PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
September 2018

In this issue:

NEW CROWN LAND MANAGEMENT ACT 2016 (NSW) ("the Act")

Summary

1. The new Act has been introduced to simplify the ownership, use and management of Crown lands by consolidating:

   (a) the *Crown Lands Act 1989* (NSW) ("the CL Act");

   (b) the *Crown Lands (Continued Tenures Act) Act 1989* (NSW); and

   (c) the *Western Lands Act 1901* (NSW).

2. The new Act has led to amendments to other relevant acts (by way of the *Crown Land Legislation Amendment Act 2017* (NSW)) such as:

   (a) the *Local Government Act 1993* (NSW) ("the LG Act"); and

   (b) the *Roads Act 1993* (NSW) ("the Roads Act").

Crown Land managed by Councils

3. Councils appointed as Reserve Trust Managers will now manage the land as if it is community classified land under the LG Act. This means councils (as Reserve Trust Managers):

   (a) will no longer require the endorsement of the Minister to lease/licence/otherwise deal with reserve trust land; but

(b) must categorise each parcel of reserve trust land under section 36 of the LG Act and prepare plans of management in accordance with that categorisation.

4. A plan of management in respect of reserve trust land must be prepared within three years of the commencement of the new Act ("the initial period").

5. Where a plan of management is already in place pursuant to the CL Act, this plan will remain in force until:

(a) a new plan of management is created;

(b) the land is classified as operational; or

(c) the expiry of the initial period by which time councils are required to have adopted a new plan of management.

6. There are several exceptions, including that:

(a) land that is a public reserve must be managed as a public reserve under the LG Act; and

(b) land may be managed as operational land under the LG Act. The Minister must be satisfied that the land does not fall within any category of community land in the LG Act. A council must apply to the Minister prior to any re-classification.

7. Until a council adopts a plan of management in respect of reserve trust land, the council may only:

(a) issue short term licences;

(b) renew existing leases but only if the renewal does not authorise an additional use; and

(c) grant new leases over reserve trust land if there was a pre-existing lease immediately prior to the repeal of the CL Act but only if the new lease does not authorise any additional use of the land.

8. The NSW Department of Industry – Crown Lands and Water Division has created a Crown land reserve manager portal to assist councils to manage their reserve trust land. Some funding is available for the preparation of plans of management, which will be distributed via the portal. The portal provides a feature allowing a council to search by local government area ("LGA") and identify all reserve trust land under their control.

Native Title Manager

9. Each council must employ a trained native title manager to advise on dealings for land possibly affected by native title. A native title manager's role is to ensure that a council's management of reserve trust land complies with the *Native Title Act 1993* (Cth) ("the NT Act").

10. In accordance with section 8.7 of the new Act, the native title manager must be consulted before a council, in relation to reserve trust land:

    (a) grants a lease, licence or right of way over the land;

    (b) mortgages the land;

    (c) imposes a covenant or restriction on the land; or

    (d) approves (or submits for approval) a plan of management for the land.

11. A council must consult its native title manager unless the reserve trust land is "excluded land". Section 8.1 defines "excluded land" to include:

    (a) land subject to an approved determination of native title; or

    (b) land where all native title rights in respect of the land have been extinguished, surrendered or compulsorily acquired.

12. In considering whether the land is subject to a determination under the NT Act, a council's native title manager must:

    (a) search the National Native Title Tribunal Register; and

    (b) check the original gazettal of the land and details of the reservation.

Vesting of Crown Land in councils

13. The new Act enables the Minister to vest reserve trust land in a council. This means the reserve trust land is transferred to the council in fee simple.

14. The Minister may only vest reserve trust land in a council if:

    (a) the land is wholly located within the council's LGA;

    (b) council accepts the vesting;

    (c) if the land is subject to a claim under the *Aboriginal Land Rights Act 1983*, the vesting has received the written consent of the Local and NSW Aboriginal Land Councils; and

    (d) the Minister is satisfied that the land is suitable for local use.

15. Any land vested in a council becomes community land under the LG Act. The Minister may state in the vesting notice that the land is transferred to the council as operational land if the Minister is satisfied that the current use of the land does not fall within any category of community land under the LG Act.

Native Title Land Claims

16. Councils are currently involved in native title land claims and determinations under the *Aboriginal Land Rights Act 1983*.

17. Land which is subject to a native title land claim cannot vest in the council without the written consent of the Local and NSW Aboriginal Land Councils.

Roads Act

18. Under the Roads Act, a council no longer needs to obtain the prior approval of the Minister before closing a council-owned road. This responsibility now wholly vests in the council.

19. A council must continue to:

    (a) give public notice in a local news publication of the proposed road closure;

    (b) provide notice to all adjoining landowners; and

    (c) issue notice to all notifiable authorities.

    The requisite notice period remains at 28 days.

20. Subject to considering any objections in response to the above notices, the council may gazette the road closure. Section 38C of the Roads Act allows a council to appeal to the Land and Environment Court against any objection to the road closure. Any dealings entered into upon condition of the road being closed (for example, a contract for sale) should make provision for the possibility that the Land and Environment Court sets aside the road closure.

21. If a council has:

    (a) recently applied to the Minister to close a council-owned road;

    (b) has not received the Minister's approval; and

    (c) will not gazette notice of the road closure by 30 September 2018,

    the council must recommence the road closure process from the beginning, including re-issuing notices.

For further information regarding this update, please contact David Baxter or Diarna Cuda.

WHEN IS A PANEL NOT THE PANEL?

***M.H. Earthmoving Pty Ltd v Cootamundra-Gundagai Regional Council (No 2)* [2018] NSWLEC 101 – Land and Environment Court of NSW – Robson J – 29 June 2018**

In these proceedings Robson J considered three motions:

1. By the Southern Regional Planning Panel ("Panel") seeking joinder as a party to the proceedings

2. By the Applicant, M.H. Earthmoving, seeking determinations of separate questions:

    (a) whether the panel determined development application 242/2017 ("DA")

(b) whether the panel had power under section 8.15(4) Environmental Planning and Assessment Act ("EPA Act") to control and direct the Council

(c) for various costs orders.

The answers to these questions depended on whether the Panel was the same entity as the Southern Regional Joint Planning Panel ("SRJPP") which had determined the DA.

The DA was for the expansion of an existing non-putrescible landfill facility at Gundagai. It had been recommended for refusal by Council and was refused by the SRJPP. At the section 34 conference, the Council reached agreement with the Applicant but the Panel purported to exercise the power under section 8.15(4) to direct Council not to enter a section 34 agreement.

The Council's position was if the Panel was not joined as a party to the proceedings, Council would proceed to a consent orders hearing.

Was the panel the same entity as the SRJPP?

The Applicant argued that the Panel was not entitled to utilise section 8.15(4) as it was the SRJPP which had refused the DA, not the Panel.

The Court analysed the differences between the SRJPP and the Panel. In terms of the local government areas covered by the Panel as opposed to the SRJPP, the only differences were those arising from the merger of various councils. The Panel was made up of the same appointees as the SRJPP.

Perhaps unusually, there was no express provision stating that the Panel was to be a continuation of the SRJPP such as was the case in clauses 6 and 7 of the Transitional Regulation in relation to the Planning Ministerial Corporation (formerly Minister Administering the Environmental Planning and Assessment Act) and the Independent Planning Commission (formerly the Planning Assessment Commission).

Robson J concluded that the Panel was the same entity as the SRJPP. He construed the statutory provisions in a manner which promoted the objects or purpose of the creation of the Panels. He noted that the construction urged by the Applicant would have resulted in an anomalous consequence in that, for certain applications for designated development, the SRJPP would have been the consent authority but the Panel would not have had the right to be heard on the appeal without leave nor to control or direct the Council.

Costs

The applicant sought various costs order against the Panel. The Court determined that it was able to make a costs order against a non-party and that the costs in these proceedings were governed by rule 3.7 of the Land and Environment Court rules. The Court was not persuaded that the conduct of the Panel was unreasonable in the light of:

- an expert report that three of the Panel's expressed concerns regarding the development remained valid, despite additional information provided in the conciliation process;

- the Applicant's costs of the conciliation were not thrown away as Council was now satisfied with the proposed development and the Panel was satisfied in relation to at least one of the four reasons for which the development application was refused.

Joinder

The Panel argued it was entitled to be joined on three bases:

1. an ability to raise an issue not otherwise dealt with;

2. the interests of justice;

3. the public interest.

His Honour said that the proceedings involved exceptional circumstances as it was the decision maker of the DA asserting that certain issues had not been sufficiently dealt with. The first basis argued by the Panel was satisfied.

In relation to the second and third bases, the Court agreed that as designated development the application should receive special scrutiny, there had been no delay in making the application for joinder and it would be inefficient for the Panel to control and direct the Council rather than be joined as a party. Consistent with sections 56 and 57 of the Civil Procedure Act, it was in the interests of the just quick and cheap disposal of the proceedings to order the Panel to be joined.

Ultimately expedition was ordered and no order for costs of the conciliation conference, the motion or for an indemnity for the Applicant for future expenses were ordered. The proceedings were heard by Commissioner D Dickson on 15-17 August 2018**.** The decision is pending.

For further information regarding this update, please contact Roslyn McCulloch or Mark Cottom.

LOW RISE MEDIUM DENSITY HOUSING CODE

The broad operation of the MDH Code was set out in our last Legal Update. Where relevant, this article adopts the abbreviations used in that article.

The MDH Code came into effect on Friday 6 July. Since publication, however, there have been a number of amendments to the Code and to the related instruments. Most significantly a new clause 3B.63 has been introduced, which defers the operation of the Code in its entirety until 1 July 2019 in the local government areas listed at the end of this update.

In addition, the amendments to the Standard Instrument, notably the specific inclusions of the new low rise medium density housing types in the definitions and zoning table, have been repealed by the *Standard Instrument (Local Environmental Plans) Amendment (Low Rise Medium Density Housing) Repeal Order 2018*.

Accordingly the Standard Instrument itself remains unaffected by the introduction of the MDH Code.

We previously reported on some additional amendments to the MDH Code, which saw the Code make permissible manor houses in particular zones (RU5, R1, R2 and R3) where multi dwelling housing or residential flat building were already permissible.

This works in parallel with the repeal of the Standard Instrument amendments, but will only operate in those local government areas where the operation of the MDH Code is not deferred.

Another consequence of the repeal of the amendments to the Standard Instrument is the requirement to include definitional provisions in *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* ("the Codes SEPP") and the most recent amending SEPP introduces a definition of "manor house" and "multi dwelling housing (terraces)".

In addition to the above amendments, the *Environmental Planning and Assessment Regulation 2000* ("Regulation") has also been amended to require consent authorities to consider the Medium Density Design Guide for Development Applications when considering a development application for manor houses or multi dwelling housing (terraces) (clause 92(1)(e) of the Regulation) where the development control plan ("DCP") does not make adequate provision for those types of development.

In support of this clause, the Department has also published the Medium Density Design Guide for Development Applications to sit alongside the Medium Density Design Guide for Complying Development.

It is of note that the definitions of "manor house" and "multi dwelling housing (terraces)" have also been included in the Regulation, by adoption of the definitions in the Codes SEPP.

Whilst this is obviously a matter that the Court has not had the opportunity to consider, arguably if development falls within the definition of "manor house" or "multi dwelling housing (terraces)", irrespective of whether the Codes SEPP applies in the particular local government area and irrespective of whether the development application relies on some broader permissible use (eg: residential flat building or multi dwelling housing), clause 92(1)(e) of the Regulation will apply.

The question of whether a DCP adequately addresses manor house or multi dwelling housing (terraces) development, is one that lies within the subjective opinion of the consent authority. It would seem at first blush, however, that simply relying on general residential flat building or multi dwelling housing controls in an existing DCP may not be sufficient unless those DCP provisions specifically address residential flat buildings or multi dwelling housing of a size and configuration that would fall within the definition of "manor house" or "multi dwelling housing (terraces)".

Armidale Regional	Ballina	Bayside
Bellingen	City of Blue Mountains	Burwood
Byron	Camden	City of Campbelltown
Canada Bay	Canterbury-Bankstown	Central Coast
City of Coffs Harbour	Cumberland	Georges River
City of Hawkesbury	Hilltops	Hornsby
Hunters Hill	Inner West	Kiama
Lane Cove	Mid-Coast	Mid-Western Regional

Morey Plains	Mosman	Narromine
Northern Beaches	City of Parramatta	City of Randwick
City of Ryde	City of Shellharbour	City of Shoalhaven
Snowy Monaro Regional	Strathfield	Sutherland Shire
City of Sydney	Tamworth Regional	The Hills Shire
Tweed	Upper Lachlan Shire	City of Willoughby
Wingecarribee	Wollondilly	City of Wollongong
Woollahra	Yass Valley	

(Bathurst Regional, City of Liverpool and City of Penrith were added a week later than the local government areas listed above, on 13 July 2018)

For further information regarding this update, please contact Joshua Palmer.

COURTS EXAMINE INVESTIGATIVE POWERS FOR PLANNING AND ENVIRONMENTAL BREACHES

Three recent decisions, one of the NSW Court of Appeal and two of the Land and Environment Court of NSW, have examined the limits of an investigator's powers under the *Protection of the Environment Operations Act 1997* (**POEO Act**) and the *Environmental Planning and Assessment Act 1979* (**EP&A Act**). The two Land and Environment Court decisions reveal a potential tension within the EP&A Act provisions which may need to be resolved by subsequent (perhaps appellate) case law, or legislative clarification.

Privilege against self-incrimination for executive liability offences

Fordham v Environment Protection Agency [2018] NSWCA 167

In the most recent of the three decisions, the NSW Court of Appeal has upheld an appeal against the Land and Environment Court's dismissal of an application for relief that would have prevented the Environment Protection Authority (**EPA**) from compulsorily interviewing a director of a company in relation to an executive liability offence. The appeal however was only upheld by remitting the matter to the Land and Environment Court for further determination, and the position taken by the EPA in the Court of Appeal is the focus of this part of the article.

Under section 203 of the POEO Act, an "authorised officer" is empowered to require answers to questions for investigation purposes, including to require the person being questioned to attend at specified time and place so that the questions can be properly put and the answers recorded. Obstructing the investigation of the matter by doing things such as failing to attend the interview, providing false information and the like can give rise to criminal offences that carry significant maximum penalties.

In this case the EPA had given such a notice to Mr Fordham requiring him to attend an interview in aid of its investigation of a suspected offence, perhaps committed by a company of which he was a director. He was concerned that the evidence obtained from him during the interview might be used to incriminate him for committing a potential special executive liability offence under section 169 of the POEO Act.

While at common law a person has a right to silence when under investigation, and also in proceedings taken by prosecuting authorities, this right can be modified by statute. In this case section 203 of the POEO Act clearly abrogated that right to silence. Section 212 of the POEO Act provides a limited privilege against self-incrimination by protecting only a

natural person against having the answers given by them in an interview used against them in criminal proceedings, if they objected at the time of answering on the basis that doing so might incriminate them personally.

The limited protection in section 212 of the POEO Act only extends to natural persons and not companies. Section 169 of the POEO Act on the other hand effectively deems company directors and persons concerned in the management of corporations to be guilty of certain environmental offences if committed by the company, except in limited circumstances (known as special executive liability offences). Given that Mr Fordham's answers could be used against the company that was under investigation, he appears to have been concerned that the answers would also be used in criminal proceedings against him on the basis of the company having committed an offence and him having been its director.

After the Land and Environment Court had dismissed civil proceedings commenced by Mr Fordham seeking a declaration that answers given by him under section 203 (qualified by section 212) would not be admissible against him in any prosecution under section 169 of the POEO Act, Mr Fordham appealed to the NSW Court of Appeal. On appeal the EPA conceded that if Mr Fordham were to be prosecuted for a special executive liability offence, the evidence gathered directly from answers given by him in a recorded interview could not be used against him, even to establish in proceedings against him that the company had committed the relevant offence.

The position taken by the EPA in the Court of Appeal (correctly, in this author's view) reflects the appropriate balance between an appropriate regulatory authority's statutory right to have its questions answered for investigation purposes under the POEO Act, and the preservation of an individual's right to have the resulting answers not used against them in any circumstance in proceedings against them. It remains important to note that in the case of any questioning by officers under the POEO Act, if a person is concerned that answers might incriminate them they need to make this clear by objecting before answering the questions truthfully (as the person is required by law to do).

Investigative functions vs proceedings function of a local council

***Port Macquarie-Hastings Council v Mansfield* [2018] NSWLEC 107**

About a fortnight before the above *Fordham* decision, a decision of Justice Sheahan of the Land and Environment Court setting aside two subpoenas in planning law prosecutions considered the extent of a council's investigative powers where enforcement proceedings were already being contemplated by the council. This case concerned the relevant investigative powers of authorised officers under the EP&A Act.

The defendant in prosecutions concerning allegedly unlawful works applied for orders setting aside subpoenas that had been issued to a related company and a consultancy that had prepared a Statement of Environmental Effects. It was alleged that the council prosecutor's reliance on information obtained by use of coercive investigative powers in the EP&A Act was inappropriate, such that the subpoenas amounted to (among other things) an "abuse of process".

The alleged association of the company and consultancy with the defendant's alleged activities that gave rise to the charges against him was at least partially discerned by the Council from information and records obtained in response to notices given by the Council

under the former section 119J (now section 9.22) of the EP&A Act (**the Notices**). Failure to comply with such investigative notices (if given under the EP&A Act) has similar consequences to those outlined earlier in this article relating to investigative notices under the POEO Act.

It was claimed by the defendant that the Notices themselves were not within the Council's power to issue, because "*at least a substantial purpose of the issue of this notice was to engage in criminal prosecution*". That is, the defendant alleged that once the Council had decided that it was going to commence some form of proceedings (whether civil or criminal) in relation to the alleged unlawful activities, the overriding purpose of the Notices was that of exercising the Council's function of **commencing proceedings** (which is a function under other legislation) rather than **investigating** an alleged breach or offence (which is a function under the EP&A Act).

Investigative powers for the purposes of the EP&A Act can only be exercised in connection with a purpose for which a power may be exercised under Division 9.2 of the EP&A Act. However, the power of a council to institute proceedings for an offence under any Act is in the *Local Government Act 1993* and not the EP&A Act (*Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10).

Sheahan J upheld the allegation of "abuse of process" made on behalf of the defendant Mr Mansfield, holding that the investigative notice by which the Council had obtained information from the defendant prior to commencing the proceedings was invalidly given to him. As a result, the subpoenas were set aside.

In doing so, Sheahan J found that the principles enunciated by the Chief Judge in *Zhang* (cited above) prevented investigative notices being issued under the EP&A Act not only after proceedings had been commenced, but also when the decision had already been made that proceedings were likely to be commenced and the notice would be issued for associated purposes. We are not aware as to whether an appeal has been or will be commenced by the prosecutor in this case.

Use of admissions made by defendant in recorded interview to gather evidence from others

***Ku-ring-gai Council v John David Chia (No 4)* [2018] NSWLEC 75**

This earlier case of *Chia* involved an application made on behalf of the defendant Mr Chia at trial for the exclusion of evidence of some prosecution witnesses. The defendant claimed that an investigator of the prosecutor Council had unlawfully used a transcript of his recorded interview (at which he had objected to answers being used against him) to question the witnesses at the investigative stage and obtain evidence against him from them.

Justice Robson rejected that argument, on the basis that the former section 122U (now section 9.31) of the EP&A Act allowed the use of the defendant's answers to obtain evidence from other persons. Provided the "suspect" is warned that failing to answer questions is an offence and that they may object to giving answers on the ground that they might incriminate him or her, answers given after the objection is made are not admissible against the person but may indeed be used to obtain further information for use in evidence against them.

Conclusion

While (on the face of it) there may appear to be a tension between *Mansfield* and *Chia*, one involved the defendant being interviewed late in the investigative process (after the Council had effectively decided some form of proceedings would be commenced – in *Mansfield*) whereas the other involved the defendant being interviewed at an earlier stage (*Chia*). That is, one involved what the Court found was the unlawful abrogation of the right to silence in contemplation of proceedings being commenced and subpoenas later being issued, whereas the other involved the very abrogation of that right which is contemplated by the investigative provisions under the EP&A Act.

Where the "line" exists between investigating and preparing a case for proceedings has not been drawn by the cases, however this appears to be something of a "grey area" that may arise again sooner rather than later in planning and environmental prosecutions. It could be the subject of some form of clarification in the future (particularly in the context of the EP&A Act), whereas the agreed position in *Fordham* discussed early in this article clarifies the limited protection of an individual's privilege against self-incrimination relating to special executive liability offences under the POEO Act.

For further information regarding this update, please contact Mark Cottom.

MORE ON CLAUSE 4.6

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 – Land and Environment Court of NSW – Preston CJ – 14 August 2018

In this matter Preston CJ allowed an appeal from a decision of Smithson C in which development consent for a residential flat building in Double Bay was refused on the basis that the breach of the height development standard was not justified under clause 4.6 of Woollahra Local Environmental Plan 2014 (WLEP).

His Honour gave a useful summary of the preconditions and other requirements of clause 4.6. We **attach** a flowchart which sets out the preconditions and other requirements of clause 4.6 as described in the judgment.

His Honour found that the Commissioner erred in three ways:

1. Applied the wrong test in considering clause 4.6;

2. Misdirected herself in relation to the objectives of the height development standard; and

3. Denied procedural fairness to the applicant.

Wrong Test

Preston J found that the Commissioner had applied the wrong test in a number of ways when she concluded that she was not satisfied of the matters in clause 4.6(4). Those errors were:

- The Commissioner directly determined whether she considered compliance with the height development standard was unreasonable or unnecessary, rather than determining whether she was satisfied that the applicant's written request had adequately addressed that matter. To non-lawyers this may seem like a pedantic distinction, however it does indicate that a consent authority will need to be careful in the language which it uses when determining applications which involve clause 4.6 requests.

- In requiring that the development that contravened the height development standard have a neutral or beneficial effect relative to a development that complied with that standard. Preston CJ said clause 4.6 does not directly or indirectly establish such a test and in this case, that test would have been inconsistent with one of the objectives of the height development standard.

- In requiring the development which contravened the height development standard to result in a "better environmental planning outcome for the site" relative to a development that complied with that standard. Preston CJ said that clause 4.6(3)(b) required that there by "sufficient environmental planning grounds to justify contravening the development standard" the words "better environmental outcome" came from the objectives of clause 4.6 and there was no provision to require compliance with those objectives.

Objectives of the Height Standard

The objectives of the height standard under the LEP were:

> *"(a) to establish building heights that are consistent with the desired future character of the neighbourhood,*
> *(b) to establish a transition in scale between zones to protect local amenity,*
> *(c) to minimise the loss of solar access to existing buildings and open space,*
> *(d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
> *(e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas."*

His Honour found that the Commissioner had misdirected herself in five ways in her consideration of the consistency of the development with those objectives:

- The Commissioner compared the proposed development with the height of adjoining residential flat buildings rather than considering whether the height of the development would be consistent with the desired future character of the neighbourhood as required by objective (a).

- The Commissioner did not address the question of whether the height of the development was consistent with objective (b) of establishing a transition in scale to protect local amenity. The Commissioner merely made a comparison between the height of the proposed development and the maximum height permitted in the adjoining zone without addressing whether there would be any adverse impact on local amenity as a result of that height difference.

- The Commissioner incorrectly held that the lack of adverse amenity impacts on adjoining properties was not a sufficient ground to justify a contravention of the height standard.

- The Commissioner asked a wrong question as to whether the non-compliant development generated a benefit to the neighbouring properties relative to a lower, height-compliant development.

- The Commissioner erred in holding that it was not sufficient that the development minimised impacts on adjoining or nearby properties. Objective (d) of the height standard required that development should minimise impacts on adjoining or nearby properties, not have no impacts on them.

The important message from the judgment is to pay careful attention to all of the words in the objectives to development standard and the zone objectives when formulating or assessing a clause 4.6 request.

Denial of Procedural Fairness

The Council's contentions had raised view loss from a nominated property in Double Bay. In the judgment, the Commissioner took into account view impacts from other properties without affording the applicant an opportunity to address the matter which was not in contention between the parties.

The appeal was upheld with costs and the proceedings were remitted to a Commissioner other than Commissioner Smithson for determination.

For further information regarding this update, please contact Roslyn McCulloch.

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CLAUSE 4.6

PRECONDITIONS

SATISFACTIONS

(1)
Cl 4.6(4)(a) consent authority is satisfied…

(i) Request adequately addressed
(not consent authority's own opinion)

(ii) in the public interest because consistent with

(a) Compliance with standard unreasonable/unnecessary

Whebe principles
(1) Achieve objectives of standard
(2) Objective/purpose not relevant to development
(3) Objectives/purpose defeated by compliance
(4) Standard virtually abandoned
(5) Unreasonable/inappropriate zoning

(b) Sufficient environmental planning grounds to justify contravention of standard

=

better environmental planning outcome
↓
no requirement to comply with objectives of clause 4.6

(a) Objectives of standard – careful analysis of each objective

(b) Objectives of zone

(2)
Concurrence of secretary

No direct/indirect requirement that non-compliant development should have a neutral or beneficial effect relative to compliant development