M Rackemann DCJ "The Planning and Environment Court – Are we there yet?" paper presented to the 2009 Queensland Environmental Law Association Conference, pp3-6; Tasmanian Resource Management and Planning Appeal Tribunal Report for 2008/2009, pp8-9; The Hon Justice Brian Preston "The Land and Environment Court of NSW: Moving Towards a Multi-Door Courthouse" (2008) 19 ADRJ 72 (Part I); (2008) 19 ADRJ 144 (Part II).

<sup>5</sup> Hon Justice K Bell *One VCAT: President's Review of VCAT 2009*, p59.

<sup>6</sup> The Hon Justice Brian Preston "The Role of Courts in Relation to Adaptation to Climate Change" Adapting to Climate Change Law and Policy Conference, ANU College of Law, 19-20 June 2008, to

The principles by which reviewing courts and tribunals are guided by statements of policy that do not take the form of binding rules are generally clear. In the land use context, the former Victorian Planning Appeals Board identified 5 factors in determining whether a non-statutory policy should be applied:<sup>7</sup>

- whether it is based on sound planning principles
- whether it is public, rather than a secret policy
- whether it has been formulated after public discussion,
- the length of time it has been in operation, and
- whether it has been continuously applied.

To these factors, the former President of VCAT added whether the policy is outdated or has been overtaken by a planning scheme: *Stella v Whittlesea City Council* [2005] VCAT 1825. This approach is similar to that adopted by the Land and Environment Court in *Stockland Development Pty Ltd v Manly Council* (2004) 136 LGERA 254; [2004] NSWLEC 472, where McClellan J identified other relevant factors, including whether the policy is designed to defeat a project known to be under consideration by a developer for a particular site, and the compatibility of the policy with the objectives and provisions of relevant planning instruments, or other policies adopted by a council or other relevant government agency.

Whether a reviewing court or tribunal should develop its own policy is more contentious. The general principle is that a review tribunal is not bound by its own previous decisions. In the context of review of land use decisions, Sugerman J in *Shellcove Gardens Pty Ltd v North Sydney Municipal Council* (1960) 6 LGRA 93 (at 104) stated that "there is no such thing as binding precedent in these matters". However, consistency and predictability may be served by a review tribunal formulating "general norms"<sup>8</sup> to structure its own decision-making and that of those whose decisions it is reviewing.

The generalist Australian administrative review tribunal, the Administrative Appeals Tribunal, has adopted the position that this can only appropriately be in the course of determining individual cases, and not in establishing general norms of correct or sound decision-making.<sup>9</sup> Brennan J explained the AAT's reluctance to develop policy in these terms:

*The Tribunal is not linked into the chain of responsibility from Minister to Government to Parliament, its membership is not appropriate for the formulation of broad policy and it is unsupported by a bureaucracy fitted to advise upon broad policy. It should therefore be reluctant to lay down broad policy, although decisions in particular cases will impinge on or refine broad policy emanating from a Minister. Different considerations might apply if a reviewable discretionary power were not subject to Ministerial supervision.*

While the relationship between an ECT and those whose decisions it is reviewing may be different,<sup>10</sup> the ECTs will in most instances be reviewing a decision made by a body or person who is electorally accountable for their exercise of power, whether directly or indirectly, which might suggest a degree of caution.

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be published in Tim Bonyhady, Andrew Macintosh, and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, forthcoming), at p30.

<sup>7</sup> *Australian Aluminium Shop Fitters and Glazing Contractors Pty Ltd v City of Fitzroy*, VPAB Appeal No P82/1162, cited in *Markay Home Company Pty Ltd v City of Waverley* (1983) 22 APA 519: Stein, n.2, p 92-3.

<sup>8</sup> P Cane & L McDonald *Principles of Australian Administrative Law: Legal Regulation of Governance* 2008, Oxford, p240.

<sup>9</sup> P Cane *Administrative Tribunals and Adjudication* Hart Publishing, 2009, at 158-9.

<sup>10</sup> See *Currey v Sutherland Shire Council & Anor* (1996) 92 LGERA 85 at 98, per Pearlman J.

The arguments in favour of reviewing courts or tribunals formulating or developing policy generally include that they have high levels of skill or experience, either through the qualifications required for appointment or through familiarisation through experience, and that they can provide leadership for decision makers whose decisions they review.<sup>11</sup> While acknowledging these arguments, it is important to note that the adjudicative task may limit the capacity of a court or tribunal to make policy. The particular litigation will limit the duration of the inquiry, and circumscribe the evidence that might be called; the parties, the experts called by them and the objectors heard in the course of the proceedings provide the diversity of views for consideration, which may leave other views unheard; and the focus on the resolution of a particular dispute makes it difficult to focus on broader considerations such as impact assessment.<sup>12</sup> In New South Wales, the Court of Appeal has confirmed on more than one occasion that the development control appeals heard by the Land and Environment Court are adversarial litigation, and that it is for the parties to frame the issues in dispute. In *Segal v Waverley Council* [2005] NSWCA 310 at [95]-[96] the Court of Appeal acknowledged the desirability of consistency in the application of planning principles, however doubted that there is any place for a principle of consistency in administrative decision-making in the context of adversarial proceedings in the Land and Environment Court, where the merits of a particular application depend on the facts and circumstances of each case.<sup>13</sup> The position may be different for those ECTs whose function is less clearly framed by an adversarial context.

The benefits of consistency of decision-making within a particular tribunal or court are generally acknowledged. There is general acceptance that one of the goals of administrative review is also to provide guidance for decision-makers and others, and that this can be a valuable role where a court or tribunal is grappling with complex interpretation questions or procedural issues.<sup>14</sup> However, there may be risks with attempting to provide guidance in more subjective evaluations. It is one thing for the legislative drafter to set out broad principles, for example design principles for residential flat buildings; it may be another for those principles to emerge from an adjudicative process.<sup>15</sup> This probably has more to do with convenience and prudence, rather than power,<sup>16</sup> an issue discussed further below.

### **Approaches to policy formulation in administrative review**

There are two approaches to the formulation of policy that can be observed. One approach is for a tribunal to differentiate some decisions as providing guidance to tribunal members, and to others, through the reporting of important decisions, or by indicating their importance in other ways such as starring, or in the VCAT experience, as “red dot” decisions. The other approach is to use individual decisions to provide more general guidance, both to the tribunal and to others, such as in the UK “country guidance” decisions generated in asylum appeals, or in the NSW Land and Environment Court planning principles. Both these approaches should be distinguished from what might be described as a “top down” approach, of guidelines issued by the head of the relevant tribunal.<sup>17</sup>

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<sup>11</sup> S Morris “Tribunals and Policy” in R Creyke (ed) *Tribunals in the Common Law World* 2008, Federation Press, 139 at 149.

<sup>12</sup> D Galpin “Planning principles: Policy-making by the Land and Environment Court” (2005) 11 *LGLJ* 94 at 101-102.

<sup>13</sup> See, however, the comments of McClellan J in *Residents Against Improper Development Inc v Chase Property Improvements Pty Ltd* (2006) 149 *LGERA* at [219].

<sup>14</sup> Pearson “The Impact of External Administrative Law Review: Tribunals” (2007) 55 *AIAL Forum* 29.

<sup>15</sup> P Williams “The Land and Environment Court’s Planning Principles: Relationship with planning theory and practice” (2005) 22 *EPLJ* 401 at 407.

<sup>16</sup> Galpin, n.12, at 102.

<sup>17</sup> For example, s159(1)(h) of the Canadian *Immigration and Refugee Protection Act* enables the Chairperson of the Immigration and Refugee Board to issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides.

### *Reporting or “starring” decisions*

The first approach resembles precedent as it applies in the common law courts, however the weight to be given to any individual decision would generally not resemble the traditional notion of binding precedent. In practice there can be a dilemma for a decision-maker, not wanting to disregard past decisions for fear of undermining the goal of fairness through consistency, yet not wanting to appear to have their decision fettered by precedent.<sup>18</sup> The context varies: at one end of the spectrum are high volume jurisdictions where there are many different decision makers, including many differently constituted review tribunals, which are required to address relatively similar factual situations in the same legal context; at the other are jurisdictions which encounter widely varying factual situations where the legal framework leaves significant leeway in decision-making. For the former situation there is often a practical difficulty in actually knowing about previous decisions, and identifying those that are relevant to the situation at hand. To some extent improvements in technology that have made it easier for courts and tribunals to “publish” their output have been both an advantage and disadvantage: in increasing accessibility, but creating problems in searching to locate relevant decisions. A decision-maker can face difficulties both in locating analogous decisions, and in deciding whether or not to follow them. Tribunals can assist by highlighting the significance of particular decisions.<sup>19</sup>

Tribunals in the United Kingdom have come closest to adopting an approach that is similar to a common law model of precedent. The Social Security Commissioners formerly determined appeals from decisions of the Appeals Service (the first instance review tribunal), and while not a court, their decisions on matters of law were binding on both the lower appeal tribunals and primary decision-makers. Since 1948 the Social Security Commissioners have identified, by consensus, decisions worthy of being reported;<sup>20</sup> other decisions are “highlighted”, as being of special interest, however this does not confer any authoritative status. Critically, a “reported” decision is given more weight than another, however a Commissioner is free to decline to follow a “reported” decision; a subsequent Commissioner can follow the later unreported decision. This model has carried through to the upper tier of the new Tribunals Service that has integrated the disparate tribunals in England and Wales, and which accepted that one of the roles of the Upper Tribunal would be “to develop, by its general expertise and the selective identification of binding precedents, a coherent approach to the law”.<sup>21</sup>

There has been a similar practice in migration reviews, where the former Asylum and Immigration Tribunal followed the system of its predecessor of “starring” decisions, which were binding on points of law on the departmental adjudicators.<sup>22</sup> This practice has continued, and is incorporated in the Practice Directions for the Immigration and Asylum Chambers of the First-Tier Tribunal and The Upper Tribunal, which state that starred

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<sup>18</sup> F Houle & L Sossin “Tribunals and Guidelines: exploring the relationship between fairness and legitimacy in administrative decision-making” (2006) 49 *Canadian Public Administration* 282.

<sup>19</sup> R Creyke “The Special Place of Tribunals in the System of Justice: How can Tribunals make a Difference?” (2004) 15 *PLR* 220 at 234-5.

<sup>20</sup> In 2004-05 that some 40 or 50 decisions each year were accorded reported status, which was around 2 percent of the 2,260 Commissioner appeals for that year: T Buck “Precedent in Tribunals and The Development of Principles” (2006) *Civil Justice Quarterly* 458 at 471. See also Buck, Bonner & Sainsbury *Making Social Security Law* 2005, Ashgate, Ch 5.

<sup>21</sup> Leggatt Review *Tribunals for Users*, 2001, cited by Sir Robert Carnwath “Tribunal Justice – A New Start” [2009] Public Law 48 at 56.

<sup>22</sup> Carnwath, at pp59-60.

decisions are treated as authoritative in respect of the matter to which the “starring” relates, unless inconsistent with other authority that is binding on the Tribunal.<sup>23</sup>

Different constitutional arrangements, and in many jurisdictions reliance on less adversarial forms of adjudication, explain why no Australian tribunal has adopted such a formal approach to precedent.

The approach adopted in VCAT of identifying “red dot” decisions is the subject of a separate paper in this session by Laurie Hewet and Jeanette Rickards.

### *Statements of general principles*

The second approach is where more general principles are articulated in the context of the resolution or determination of a particular appeal. The process of extrapolation and publicising of principles has been described as rule-making by adjudication, in contrast to legislative rule-making, and can facilitate decision-making, promote integrity by testing decisions against principles, and diminish inconsistency.<sup>24</sup>

Here as well there are different models, and again the UK experience is more formalised. The example there is of the “country guidance” decisions generated in the immigration and asylum tribunals, described as “a form of judicial policy making through adjudication”.<sup>25</sup> A country guidance decision is one that involves findings of fact on circumstances in a particular country for particular groups. Such findings must be made as part of the decision on an asylum claim, where the decision-maker must determine the risk of persecution if the individual is returned to that country, for example conditions in Croatia relevant to the circumstances of Serb asylum seekers. The Court of Appeal endorsed country guidance decisions in *S v Secretary of State for the Home Department* [2002] EWCA Civ 539, on the basis that there is no public interest, or legitimate individual interest, in multiple examinations of circumstances in a particular country at any particular time, and that there is a risk of inconsistent results and the likelihood of repeated and therefore wasted expenditure of judicial and financial resources upon the same issues and the same evidence.

The practice of country guidance decisions is now included in the Practice Direction for the Immigration and Asylum Chambers of the First-Tier Tribunal and The Upper Tribunal, which states that a country guidance case is authoritative in any subsequent appeal, so far as that appeal relates to the country guidance issue in question, and depends upon the same or similar evidence. Country guidance decisions, however, do more than provide guidance: the Practice Direction states that “any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law”.

The approach adopted by the NSW Land and Environment Court is less rigid than the UK example. In 2003 the then Chief Judge, Justice McClellan, outlined the decision to publish

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<sup>23</sup> Practice Directions: Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, issued by Lord Justice Carnwath, Senior President of Tribunals, 10 February 2010 [http://www.tribunals.gov.uk/Tribunals/Documents/Rules/IAC\\_UT\\_FtT\\_PracticeDirection.pdf](http://www.tribunals.gov.uk/Tribunals/Documents/Rules/IAC_UT_FtT_PracticeDirection.pdf).

<sup>24</sup> Preston, n.6, at p35; Creyke, n.19, at 234.

<sup>25</sup> R Thomas "Refugee Roulette: A UK perspective" in J Ramji-Hogales et al *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, New York University Press 2009, 164 at 175.

decisions of Commissioners and the prospective development of planning principles as follows:<sup>26</sup>

*The court has now begun to publish the decisions of Commissioners upon the internet. Anyone who has access to the net is able to understand the outcome of a particular matter and identify the reasoning processes of the Commissioner who decided it. As a reflection of the greater significance which the community will attach to Commissioners' decisions, the Commissioners are intent upon including in their reasons for decision a discussion of both general and particular planning principles. You can expect that with time a body of decisions which reflect the principles appropriate to apply to various planning problems will be articulated.*

*With time I anticipate that the publication of Commissioners' decisions which embody these principles will enable councils and other decision-makers as well as architects, planners and developers to understand the principles which will be applied by the court in the ordinary course. They should also enable local government to have a better understanding of the approach of the court and I have no doubt this will assist in the application by those bodies of appropriate principles to the decisions which they must make. The number of appeals is likely to be reduced and the capacity of the planning profession and those who advise councils and developers to predict the approach which the court will take will be enhanced. The quality of decision making will be enhanced at every stage of the process.*

The planning principles are described on the Court's website in the following terms:

*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.*

There are now 43 decisions containing planning principles identified on the Court website (see annexure). The planning principles have been said to fall into two general categories. The first has been described as "outcome" principles,<sup>27</sup> being principles concerned with the setting of goals or planning, otherwise described as "assessment or outcome-oriented" principles,<sup>28</sup> and "descriptive and prescriptive"<sup>29</sup>. The second category is more clearly

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<sup>26</sup> "Land and Environment Court – Achieving the Best Outcome for the Community", 28-29 November 2003,

[http://infolink/lawlink/lec/ll\\_ Lec.nsf/vwFiles/Speech\\_28Nov03\\_McClellan.pdf/\\$file/Speech\\_28Nov03\\_McClellan.pdf](http://infolink/lawlink/lec/ll_ Lec.nsf/vwFiles/Speech_28Nov03_McClellan.pdf/$file/Speech_28Nov03_McClellan.pdf)

<sup>27</sup> Galpin, n.12, at 85.

<sup>28</sup> Williams, n.15, at 404.

<sup>29</sup> T Moore, Senior Commissioner "The Relevance of the Court's Planning Principles to the DA Process" 21 May 2009:

focussed on process, and are described as “procedural or process-oriented” principles,<sup>30</sup> or “consistency” principles.<sup>31</sup> The difficulty with these classification attempts, however, is that the boundary is blurred: for example, Galpin and Moore identify *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 which is concerned with assessment of impact on views as a consistency, or process, principle, while Williams describes it as an assessment or outcome principle.

In 2009 Senior Commissioner Moore analysed the application of the planning principles, and found that the most commonly cited planning principles are those relating to impact on views (*Tenacity Consulting v Warringah Council* [2004] NSWLEC 140, (2004) 134 LGERA 23), sunlight (*Parsonage v Ku-ring-gai Council* [2004] NSWLEC 347, (2004) 139 LGERA 354), location of brothels (*Martyn v Hornsby Shire Council* [2004] NSWLEC 614, (2004) 139 LGERA 282), and trading hours of licensed premises (*Vinson v Randwick Council* [2005] NSWLEC 142, (2005) 141 LGERA 27).<sup>32</sup>

Moore SC’s analysis showed that *Tenacity* was also the most frequently used planning principle in Council assessments (32 of 152 Councils), and that *Tenacity* has also been cited in the South Australian Supreme Court and the Western Australian State Administrative Tribunal.<sup>33</sup> The NSW Department of Planning has applied planning principles in preparing Director General’s reports.

Planning principles have also been taken up in the planning process. For example, *Tenacity* is referred to in the Manly Council Residential Development Control Plan,<sup>34</sup> and it has been expanded in the Woollahra Council Development Control Plan.<sup>35</sup>

## Issues for ECTs in developing policy

### *Subject matter*

Galpin suggests that if another consent authority has made policy on a given matter a court should not do so; and further, that the courts and tribunals are on safer ground in promoting consistency in process rather than addressing outcomes.<sup>36</sup> The two planning principles most frequently cited in Moore SC’s survey, *Tenacity* and *Martyn*, demonstrate both these propositions. The planning instrument at issue in *Tenacity* stated that “development is to allow for the reasonable sharing of views”; as noted by Roseth SC, it did “not state what is view sharing or when view sharing is reasonable”. The planning principle identifies four steps: assessment of the views affected; consideration of from what part of the affected property the views are obtained; the extent of the impact; and the reasonableness of the proposal causing the impact (for example, whether or not it complies with the planning controls). In *Martyn* Roseth SC listed criteria for assessment of the location of a brothel, filling in the gaps in the applicable planning controls which said nothing about assessment of brothels.

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[http://infolink/lawlink/lec/ll\\_ Lec.nsf/vwFiles/NEERG\\_21\\_May\\_2009\\_paper.pdf/\\$file/NEERG\\_21\\_May\\_2009\\_paper.pdf](http://infolink/lawlink/lec/ll_ Lec.nsf/vwFiles/NEERG_21_May_2009_paper.pdf/$file/NEERG_21_May_2009_paper.pdf).

<sup>30</sup> Williams, n.15 at 404.

<sup>31</sup> Galpin, n.12 at 95.

<sup>32</sup> Moore, n.29. As at May 2009, *Martyn* had been cited 25 times, *Parsonage* 16, *Tenacity* 80 and *Vinson* 12. It should be noted here that *Parsonage* has been replaced by the planning principle in *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082.

<sup>33</sup> *Hutchens & Anor v City of Holdfast Bay & Anor* [2007] SASC 238; *App Corporation Pty Ltd v City of Perth* [2008] WASAT 291.

<sup>34</sup> Moore, n.29.

<sup>35</sup> Williams, n.15 at 405.

<sup>36</sup> Galpin, n.12 at 102.



Addressing outcomes rather than process runs the risk of undermining the notion of assessment of matters on their merits.<sup>37</sup>

### *Consultation*

In contrast with the formulation of policy by a local authority, which is usually an elected body, and engages in various forms of public notification and consultation, there is an issue as to whether it is appropriate for a court or tribunal to seek input other than from the parties and their experts. An example of this occurring is *Hasan v Moreland City Council* [2005] VCAT 1931, a review of conditions on a planning permit requiring new attached dwellings to be constructed in a manner that included measures for insulation, solar hotwater and a rainwater tank, that were more onerous than required under the applicable building code. The issue for the tribunal was whether such conditions should be imposed as part of the planning permit regime or be left to the building controls applicable to all buildings. The tribunal directed that notice be given to the relevant minister and his department, local councils, and bodies responsible for water supply, sustainability and building control, and they were invited to make submissions or to join the proceedings. As Morris J puts it, the response was "disappointing"<sup>38</sup> and the tribunal relied on its powers to inform itself as it thought fit, hear from the parties and make a decision. The tribunal concluded that it was inappropriate to impose such conditions on a planning permit and better to leave the matter to be dealt with by building controls, commenting:

*36 As this case was in the nature of a test case, we would expect responsible authorities to cease imposing like conditions on planning permits. It would be undesirable if a future applicant was forced to incur costs to overturn such conditions. Of course, in such circumstance, the tribunal may need to make an order that the responsible authority pay such costs.*

The practice of Land and Environment Court is to invite the advocates appearing in a particular matter to make submissions as to whether a potential planning principle arises, and if so, what that principle should be.<sup>39</sup>

### *Converting policy into prescription*

There is always a risk that a statement of policy will be treated as prescriptive. To counter this, Moore SC in *Alphatex Australia v The Hills Shire Council (No 2)* [2009] NSWLEC 1126 set out the following general principles:

*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*

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<sup>37</sup> Williams, n.15, at 406.

<sup>38</sup> Discussed by Morris, n.11 at 149-150. The reasons for the decision state that submissions were received from Melbourne Water, the cities of Port Phillip and Manningham, Mr Mike Hill of WestWyck Pty Ltd and the Housing Industry Association; the Housing Industry Association applied to be joined.

<sup>39</sup> Moore, n.29.

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 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**

The pressures of volume that explain and justify the formulation of guidance or policy in other contexts may not generally be present in review of land use and environmental decisions. There are, however, good reasons why an ECT might wish to give guidance through a "red dot" system, or the formulation of a planning principle. In contrast to other types of review such as income support or asylum decisions, where the focus is squarely on the individual applicant, land use and environmental decision-making routinely involves consideration of other competing individual interests and broader community and environmental interests. Identification of leading decisions, or general principles, can assist in elaborating often complex or technical matters, or provide a starting point for consideration of subjective elements.<sup>40</sup> Maintaining consistency and predictability within a court or tribunal, providing a framework for predictability in decision-making across a diverse range of local authorities, and assisting in framing the context within which ADR processes can operate, are valuable outcomes, provided that there is always room for argument about the circumstances of the particular case.

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<sup>40</sup> See, for example, Roseth SC's discussion of "compatibility" in *Project Ventures Pty Ltd v Pittwater Council* [2005] NSWLEC 191.

## LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

### Current planning principles

Principle	Specific aspect	Case
Adaptive re-use	Adaptive re-use and public interest	Michael Hesse v Parramatta City Council <a href="#">[2003] NSWLEC 313 revised - 24/11/2003</a>
Aesthetics	Weight to be given to expert opinion on architectural design	Architects Marshall v Lake Macquarie City Council <a href="#">[2005] NSWLEC 78</a>
Aesthetics	Acceptance or not of proposals of court appointed expert witness	PDP (Darlinghurst Apartments) Pty Limited v City of Sydney Council <a href="#">[2005] NSWLEC 41</a>
Brothels	Location of brothels	Martyn v Hornsby Shire Council <a href="#">[2004] NSWLEC 614</a>
Building envelope	Tensions between a prescribed floor space ratio and a prescribed building envelope	PDE Investments No 8 Pty Ltd v Manly Council <a href="#">[2004] NSWLEC 355</a>
Compliance	Responsibility for monitoring compliance with a condition	Dayho v Rockdale City Council <a href="#">[2004] NSWLEC 184</a>
DCPs and Council policies	Weight to be given to Development Control Plans and to policies which had been adopted by councils although not embodied in DCPs	Stockland Development Pty Ltd v Manly Council <a href="#">[2004] NSWLEC 472 revised - 01/10/2004</a>
Demolition	The extent of demolition - alterations and additions or a new building	Edgar Allan Planning Pty Limited v Wollahra Municipal Council <a href="#">[2006] NSWLEC 790</a>
ESD and the precautionary principle	Explication of the precautionary principle and framework for its implementation	Telstra Corporation Limited v Hornsby Shire Council <a href="#">[2006] NSWLEC 133</a>
ESD principles	What regard should a consent authority give to the principles of ecologically sustainable development	BGP Properties Pty Limited v Lake Macquarie City Council <a href="#">[2004] NSWLEC 399 revised - 05/05/2005</a>
FSR	FSR - Compatibility in a suburban context	Salanitro-Chafei v Ashfield Council <a href="#">[2005] NSWLEC 366</a>
General impact	Impact on neighbouring properties	Pafbun v North Sydney Council <a href="#">[2005] NSWLEC 444</a>
General impact	Reasonableness of and necessity for proposal	Super Studio v Waverley Council <a href="#">[2004] NSWLEC 91</a>
Height, bulk and scale	Assessment of height, bulk and scale	Veloshin v Randwick Council <a href="#">[2007] NSWLEC 428</a>
Heritage	Demolition of contributory item in conservation area	Helou v Strathfield Municipal Council <a href="#">[2006] NSWLEC 66</a>
Heritage	Impact of adjacent development	Anglican Church Property Trust v Sydney City Council <a href="#">[2003] NSWLEC 353</a>
Landscaping	Imposition of conditions relating to the preservation of landscaping or protection of existing vegetation.	Falcomata v Ku-ring-gai Council (No 2) <a href="#">[2005] NSWLEC 459</a>
Licensed premises	Extension of trading hours increase in	Vinson v Randwick Council <a href="#">[2005]</a>

	permitted patron numbers or additional attractions	<a href="#">NSWLEC 142</a>
Master plans	Proposal permissible but inconsistent with Master Plan	Aldi Foods Pty Limited v Holroyd City Council <a href="#">[2004] NSWLEC 253</a>
Noise	Attenuation measures	Stockland Developments v Wollongong Council and others <a href="#">[2004] NSWLEC 470</a>
non-statutory regional planning policies	Assessing the role of non-statutory regional planning policies vis-à-vis statutory local plans	Direct Factory Outlets Homebush v Strathfield Municipal Council <a href="#">[2006] NSWLEC 318</a>
Open Space	Location of communal open space	Seaside Property v Wyong Shire Council <a href="#">[2004] NSWLEC 600</a>
Plan of management	Adequacy or appropriateness of a plan of management to the particular use and situation	Renaldo Plus 3 Pty Limited v Hurstville City Council <a href="#">[2005] NSWLEC 315</a>
Privacy	General principles	Meriton v Sydney City Council <a href="#">[2004] NSWLEC 313</a>
Privacy	Use of landscaping to protect privacy	Super Studio v Waverley Council <a href="#">[2004] NSWLEC 91</a>
Redevelopment	Isolation of site by redevelopment of adjacent site(s) - general	Melissa Grech v Auburn Council <a href="#">[2004] NSWLEC 40</a>
Redevelopment	Isolation of site by redevelopment of adjacent site(s) - where intensification of development is anticipated	Cornerstone Property Group Pty Ltd v Warringah Council <a href="#">[2004] NSWLEC 189</a>
Redevelopment	Isolation of site by redevelopment of adjacent site(s) - role of Court in assessing consolidation negotiations	Karavellas v Sutherland Shire Council <a href="#">[2004] NSWLEC 251</a>
Redevelopment	<p>Existing use rights and merit assessment</p> <p>The principles to be considered when undertaking a merits assessment of a proposed redevelopment of a site with existing use rights were dealt with by Roseth SC in <b>Fodor Investments v Hornsby Shire Council</b> [2005] NSWLEC 71.</p> <p>In <b>Stromness Pty Ltd v Woollahra Municipal Council</b> [2006] NSWLEC 587 the planning principles in <b>Fodor</b> were considered and confirmed by Pain J at pars 83-89.</p> <p>Principle 2 was specifically supported in paragraph 87 and principles 1,3 and 4 were specifically supported in paragraph 89.</p> <p>Her Honour states, in para 89, that care must be exercised in the application of the principles to ensure that there is not a de facto application of standards in environmental planning instruments as that is prohibited by s 108(3) of the</p>	<p>Stromness Pty Ltd v Woollahra Municipal Council <a href="#">[2006] NSWLEC 587</a></p> <p>Fodor Investments v Hornsby Shire Council <a href="#">[2005] NSWLEC 71</a></p>

	Environmental Planning and Assessment Act.	
Seniors living	Seniors living in low density zone	GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council <a href="#">[2003] NSWLEC 268</a>
Setbacks	Building to the side boundary in residential areas	Galea v Marrickville Council <a href="#">[2005] NSWLEC 113</a>
Site dimensions	Small or narrow sites	CSA Architects v Randwick City Council <a href="#">[2004] NSWLEC 179</a>
Staged development	How much information should be provided at Stage 1	Anglican Church Property Trust v Sydney City Council <a href="#">[2003] NSWLEC 353</a>
Subdivision	When a residential subdivision application should impose constraints on future development	Parrott v Kiama Council <a href="#">[2004] NSWLEC 77 revised - 16/03/2004</a>
Subdivision	Solar access for allotments in residential subdivisions	Wallis & Moore Pty Limited v Sutherland Shire Council <a href="#">[2006] NSWLEC 713</a>
Sunlight 	Access to sunlight	The Benevolent Society v Waverley Council <a href="#">[2010] NSWLEC 1082</a>
Surrounding development	Compatibility of proposal with surrounding development	Project Venture Developments Pty Ltd v Pittwater Council <a href="#">[2005] NSWLEC 191</a>
Unusual contemporary design	Basis for assessment	Totem Queens Park Pty Ltd v Waverley Council <a href="#">[2004] NSWLEC 712</a>
Use	Impact of intensification	Randall Pty Ltd v Leichhardt Council <a href="#">[2004] NSWLEC 277</a>
Views	Views – general principles	Tenacity Consulting v Warringah Council <a href="#">[2004] NSWLEC 140</a>
Zones	Weight to be given to the zoning	BGP Properties Pty Limited v Lake Macquarie City Council <a href="#">[2004] NSWLEC 399 revised - 05/05/2005</a>
Zones	Development at zone interface	Seaside Property Developments Pty Ltd v Wyong Shire Council <a href="#">[2004] NSWLEC 117</a>