PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
May 2020

In this issue:

A sky or building sign? The difficulties in construing old consents

NSW local government, planning and environmental law reform continues amid covid-19

A SKY OR BUILDING SIGN? THE DIFFICULTIES IN CONSTRUING OLD CONSENTS

***Benmill Pty Ltd v North Sydney Council (No 2)* [2020] NSWLEC 44**

In this case Benmill Pty Ltd (**Benmill**) sought declarations in relation to three illuminated roof signs displayed near the top of a 17 storey commercial building in Alfred Street, North Sydney. Benmill sought declarations that, on their proper construction, consents granted in relation to these signs were for a "roof or sky advertisement" as defined under State Environmental Planning Policy No 64 – Advertising and Signage (**SEPP 64**). The Council contended that the approved use of each sign was as a "building identification sign" as defined under SEPP 64. Council also contended that Benmill was not entitled to relief on the grounds of issue estoppel and/or abuse of process.

In 2007 then Senior Commissioner Roseth granted consent to development which included the roof signs (**2007 Consent**). Conditions of that consent limited the duration of the consent for the signs to 10 years and required a separate consent for the signs to remain in situ.

In 2016 Council granted consent for the signs approved under the 2007 Consent to remain in situ for a further 10 years (**2016 Consent**). The consent included a condition which described the signs as "building identification signs" as defined under North Sydney Local Environmental Plan 2013.

Later in 2016 that consent was modified by the Council to amend the description of the development to "continued use of roof sign" and to remove the description of the signs as "building identification signs" from the conditions.

In 2018 two (2) concurrently heard appeals relating to the signage on the building were dismissed. The proceedings were in the name of Benmill's architect, Tony Legge, on behalf of Benmill (***Legge***). The first appeal was against the deemed refusal of a development application for three new dynamic/changeable LED panel signs. The second appeal was against the deemed refusal of a modification application to the 2016 Consent to alter the approved signage to three dynamic/changeable LED panel signs.

Issue Estoppel

Council contended that the decision in *Legge* had finally determined that the signs approved under the 2007 and 2016 Consents were for "building identification signs".

Robson J held that there was no issue of estoppel by reason of the decision in *Legge*. He said the Senior Commissioner's finding that the signs approved under the 2007 and 2016 Consents were "building identification signs" was an incidental step in the reasoning process to determine, for the purpose of the modification application, that the proposed development was not substantially the same as that for which consent had originally been granted.

Robson J acknowledged that a decision of a Land and Environment Court Commissioner could result in an issue estoppel. He noted that the Senior Commissioner in *Legge* has specifically acknowledged the characterisation of the signs as "building identification signs" was not determinative of the question of whether the proposed development was substantially same as that for which consent was originally granted.

Abuse of Process

The doctrine of abuse of process can be invoked if the continuance of proceedings would be unjustifiably vexatious and oppressive if it was sought to litigate anew a case which had been disposed of by earlier proceedings. It is a similar but less restrictive doctrine compared to that of issue estoppel.

Robson J did not consider the proceedings to constitute an abuse of process for the same reason he held that there was no issue estoppel, namely, that the characterisation of the signs was one step in the reasoning process in the determination of those proceedings. Further, Robson J considered that it would be oppressive not to allow the parties to re-litigate an important issue concerning their existing rights and obligations which were incidentally considered as a step on the way to deciding a merit appeal in Class 1 of the Court's jurisdiction where, amongst other things, the rules of evidence do not apply. He also accepted Benmill's submissions that there was limited or no utility in an appeal from the *Legge* decision so that Benmill's failure to appeal was not indicative that the present proceedings were an abuse of process.

Construction of the 2007 Consent

Benmill contended that the 2007 Consent was properly construed as being for a "roof or sky advertisement" as defined under SEPP 64. Council submitted that the use permitted by the 2007 Consent was for a "building identification sign" under SEPP 64.

The orders of the Court relevant to the 2007 Consent relevantly said:

> "Development application for the re-cladding of the existing building at 275 Alfred Street, North Sydney and the erection of a roof sign is determined by the grant of consent subject to the conditions in Annexure A."

The orders used the term "roof sign" and did not refer to the signs as either a "roof or sky advertisement" or a "building identification sign".

There was a dispute between the parties as to whether the 2007 Court orders contained an ambiguity. Robson J considered it appropriate to firstly read the orders and the reference to roof sign, including the conditions in approved plans, in order to identify the character of the development. Only if ambiguity was found after that point could recourse be had to the context in which the order had been made.

After considering the orders, plans and conditions Robson J considered that ambiguity did arise and he proceeded to consider the reasons included in the judgment of the Senior Commissioner. Having considered the orders, reasons for judgment, approved plans and conditions, Robson J was satisfied that the ambiguity had been resolved and the evidence was sufficient to lead him to the view that the appropriate construction of the use permitted by the 2007 Consent (and thereafter the 2016 Consent) was for a "roof or sky advertisement".

His Honour's reasons for so finding were:

- The judgment referred to cl 21(1)(b)(i) of SEPP 64 which specifically related to "roof or sky advertisements", for which a SEPP 1 objection would be required for the subject signs, and a SEPP 1 objection was lodged.
- A 10 year time limitation in SEPP 64 only applied to "roof or sky advertisements" pursuant to cl 21(2). Both the 2007 and 2016 Consents contained a condition in similar terms.
- The Senior Commissioner used the words "advertising" in the reasons for judgment when describing the "advertising sign towards to the east".
- The Senior Commissioner also referred to the "outdoor advertising" provisions of the relevant DCP.

Robson J considered that collectively the matters described above demonstrated that on a proper construction of the 2007 Consent, and consequentially the 2016 Consent, consent was granted for a "roof or sky advertisement" as defined under SEPP 64.

Robson J declared that, on its proper construction, the 2016 Consent, as modified, is for a "roof or sky advertisement" as defined under SEPP 64. He also ordered that Council pay Benmill's costs, subject to any motion to the contrary.

This case is a salutary lesson of the importance of the language in a development consent and the difficulties which might be encountered when attempting to construe old development consents.

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

NSW LOCAL GOVERNMENT, PLANNING AND ENVIRONMENTAL LAW REFORM CONTINUES AMID COVID-19

In our most recent previous edition, we reported on a number of legislative measures introduced by the NSW government in response to the COVID-19 pandemic, particularly in the local government and planning spheres. Further such changes have been introduced since then, some directly in response to the pandemic and others not necessarily as much. Some measures are temporary and others, permanent.

Changes enacted by Parliament

Various changes to the planning legislation have been brought about by COVID-19 legislation amendment bills that were passed by NSW Parliament on 14 May 2020. These changes are usefully outlined on the NSW Department of Planning, Industry and Environment website.

In particular, the changes extending the lapsing period for some development consents and the time within which planning appeals in the Land and Environment Court may be commenced by an applicant for approval are likely to be frequently relied upon moving forward. The link above and the text of the legislation (particularly sections 4.53 and 8.10 of the Environmental Planning and Assessment Act, in the cases of lapsing and appeals respectively) warrant careful consideration if taking more time than usual in relation to such matters is being contemplated in a particular case.

In a local government context, it is also worth noting that in addition to allowing councils a longer period within which they can catch up shortfalls in general income, special Local Government Act provisions in response to the COVID-19 pandemic now also include section 747AB. Until at least 26 September 2020 (and possibly until 26 March 2021 at the latest, if such a later date is fixed by regulation), section 747AB prevents the commencement of proceedings for the recovery of a rate of charge by a council unless the council has considered each of the following:

(a) whether the payment of the rate or charge could be made in instalments or by way of some other financial arrangement,

(b) whether the person should be referred to a financial counsellor,

(c) whether mediation or alternative dispute resolution should be attempted first,

(d) whether interest on the unpaid amount should be deferred or waived.

The changes that we have specifically discussed above are temporary in nature. The remaining changes specifically discussed within this article are permanent in nature.

Change to "physical commencement"

A major change however that is perhaps not as well-known to date was brought about when the *Environmental Planning and Assessment Amendment (Lapsing of Consent) Regulation 2020* was published on 15 May 2020. Effective immediately, it introduces a new clause 124AA into the EP&A Regulation so that for the purposes of section 4.53(7) of the EP&A Act, work is **not** taken to have been physically commenced **merely** by the doing of **any one or more of the following**:

(a) creating a bore hole for soil testing,

(b) removing water or soil for testing,

(c) carrying out survey work, including the placing of pegs or other survey equipment,

(d) acoustic testing,

(e) removing vegetation as an ancillary activity,

(f) marking the ground to indicate how land is to be developed.

The new clause 124AA only applies to development consents granted from 15 May 2020. This prevents the obvious uncertainty that would have otherwise arisen in the case of consents granted before that date, where a person relying on a consent may have made decisions to act in accordance with the previous state of the law by carrying out one or more of the types of work listed in the clause in order to retain the value of the consent for their property.

The six matters listed in clause 124AA(1) of the EP&A Regulation appear to draw from previous decisions of the NSW Court of Appeal and the Land and Environment Court where work of such a nature has previously been held to be sufficient to amount to "physical commencement" of work which avoided the lapsing of a development consent for the purposes of section 4.53(4) of the EP&A Act. Many of those cases refer to the previous numbering of that provision (namely section 95(4) of the EP&A Act), which applied prior to the renumbering of the EP&A Act on 1 March 2018.

When those cases are considered, the new clause 124AA appears to be intended to prevent relatively minor works from being sufficient to prevent the lapsing of a development consent under section 4.53(1) of the EP&A Act. In practice, the clause **partly** reverses the effect of a long line of cases where "merely preparatory works" of the nature listed in the provision have been held to "relate to" the approved development and thus prevent the relevant consent from lapsing.

Accordingly, something more than the types of work listed in the new clause 124AA is required to prevent the lapsing of a development consent granted from 15 May 2020. The meaning of the new "physical commencement" test is likely to be the subject of court cases in the future, particularly given that it may be arguable that other forms of "preparatory work" exist that are not listed in items (a)-(f) in clause 124AA(1) of the EP&A Regulation.

There would, however, be some risk in carrying out merely preparatory works beyond those listed in the new clause 124AA in the present circumstances. In this regard, it is worth noting what has **not** changed with the introduction of the clause:

- The test continues to be one of "physical commencement" and not "substantial commencement". Thus whilst something more than the types of preparatory works listed in the new clause 124AA needs to be carried out to prevent a consent from lapsing, the work required need not necessarily be "substantial" provided that it relates to the approved development in a real way.

- The requirement that the work "relate to" the approved development still means that the work should be carried out in accordance with the conditions of the relevant consent. To do otherwise risks the work being properly classified as not "relating to" the approved development, and thus not able to prevent the lapsing of a potentially valuable consent.

For quite some time, section 4.53(7) of the EP&A Act (including when it appeared within the previous section 95 of the Act) has provided a power for the EP&A Regulation to "*set out circumstances in which work is or is not taken to be physically commenced*". While this new permanent measure is not directly provided in response to the COVID-19 pandemic, now is a logical time for it to have been introduced (given the temporary measures introduced in relation to lapsing of consents discussed previously within this article).

State Environmental Planning Policy Amendment (Minor Amendments) 2020

Minor, permanent changes to State environmental planning policies were brought about by the above policy on 17 April 2020. These include the repeal of clause 6 of State Environmental Planning Policy No 55 – Remediation of Land.

In brief, the former clause 6 set out the statutory requirements for the consideration of contamination and remediation in zoning or rezoning of land. However, the provisions have effectively been transferred into a related local planning direction made by the Minister under section 9.1(2) of the Environmental Planning and Assessment Act.

Changes relating to public meetings, execution of documents and public notices

Changes to regulations were introduced at various times in the second half of April 2020 to allow for public meetings and execution of documents to be conducted in a manner consistent with the public health restrictions that applied at the time. Despite the somewhat relaxed restrictions that apply now, the temporary arrangements remain useful and/or necessary in order to comply with the current restrictions.

For a similar purpose, changes were made to both the Environmental Planning and Assessment Regulation and the Local Government (General) Regulation on 17 April 2020. Among other things, those amendments provide for permanent revised public notification and exhibition requirements relating to development consents and other approvals.

In this respect, key amended provisions include clauses 124 and 137 of the Environmental Planning and Assessment Act, which relate to validity of development consents and complying development certificates respectively. Previously, in addition to describing the land and the development the subject of the consent or certificate, the public notice of the relevant approval was required to be given in a local newspaper and state that the approval was available for inspection (free of charge) during ordinary hours at a particular office.

From now on (rather than as a temporary arrangement during the COVID-19 pandemic), any public notice of a development consent or complying development certificate must be published on the consent authority's website. The notice simply needs to describe the land and the development the subject of the consent or certificate. Provided the description is not misleading or incomplete (there being cases where public notices have not been able to be relied upon because of such errors), section 4.59 of the Environmental

Planning and Assessment Act will prevent the validity of the consent being questioned in any legal proceedings in the Land and Environment Court unless the proceedings are commenced within 3 months of the notice being published on the website.

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

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