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Testing Principles

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Introduction

It would be fair to say that in my practice as an expert, I come across more instances where I consider that a key Planning Principle is at best partially understood, or at worst dangerously misapplied. One might ask how could this be?

First, it must be understood that my own scope of work is in good part concerned with a very limited selection of the available Planning Principles. In fact, I rarely get to consider more than two of them: those that directly impact on the assessment of overshadowing and solar access. Nevertheless, my experience and how it intersects with the use and abuse, and the possible evolution of Planning Principles, can be instructively generalised.

As Senior Commissioner Moore clearly set out in 2009, planning principles have been found to contain elements that fall into two distinct categories: those that are prescriptive and those that are process oriented. I say 'have been found to do so', because I really don't think that in the early evolution of planning principles this categorisation was either quite so apparent, or necessarily intended. To come to that conclusion, I have compared Senior Commissioner Moore's exposition with that of his predecessor in 2005, when the planning principles were first collected together and published on the Court's website.

In 2005, then Senior Commissioner Roseth was concerned almost entirely with issues of reasonableness, including the test of good design. It is only on several years reflection, and with feedback primarily from these very NEERG Seminars, that it has become clear that those early concerns have been very well incorporated in principles which are now characterised as process oriented, and which can be therefore said to 'provide guidance to decision-makers on how to consider an issue, where there is no detailed approach in the relevant planning instrument'. As is often pointed out, *Tenacity*, relating to view sharing, is the example *par excellence* of this kind of Principle, and is the one by far most often cited and consistently applied.

But the same concerns with reasonableness, and tests of good design have not been nearly so sufficient foundation for the second category of Principle: those 'both descriptive and prescriptive'. Commissioner Moore has described this kind of Planning Principle as 'one that might be regarded as the answer when a planning instrument proposes that an undefined performance criterion must be achieved'. Not surprisingly, he cites access to sunlight as the clearest example, and even less surprisingly, he has found it necessary to repeal and then to revise one of the two key Principles which sought to deal with it.

In this paper and the presentation which accompanies it, I look at *Parsonage v Ku-ring-gai [2004] NSWLEC 347* (*Parsonage)* and its successor *The Benevolent Society v Waverley Council [2010] NSWLEC 1082 (BenSoc)*, to illustrate the issues with a planning principle that — in the pursuit of clarity — strays into explicit, even numeric controls. My purpose is:

- to highlight the ever present danger that the added authority of the Court may elevate what should be a 'deemed to satisfy' criterion into a prescription,
- to generally make the point that notwithstanding their extensive experience, the Commissioners are not a group that can exercise a sufficiently rigorous scrutiny of likely consequences of such prescriptive controls,
- but finally, to encourage experts to follow the Court's advice — namely to conscientiously and critically engage with such principles in the knowledge that the Court is determined to identify and review its inadvertent mistakes.

'Descriptive and Prescriptive': moving on with *Parsonage*

In *Parsonage v Ku-ring-gai [2004] NSWLEC 347*, Roseth SC published a planning principle concerning access to sunlight. The planning principle encompassed three clauses:

> 6 The Australia-wide resource document for residential development, AMCORD, suggests that a development should not reduce the sunlight received by the north-facing windows of living areas of neighbouring properties to less than 3 hours between 9am and 5pm at the winter solstice. The NSW-specific Residential Flat Design Code, which applies only to apartment buildings of three storeys and over, recommends 3 hours of sunlight to the living rooms and private open spaces of 70% of apartments between 9am and 3pm, reducing it to 2 hours in dense urban areas. The Code does not specifically deal with the impact on sunlight received by neighbouring buildings, though one may assume that the same criteria apply. Where local controls contain numerical guidelines, they usually require the retention for neighbouring properties of 3-4 hours of sunlight on living room windows and private open spaces between 9am and 3pm at the winter solstice.
>
> 7 The Court must, of course, take into account whatever guidelines are relevant to an application. However, numerical guidelines should be applied with a great deal of judgment. Consider a dwelling that now receives sunlight all day. Taking away that sunlight from 9am till noon would satisfy most guidelines; and yet the occupants of such a dwelling are likely to perceive it as a devastating impact on their dwelling's amenity. The other side of the coin is that the impact on a neighbour's sunlight must be assessed in the context of the reasonable development expectations of the proposal and the constraints imposed by the topography and the subdivision pattern. Preserving 3 hours of sunlight on a neighbouring site may require an unreasonable reduction in the development potential of the proposal.
>
> 8 Numerical guidelines dealing with the hours of sunlight on a window or open space usually leave open the question what proportion of the window or open space should be in sunlight, and whether the sunlight should be measured at floor, table or a standing person's eye level. Numerical guidelines should therefore be applied with the following principles in mind, where relevant:
>
> - The ease with which sunlight access can be protected is inversely proportional to the density of development. At low densities, there is a reasonable expectation that a dwelling and some of its open space will retain its existing sunlight. (However, even at low densities there are sites and buildings that are highly vulnerable to being overshadowed.) At higher densities sunlight is harder to protect and the claim to retain it is not as strong.
> - The amount of sunlight lost should be taken into account, as well as the amount of sunlight retained.
> - Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours.
> - To be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5 ° or more. (This is because sunlight at extremely oblique angles has little effect.) For a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight. For private

open space to be assessed as being in sunlight, either half its area or a useable strip adjoining the living area should be in sunlight, depending on the size of the space. The amount of sunlight on private open space should be measured at ground level.

- Overshadowing by fences, roof overhangs and changes in level should be taken into consideration. Overshadowing by vegetation should be ignored, except that vegetation may be taken into account in a qualitative way, in particular dense hedges that appear like a solid fence.
- In areas undergoing change, the impact on what is likely to be built on adjoining sites should be considered as well as the existing development.

In *The Benevolent Society v Waverley Council [2010] NSWLEC 1082*, Moore SC 'adopts *Parsonage*, except the fourth dot point, and replaces this dot point with two paragraphs that are not numerically prescriptive.' Declaring that it will no longer be appropriate to cite *Parsonage* as a planning principle, Benevolent Society substitutes the contentious paragraph as follows:

- For a window, door or glass wall to be assessed as being in sunlight, regard should be had not only to the proportion of the glazed area in sunlight but also to the size of the glazed area itself. Strict mathematical formulae are not always an appropriate measure of solar amenity. For larger glazed areas, adequate solar amenity in the built space behind may be achieved by the sun falling on comparatively modest portions of the glazed area.
- For private open space to be assessed as receiving adequate sunlight, regard should be had of the size of the open space and the amount of it receiving sunlight. Self-evidently, the smaller the open space, the greater the proportion of it requiring sunlight for it to have adequate solar amenity. A useable strip adjoining the living area in sunlight usually provides better solar amenity, depending on the size of the space. The amount of sunlight on private open space should ordinarily be measured at ground level but regard should be had to the size of the space as, in a smaller private open space, sunlight falling on seated residents may be adequate.

A number of observations need to be made about what appears to be a highly desirable process of revision.

Waiting for judgement day

The first concerns the fact that revision of a planning principle by the Land and Environment Court is contingent on an opportunity to incorporate such a revision within an opportune judgement. Thus, notwithstanding that from a time shortly after publication of Parsonage the numerical controls were understood to be defective and even regressive (and declared to be so by Moore SC in 2009), it had to wait until April 2010 for the principle to be consolidated and revised.

To be fair, where a published principle is immediately recognised to be so defective in its formulation as to have possible consequences as drastic as sterilising all development of a certain kind, the Court can act with admirable alacrity. The example I have in mind is **Planning principle - access to daylight** in *Allan Robert Cooley and Janet Louise Patterson v City of Sydney Council [2006] NSWLEC 55*, formulated by Watts C, which read:

> 37 Where a person has been enjoying daylight (as distinct from sunlight) from a window or skylight of a dwelling for a considerable period of time, the preservation of this amenity should be given major weight. If a structure is to be erected near the window or skylight, it should not intrude in a significant way within a plane set at 45 degrees to the horizontal at the sill (or, in the case of a skylight, the edge of the skylight nearest the structure), and vertical planes at 45 degrees in plan fanning out from each side of the window.

This principle lasted a little over a weekend on the Court's website, after I identified it and Mike Neustein urgently communicated our thoughts to the Court.

But in the normal process relying on what I call an opportune judgement, the circumstances for revision are hardly ideal. Moore SC explains in his 2009 paper, and also in the *BenSoc* judgement itself, that a Commissioner has to seek submissions from the parties as to the appropriateness of the parts of the principle with which he can deal. This, and other externalities – such as the compressed timing required of the delivery of the judgement in *BenSoc* – can severely limit the appropriate consideration that should be given to a consolidated and revised principle. Thus, *BenSoc* is welcome for moderating the worst of *Parsonage's* deficiencies, but is also an example of what can go wrong.

A glass half full: what is left out matters

So my second concern is that important, but imperfect elements of *Parsonage* escaped attention, or worse, have been almost excised from the principle. *BenSoc* does not refer at all to Clauses 6 and 7 of *Parsonage*. Yet it is those clauses that contain an approximation of the rationale, and elements of the 'process based approach' of the original principle.

In reviewing its antecedents in the model codes and planning instruments, Clause 6 of *Parsonage* enumerates the preference given to winter sun between the hours of 9am and 3pm. It fails to assign to this preference any basis in an understanding of its utility. In other words, the original principle forgoes any attempt to contextualise what is in fact a numerical control, by omitting to explore its purpose. By overlooking the clause, the consolidated principle in *BenSoc* has the effect of leaving this omission unremediated.

Clause 7 of Parsonage is in the style of the exhaustive procedural approach taken to view sharing in *Tenacity*. But by itself, the clause addresses little of the range of concerns that could and should be brought to bear, in a step-by-step assessment of the impact of a measured amount of sunlight.

In my experience, the overall effect of the two original clauses has been most often to embolden Council officers to neglect the possible purpose of the principle, and to privilege a mechanistic interpretation of the *de facto* numerical control. In my perception, this has become only worse since *BenSoc* has left the field open by ignoring the deficiencies of those clauses altogether.

In fact, reading the original three clauses together, it has always been possible to infer the highest level of intent by the Court. I now realise that the usage of the term 'effective sun' is mine, not that of the judgement — but I have always held that *Parsonage* would not have existed were it not that too many applicants have always been tempted to claim any shred of sunlit surface as worthy of consideration in meeting numerical controls, regardless of whether in so doing they were meeting the intended performance objectives of solar access. Really, *Parsonage* sought to eliminate worst practice, and to give some substance to what is effective sunlight. Unfortunately, having to rely in this way on inference runs counter to Senior Commissioner Moore's hope that 'principles are not replete with hidden meanings'. Unless made explicit, the objective of the principle — to ensure that sun counted as complying is indeed actually effective — will remain at least obscure.

A quick fix

I come now to the numerical controls that have been reassessed.

Parsonage proposed that "to be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5 ° or more. (This is because sunlight at extremely oblique angles has little effect.)". In *BenSoc* Moore SC states that this rule "pays no regard to the orientation of the glazed surface to the sun and, in my view provides no functional assistance in decision making. It has never been pressed to me in any case where *Parsonage* has been relied upon by a party".

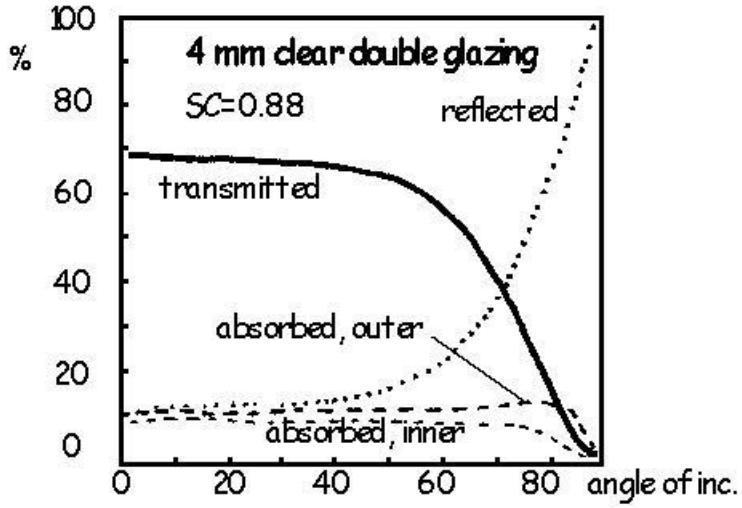

Figure 1: Angular sensitivity of transmitted solar radiation by glazing.

In my view, he is wrong in both of his observations regarding the technical worth of Roseth's formulation, but of course I can't argue with his third. Roseth SC was quite correct in seeking to limit reliance on sun at angles of incidence where the optical properties of the glass itself seriously reduce the solar radiation transmitted through the glass. The real basis of his concern is to be found in the typical graphs of angular selectivity of glazing, such as Figure 1. As we can see, there was no more basis for his choice of 22.5 ° (other than the original Sunlight Indicators report authored by one of his fellow Commissioners) than the 15 ° recommended by Phillips in Sunshine and shade in Australasia. Except perhaps if he thought to also prevent an angle of incidence so acute to the surface of the window, that the resulting sun patch in the room is at best a mere sliver.

The practical difference that results from Roseth's rule for most practical glazing, is to reduce by approximately half an hour the span of time that can be counted as effective sun. If there was anything wrong with the rule, it was only really that what works in plan should also be considered fully in three dimensions – but it is easy to see how difficult that would be to implement in practice. In short, having myself identified an arcane technical shortcoming of this numeric control, I would have supported quite strongly its retention.

Parsonage went on to propose that "for a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight."

Recognising and doing away with the anomaly of the "half the window" test was long overdue. *BenSoc* now proposes that "regard should be had not only to the proportion of the glazed area in sunlight but also to the size of the glazed area itself. Strict mathematical formulae are not always an appropriate measure of solar amenity. For larger glazed areas, adequate solar amenity in the built space behind may be achieved by the sun falling on comparatively modest portions of the glazed area."

The current formulation, though likely to be interpreted in a self-serving manner by a few applicants for new buildings, is altogether more useful. This is especially so when the test is applied to overshadowed neighbours, as was the case in the *BenSoc* judgement.

The provision in *Parsonage* that sought to regulate the assessment of sunlight to private open space had only ever really been used to make life impossible for applicants with otherwise complying small courtyards or terraces. Though Parsonage did refer to the need to consider the size of the private open space, it was easy to interpret as a consideration relating only to a preferred contiguity between the interior and the sunlit portion of the outdoor space. In this, it sometimes had the effect of being doubly punitive.

BenSoc now devotes a whole new dot-point to private open space, advising "regard should be had of the size of the open space and the amount of it receiving sunlight. Self-evidently, the smaller the open space, the greater the proportion of it requiring sunlight for it to have adequate solar amenity. A useable strip adjoining the living area in sunlight usually provides better solar amenity, depending on the size of the space. The amount of sunlight on private open space should ordinarily be measured at ground level but regard should be had to the size of the space as, in a smaller private open space, sunlight falling on seated residents may be adequate."

The new formulation is not only clearer, but captures the reality of what happens with sunlight in smaller courtyards and on verandas.

Conclusion

It would be fair to say that the Court has rarely represented the principles as either unchallengeably robust, or as immutable. Quite the contrary. Their application in individual cases is sufficiently variable to give credence to the claim that the principles are to be used as guidance rather than precedent. More importantly, the Court explicitly invites experts to consider the principles critically. As put by Roseth SC in early 2005:

> "Clearly, where an expert is considering an issue on which the Court has established principles, he/she should consider those principles. However, the expert is not obliged to adopt the principle. Nor is an advocate obliged to adopt it in submissions.
> Where an expert agrees with a planning principle, the correct approach is to adopt it and to apply the relevant parts to the case in question. Where an expert thinks that the planning principle is not entirely correct and requires modification, the correct approach is to adapt it to a form that the expert does consider correct.
> The third approach is to reject parts or the whole of a principle as being misguided. This would be appropriate where the expert believes that the planning principle established by the Court is wrong.....
> Clearly, the rejection of the principle should be supported with good reasons."

In revisiting one of the Court's most influential Planning Principles, Senior Commissioner Moore took the trouble to acknowledge the input of experts in his considered revisions. I have tried to point out in this paper that nevertheless, the Principle remains flawed in important details, and that the constraints the Court imposes on itself to recognise and act in a timely manner on deficiencies in the prescriptive Principles are in themselves an issue. Why do I think this is of such vital concern?

In my current work I am dealing with a number of development applications, at least two of them proceeding to appeal, where a Council and their legal advisers are giving primacy to the "half the window" test. In each case, they appear to draw for their authority on the fact that the text from Parsonage had been adopted into their local controls.

This of course raises a prospective legal and technical difficulty with the application of the planning principle during an appeal. The Senior Commissioner has clearly stated that planning principles of the Court "do not and cannot have the same force as some form of statutory prescription. They certainly cannot automatically displace or override the provisions of the local environmental plan, or a development control plan that deals with the topic of a particular planning principle in a fashion differing from that enunciated by the planning principle itself."

I cannot think of a better reason to encourage experts to fulfil their function as friends of the Court by rigorously testing the Principles, than this — to avoid a situation where the Court might otherwise allow a Planning Principle to persist so long in a flawed state that it becomes the basis of a flawed statutory prescription.