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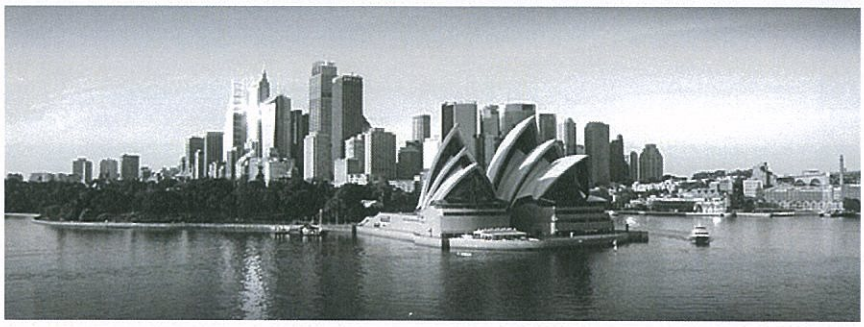
LEGAL UPDATE
May 2013



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BUYER BEWARE

***Lenland Property Developments Pty Ltd v Council of The City of Sydney* [2013] NSWLEC 1060**
12 April 2013 – Land and Environment Court – Commissioner Dixon

The Council had approved a fifteen storey mixed use development in the Sydney CBD comprising a retail ground floor, commercial uses on levels 1 to 4 and residential apartments above. The applicant sought to change the use of levels 2 to 4 from commercial to residential apartments and did so by way of a development application for alterations and additions to the as yet unconstructed building. The applicant appealed to the Land and Environment Court against the deemed refusal of that application.

The Court made preliminary findings approving the application, however the applicant disputed a proposed draft condition of consent requiring the imposition of a restrictive covenant limiting the use of levels 2, 3 and 4 to use for residential purposes and not commercial uses, including a prohibition against serviced apartments.

In deciding whether to impose the condition the Commissioner noted the general position of the Court that it is inappropriate for a condition of development consent to require the imposition of a restrictive covenant on the title to the land and that such a condition is only to be imposed in a rare and exceptional case.

The Commissioner found that the development consent clearly identified the approved development and included specific conditions describing and limiting the approved use, including a prohibition against serviced apartments. No confusion could arise and a prospective purchaser would be well aware of the approved use for each apartment on a reading of the consents and requisite searches in the conveyancing process.

The Commissioner further found that the conditions in the consent, together with the provisions of the Environmental Planning and Assessment Act 1979, were sufficient to ensure the outcome sought by Council (namely limiting the use of the apartments to residential apartments without further development consent).

The Commissioner deleted the relevant condition.

This case is an interesting one for conveyancing practitioners as it is by no means universal practice for an examination to be made of existing development consents attaching to a property when acting for a purchaser.

For enquiries about this case please contact Gary Green or Ryan Bennett.

IT "REALLY STINKS" AND "MIGHT BE ANNOYING", BUT IT ISN'T AN ABUSE OF PROCESS

***ABD Holdings v Council of the City of Sydney* [2013] NSWLEC 45**
9 April 2013 – NSW Land & Environment Court – Sheahan J

The respondent council sought to have proceedings, in the class 1 jurisdiction of the Land and Environment Court, struck out on the basis that the matter was an abuse of process pursuant to well established principles that the Court's integrity is fundamental to the administration of justice.

The proceedings and background

The class 1 application filed by the applicant on 28 September 2012, was an application to modify a development consent granted by the Court, pursuant to Section 96(8) of the Environmental Planning and Assessment Act 1979 ("the Act") - that power being one which an application to modify is lodged directly to the Court.

In this case, the relevant consent sought to be modified was granted six weeks earlier by way of consent orders agreed upon by the parties in an appeal pursuant to Section 97(1). Those proceedings before the Commissioner were settled between the parties as a result of an amended parking plan that increased onsite parking and reduced the useable floor space of the development. That appeal was determined by a Commissioner of the Court without any findings on the merits of the proposal.

The modification application under Section 96(8) sought to delete three of the parking spaces with a reconfiguration of the ground floor such that more useable floor space was proposed.

Abuse of process?

The Council relied on various decisions that established the principle of "abuse of process" and submitted that the Court had a power to protect itself from abuse where an application sought determination of the same matters of substance previously determined by the Court. Further, it was said by the Council that the public would have no confidence in the system if matters dealt with by consent could be reopened and determined again and again. In its submission, it was even said that the process undertaken by the applicant "really stinks".

On the other hand, the applicant submitted that the appeals were commenced pursuant to different provisions under the Act, and could not be characterised as "the same application". It was acknowledged by the applicant that an application direct to the Court to modify a consent "might be annoying" to the Council. However, the Act specifically permits such applications. Also raised was the fact that the Act does not place timing limitations on this power to apply directly to the Court - the only constraints are those expressed in Section 96 that the modification be "substantially the same".

The Court agreed with the applicant and refused the Council's request to have the application struck out as an abuse of process. The Court held that the merits of the proposed modification had not been determined and that the ability to lodge such a modification under the Act meant the application was not improper.

For enquiries about this case please contact Stephen Griffiths or James Fan.

DRINKING IS HARMFUL TO YOUR HEALTH

***Cardno Pty Ltd V Campbelltown City Council* [2013] NSWLEC 1056**
5 April 2013 – NSW Land & Environment Court – O'Neill C

This case concerned the deemed refusal of a development application for the use of existing commercial premises as a retail liquor outlet at Woodbine (near Campbelltown). The Council's sole contention was that the proposal would have an unacceptable social impact in the locality. The site was zoned 4(b) – Industry under Campbelltown (Urban Area) Local Environmental Plan 2002 and a retail liquor outlet was permissible with consent. The Council relied only on the fact that the proposed development was contrary to Section 79(c)(1)(b), which required the consent authority to consider the likely impacts of the development including social and economic impacts in the locality.

The Council called evidence from the NSW Police Force (Local Area Command, Crime Management Unit and Licencing Units), Aboriginal Community representatives and a consulting social planner, Dr Alison Ziller.

The applicant called a social planner, Ms Joanna McClellan.

The experts had agreed that the locality relevant to the matter included Woodbine, Leumeah and the western parts of Campbelltown and Claymore. The experts disagreed as to whether the proposal was likely to have an adverse social impact in the locality.

The Court preferred the evidence of Dr Ziller that there was an unacceptable risk of an adverse social impact in the locality as a result of the proposal.

The Court took into account the fact that the Campbelltown Local Government Area (LGA) had a high proportion of disadvantaged areas compared to greater Sydney and a number of high crime "hotspots" for domestic violence and non-domestic violent assaults. There had been a disproportionate increase in licenced premises in the Campbelltown LGA between 2009 and 2011 (12%) compared to the increase in population over the period of 2006-2011 (2%). Most of that increase in licenced premises had been in the category of retail liquor outlets. The Court took into account research which suggested that disadvantaged communities exposed to substantially higher numbers of retail liquor outlets experienced significantly higher rates of alcohol-related harm. The Court concluded that an additional retail liquor outlet was likely to have an adverse social impact in terms of alcohol-related harm in the Campbelltown community.

The Court also noted that the significantly socially and economically disadvantaged suburb of Claymore was located 1.8km from the proposed outlet and there was a pedestrian route between that suburb and the outlet and nearby fast food outlets, skate park and Leumeah Railway Station. The Court concluded that the addition of a retail liquor outlet in that locality would lead to an increase in the consumption of alcohol by the socially and economically disadvantaged persons of Claymore and was likely to result in an adverse social impact in the locality.

In the immediate context the proposal was in a "fast food hub" which included Oporto Chicken, KFC, Hooters, McDonalds and Sizzler. Nearby there were two hotels, the Ibis Budget Hotel and the Quest Hotel, the former of which was used by NSW Family and Community Services and the Tharawal Aboriginal Corporation as emergency accommodation for vulnerable people. There was also a skate park and two

reserves nearby. A number of streets in the vicinity and the skate park were classified as Alcohol Free Zones (AFZ). The Court accepted the evidence of the Police that in the immediate area there were a number of facilities which acted as attractors for minors, youth and family and was likely to increase the number of alcohol-related incidents in the skate park and to potentially put minors and others at risk of harm. The Court also considered the location of a retail liquor outlet directly in front of a budget hotel used for emergency accommodation for vulnerable people to be inappropriate.

The Court was not satisfied that the proposed mitigative measures were capable of adequately curing the likely adverse social impacts. The appeal was dismissed.

It is evident that the particular circumstances of the location of the proposal were critical factors in the Court's decision. This case can be contrasted with the decision of Commissioner Pearson in *Woolworths Ltd v Blacktown City Council* [2011] NSWLEC 1296 in which the Court approved a retail liquor outlet at Quakers Hill which was adjacent to a McDonalds and Subway near a reserve and school and adjacent to a residential area. In the particular circumstances of that case the Court concluded that the proposed development would not be likely to have an adverse social impact in the locality.

For enquiries about this case please contact Julie Walsh or Roslyn McCulloch.

A PLANNING PRINCIPLE ON PUBLIC DOMAIN VIEWS

***Rose Bay Marina Pty Limited v Woollahra Municipal Council* [2013] NSWLEC 1046**
20 March 2013 – NSW Land & Environment Court – Senior Commissioner Moore

The Land and Environment Court has established a new planning principle in situations where loss of views from the public domain is contended.

The Court had previously established a planning principle for loss of views in *Tenacity Consulting v Warringah Council* (2004) 134 LGERA 23. That decision of Roseth SC principally relates to view loss on private property and particularly, consideration of impacts on dwellings. However, as noted by the Senior Commissioner, the new planning principle is broadly consistent with the matters raised for consideration in *Tenacity*.

The principle requires a two stage approach. The first is a factual inquiry, whilst the second stage is an analytical inquiry. Within each stage, there are then various steps of identification and analysis.

The First Stage - Inquiry

This stage requires identification of the nature and scope of the existing views from the public domain. This requires consideration of:

- the nature and extent of any existing obstruction of the view;
- relevant elements of the view (such as whether there are changing elements);
- what might not be in the view;
- whether the change is permanent or temporary; or
- what might be the curtilage of important elements within the view.

The second step is to identify relevant locations for the potential view loss.

This is followed by the identification of the extent of the obstruction at each location.

The fourth step is to identify the intensity of the public use of those locations.
The final step is to identify the importance of the view.

The Second Stage – Analysis

The analysis stage does not mandate a formal assessment formula. It is not a mathematical process. This assessment will be by analysis on a quantitative and a qualitative level.

Firstly, the development controls and planning documents should be in the forefront of consideration.

The evaluation then requires an assessment of the extent of the present view, the compositional elements, what will remain of the view (if the proposed development is approved), and whether the resulting view will still be sufficient to understand and appreciate the attractive or significant elements of the view.

Similar to *Tenacity*, the Court stated that higher values will be placed on iconic views and landmarks. However, the Court added that clear and unobstructed views will also be of higher value.

The Court summarised the factors to be considered in the qualitative assessment as being:

- Is any significance attached to the view likely to be altered?
- If so, who or what organisation has attributed that significance and why have they done so?
- Is the present view regarded as desirable and would the change make it less so (and why)?
- Should any change to whether the view is a static or dynamic one be regarded as positive or negative and why?
- If the present view attracts the public to specific locations, why and how will that attraction be impacted?
- Is any present obstruction of the view so extensive as to render preservation of the existing view merely tokenistic?
- However, on the other hand, if the present obstruction of the view is extensive, does that which remains nonetheless warrant preservation?
- If the change to the view is its alteration by the insertion of some new element(s), how does that alter the nature of the present view?

The Court concluded that a sufficiently adverse impact on views from the public domain may be determinative in the refusal of an application.

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