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LEGAL UPDATE
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SECTION 96 APPLICATION – "SUBSTANTIALLY THE SAME DEVELOPMENT"

Innerwest 888 Pty Ltd v Canterbury-Bankstown Council [2017] NSWLEC 1241 – Land and Environment Court of NSW – Morris C – 16 May 2016

This was an appeal to the Land and Environment Court against the deemed refusal of an application to modify a development consent for a mixed use development at Hurlstone Park.

The original consent was granted in 2013 under an earlier planning instrument (Canterbury LEP 138) and was subject to a condition that there be a maximum of 5 storeys across the whole of the development to be achieved by lowering the basement or deleting units. Under Canterbury LEP 2012 a mixed use development was prohibited on the land.

The consent was modified in 2014 to delete that condition, to increase the number of units and to provide additional parking.

The application to modify, which was before the Court when compared to the original consent, proposed (amongst other things):

- an increase in the number of units from 60 to 73 (10 extra in this modification)
- to increase parking spaces from 102 to 134 (13 extra in this modification), and

- most critically, an increase from 5 to 6 storeys.

The Court held that the development as proposed to be modified was not substantially the same as that for which consent was originally granted on the basis that the condition which required the reduction in height to 5 storeys was an essential element of the consent. The Court noted that the original consent ensured that the development would comply with the controls under Canterbury LEP 2012 despite the fact that it exceeded many of the controls under Canterbury LEP 138. The proposed modification would result in a breach of the maximum building height control of 18m under Canterbury LEP 2012 and the 5 storey height limit imposed by the consent as granted. The Court held that in both quantitative and qualitative terms the proposed modification failed the jurisdictional test in s.96(2)(a) of the Environmental Planning and Assessment Act 1979.

The Court also considered the merits of the proposal and determined that the additional storey and increase in height would not represent an appropriate built form outcome, primarily due to the visual impacts of that additional built form.

For enquiries about this judgment, please contact Peter Jackson or Alistair Knox.

IMMEDIATE PRODUCTION OF ALL DOCUMENTS NOT A REASONABLE REQUIREMENT

Council of the City of Sydney v Blue Chips Franchise Pty Ltd [2017] NSWLEC 24 – Land and Environment Court of NSW – Preston CJ – 9 March 2017

A recent decision of the Chief Judge of the Land and Environment Court has discussed what constitutes a reasonable excuse for failing to comply with a direction issued pursuant to s.119M(1) of the Environmental Planning and Assessment Act 1979 ("the Act").

The Council of the City of Sydney ("the Council") commenced prosecution proceedings in the Local Court charging Blue Chips Franchise Pty Ltd ("the defendant") with an offence pursuant to s.119M(1) of the Act for the failure to comply with a requirement under Division 1C of Part 6. The matter ultimately came before the Land and Environment Court after the Council appealed against the dismissal of the prosecution proceedings by the Local Court.

It was alleged that the defendant, a property management service, failed to comply with an oral direction given under s.119M of the Act to immediately produce all documents relating to 33 apartments managed by it. The defendant failed to comply with the direction as it only provided documents relating to one of the 33 apartments.

In the Local Court, the defendant had argued before the Magistrate that it had a reasonable excuse for failing to comply with the requirement as there was insufficient time to produce all documents. The Magistrate found in favour of the defendant and dismissed the prosecution charge.

The appeal to the Land and Environment Court largely concerned whether the Magistrate had rightly determined who carried the onus of proving a reasonable excuse existed. Further, there were also arguments regarding whether certain errors of the Magistrate as contended by the Council were errors that could be raised on an appeal commenced by the prosecutor.

Notwithstanding the lengthy legal arguments, and the lengthy reasoning of the Court in dealing with those arguments, there were two fundamental principles confirmed by the Court in the appeal.

Firstly, in such a prosecution where a defence may be raised that there was a reasonable excuse for the failure to comply with a requirement, it is for the defendant to raise such a matter and prove it on the balance of probabilities. Once raised by the defendant, it then falls upon the prosecutor to rebut the defence of reasonable excuse.

The second principle arising from the matter is that requirements issued to a person or an entity under Division 1C of Part 6 of the Act, similarly to an order under s. 121B, must give a reasonable time for a person to comply with the requirement.

Whilst what may constitute a reasonable time for compliance will differ in every circumstance, it was plain that the Land and Environment Court did not accept the Council's argument here that immediate production of documents relating to 33 apartments was a reasonable requirement in the circumstances.

Accordingly, the appeal was dismissed and Council was ordered to pay costs.

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

CLAUSE 26 OF SEPP (HOUSING FOR SENIORS OR PEOPLE WITH A DISABILITY) 2004 – PROHIBITION OR DEVELOPMENT STANDARD

Principal Healthcare Finance Pty Ltd v Council of the City of Ryde [2016] NSWLEC 153 – Land and Environment Court of NSW – Robson J – 2 December 2016

The question of whether a provision of a SEPP or an LEP is a prohibition or a development standard is one that has occupied much time, energy and money over the years and resulted in this plea by Justice McClellan in the Court of Appeal decision in *Agostino v Penrith City Council* (2010) 172 LGERA 380:

> *The wastage of public and private money debating these issues is a blight upon our planning system which should be resolved, preferably by legislative intervention or amendment to individual planning instruments.*

This sentiment was echoed by Robson J in his determination of this separate question – whether clause 26 of SEPP (Housing for Seniors or People with a Disability) 2004 ("the SEPP") was a prohibition or development standard.

Clause 26 of the SEPP provides (relevantly for this case) as follows:

> *26 Location and access to facilities*
>
> *(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to:*
>
> *(a) shops, bank service providers and other retail and commercial services that residents may reasonably require, and*
>
> *(b) community services and recreation facilities, and*
>
> *(c) the practice of a general medical practitioner.*

(2) Access complies with this clause if:

(a) the facilities and services referred to in subclause (1) are located at a distance of not more than 400 metres from the site of the proposed development that is a distance accessible by means of a suitable access pathway and the overall average gradient for the pathway is no more than 1:14, although the following gradients along the pathway are also acceptable:

(i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,

(ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,

(iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time

The proposal was for a high-care residential aged care facility containing 127 bedrooms with 141 beds.

The development application had been refused by the Joint Regional Planning Panel (JRPP) on the basis that the above provisions constituted a prohibition rather than a development standard.

The judgment noted that there were 4 legal opinions provided to the JRPP – 2 for the applicant, 1 for the Council and 1 for the JRPP, and that the opinions were inconsistent with each other.

In accepting the applicant's argument that the relevant provisions set out above in clause 26 constituted a development standard rather than a prohibition, the Court adopted the two-step process set out in *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319 namely:

(a) the first step is to ascertain whether the proposed development is prohibited **under any circumstances** and, if not;

(b) to consider and determine whether the relevant provision specifies a requirement or fixes a standard in relation to an **aspect** of the proposed development.

The Court held that taking into account the SEPP as a whole, the above provisions of clause 26 satisfied the two-step process and constituted a development standard.

Accordingly, the appeal could proceed to a determination on the merits and, in particular, a consideration of whether, in the circumstances of the case, it was appropriate to vary the development standard.

For queries about this case, please contact Roslyn McCulloch or Tom Bush.

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