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LEGAL UPDATE
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Show Me the Money

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***Hinkler Ave 1 Pty Limited v Sutherland Shire Council* [2023] NSWCA 264**

The date on which a development application is found to be properly made is particularly important when dealing with savings provisions and the replacement of environmental planning instruments.

The facts in this case concerned the operation of a transitional provision in the *State Environmental Planning Policy (Housing)* 2021 ("Housing SEPP"). The Housing SEPP imposes more onerous requirements to provide affordable housing than the previous *State Environmental Planning Policy (Affordable Rental Housing*) ("2009 SEPP"), which would restrict the applicant's proposed mixed-use development of the site.

The principal issue for determination was whether the development was subject to the Housing SEPP or the previous policy. The Housing SEPP does not apply to a development application "made, but not yet decided before the commencement date", being 26 November 2021 (Cl 2(1) Sch 7A).

The applicant lodged a development application to the NSW Portal on 22 October 2021. The applicant did not submit an A4 building plan or pay the lodgement fee until early December. For these reasons, the primary judge found that the manner and form requirements of cl 50 of the *Environmental Planning and Assessment Regulation 2000* (NSW) ("EPA Regulation") were not complied with before

the commencement date. The effect was that the development was governed by the Housing SEPP rather than the 2009 SEPP (see *Hinkler Ave 1 Pty Limited v Sutherland Shire Council* [2022] NSWLEC 150 at [76], [78]).

The Court dismissed the appeal against the decision of the primary judge.

Applying *Botany Bay City Council v Remath Investments No 6 Pty Ltd* (2000) 50 NSWLR 312, the Court held that a development application is made at the time of its lodgement, which includes the lodgement of necessary forms, information, documents and payment of the prescribed fee. After the applicant submitted the requested documentation, the portal registered the lodgement as 13 December 2021 and both parties were notified of that fact.

The requirement for a consent authority to determine a lodgement fee did not negate the importance of the condition to pay that fee. The development application could not be made and then unmade in the manner proposed by the applicant. The Court found that the transitional provision envisages an identifiable event, namely the making of the development application [at 45]. Therefore, the development application was not made until the fee payment in December.

The Court rejected the applicant's contention that the primary judge erred in law by failing to determine for himself whether the development application had been made by the commencement date. The primary judge found that the documents submitted before 26 November 2021 were 'not of a nature that could be accepted' as meeting the requirements of the *EPA Regulation* 2000 [at 59]. The applicant's failure to include "an A4 plan of the building that indicates its height and external configuration, as erected" meant that the development application was not made before the commencement date.

This case demonstrates that in order to rely upon a savings provision, a development application must be complete. Completeness demands the submission of all required documentation along with the payment of the lodgement fee.

Put simply, without submitting a complete development application, receiving notification of the DA fee and paying it, the DA will not be "made" for the purpose of savings provisions.

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