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Proper Construction of Clause 6.21 (Design Excellence) of Sydney Local Environmental Plan 2012

PROPER CONSTRUCTION OF CLAUSE 6.21 (DESIGN EXCELLENCE) OF SYDNEY LOCAL ENVIRONMENTAL PLAN 2012

The Council of the City of Sydney v Emag Apartments Pty Limited [2023] NSWLEC 23

This case involved an appeal by the Council of the City of Sydney (**Council**) pursuant to s 56A of the *Land and Environment Court Act 1979* against decisions of Commissioner Dickson delivered in March and June 2022.

The Commissioner had earlier approved a development application for alterations and additions to an existing building, including the demolition and construction of an 18-storey boarding house.

The grounds of appeal included that the Commissioner erred on a question of law in her finding that clause 6.21 of the *Sydney Local Environmental Plan 2012 (SLEP 2012)* was limited to the external urban design of the proposed development, rather than the internal amenity of the building.

Clause 6.21 provides a jurisdictional requirement that development consent must not be granted unless, in the opinion of the consent authority, the proposed development exhibits design excellence. Clause 6.21(4) details a number of mandatory matters which the consent authority must have regard to.

The Commissioner accepted the submissions of Senior Counsel for the applicant at the hearing that clause 6.21(3) &(4) were only directed to external urban design.

DISCLAIMER

The above are summaries only. They are not intended to take the place of legal advice.

On 17 March 2023, her Honour Justice Duggan delivered judgment upholding most of the Council's grounds of appeal. This included findings that:

- Clause 6.21 (2) does not limit itself to development that comprises the erection of a new building or external alterations to an existing building. Instead by using the word 'involving', the class of development to which clause 6.21 applies is widened.
- If part (or the whole) of the proposed development involves the erection of a new building or external alterations to an existing building, the clause is triggered.
- Merely because clause 6.21 (2) refers to 'external alterations' does not mean that internal amenity issues are not to be considered in the context of determining whether the development exhibits design excellence.
- The Commissioner erred in her construction of the clause as being confined to 'external urban design of the proposed development.'
- The matters required to be considered under clause 6.21 (4) are not exhaustive and, given it is necessary to consider the development as a whole, issues of internal design and amenity would not be irrelevant.

Her Honour also referenced the decision of Preston CJ (*Toga Penrith Development Pty Ltd v Penrith City Council* [2022] NSWLEC 117) in relation to the requirement to 'have regard' to a matter. Her Honour stated the following at [23], with reference to *Toga*:

1. *It is not sufficient for a Commissioner to form the opinion that the proposed development did or did not exhibit design excellence or to do so having regard to the evidence of the urban design experts: at [70];*
2. *An opinion that the proposed development does or does not exhibit design excellence, which is formed without having regard to the matters prescribed in cl 6.21(4), will not be an opinion for the purposes of cl 6.21(3): at [72];*
3. *The matters in cl 6.21(4) are framed in particular language, not as general topics but instead as outcomes or objectives to be achieved, and the statutory obligation to "have regard" to these matters requires having regard to the particular terms in which the matters are expressed and not just the general topics that are the subject of the matters: at [73];*
4. *The particular terms in which the matters in cl 6.21(4) are expressed serve as focal points for, and fundamental elements in, the consent authority deciding whether or not the proposed development exhibits design excellence: at [73]; and*
5. *Consideration of each of the matters in (4)(a), (b), (c) and (d)(i)-(xiii) requires, in each case, answering the particular question posed: at [74].*

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This decision provides clear guidance on the application of a design excellence clause. Given the jurisdictional nature of such clauses, both applicants and consent authorities need to carefully consider the application of such clauses to their development and as part of the assessment process.

For more information about this update, please contact Tom Ward.

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