ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

LOCAL DEMOCRACY MATTERS INCORPORATED V INFRASTRUCTURE NSW; WAVERLEY COUNCIL V INFRASTRUCTURE NSW (NO 4) [2019] NSWLEC 140

Land and Environment Court, New South Wales, Pain J, 1 October 2019

The award of costs in unsuccessful action to prevent the demolition of a sports stadium.

Key words: Costs, New South Wales, Sydney Football Stadium, Public Interest

1. Local Democracy Matters Incorporated *(*LDM) was incorporated in early 2017 to represent residents' concerns over the proposed amalgamations of local councils and issues of democracy and participation more generally in the Woollahra, Waverley and Randwick local government areas in Sydney.

2. The demolition of the Sydney Football Stadium (the SFS) and construction of a new stadium affects residents of the Woollahra, Waverley and Randwick local government areas as the significantly larger stadium will be visible from all these local government areas. Residents of neighbouring local government areas will be impacted through the loss of open space and amenity. The decision was to demolish a stadium with 45,000 seats to make way for a new stadium of the same scale at a potential total cost of $674 million.

3. In *Local Democracy Matters Incorporated v Infrastructure NSW; Waverley Council v Infrastructure NSW* [2019] NSWLEC 20 (*LDM No 2*) the court dismissed the applicant incorporated association's (LDM) judicial review proceedings. Under challenge in those proceedings was the decision of the Minister for Planning to approve a concept plan and Stage 1 works for the demolition of the SFS at Moore Park Sydney.

There were three unsuccessful grounds of judicial review argued:

1. The exhibition period for the concept plan was 28 days but should have been 30 days according to the now repealed clause 83 of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation).

2. The Minister failed to consider design excellence as required by clause 6.21 of the Sydney Local Environmental Plan 2012 (SLEP).

3. The operation of the State Environmental Planning Policy No 55—Remediation of Land (SEPP 55) required consideration of contamination in a particular manner and this had not been complied with.

4. Infrastructure NSW (INSW), a government agency subject to ministerial control under section 7 of the *Infrastructure NSW Act 2011*, was the first respondent. Sydney Cricket and Sports Ground Trust (SCGT), a statutory corporation subject to ministerial control under section 5 of the *Sydney Cricket and Sports Ground Trust Act 1978*, was the second respondent. The Minister for Planning the third respondent. The fourth respondent (Lendlease Building Pty Ltd) filed a submitting appearance and made no submissions on costs.

5. LDM submitted that each party should pay their own costs relying on rule 4.2(1) of the Land and Environment Court Rules 2007 (LEC Rules). The three active respondents sought orders that LDM pay their costs. LDM contended that it was a not-for-profit organisation, founded with the purpose of civic advocacy, serving a wide public interest, seeking enforcement of public law obligations, and had no pecuniary interest in the outcome of the litigation. Others claimed that many of its members were from the Greens party and that the action was taken immediately before a state election for the political gain of the Greens Party.

6. The court noted that the usual non-binding rule in judicial review proceedings is that the successful party obtains a costs order in its favour in the absence of any disentitling conduct. The court found that:

> In *LDM No 1* (an interlocutory judgment) I found that LDM was acting in the public interest at [33] because LDM is a community group established to promote democracy in specified local government areas, it would gain no benefit directly if the proceedings were successful, and the grounds raised in the proceedings alleged important matters concerning the assessment of the SFS, including the adequacy of consideration of design excellence in the concept plan, and raised matters of considerable public importance given the location of the SFS.

7. The court accepted that the majority of the members of LDM were local residents and that two out of the three grounds of review did provide something more in elucidating the relevant statutory provisions and raised matters of importance in doing so. The Council was efficient in the manner in which it argued the cases and did not duplicate the efforts of LDM and was reasonable in its court conduct.

8. The court ordered that each party pay their own costs.

IMPLICATIONS

The usual costs rule in judicial review proceedings is that costs follow the event so that a losing party would generally pay the costs of a winning party in the absence of countervailing circumstances. There are exceptions and the public interest is one of them. Under the applicable statute, in this case, there were three relevant elements:

1. The litigation was characterised as having been brought in the public interest.

2. There was “something more” than the mere characterisation of the litigation as being brought in the public interest, such as the litigation raised one or more novel issues of general importance, affected a significant section of the public or an important environmental asset, and there was no financial gain for the applicant in bringing the proceedings.

3. There were no relevant countervailing circumstances to prevent departure from the usual costs order such as seeking to vindicate rights of a commercial character, benefit from the litigation or disentitling conduct of the applicant, such as impropriety or unreasonableness in the conduct of the litigation.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2019/140.html

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