Blue Mountains Conservation Society Inc.

Planning and Development Resource Kit

Case Study: Parklands, Blackheath

This case study illustrates several issues relating to planning and development: Blue Mountains City Council's public participation processes in development approvals, the hazards of embarking on legal proceedings, and the "moveable feast" of legal protections of the environment through differing "interpretations" of LEPs. It also offers some salient lessons for residents' groups who are working to stop a large environmentally and socially damaging development in their township.

This case study has been prepared with the assistance of members of Blackheath Residents Against Improper Development (BRAID), and therefore reflects their experiences and issues of opposing the development rather than other parties involved.

The campaign against the Parklands development

The first Development Application (DA)

"Parklands" is the site of an old heritage golf course of about 11 hectares in Govett's Leap Rd, Blackheath, 1 km from the town centre. In the early 1990s, the owner received development approval from Blue Mountains City Council to build 12 holiday units housed in 3 separate buildings on the site plus a manager's residence.

In late 2004, developers interested in buying the property lodged a Development Application (DA) for an integrated development (community title subdivision) comprising 84 dwellings in 42 separate buildings. Immediate neighbours were notified in writing, as per Council's notification policy, but other than a small notice in the Council section of the *Blue Mountains Gazette*, no publicity, media release, public meeting or site inspections were offered to the community, despite the large size and intensive nature of the development.

At the time of the new DA, the sewer in Blackheath was at capacity, so the developers proposed to service 80% of the development using a pump-out sewer service from an on-site septic tank. Estimates of how many effluent road tanker movements would be required to service the development – up and down Govett's Leap Rd and right through the village – ranged up to 42 per week.

On November 2, 2004, Councillors deferred their decision, apparently to consider a document from the NSW Health website concerning on-site effluent disposal for multi-unit dwellings. Since this document did not form part of the DA, it was unclear why Councillors didn't reject the development in line with the advice of Council staff.

News of the proposed development soon got around Blackheath and concerned residents held their own public meeting on February 7, 2005. Over 150 people attended and voted 134 to 5 for Council to reject the DA and to consult more widely and transparently on any future DA for the site.

Residents also lodged objections, signed petitions (over 300 signatures) and lobbied their local Councillors. Council staff in their report to a Council meeting in February 2005 recommended rejection of the proposal on the following grounds:

1. The adverse impact of the effluent road tankers on the existing and future amenity and well-being of the Blackheath town centre.

2. Clause 10.8 (e) *Local Environmental Plan 1991* Residential Bushland Conservation zone prohibited development that cannot be serviced by a reticulated sewerage system or an on-site effluent disposal system satisfactory to Council.

The Councillors voted to support the recommendation and rejected the DA.

The second Development Application

In May 2005, new developers lodged a new Development Application for 78 duplex dwellings, this time proposing on-site effluent treatment with dispersal onto the ground. Being fraught with technical difficulties, the new proposed effluent disposal method was still unacceptable to the community and would likely see discharge of partially treated effluent into Pope's Glen Reserve and Creek, a tributary of the Grose River. This time, the Council extended the submission period and called a public meeting on June 15 as part of the assessment of the DA. They received 90 submissions from the community, all expressing concern about the impacts on the community and the environment.

Formation of Blackheath Residents Against Improper Development (BRAID)

When the second DA was lodged, Blackheath residents objecting to the development became Blackheath Residents Against Improper Development (BRAID), a subcommittee of RAID Inc, a then active lower mountains group. Becoming an incorporated body was advised, to create an entity capable of mounting a legal challenge and to protect individual members against personal legal action from developers. Incorporation also requires public

liability insurance, as well as transparency in formulating objectives, representing members and handling donations.

Although the group was known to the community as BRAID, the name BRAID/RAID Inc was used in public documents where the relationship needed to be shown.

Developers appeal BMCC's deemed refusal of the second Development Application

With the lengthy consultation process, Council ran out of time to assess the Parklands proposal, so the developer was able to take the matter to the Land & Environment Court as a "deemed refusal". In a clever piece of timing the developer acquired the court dates that had been set aside to appeal Council's refusal of the first DA. This appeal had been dropped but the same dates were secured by the developer's lawyers, giving Council and BRAID/RAID Inc little time to prepare their counter case.

On August 12, 2005, in a Court decision, BRAID/RAID Inc was allowed to join the proceedings as second respondent. Later that month, Council and BRAID argued in Court that the proposed on-site effluent treatment was not sustainable given the quantity of effluent likely to be generated, the sloping site, the natural springs under the ground, the low evaporation especially in winter, and the close proximity of an endangered Blue Mountains swamp and Pope's Glen Creek. They also argued that it would inevitably lead to contamination of the creek with dire consequences for creek life and public health.

However, on August 23, 2005, Justice Pain in the Land & Environment Court made two crucial judgements:

1. Clause 10.8(e) in LEP 1991's requirement that land zoned Residential Bushland Conservation to be connected to a reticulated sewerage system before subdivision can occur was a "development standard"– not a prohibition. "Development standards" can be *varied* through an evaluation process. This judgement would allow the possibility of on-site effluent treatment and dispersal on the Parklands site.

2. The on-site effluent treatment plant proposed for Parklands was not a "designated development" i.e. effluent treatment was not the purpose of the development but was ancillary to another purpose (a housing development) and therefore did not require an Environmental Impact Statement (EIS).

After Justice Pain's decisions, BRAID/RAID Inc took out a Holding Summons to keep the door open for an Appeal of her decision at a later date.

Council and BRAID/RAID Inc proceeded to a Merit Hearing to be heard by a Commissioner of the Land & Environment Court. This was set down for September 26-29, 2005, including a

one-day site visit, one day in Katoomba courthouse, then back to Sydney. BRAID briefed a solicitor and two barristers and engaged five experts (two from interstate) to give evidence on the following issues:

1. Protecting Pope's Glen from effluent dispersal.
   Because the proposed development was below a certain size, the Environmental Protection Authority no longer supervised it. So the protection of Pope's Glen Reserve and Creek, the endangered Blue Mountains Swamp on the boundary of Parklands, and the World Heritage Area beyond was left to Council and BRAID/RAID Inc – and subsequently the Court. Four of BRAID's five experts argued a highly technical battle against the developer's team of experts and their proposed on-site effluent treatment plant.

2. The heritage issue.
   In 1903 John Pope laid out the nine-hole private golf course at Parklands (*The Mountaineer*, 5 June 1903). This information was not available when the Council created LEP 1991 Amendment 5 and Development Control Plan 15 – both plans specifically covering the Parklands property. BRAID's expert argued that covering the heritage golf course with houses was contrary to the Council's planning instruments, designed to protect the heritage and landscape features of the site. On the other side, the developer had three experts who asserted that the 78 dwellings and landscaping would conserve and embellish the heritage features.

Court proceedings a challenge for community groups

Legal action is a bewildering process with many rules and regulations, which trip up the inexperienced. For example, BRAID and Council as the two respondents were required to submit their respective "Statements of Issues" several weeks before the case. But the Commissioner permitted the developer's experts to keep redesigning the proposed effluent treatment plant "on the run" to satisfy one concern after another expressed by the opposing experts, and BRAID and Council were not permitted to challenge the new issues emerging from these changes because they were not in the Statement of Issues. This kind of bias has led to the nickname "Developer's Court".

Merit Hearing stretches to ten days

As the effluent treatment plant kept being redesigned in court, the hearing stretched out to ten days, over three weeks (more than double the time originally allocated by the Court) thereby putting extreme pressure on the resources of Council and BRAID/RAID Inc. BRAID's funding was based on four days in court, not ten. This created a cost blow-out. Members of

the BRAID committee who needed to be on call as the case unfolded – for briefings and to research and write documents – had put their lives on hold and were staying in Sydney at their own expense. BRAID's barristers who were working at greatly reduced rates had other matters queuing up. BRAID's experts often sat for days waiting to be called to give evidence. Several Council officers who were on annual leave used up some of their holidays sitting in the courtroom. There were so many documents that they exceeded the Commissioner's normal filing system and he had to ask for assistance in numbering them.

Council signs agreement with developer without consulting BRAID

One evening after the Court had dismissed BRAID's experts, the developer and Council met purportedly to discuss "Consent Conditions". (The Court requires Consent Conditions to be agreed upon in case the DA is approved.) Meanwhile BRAID members had been sent to Blackheath for an emergency meeting to discuss the latest changes to the effluent treatment plant. In BRAID's absence, Council's representatives signed a hand-written agreement, stating that the latest changes to the proposed effluent treatment plant resolved all Council's issues with the on-site system.

Development Application approved

In February 2006, the Parklands development was approved by the Land & Environment Court, with an on-site effluent treatment and dispersal system.

BRAID's Appeal in the Supreme Court

On February 27, 2006, after securing pledges from several sources to fund it, BRAID/RAID Inc filed a Notice of Appeal in the Supreme Court. (The filing fee alone was over $2,000.) They would appeal both Justice Pain's judgements, on the basis of which the Parklands development had been approved:

1. That Clause 10.8(e) in LEP 1991 was a "development standard" capable of being varied – e.g. with on-site effluent treatment – rather than a prohibition on development.

2. That the on-site effluent treatment plant was not a "designated development" and required no EIS.

In March 2006, after much lobbying from BRAID, Blue Mountains City Council voted to join BRAID/RAID Inc's Supreme Court appeal in the matter of Clause 10.8(e). The intention of

this Clause was to *prohibit* subdivision in the Residential Bushland Conservation zone, until they were connected to a "reticulated sewerage system" (the Sydney Water sewer). In appealing Justice Pain's decision, Council was seeking to uphold the intent of its own LEP.

Pressure to stop BRAID's Appeal

During March and April 2006 several attempts were made by the developers to prevent BRAID's Court of Appeal action. They tried to wind up RAID Inc as an entity under the Corporations Act. That was unsuccessful thanks to help from another barrister and costs were awarded against the developer. Then they tried to have the appeal dismissed due to BRAID/RAID Inc's financial position. BRAID's legal team were also successful in fighting this action but the pressure was designed to take its toll financially and emotionally on the community group, already exhausted by months of fundraising and court action. An article without a by-line even appeared in the *Blue Mountains Gazette* attempting to undermine Council's decision to join the Appeal in the name of "wasting public money".

BRAID wins in Court

In November 2006, Council and BRAID lost their appeal of Clause 10.8 (e), but BRAID won the second part of their appeal on the issue of "designated development". The Court of Appeal determined that a 2000 amendment to the *Environmental Planning and Assessment Act* (EP&A Act) meant that on-site effluent treatments plants are "designated development" requiring an Environmental Impact Statement (EIS).

On development issues, the Court of Appeal's job is to clarify the law for the Land & Environment Court. In response to the action by BRAID/RAID Inc the Court of Appeal upheld the definition of "designated development" in the government's own regulation, stating in effect that an effluent treatment plant is an effluent treatment plant and therefore subject to an EIS. Until this judgement, the regulation had been overlooked by the Land & Environment Court, where effluent treatment plants ancillary to another purpose were being approved without an EIS.

This judgement also quashed the approval given by the Land & Environment Court to Parklands because the development was assessed without an EIS. This was a landmark decision. Not only was it a win for Blackheath after two years of community action, but a win for the wider community of NSW. On-site effluent treatment plants across the state would no longer be able to avoid an EIS by being ancillary to another purpose, such as a resort.

The Minister responds by changing the Regulation

On March 1, 2007, in response to the Court of Appeal's determination, Planning Minister Sartor reversed the EP&A Act amendment made in 2000, which included effluent treatment plants under the definition of "designated development". With a stroke of the pen, Minster Sartor effectively overturned the Court's decision. The new amendment stated clearly that effluent treatment plants that are "ancillary" to another purpose, such as a resort, are not "designated development".

This paved the way for approval of the Parklands development, which the Council now had no choice but to do. But the change in regulation also meant that effluent treatment plants across NSW can be approved without an assessment of off-site impacts.

The fight against the Parklands development was over and all legal avenues had been exhausted. But as of December 2012 the development had still not begun.

Latest developments 2013

Soon after December 17, 2012 – the date when the five-year approval would expire – Council received notification from an independent certifier that "significant commencement" of the Parklands development had occurred to secure the DA. A large number of residents requested that Council investigate this assertion, since not a single footing of the 78 dwellings had been dug. But due to a crucial "minor" change to the DA granted by Council in mid 2012 without public notification, Council determined that "significant commencement" had indeed occurred, thus saving the development approval. As of June 2013 the developers had on-sold the property to new owners with the DA for 78 dwellings secured, but no building had commenced. Some prospective buyers had commented privately that the figures for purchasing the property and building the approved development "did not stack up", so it's possible the new owners may seek to vary the DA.

Lessons for community activists from this Case Study

Incorporation

Any community group considering taking legal action needs to become incorporated. BRAID became a subcommittee of RAID Inc in order to become an incorporated entity capable of taking legal action on the community's behalf. Incorporation also protects individual members against personal legal action from developers. In this case, two BRAID members received a demand to disclose their personal financial details in an attempt to intimidate, but they were protected by incorporation.

Developers can use a wide variety of tactics to win the day

In the Parklands case the developers used a wide variety of tactics to further their case such as pushing for a quick resolution (taking advantage of the opportunity to have the hearing scheduled very quickly), using various legal avenues to thwart the work of BRAID (trying to wind up RAID Inc as an entity under the Corporations Act, and seeking to have the appeal dismissed due to BRAID/RAID Inc's financial position), and using local media. BRAID also suspected not all people who sought to join BRAID were genuine. It has been well documented that some developers put spies into community action groups in an attempt to undermine the group or gain inside information on the group's tactics and finances.

The lesson to be drawn from BRAID's experience is that any residents' action group opposing a large "high stakes" development should assume that developers will use whatever means are available to ensure their development is given the green light

Legal action

BRAID's experience provides many lessons about going down the path of legal action that similar groups facing such a decision should seriously consider. In July 2005, when the developers took the second DA to Court, BRAID sought support from the Environmental Defender's Office (EDO). But due to their full case load with bigger developments such as mining and roads, and the timing trick which meant the Merit Hearing for Parklands would take place in less than two months, the EDO was unable to help. BRAID had already received legal advice through private contacts and these environmental lawyers were free agents keen to test the state legislation about Environmental Impact Studies in relation to non-reticulated sewerage systems. Even if the EDO had been available they may not have been as daring with the bigger legal issue. But without the EDO, the BRAID group was entirely responsible for briefing legal representatives, running the legal case, recruiting (and paying) expert witnesses and consultants and, most importantly, raising funds. Although BRAID's solicitors and barristers did their work at reduced rates, the legal costs were enormous.

In 2005 and 2006, BRAID raised over $13,000 by running trivia and movie nights and shaking a bucket in the village. Even applying for legal aid, which they received as part-funding in the Court of Appeal, required hours in the preparation of submissions. As well, the group couldn't rely on their virtually pro-bono lawyers always being available at crucial times. The amount of work involved was all-consuming over several years, and wasn't for the faint-hearted.

For the inexperienced, court action is bewildering and intimidating, especially the cross-examination process. Experts, whose role is to assist the Court, can be cross-examined by the opposing barrister as if they are criminals, shredding their experience and integrity and

questioning their impartiality. Members of community groups are given the same treatment, the subtext of the constant abuse (which goes unchecked by the Commissioner) being that developers have all the rights and community members have none.

The experience left many of the group burnt out and cynical about the legal and political systems. In such contentious legal proceedings as these were, developers often rely on opposition slipping away, simply from exhaustion of resources and energy. Or they take unanticipated actions, devised to either demoralise or stop the community momentum.

The case study suggests that, without the support of the EDO, groups should think very carefully about going down the legal path, or at least not embark on it naively, and learn from the experience of others like BRAID/RAID Inc.

Stalling the development process

In the end, as in the case of the notorious proposed flora and fauna park ("crocodile park") on Bodington Hill, Wentworth Falls, in the late 1980s, stalling the process of approval through legitimate legal challenges can often lead to the desired outcome: the development doesn't proceed. Developers often rely on moving in quickly, getting approval fast and without much opposition, developing fast or on-selling the approval, making a profit and moving on to do it all again somewhere else. Stalling is an entirely justified tactic in David and Goliath struggles between residents and developers and may win out even when legal wins are overridden by Ministerial intervention.

In the Parklands case, the development was finally approved by Council in December 2007 (three years after the first DA), too late to be included in Sydney Water's calculations for the 2008-2009 sewer upgrade in Blackheath. The development couldn't proceed without building the "gold-plated" and impossibly complex effluent treatment plant the court process had forced them to design, until a sewer allocation was granted for the 78 dwellings. Then in 2008, the Global Financial Crisis hit and sourcing finance for such developments became almost impossible. Overnight, banks required speculative developments to have sold 60% or more "off the plan" before making funds available, so again Parklands couldn't proceed at that stage despite all the glossy brochures encouraging people to pre-buy.

The case study demonstrates that unpredictable changes in circumstances caused by larger forces (e.g. the state of the global economy) can intervene to create unanticipated outcomes for development proposals at the local level.

