PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
September 2012

In this issue:

EXISTING USE RIGHTS – CHANGE TO A PERMISSIBLE USE – DO DEVELOPMENT STANDARDS APPLY?

***Cracknell & Lonergan Architects Pty Ltd v Leichhardt Municipal Council* [2012] NSWLEC 194**

27 August 2012 – NSW Land and Environment Court – Craig J

Originally, one of the benefits of existing use rights was that any development standards or other planning controls which "derogated" from those existing use rights did not apply, whether the change of use was to another prohibited use or to a permissible use.

This included development standards such as floor space ratio and height controls in the Local Environmental Plan.

In the case of *Iris Diversified Property Pty Limited v Randwick City Council* (2010) 173 LGERA 240, Pain J determined that where a property had the benefit of existing use rights, but the change of use was to a *permissible use,* the relevant planning controls such as development standards did in fact apply.

In this case (an appeal against refusal of a development application for demolition of a factory/warehouse building and erection of a residential flat building on land zoned Residential in Leichhardt), the Applicant sought to argue that *Iris* was wrongly decided.

The Court found that in this case, any existing use rights had been abandoned.

The Court also found that the proposal was undeserving of approval on the merits based on a general section 79C assessment. This meant that the question of whether *Iris* was wrongly decided did not, strictly speaking, require determination. Nevertheless, the Court declined to find that *Iris* was wrongly decided.

The Judgment represents a clear and definite step towards firming up the Court's views on what may be done when changing from an existing use to a permissible use. It seems likely that any move away from the narrow view taken by the Court will lie in the hands of the legislators.

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

THE COURT'S DISCRETION – STILL WIDE AND UNFETTERED

***Wollondilly Shire Council v 820 Cawdor Road Pty Ltd* [2012] NSWLEC 71**

5 April 2012 – NSW Land and Environment Court – Lloyd AJ

Wollondilly Shire Council ("the Council") brought civil enforcement proceedings to restrain the use of a dilapidated building on rural land as a dwelling on the basis that the subject building was one of three erected dwellings on the land, the other two being lawfully erected, and where no more than two were permissible.

The issues in the proceedings were:

1 Whether the building was a dwelling.

2 If the building was a dwelling, whether the Court should exercise its discretion and not make orders restraining the use of the premises as a dwelling.

Background

The land, owned by the First Respondent, was zoned RU1 Primary Production, in which zone multi-dwelling housing was prohibited. The land included a dwelling described as the "main dwelling" as well as a rural worker's dwelling. Those two dwellings were lawfully erected.

The building was built in the 1890s on a property of 99.81 hectares. It had no facilities such as a kitchen, laundry, toilet, running water and electricity. The building had become dilapidated and Council expressed concerns about its structural stability.

The Second Respondent, who was described as a recluse, had lived in the building on an almost continuous basis for 20 years.

Was the building a "dwelling"?

For the use of the subject building to be unlawful, it required characterisation as a "dwelling". Dwelling was defined in the Wollondilly Local Environmental Plan 2011 as "*a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile*."

The Court, in determining whether the building was a dwelling, identified two limbs:

i a room or suite of rooms occupied or used as a separate domicile, or

ii a room or suite of rooms so constructed or adapted as to be capable of being occupied or used as a separate domicile.

The Court found the first limb to be the relevant question as that related to the actual use of the building as a domicile, whereas the second limb would normally include considerations as to the ability of the room or suite of rooms to be used as a domicile.

The Respondents made submissions that the building was not a dwelling as it did not have the type of facilities that one would normally expect such as a kitchen, bathroom or running water. However, the Court rejected those submissions, in that they deal with the second limb of the test.

As the building was used by the Second Respondent for his habitation with a degree of permanency, it was found that it was used as a domicile and was therefore a dwelling.

Discretion

The Court identified various factors as being relevant to the exercise of its discretion in making orders under section 124 of the Environmental Planning and Assessment Act 1979.

The Second Respondent was a 67 year-old recluse with a history of manic depressive disorder. He had no income for some 20 years and lived on a diet of oats, bread and fruit. He cooked on an open fire or a camping stove, and stored perishable food under a wet cloth.

The Court had evidence from a psychologist, who had assessed the Second Respondent, who said that the building was a haven from mainstream society which enabled the Second Respondent to cope with his mental disorders. The psychologist stated that eviction from the building would cause great stress to him and trigger depression which could prove catastrophic to his mental health.

The Court found that to restrain the use of the building as a dwelling would cause the Second Respondent significant harm, whereas to allow him to remain would be of little environmental impact. Accordingly, the Court declined to make any orders.

The Council was ordered to pay costs.

For enquiries about this case please contact Peter Jackson or Andrew Simpson.

LAPSING OF DEVELOPMENT CONSENT

***Wollongong City Council v K & M Prodanovski Pty Ltd* [2012] NSWLEC 107**

11 May 2012 – NSW Land and Environment Court – Sheahan J

The Applicant, Wollongong City Council, sought a declaration that a development consent granted for a mixed use building had lapsed. The Respondent, the beneficiary of the consent, asserted that demolition and geotechnical works undertaken meant that the consent had not lapsed. The Council countered that argument on the basis that the works undertaken were unlawful and therefore could not be relied upon as physical commencement for the purposes of section 95(4) of the Environmental Planning and Assessment Act 1979 ("the EPA Act").

Background

On 28 June 2005 the Council granted consent to the demolition of an existing service station and associated structures, and the construction of a mixed use development comprising 24 residential units and 3 commercial units, and basement car parking.

The consent was due to lapse on 28 June 2007; however, the Council agreed to the extension of the lapsing period to 28 June 2008.

No works were undertaken until about April 2008 when the Respondent notified the Council that it intended to commence demolition works.

Soon after, the Respondent commenced demolition of the above ground structures and those works were completed by 14 May 2008. The Respondent also undertook removal of the underground storage tanks around that time. However, the Council issued a stop work order under section 121B of the EPA Act on 15 May 2008.

The conditions of consent

The Council at the outset acknowledged that the conditions of consent were poorly drafted, with overlap in various areas. However, it contended that its intent was clear and that the relevant conditions of the consent required the Respondent to:

- appoint a Principal Certifying Authority prior to demolition works;
- have prepared by a "competent person", as defined in the relevant Australian Standard, a Hazardous Materials Survey and forward this to Council;
- notify NSW WorkCover prior to commencing demolition works;
- forward an Asbestos Management Report, a Hazardous Substances Management Plan and a Remediation Action Plan to the appointed PCA and the Council;
- undertake a phase 2 detailed report pursuant to SEPP 55 prior to the removal of the sub-surface service station tanks; and
- obtain a Construction Certificate prior to construction work.

The Council asserted, and the Respondent did not contest, that the above steps were not followed. Rather, the Respondent contended that each of the conditions was to be construed narrowly. On the Respondent's interpretation of the conditions, demolition and geotechnical works did not require the appointment of a PCA and other conditions, such as those relating to NSW WorkCover, were of an advisory nature and not mandatory.

The Court's consideration

Essentially, the issues were:

1 Whether the works undertaken on the land and relied upon by the Respondent were lawful under the consent granted.

2 If the works were unlawful, whether such works constitute "physical commencement" for the purposes of section 95(4) of the EPA Act.

On the first issue, the Court accepted the Council's contention that the works undertaken needed to be within the "four corners" of the consent to be lawful, particularly where the works had a "temporal or physical" connection to the subject matter of the consent. Those conditions were to be read strictly and therefore any breach of those conditions meant that those works were unlawful.

The Court found that some breaches, such as the requirement to notify WorkCover, were of a technical or minimal nature. However, the breaches relating to demolition and geotechnical issues were of a serious nature.

Having found that the works relied upon by the Respondent for "physical commencement" were unlawful, the Court found that the consent had lapsed and made orders restraining the Respondent from carrying out development in reliance upon that consent.

For enquiries about this case please contact Gary Green or James Fan.

WHEN IS A STOREY NOT A STOREY?

***The Owners of Strata Plan 75903 v Lyall Dix* [2011] NSWSC 245**

5 April 2011 – NSW Supreme Court – Hall J

The Owners of Strata Plan 75903 ("the Strata Plan") commenced action against the developer and the Principal Certifying Authority ("the PCA") in relation to the construction of a residential flat building. The developer alleged that the PCA provided negligent advice that the construction of the building was exempt from the Home Building Regulation 1997 ("the Regulation") on the basis that the building had a rise in storeys of more than three.

It was claimed that, as a result of the negligent advice, the developer did not have effective home warranty insurance. This meant that the Strata Plan could not claim for building defects against an insurer.

In a preliminary hearing, the Court was asked to determine the meaning of the term "storey" for the purposes of the Regulation.

It is noted that on this preliminary question the Court was not determining whether the PCA was negligent, but only the correctness of the advice given.

Key to the Court's decision (and the advice) was whether the lower ground level, which contained store rooms, six residential units and fourteen car spaces, was a "storey" within the meaning of the Regulation. If it was, the advice was correct and, if not, it was incorrect and insurance was required.

The Home Building Act 1989 states that a person is prohibited from carrying out residential building work unless a contract for insurance in relation to that work is in force. Clause 57BC of the Regulation provides exemptions to this requirement in the case of multi-storey buildings, being buildings with a "rise in storeys of more than 3" and containing 2 or more dwellings. The Regulation defined "rise in storey" by reference to the BCA. Storey was also defined, by way of exclusion of space within a building "if the space includes accommodation only intended for vehicles". No explicit reference was made to the BCA in the definition of storey.

The Court was required to determine the extent to which, if any, the BCA definition of storey was to be deemed to be incorporated in the definition in the Regulation.

What was on its face a comparatively simple question (is the lower floor level a "storey"?) was in fact a complex issue that ultimately turned on semantic constructions of words and phrases such as "space within a building," "includes," and "contains only".

The Court held that it was apparent that the draftsman intended "storey" as included in clause 57BC to mean something different to "storey" as used in the Building Code of Australia, otherwise the draftsman would have simply adopted the Code meaning as occurred with the phrase "rise in storeys".

The fact that clause 57BC(5) specifically stated that "storey" does not include a space within a building if that space includes accommodation only intended for vehicles meant that this specific definition overrode the definition of "storey" in the Building Code of Australia.

The specific exclusion of a space which "included" space for the accommodation of vehicles meant that the space need not be solely used for the accommodation of vehicles in order for the space to fall outside of the definition of storey.

As the lower ground level in part provided accommodation for vehicles, it was not a storey. The building did not, therefore, contain a rise in storeys of more than 3 and so was not a multi-storey building. Insurance was therefore required.

Whilst the case does not allow any conclusions to be drawn on whether the certifier was or was not negligent, it serves to illustrate difficulties in providing advice on statutory interpretation.

The salutary lesson is if in doubt, seek legal advice.

For enquiries about this case please contact Stephen Griffiths or Joshua Palmer.

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