PIKES & VEREKERS
LAWYERS

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PIKES & VEREKERS NEWS

We congratulate Roslyn McCulloch on successfully attaining Specialist Accreditation in the field of Local Government and Planning Law.

Roslyn joins our other Accredited Specialists, Stephen Griffiths and Julie Walsh (Local Government and Planning Law), David Baxter and Kim Probert (Property Law) and Rob Tassell (Commercial Litigation).

We also welcome Blair Jackson, a recent Graduate-at-Law, as our newest staff member.

A VICTORY FOR COMMON SENSE – COURT UPHOLDS COUNCIL CLEAN-UP ORDER

***McNeil v Narrabri Shire Council* [2013] NSWCA 112**
NSW Court of Appeal – Barrett JA, Emmett JA, Preston CJ – 3 April 2012

This was an appeal to the Court of Appeal against a decision of the District Court at Tamworth directing judgment for the Council against Mr McNeil ("McNeil"), the owner of a property in the Council area, to pay the sum of $40,687.00 to the Council for its costs of cleaning up his property following non-compliance with an order issued by the Council.

McNeil owned a property consisting of two lots, but just one street address reference, in use as a pizza shop, when it suffered damage in a fire on 29 January 2006.

After investigations and correspondence, Council issued a notice of intention to issue an order under Section 132 of the Local Government Act 1993 ("the Act").

The notice indicated that Council proposed to issue an order under Section 124 (item 21) of the Act in respect of one of the two lots to the property, which would require the following:

> *"Restoration of the land to a safe and healthy condition."*

On 7 July 2006 the Council gave McNeil an order under Section 124 of the Act.

The property was described as in the notice of intention and the reason for giving the order was stated to be that the property was not in a safe and healthy condition as a result of "the presence of a dilapidated structure and the presence of friable asbestos waste".

No appeal was lodged against the order.

On 11 October 2006 the Council wrote to McNeil stating that it intended to enter the premises for the purposes of carrying out the order, that it had engaged contractors for this purpose and that it would be seeking to recover associated costs from McNeil under Section 678 of the Act.

Later in October, the Council's contractors cleared both lots to the property and rendered an invoice to the Council.

McNeil denied that the Council was entitled to recover from him the sum claimed as a debt under Section 678. The essence of his defence was that he was not given a valid order under Section 124.

Further, McNeil alleged that he did not fail to comply with the terms of the order as at the date that order was given, the property was not unsafe and unhealthy and that the expenses incurred by Council were not proper expenses under Section 678 of the Act.

The Appeal

The grounds of appeal were as follows:

1. The Section 124 order was invalid because it did not order McNeil to do, or to refrain from doing, anything.

2. Item 21 of the Table in Section 124 does not authorise an order requiring demolition or removal of a building.

3. The Section 124 order, even if otherwise valid and effective in relation to Lot 1, was ineffective in relation to Lot 2.

4. The Section 124 order was invalid because it was based on the premise that friable asbestos material was present on the property, in circumstances where a finding should have been made that there was no friable asbestos on the property.

The Court dismissed each ground of appeal.

The Section 124 Order Did Not Require Anything To Be Done

The Court noted that although the Section 124 order was "infelicitous in its expression" nevertheless it satisfactorily set out what was required to be done to comply with its terms.

The Section 132 notice of intention had used the precise words "restoration of the land to a safe and healthy condition" and this phrase had been omitted from the order itself.

The Court held that, nevertheless, the terms of the Section 124 order achieved the same effect of requiring restoration of the land to a safe and healthy condition. The order set out three specific requirements which specified the person required to undertake the restoration, namely an appropriately licenced contractor, the restoration to be undertaken being "all clean-up works associated with the site" and the outcome or objective to be achieved, namely, "to restore, safe and healthy conditions".

Accordingly, the Court held that, properly read in its entirety, the order required McNeil to do something, being clean-up works on the property to restore safe and healthy conditions. Accordingly, the order was clear enough in identifying what it was the Council was ordering McNeil to do.

No Power To Require Demolition

The Court dismissed the contention that an order based on item 21 of Section 124 of the Act is incapable of requiring the demolition of any building.

Misdescription Of Property

It was also argued by McNeil that the failure to refer to Lot 2 in the order rendered it invalid.

The Court held that the reference to the street address in the order was sufficient to identify the property.

No Friable Asbestos Material

McNeil alleged that the circumstances on which the Section 124 order was based were that, as a result of the presence of friable asbestos waste, the property was not in a safe and healthy condition. McNeil contended that, on the evidence, there was no friable asbestos material on the property at the time when the Council made the order and, accordingly, the order was invalid. The Court noted that this raised a question as to the onus of proof in relation to invalidity. The Court held that the onus was on McNeil to establish that the order was invalid by establishing the fact that there was no friable asbestos. This onus was not overcome.

Accordingly, the appeal was dismissed.

For enquiries about this case please contact Julie Walsh or James Fan.

RESOLUTION OF CONFLICT BETWEEN LEP AND DCP

***Maguire v Sutherland Shire Council; Furia Pty Ltd v Sutherland Shire Council* [2013] NSWLEC 1115**
2 July 2013 – NSW Land and Environment Court – Morris C

This case considered a development application for a childcare centre in circumstances where the Development Control Plan ("DCP") precluded the approval of childcare centres in cul-de-sacs.

The Commissioner applied the recently amended Section 74C(5)(b) of the Environmental Planning and Assessment Act 1979 ("the Act"), which amendment was the subject of our November 2012 Legal Update (Development Control Plans: Clarification of the Status Quo or a Watering Down of Development Controls?).

Section 79C(5) provides as follows:

> *"A provision of a Development Control Plan (whenever made) has no effect to the extent that:*
>
> *(a) It is the same or substantially the same as a provision of an environmental planning instrument applying to the same land, or*
>
> *(b) it is inconsistent or incompatible with the provisions of any such instrument."*

The Commissioner noted at paragraph 70 of the judgment:

> *"I do not accept that the DCP can prohibit the establishment of childcare centres in cul-de-sacs. That is because, in accordance with the provisions of Section 74C(5)(b) of the Environmental Planning and Assessment Act 1979 a Development Control Plan has no effect to the extent that it is inconsistent with the LEP. A childcare centre is permissible with consent on the land within Zone 4 and therefore the DCP cannot 'prohibit' the grant of that consent. The DCP can act as a guide to preferred locations and accordingly, regard must be had to the locational objectives contained within the plan."*

The Commissioner in the circumstances of the case was satisfied that the centre did not pose any health or safety risk to children using the centre and that any potential environmental impacts were minimised.

Accordingly, the provisions of the DCP did not preclude the grant of consent.

For enquiries about this case please contact Gary Green or Joshua Palmer.

ONLY LAWFUL WORK WILL PREVENT THE LAPSING OF A CONSENT

***K and M Prodanovski Pty Ltd v Wollongong City Council* [2013] NSWCA 202**
NSW Court of Appeal – Meagher JA, Leeming JA and Sackville AJA – 18 June 2013

This was an appeal from a decision of Sheahan J of the Land and Environment Court as to whether a development consent for the redevelopment of land at Keiraville had lapsed pursuant to Section 95 of the Environmental Planning and Assessment Act 1979 ("the EPA Act").

Section 95(4) provides:

> *"Development consent for:*
>
> *(a) the erection of a building, or*
> *(b) the subdivision of land, or*
> *(c) the carrying out of a work,*
>
> *does not lapse if building, engineering or construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies before the date on which the consent would otherwise lapse under this section."*

The Relevant Facts

Prior to the grant of consent a geotechnical investigation of the land was undertaken. The report recommended additional geotechnical investigations on part of the land following demolition of the existing structures.

Conditions of consent required, inter alia:

- A supplementary geotechnical investigation of part of the land "once demolition of structures is complete".
- The appointment of a Principal Certifying Authority ("PCA") prior to the commencement of work.
- Demolition in accordance with AS2601(2001) and the requirements of NSW WorkCover Authority.

Prior to the date on which the consent would have lapsed (28 June 2008) demolition of the structure was undertaken but not in accordance with the relevant condition of consent. Subsequently, between 19 and 24 June 2008, further geotechnical work involving the drilling of 3 boreholes was undertaken and was the subject of a report dated 31 July 2008. No PCA had been appointed at the time of the demolition or the further geotechnical work.

The Findings

Sheahan J had held that the demolition work was not undertaken in accordance with the relevant condition of consent and was therefore contrary to Section 76A(1) of the EPA Act and so did not prevent the lapsing of the consent. The appellant did not seek to overturn that part of the decision of Sheahan J.

The Court of Appeal confirmed that if work is not undertaken in accordance with the consent, it will not "relate to" the development for which consent is given, and so will not prevent the lapsing of that consent. The Court held that the geotechnical works undertaken in June 2008 were not undertaken after demolition work **in accordance with the consent** and so were also unlawful. As the geotechnical works were unlawful, they did not operate to prevent the lapsing of the consent under Section 95 of the EPA Act.

The Court rejected the Council's argument that the appellant was required to appoint a PCA before commencing **any** work, including geotechnical work. The condition relating to supplementary geotechnical work was silent as to the need for a PCA prior to that work being undertaken. No other conditions suggested that the term "work" in relation to the condition requiring the appointment of a PCA would include preliminary investigations such as those conducted by the appellant.

The appeal was dismissed with costs.

For enquiries about this case please contact Ryan Bennett or James Fan.

AN UPDATED PLANNING PRINCIPLE

***Davies v Penrith City Council* [2013] NSWLEC 1141**
NSW Land and Environment Court – Moore SC – 31 July 2012

The relevant planning principle on criteria for assessing impact on neighbouring properties, set out in *Pafburn v North Sydney Council* [2005] NSWLEC 444, has been amended in a decision of Senior Commissioner Moore.

The relevant planning principle in *Pafburn* provided:

> *The following questions are relevant to the assessment of impacts on neighbouring properties:*
>
> - *How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?*

- *How necessary and/or reasonable is the proposal causing the impact?*
- *How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?*
- *Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?*
- *Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?*

In a decision concerning the necessity of a carport, the Senior Commissioner noted that suggestions of necessity may be related to the personal circumstances of the private owner. Considering that development consents run with the land, it was held that issues of necessity were not relevant.

Accordingly, the Senior Commissioner amended the planning principle for assessing impact on neighbouring properties by amending the second bullet point as follows:

- ***How reasonable is the proposal causing the impact?***

For enquiries about this case please contact Colleen Schofield or Ros McCulloch.

LEP SAVINGS PROVISION

***Alamdo Holdings Pty Ltd v The Hills Shire Council* [2012] NSWLEC 1302**
NSW Land and Environment Court – Dixon C – 31 October 2012

The proceedings concerned a development application to change the use of an existing building in a light industrial complex to that of bulky goods retail.

At the time of the hearing of the matter, the then in force Baulkham Hills Local Environmental Plan 2005 provided that the use of bulky goods retail was permissible with development consent. However, the draft Hills Local Environmental Plan 2012 had been exhibited, but not yet commenced, which would have the effect of prohibiting the development.

After the Commissioner presiding over the matter reserved judgment, the Hills Shire Local Environmental Plan 2012 ("the new LEP") came into force. On this basis, the parties came back before the Court to present arguments as to the weight to be applied to the new LEP.

After consideration of the wording of the relevant savings provision of the new LEP, the Commissioner found that the new LEP was not a relevant consideration pursuant to Section 79C of the Environmental Planning and Assessment Act 1979 ("the Act").

Following an analysis of the merits of the matter, the Commissioner granted development consent to the change of use.

The Savings Provision

The Standard Instrument (Local Environmental Plan) Order 2006 ("the Standard Instrument") does not contain a savings provision. However, it has been a regular occurrence in new standard instrument form LEPs to include a savings provision at clause 1.8A.

In this case, the new LEP (being a standard instrument LEP) contained at clause 1.8A a savings provision which stated that:

> *"If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement,* ***the application must be determined as if this Plan had not commenced****."* (emphasis added)

The Relevant Principles

Section 79C(1) provides that:

> *"In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:*
>
> *(a) the provisions of:*
>
> *(i) any environmental planning instrument, and*
>
> *(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
>
> *…*
>
> *(e) the public interest."*

Pursuant to Section 79C(1)(a)(ii), a draft LEP is a mandatory consideration, but the weight to which it is given is determined by its certainty and imminence: see *Blackmore Design Group v North Sydney Council* (2001) 118 LGERA 290.

In the seminal decision of *Terrace Towers v Sutherland Shire Council* (2003) 129 LGERA 195 (in which Pike Pike & Fenwick acted for the successful Council), the Court of Appeal found that it was appropriate for a consent authority, or the Court on appeal, to give significant weight to a plan that commenced after the making of the development application. This was despite there being a savings provision which provided that the application must be determined as if the LEP "had been exhibited but had not commenced".

The Commissioner's Decision

A fundamental issue before the Court was the weight to which the new LEP should be afforded, if any. It was argued by the Council that the certainty and imminence of the new LEP meant it ought to be given significant weight in line with the authority in *Terrace Towers*.

The Commissioner agreed with the applicant's submission that the savings provision ought to be considered strictly on its wording. This meant that the savings provision contained in the new LEP was different to that in *Terrace Towers* and that it was a clear intention in the drafting of the LEP.

On that basis, the Commissioner found that the new LEP must be considered as though it had not been exhibited. Thus the new LEP had no legal basis under the Act.

The Commissioner did find that the new LEP was a matter of relevance under Section 79C(1)(e) in that it formed part of the public interest. However, it was given little weight in that respect.

The Way Forward

It has been noted by Pikes & Verekers that the savings provisions within recent standard instrument LEPs have been variously worded. For example, Sydney Local Environmental Plan 2012 (made in December 2012) contains the wording in line with *Terrace Towers*. However, in recent LEPs for local government areas such as Canterbury, Canada Bay and Willoughby, the savings provision does not include the words "as if the plan had been exhibited".

If determining an application under a savings provision, the consent authority could be faced with a strange situation where a development application, if determined prior to an exhibited draft LEP being made, can give weight to that draft LEP, yet no weight once it is in force (despite the fact its terms and provisions can be considered certain and imminent).

For enquiries about this case please contact Ryan Bennett or James Fan.

APPLICATION OF PLANNING PRINCIPLE – DEMOLITION IN A HERITAGE CONSERVATION AREA

***Tang v Hornsby Shire Council* [2013] NSWLEC 1123**
NSW Land and Environment Court – Tuor C – 9 July 2013

This case (in which Pikes & Verekers acted for the Council) concerned an application to demolish an existing dwelling house and associated structures and erect a new two storey dwelling house in Highlands Avenue, Wahroonga.

The experts agreed that the planning principle in *Helou v Strathfield Municipal Council* [2006] NSWLEC 66 was applicable.

That planning principle set out a number of tests which the Court considered.

What Is The Heritage Significance Of The Conservation Area?

The experts disagreed as to the significance of the HCA. In the opinion of the Council's expert, the Statement of Significance referred to the pre-Second World War subdivisions that led to the construction of the house and development post-1892.

The applicant's expert considered that the extent of recent development in the immediate context of the site had significantly eroded the integrity and level of intactness of this precinct within the HCA, referring in particular to a number of two storey developments in surrounding areas which had been approved after the identification of the HCA in a heritage report, but prior to the HCA being given statutory force under the Local Environmental Plan.

What Contribution Does The Individual Building Make To The Significance Of The Conservation Area?

The Council's expert noted that the house was identified in a heritage study and review carried out by the Council as a contributory element in the HCA.

The Applicant's expert considered that the house made a "neutral" contribution to the HCA.

Is The Replacement Of Such Quality That It Will Fit Into The Conservation Area?

The Council's expert considered that the proposed dwelling took its cues from the more recently approved two storey dwellings in the vicinity which had an adverse impact on the HCA.

The applicant's expert accepted that the proposed dwelling did not strictly comply with the provisions of the Council's Heritage DCP but stated that given the varied form of contemporary development in the surrounding area, the proposal would fit within the HCA.

The Commissioner accepted the evidence of the Council's heritage expert in answering all of these questions.

The Commissioner did not accept that Council's approval of other two storey buildings which were non-contributory to the HCA justified the current proposal as these buildings were approved prior to inclusion of the HCA in the LEP.

Accordingly, the appeal was dismissed.

For enquiries about this case please contact Peter Jackson or Roslyn McCulloch.

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