Land Lease Community E-newsletter
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OutasiteLite

Kincumber Nautical Village

KNV APPEAL DECIDED

APPEAL PANEL SAYS SITE FEE INCREASE IS A FIXED METHOD

The anticipation is over. The Appeal Panel of the Tribunal has handed down the decision in *Kincumber Nautical Village Pty Ltd v Morris & Ors* and it is not good news for home owners. The Appeal Panel allowed the appeal and set aside the original decision.

In its reasons for the decision the Appeal Panel stated the principal issue in the appeal was whether a formula for calculating site fee increases, that is made up of a number of components, falls within the meaning of the term "a fixed method" in sections 65 and 66 of the *Residential (Land Lease) Communities Act 2013* (RLLC Act). The Appeal Panel noted there is no definition of the term "a fixed method" or "a fixed calculation" and then went on to consider the legal submissions of each of the parties on this point.

The home owners relied on the Macquarie and Oxford English Dictionary definitions of "fixed" as meaning "definite; not fluctuating or varying" and "definitely appointed or assigned; not fluctuating or varying: definite, permanent". The operator agreed that "fixed" in the context of the RLLC Act means definite.

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The home owners submitted that the method in their site agreements is not fixed because it is not definite. Certain components vary or fluctuate and it does not provide the certainty to home owners intended by the Act. Additionally, the standard form site agreement enables an operator to choose ONLY ONE option from:

- in proportion to variations in the CPI
- a dollar amount ($)
- a percentage (%)
- a percentage of the increase in the age pension
- other *(specify)*.

The operator of KNV chose 'other' but included CPI and a percentage in the method. The home owners argued the operator was not able to include two options that were available as single options in a fixed method, because that would mean it was not a fixed method but a number of methods.

The operator argued the method is a single fixed method made up of a number of fixed calculations and that it does provide certainty to home owners because they know exactly how the increase will be calculated each year.

THE DECISION

The Appeal Panel agreed with the operator. It found:

"in providing for a site fee increase in accordance with a fixed calculation it is not the amount of the increase which is relevant but whether the method for calculating the increase allows a home owner at the time they enter into this site agreement to know with certainty how an increase is to be calculated and that the method of increase will not vary from year to year. In our view there is no bar on such a calculation comprising a formula containing multiple integers or components."

It held the view that it is irrelevant whether a fixed method contains a number of components as long as the calculation is 'fixed', that is definitely ascertainable.

The Appeal Panel was satisfied the Tribunal had erred at first instance in its construction of sections 65 and 66 of the RLLC Act and was wrong to conclude there was a breach of section 66 (2). It went on to say:

"the Tribunal ought to have concluded that, pursuant to s66 (7) of the RLLC Act, the terms of the site agreement providing for fee increases were not open to challenge and that the Tribunal lacked jurisdiction to determine the applications."

On that basis the Appeal was allowed.

HOME OWNER REACTION

The 52 home owners at KNV who challenged the validity of the increase method are extremely disappointed by the outcome. Bob Morris, who represented the home owners is "stunned by the decision" and believes the Appeal Panel got it wrong. Bob said:

"This case was about statutory interpretation and the intent of the legislation, the RLLC Act. The Appeal Panel has relied on the fact that the RLLC Act does not specify the meaning of "fixed method". However, the Appeal Panel may have been unaware of its own earlier decision of Principal Member A Suthers and Senior Member G K Burton SC in *Palm Lake Resort P/L v King* and Metcalfe [2021] NSWCATAP 195. That appeal on point, was heard shortly before the KNV appeal on 16 February 2021 with a decision handed down on 30 June 2021. That case was also about the meaning of sections 65 and 66 and in dismissing the Appeal, the Appeal Panel in Palm Lake noted at paragraph 69:

> *"Other (specify) at the end of a list cannot be simply at large. In context it is appropriately governed by the other items in the list, all of which are single means or types of increase which specifically include, as single rather than composite means or types, the two means or types that feature in the owner's formula as it currently stands."*

This was exactly the argument put by the residents of KNV and that makes our result more disappointing and difficult to accept."

The Palm Lake decision was, as Bob says "handed down before ours but was not referred

to in the judgement. It would seem its relevance is critical and could have resulted in a different statutory interpretation in our case."

Bob believes the decision means it is imperative that the review of the Act addresses the ambiguity in the Act regarding fixed methods. He has sought support from the Liberal Member for Terrigal, Adam Crouch MP, and Liesl Tesch MP, the Labor Member for Gosford, who both spoke in support of the KNV residents in the NSW Parliament. It is now in the hands of the The Hon Kevin Anderson MP, Minister for Better Regulation and Innovation.

BUT WAIT, THERE'S MORE

On 11 October the KNV Residents Committee met with the operator to discuss site fees. The Committee expected that a negotiated agreement of increases of $6, $6, $6 and $7 per week over four years would be put in place. Bob Morris was at the meeting and said "This agreement was reached in June before the Appeal was decided but it couldn't be implemented because it was dependent on applicants in the case waiving their right to claims of overpaid site fees. Section 12 of the Act prevents this but the operator told the negotiating committee he would bring back the proposal even if he won the NCAT Appeal.

It was incredibly disappointing when that did not happen and instead, draconian proposals were foreshadowed by KNV for those on the fixed method, resulting in immediate increases of up to $14 per week and increases next year of up to $20 per week. With no fair and equitable agreement, the only realistic option for home owners is to appeal to the Supreme Court."

An application (Summons) commencing an appeal to the Supreme Court of NSW was filed on 12 October 2021 appealing from the decision of the NSW Civil and Administrative Tribunal - Appeal Panel in *Kincumber Nautical Village Pty Ltd v Morris & Ors* [2021] NSWCATAP 275.

A representative proceeding has been lodged and the Supreme Court will be asked to set aside the NCAT Appeal Panel decision dated 14 September 2021 and determine the proper construction of the RLLC Act sections 65 and 66 that deal with fixed method site fee increases.

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"Other (specify) at the end of a list cannot be simply at large. In context it is appropriately governed by the other items in the list, all of which are single means or types of increase which specifically include, as single rather than composite means or types, the two means or types that feature in the owner's formula as it currently stands."

DEVELOPMENT APPLICATION NOTIFICATIONS

PORT STEPHENS COUNCIL TAKES POSITIVE ACTION

The Tenants' Union has spoken with many land lease community home owners regarding proposed developments in their communities. Developments can range from small to large scale projects involving infrastructure installation, road repositioning and the relocation of sites and homes. All developments potentially impact the current residents however, those residents often only become aware of a development when work commences, and that is a cause of dismay and concern to many. Port Stephens Council has recognised this in an issue and has taken positive action.

At the 9 February 2021 ordinary council meeting Councillor John Nell proposed a motion that Council:

1. Amend the Community Engagement Strategy to require reasonable attempts be made to notify the relevant residents committee or equivalent in the event that a development application for alterations and additions or a modification application is received for a caravan park/manufactured housing estate.
2. Place the revised Community Engagement Strategy on public exhibition for a period of 28 days and should no submissions be received, the strategy be adopted without a further report to Council.

The meeting was advised that concern had been raised by land lease community residents that they were not made aware of proposed changes to their place of residence. Council's Community Engagement Strategy (CES) requires that surrounding neighbours are notified of certain Development Applications (DAs) and Modification Applications (MAs) but residents of the community are not required to be notified.

The background report noted that there are approximately 30 land lease communities in the Port Stephens Local Government Area and that Council does not hold the names and addresses of the residents. However, most communities have a Residents Committee or equivalent. While Council does not hold the names and addresses of the people on those committees, reasonable attempts could be made to obtain this information prior to notification of a Development Application for alterations and additions or a modification application.

The motion was carried, which is great news for land lease community residents in the Port Stephens Local Government Area.

Home owners in land lease communities in other local government areas may want to consider citing Port Stephens Council as an example when advocating with their own Council regarding notifications to residents of development applications in land lease communities.

Full details of the meeting and motion are available on the Port Stephens Council website: https://www.portstephens.nsw.gov.au/your-council/about-council/council-meetings-and-minutes/council-agendas,-documents-and-minutes

FURTHER CHALLENGES FOR MARGARET RECKLESS, CHAMPION CAMPAIGNER & HOME OWNER

In Outasite magazine (July 2021) we reported on Margaret's ongoing saga with her operator who was busy pursuing a second attempt at terminating her site agreement at the Tribunal. This was happening in tandem with the threats addressed to "the occupier" from third party electricity retailer Humenergy. Humenergy, as we previously reported were invited by Silva Portfolios (operator of Ballina Waterfront Village - BWV) to run their embedded electricity network after Margaret had successfully fought against unlawful overcharging for electricity. That case went all the way to the Supreme Court of NSW. Margaret has to date resisted being dragooned into becoming a direct customer of the electricity retailer Hum, as have other home owners at BWV. The Australian Energy Regulator (AER) has been clear in issuing a Q&A document (January 2021) that any retailer must obtain the explicit informed consent (EIC) of a customer. If they don't obtain the EIC the contract is void.

DEVELOPMENT CONSENT

Now Margaret has a new and more uncertain concern to deal with.

On 15 September 2021 Ballina Shire Council granted development consent to Ardill & Partners as applicants for Silva Portfolios, the operator of BWV. Part of the redevelopment proposal and expansion of the land lease community includes, wait for it… the removal of Margaret's home and the displacement of two other home owners - the Craig's. Coincidentally they are the other home owners who have been involved in litigation with the operator regarding electricity overcharging and issues regarding their water utility.

The development consent granted by Council in DA 2019/743 permits refurbishment and expansion of the existing land lease community to provide a total of 87 long-term sites and one site for the manager residence/office. The proposal comprises demolition works, earthworks, removal of short-term and camping sites, removal of access from River Street, West Ballina and the construction of new driveway access from Emigrant Creek Lane. There will also be construction of new amenities and facilities, internal roadworks and car parking spaces.

In a response to a request from Ballina Council for additional information prior to the granting of consent; the applicant for BWV nonchalantly in a letter dated 7 September 2021, said the residents had protections under the RLLC Act 2013 and the BWV "operators will utilise existing tourist cabins onsite for temporary accommodation of residents while works are being undertaken until these residents' homes are relocated. In the event that the tourist cabin is not available, alternative comparable accommodation will be sourced by the operators within the local area. This matter is now considered adequately addressed." It is really quite breathtaking that this DA got approved when there is no statement of environmental effects and Council seemingly did not have regard to written submissions lodged by interested parties.

The BWV operator has tried on two occasions to have Margaret's agreement terminated at NCAT (the decision from the July hearing is awaited). Margaret believes the operators actions are retaliatory.

We will keep you posted on the ongoing saga of the favourite (to many of our readers) elderly campaigning resident who is not quite ready to be walked over as she faces her next challenge.

Margaret Reckless, campaigner and home owner

PLEASE STAY IN TOUCH

You can subscribe to our email bulletins online via our website tenants.org.au/thenoticeboard. Please make sure to tick the 'Outasite Lite' box. We would also love you to spread the word among fellow land lease community residents!

***Outasite Lite* is published by the Tenants' Union of NSW**

Phone: 02 8117 3700

Email: contact@tenantsunion.org.au

Website: tenants.org.au/thenoticeboard

Address: Level 5, 191 Thomas Street, Haymarket NSW 2000

***Outasite Lite* editor:** Leo Petterson Ross

Contributors: Julie Lee and Paul Smyth

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for land lease community residents

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tenants.org.au/thenoticeboard