PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
February 2014

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SECTION 34AA CONCILIATION/ARBITRATION – A BIRD IN THE HAND

Section 34AA of the *Land and Environment Court Act* 1979 provides for mandatory conciliation in respect of "residential development appeals" (detached dwelling houses and dual occupancies).

If the conciliation is unsuccessful, the case moves straight into arbitration and the Commissioner presiding over the conciliation determines the matter (unlike a Section 34 conference in respect of other appeals, where either party has the ability to object to that Commissioner determining the matter).

If the parties agree, the basis of what has occurred at the conciliation conference is taken into account in the determination of the matter, however, if the parties do not consent those matters are not to form part of the Commissioner's consideration.

There has been some debate about whether in those circumstances it is humanly possible for the presiding Commissioner to put out of their mind matters which were conceded in the conciliation phase.

In a recent Section 34AA conference in which we acted for an applicant, the applicant offered to amend the plans to delete a portion of the proposed works to ameliorate amenity impacts on the next door neighbour in return for settlement of the whole of the proceedings in the conciliation conference.

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The Council rejected the offer and the applicant made clear that the offer was only on the table in the conciliation phase.

The matter did not settle and moved into the hearing phase.

The applicant, consistent with what it had said during the conciliation phase, did not offer to amend the plans and sought approval for the original proposal.

The Commissioner approved the original proposal and did not impose a condition requiring amendment in accordance with what occurred at the conciliation phase.

The case is a salutory example of the need for each party to take very seriously offers made in the conciliation phase as to refuse to give them serious consideration may result in a poorer outcome in the hearing phase.

For queries about this matter, contact Gary Green or Ryan Bennett.

TAKE-AWAY FOOD SHOP ADDED TO PLACE OF WORSHIP, NOT SUBSTANTIALLY THE SAME DEVELOPMENT

***Jardine & Anor v Campbelltown City Council* [2013] NSWLEC 1164**
21 June 2013 – NSW Land & Environment Court – Dixon C

This was an application direct to the Land and Environment Court under s 96AA of the *Environmental Planning and Assessment Act* 1979 ("the Act") to modify a development consent.

The Court had granted development consent for a place of worship in a building within an industrial estate at Minto.

The application was to expand the Christian outreach programme of the applicant by opening a small take-away food shop within the front area of the building. The shop would provide for the sale of light refreshments to parishioners in addition to workers and businesses within the surrounding industrial estate.

The Council raised an initial jurisdictional point, namely that there was no power to approve the application as the development consent as modified would not constitute "substantially the same development" as required under s 96AA of the Act.

The applicants submitted that because there was no external physical change to the building by the incorporation of the proposed shop, the development (after modification) was substantially the same as that approved under the original development consent.

The Commissioner disagreed, noting that determining whether a development is substantially the same as that approved requires more than a physical assessment on a "before and after" basis. It must compare the two uses to determine whether the modified development consent is "essentially" or "materially" the same as the development originally approved. It is not simply a comparison of the physical features of both; there needs to be "a qualitative and quantitative comparison and assessment" *Moto Projects (No 2) Pty Ltd v North Sydney Council* 106 LGERA 298 at [56].

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The Commissioner held that the introduction of a take-away food shop took the proposal beyond being substantially the same development as originally approved. Accordingly, the appeal was dismissed.

For queries about this judgment, contact Peter Jackson or James Fan.

TWENTY YEAR TIME LIMITED CONSENT FOR A DWELLING HELD TO BE UNREASONABLE

***Newton v Great Lakes Council* [2013] NSWLEC 1248**
20 December 2013 – NSW Land and Environment Court – Moore SC

The applicant appealed against the imposition of conditions upon a consent issued by Great Lakes Council ("the Council") for the construction of the new dwelling.

The Council imposed the conditions on the proposed dwelling in Winda Woppa, a part of a peninsula in the Port Stephens area. The peninsula had been subjected to coastal erosion following severe storm activity over the previous decade.

The conditions were imposed pursuant to the Hawks Nest – Low Density Residential Development Control Plan No 48 ("the DCP"). One of the DCP's stated objectives included safeguarding people and assets from coastal hazards and sea level rise. One relevant control required that development applications on the Winda Woppa peninsula be accompanied by a geotechnical engineering report to determine suitable measures for protection of buildings from coastal erosion and sea level rise.

The first of the two conditions appealed against limited the consent to a period of twenty years, whilst the second condition required that the dwelling be constructed to a foundation to take into account sea level rise conditions over the twenty years.

Time-Limited Consent for Dwelling

It was observed by the Court that the first condition imposed a requirement to cease using the dwelling after the twenty year period, whilst also giving hope of an infinite period of occupation subject to undertaking a coastal hazard study.

The Court then considered that determining whether the condition ought to be deleted was a balancing exercise to determine the reasonableness of maintaining the condition, as well as considering other developments in the locality.

On considering the potential for further development in the locality, it was noted by the Court that the subject land appeared to be the last vacant block. Accordingly, it was considered to be unfair to this development application only, to be subject of a time-limited consent. On the contrary, if the area had been a greenfields development area, more onerous conditions may be appropriate.

Balancing the matters to be considered, including the clear positive planning intention, the Court found this condition limiting the consent to a period of twenty years to be unreasonable as it was out of context with nearby existing developments.

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Structural Design

The second condition required the applicant to design the footings of the construction to withstand coastal erosion until 2033.

The Court noted that the Council had suggested that the structural design was adequate in normal conditions but was inadequate for the subject location.

Noting that the area had been subject to severe coastal erosion and storm activity, the Court nevertheless found that a range of options would satisfy the requirement under this condition for structural stability.

The Court also noted that there was a "not insignificant risk" that storm events could impact on the structural stability of the dwelling. Accordingly, the Court found this condition to be reasonable in the circumstances.

For enquiries about this judgment, contact Roslyn McCulloch or Colleen Schofield.

NEW PLANNING PRINCIPLE FOR WHAT CONSTITUTES ALTERATIONS AND ADDITIONS

***Coorey v Hunters Hill Council* [2013] NSWLEC1187**
4 October 2013 – NSW Land and Environment Court – Moore SC and Sullivan AC

The planning principle established in *Edgar Allen Planning Pty Ltd v Woollahra Municipal Council* [2006] NSWLEC 790 in relation to what constitutes "alterations and additions" was replaced by this decision of Senior Commissioner Moore.

The earlier planning principle was as follows:

> *"A development application to alter and add to a building will be taken to be that relating to a new building where more than half of the existing external fabric of the building is being demolished. The area of the existing external fabric is taken to be the surface area of all the existing external walls, the roof measured in plan and the area of the lowest habitable floor."*

In considering whether to replace the earlier planning principle, the Court noted that the earlier principle relied upon a purely mathematical formula. This was found to be inappropriate, as it ignored the fact that the nature of the analysis required depended on the reason why the enquiry was being made.

The Court noted that for example, whether something should be regarded as alterations or additions to a heritage item involves different considerations when compared to an enquiry, for example, as to whether particular controls defining a building envelope may be engaged or not by a development proposal.

The new planning principle requires, as a first step, an analysis of the purpose for which the enquiry is being made.

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That is, the first question to be considered is:

> *"What is the purpose for determining whether this application should be characterised as being for alterations and/or additions to an existing structure rather than an application for a new structure?"*

The answer to this fundamental question will frame the approach to be undertaken.

The Court noted a need to undertake a qualitative and quantitative analysis of what is proposed compared to what is in existence.

In determining the question whether the proposal is for alterations and additions, regard should be had to such of the following matters as are relevant in the particular circumstances:

Qualitative:

- *"How is the appearance of the existing building to be changed when viewed from public places?*
- *To what extent, if any, will existing landscaping be removed and how will that affect the setting of the building when viewed from public places?*
- *To what extent, if any, will the proposal impact on a heritage item, the curtilage of a heritage item or a heritage conservation area?*
- *What additional structures, if any, in the curtilage of the existing building will be demolished or altered if the proposal is approved?*
- *What is the extent, if any, of any proposed change to the use of the building?*
- *To what extent, if any, will the proposed development result in any change to the streetscape in which the building is located?*
- *To what extent, if any, are the existing access arrangements for the building proposed to be altered?*
- *To what extent, if any, will the outlook from within the existing building be altered as a consequence of the proposed development?*
- *Is the proposed demolition so extensive as to cause that which remains, to lose the characteristics of the form of the existing structure?"*

Quantitative:

- *"To what extent is the site coverage proposed to be changed?*
- *To what extent are any existing non-compliances with numerical controls either increased or diminished by the proposal?*
- *To what extent is the building envelope proposed to be changed?*
- *To what extent are boundary setbacks proposed to be changed?*
- *To what extent will the present numerical degree of landscaping on the site be changed?*
- *To what extent will the existing floor space ratio be altered?*
- *To what extent will there be changes in the roof form?*
- *To what extent will there be alterations to car parking/garaging on the site and/or within the building?*
- *To what extent is the existing landform proposed to be changed by cut, and/or fill to give effect to the proposed development?*
- *What relationship does the proportion of the retained building bear to the proposed new development?"*

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The Court noted that this list is not intended to be exhaustive.

Practical advice for Councils

For avoidance of doubt, Councils might consider whether to specifically deal with the question of what constitutes "alterations and additions" in a Development Control Plan, whether it be the above test, or some other test.

For enquiries about this judgment, contact Stephen Griffiths or Joshua Palmer.

WHEN IS A PHARMACY A SHOP?

***Bardsley-Smith v Penrith City Council* [2013] NSWCA 200**
4 July 2013 – NSW Court of Appeal – McColl, Barrett JJA, Sackville AJA

In a previous legal update, we reported on the failed challenge to the grant of consent and the continuing operation of a Chemist Warehouse in a bulky goods retail shopping centre: *Bardsley-Smith v Penrith City Council* (2012) 189 LGERA 130. Justice Sheahan of the Land and Environment Court had rejected the argument that Penrith City Council ("the Council") had granted consent to a prohibited use – being that of a shop. His Honour also rejected the alternative argument that the continued use was contrary to the consent issued.

However the Court of Appeal found that whilst the development consent issued was valid, the continuing operation of the Chemist Warehouse was unlawful.

The matter was remitted to Sheahan J for consideration of final orders.

The Consent Issued

In 2008, the Council received a development application for what was described as a "distribution centre" from people working in affiliation with Chemist Warehouse. The operations proposed included (1) the wholesale distribution of pharmaceutical goods to other Chemist Warehouse stores in NSW, (2) the despatching of pharmaceutical goods sold on the internet through the ePharmacy platform and (3) the retail sale of "over-the-counter" goods ("OTCs") – being those pharmaceutical goods that do not require a prescription.

The subject premises, being located in bulky goods retail centre, was zoned 4(b) Special Industry under the Penrith Local Environmental Plan (Industrial Land) 1996 ("LEP 1996"). Uses permissible included "warehouse or distribution centre", whilst the use of land as a "shop" was prohibited.

Whilst the definition of "warehouse or distribution centre" did not permit retail sales, it was stated by the applicant that retail sales of OTCs were required pursuant to the pharmaceutical benefits scheme when dispensing prescription drugs under the ePharmacy operations.

In applying the principle that the documents accompanying a development application are not taken as being incorporated into a consent unless done expressly, the Court of Appeal held that the development consent did not give consent to the prohibited use as a "shop" despite there being retail sales anticipated. The Court of Appeal held that those retail sales were permitted pursuant to the consent as the accompanying documents to the application

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contemplated use of part of the premises as a retail pharmacy. However, that retail use was limited to the sale of OTCs and prescription drugs.

The Continuing Use

The Court of Appeal noted that the use of the premises included that of a large scale retail pharmacy. As the Court had construed the consent as permitting the sale of OTCs and prescription drugs, the issue was whether the continuing use of the premises was lawful.

It was argued that the retail operations were inextricably linked to the distribution and ePharmacy uses, and was therefore permissible as an ancillary use. The Court of Appeal disagreed with this, and stated that the scale of goods offered for sale was far beyond the OTCs contemplated by the consent. The Court of Appeal also noted that the retail floor area included some 43% of the premises and that the retail sales amounted to some $5m per year.

It is understood that an appeal to the High Court has been commenced, with the hearing for special leave being in March 2014. A later update will report.

For enquiries about this judgment, contact Joshua Palmer or James Fan.

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