RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

Citation:	A Donley & Ors v Huon Valley Council [2019] TASRMPAT 20	
Parties:	*Appellants*:	Archie Donley, Bob Hawkins, David Morgan, Elizabeth Smith, Robert Wills, and Carol Murphy
	Respondent:	Huon Valley Council
Subject Land:	14 George Street, Cygnet	
Appeal No:	65/19SOL	
Jurisdiction:	Planning Appeal	
Hearing Date(s):	13 September 2019	
Decision Date:	17 October 2019	
Delivered At:	Hobart	
Before:	R Grueber, Presiding Member R Howlett, Member P Jans, Member	
Representation:	*Appellants*: *Respondent:*	Self-represented Self-represented
Catchwords:	Sale of public land by council – appeal - grounds of appeal – public interest	

REASONS FOR DECISION

Application

1. On 12 July 2019, Archie Donley, Bob Hawkins, David Morgan, Elizabeth Smith, Robert Wills and Carol Murphy (the Appellants) lodged an appeal against the decision of the Huon Valley Council (the Council) to sell land at 14 George Street in Cygnet (the Land). The appeal was made pursuant to s178A of the *Local Government Act* 1993 (the Act).

Local Government Act 1993

2. Section 177A of the Act defines public land. The definition includes land owned by a Council that provides health facilities for public use.[1] A portion of the Land contains the Cygnet Medical Centre (the Medical Centre). It was common ground that the Land is public land within the meaning of s177A.

3. S178 regulates the sale of public land owned by a Council. It requires certain steps to be taken in respect to a resolution to sell and advertisement of the intention to sell. It also sets out a process for objection by the public. It was common ground that the procedures set out in s178 were followed and that the Appellants had lodged objections within the section.

4. Section 178A establishes a right of appeal by an objector:

> ***178A. Appeal***
>
> *(1) Any person who lodged an objection under section 178 may appeal to the Appeal Tribunal against the decision of a council under section 178(6) within 14 days after receipt of notice of that decision under section 178(6)(b) .*
>
> *(2) An appeal must be made in accordance with the Resource Management and Planning Appeal Tribunal Act 1993 .*
>
> *(3) An appeal may only be made on the ground that the decision of the council is not in the public interest in that –*
>
> *(a) the community may suffer undue hardship due to the loss of access to, and the use of, the public land; or*
>
> *(b) there is no similar facility available to the users of that facility.*
>
> *(4) The Appeal Tribunal is to hear and determine an appeal in accordance with the Resource Management and Planning Appeal Tribunal Act 1993 .*
>
> *(5) The decision of the Appeal Tribunal on hearing an appeal is final and section 25 of the Resource Management and Planning Appeal Tribunal Act 1993 does not apply.*

5. Section 178B sets out the powers of the Tribunal on hearing an appeal under s178A:

> ***178A. Appeal***
>
> *(1) Any person who lodged an objection under section 178 may appeal to the Appeal Tribunal against the decision of a council under section 178(6) within 14 days after receipt of notice of that decision under section 178(6)(b) .*

[1] S177A(1)(b).

(2) *An appeal must be made in accordance with the Resource Management and Planning Appeal Tribunal Act 1993 .*

(3) *An appeal may only be made on the ground that the decision of the council is not in the public interest in that –*

(a) *the community may suffer undue hardship due to the loss of access to, and the use of, the public land; or*

(b) *there is no similar facility available to the users of that facility.*

(4) *The Appeal Tribunal is to hear and determine an appeal in accordance with the Resource Management and Planning Appeal Tribunal Act 1993 .*

(5) *The decision of the Appeal Tribunal on hearing an appeal is final and section 25 of the Resource Management and Planning Appeal Tribunal Act 1993 does not apply.*

Background

6. A number of facts were either agreed or not disputed. The Medical Centre was developed by the Council in 2012, with funding from the Commonwealth Government (the Commonwealth) through the then Department of Health & Aging pursuant to the Health & Hospital Funds Program Regional Priority Initiative. The funding was subject to an agreement entered into between the Commonwealth and the Council, dated 22 December 2011 (the agreement).

7. The Medical Centre was developed by the Council in 2012. The agreement requires the Medical Centre to be used for the provision of primary health care by health professionals for 20 years after completion of the works, that is until 2032. The Council must repay the Commonwealth funding on a sliding scale if the Council fails to comply with its obligations under the agreement. Those obligations are secured by a caveat registered by the Commonwealth over the title to the land that prevents registration of dealings on the title, including a transfer of the title.

8. The Council initially operated the Medical Centre itself until February 2017. It encountered difficulties employing doctors, resulting in dissatisfaction within the community because of the changing medical personnel. Consequently, since February 2017, the Council has leased the Medical Centre to a private medical services provider which has provided primary health care by health professionals, as required by the agreement.

9. On 26 September 2018, the Council, then constituted by a Commissioner, resolved to sell the land. This was followed by the statutory process of advertising and receiving objections. The matter then went before the Council again on 26 June 2019, on this occasion an elected Council, when the Council confirmed its intention to proceed with the sale of the land notwithstanding the objections.

10. The Medical Centre is located in the town of Cygnet. It provides services to a number of surrounding villages, the total population of those villages and Cygnet in the 2016 Census data is 4,230, which is 26.11% of the population of the municipality of Huon Valley. That locality is serviced by another medical centre, a family medical practice using premises owned by the State Department of Health & Human Services, a practice provided by the South East Tasmanian Aboriginal Corporation and a centre for allied health services provided by the Tasmanian Health Service, all within Cygnet. More broadly within the municipality, there are two private medical practices and a centre for allied health services in Huonville, a medical centre at Geeveston which is owned and operated by the Council, a medical centre at Dover

also by the Council and allied health services at Dover operated by the Tasmanian Health Service.

11. The Council contends that there is no current need for it to provide health services or facilities in Cygnet. The provision of medical services is not an obligation of Council under the Act or any other legislation. The Council contends that during the period of its operation of the Medical Centre, it suffered a loss of $226,000. The extent of the loss is disputed by the Appellants. The Council contends that the National Competition Policy prevents it from operating the Medical Centre other than on a level playing field with private operators.

12. The Medical Centre is situated on a larger portion of land. Any sale would involve a subdivision of the part on which the Medical Centre is situated. The resolution by Council requires that any sale be subject to the purchaser taking on the Council's obligations under the agreement with the Commonwealth, and therefore the agreement of the Commonwealth. The Council acknowledges that there can be no guarantee that a purchaser would carry on the medical practice for the required period, but there is similarly no guarantee that the Council would be able to obtain a lessee to provide the medical services during the period of the agreement or to be able to fund the operation of medical services at the Medical Centre itself.

13. The Appellants contend that selling the Medical Centre exposes the community to the risk that a private operator choose to cease providing medical services, either voluntarily through insolvency, as a consequence of on sale or lease of the Medical Centre or through a mortgagee exercising its rights. They contend that this will result in the community suffering undue hardship. They also point to undue hardship if the Medical Centre reduced its level of service or increased the cost to users. Hardship would be compounded through the distance from hospitals, lack of alternative medical providers and inadequate public transport. They contend that the sale is not in the public interest because there is no similar facility available to users. They say that the only reason provided to the community is at the risk of exposure under the agreement with the Commonwealth and that the sale does not make financial sense. They contend that the obligation to the Commonwealth decreases by $60,000 per year, up to 2032 so that this means that the facility is worth $60,000 per year more the longer the Council retains ownership.

14. The Council confirmed that one of the reasons for sale is to remove the contingent obligation to the Commonwealth, but point out that the value of the Medical Centre does not increase as the contingent risk reduces because it is a contingent risk, not a realised liability.

Consideration

15. The test in s178A(3) restricts grounds of appeal and the Tribunal is only entitled to have regard to those matters set out in the subsection.[2] The only grounds that may be considered are that the sale is not in the public interest in that either the community may suffer undue hardship due to the loss of access to, and the use of, the public land, or there is no similar facility available to the users of that facility.

16. The grounds establish a public interest test. Defining what the public interest is can be notoriously difficult. In *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health*[3], Lockhart J said:

2 P & S Seabourne v Huon Valley Council [2005] TASRMPAT 293.

3 (1995) 128 ALR 238.

> *"The public interest is a concept of wide meaning and not readily limited to precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is, or is not, in the public interest."*

The expression directs attention to the interests or welfare of the public in general rather than individual interests. In *Director of Public Prosecutions v Smith*[4], the Appeal Division of the Supreme Court of Victoria said:

> *"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of Government and Government instrumentalities, tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals…"*

17. The consideration of public interest is limited by s178A(3) to the two specified criteria in subsection (3)(a) and (b). It does not permit separate consideration of broader matters which might otherwise invite consideration of public interest, including the motivation for sale or the financial benefit or detriment the Council has experienced when running the Medical Centre.

Will the community suffer undue hardship due to the loss of access to, and the use of, the public land?

18. S178A(3)(a) does not require a determination that the community *will* suffer undue hardship, rather that it *may* suffer undue hardship. The use of *may* expresses consideration of possibility rather than certainty or probability. It will require consideration of real possibility not merely conjectural possibility.

19. The first consideration is what the *community* is for the purposes of the section. The Statement of Agreed Facts & Contentions filed by the parties agrees that the community means the residents of the Huon Valley, presumably the municipality. This reflects the determination of the Tribunal in *P & S Seabourne v Huon Valley Council*[5], where it said:

> *The Act does not define what is meant by the 'community'. In the statutory context it can reasonably be taken to mean the inhabitants of the municipality in which the public land lies.*

20. The section uses the word community rather than some form of description of the whole municipal area. In *Swanton v Resource Management & Planning Appeal Tribunal*[6], Pearce J considered an appeal in respect to s178A(3)(a) and said:

> *In the course of hearing and determining the appeal, it will be necessary for the Tribunal to interpret and apply the terms of the section according to its terms, examine the context and the purpose and policy of the provision, to attribute meanings to the terms 'community' and 'undue hardship' and determine whether the relevant undue hardship is 'due to the loss of access to, and the use of, the public land.' It will also be for the Tribunal to attribute meaning and purpose to the term 'public interest'. Those tasks cannot be undertaken by this Court. It will be for the Tribunal to do so, based on evidence before it and its findings of fact.*[7]

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4 [1991] 1 VR 63 at [75].

5 Op cit at [9], see also P Owen v Brighton Council [2009] TASRAMPAT 44 at [9].

6 [2015] TASSC 6.

7 At [17].

His Honour gave some direction in respect to this:

> *It seems to me that was constitutes the 'community' may vary according to the circumstances of each case. Determination of the question is a matter for the Tribunal and is likely to depend on findings of fact based on evidence. Without intending to bind that Tribunal's determination, I think that the relevant facts may include the nature and location of the land, the use to which it has been or may be put, the class of persons who may be affected by the loss of access to, or use of, the land and the nature of the effect it may have on them.*[8]

21. The evidence before the Tribunal was that the catchment area of the Medical Centre was the Cygnet and surrounding area. The other major population areas in the municipality, Huonville, Geeveston and Dover, have their own medical centres and it is unlikely that the residents of those areas, at large, would use the Medical Centre or be affected by the loss of access to, and use of, the land. Notwithstanding the agreement of the parties in respect to what the community is, it is apparent to the Tribunal that it is in fact the greater Cygnet area described in the Statement of Facts & Contentions as including Cygnet and the surrounding villages of Abels Bay, Charlotte Cove, Cradoc, Deep Bay, Eggs & Bacon Bay, Garden Island Creek, Gardners Bay, Glaziers Bay, Lower Wattle Grove, Lymington, Petcheys Bay, Nicholls Rivulet, Randalls Bay, Verona Sands, and Wattle Grove. Having regard to the use of the land for the purposes of the Medical Centre, its location within those communities and the likelihood that the residents of those communities would be the persons who would be affected by the loss of use of the land, this is the community within the guidance provided by *Swanton v Resource Management & Planning Appeal Tribunal*.

22. The land insofar as it attaches to the Medical Centre is subject to a lease to the private operator. Generally a lease would carry within it, by definition, a right to exclusive occupation by the lessee. This would suggest that the community currently has no right to access or use the land. However, in his evidence, the General Manger of the Council confirmed that the lease required the lessee to ensure that the Medical Centre was open for minimum periods and so could be accessed by the community. To that extent, the Tribunal accepts that the community has access to and the use of the land.

23. The issues therefore are whether that community may lose access to, and use of, the land; whether that would constitute undue hardship; and whether that undue hardship means that the decision of the Council is not in the public interest.

24. The natural meaning of hardship is severe suffering or the loss or absence of something that is usually present. The community may well suffer hardship if the Medical Centre closed. A significant proportion of the community would need to seek medical assistance elsewhere, either within Cygnet or outside Cygnet. The evidence of Mr Donley and Mr Stanley Smith was that, from inquiry and experience, the other medical service providers in Cygnet might not be able to service the patients of the Medical Centre and that travelling distances to other centres would be difficult for that part of the community who relied on public transport. Whether the hardship is undue will depend on all the circumstances of the case.[9] The use of the adjective 'undue' to quality hardship indicates that something more than an ordinary degree of hardship is required.[10] It is arguable that the hardship arising from closure of the Medical Centre would be undue hardship, although for patients with independent means of travel, alternatives are available in Cygnet and more widely.

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8 At [35].

9 *P & S Seabourne v Huon Valley Council* op cit at [11].

10 Op cit at [10].

25. However, there is a real difficulty for the Appellants' claim of undue hardship, which is whether there is a realistic possibility they may in fact lose access to, and the use of, the land. The intention of the sale is not to result in the closure of the Medical Centre, quite the opposite. While the Appellants point to the possibly of failure of the Medical Centre, those risks are speculative and are no greater as a result of the Council ceasing to be the landlord. The Council has no control over the business of the Medical Centre, whether it owns the land or otherwise. It could not be said that the sale is not in the public interest due to the loss of access to, and the use of, the land.

No similar facility available to the users of the Medical Centre

26. S178A(3)(b) requires the Tribunal to consider whether the sale is not in the public interest on the grounds that there is no similar facility available to the users of the Medical Centre. The usual meaning of *facility* is a place provided for a particular purpose, and the term in the subsection reflects the definition of *public land* in s177A(1) which includes any land that provides health facilities for public use. The consideration under s178A(3)(b) is not by reference to the community, but by reference to users of the facility. The question therefore is whether the sale is not in the public interest in that there is no similar facility for the provision of medical services available to the users of the Medical Centre.

27. There is a similar facility available in Cygnet, as noted above. While it might be inconvenient for the users of the Medical Centre to seek medical services from another provider, convenience is not a consideration in the ground. The ground is not limited to consideration of availability within the community and the availability of medical services more broadly within the municipality, in Huonville, Geeveston and Dover, can therefore be taken into account. The Tribunal is not satisfied that there is no similar facility available to the users of the Medical Centre. In any event, the public interest consideration will only arise if the sale somehow restricts the users of the Medical Centre from using the Medical Centre. The public interest will not be affected if there is no change in the availability of the Medical Centre for use by its current users. This will not occur as a result of the sale and any future occurrence is, at best, speculative.

Determination

28. Pursuant to s178B of the Act, the Tribunal confirms the decision of the Council.

29. S28(1) of the *Resource Management & Planning Appeal Tribunal Act 1993* directs that each party to this appeal is to pay its own costs. The Tribunal will consider an application for a costs order under s28(2) if it is made in writing with supporting submissions within 21 days of the date of this decision. If an application is made, the operation of s28(1) is stayed until further order.

30. If requested, the Tribunal will reconvene to hear any evidence in respect of any matter bearing upon an order for costs.