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In this issue:

Clause 4.6 Variations – Not as Tough as Recent History Suggests?

Independence of Expert Witnesses

Do You Need a Law Degree Before Issuing a Complying Development Certificate?

Residential Development Appeals

Legal Professional Privilege – Be Careful What You Disclose

CLAUSE 4.6 VARIATIONS – NOT AS TOUGH AS RECENT HISTORY SUGGESTS?

***Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 – Land and Environment Court of NSW – Preston CJ – 19 February 2016**

This was an appeal to the Land and Environment Court against the deemed refusal of a development application to construct a residential flat building which did not comply with the height and floor space ratio development standards in the Randwick Local Environmental Plan 2012.

At first instance, the Commissioner accepted that the written requests to vary the development standards under clause 4.6 were justified and upheld the appeal.

The Council brought a section 56A appeal and argued:

1. The Commissioner failed to be satisfied about the pre-condition to exercise the power in clause 4.6.

2. The Commissioner failed to give reasons about primary contested issues.

3. The Commissioner failed to consider a relevant matter.

In dismissing the section 56A appeal, Preston CJ made some interesting comments about clause 4.6(3)(a) which provides:

> *(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
>
> *(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,*

The Council submitted that the Commissioner was required to give reasons about why compliance with the development standards was unreasonable or unnecessary in the circumstances of the case and had not done so. The Council argued that the criteria which the Commissioner identified in her discussion about clause 4.6(3)(a) were merit considerations that amounted to no more than establishing an absence of environmental harm.

Preston CJ agreed with and adopted the applicant's submissions on this issue which were, in summary:

1. On a fair reading of the judgment, the Commissioner **did** conclude that compliance with each of the development standards was unreasonable or unnecessary in the circumstances of the case.

2. One of the established tests to demonstrate whether compliance with a development standard is unreasonable or unnecessary is if the development is consistent with the objectives of the development standard. Both of the development standards had an objective of ensuring that development did not cause environmental harm. Accordingly, establishing that development did not cause environmental harm was a means of demonstrating compliance with the objectives of the particular development standards under consideration here and, consequently, that compliance with those development standards was unreasonable or unnecessary.

3. The Commissioner was only required to give reasons on the principal contested issues which were those identified in the Statement of Facts and Contentions. There was no contention to the effect that the clause 4.6 variation requests were not well founded on the ground that compliance was unreasonable or unnecessary and no reference was made to clause 4.6(3)(a).

Preston CJ added at [38]-[39] that the Commissioner did not have to be satisfied **directly** that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only **indirectly** by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.

There was no reference in this judgment to the decisions of Pain J and Pearson C in *Four2Five v Ashfield Council* in which a more restrictive approach appeared to have been accepted by the Court, although on different aspects of clause 4.6. Perhaps this decision of the Chief Judge may be seen as a move away from a prescriptive approach to the consideration of clause 4.6 variation requests.

It should be noted that not all development standards will have an objective of ensuring that development will not cause environmental harm or similar. Care needs to be taken in the consideration of objectives for development standards both at the drafting stage and when considering clause 4.6 requests.

For enquiries about this judgment, please contact Roslyn McCulloch or Alistair Knox.

INDEPENDENCE OF EXPERT WITNESS

***235 Spit Road Pty Ltd v Mosman Municipal Council* [2016] NSWLEC 1274 – Land and Environment Court of NSW – Commissioner Brown – 30 June 2016**

This was a Class 1 appeal against Council's refusal of a development application for demolition of an existing 5 berth commercial marina and construction of a 17 berth commercial marina at The Spit, Mosman.

Expert evidence was given on behalf of the applicant and Council by planning experts and navigational experts.

The Council objected to the evidence of the applicant's navigational expert who had formerly been in a senior position at the Roads and Maritime Services, and at the time of giving evidence, was the Chief Executive Officer of the Boating Industry Association (BIA).

The evidence indicated that a letter of support was submitted to the Council from the BIA albeit not from the expert giving evidence in the proceedings but from a previous Chief Executive Officer.

The Commissioner agreed with Council that given the existence of this letter, which expressed clear support for the application, the Court could not be satisfied that the expert could be reasonably seen as having an overriding duty to assist the Court impartially on matters associated with navigation and safety as required by the Expert Witness Code of Conduct under the Uniform Civil Procedure Rules.

The Commissioner also held that in any event, he preferred the evidence of the Council's navigational expert.

The Commissioner also refused the application on the basis that in balancing the public and private benefits of the marina he was required to give precedence to the public good having regard to the relevant provisions of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (a deemed SEPP).

He concluded that in the circumstances of this case, the impact of the extension of the Marina on the other users of the waterway (especially sailors from the nearby sailing club) was unacceptable.

For enquiries about this judgment, please contact Julie Walsh or Rachael Jordan.

DO YOU NEED A LAW DEGREE BEFORE ISSUING A COMPLYING DEVELOPMENT CERTIFICATE?

Bankstown City Council v Ramahi (No 2) **[2016] NSWLEC 34 – Land and Environment Court of NSW – Craig J – 8 April 2016**

This case concerned a challenge by Bankstown City Council to the validity of 3 complying development certificates (CDCs) issued by a private certifier for alterations and additions to an existing dwelling house and construction of a detached secondary dwelling on land at Condell Park.

The CDCs were said to be invalid because they did not comply with the development standards which were pre-conditions to the issue of a CDC for secondary dwellings under State Environmental Planning Policy (Affordable Rental Housing) 2009 (the SEPP).

In particular, the CDCs were for a secondary dwelling that did not meet maximum floor area and side and rear setback criteria.

The certifier, under cross-examination accepted that the CDCs for the secondary dwelling did not satisfy these criteria.

However, he argued that the effect of the Court of Appeal decision in *Trives v Hornsby Shire Council* [2015] NSWLEC 158 was that it was a matter for the certifier, not the Court, to determine whether the development was complying development.

The Court rejected this argument, adopting the approach taken by Biscoe J in *Hornsby Shire Council v Trives (No 3)* [2015] NSWLEC 190 that when issuing a CDC, a certifier must be satisfied that the development is complying development within the meaning of the relevant Environmental Planning Instrument, and that the certifier's state of satisfaction must be one that could be formed by a reasonable person who correctly understood the meaning of the law.

Accordingly, the Court held that the CDCs were invalid.

An additional point of argument was whether the third CDC which was issued in respect of work that had already been carried out was a valid CDC.

The Court held that just as a development consent could not validly be granted for development that has already taken place, so a CDC could not be issued retrospectively.

As a result of the invalidly issued CDCs, the Court ordered demolition works.

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

RESIDENTIAL DEVELOPMENT APPEALS

Aitchison v Sutherland Shire Council **[2016] NSWLEC 48 – Land and Environment Court of NSW – Moore J – 2 May 2016**

From time to time, there has been confusion regarding the inclusion of a Class 1 development appeal in the residential development appeal list in the Land and Environment Court.

Section 34AA of the Land and Environment Court Act (the Court Act) provides for a "fast track" stream for "small scale residential development".

This is defined as "development for the purposes of detached single dwellings and dual occupancies (including sub-divisions), or alterations or additions to such dwellings or dual occupancies."

When the section was introduced into the Court Act in 2010, the second reading speech in parliament referred to "small scale developments for single dwellings and dual occupancies".

This case was a referral to Moore J by the Registrar in circumstances where the parties sought clarification on whether a development application fell within this definition.

The subject development application proposed sub-division of an existing lot into 2 lots, together with the erection of dual occupancies on each of the proposed resulting lots.

The Court held that this development did not fall within the above definition and called in aid of this conclusion the second reading speech and in particular, the reference to "small scale" residential development.

Accordingly, the matter was placed in the general stream for development appeals rather than the fast track stream.

It should be noted that section 34AA allows for proceedings to be removed from or transferred to, the fast track stream by the Court of its own motion or by a motion of either of the parties.

The Court has traditionally required one of the parties to file a motion (with payment of the relevant filing fee and supporting affidavit) to enable this to be done.

For enquiries about this judgment, please contact Joshua Palmer or Tom Bush.

LEGAL PROFESSIONAL PRIVILEGE – BE CAREFUL WHAT YOU DISCLOSE

We reported on this case back in 2004, but a number of recent instances have caused us to include it in this update as a timely reminder of the pitfalls in referring to legal advice.

***Ashfield Municipal Council v RTA* [2004] NSWSC 917 – NSW Supreme Court – Barrett J – 6 October 2004**

Ashfield Municipal Council brought proceedings against the RTA to prevent it from drilling boreholes in Council's roads as part of the preliminary investigations for the M4 East extension. Before commencing proceedings, Council obtained advice from Senior Counsel. Council referred to this advice in two letters to the RTA.

The reference in the first letter was as follows:

> *Based on legal advice, it is Council's view that Connell Wagner cannot enter and carry out work at the locations referred to in your letter of 7 September 2004, because it needs the consent of Council as roads authority under s. 138 of the Roads Act 1993.*

The second letter actually quoted the conclusion of Senior Counsel's advice in support of the Council's position:

> *I can assure you that my Council has treated this matter very seriously and has considered in detail the matters raised in your letter of the 14th September. For your information Council has obtained a detailed opinion from Mr T F Robertson SC. His opinion concludes as follows:*
>
> *'If the land in question is a public road for which Council is the appropriate roads authority, the RTA's contractor cannot dig up or disturb the road without Council's consent under s. 138 of the Roads Act. If the RTA proposes to do that work, then it too must obtain a consent from Council, but only where it proposes to do work on classified roads.'*
>
> *In making reference to the above quote Council is not waiving the legal professional privilege attached to Mr Robertson's advice*.

The RTA sought an order for production of the advice, arguing that privilege had been waived by Council when it disclosed the substance of the advice. This was based on the common law principle that it is inconsistent and unfair for a party to disclose and use the conclusion of a legal advice while refusing to disclose other parts of the advice which relate to that conclusion.

The Court agreed that privilege in the advice had been waived probably by the first, and certainly by the second letter. The first letter had disclosed the "substance" of the advice, while the second letter had actually quoted the conclusion. The Council was ordered to produce those parts of the advice which related to the conclusion which was referred to in each of the letters. It was allowed to block out sections of the advice which did not relate to the quoted conclusion.

The fact that Council had expressly reserved the privilege in the second letter was not effective to prevent a waiver, because "an intentional act inconsistent with the maintenance of confidentiality does not lose its significance or assume some different character just because there was a subjective intention not to compromise the privilege".

This case demonstrates that great care needs to be exercised when making references to confidential legal advice. A party which discloses the conclusions reached in legal advice, whether directly citing the conclusion, or indirectly paraphrasing it (as in the first letter quoted above) may be forced to disclose the whole of the advice which leads up to the conclusion. That may include facts and analysis unfavourable to that party's case, as well as material which is favourable.

For enquiries about this judgment, please contact Peter Jackson or Jennifer Hold.

Pikes & Verekers Lawyers

Level 2
50 King Street
SYDNEY NSW 2000

DX 521 Sydney
T 02 9262 6188
F 02 9262 6175

E info@pvlaw.com.au
W www.pvlaw.com.au