PIKES LAWYERS

LEGAL UPDATE
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PIKES NEWS

Pikes Lawyers will merge with Verekers Lawyers on 1 June 2012 to form Pikes & Verekers Lawyers.

Mark Green and Robert Tassell (partners at Verekers Lawyers) will join the existing Pikes' partners to form the new partnership.

Our contact details will remain the same, except that our email address will be info@pvlaw.com.au and, consequent upon our reception area moving to Level 2, our address will be "Level 2, 50 King Street, Sydney".

The merged firm Pikes & Verekers Lawyers will enhance the services already provided to our clients. Mark and Robert have built up a fine general practice with an emphasis on commercial law.

COUNCIL ORDER RULED INVALID FOR UNCERTAINTY

***Bobolas v Waverley Council* [2012] NSWCA 126**

7 May 2012 – NSW Court of Appeal – McColl JA, Macfarlan JA and Tobias AJA

The appellants were each issued with an order under section 124 of the *Local Government Act 1993* ("the LG Act") by Waverley Council ("the Council"), which required them to remove rubbish accumulated on residential premises in Bondi.

Council claimed relief in the Land and Environment Court under section 678 of the LG Act to enable it to enforce the orders. That relief was granted (see *Waverley Council v Bobolas (No 2)* [2009] NSWLEC 211) which included an order allowing Council's officers to enter and remain on the premises to carry out the removal of rubbish.

The main issue addressed in the Court of Appeal was whether the order under section 124 was invalid on the basis that it was uncertain.

The Order

In January 2009, Council's officers attended the premises and formed the opinion that waste accumulated there was causing or likely to cause a threat to public health.

On 5 March 2009, the Council issued the Order which stated:

> *TERMS OF THE **PROPOSED** ORDER*
>
> *(a) Remove the accumulation of rubbish from all parts of subject premises...*
>
> *REASONS FOR THE ORDER*
>
> *The **order will be** given...*
>
> *PERIOD FOR COMPLIANCE WITH THE ORDER*
>
> *As the storage of waste and refuse constitutes a health risk **the order will** require that you comply with its terms within twenty-eight (28) days from the date of this order.*
>
> *(Emphasis added)*

When Council's officers attended the premises again in April 2009, they formed the opinion that the Order had not been complied with.

The Land and Environment Court

Justice Pain in the Land and Environment Court rejected much of the appellants' defence which raised issues such as the existence and constitution of the Council under the LG Act and the powers of the Council to carry out the orders under the LG Act.

Particularly, Her Honour referred to section 697 of the LG Act, under which proof of the incorporation of council is not required. Her Honour also referred to the powers afforded under Part 2 Chapter 8 of the LG Act which confer on councils' powers to enter land and buildings and to carry out inspections.

Her Honour also rejected evidence that went to the conduct of the functions of the Council in relation to the earlier orders.

As to the fact the order stated "proposed" and contained other wording to suggest it was framed in futurity, Her Honour stated that "*I think any of the recipients of this order would be under no illusion that they were to comply with the order, that there were potential offences that might arise if they failed to comply with the order.*"

The Court of Appeal's Decision

McColl JA compared the strict requirement of Council orders to that of a search warrant in the sense that it would permit entry to premises whether or not the owner or occupier gave consent. Her Honour noted at [41] that such orders "*authorise the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect*". There is, therefore, a need to "*insist on strict compliance with the statutory conditions*."

Referring to authorities on the issuing of search warrants, Her Honour noted that there is a balancing test of a person's private interest against the public interest.

Her Honour held that, because the order contained certain terms in the future tense, the order did not convey any requirement for immediate implementation or compliance. This was confirmed by use of words and phrases such as *"Terms of the proposed order", "Reasons for the order", "the order will be given..."* and *"...the order will require that you comply..."*

It was held that this deficiency went to the heart of the order and the recipient of the order could not "*be certain as to whether it required present compliance or, rather, whether it was some sort of warning notice in anticipation of an order requiring removal of rubbish being issued at a later date*."

Despite the fact that Council had carried out the subject matter of the order, the Court of Appeal set aside the orders made by Pain J and declared the order issued by the Council to be invalid.

Conclusions

The case again highlights the stringent requirement that orders under section 124 of the LG Act, but also those under section 121B of the *Environmental Planning and Assessment Act 1979*, need to be drafted with care and precision. It is a reminder that recipients of such orders must know what breaches have been committed, what acts are required to rectify the breach and the timeframe for compliance.

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

AFFORDABLE HOUSING DEVELOPMENT FAILS CHARACTER TEST

***McKees Project Management Pty Ltd v Manly Council* [2012] NSWLEC 1126**

5, 6 and 7 March 2012 – Land and Environment Court of NSW – Brown ASC

Pikes Lawyers represented Manly Council in this appeal against the Joint Regional Planning Panel's refusal of a development application for construction of two buildings containing 17 dwellings including 9 affordable housing units pursuant to State Environmental Planning Policy (Affordable Rental Housing) 2009 ("the SEPP") in Beatrice Street, Clontarf.

The proposed development was four storeys in height.

The contentions raised by Council included incompatibility of the proposed development with the character of the local area (contrary to the "character test" in clause 54A(3) of the SEPP); unacceptable impact on the amenity of surrounding residences; poor internal amenity; unacceptable tree loss and ineffective delivery of affordable housing.

The site is located within zone 2 Residential under the Manly LEP 1988 in which multi dwelling developments (including residential flat buildings) are permissible with consent. The Manly DCP for the Residential Zone 2007 contains a residential density control which provides that for the

relevant subzone the maximum density is one dwelling per 1,150 sqm of site area. The site area of the subject property is 2910 sqm. The site is located in the lowest density subzone in the local government area.

It was agreed that the character test in clause 54A(3) of the SEPP requires consideration of the following matters:

- What is the "local area"?
- What is the character of the "local area"?
- Is the design of the proposed development compatible with the character of the "local area?"

It was agreed that the established built form within the immediate vicinity of the site is large detached dwellings on single allotments and that there were no residential flat buildings located within the vicinity of the site or within the wider Clontarf headland.

It was also agreed that in assessing whether the design of the proposed development was compatible with the character of the local area, the word "compatible" had the meaning attributed to it in *Project Venture Developments Pty Limited v Pittwater Council* [2005] NSWLEC 191.

Acting Senior Commissioner Brown dismissed the appeal. The Court held that pursuant to clause 54A(3) of the SEPP, the design of the proposed development was not compatible with the character of the "local area" and the degree of incompatibility was such that the development application should be refused for that reason alone.

The Court found that development under the SEPP should not slavishly follow the form of development anticipated by the DCP for multi dwelling development as the character test in the SEPP is compatibility and not replication. In this case, the Court, said, however, that an assessment of the existing building forms and also the character envisaged by the forms of development contemplated by the Residential zone must take into account the requirements of the DCP, that is the applicable density for the subzone.

The Court said that given the Manly local government area has only one residential zone, the requirements of the DCP that identify different densities for different areas has added importance.

The Court found that if the proposed development was considered against the matters set out in *Project Venture* and in the context of the character of the local area, it would not be in harmony with the character of the local area for reasons including:

a The proposed development would not be in harmony with the character of the local area as it relates to the Beatrice Street and surrounding streets visual catchment area and when viewed from Middle Harbour, The Spit and Parriwi Head.

b Although the proposed development was largely located below street level, one unit had a height two metres above the level of the adjacent crown of the road contrary to a provision of the DCP which specified that development could not exceed the level of the crown of the adjacent road pavement. That provision

applied to only a few properties in the Manly local government area and the Court found it therefore had added importance.

c The proposed required additional consideration in terms of its visual impact given the site is located within a foreshore scenic protection area and Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 applies to the site.

d Although the Applicant's experts argued that the proposed development had a similar height to adjoining and nearby residential buildings and the existing house on the site, the Court found this was not necessarily a reasonable comparison when considering visual impact because a comparison of height involving the peak of a pitched roof and the parapet of the proposed building ignored the bulk created by the proposed development. Further, that a comparison of overall height also ignored the extensive excavation proposed and the consequent additional storey that would be visible from Middle Harbour, The Spit and Parriwi Head.

The Court stated that whilst the number of levels proposed was replicated elsewhere within the local area, the number of levels when combined with the grouping or massing of the building form created a form not visible anywhere else within this part of Clontarf.

The Court also found that there were unacceptable amenity impacts on some adjoining properties including overshadowing, loss of privacy and visual bulk.

For inquiries about this case please contact Stephen Griffiths or Colleen Schofield.

EXPERT WITNESSES – CONFLICTS AND CONFIDENTIALITY

***Australian Leisure and Hospitality Group Pty Ltd v Stubbs* [2012] NSWSC 215**

14 March 2012 – NSW Supreme Court – Nicholas J

This case concerns pending Land and Environment Court proceedings where an expert witness retained to give evidence had earlier undertaken work for the opposing side and, in that process, been given confidential information.

Whilst the decision focuses on when the Court should make an order restraining a witness from any pre-trial involvement, it highlights the difficulties that may face an expert witness or consultant should they be retained in opposition to a former client for whom they had previously undertaken work.

Background

The Plaintiff owned and developed liquor stores around Australia. The Defendant was a consultant with expertise in social and strategic planning.

In early May 2009, the Defendant was requested to prepare a social impact statement to support a development application for a proposed liquor store in Nowra. The Defendant replied by saying she would "…*seek to identify opportunities to understand any adverse impacts of the existing use within the locality, and to propose positive ways that the existing application may address these impacts through design or management.*"

During May and June 2009, the Defendant was provided information regarding the operation of the proposed development as well as the nature of other businesses conducted by the Plaintiff.

After the Defendant provided a report to the Plaintiff in July 2009, the Plaintiff provided a critique of the report during a meeting between the two.

In a letter dated 11 August 2009, the Defendant responded and identified negative aspects relating to the proposed development such as alcohol-related harm.

Soon after, the Defendant was informed that the report would not be used to support the development application and that no further work was required of the Defendant.

After the development application was refused by Shoalhaven Shire Council, the Plaintiff appealed to the Land and Environment Court in November 2011. A contention raised by the Council was that the proposed development would have an unacceptable social impact in that it would increase the availability of alcohol and increase alcohol-related harm.

In December 2011, the Council retained the Defendant as an expert witness to give evidence in the Land and Environment Court.

The Plaintiff objected to this on the grounds that the Defendant would have a conflict of interest. Objection was taken to the Defendant being retained on the basis that confidential information had been provided in the pre-development application advice, and that there was a real possibility it would be disclosed.

Potential Breach of Confidence

The critical issue before the Court was whether there was a real possibility of the misuse of the Plaintiff's confidential information if the Defendant was retained as a witness by the Council in the Land and Environment Court proceedings.

The Court found that it was quite possible that the witness, having been retained to meet a case against the Plaintiff, would inadvertently disclose confidential information in pre-trial preparation, or that she would be influenced by the information.

The Court was unpersuaded that an undertaking not to disclose confidential information would be sufficient as there was still a risk of inadvertent or subconscious breach of confidence by the Defendant.

Accordingly, the Court made orders restraining the witness from assisting the Council in the matter.

For inquiries about this case please contact Julie Walsh or James Fan.

WITHDRAWAL OF EXPERT WITNESS AND COSTS IN CLASS 1 PROCEEDINGS

***Weriton Finance Pty Ltd v Wollongong City Council (No 4)* [2012] NSWLEC 97**

2 May 2012 – Land and Environment Court of NSW – Sheahan J

In nine sets of class 1 proceedings that were partly successful for the Applicant, the Respondent Council sought the costs of joint conferencing, preparing joint reports and the costs of the final day of hearing arising from the failure of one of the Applicant's expert witnesses to properly participate in joint conferencing and to appear to give evidence at the hearing ("the Expert Witness Issue").

Council also sought its costs in seven of nine proceedings that were dismissed and claimed those appeals were pursued despite the fact there was no reasonable prospect of success ("the Prospects of Success Issue").

Background

The nine sets of appeals concerned the Headland Hotel site at Austinmer. The proposed development was to consolidate nine lots, demolish existing hotel buildings, re-subdivide the land into eight lots, develop bed and breakfast facilities on seven of the eight proposed lots and develop the eighth lot into a complex of 18 serviced apartments with spa treatment rooms, swimming pool, restaurant and function rooms.

Council did not oppose the demolition of the hotel, but opposed all other aspects of the proposed development.

In a preliminary Judgment by Senior Commissioner Moore and Commissioner Morris, the Court held that the proposals required analysis of clause 11 of the Wollongong Local Environmental Plan 1990, which restricted certain types of developments.

Following the hearing of the matter before both Commissioners, the Court granted consent to the demolition of the hotel and the proposed serviced apartments; however, the Court refused the seven bed and breakfast developments on the basis that dwelling houses (a necessary component of a bed and breakfast) were not compliant with the objectives of the Tourism zoned land as well as issues of jurisdictional fact under clause 11.

The Prospects of Success Issue

The Council sought its costs of seven of the nine proceedings that were unsuccessful on the basis they were "doomed to fail" following the preliminary judgment of the Commissioners.

Following the preliminary judgment, Council's solicitor had written to the Applicant's solicitor, inviting the discontinuance of all nine of its proceedings.

The Applicant, however, continued the proceedings as it had expert opinion that the zoning was appropriate for the proposed uses, and that there were no other tourist zoned sites found within close proximity.

Justice Sheahan, in his costs decision, held that differing views of the prospects of litigation are not uncommon, and therefore refused to award the Council its costs of the seven failed appeals.

The Expert Witness Issue

The role of the Applicant's urban design expert witness ("the witness") was the centre of the Council's application for costs incurred as a result of the witness's failure to attend Court to give evidence and the failure to properly participate in joint conferencing.

The Applicant had retained the witness to address contentions raised by the Council. The witness had provided a fee estimate of $8,000.00 on 20 August 2010 for providing a Statement of Evidence. The fee agreement gave the witness the right to terminate work without notice and to exact payment of work completed.

Quite early in the proceedings, the witness identified shortcomings in the proposal. Plans were subsequently amended on recommendation of the witness to address the contentions raised by Council.

Due to the work required in the revision of plans, the witness provided a revised fee proposal of $37,000.00 on 18 September 2010.

In the period 22 to 30 September 2010, the witness submitted several invoices totalling approximately $80,000.00. The Applicant made payments of $42,000.00, leaving some $38,000.00 outstanding.

The Court noted that the real and relevant issue with the witness arose as the five day hearing in early December approached. The witness, together with Council's experts on urban design, had submitted individual statements of evidence but had yet to joint conference and prepare a joint report.

At this stage, the witness's fees had escalated to over $100,000.00, leaving some $65,000.00 unpaid. In the week before the hearing, the witness, through his office, sought the outstanding amounts from the Applicant. The witness had sent a letter demanding payment of fees under threat of suspending work.

On the last working day before the hearing, the witness had left the joint conference with Council's experts without completing the joint report. Council's experts took exception to the fact that the witness had sent through a large amount of material on the night before the hearing as well as being largely uncooperative.

On the night before the first day of the hearing, the witness emailed the Applicant asking for instructions going into the hearing, and noted that the joint report was yet to be finalised.

On the first day of the hearing on 6 December 2010, the witness did not attend Court and explained that his father had been taken ill interstate and he would be flying out to visit his father.

The matter continued on the second day without the respective experts in urban design. The matter was then adjourned for two days.

Several days prior to the resumption of the matter, the witness wrote to the Applicant and said he was not prepared to attend Court or complete the joint conferencing whilst the account was outstanding. On the night prior to the resumption, the witness terminated the retainer to provide services.

On the morning of the resumption of the hearing on 10 December, the Applicant's solicitor had a lengthy discussion on the issue of attending Court. However, despite the pleas of the Applicant's solicitor, the witness did not attend. Although the Court allowed the witness's Statement of Evidence, there was little weight afforded to it as it was not tested in cross-examination.

The matter did not conclude on 10 December and the matter was adjourned to 1 February 2011 for final submissions.

The Court's Consideration

In the Court's consideration of whether to award the Council's costs arising from the witness's non-involvement, it found that the Applicant should have foreseen that the witness would fail to discharge his duties to the Court if it decided not to pay the witness. It was held that the Applicant had the opportunity to mitigate any damage or loss and that the circumstances of the case were such that the applicant should be held responsible for the failures of its witness.

The Court referred to the fact there was no effort made by the Applicant to warn the Court or the Council's representatives. The Court held that this failure was the element of unreasonable conduct that made it liable for an order for costs.

The Court noted the difficulty was that the witness had repeatedly threatened not to perform further work, but continued to do so until the last moment. The Court also noted that sanctions against breaches by expert witnesses were largely unexplored territory.

The Court ordered the Applicant to pay a portion of the costs of Council's expert witnesses in joint conferencing and preparing its comments on their respective statements of evidence. The Court also ordered the Applicant to pay one-eighth of the costs of the total costs involved over the six days of hearing.

Conclusions

This case highlights the need for litigants to properly manage their expert witnesses and, if required, respond to such issues immediately when they become apparent. Involved in this is the requirement to notify the Court, as well as the opposing party, of any significant slippage or non-compliance with the Court timetable.

Schedule D of the Court's Practice Note on Class 1 Development Appeals requires that, in all matters, parties are to serve a copy of the usual directions, the Statement of Facts and Contentions and the Expert Witness Code of Conduct on all experts to be relied upon.

Of particular importance is the requirement in the "usual directions" that experts (including Council officers) give notice to the party instructing them **and** the Court, if for any reason, they anticipate that they cannot comply with the directions. This is a requirement which is not often complied with.

As the Court was not asked to impose sanctions on the witness in this instance, it remains to be determined whether costs orders may be imposed on witnesses should similar circumstances arise in the future. The Court indicated that it could not do so if the witness had not had a chance to defend the application. However, such a situation may occur where a litigating party seeks orders against the witness personally.

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







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