

C O U R T O F A P P E A L

R E C O R D S H E E T

CORAM: HOPE JA; PRIESTLEY JA; MEAGHER JA

NO: CA 581 of 1986

APPEAL COUNCIL OF THE CITY OF SYDNEY v CLAUDE NEON LIMITED

APPEAL FROM: PERRIGNON J

KEY WORDS: PLANNING - DEVELOPMENT APPLICATION - APPROVAL BY COUNCIL AS OWNER TO MAKING OF APPLICATION - POWER OF LAND AND ENVIRONMENT COURT TO GIVE SUCH APPROVAL

COUNSEL  
Appellant: P.D. McCLELLAN QC (P.D. KERR)  
Respondent: D.F. JACKSON QC (D.P. WILSON)

SOLICITORS:  
Appellant: DAWSON WALDRON  
Respondent: CUTLER HUGHES & HARRIS

HEARING DATE 6 MARCH 1989

HEARING LENGTH THREE HOURS

JUDGMENT DATE: 14 APRIL 1989

EXTEMPORE / RESERVED: RESERVED

ALLOWED / DISMISSED: DISMISSED

IN THE SUPREME COURT )  
OF NEW SOUTH WALES )  
COURT OF APPEAL )

CA 581 of 1986  
LEC 10147 of 1985

CORAM: HOPE JA  
PRIESTLEY JA  
MEAGHER JA

Friday 14 April 1989

COUNCIL OF THE CITY OF SYDNEY v CLAUDE NEON LIMITED

Planning - application for planning approval - Environmental  
Planning and Assessment Act 1979 s 77(1) - necessity for  
development application made by owner of land or by any person  
with the consent in writing of the owner of land - application  
for planning approval for erection of advertising structure with  
light fittings projecting over public road - Local Government  
Act 1919 s 232 - fee simple of roads vested in local government  
councils - application for development approval refused by  
council - appeal to Land and Environment Court - point raised by  
council that no approval given by it as owner of public road to  
making of development application - Land and Environment Court  
Act s 39(2) - power of Land and Environment Court upon an appeal  
in respect of a development application to exercise functions  
and discretions of council in respect of the matter the subject  
of the appeal - nature of rights of councils in respect of  
public roads - possibility of a decision of council on one  
subject-matter implicitly involving also decision by council on  
related subject-matter - effect of approval by council to  
development projecting over public road when no prior consent  
given by it to application considered - power of Land and

Environment Court on appeal against council's refusal of development approval to exercise power of council to give consent to making of development application - HELD affirming decision of Land and Environment Court that (1) a local government council's approval of development application involving a structure projecting over a public road implicitly gave consent also to making of application; (2) upon an appeal to the Land and Environment Court against a refusal by the council of development approval that court was authorised by s 39(2) of the Land and Environment Court Act to give the council's approval as owner to the making of the development application.

ORDERS

Appeal dismissed with costs.

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JUDGMENT

HOPE JA: For many years an illuminated advertising sign has been erected on the top of a building at the corner of Oxford and Flinders Streets, Taylor Square. On 19 January 1979 Claude Neon Limited (the appellant) applied for planning approval for the erection of a new sign, incorporating part of the old sign, to carry a "Johnnie Walker" illuminated advertisement. This application was made with the written consent of the owner of the building. Initially the Council refused the application but, following a request for reconsideration, on 8 October 1979 gave approval for a period of not more than five years after the completion of the work the subject of the application. The new sign was then erected.

The Council having notified the appellant that the period of the consent would soon run out, the appellant on 20 September 1984 wrote to the Council asking that the term of the approval be extended for a further five years period. On 10 December 1984 the Council refused this application. On 25 January 1985 the appellant sent a formal application for development approval for the "continued display of advertising

structure the subject of development approval dated 10th Oct., 1979, and as described by design No. 3526R". The written consent to the application of the owner of the building was endorsed on it and the application was lodged on 12 February 1985. On 25 March 1985 the Council again rejected the application.

The appellant appealed to the Land and Environment Court against the refusal of development approval. On 29 July 1985 the solicitor for the Council notified the appellant's solicitors that the flood lights attached to the advertising structure projected into the air space above Oxford Street and that, since the Council was the owner of the air space which that part of the structure projected and had not given its consent, the appellant's application was a nullity because it failed to comply with s 77(1)(b) of the Environmental Planning and Assessment Act 1979.

The appeal came on for hearing before Assessor O'Neil. At the same time an appeal to the Land and Environment Court was heard against a notice served by the Council pursuant to cl 21(1) of Ordinance 55 requiring the removal of the sign and the related advertising structure on the ground that the sign and structure were not licensed under that Ordinance. In the course of his reasons Assessor O'Neil said that the sign was mounted about one metre behind the parapet of the building and was illuminated by floodlamps which extended from the parapet over the street below, and some internal lighting. This Court was told that public roads are commonly not the subject of any zoning or reservation under planning schemes so that development

consent is not needed for work which is carried out upon or over— them. However the subject land was the subject of a reservation for the purposes of a proposed county road. Although it appears that the proposal regarding the county road would no longer involve any part of the public road adjoining the subject premises the reservation has not been removed. Accordingly development approval was required for any development on or over the road.

Assessor O'Neil did not think that the consent of the Council as the owner of the road was necessary, but in any event thought that the provisions of s 39(2) of the Land and Environment Court Act would empower the Land and Environment Court to consider and to deal with the application for development approval. He went on to allow the appeal and to give consent for the continued display of the advertising sign for five years from the date of the court's order, unless extended by council, the date of the order being 3 February 1986. It might be noted that over three years of this period has already run. He also allowed the appeal against the notice which the Council had given under Ordinance 55.

The Council thereupon appealed to a judge of the Land and Environment Court against both decisions on the basis of two alleged errors of law:-

- (a) the conclusion that the development application was valid notwithstanding the absence of any written consent by the Council pursuant to s 77(1)(b) of the Environmental Planning and Assessment Act;
- (b) the conclusion that the Land and Environment Court was empowered by s 39(2) of the Land and Environment Court Act to consent to the making of

the development application so far as it related to the air space above the public road and to regard that consent as a consent on the part of the Council.

The appeals came on for hearing before Perrignon J who dismissed them on 18 November 1986. In the course of his reasons his Honour pointed out that the application concerned a sign constructed in accordance with drawing number 3526R, and that that drawing did not indicate the position of the floodlamps and in particular did not indicate that the lamps or supporting brackets were to project over the street. However, on the assumption that they did, his Honour concluded that the Assessor was correct in his opinion that the court could exercise the Council's power under s 77(1)(b) to consent to the application so far as it related to any projection over the street. His Honour also expressed the view that, if this were wrong, he would nonetheless have concluded that the decisions of the Council of 8 October 1979 and 25 March 1985 were restricted to the buildings on which the sign was erected and the air space over those buildings, and that the Council's consent under s 77(1)(b) in respect of any projections over the street was thus unnecessary. The Council has appealed to this Court claiming that Perrignon J erred in law in his conclusions insofar as they related to the validity of the development application and the power of the Court to exercise the Council's power to consent to the lodging of the application.

The vesting of the title to public roads in local government councils is effected by s 232 of the Local Government Act. Section 232(2) provides that the vesting in fee simple

under this section shall be deemed to be not merely as regards so much of the soil below and of the air above as may be necessary for the ordinary use of the road as a road, but so as to confer on the council subject to the provisions of the Act the same estate and rights in and with respect to the site of the road as a private person would have if he were entitled to the site as private land held in fee simple with full rights both as to the soil below and of the air above. The section is not to affect any existing right of any person under the provisions of any Act or to authorise the Council to grant, demise, dispose of or alienate the road or the soil or materials thereof.

A number of other powers in respect of roads are given to councils by or under the Local Government Act. I will refer to some only of them. Section 249 gives councils the care, control and management of every public road and in particular a council may in respect of any public road control and regulate structures abutting on the alignment of the road (s 249(d)), and control and regulate, prevent the erection or order the removal of structures of any kind extending from any land over the alignment of any road (s 249(e)). Section 510 empowers councils to regulate advertisements and structures used or to be used for the display of advertisements, which word includes any sign visible from any public place. A person aggrieved by any decision of a council in the exercise of its power to regulate advertisements and associated structures or under any ordinances relating thereto, may appeal against the council's decision to the Land and Environment Court. Ordinance 30, which relates to



roads and bridges, provides among other things that, except with the permission of the council, a lamp or lamp iron or means of lighting any such lamp or an attachment of any kind shall not be affixed to any building so as to project over the footway or carriageway of any road (cl 28). Ordinance 55 provides for the regulation of advertisements and structures used for the display of advertisements and provides for a system of licensing by councils. Where an advertisement is displayed or an advertising structure is erected contrary to the provisions of the Ordinance, the council may, by notice in writing, direct the advertiser, inter alia, to demolish or remove the advertisement or structure.

It is in the context of these and other provisions relating to roads that it is necessary to consider the position of a council in relation to a development application which involves a projection across a public road. Section 77(1) provides that a development application may be made only by -

- (a) the owner of the land to which the application relates; or
- (b) any person, with the consent in writing of the owner of the land, to which the application relates.

In Jebblon Pty Limited v North Sydney Municipal Council (1982) 48 LGRA 113 at 120 Cripps J said that:-

"....any person who is an 'owner' within the meaning of the Local Government Act, must either join in the making of the application pursuant to s. 77(1)(a) or if an application is made by another person, the consent in writing of any such 'owner' must be obtained: see s. 77(1)(b)."

In that case the owner of a strata title made an application for development approval in respect of a development which related

not only to its own property but to the common property vested in the body corporate under the Strata Titles Act. The body corporate had not given its consent to the lodging of the application, and it was in that context that his Honour expressed the opinion I have quoted. However his Honour treated the part of the application which involved the common property as severable and granted approval in respect of the development which was to be carried out on the property of the applicant.

In King v Great Lakes Shire Council (1985-86) 58 LGRA 366 an application was made to the Land and Environment Court for a declaration that a development consent for a caravan park was void. Cripps CJ held that the council had consented to the development application but that it was not the owner for the purposes of the Environmental Planning and Assessment Act; the Crown owned the land. Since the Crown had not consented, the approval granted by the council was void.

Subject to what I consider to be special considerations applying to cases such as the present, I would respectfully agree with the conclusions of Cripps CJ. It is however necessary to have regard to the statutory scheme in respect of consents to see whether this conclusion applies or needs some modification where the consent authority is the owner of the land, and that land is a public road. Probably on any construction of the relevant provisions, anomalies will be thrown up. However if the submissions for the Council in the present case are correct, a considerable anomaly arises. If an application is made to a council for a licence for an advertisement and an advertisement structure which projects over

a public road, a refusal by a council to grant the necessary licence can be the subject of an appeal to the Land and Environment Court. Assuming however that planning approval is necessary for the structure or, as in the present case, for the continuance of the structure, although a refusal of development approval can be the subject of an appeal to the Land and Environment Court, that court would have no power to give approval if the council, as owner of the road over which the structure projected, did not consent to the making of the development application, and indeed, the application itself might, on one view, be regarded as invalid because of the absence of a consent to it by the council. One has only to consider the proliferation of structures projecting from buildings over public roads to appreciate what an unfettered and unappellable power of control this construction of s 77(1) would give to councils when it would seem that it was the intention of the legislation, including the ordinances, to make the council's power subject to appeal. To adopt the language of Gibbs J in Australian Broadcasting Commission v Australasian Performing Right Association Limited (1973) 129 CLR 99 at 109, such a consequence would be capricious, unreasonable, inconvenient and unjust. Moreover it would seem to be inconsistent with the purpose or object underlying the statute, a result which both the general law and s 33 of the Interpretation Act 1987 require the Court to try to avoid.

Can the consequence be avoided? It is necessary first to consider the nature of the ownership of public roads which s 232 of the Local Government Act vests in local councils.

Although the section provides that the council has the same estate and rights in and with respect to the site of a public road as a private person would have if he were entitled to the site as private land held in fee simple, it does not follow in my opinion that the functions, powers, rights and duties of the council with respect to land comprised in a public road are the same as those of a private person with respect to land which he owns. The section itself limits the council's rights in respect of the land by the words "subject to the provisions of this Act", and they are no doubt subject also to the provisions of later Acts, and possibly of some other relevant Act. The functions, powers, rights and duties of the council are to be found in the Local Government Act and other relevant legislation. Section 232 defines the extent of the estate in fee simple which the local council acquires in public roads, but does not make local councils into private owners or give them the functions, powers, rights and duties which private owners have. Councils own the land which is the site of a public road for the purposes of its use as a public road. They cannot do with the road everything that a private owner could do with his own land. They can only do those things which are authorised by or under the relevant statutes. In particular functions and duties in respect of roads are given to or imposed on councils by or under the relevant statutes. Amongst these functions and duties is the function of controlling and regulating structures of any kind extending from any land over the alignment of a road, and of regulating advertisements and structures used for the display of advertisements, including those that extend over

the alignment of any road. If it is proper that such an advertisement and structure should be approved by the granting of a licence, it is the council's duty to grant that licence. If it fails to do so, the Land and Environment Court can, on appeal, make the decision for the council and grant the licence.

If then the owner of land applies to a council for its consent as owner of the road to the erection of an advertising structure projecting over the road, the council does not have a right arbitrarily to withhold its consent as the ordinary owner of private land might do. If the proposed development is one which ought to be approved, then the council ought to give its consent. Its failure to do so simply because it wished to frustrate the right of the adjoining owner to obtain approval to a projecting structure would be a use of its power for an improper purpose, that is, it would be a mala fide abuse of power. However it does not follow that the mala fide refusal of consent could be made the equivalent of a granting of consent, whatever remedies might be available to require the council to give its consent.

With this background it is necessary to consider how the provisions of s 77(1)(b) can operate in practice. An owner wishing to obtain development approval for a structure on his building which will project over a road can adopt a number of alternatives. He may ask the council for its consent before lodging the application. He may lodge the application and ask the council to consent to its lodgement and thereafter to consider it. Or he may simply lodge the application seeking the council's development consent. If the council gives consent in

either of the first two cases, no issue as to compliance with s 77(1)(b) arises. What is the position in the third case? The council, conscious of its position as owner, might consent to the lodging of the application and then give development approval. On the other hand it might simply give development approval, as it did in respect of the appellant's earlier application. As it seems to me, if the council adopts this course, its consent necessarily and implicitly imports consent to the lodging of the application. Whether as against the applicant or in proceedings taken by any other party, the council has in law consented to the lodging of the application. This conclusion is based upon the applicability of the principle that a council can impliedly exercise two powers when all it purports to do is to exercise one power.

Three decisions applying this principle were concerned with the effect of a council giving approval to the erection of a building which would extend beyond a previously fixed building line. In Mosman Municipal Council v Bosnich (1969) 17 LGRA 74 a resolution of a council approving such an application was held by implication to have effected the necessary modification or variation of the previously fixed building line, although in that case there were references to the building line in the building surveyor's report. In R.J.D. Investments Pty Ltd v Woollahra Municipal Council (1971) 24 LGRA 1 the council approved a development application but refused to give its consent to a subsequent building application and the applicant appealed to the Board of Appeal. At the hearing of the appeal the council relied, inter alia, upon a foreshore building line

and the extension of the building beyond that line. The Board approved the application. In proceedings in the Supreme Court in Equity the plaintiff sought a declaration that, by virtue of the development consent, the council had altered or abolished the foreshore building line to permit the erection of the building approved by the development consent. A declaration was made affirming that the development approval given by the council operated as a variation pro tanto of the building line even in the absence of evidence that the members of the council consciously intended to deal with the building line. These two decisions were referred to in the decision of this Court in Kogarah Municipal Council v Kent (1981) 46 LGRA 334 where a council refused to grant approval to the erection of a carport upon the ground that the variation of the fixed building line as proposed by the application would be out of keeping with nearby residences and detrimental to the amenity of the area. An appeal to the Land and Environment Court was upheld and an order was made varying or abolishing the building line insofar as the proposed structure infringed it. This Court held that the Land and Environment Court had power under s 39(2) of the Land and Environment Court Act to make that order.

A different result was reached in Strathfield Municipal Council v Drew [1985] 1 NSWLR 338. There the applicant sought development approval for the establishment of a crematory. The Public Health Act 1902 required the consent of the council for the establishment of such a place and the considerations relevant to the giving of consent under that Act were quite different to those relevant in the consideration of development

approval. It was held that the Environmental Planning and Assessment Act did not amend the Public Health Act and the view was expressed by Samuels and McHugh JJA that the Land and Environment Court had no power, pursuant to s 39(2), to give a consent under the Public Health Act, the matter the subject of the appeal to the court having nothing to do with the exercise of the council's powers under the Public Health Act.

In my opinion the principle (i.e. that an approval for one purpose may impliedly be an approval for another purpose) is to be applied where a council is asked to give consent to a structure which in part projects over a public road. If the council gives development approval to that structure, it is doing two things. It is consenting as owner of the road to the making of the application, and it is also approving the application. The first consent is necessarily implicit in the second consent, and in my opinion it does not matter that the council, when giving the second consent, is not conscious that it is implicitly giving the first consent also. There is no such difference between the nature of the act of the council in giving its consent as owner and the nature of the giving by it of development consent to enable it to be said that the actions have nothing to do with each other. If the council were in a position of an ordinary private owner of land in relation to the road, the actions would be completely different. However that is not the position, and if a council considers that it should give consent to a development application it must also consider that it should give consent to the making of the application.

I have thus far been dealing with the position where



the council gives development approval to the proposed structure. If it does not give that approval, either by refusing the application or by failing to deal with it, it cannot be said that it has given its consent to the making of the application. The question then arises whether the Land and Environment Court on appeal to it can give approval not only to the development application but to the lodgement of the development application. This depends upon the construction and application of s 39(2) of the Land and Environment Court Act which provides:-

"In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal."

If the power of the council to consent to the lodging of the application is a function or discretion which it has in respect of the matter the subject of the appeal, then the council would have the power not only to grant development approval but to exercise the power of the council to consent to the lodging of the application.

The application of s 39(2) was considered by this Court in North Sydney Municipal Council v .D. Mayoh Pty Limited (Court of Appeal; unreported; 23 September 1988). There the North Sydney Planning Scheme Ordinance provided that, where it appeared "to the responsible authority that the purpose for which the land is reserved cannot be carried into effect within a reasonable period the responsible authority" might approve development on the land. The question arose whether the Land

and Environment Court on an appeal to it could decide whether the purpose for which the land was reserved could not be carried into effect within a reasonable period, or whether that power to make that decision was one which could be exercised only by the responsible authority, the North Sydney Municipal Council. In his reasons McHugh JA, with whom the other members of the Court agreed, having pointed out that "functions" is defined in s 4 of the Land and Environment Court Act to include "powers authorities and duties", and having discussed the wide meaning to be given to the words "in respect of", concluded that the function of the council to decide whether the purpose for which the land was reserved could not be carried into effect within a reasonable period was at the heart of the matter which was the subject of the appeal to the Land and Environment Court, and that it was a function of the council which could be exercised by the Land and Environment Court pursuant to s 39(2), being a function which the council had in respect of the matter the subject of the appeal.

The giving of its consent to the making of an application for development approval is undoubtedly a function of the council, and it is a function the exercise of which is basic to its function to grant development approval in such a case. If the view which I have expressed is right, namely, that a council can give its consent to the lodging of an application by giving development approval, in my opinion s 39(2) places the Land and Environment Court, upon an appeal, in the same position as the council. Section 39(5) provides that a decision of a council upon an appeal shall, for the purposes of the Land and

Environment Court Act or any other Act or instrument, be deemed, where appropriate, to be the final decision of the body whose decision is the subject of the appeal and shall be given effect to accordingly. The decision of the Court is thus, where appropriate, deemed to be the decision of the Council, and in my opinion the subject case is an appropriate case. The Court thus having the same powers as the council had when dealing with the application before it, it is empowered to give a consent which will operate as a consent by the council in its capacity as owner of the road to the lodging of the application for development approval.

As is apparent from the nature of the submissions made on behalf of the Council, there are two critical points in its case. The first is that the Council has no jurisdiction to grant development approval in a case such as the present unless before it determines the application it has already given its consent to the application. The second is that the Court cannot exercise the power of the Council to consent to the lodgement of an application for development approval as owner of the public road. For the reasons I have given in my opinion Assessor O'Neil and Perrignon J were correct in rejecting these submissions, and the appeal should be dismissed with costs.

I certify that this and the  
preceding 15 pages are a  
true record of His Honour's  
Reasons for Judgment.

*M. Schmitt*  
Associate

14/4/89

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FRIDAY, 14 APRIL 1989

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JUDGMENT

PRIESTLEY JA:

I agree with Hope JA.

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I Certify that this is a true  
copy of the reasons for  
judgment handed of The  
Honourable Mr. Justice Priestley.

Date 14-4-89

*Howell*  
Associate

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
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JUDGMENT

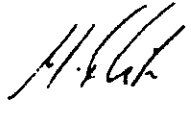
MEAGHER JA: I agree with Hope JA.

THE COUNCIL OF THE CITY  
OF SOUTH SYDNEY -v-  
CLAUDE NEON LIMITED

This and the preceeding  
20 pages is the exhibit  
marked "SJG 1" referred  
to in the affidavit of  
STEPHEN JOHN GARRETT sworn  
the 4th day of May 1989  
before me:

  
.....  
Solicitor

Certify that this is a true  
copy of the reasons for  
judgment herein of The  
Honourable Mr. Justice Meagher

Date 14.4.89 

Associate: