PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
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IMMINENCE AND CERTAINTY

***Brazete Investments Pty Ltd v North Sydney Council* [2020] NSWLEC 1544**

This matter related to a development application to make additions to an existing residential flat building in McMahons Point.

The principal issue in the matter was the impact on the heritage significance of the existing building, in circumstances where Council had prepared a Draft LEP to list the building as a heritage item.

The subject building was identified as a neutral item within the McMahons Point South Heritage Conservation Area. Following the lodgement of the Class 1 appeal, Council submitted a planning proposal with "housekeeping amendments" which also sought to list the building as a heritage item. Council was granted gateway determination, and publicly exhibited the planning proposal, between the s34 conference and the hearing of the matter.

As a result, the building had status as a draft heritage item at hearing. The Court had to determine the imminence and certainty of the making of the draft instrument (per *Terrace Towers Holdings Pty Limited v Sutherland Shire Council* (2003) LGERA 195).

The Commissioner determined that although there was a high degree of certainty that the instrument would be made, it was uncertain as to whether the site would be

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listed as a heritage item, inter alia because the heritage report relied upon to support the heritage listing was in fact prepared years earlier to support the issuance of an Interim Heritage Order. Whilst the Commissioner considered the planning proposal, as required by s 4.15(1)(a)(ii) of the *EP&A Act* no determinative weight was given to the planning proposal.

The Commissioner upheld the appeal and granted development consent.

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

EVEN MORE ON CL 4.6

Pikes & Verekers Lawyers have previously reported on the evolving case law regarding cl 4.6 in our September 2019 and July 2019 editions (and many before that). On review of 2021, clause 4.6 continues to be a contentious, but not insurmountable, provision.

Prismena Properties Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1034

This matter related to a development application for a 3-unit residential flat building in Double Bay.

Clause 4.1A of Woollahra LEP prescribed a minimum lot size development standard of 700m^2 for RFB development which the subject site, being 638.6m^2, contravened by 8.8%. The primary dispute between the parties was the sufficiency of the cl 4.6 variation request.

The objective of the relevant development standard was *"to achieve planned residential density in certain zones consistent with the desired future character of the neighbourhood."* The variation request argued that when interpreting the objective, the "focus" should be on "achieving the desired future character" rather than on "achieving 'planned residential density'". The applicant argued that planned residential density, as conceived in the objective, "goes to regulation and cannot be satisfied". The findings of Preston CJ in *Baron Corporation Pty Limited v Council of the City of Sydney* (2019) 243 LGERA 338; [2019] NSWLEC 61 ('*Baron*') at [57], were used to support the argument.

The Commissioner found that there were pertinent parallels between cl 4.1A and the findings in regard to objective (b) in *Baron* and ultimately found that the proposed development did achieve the relevant objective.

The environmental planning grounds in the cl 4.6 request were, inter alia:

(1) the site's topography (sloping away from the street) meant an RFB would not present to the street any differently from other lower density housing forms,

(2) there was an institutional development rather than residences to the immediate rear (where the visual bulk would be more apparent),

(3) there was a consistency of bulk and scale with existing adjacent development,

(4) the aspect that contravened "does not materially affect the form of the development that is anticipated on the site given that it complies with the FSR and height standards.

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Council contended that (1) the written request impermissibly addressed the development as a whole rather than the contravening aspect and why that contravention was justified, and (2) that the planning grounds were not particular to the circumstances of this case and could apply equally to any complying development.

The Commissioner upheld the appeal and granted the development consent.

Triple Blue Pty Ltd v Woollahra Municipal Council & Ors [2021] NSWLEC 1065

This matter related to a development application for alterations and additions to a residential flat building, including an extension to the rear and a new unit above. The existing building was a heritage item, which exceeded the height and floor space ratio development standards. The alterations and additions resulted in further exceedances.

The applicant and respondent reached agreement through the s34 conciliation process. Before the agreement was entered, an adjoining neighbour was joined to the proceedings on the basis that heritage impacts upon their property, which was also a heritage item, were not sufficiently addressed (see *Triple Blue Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 27).* As a result the matter did not settle and proceeded to hearing.

Ultimately, Commissioner O'Neill found that the proposal would not detrimentally impact on the heritage values of the neighbouring item. Notably, in considering the cl 4.6 requests for height and FSR, the Commissioner accepted an argument that the additional floor space was required to fund the proposed heritage conservation works. The Commissioner stated, at [50] "*a proposal that facilitates the conservation of a heritage item is an environmental planning ground because it fulfils to the object of the EPA Act to promote the sustainable management of built and cultural heritage. I accept that the conservation of a heritage item does not, in of itself, justify additions to the building envelope of the existing building, however, I am satisfied that the proposed modest additions to the building envelope have been located so as to retain the unique architectural qualities of The Chilterns and that these additions will facilitate the conservation works required for the conservation of the heritage item*".

The Commissioner upheld the appeal and granted the development consent.

Eather v Randwick City Council [2021] NSWLEC 1075

This matter related to a development application for Torrens title subdivision of an approved and constructed attached dual occupancy development in Chifley.

Pursuant to cl 4.1 of *Randwick LEP 2012* the minimum lot size is 400m^2. The resultant lots from the proposed subdivision would be 392.2 m^2 and 373.7m^2.

One of the arguments advanced in the cl 4.6 request was that the subdivision would be entirely consistent with the desired future character and anticipated subdivision pattern as described in the Local Strategic Planning Statement and the Housing Strategy.

The Housing Strategy, which was a document referred to in Council's LSPS, indicated a future intention to reduce the minimum lot size development standard to 325m^2. Although the LSPS, a strategic document which Councils are required to prepare pursuant to s 3.9 of the EPA Act, is not specifically referenced as a relevant consideration pursuant to s 4.15 of

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the EPA Act, the applicant sought to give the document weight to inform the desired future character.

Commissioner Walsh held that "the fact of the particularly small departure from the actual numerical standard and lack of any material impacts consequential of the departure are sufficient environmental planning grounds to justify contravening the development standard" and that "alignment between the lot sizes as proposed and the strategic intentions of Council as understood from particulars of Council's Local Strategic Planning Statement…which suggest changes to minimum lot sizes under a future change to RLEP, is a further environmental planning ground justifying the contravention of the subdivision standard".

The Commissioner upheld the appeal and granted development consent.

We note that, on 23 March 2021, Randwick City Council resolved to further reduce the minimum lot size for attached dual occupancies in the R2 Zone to 275m^2, although this has not yet translated to Council's LEP.

Barua No. 4 Pty Ltd v Randwick City Council [2021] NSWLEC 1156

This matter related to a development application for a residential 3-4 storey residential flat building. The proposal, at 1.23:1, exceeded the Floor Space Ratio development standard of 0.9:1. The proposal included the amalgamation of two sites. The proposal would result in view loss to an adjacent residential flat building.

Following general agreement between the experts, the matter proceeded by way of a consent orders hearing, in which the Court is nonetheless required to carry out an assessment under s 4.15 of the EPA Act to determine whether it is lawful and appropriate to grant consent.

Commissioner Horton accepted the argument advanced in the cl 4.6 request that the amalgamation of lots "provides a basis for the distribution of gross floor area on the site in a manner that provides for the retention of some views". The Commissioner summarised the grounds stated in the cl 4.6 request in relation to amalgamation, for example "if the two lots were developed independently, each would require separate lift and fire stairs cores which are excluded from FSR calculations but contribute to bulk and scale" and "if developed independently, the area between the built forms on two sites would be external space formed by a setback of 2m from side boundaries which is less desirable as it is more likely to generate adverse impacts, including greater view loss…".

Further, objective (d) of the Floor Space Ratio development standard is "to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views". A neighbouring resident submitted that the absence of any qualifying text in the objective to allow latitude for any impact on the amenity of neighbouring land. The Commissioner held that the impacts were as a result of a complying height that is unrelated to the contravention of the FSR standard.

The Commissioner upheld the appeal and granted development consent.

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

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"WHAT IS A HEDGE"

"WHAT IS A SEVERE VIEW IMPACT"

***Wein v Reeves* [2022] NSWLEC 1019**

This matter related to an application under the *Trees (Disputes Between Neighbours) Act 2006* ("Trees Act"). The properties in question were located on Sydney Harbour with both properties enjoying extensive harbour views.

The Applicant commenced proceedings pursuant to s14B of the Trees Act for obstruction of views and sought Orders for the pruning of the trees in the neighbour's rear yard.

Acting Commissioner Douglas worked through the process set out in *Grantham Holdings Pty Ltd v Miller* [2011] NSWLEC 1122 at [17]- [22] for considering the jurisdictional tests under Pt 2A of the Trees Act. Those jurisdictional tests, set out below, must all be satisfied before any Orders may be made to ameliorate impact.

Do the trees form a hedge?

The Court considered the first test in s14A(1) - are the trees a hedge for the purposes of the Act?

The commissioner considered the commentary of Preston CJ in *Johnson v Angus* (2012) 190 LGERA 334 and noted that:

> *"Hedges may be comprised of two trees, but when representations are made that only two trees comprise a hedge, there is a distinct onus on the applicant to prove that the relationship between the trees satisfies the requirements of the Trees Act. Typically, this would involve trees of a similar species and form, planted at the same time, relatively close together"*

Considering the various grouping of trees that were the subject of the application the Commissioner found that only one grouping of Cypress trees met the requirements of s14(A)(1). The balance of the trees the subject the application did not satisfy the criteria of s14A(1) and were therefore discounted.

These trees were of different species, strongly dissimilar in appearance, morphology, function and growth habit. The trees were also planted at different times such that the Commissioner found that the trees had not been planted so as to "form a hedge".

Severe Obstruction of View

The Commissioner in considering the four Cypress trees, being the only trees which met the definition of a hedge, moved to consider the other jurisdictional hurdles in s14E of the Act being those matters of which the Court must be satisfied before making any Order.

Amongst other matters, the Court was required to be satisfied that the trees were "severely obstructing a view from a dwelling situated on the applicant's land".

The Applicant submitted in considering the view impact that for the Court to find jurisdiction it need only consider those views impacted in isolation and, in particular, could ignore extensive harbour views maintained from the 3rd level of the dwelling.

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The Commissioner rejected the submission and endorsed the Court's approach in *Haindl v Daisch* [2011] NSWLEC 1145, namely that "to assess the severity of obstruction of a view from a dwelling situated on the applicant's land requires consideration of all views available from a dwelling".

In adopting this approach and applying the view sharing principles in *Tenacity Consulting v Warringah* [2004] NSWLEC 140 to those views impacted, the Court found that the impact upon views by the Cypress "hedge" did not create a "severe" view obstruction to the "whole of the property".

The Commissioner dismissed the application.

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

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