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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
6 October 2004 – NSW Supreme Court – Barrett J

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:

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'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 the 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 case contact Julie Walsh or Roslyn McCulloch

WHEN A DEVELOPER GOES BUST, WHO IS TO BLAME?

**MM Constructions (Aust) Pty Ltd v Port Stephens Council [2012] NSWCA 417
19 December 2012 – NSW Court of Appeal - Allsop P, Basten JA and Bergin AJA**

This was an appeal to the Court of Appeal against a decision by a single Supreme Court Judge dismissing a claim against a Council by a developer, who sued the Council in damages for his financial difficulties arising out of a development project.

The Facts

In 2000 the developer obtained development consent for the building of a luxury apartment development in Port Stephens to be known as "Milan Towers".

The development application was for 2 x 5 storey residential towers with 25 apartments. The buildings were 15.7 metres above natural ground level.

Under the Hunter River Environmental Plan ("the REP") the concurrence of the Department of Planning was required for buildings over 14 metres. That concurrence was obtained

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In 2005 the developer wrote to Council requesting an increase in height including 1 additional floor and an increase in the number of apartments from 25 to 41

The developer engaged a planning consultant to assist with the application. The council officer ("Ms G") had a meeting with the applicant in which she indicated an initial view that the changes between the original approval and the application were so substantial that they could not be regarded as "substantially the same development" under section 96, and that a new development application would be required.

This view was one which was also expressed to the developer by his planning consultant.

The developer was subsequently allegedly informed orally by an officer of the Department of Planning that his proposal could be dealt with by Council under section 96. In 2006, the developer lodged a formal application with Council under section 96 in respect of the proposal.

Ms G sought advice from the Council's lawyers on whether the application could be considered to be "substantially the same development" under section 96. The advice provided by the Council's lawyers was that the Council would have difficulty supporting an argument before a Court (should the matter be appealed) that the application was not substantially the same.

In response to Council's letter seeking concurrence in respect of the height limit, the Department of Planning advised Ms G that it did not consider the application be substantially the same development .

The developer's lawyer wrote to Council challenging the need for Departmental concurrence. He wrote to Council on 4 December 2006 explaining the matter was urgent as the mortgagee had taken possession of the property on 13 November 2006 and the property was to be sold by auction on 13 December 2006 in a mortgagee sale.

The auction took place on 13 December 2006 and the property was passed in.

On 5 February 2007, Ms G sought further clarification from the Department about its view that concurrence would not be issued. A response was received on 12 February 2007 from the Department indicating that its view was the application was a substantial departure from the original approval but that if the application was to be dealt with under section 96, the Council did not require concurrence from the Department.

Ms G then sought advice from the Council's lawyers as to whether concurrence was required to the application. The lawyers advised that no separate concurrence was required from the Department and that the application was for Council only to approve or not pursuant to section 96.

On 30 March 2007, contracts were exchanged for the sale of the property by the mortgagee in possession.

The application was finally refused by Council on 12 July 2007.

Misfeasance in a public office

The developer alleged that the Council, through its employee, Ms G, was guilty of "misfeasance in a public office" on the basis that Ms G:

- Pre-judged the application.
- Did not give the application genuine consideration or properly and diligently carry out the tasks required of her in assessing and reporting on the application.
- Displayed bad faith in being deliberately obstructive.
- Mised the councillors and the applicant.

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Central to the developer's case was a conclusion that Ms G deliberately undermined or obstructed the application and deliberately misled the councillors with a view to harming the developer. She denied this and she was believed by the trial Judge.

The Court of Appeal held that there was no basis on which it should overturn the decision of the trial Judge in that regard.

Negligence

The developer argued that Council owed him a duty to exercise reasonable care to avoid foreseeable economic loss in the determination of the application.

The Council was said to have a duty of care to protect the developer from economic loss based on the following:

- The need for the consent.
- The vulnerability of the developer.
- Reliance by the developer upon the good faith and non-negligent performance of duty by Council staff.
- The control vested in the Council over the property and the interests of the developer by the power given by the Statute.

The Court held there was no such duty of care.

The evidence that the developer "relied" on the Council officers doing their jobs competently and diligently was no more than a reasonable expectation of members of the public. No representation was made by them which might be seen to have founded any assumption of responsibility by the Council.

The Council was not responsible for the developer's financial predicament, nor was it responsible for his decision, made with the advice of his own professional advisors, not to exercise his rights of appeal.

Important to the developer's complaint and argument was his asserted vulnerability to delay and the financial consequences thereof. The Court noted however that section 96 provides its own mechanism for protection from delay, the right of appeal after the time at which the application is deemed to be refused.

The Court further noted that to impose a duty of care in the circumstances of determination of an application for development consent or a section 96 application, based on the applicant's economic interest might tend to skew the balancing of interests to be assessed by a Council which are required to be weighed in any exercise of public power.

For these reasons the Court dismissed the appeal.

For enquiries about this case, contact David Baxter or Kim Probert

DEFINITION OF "DEPOT" UNDER THE STANDARD INSTRUMENT

***Flowers v Wollondilly Shire Council* [2012] NSWLEC 1340
12 December 2012 – NSW Land & Environment Court – Tuor C**

Wollondilly Shire Council ("the Council") refused an application for development consent to use certain rural lands as a "depot" in relation to a tree lopping business.

The key issue involved the permissibility of the proposed development.

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Background

The land had an area of approximately 2 ha and included a detached dwelling and some outbuildings. The land had been used without development consent by the applicant for the storage of machinery, and depositing of materials such as woodchips and logs. Part of the existing dwelling had been used as an office for the tree lopping business.

The applicant sought consent for the storage of machinery relating to the tree lopping business such as trucks, bobcats and trailers. The application stated that no woodchips or logs would be on the site for commercial purposes. The applicant employed two full-time and one casual employee. The use would also include the parking of employee vehicles.

The site was zoned RU2 Rural Landscape, which permitted the use of the site as a "depot". A depot is defined as:

*"...building or place used for the storage (but not sale or hire) of plant, machinery or other goods (**that support the operations of an existing undertaking**) when not required for use, but does not include a farm building."* (emphasis added)

The Proper Characterisation

The Council argued that the permissibility issue depended upon a consideration of the operations that the "depot" would be supporting. In this case, the Council argued that the dominant use of the land was for commercial purposes, a use prohibited under the LEP. If so, the depot use would also be prohibited as it was supporting a use that did not have development consent and could not be granted under the LEP.

The Court accepted this argument and stated that, on a common sense and practical analysis of the uses taking place on the land pursuant to the decision of *Chamwell v Strathfield Council* [2007] NSWLEC 114, the entirety of the uses on the land represented a commercial use which did not have development consent. The Court accepted that the requirement within the definition of depot, which contained the words "existing undertaking" required an analysis of the other operations on the land which the depot would be supporting. Therefore, in the context of the planning regime, that "existing undertaking" would need to be lawful (either being subject to a valid development consent, existing use rights, or a use that does not require development consent), or capable of being consented to.

For enquiries about this case please contact Peter Jackson or Colleen Schofield

FIRST IN BEST DRESSED?

***The Architecture Company Pty Ltd v Randwick City Council* [2012] NSWLEC 1250
4 September 2012 – NSW Land & Environment Court – O’Neill C**

The applicant appealed against the refusal of development consent for a seven storey residential flat building with basement car park.

The site was a narrow corner block in a residential setting. A nine storey residential flat building adjoined to the east and a five storey residential flat building adjoined to the north.

The issues in dispute related to potential impacts on the neighbouring residents to the east, internal amenity of the proposed residences and whether mechanical stacking for parking was suitable.

The planning controls

The development was subject to State Environmental Planning Policy No 65 — Design Quality of Residential Flat Buildings (SEPP 65) and the Residential Flat Design Code (RFDC). The key provisions at the

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heart of the appeal related to the separation distances between habitable rooms and balconies of the subject development and those of the building to the east.

Also applicable was a site specific Development Control Plan (DCP) which nominated the number of storeys, maximum building height and side and rear setbacks for the site. The DCP contained a control that allowed the development to provide a nil setback to the boundary to the east. Whilst the parties agreed that this was entirely inappropriate (given the nature of the development on the site adjoining to the east), the dispute turned on what was the appropriate setback to that boundary.

The Court's findings

The Commissioner found that the design appropriately addressed the site's constraints, noting that it was a narrow allotment and the neighbouring development was built very close to the boundary (pursuant to an approval issued by the Council). It was found that the curved eastern elevation provided reasonable access to sunlight and views from the western balconies of the neighbouring units. It was also found that the use of treatments such as highlight windows and no east facing balconies meant that the privacy of occupants in the neighbouring building was not unacceptably compromised.

In relation to the provision of parking, the Commissioner found that the provision of one parking space per unit was sufficient for the type of accommodation and that the use of mechanical stackers was appropriate due to the constrained nature of the development site.

For enquiries about this case please contact Gary Green or Ryan Bennett.

COMPLYING DEVELOPMENT CERTIFICATE DECLARED INVALID

***Blacktown City Council v Haddad [2012] NSWLEC 224* 28 September 2012 – NSW Land & Environment Court – Pepper J**

Blacktown City Council ("the Council") sought a declaration that a complying development certificate ("the CDC") for the construction of a two storey permanent group home comprising 29 bedrooms was void and of no effect.

The CDC was issued by a private certifier relying on State Environmental Planning Policy (Affordable Rental Housing) 2009 ("the SEPP").

The Council argued that the development could not be characterised as a "permanent group home" as defined in the Standard Instrument.

The Proposed Development

The subject of the CDC was a two storey building with 29 bedrooms, with each having an ensuite, wardrobe, bench and sink area, and laundry facilities. Although each room did not have a cooktop/stove, there was provision of an area marked for tea making.

Most of the rooms had their own balconies or ground floor private open space.

The ground floor provided a further communal laundry as well as a communal kitchen with cooktops, ovens and capacity to seat 12 persons.

The following was also proposed:

- (a) individual telephone lines and access to cable television in each room;
- (b) peep holes on individual room doors;

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(c) a Managing Agent, who would not reside at the premises, but would organise the cleaning and maintenance of the common areas, and undertake periodic inspections of the bedrooms to ensure that they were being maintained.

The SEPP

Clause 45 of the SEPP provided that development for the purposes of a group home was complying development if the development satisfied various requirements for complying development specified in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008. (Clause 45 has since been amended to state that the development for a group home is a complying development if the proposal does not result in more than 10 bedrooms within one or more group homes on a site. The relevant definitions are now also contained in clause 42 of the SEPP).

Dwelling was defined in the Standard Instrument 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's Characterisation

The assertion by the Council that the dwelling needed to be occupied by a single family was rejected by the Court. The Court found that the definition clearly states that persons of the single household do not need to be related to each other. It was noted that modern households include the notion of share housing where person living together may initially be strangers yet form the same household.

However, the Court found that the proposed development did not meet the criteria that the dwelling would be occupied by a single household. This was essentially due to the high number of potential occupants. Whilst noting that this was a matter of fact and degree, the Court was of the opinion that the proposal lacked communal living areas to engender social interaction between the members of the household. Instead, the provision of private balconies and open spaces with the possibility of lounge suites within each room meant that the proposed development would promote the isolation of individual occupants and potentially multiple households. This view was compounded by the provision of individual laundry facilities and the ability to use the tea making space to prepare individual meals.

The Court also found that the definitions of "dwelling" and "domicile" were not satisfied by the proposed development's requirement for lease terms of a minimum three months. This was because the term "domicile" requires a degree of permanency to those living there. This short term leasing arrangement also meant that the household could not operate cohesively if its members were of a transient nature.

As the construction of the building subject of the CDC had not been undertaken, no issues of discretion arose. Accordingly the Court held the CDC to be invalid.

For enquiries about this case contact Ryan Bennett or James Fan.

CLASS 1 DEVELOPMENT APPEALS – POWER TO AMEND WHERE THERE IS AN OBJECTOR

***V'landys v Land and Environment Court of NSW* [2012] NSWLEC 218
3 October 2012 – NSW Land and Environment Court – Biscoe J**

Mr V'landys ("the objector"), commenced proceedings in the Supreme Court seeking to set aside the decision of a Commissioner of the Land and Environment Court in Class 1 proceedings to which he was an objector. The Supreme Court proceedings were transferred to the Land and Environment Court (before a Judge of the Court) as the more appropriate jurisdiction for the proceedings.

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The essential challenge to the Commissioner's decision was the alleged failure to give procedural fairness to the objector by failing to notify him of the "significant" amendments in accordance with the Council's DCP.

The Class 1 Proceedings

The Class 1 appeal was by Mr and Mrs Dive ("the Dives") against the refusal of development consent by Hunters Hill Council ("the Council") for alterations and additions to their existing single storey dwelling. The proposal included a first floor addition, a covered deck facing the street frontage, ground floor renovations, and a swimming pool.

The proposal was objected to by an immediate neighbour on the grounds of view loss and loss of privacy. The objector had suggested, in general terms, that a balcony be relocated with an additional setback on the upper floor.

The Class 1 appeal proceeded by way of mandatory conciliation and hearing under s 34AA of the Land and Environment Court Act during which, the objector and his solicitor were allowed to address the Court and participate except during the conciliation phase.

During the hearing phase, the Dives' solicitor tendered a series of conditions that had the effect of changing the plans tendered in terms of roof design and other minor adjustments. The hearing was adjourned for a short time to allow the Council's solicitor and the objector to consider the proposed conditions. The effect of the Dives' proposed conditions and the Council's without prejudice conditions was explained to the objector by Council's solicitor during this adjournment.

At the resumption of the hearing, neither the objector nor either of the parties suggested that there was a requirement to re-notify the development due to the amendments.

In a reserved judgment, the Commissioner noted the contentions for refusal as being:

- a) Inadequate view sharing with the objector's property;
- b) Loss of privacy on the objector's property; and
- c) Unacceptable streetscape compatibility.

The Commissioner noted that:

"The effect of the changes was to create a roof form more consistent with the pitched roof character in the area with the consequent benefit of improving the view through the proposed deck..."

Was the objector denied Procedural Fairness?

Justice Biscoe, in exercising the Supreme Court's supervisory functions in reviewing the Commissioner's decision (somewhat similarly to a s 56A appeal), noted that there were three methods of changing a development before or at the time of consent:

1. Amendment to the application prior to determination with the agreement of the consent authority, and on appeal, with leave of the Court;
2. Granting of consent pursuant to a condition under s 80(1)(a) of the Environmental Planning and Assessment Act 1979, the power of which is limited by s 80A of that Act; and
3. The granting of partial consent under s 80(4).

The Court found that the Dive's proposed changes to the plans fell under the second method.

The Court held that there was no requirement to re-notify pursuant to the DCP. Firstly, the Court held that the amendments to the roof and other minor changes were not of a "significant" nature such that the DCP notification provision was triggered. The Court noted that, treating the development as a whole, the

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conditions adopted by the Commissioner only modified the details of the development, which is permissible under s 80A(1)(g).

Alternatively, the Court was of the opinion that the notification requirement only applied to amendments under the first of three methods listed – being amendments prior to determination that required agreement of the consent authority or leave of the Court.

Further, the Court found that the DCP requirement to notify was not a matter of relevance to the Commissioner in exercising the consent authority's functions on appeal. His Honour held that the Commissioner ought only be concerned about substantive matters in a DCP relevant to the determination, and that the DCP did not bind the Court on appeal.

Finally, the Court noted that the parties did not raise the notification issue before the Commissioner, who is bound to determine the real issues in dispute between the parties. The Court noted that the objector was in Court with his solicitor and was kept informed of the conditions. He did not raise any issue relating to notification, nor did the Council (which the Court noted was effectively representing the interests of its constituents such as the objector).

Accordingly, the proceedings were dismissed.

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

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