Reasonableness of Conditions of Consent to protect against Sea Level Rise

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In a recent decision of the Land & Environment Court, the reasonableness of two conditions of consent imposed in respect of a dwelling proposed on land subject to coastal hazards was considered. The case demonstrates the difficulties for local councils in attempting to deal with issues such as sea level rise and climate change on a case by case basis.

In *Newton and anor v Great Lakes Council* [2013] NSWLEC 1248, the Land & Environment Court considered a condition requiring a proposed dwelling to meet certain engineering standards to protect against coastal hazards in the future (**Engineering Condition**) and a condition limiting the operation of the consent to 20 years, subject to any further information being submitted to Council at that time to the effect that it was appropriate for the dwelling to continue to be occupied (**Time Limit Condition**).

The *Environmental Planning & Assessment Act 1979* (**EPA Act**) specifically authorises the grant of time limited consents (see s80A(1)(d)). In addition, the Department of Planning's publication '*NSW Coastal Planning Guideline: Adapting to Sea Level Rise'* includes time limited consents as an option for dealing with the impact of sea level rise.

It is also to be noted that the proceedings were an appeal against the conditions, and not a challenge to their validity. The Commissioner appeared to accept that both conditions were valid.

Not unsurprisingly, the Commissioner found that the Engineering Condition was reasonable, as the proposed dwelling did not incorporate any engineering to protect it against the coastal hazards which the evidence clearly indicated could affect the property in the future due to sea level rise.

However, the Court found that the Time Limit Condition was unreasonable. The basis for this finding was not any uncertainty about the potential impacts of coastal hazards on the property, but the fact that the proposed dwelling would have the same setbacks from the sea as all other dwellings along the street, and that no other dwellings were subject to a similar condition. The Commissioner also noted that there were no other vacant blocks, so there would be no further significant development in the street.

In one sense, the Commissioner's reasoning is sound. It would be unusual if in 20 years time the owners of the subject property were required to cease using their dwelling in circumstances where all other dwellings along the street continued to be occupied. If a concern is the danger to emergency services personnel in having to attend the street in the event of a severe coastal event, then clearly the condition would not address this, as all other residents of the street would still require the attendance of the emergency services.

Also, the Commissioner noted that due to the Engineering Condition, the proposed dwelling would fare better in coastal hazard events than other dwellings in the street which were not constructed to withstand the projected coastal hazards.

However, the case highlights the difficulty for councils attempting to deal with new information and new risks arising from sea level rise and climate change. It is possible that at the time the other dwellings in the street were granted consent, Council did not know of the risks from coastal hazards, or the projected impact of those risks in the future. Surely, once the Council becomes aware of the risks it must take action to mitigate the danger from the risks. A failure to do so could foreseeably lead to actions in negligence if damage did occur in the future.

The Commissioner did not seem to consider the potential for the other properties in the street to be redeveloped, and for similar conditions to be imposed on consents for those properties in the future. Perhaps, in practice this opportunity would not arise, as owners would be hesitant to redevelop if they knew of the risk of a Time Limit Condition being imposed.

A better approach for the Council would have been to amend its planning controls to restrict development for new housing along the street. Although this would have lead to an even worse result for the owners of the subject property (as they would not be able to develop their land at all), it would not be subject to review by the Court. However, it may be that the Council considered this approach and it was not pursued for some valid reason.

The Commissioner did consider the extent to which the owner of the subject property knew of the coastal hazards at the time of purchase of the property. It was noted that the risks may have been made known to the owner on a s149(5) certificate, but were not obvious from a s149(2) certificate. It is not clear whether knowledge of the risks would have affected the outcome in the case. However, as most purchasers only receive a s149(2) certificate, a legislative change to require more detail on such certificates in respect of coastal hazards would presumably be welcomed by councils, although presumably not property owners.

The case highlights the tensions inherent in planning for climate change between the protection of property from coastal hazards in the future, and the desire of all property owners to develop their land in the present. Councils need to consider all options for protecting persons and property from such risks and based on the decision in this case, it could be that there will be many more attempts to do so overturned by the Courts in the future.

About megan hawley
Partner. Megan is a highly respected specialist planning, environment and local government lawyer with over 20 years' specialist experience. During her career Megan has worked in 2 of Australia's top tier law firms, including 5 years as a partner. Megan frequently advises state government, local government and private sector clients in relation to issues pertaining to the Environmental Planning and Assessment Act 1979, the Local Government Act 1993, and the Environment Protection and Biodiversity Conservation Act 1999. Megan has particular expertise in acting for public authorities and private developers in negotiating and drafting commercial agreements, planning agreements and other agreements, particularly where the agreement involves contaminated land, pollution issues, or the provision of affordable housing. Megan is an Accredited Specialist in Local Government and Planning Law as regulated by the Law Society of NSW's Specialist Accreditation Board.
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