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"AMBER LIGHT" – SOON TO TURN RED?

Recent decisions of the NSW Court of Appeal have cast doubt over whether the Land and Environment Court in fact has power to adopt the "amber light approach" in planning appeals. The matter remains of some controversy, and until a further decision of the Court of Appeal on this point, applicants need be very wary of inviting the Land and Environment Court to give their proposed development an "amber light" as a fall-back position at the hearing of their planning appeal.

***RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130**

Most recently, in *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130 (reported elsewhere in this Legal Update), the appellant argued that it had been denied procedural fairness when a Judge of the Land and Environment Court had determined to refuse the relevant development application without first permitting the applicant to amend the development application to reduce the height of the proposed development. This kind of approach has from time to time been adopted by Commissioners of the Land and Environment Court, and come to be known as the "amber light" approach.

The Court of Appeal unanimously held that the conduct of the primary Judge at the hearing did not give rise to any legitimate expectation that the applicant would be given an amber light approach in the judgment to be later delivered, nor had his Honour been obliged to offer an amber light approach to the applicant. In additional remarks, Payne JA in the Court of Appeal stated as follows:

> *I agree with Preston CJ of the LEC that the appellant had no legitimate expectation that the "amber light" approach, an approach with no statutory basis and of questionable legality, would be adopted. After the decision of this Court in* Ku-ring-gai Council v Bunnings Properties Pty Ltd *[2019] NSWCA 28, and in particular the reasons of Basten JA in that case, it is doubtful that the "amber light" approach is legally available. In any event, in the present case, as Preston CJ of the LEC explains, the appellant was given every opportunity to say what it wanted about the "amber light" approach and there was no denial of procedural fairness.*

The above remarks are particularly interesting because Basten JA was in the minority in the *Bunnings Properties* decision referred to above. Further, the Chief Judge of the Land and Environment Court has sat on all three recent cases that have considered this issue and the reasoning given by his Honour in each case has not been impugned.

***Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28**

In the *Bunnings Properties* decision, the Chief Judge (with whom the then-President of the Court of Appeal agreed) found that it was within the Commissioner's power in determining a development appeal to make interim factual findings, including that he was "*not satisfied that the proposed development is acceptable in the form presented to the Court*" and to take up an offer made by the applicant to amend or vary the application for development consent before the Court "*to address the concerns raised by Council*" by providing further plans. In doing so however, the Chief Judge described this "amber light" approach as being "*problematic in many ways*".

Among others, a problem with the amber light approach is that it has no statutory basis in either the planning legislation or the Court's legislation. Further, his Honour has noted that the Court's evaluation of the acceptability of the development for which consent has been sought is not to be undertaken by reference to an evaluation of the acceptability of other development for which consent has not been sought.

***Saffioti v Kiama Municipal Council* [2019] NSWLEC 57**

Between the respective dates of the two decisions referred to above, his Honour (sitting on the Land and Environment Court) gave another decision dismissing an appeal against a Commissioner's decision not to adopt the "amber light" approach in determining to refuse a development application in a planning appeal. In *Saffioti v Kiama Municipal Council* [2019] NSWLEC 57, his Honour found that the Commissioner was not obliged to offer an amber light to the applicant in that case.

The *Saffioti* case involved proposed development that departed from relevant provisions of a development control plan. In dismissing the appeal against the Commissioner's decision, his Honour noted that the onus is on the applicant for development consent to proffer, in the development application for the development, the alternative solutions that achieve the objectives of the standards for dealing with the relevant aspects of the development.

Conclusion

In light of the above decisions, it remains doubtful whether the Land and Environment Court has power at all to adopt the "amber light approach" in determining planning appeals where the plans the subject of the development application are found to be not acceptable but capable of some amendments that would resolve the Court's concerns.

Accordingly until this issue is clarified by a later Court of Appeal decision, applicants should exercise great caution if considering inviting the Land and Environment Court to consider adopting an amber light approach as a fall-back position at the hearing of their development appeal. At the very least, the recent decisions discussed in this article show that parties to planning appeals cannot legitimately expect that the Land and Environment Court will adopt such an approach in determining the appeal.

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

COURT OF APPEAL CLARIFIES RECOVERABLE BUSINESS LOSSES FOR SOME COMPULSORY ACQUISITIONS

The recent Court of Appeal decision *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41 has sparked commentary on the scope of recoverable financial costs for compulsory land acquisitions pursuant to s 59(1)(f) of the *Land Acquisition (Just Terms) Act 1991* (**Just Terms Act**).

In August 2015 RMS acquired land over which United Petroleum had an oral lease to run its business, terminable at one month's notice.

At first instance Justice Robson in the Land and Environment Court awarded United Petroleum $2 million as the capitalised sum for the loss of the business and an additional $83,000 for the additional rent paid to the acquiring authority.

The Court of Appeal allowed the appeal by RMS and dismissed United Petroleum's claim for compensation.

There were two key issues on appeal, namely whether United Petroleum was entitled under s 59(1)(f) to compensation for:

1. its loss of ongoing business profits; and

2. the increased rental paid to RMS.

Compensation for loss of ongoing business profits

Section 59 of the Just Terms Act sets out what "loss attributable of disturbance" of land means. This head of compensation is separate to market value of the land and other compensable items, and lists six matters (including certain legal costs and valuation fees) which include with the following item:

(f) *any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition.*

Justice Basten in the principal judgment of the Court of Appeal found that United Petroleum's loss of business profits was not a loss attributable to disturbance because the cost was not one relating to the actual use of the land, nor was it a cost that was a direct and natural consequence of the acquisition. He sought to clarify that s 59(1)(f) is not a "catch all" provision and is constrained by its context in the Act, i.e. immediately following provisions 59(1)(a) – (e). He identified four particular constraints of the 59(1)(f) provision as follows:

1. There must be a temporal element involved, fixed by the extent of the claimant's interest in the land;

2. The financial costs must relate to the actual use of the land (i.e. residential, agricultural, or commercial) – meaning land as an area of earth rather than a bundle of legal rights;

3. The financial costs must be a direct and natural consequence of the acquisition, distinguished from loss caused by the carrying out of the public purpose for which the land is acquired; and

4. A constraint on the wording "any other financial costs", meaning that it is an exclusive category of costs that is independent from the other losses listed in section 59 of the Just Terms Act.

On this interpretation of section 59, Basten JA held that the acquisition did not cause the termination of the business, but only a loss of ongoing profits and this is not a financial "cost" that is compensable under s 59(1)(f). Basten JA also saw the claimed loss as an attempt to re-characterise market value. Justice Macfarlan agreed with this approach, as did Justice Payne on the latter point.

Justice Sackville, with whom Justice Payne agreed, held that as a result of the Court of Appeal's previous decisions in *George D Angus* and *El Boustani*, without a challenge directly to the case law by the RMS, s 59(1)(f) had to allow compensation for loss of profits where a business conducted on the acquired land was forced to close due to a compulsory acquisition and therefore one month's profits was compensable.

Justice Preston took the view that s 59(1)(f) is capable of extending to financial losses such as loss of income or profits but due to the oral tenancy arrangement, the claim should be limited to the loss of one month's profits. In doing so, his Honour expressly departed from his first instance decision in *George D Angus* where further costs had been recompensed.

All judges agreed however that s 59(1)(f) is not intended to "catch" financial costs of the nature referred to in provisions 59(1)(a)-(e) that are not otherwise compensable due to limitations within those provisions, and future profits lost beyond the one-month notice period under the lease were not compensable. In both cases the Court's reasoning was essentially consistent with that of Basten JA.

Compensation for increased rent paid to RMS

At first instance United Petroleum was awarded compensation for the difference in rental price between the prior acquisition rent to the lessor and the occupation fee paid to RMS for post-acquisition occupation of the acquired land. This additional rent had amounted to about $83,000.00.

The Court of Appeal unanimously held that the rent paid to RMS was not a direct and natural consequence of the acquisition of the terminable interest in the land, but rather the consequence of an intervening decision by United Petroleum to remain in occupation of the premises following acquisition at an agreed fee.

Future

Despite this case there was little clarification from the Court as to how future loss of profits might be dealt with when a tenant is occupying the land under a long term tenancy. A future case with the right facts might see RMS challenge whether loss of profits is compensable at all under s 59(1)(f) following Basten JA's commentary.

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

EVEN MORE ON CL. 4.6

The planning fraternity in New South Wales was shaken up by a decision in *Four2Five Pty Ltd v Ashfield Council* from 2015. Last year, decisions in *Initial Action* and *Al Maha (*see Legal Update) either steadied the ship or added fuel to the fire depending on who you ask. Recent decisions in the Land and Environment Court and Court of Appeal offer further insight into how the clause ought to be properly applied.

***Baron Corporation Pty Ltd v Council of the City of Sydney* [2019] NSWLEC 61**

This matter was a 56A appeal against a decision of a Commissioner to refuse development consent on the basis that the cl. 4.6 variation was not well founded and therefore there was no power to approve the development. The subject site had an earlier development consent for a residential flat building comprising 27 units and a FSR of 2:1. The owner subsequently lodged a development application for alterations and additions, essentially to fill voids within the approved envelope resulting in 39 units and a FSR of 2.3:1. On appeal, the Commissioner found that the clause 4.6 request to vary the FSR standard was not well founded as the written request did not adequately address the matters required by cl. 4.6(3)(a) or cl. 4.6(3)(b).

The applicant appealed against the decision on a number of grounds. We will focus on two. Firstly, that the Commissioner misdirected herself in the application of objective (b) of the FSR standard. Secondly, the Commissioner erred in finding that there were not sufficient environmental planning grounds established in the written request.

Objective (b) of the Floor Space Ratio Standard pursuant to Sydney LEP 2012 is "to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic." The Commissioner was not satisfied that the request demonstrated that objective (b) was achieved notwithstanding non-compliance with the FSR standard. On appeal Preston CJ found [at 49]:

> *The central problem in the approach of the Commissioner to objective (b) of the development standard is the Commissioner's elevation of the regulation that is the subject of objective (b) to be an end in itself. Objective (b) is explanatory of the central purpose of the floor space ratio development standard to regulate the density of development, built form and land use intensity of buildings on land in the local area. By fixing different maximum floor space ratios for buildings on land*

> *in different areas by means of the Floor Space Ratio Map, the clause does regulate the density of development, built form and land use intensity. But the regulation of the density of development, built form and land use intensity is not the end to be achieved by the clause, rather it is a means to achieve the goals identified in objective (a) "to provide sufficient floor space to meet anticipated development needs for the foreseeable future", objective (c) "to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure" and objective (d) "to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality", and the particular goal in object (b) "to control the generation of vehicle and pedestrian traffic".*

Despite finding that the Commissioner did err in her application of objective (b), his Honour found that the Commissioner did not err in her finding that the written request did not establish sufficient environmental planning grounds. The Commissioner was of the view that a lack of amenity impacts of itself did not represent sufficient environmental planning grounds. His Honour held that the Commissioner's conclusion was reasonable. Therefore, the appeal was dismissed.

***RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130**

Justice Moore dismissed the primary appeal which related to a DA for a residential flat building that was non-compliant with the building height development standard on the basis that the written request had not adequately addressed the cl. 4.6(3) requirements. Rebel submitted that cl. 4.6(4)(a)(i) does not require the consent authority to evaluate for itself whether the matters in 4.6(3) have been addressed, but rather only to satisfy itself that the request adequately addresses those matters. The Court of Appeal led by Preston CJ of the LEC dismissed the appeal and held that Justice Moore had correctly applied cl. 4.6(4)(a)(i). Per Preston CJ at [51]:

> *In order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).*

***Gary Abrams v The Council of the City of Sydney (No.4)* [2019] NSWLEC 71**

Mr Abrams lodged a development application for a residential flat building containing 14 units in Alexandria. Mr Abrams lodged an appeal against Council's deemed refusal of the DA. The appeal was dismissed by Commissioner Dickson on the basis that the cl. 4.6 request did not satisfactory demonstrate that there were sufficient environmental planning grounds to justify contravention of the FSR development standard.

Mr Abrams appealed against the Commissioner's decision on the basis that the Commissioner failed to provide adequate reasons for dismissing the appeal. Justice Robson upheld the appeal and found that there were insufficient reasons given as to why the written request did not demonstrate that compliance with the development standard was unreasonable or unnecessary in the circumstances of the case.

Mr Abrams requested that the Court either determine the DA with approval or grant an exclusionary remitter on the basis that there was a reasonable apprehension that the Commissioner would not determine the matter impartially. Justice Robson did not consider that there was such a reasonable apprehension and remitted the matter to Commissioner Dickson.

Lessons

1. **In assessing whether a cl 4.6 written request adequately addresses the cl 4.6(3) factors, a consent authority can and should be satisfied that those matters have in fact been demonstrated.**

2. **Where an objective of a development standard is to regulate some characteristic of development, the regulation of development cannot be an end in itself. If that were the case, the objective could never be satisfied and cl 4.6 would be thwarted.**

3. **An absence of amenity impacts of itself does not necessarily constitute sufficient environmental planning grounds.**

For further information regarding this update, please contact Alistair Knox.

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