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LEGAL UPDATE
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In this issue:

The legal principles governing the exercise of the power contained in s 96(2) of the EP&A Act

SECTION 96 MODIFICATION – CHANGE OF LOCATION OF DRIVEWAY TO MORE FLOOD PRONE AREA "NOT SUBSTANTIALLY THE SAME DEVELOPMENT"
***DL Newport Pty Ltd v Northern Beaches Council* [2017] NSWLEC 1661 – Land and Environment Court of NSW – Dixon C – 21 November 2017**

This was an appeal to the Land and Environment Court for modification of a development consent for the construction of a three storey shop top housing development with an attached dual occupancy in Newport.

The application was to change the location of the sole vehicular access and driveway so that all traffic would be required to access the development from a new street that was classified as having a greater flooding hazard.

Northern Beaches Council ('Council') relied on evidence given by its flood expert to support its case that the development would not have the same essence in terms of potential for flood impacts and risk to life. During the hearing, the flood experts agreed that the risks to life would be increased unless satisfactory safety measures were put in place.

The Court took into account the agreed position of the flood experts. It held that the development as proposed to be modified was not "substantially the same" as that for which consent was originally granted on the basis that the essence would change from a safe development to a less safe development.

This continues the trend of assessing s 96 modification applications as set out in *Council of Trinity Grammar School v Ashfield Council* [2015] NSWLEC 1086, *Innerwest 888 Pty Ltd v Canterbury Bankstown Council* [2017] NSWLEC 1241 et al.

In those decisions, the Court found that a particular element of the original consent, or "essential component", was to be varied and therefore the development was not "substantially the same".

In light of these decisions, developers and Councils should carefully consider whether a s 96 modification application will vary an "essential component" of development.

The recently passed *Environmental Planning and Assessment Amendment Act 2017* requires the preparation of a statement of reasons in the granting of development consent.

Notably, that document will be particularly relevant, we assume, in determining the "essential components" of the consent.

"SUBSTANTIALLY THE SAME DEVELOPMENT" TEST

The Commissioner provided a useful summary of the applicable legal principles applying to the "substantially the same development" test at [44] of her judgment. These principles govern the exercise of the power contained in s 96(2) of the *Environmental Planning and Assessment Act 1979* as follows:

1. "First, the power contained in the provision is to "modify the consent". Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (*North Sydney Council v Michael Standley & Associates Pty Ltd*(1998) 43 NSWLR 468 at 475 and *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333; (2008) 166 LGERA 342 at [13]). Parliament has therefore "chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity" (*Michael Standley* at 440);
2. the modification power is beneficial and facultative (*Michael Standley* at 440);
3. the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (*Scrap Reality* at [16]);
4. the applicant for the modification bears the onus of showing that the modified development is substantially the same as the original development (*Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8);
5. the term "substantially" means "essentially or materially having the same essence" (*Vacik* endorsed in *Michael Standley* at 440 and *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]);

6. the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (*Scrap Realty* at [19]);

7. the term "modify" means "to alter without radical transformation" (*Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 42, *Michael Standley* at 474, *Scrap Realty* at [13] and *Moto Projects* at [27]);

8. in approaching the comparison exercise "one should not fall into the trap" of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made under s 96(2)(a) (*Vacik*);

9. the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their "proper contexts (including the circumstances in which the development consent was granted)" (*Moto Projects* at [56]); and

10. a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be "legally flawed" (*Moto Projects* at [52]).

For further information regarding this update, please contact Ryan Bennett or Alistair Knox.

Pikes & Verekers Lawyers

Level 2
50 King Street
SYDNEY NSW 2000

DX 521 Sydney
T 02 9262 6188
F 02 9262 6175

E info@pvlaw.com.au
W www.pvlaw.com.au