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LAWYERS

Resource Management and Planning Appeal Tribunal

Case Commentary

JM Shepperd v P Clennett [2020] TASRMPAT 18
5 August 2020

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On 5 August 2020, the Resource Management and Planning Appeal Tribunal (**Tribunal**) handed down its decision in *JM Shepperd v P Clennett* [2020] TASRMPAT 18 (**Shepperd v Clennett**). The decision is the first the Tribunal has made on the merits of a *Neighbourhood Disputes About Plants Act 2017* (Tas) (**NDAP**) application (**application**), noting that previously only jurisdictional matters of NDAP have been considered.[1] In *Shepperd v Clennett*, the application was dismissed.

Shepperd v Clennett is an important decision as it gives guidance to those seeking to make an application, or those who need to respond to an application, about the operation of NDAP. The decision can be used to gauge how likely it is that an application will be successful and provides insight into what is considered a 'severe' obstruction of sunlight or views caused by trees.

1 Making an NDAP Application

Under s 23 of NDAP, a person who is a landholder of 'affected land' can apply to the Tribunal for an order under NDAP.

For the Tribunal to exercise its discretion to make orders under NDAP, the relevant land must be 'affected land'. There are four circumstances in which land is considered 'affected land' for the purposes of NDAP, which are set out in s 7 of

[1] The decision of *J Fuller v Estate of Nelder Josephine Hunt* (2018) TASRMPAT 28 concerned an application, however a jurisdictional ruling was made and the merits of the matter at hand were not considered. There have been other applications made under NDAP, but they have been either withdrawn or resolved before the hearing stage of the process.

NDAP. They are when:

- branches of a plant overhang the affected land; or
- a plant has caused, is causing or is likely within the next 12 months to cause:
  - serious injury to a person on the affected land; or
  - serious damage to the affected land or any property on the affected land; or
  - substantial, ongoing and unreasonable interference with the use and enjoyment by a person of the affected land.

The Tribunal can make any orders that need to be made in relation to a plant to:

- ensure that a part of a plant does not overhang the applicant's land; or
- prevent, or reduce the likelihood of, serious injury being caused to a person; or
- prevent, restrain, or reduce the likelihood of, serious damage being caused to an applicant's land or property on their land; or
- prevent, or reduce the likelihood of, substantial, ongoing and unreasonable interference with a person's use and enjoyment of an applicant's land being caused by a plant; or
- remedy damage caused to an applicant's land, or any property on their land, by a plant.

The Tribunal can only make an order that is relevant to why the land is considered 'affected land'. For example, land being affected by overhanging branches alone does not enliven the Tribunal's discretion to make orders to remove trees or reduce their height. The orders that could be made in those circumstances are limited to ensuring that the branches do not overhang the land. In such circumstances, it may well be more cost effective for an affected landowner to exercise their common law right of abatement to remove the overhanging branches, rather than go through a lengthy and costly application and hearing process.

2 Shepperd v Clennett Application Summary

In *Shepperd v Clennett*, the application made under s 23 of NDAP concerned two cypress trees and an oak tree (**the trees**) on the respondent's land, and sought orders requiring the respondent to either:

- carry out works to reduce the height of the trees located on the respondent's property; or
- remove the trees on the respondent's property (**Application**).

The Application was made on the basis that the trees caused, were causing, or were likely within the next 12 months to cause substantial, ongoing and unreasonable interference with the use and enjoyment by the applicant and/or the tenants renting the property on the relevant land. It was argued by the applicant that the substantial, ongoing and unreasonable interference was a result of:

- sunlight being severely obstructed from reaching windows facing the boundary with the respondent's property; and
- the severe obstruction of a view from the applicant's dwelling.

The Application was dismissed, as it was found that the trees did not cause any severe obstruction, and any obstruction caused did not cause a substantial, ongoing and unreasonable interference with the use and enjoyment of the applicant's land.

Interestingly, it was found the land was 'affected land' due to branches of the trees

overhanging the affected land. However, as stated above, that does not enliven the Tribunal's discretion to make orders to remove trees, or reduce their height, which are the orders the applicant sought.

3 Jurisdictional Fact Assessment: Land Affected by a Plant

There are multiple jurisdictional facts that must be proven before the Tribunal can exercise its discretion to grant orders under NDAP. However, this article focuses on the jurisdictional fact of whether relevant land is 'affected land' due to substantial, ongoing and unreasonable interference with the use and enjoyment by a person of the affected land, as that was one of the main contentions in *Shepperd v Clennett*.

The jurisdictional fact of land being 'affected land' due to substantial, ongoing and unreasonable interference is general in nature. However, if it is argued that substantial, ongoing and unreasonable interference is caused by a plant causing an obstruction of sunlight, or an obstruction of views, from the relevant dwelling, then NDAP sets out an additional threshold test that must be established. That is, whether the obstruction of sunlight, or obstruction of views, is a 'severe' obstruction.

It is important to note the distinction between the requirements of 'severe' obstruction and of 'substantial, ongoing and unreasonable interference', which was detailed in the *Shepperd v Clennett* decision. Even if one assumes it would be reasonable to, for example, reduce the height of trees, an order to that effect can only be made if:

- the relevant plant causes a severe obstruction; and
- that severe obstruction causes a substantial, ongoing and unreasonable interference with the use and enjoyment of the relevant land.

We note that the 'severe' threshold test is a high threshold test. This is likely due to the significance of the orders that can be made if the test is met.

4 The 'Checklist' - Factors to be Considered by the Tribunal

There are certain factors that must be considered, where relevant, by the Tribunal when assessing an application. These are set out in s 30 of NDAP and can be accessed **here**. The factors can be considered at the stage of determining whether land is 'affected land', and at the stage where the Tribunal determines whether orders should be made. However, some factors are more relevant to one stage over the other.

For example, some factors in s 30 of NDAP are clearly relevant when determining whether land is 'affected land'. Section 30(a) of NDAP in effect states that the Tribunal must consider the provisions of a planning scheme. Planning schemes can contain standards relevant to the obstruction of views and sunlight, and can be considered when assessing an application. Further, s 30(e) of NDAP sets out factors the Tribunal must consider when determining whether sunlight is severely obstructed, and s 30(f) of NDAP sets out factors the Tribunal must consider when determining whether a view is severely obstructed.

Some factors in s 30 of NDAP are clearly relevant when determining whether orders should be granted, and factor in the interests of the respondent to the application. For example, section 30(i) of NDAP in effect states that the Tribunal must consider the extent to which a plant contributes to the amenity of the land, including by:

- providing privacy; or
- providing protection from sun, wind, noise, odour or smoke; or
- contributing to the landscaping or garden design on the land.

Section 30(k) of NDAP is also clearly relevant when determining whether orders

should be granted, which in effect states that the Tribunal must consider the likely effect on the plant of pruning it, if such an order were to be made.

For some applications, the Tribunal may consider other factors in addition to those in s 30 of NDAP. For example, if it is argued that the relevant land is 'affected land' due to a plant causing substantial, ongoing and unreasonable interference, factors set out in s 32 of NDAP, which can be accessed **here**, may also be considered by the Tribunal.

Applicants should treat s 30 of NDAP (and other sections if relevant such as s 32 of NDAP) as a checklist that must be addressed at the hearing. This is especially important for the applicant, as they have the onus of proof as detailed below.

5 Onus of Proof

In planning appeals there is no onus of proof, however for NDAP applications the applicant bears the onus of proof on the balance of probabilities. The importance of the onus and standard of proof is reinforced by the nature and scope of orders that may be made by the Tribunal, which could significantly affect a respondent to an application. For example, when made, orders:

- are registered on the title of the respondent's property. This could affect future sales of the property, and future owners of the property would be affected;
- can require the respondent to pay compensation for damage to the applicant's land or property of the land; and
- apply for 10 years from the date they are made unless otherwise specified.

Further, s 7(3)(c) of NDAP provides that a plant can only cause substantial, ongoing and unreasonable interference by virtue of causing a view from the applicant's dwelling to be obstructed, if "*the view from the dwelling was not so obstructed when the person took possession of the affected land.*" Therefore, NDAP even applies to situations where a plant first obstructed a view prior to the commencement of NDAP. [2] This can impact a respondent significantly, as they may have planted plants far before NDAP was even contemplated, and would not have anticipated the potential costs of the NDAP hearing process when planting the relevant plants.

In *Shepperd v Clennett*, the applicant had the onus of proof to prove on the balance of probabilities that:

- the view from the applicant's property was severely obstructed by the trees;
- the trees caused sunlight to be severely obstructed from reaching a window; and
- if it was proven that there was a severe obstruction, that the severe obstruction caused substantial, ongoing and unreasonable interference.

It is expected that an applicant will provide evidence, as they have the onus of proof. A respondent should also have evidence to respond to the applicant's evidence.

5.1 Evidence required

Experts should be engaged to address most of the 'checklist' considerations. The following experts should be engaged to give evidence at a hearing:

- ***a planner***, to address the relevant planning scheme provisions, which is a

[2] This is consistent with other Australian jurisdictions with similar legislation. For example, in *Mahoney v Corrin* [2013] QCAT 318, Wilson J confirmed that the Queensland Civil and Administrative Tribunal has jurisdiction in respect of views that were lost prior to the commencement of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).

consideration under s 30(a) of NDAP. Planners can also discuss amenity considerations such as any amenity the plant may provide the respondent;

- ***an arborist***, to address the likely effect on the relevant plant of pruning it if such an order were to be made, which is a consideration under s 40(k) of NDAP. Arborists can also give evidence concerning the type of plant, whether the plant is evergreen or deciduous, the height and size of the plant, the health of the plant and also the growth rate of the plant;
- ***a visual expert***, for applications that concern an obstruction of a view, who may prepare montages regarding any obstruction. They could work with the arborist to visually show projections of how the plant will grow in the future; and
- ***a shadow diagram expert***, for applications that concern the obstruction of sunlight. Shadow diagrams involve a great degree of technicality, which is why an expert should be engaged. Draftsmen or architects may be able to assist with shadow diagrams.[3]

In addition to expert evidence, evidence must be provided regarding the history of the applicant's property and the relevant plant. Applicants and respondents are normally best suited to give this evidence. Evidence about the history and current situation will need to cover:

- when the plant was planted;
- when the applicant purchased their property;
- the dimensions of the plant including the height and width; and
- the location of the plant in relation to the applicant's property.

6 Shepperd v Clennett - Analysis of View Obstruction

As the applicant argued in *Shepperd v Clennett* that substantial, ongoing and unreasonable interference was caused by view obstruction, s 7(3) of NDAP was required to be satisfied for the land to be considered 'affected land'.

Section 7(3) of NDAP states that, for substantial, ongoing and unreasonable interference to occur by virtue of a view being obstructed:

- the plant must be at least 2.5 metres high; and
- the plant must cause the view to be severely obstructed; and
- the view from the dwelling must not have been so obstructed when the person took possession of the affected land.

Further, s 30(f) of NDAP sets out factors the Tribunal must consider when it is alleged that a view is obstructed. If it is alleged that a view is obstructed because of a plant, the Tribunal must consider:

- the nature and extent of the view that is obscured; and
- the uses to which the part of the dwelling is put.

6.1 Requirement that the plant be at least 2.5 metres high

This is a factual requirement. In *Shepperd v Clennett,* this requirement was met.

6.2 Requirement that the plant causes the view to be severely obstructed

We note that the use of the word 'causes' in s 7(3)(b) of NDAP shows that the plant must cause a 'severe' obstruction at the time of the hearing. This is different to the temporal requirement of any interference, which can be past, present, or within the

[3] In *Shepperd v Clennett,* a planning expert drafted shadow diagrams.

next 12 months. We note that future growth may also be considered by the Tribunal when determining what orders should be made.

In *Shepperd v Clennett*, the Tribunal used the factors in s 30(f) of NDAP, set out above, in its analysis of whether the obstruction of views was a 'severe' obstruction. The Tribunal found that the view from the dwelling was not severely obstructed due to:

- *the extent of view obstruction*. The Tribunal accepted the respondent's evidence that the obstruction caused by the trees only impacted 10-15% of the viewfield of the dwelling;
- *the value of the obstructed view*. The Tribunal considered that the obstructed view was of the Southern Outlet, parts of the Queens Domain and was predominately a land view over rooftops in an inner residential area. There was no iconic view or water views impacted to any significant extent by the trees. The Tribunal accepted evidence that "*whilst the subject trees do obstruct a portion of the overall vista, the obstruction is minor and there remains a far greater proportion of high quality views (indeed subjectively higher quality) that are unaffected by the trees.*"; and
- *where the obstructed view was in relation to the boundaries of the land*. The view was impacted along a side boundary of the dwelling located in the Inner Residential Zone of the *Hobart Interim Planning Scheme 2015* (**Planning Scheme**). Therefore, the Tribunal found that it was unrealistic to retain extensive side views with the density of permissible development in the area. The Tribunal stated that "*The unobstructed views remaining available from all of the habitable rooms of the Applicant's dwelling are, in the Tribunal's view, of much greater significance*".

The Tribunal stated that even if the obstruction of views was severe, when s 30(a) of NDAP is considered, the obstructed view cannot be considered to cause substantial, ongoing and unreasonable interference with the use and enjoyment of the land. Section 30(a) of NDAP in effect states that the Tribunal must consider the provisions of the relevant planning scheme. In *Shepperd v Clennett*, it was shown that the Planning Scheme contains standards relevant to the obstruction of views and sunlight. It was found that the location of the trees and the distance from the land boundary were not unusual in the locality or in the Inner Residential Zone of the Planning Scheme.

6.3 Requirement that the applicant be the owner of the land, and that the view from the dwelling was not so obstructed when the person took possession of the affected land

This is a factual requirement. In *Shepperd v Clennett,* there was no dispute that the trees were already planted when the applicant bought their property. However, the extent to which the trees obstructed the view at that time was in dispute. It was found that the trees did not obstruct the view from the dwelling to the same extent that they did at the time of the hearing. Therefore, this requirement was met.

In summary, in *Shepperd v Clennett* the Tribunal found that the obstruction of a view caused by the trees was not 'severe', and that even if it was 'severe', it did not cause a substantial, ongoing and unreasonable interference.

7 Shepperd v Clennett - Analysis of Sunlight Obstruction

As the applicant argued in *Shepperd v Clennett* that substantial, ongoing and unreasonable interference was caused by sunlight obstruction, s 7(2) of NDAP was required to be satisfied for the land to be considered 'affected land'.

Section 7(2) of NDAP states that substantial, ongoing and unreasonable interference

may occur by virtue of a plant causing sunlight to be severely obstructed from reaching a window, solar photovoltaic panel, a solar collector for a solar hot water system, or a skylight, situated on a roof of a building on the affected land.

Section 30(e) of NDAP sets out factors the Tribunal must consider when it is alleged that sunlight is severely obstructed. If it is alleged that sunlight is severely obstructed from reaching for example, a window because of the plant, the Tribunal must consider:

- the amount of sunlight obstructed; and
- the number of hours per day during which the sunlight is obstructed;
- the period of the year during which the sunlight is obstructed; and
- whether the plant loses its leaves at certain times of the year and the proportion of the year during which leaves are lost.

The Application did not concern the obstruction of sunlight from solar panels or skylights, so the analysis for s 7(2) of NDAP was limited to whether sunlight was severely obstructed from reaching a window.

In *Shepperd v Clennett*, the Tribunal assessed each window where sunlight was partially obstructed. The Tribunal considered the factors set out in s 30(e) of NDAP when determining whether the obstruction of sunlight was a 'severe' obstruction. In doing so they accepted the evidence of the respondent, which included shadow diagrams. Additional considerations included:

- the fact that the rooms were already partially shaded by the existing fence;
- the fact that some sunlight did penetrate each window;
- the use of the rooms to which the windows were in;
- the orientation of the building;
- the slope of the land;
- the height and proximity of the boundary fence that already partially obstructed sunlight from the bedroom windows; and
- how the bedrooms were to be treated under the Planning Scheme. For example, bedrooms are considered non-habitable rooms, so the consideration of loss of sunlight to those rooms was discounted when compared to living spaces.

The Tribunal found that sunlight was not severely obstructed from any of the relevant windows.

Further, the Tribunal found that even if the obstruction was considered severe from any of the relevant windows, that obstruction would not cause a substantial, ongoing and unreasonable interference with the use and enjoyment of the land. Whilst the 'severe' threshold is limited to a window, the 'substantial, ongoing and unreasonable' threshold is not, and instead is relevant to the use and enjoyment of the entire land.

As the open plan living/dining/kitchen area on the first floor would continue to receive more than three hours of direct sunlight per day in midwinter through the other windows, the Tribunal found any interference caused by the obstruction of sunlight from some windows was not substantial, ongoing and unreasonable.

In summary, in *Shepperd v Clennett*, the Tribunal found that the obstruction of sunlight from multiple windows, caused by the trees, was not 'severe', and that even if it was 'severe', any interference caused by the obstruction of sunlight was not substantial, ongoing and unreasonable.

8 Key Takeaways

The decision of *Shepperd v Clennett* has made it clear that, before making an application based on a plant causing substantial, ongoing and unreasonable interference by obstructing a view or sunlight, one should be aware that:

- The first threshold test that needs to be met for the Tribunal to exercise its discretion to grant orders is not one of unreasonableness, but one of severity. Further, the requirement for a plant to cause a severe obstruction is a high threshold. Therefore, one should not make an application only on the basis that it would be reasonable for a plant to be trimmed or removed. Instead, the basis of an application should be that a plant causes a severe obstruction of sunlight or views, and that the same obstruction causes substantial, ongoing or unreasonable interference with the enjoyment of the relevant land.
- The 'substantial, ongoing and unreasonable interference' requirement is for the use of the entire land, and not confined to the obstruction of a particular view, or sunlight obstruction from a particular window.
- Applicants will need to have detailed factual knowledge about the relevant plant, and the interests of both the applicant and respondent.
- Each factor in the NDAP 'checklist' will need to be addressed in evidence. This includes the amenity the plant provides for the respondent, and the effect on the plant of pruning it if such an order were to be made.
- In order to adequately address the NDAP 'checklist', expert witnesses should be engaged, including the following:
  - planning expert;
  - visual expert;
  - arborist; and
  - shadow diagram expert.

If you have any queries or would like further information regarding this case commentary, please contact:

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