PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
June 2022

In this issue:

JURISDICTIONAL PRECONDITIONS IN PLANNING APPEALS

Jurisdictional preconditions are requirements, imposed by legislation, that must be satisfied before the consent authority can grant consent to a development application (**DA**). The importance of ensuring that all jurisdictional preconditions are satisfied prior to the determination of a DA was recently highlighted in the following cases decided by the Land and Environment Court (**Court**).

***11 Church Street Pty Ltd ATF The Trustee for 11 Church Street Discretionary Trust v Newcastle City Council* [2022] NSWLEC 1252**

This case demonstrated that if not all jurisdictional preconditions are met, the Court (whether that be at a contested hearing or pursuant to a proposed s 34 agreement) does not have lawful authority to determine the relevant DA by the granting of consent. Applicants run the risk of the proceedings being deferred (as was the case in this matter) or dismissed if a precondition has not been met.

The facts in this case concerned a DA for the demolition of part of an existing structure and the erection of a 14-storey building, including a café at ground level and shop top housing above. The shop top housing included 38 regular units (19 of which were affordable rental units).

The parties agreed that the proposal satisfied the 'must not refuse' standards provided in clause 14 of the former *State Environmental Planning Policy (Affordable Rental Housing) 2009* (which has since been transferred to the *State*

Environmental Planning Policy (Housing) 2021). The principal issue for determination by the Court was the issue of car parking, or in this case the provision of no parking.

However, Commissioner Horton was not satisfied that the requirements of cl 7 of the former *State Environmental Planning Policy No 55 – Remediation of Land* (which has since been transferred to *State Environmental Planning Policy (Resilience and Hazards) 2021*) had been met. The corresponding provision in the current Policy (section 4.6(1) – which is identical to clause 7(1) of the former Policy) prohibits the consent authority from granting consent to a DA unless:

> *(a) it has considered whether the land is contaminated, and*
>
> *(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and*
>
> *(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.*

The Commissioner held at [108] that there was incomplete knowledge as to whether development for the purposes referred to in Table 1 of the Contaminated Land Planning Guidelines had been carried out on the land in the past.

Whilst the Commissioner was of the view that the DA was deserving of the granting of consent (on a merits basis), he directed the applicant to provide the Court with a report specifying the findings of a preliminary investigation of the land concerned, in accordance with the Contaminated Land Planning Guidelines.

As this case demonstrates, it is ultimately the applicant's responsibility to ensure that all jurisdictional preconditions are met – irrespective of whether they are raised by the respondent in the proceedings.

It is therefore important that thorough consideration is given to all preconditions to the granting of development consent which may apply to a DA, both in preparing it for lodgement and in assessing it for determination. Ideally this should be considered prior to the lodging of a Class 1 appeal in the Court, so that sufficient time exists to address such matters prior to any hearing.

***Barel v Randwick City Council* [2022] NSWLEC 1176**

This case was an appeal against the actual refusal of a DA. The DA proposed demolition and construction of a two-storey attached dual occupancy dwelling, basement excavation, tree removal and landscaping and associated works.

The Council argued that the application warranted refusal due to the excessive excavation (and the insufficient detail supporting it), the scale and form of the proposed development (including that it was inconsistent with the desired character of the locality), and the proposed development having unreasonable and detrimental impacts on the adjoining properties.

As is the case for all DAs, Commissioner Dickson had to address the relevant jurisdictional preconditions prior to determining the DA in this case.

As was noted previously in this article, the provisions of *State Environmental Planning Policy (Resilience and Hazards) 2021* came into force on 1 March 2022. However, the Commissioner determined the DA in this case as if clause 7(1) of State Environmental Planning Policy No 55 continued to apply.

Commissioner Dickson was not satisfied that the submitted Geotechnical Report (which was a desktop study) satisfactorily assessed the potential for contamination of the subject site. The Commissioner held at paragraph [18] that prior to the granting any approval, the consent authority would require at least:

- an investigation of the previous development application history for the site;
- perusal of historic aerial imagery; and
- a site inspection,

to allow the consent authority to undertake the consideration required under cl 7 of SEPP 55.

The Commissioner was not satisfied that cl 7 of SEPP 55 was met in this case, and due to the absence of the information referred to above, dismissed the appeal on the basis that the jurisdictional precondition under clause 7 was not satisfied.

***Jeffrey v Canterbury Bankstown Council* [2021] NSWLEC 73**

This case involved a s 56A appeal against a decision of Acting Commissioner Clay, who refused to grant consent to a development application for change of use of premises to a funeral home.

The appellant argued that the Acting Commissioner erred on the following grounds:

1. He misconstrued the objective of a development standard;

2. He misconstrued the objectives of the zone in which the proposed development was to be carried out;

3. He constructively failed to exercise jurisdiction by not addressing all of the ways in which the applicant's written request sought to justify the contravention of the development standard; and

4. He denied the applicant procedural fairness by failing to warn her that he might regard her written request to be insufficient.

Chief Justice Preston found that only the second ground was substantiated. However, his Honour dismissed the appeal in any event because the misconstruction of the zone objectives did not vitiate the Acting Commissioner's decision in the circumstances of the particular case.

In relation to the allegation of a denial of procedural fairness, the appellant had contended that the adequacy of the written request was not a principal contested issue and therefore she should have been warned by the Acting Commissioner that her written request seeking to justify the contravention of the development standard considered in her case was not sufficient. This ground was rejected by Preston CJ, who stated the following at paragraph [85]:

> *… The matters raised by the statutory provisions of cl 4.6(3) and (4) are jurisdictional: the Court cannot grant development consent for development that contravenes a development standard unless the matters raised by the statutory provisions are satisfied. Such matters will be principal contested issues regardless of whether the parties raise them…"*

This case reinforces the importance of ensuring that jurisdictional preconditions are met in relation to a DA, irrespective of whether such matters are specifically contended by the respondent in an appeal to the Court. Indeed, an applicant needs to be able to establish that all relevant jurisdictional preconditions are satisfied prior to the determination of the DA, whether by the consent authority at first instance or by the Court on appeal.

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

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