PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
August 2014

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PIKES & VEREKERS' NEWS

Gary Green, one of our Partners, was thrilled to receive an award from the Australian Institute of Building Surveyors (AIBS) for "Appreciation of Outstanding Contribution to the Profession" in recognition of his advice to the AIBS on a variety of matters and regular presentations to AIBS conferences over many years.

KEEPING SECTION 94 PLANS UP TO DATE

***Woopee Beach Pty Ltd v Coffs Harbour City Council* LEC Proceedings 10109 of 2014**
Section 34 Agreement reached and Orders entered 17 June 2014.

The Applicant in these proceedings had the benefit of a development consent for a 95 lot residential subdivision in an urban release area at Woolgoolga, north of Coffs Harbour.

The development consent was subject to a condition requiring development contributions be paid in respect of each of the new lots. Those contributions included money to be paid towards the upgrading of road and traffic facilities in the release area, including construction of intersections within the Pacific Highway.

The contributions were levied entirely in accordance with the relevant Section 94 Contributions Plan.

Shortly after the contributions plan was made, the then Roads and Traffic Authority obtained approval under Part 3A of the *Environmental Planning and Assessment Act* 1979 to carry out major upgrade work to the Pacific Highway including construction of a bypass of Woolgoolga. Those road works effectively replaced the Pacific Highway in the vicinity of the subject site and included the construction of intersections and flyovers connecting the local road network to the Pacific Highway.

The road works to be carried out by the RTA rendered the road works provided for in the Section 94 plan unnecessary and obsolete.

Council was obviously aware of the road works being carried out by the now Roads and Maritime Services and was engaged in a thorough review of all of its Section 94 contributions plans (there being many contributions plans across a range of release areas in Coffs Harbour, each impacted by the major upgrades to the highway).

Under the terms of the consent, the Applicant could not obtain a construction certificate and so commence work, until the development contributions had been paid. The Applicant was of the view that it was unreasonable that it should have to pay to Council money that would never be expended by Council as the road works for which that money was to be paid, would never be carried out.

The Applicant lodged a Section 96 Modification Application seeking to vary the contributions payable and delete amounts for works that would not be undertaken by Council.

Section 94B(1) of the *Environmental Planning and Assessment Act* 1979 provides:

> *"A consent authority may impose a condition under section 94 and 94A only if it is of a kind allowed by,* ***and is determined in accordance with****, a contributions plan."*

Council took the view that irrespective of whether or not it was appropriate or reasonable for contributions to be paid for the subject road works, as the contributions were provided for and determined in accordance with the contributions plan in force, they could not be varied by Council. To vary the contributions payable would be to impose a condition that would not be of a kind "determined in accordance with" the contributions plan.

The Applicant appealed to the Court. Section 94B(3) of the Act provides:

> *"A condition under section 94 that is of a kind allowed by a contributions plan… may be disallowed or amended by the Court on Appeal because it is unreasonable in the particular circumstances of that case even if it was determined in accordance with the relevant contributions plan…this subsection does not authorise the Court to disallow or amend the contributions plan or direction."*

Thus the Court has the power to vary conditions requiring contributions to reflect what is reasonable, even though that condition may not be reflective of the expressed terms of a contributions plan. This is not a power available to the Council, however.

The matter went to a conciliation conference pursuant to Section 34 of the *Land and Environment Court Act* 1979 and during the course of that conference, agreement was reached between the parties that the contributions for the road works that would no longer be carried out by the Council should be deleted from the consent.

It is important to note that even though the deletion of the contributions was agreed to by Council, the orders made under Section 34 of the *Land and Environment Court Act* are to be reflective of "*a decision that the Court could have made in the proper exercise of its functions*". Thus in the context of a Section 34 conciliation conference, the Court's powers under Section 94B(3) are enlivened, even though the agreement is between the Applicant and the Council.

Orders were made in accordance with the Section 34 agreement reached and the development contributions reduced accordingly.

For enquiries about this judgment, contact Gary Green or Joshua Palmer.

DEMOLITION OF CONTRIBUTORY ITEM IN A HERITAGE CONSERVATION AREA

***Bennett v Mosman Council* [2014] NSWLEC 1091**
21 May 2014 – NSW Land and Environment Court – O'Neill C

This case was an appeal against Council's refusal of a development application to demolish a contributory item within the Bradleys Head Road Heritage Conservation Area ("HCA") in Mosman.

The proposal was to construct a new two and three storey federation style dwelling sited further forward on the site than the existing dwelling including new landscaping and a new swimming pool.

The existing house had been identified as a contributory item in the HCA in a comprehensive heritage study carried out for the Council in 1996.

The HCA was described, in the heritage study, as "aesthetically and historically one of the most dramatic and pleasing residential areas of Sydney".

The site was also adjacent to, and in the vicinity of, a number of individually listed heritage items.

The Court noted that there were sometimes justifications for demolishing a building identified as being contributory to the heritage significance of a conservation area depending on the individual merits of each case.

For example, demolition might be justified on the grounds of a lack of contribution to the conservation area, as original surveys that informed the development control plan are sometimes cursory and a more detailed study may determine that the contribution of the building has been overstated, or the building does not date from an important phase of development within the conservation area. Demolition might also be justified on the grounds of the condition of the building or perhaps due to detrimental alterations and additions having destroyed any contribution it once made, or the excessive cost of rectifying structural damage or unsympathetic alterations would render the building's rectification an unreasonable burden

(as explored by the planning principle in *Helou v Strathfield Municipal Council* [2006] NSWLEC 66).

In this case the Court found that the Applicant had not made out a convincing case for the demolition of the existing dwelling.

The Court noted that the existing dwelling was a representative example of the early 20th Century residential architecture which was the identified period of significance for the HCA. Further, the heritage study which preceded the making of the HCA was a comprehensive review and the Applicant did not dispute the conservation ranking of "2" given to the existing dwelling in that study (a building which contributes to the character of the area but whose significance has been reduced by loss of original fabric or details).

The Court also found that the existing dwelling formed part of the setting of the heritage items adjacent and in the vicinity and that the existing dwelling did not demonstrate a greater degree of alteration than other dwellings identified as contributory to the heritage significance of the conservation area. Further, the Court also found that the alterations and additions to the existing dwelling did not destroy the contribution it made to the heritage significance of the HCA.

The Court noted that the Applicant wished to demolish the existing dwelling because it was more cost effective than renovating the dwelling and renovation involved a number of design compromises. The Court did not accept that the existing dwelling could not be altered and added to in a sympathetic way to create a useful family home and noted that persons must be cognisant of the constraints of a site when purchasing a new home.

In summary, the Court held that demolition of the existing dwelling would diminish the historic and aesthetic values of the conservation area, and its collective significance, and accordingly, the application must be refused.

For enquiries about this judgment, contact Julie Walsh or Blair Jackson.

ALTERATION OF CONTRIBUTORY ITEM IN A HERITAGE CONSERVATION AREA

***Kiprovski v Leichhardt Council* [2014] NSWLEC 1086**
15 May 2014 – NSW Land and Environment Court – O'Neill C

This was an appeal against Council's refusal of a development application for substantial alterations and additions to a two storey terrace house in the Heritage Conservation Area ("HCA") of Balmain.

The proposal was to retain the street elevation, the front roof plane and chimney and the two storey side masonry walls.

The interior of the terrace house, including the structure of the floors, was to be demolished, and the remaining masonry shell was to be braced. The proposal was to excavate the site and construct a new ground floor 710mm below the existing ground floor level and to extend the front door opening down to the new ground floor level by demolishing the front verandah and stair adjacent to the front door.

A courtyard was to be provided below natural ground level at the rear of the extension and a new first floor was to be constructed 1270mm below the existing first floor level with a new second floor level to be inserted below the existing ridge line as a result of the dropping of the floor levels of the ground and first floors.

The Applicant's architect stated in oral evidence, that the proposal was consistent with many "exuberant" and substantial renovations within Balmain.

He further argued that it was unfair to expect a person to live in a "pauper's house" being surrounded by such exuberant renovations.

The Council argued that the proposal ignored the existing fabric of the Victorian terrace and was an inappropriate response to renovating a contributory building in the Balmain HCA.

The Court found that the proposal completely ignored the constraints of the existing fabric and failed to achieve a cohesive relationship between the existing and new fabric, as the proposed floor levels bore no relationship to the retained street elevation of the dwelling and its openings including a front door, the ground floor window, the front verandah and the first floor french doors and verandah.

The Court found that whilst the design might be an appropriate response to maximising the floor area and internal amenity of an infill building on a "tiny" site, it was an inappropriate and insensitive response to alterations and additions to an existing, modest, Victorian terrace house within the Balmain HCA.

Accordingly, the appeal was dismissed.

For enquiries about this judgment, contact Roslyn McCulloch or James Fan.

MODIFICATION OF DEVELOPMENT CONSENT – "SUBSTANTIALLY THE SAME DEVELOPMENT" – STILL A TRICKY QUESTION

***Newton Denny Chapelle v Ballina Shire Council* [2014] NSWLEC 1123**
26 June 2014 – NSW Land and Environment Court – Morris C

Section 96 of the *Environmental Planning and Assessment Act* 1979 enables a development consent to be modified provided the development as modified is "substantially the same development" as the development for which consent was originally granted.

This continues to be a tricky question which Councils and Commissioners of the Land and Environment Court have to grapple with from time to time.

This case considered the question and found the proposal did not pass this test.

The appeal was against Council's refusal to modify a development consent granted by Council for a bulk store and scaffolding use involving the construction of a shed and vehicular access for the bulk storage of trucks and scaffolding equipment.

The site was within a rural zone.

The original development consent contained a condition that all scaffolding equipment and associated materials were to be stored within the confines of the approved shed. No approval was granted for the storage of scaffolding equipment and/or materials outside the shed either on the approved hardstand area or any adjacent area.

The modification application sought to incorporate an external holding yard, increase the extent of hardstand area and, most significantly, use that area for the storage of scaffolding equipment. The external area was approximately 600m^2.

The Council argued that the "essence" of the development was substantially altered by the proposal as the character of the approved use was rural in nature given that all scaffolding was to be stored in the shed. The Council argued that the proposal would create an industrial like character due to the external storage of scaffolding. The Council accepted that large sheds were consistent with the rural character of the locality.

The Court referred to the classic statement of what constitutes "substantially the same development" in *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280 where at paragraphs 55 and 56, Bignold J described the process for consideration of a proposed modification of development as follows:

> *"55. The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the approved development.*
>
> *56. The comparative task does not merely involve a comparison of the physical features or components of the development as approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted)."*

The Court noted that on a quantitative assessment, the proposed modification did not change the quantity of scaffolding that could be stored at the site.

However, the Court found in qualitative terms, the storage of material within the shed was a material and essential physical element of the approved development. It was important to ensure that the development would be conducted in a manner that would maintain the rural character of the area. The Court held that because the focus of the original consent was that all goods were to be stored within the shed, this critical element would change if the modification were to be allowed. External storage would result in a material change to that essential feature and therefore, the Court was not satisfied that the development would be substantially the same development for which the consent was originally granted.

Accordingly, the appeal was dismissed.

For enquiries about this judgment, contact Peter Jackson or Ryan Bennett.

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