LEGAL ISSUES OPEN FORUM – SOCIAL IMPACTS AND SECTION 79C: SEX, DRUGS AND ROCK & ROLL

ALAN BRADBURY
**Introduction**

The Courts have traditionally been cautious in the consideration of social impacts in the determination of development applications. The material impacts of development on things like traffic, parking, solar access, noise, smells and so on are readily weighed up by consent authorities and the Court in the evaluation of development proposals. However, despite there having been specific references to “social effects” or “social impacts” in the *Environmental Planning and Assessment Act 1979* since its enactment nearly 40 years ago, a certain amount of mystery still surrounds the particular social issues that are treated as being relevant to the consideration of a development application.

Upon its enactment, the EP&A Act in section 90(1)(d) required a consent authority to take into account the social effect and the economic effect of the development in the locality. When the Act was substantially amended in 1997, section 90(1)(d) was replaced by section 79C(1)(b) which requires a consent authority to take into consideration “the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality”. It is also worth noting that some environmental planning instruments also require consideration of specific social impacts in relation to the development of some land. For example, the *Lake Macquarie Local Environmental Plan 2014* expressly provides that development consent must not be granted for the purpose of a bottle shop unless the consent authority has considered information on the community social profile, the social impact of the proposal and any proposed mitigation measures and is satisfied that the development will not have a significant adverse impact on the surrounding area¹. Similarly, the *Yarrowlumla Local Environmental Plan 2002* requires a consent authority, in the assessment of a development application for land within the floodplain, to consider “the social impact of flooding on occupants, including the ability of emergency and support services to access, rescue and support residents of flood prone areas”².

In this presentation I am going to discuss some of the ways in which the Court has taken into account different kinds of social impact as a relevant matter in the consideration of a development application. This is not an exhaustive discussion and I have selected themes that seem to me to be either interesting or novel. The cases fall into these categories:

- **Sex** – brothels and adult book shops
- **Alcohol** – bottle shops and hotels
- **Mining**
- **Group homes/boarding houses**

Before looking at the case, something needs to be said about the evidence necessary to demonstrate that a development will or is likely to have an adverse social impact.

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¹ Clause 7.11(2)(a)
² Clause 40(1)(d)
Evidence of social impacts

It has been said that the effect of a development on the social behaviour of residents or the behaviour of others coming to the area is often a matter raised in the assessment of a development application even though the possible effect is based upon speculation. However, the Court has been determined to ensure that decisions involving social impacts are based on actual evidence.

This issue has been at the forefront of several appeals involving development applications for the erection of Muslim places of worship. A good example is the decision in New Century Developments P/L v Baulkham Hills Council [2003] NSWLEC 154. That case concerned an application for a Muslim house of prayer (a Mehfil) in Annangrove. The application was the subject of strong opposition from local residents, primarily because it was said that it would have no connection to the local community as it would be used by people from outside the area and would provide no service to their community. They were concerned that large numbers of people would come, use the facility and go, without any contact with their community. They also argued that the proposed development was antipathetic to the shared beliefs, customs and values of the local community and had already resulted in acts of vandalism involving the spray painting of graffiti on the roadway. They recognised that people associated with the development were not directly responsible for this but said that such acts had not occurred before in their community, were abhorrent to their community and caused them to fear for their safety. They were concerned that, if the proposal were approved, “these acts of antisocial behaviour would continue to occur in their community and thereby have an adverse social impact.”

While the Court recognised that there was strong community opposition to the proposed development and that residents had real fears, it pointed out that these fears must have foundation and a rational basis which was absent in this case. The Court held that a consent authority must not blindly accept the subjective fears and concerns expressed in public submissions and said that, whilst such views must be taken into consideration, there must be evidence that can be objectively assessed before a finding can be made of an adverse effect. Whilst the court is entitled to have regard to the views of residents, those views will be accorded little, if any, weight if there is no objective, specific, concrete, observable likely consequence of the establishment of the proposed use. A fear or concern without rational or justified foundation is not a matter which, by itself, can be considered as an amenity or social impact pursuant to s 79C(1) of the EP&A Act.

It follows that in forming an opinion on the probable impact of a proposed development on the amenity of an area, tangible or otherwise, a court would prefer views from residents which are based upon specific, concrete, likely effects of the proposed development. The specific objections raised by the local residents in the New Century case were found by the Court to have no foundation and when objectively assessed, could be afforded little weight.

A more recent example is to be found in the decision of the Court in Mac Services Group v Mid-Western Regional Council [2014] NSWLEC 1072, a case about a 400 room worker’s accommodation facility at Gulgong intended to service the needs of fly in/fly out or drive in/drive out (FIFO/DIDO) mine workers. There was significant local objection to the proposal with over 300 objections (and only four submissions in support). These submissions raised concerns such as:

- a concentration of a large segment of non-resident mine workforce in one place close to an established residential area.
- a significant gender imbalance with associated adverse social impact.
- significant income inequality with associated adverse social impacts.

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3 Leslie Stein, Principles of Planning Law, p.173
4 At [36]
The Commissioner left little doubt about the weight she thought the public objections should be given saying, for example:

“There is no evidence to support Dr Ziller’s concerns or those expressed by the objectors that cashed up FIFO/DIDO males will be roaming the streets and bars of Gulgong harassing women. This fear has not been realized in the Narrabri Mac, which is the closest we have to a likely understanding of the Mac experience. The evidence from the police is that there has been no incident concerning the Mac residents in Narrabri.”

The need for hard evidence of likely social impacts needs to be kept in mind as I discuss some of the different ways in which social impacts have been considered by the Court.

Sex and Morality – Brothels and Adult Book Shops

The first chief judge of the Land and Environment Court, Justice Jim McClelland, once famously declared that the Court was not a “Court of morals” and must make its decisions based solely on planning and environmental considerations. His Honour was quick to add, however, that this did not mean that matters of taste or morals must always be irrelevant to planning considerations.

His Honour made these comments in the course of considering a development application for what had been described in the application as a “health and beauty salon” in the heart of the Parramatta business centre. The Council had refused the application, principally on the basis that the application was a “sham” and that the premises had for some considerable time been used as a brothel and was likely to continue to be so used (at the time this was in breach of the Prostitution Act 1979). In refusing development consent, his Honour said:

In my view, it would be naive in the extreme for the Council or the Court to conclude that the present application is in reality for a health and beauty salon and it would be a disservice to that reputable trade to launch it into the process of becoming yet another synonym for brothel.

There are those who believe that brothels should be legalized in order to satisfy under controlled conditions a demand which no law has ever managed to suppress. But it is not the role of councils or courts to usurp the functions of the legislature. In this case the reality is that the Court is being asked to consent to the conduct of a brothel. In construing what is a permissible use... a council or the court is entitled, indeed obliged, to have regard to what is permissible under the laws of the State. In this case, the Council or the Court is entitled, in the exercise of their discretion in the determination of a development application to look behind the words of such an application to the real use which is intended by the applicant.

Of course, brothels are now legal in NSW and therefore a legitimate use within the planning regime. As such, pedestrians passing by the front of a well-kept brothel, or the mere knowledge that a brothel exists in a particular location ought not be a sufficient basis for concluding that the use has or is likely to have a significant adverse impact and should be refused. However, development applications for brothels remain a controversial area in most local government areas and the moral dimension which lies behind this land-use, while outwardly denied, is usually not too far below the surface. This has led the Court to promulgate a planning principle on the location of brothels which begins by recognising that brothels are a legal land use that benefits some

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Dennis v Parramatta City Council (1981) 43 LGRA 71 (at 74)
sections of the community but offends others. The planning principle continues, “Most people believe that the exposure of impressionable groups like children and adolescents to the existence of brothels is undesirable. The aim should therefore be to locate brothels where they are least likely to offend.” In the case that gave rise to the establishment of the planning principle, the then Senior Commissioner refused development consent for a brothel that was to be located near a Skin Care College which conducted most of its classes between 6 and 9pm. The Court found that this closeness made it likely that the students of the college would encounter the brothel’s clients on their way to and from their classes:

I do not want to judge whether this in its own would have a corrupting effect on them. However, it is likely, that some of the parents would not like the proximity of the brothel and would look for other colleges for their daughters. The economic effect on the College could be serious. Instead of 30 students, they may find only 20 or fewer for their classes.  

The Planning Principle adopted by the Court expressly provides that brothels should not adjoin, or be clearly visible from schools, educational institutions for young people or places where children and adolescents regularly gather. It does go on to say that this does not mean, however, that “brothels should be excluded from every street on which children may walk”.

In practice, the Court has taken a fairly pragmatic approach to this. For example, in Marinos v Ashfield Council [2015] NSWLEC 2, the Council had contended that a development application for an adult book shop should be refused due to its proximity to schools and churches. It was acknowledged that schoolchildren regularly walked past the site of the proposed business. The Court held that the application could be approved subject to a condition requiring the preparation of a plan of management to restrict the visibility of the premises from the street.

Similarly, in Zhang v Ashfield Council [2004] NSWLEC 259 the Court heard an appeal from the refusal of a development application for a brothel to be located on the first floor of a commercial building in the Ashfield shopping/commercial centre. The location was near several schools and a church and the Council argued that the location was inappropriate and would have an adverse social impact on the community, largely because the brothel would attract people of an inappropriate kind. This would be inconsistent with the number of school-aged children who would pass by the premises on their way to and from school.

In approving the application, the Court accepted, as a matter of principle, that brothel patrons were ordinary members of the community and that it would not be possible to distinguish between brothel patrons and anyone else using the local area. The Court also observed that it was difficult to see why there should be any interaction between passers-by and brothel patrons especially given the desire of most patrons for discretion as they enter or leave. The Court found that there was no evidence that school-aged children would be at any increased risk as a consequence of the existence of the brothel and granted consent subject to conditions.

Alcohol – bottle shops and hotels

The social impacts considered by the Court in relation to bottle shops and hotels fall into two categories. One is the amenity impacts caused by patrons through noise and anti-social behaviour. The other is the social impact of facilitating the access to alcohol to people in socially disadvantaged communities.

An illustration of the first category is the decision of the Court in Solotel Pty Ltd v Woollahra Council [2011] NSWLEC 1210. That case concerned an application for alterations to the Paddington Inn designed to enable the expansion of the then current ground floor hotel into the first and second floors of the building with a

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6 Martyn v Hornsby Shire Council [2004] NSWLEC 614 (at [18])
7 Ibid, at [20]
8 Ibid, at [18]
consequential increase in the number of patrons from 350 to 732. The Council was happy with the physical building works proposed but contended that the increased number of patrons would have adverse social impacts on the amenity of residents in the vicinity of the hotel. These were said to involve unacceptable antisocial behaviour by patrons involving rowdy behaviour leading to sleep disturbance, smashing of bottles and drinking glasses in the gutters and in the front forecourt areas of nearby terrace houses and antisocial acts such as vomiting and urinating in the street and on nearby residences.

There was evidence that the antisocial behaviour could be attributed to other licensed premises in the area as well as the Paddington Inn and that there was an element of inevitability to the behaviour given the location of the residential area in close proximity to the Oxford Street entertainment area and other licensed premises nearby. However, the Court pointed out that accepting such behaviour as inevitable did not render it acceptable.

The Court received evidence from local residents that rowdy behaviour occurred on a regular basis and, while it accepted that the behaviour was associated with persons attending a variety of different establishments in the area, it was satisfied that some of the behaviour could be linked to the current operation of the Paddington Inn. The Court concluded that the unacceptable antisocial behaviour was of sufficient regularity and intensity that any increase, other than a mere trifling increase that would be unobservable by the local residents, should not be permitted. As the Court could not conclude that the antisocial behaviour associated with the patrons of the hotel would not increase if the capacity of the hotel was doubled, it was not appropriate to approve any increase in the number of persons allowed on the premises and the application was refused.

An example of the second category is Motto Farm Pty Ltd v Port Stephens Council [2011] NSWLEC 1293. This appeal concerned an application to change the use of part of an existing restaurant associated with an existing motel in Heatherbrae to that of a hotel. There was no other hotel in the locality and the Council opposed the approval of the application largely on the ground that it would be likely to result in adverse social impacts. The Council relied on evidence from a social researcher which indicated that approximately 50% of residents in the local area were caravan park residents and that Heatherbrae was one of the most disadvantaged areas in the State with a high proportion of low income earners, a large number of unemployed and a high proportion of lone person households. These characteristics meant that a large number of local residents were vulnerable to gaming machines and gaming related harm and also to alcohol related crime.

The Court referred to provisions of the Gaming Machines Act 2001 which effectively excluded problem gambling from the considerations relevant to the assessment of a development application. This led the Court to conclude that the assessment of the social impacts of the proposal must exclude the impacts of gambling machines. The Court then went on to discuss the academic literature on the relationship between alcohol outlets and alcohol-related crime, finding that there was significant merit in the submission by the Police that the establishment of a hotel in Heatherbrae had the potential to initiate alcohol related crime in an area where it currently does not exist because of the absence of any hotels. The Court held that, given the established relationship between alcohol outlets and alcohol-related crime in the academic literature, it was satisfied that the establishment of a hotel in an area that currently does not have any hotels and consequently suffers little or no alcohol related crime was a valid reason to refuse the development application.

There have been a number of other appeals in which the social effects of alcohol related harm have been considered by the Court in the assessment of development applications for liquor outlets. These have more often resulted in approval subject to conditions than to outright refusal (as in Motto Farms). For example in Martin Morris and Jones P/L v Shoalhaven City Council [2012] NSWLEC 1280, in examining the likely impacts of a proposed Dan Murphy’s retail liquor outlet in Nowra, the Court heard detailed evidence concerning the likely social impacts of approving the application. The Court’s focus was centred on alcohol related harm

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9 S209(3)(b); see also Waugh Hotel Management v Marrickville Council (2007) 156 LGERA 414 (at [91])
10 At [71]
experienced either directly as a result of the risky consumption of alcohol, or indirectly by those who are exposed to persons who engage in the risky consumption of alcohol. The Council’s evidence was that the proposed development would be located in an area identified as significantly disadvantaged both socially and economically, the proposed development would increase the availability of alcohol by increasing the number of outlets in close proximity and decreasing price; the level of alcohol-related harm in the adjoining community was already high and international academic literature consistently reported a direct relationship between the density of liquor outlets and alcohol-related harm and between price and alcohol-related assaults.

The Court was satisfied on the evidence that an increase in the number of liquor outlets was likely to result in an increase in the consumption of alcohol at risky levels and an increase in alcohol-related harm in the locality. The Court also accepted that price may also be a factor and that there was a real chance of an adverse social impact. It then went on to consider whether that real chance warranted refusal of the application or whether appropriate conditions could be imposed to mitigate the adverse social impacts. The Court held that the application could be approved subject to conditions which required (amongst other things):

- Closure of a BWS liquor store already in existence on part of the site (BWS and Dan Murphy’s are both owned by Woolworths);
- Restricting the sale of 4 litre wine casks
- Implementation of management procedures including policies, staff training and supervision directed to ensuring liquor is not purchased by or for minors, refusal of service to the drunk and disorderly; keeping an incident register and upgraded CCTV coverage.
- Implementation of strategies including assisting community education programs and a financial contribution to community services assisting disadvantaged residents in the local community.

**Mining**

A novel argument utilising the social impact head of consideration was raised in a recent decision of the Court concerning a proposed expansion of the Warkworth open cut coal mine near the village of Bulga in the Hunter Valley: Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Workworth Mining Limited [2013] NSWLEC 48. It was contended by the Association in that case that approval of the project would have a significant social impact on Bulga village as a community. The principal issues raised by the Association were whether the Project would exacerbate existing experiences of solastalgia and whether there is a risk that Bulga village as a community will be destroyed.

Solastalgia or “loss of place” is a condition caused by the gradual erosion of the sense of belonging to a particular place and a feeling of distress about its transformation. The Association contended that the project would ultimately result in the destruction of Bulga village for a number of reasons including the likely decline in population in consequence of the noise, light and dust impacts of the proposed development and the change in the make-up of the local community as long term residents who originally came to the area to enjoy a quiet rural lifestyle move out and are replaced by mineworkers who, because they generally work 12 hour shifts, are often unable or unwilling to take on some of the voluntary tasks that create the social fabric of a community.

The Court considered evidence about the social impacts of noise and dust, referring to evidence from residents that noise from existing mining operations was causing sleep disturbance and friction within relationships and that noise and dust from the mine led to some residents having to keep their windows shut and to rely on air-conditioning for cooling. One resident was quoted as saying that “if you are told you have to stay inside for your health and can’t dry your clothes on the clothesline there is not much sense in living in the bush”.

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[2013] NSWLEC 48 at [433]
The social effects of the visual impacts associated with the mine were also taken into consideration. These included the impact of lights from the mine at night either shining directly into residential properties or simply lighting the sky with a resultant loss of visibility of stars at night as well as the visual impact of the overburden heaps which residents complained were a constant reminder of the existence of the mines.

The Court also considered the positive social impacts associated with the creation of employment at the mine but concluded that while there would be some positive impacts there would be significant negative social impacts arising from continuation of adverse impacts of noise and dust, visual impacts and adverse impacts arising from a change in the composition of the Bulga community. Ultimately, the Court found that the project would have significant and unacceptable impacts on a range of things including biological diversity, noise and social impacts and that in balancing all relevant matters, the preferable decision was to refuse development consent for the project.

**Boarding houses and affordable housing**

In *Baker v Gosford City Council (No.2)* [2004] NSWLEC 467 the Court refused development consent for the redevelopment of a mobile home park as a 2 storey unit development solely because of the likely social impact on the existing residents of the mobile home park. The development application was accompanied by a housing management plan to address the needs of the existing residents. This plan enabled residents to either sell their mobile home to the park owner and then move into one of the new units, relocate to another agreed location within the park or elsewhere (with payment of compensation). Most residents opposed the development but there were some who supported it. The Court gave close consideration to the social impacts associated with the proposed development drawing the following conclusions:

- The mobile home park was physically enclosed by a boundary wall on 3 sides and a watercourse on the fourth, resulting in an integrated society within the park;
- There was a strong informal social network within the park (looking after plants, cooking of meals, and undertaking minor maintenance tasks);
- The existing village society was an ambulatory one with residents walking between each other’s dwellings and interacting informally during the process;
- The move into a 2 storey residential apartment building was likely to result in a breakdown of bonds within a tight-knit mutually supportive community resulting in significant losses in quality of life and capacity for independent living;
- The disruption to the existing residents constitutes an unacceptable social impact that was determinative of the appeal with the application being refused.

A similar approach was taken by the Court in *Wygiren v Kiama Council* [2008] NSWLEC 1233, a case about the development of a caravan park containing a large number of permanent sites. The evidence was that there was a need for “affordable housing” and “low cost housing” in Kiama and that the dwellings to be provided in the development would be affordable, but only to those persons who had sufficient funds to buy one. Those persons were likely to be existing homeowners who were seeking a lifestyle change or wanted to free up equity in an existing dwelling. Persons outside this group would not be able to rely on home loans because the tenure arrangements in the caravan park did not provide acceptable security for lenders and would have to rely on other sources of finance such as personal loans carrying higher interest rates or vendor finance.

In dismissing the appeal, the Court said there was considerable merit in the Council’s argument that the proposal did not represent “affordable housing” or “low cost housing” for the majority of low to moderate
income earners who would have to borrow to buy a dwelling and that the development was "likely to constitute a poverty trap that is exacerbated by security of tenure issues". An interesting issue in relation to the scope of the power to take social impacts into consideration arose in Gray v Sutherland Shire Council [2015] NSWLEC 1102. This was a case about a development application to construct a two-storey boarding house. Evidence was given by social planners who agreed that there was a need for affordable housing in the area for key workers but that it would not be desirable for social/public housing in the area to be increased due to the density of this form of housing that currently existed in the area and the existing problems with anti-social behaviour. The social impact considerations were agreed to be that:

- The extent of reported anti-social behaviour indicated that the current levels of social housing had already reached its maximum threshold in the locality;
- The addition of further social housing had the potential to add negatively to the existing cumulative impact in this residential area, including a disproportionate number of people in the locality who are socially and financially disadvantaged;
- This was not a proposal for social/public housing but for a new generation boarding house which would offer housing choice not for people of low or very low incomes but for people on moderate incomes.

The social planners for the parties agreed that the development ought be approved on condition that residency of the development be restricted to persons with an annual income of not less than $43,340 and are not in receipt of income support payments from the Commonwealth or who are students at local tertiary establishments.

At first instance, Commissioner Morris found that while the proposed restriction on occupancy may be a way of addressing the potential adverse social effects, she did not accept that it was a condition that could reasonably be imposed or one that could be said to be for a planning purpose and for those reasons the application was refused. This decision, however, was reversed on appeal. In Gray v Sutherland Shire Council [2016] NSWLEC 64 Craig J held that a condition restricting occupancy of the development to people with a specified minimum income could be validly imposed. His Honour referred to the evidence of the social planners which made it clear that it would be undesirable for public housing to be increased in the area given the density of such housing already present in the area and the associated anti-social behaviour problems said to be associated with it. The restriction on occupancy to people with an income above a specified minimum was considered essential by the experts if the development was not to add to those social problems. The Court held that the condition was therefore directly referable to a mandatory relevant consideration pursuant to s.79C(1)(b), namely the social impact in the locality and consequently was for a proper planning purpose.

Conclusion

This quick survey of some of the different cases in which the social impacts of development have been considered demonstrates the wide range of different impacts this head of consideration can cover. It is fair to say that the gates are not yet closed on what types of social impacts will be relevant to the consideration of different types of development application. The take home message is that some social impacts that might have once been thought to be irrelevant may now justify the refusal of a development proposal.

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12 At [150]