PIKES & VEREKERS
LAWYERS

LEGAL UPDATE
March 2015

In this issue:

PIKES & VEREKERS' NEWS

We have a new website. The website address is www.pvlaw.com.au.

TIME LIMITS TO LODGE CLASS 1 APPEALS – A TIMELY REMINDER

***CSKS Holdings Pty Ltd v Woollahra Council* [2014] NSWLEC 176 dated 14 October 2014 – NSW Land and Environment Court – Pain J**

Concern was expressed in a number of quarters when the time to lodge an appeal against a refusal or a deemed refusal of a development application was reduced from 12 months to 6 months.

In the case of a deemed refusal, this means the appeal must generally be lodged within 6 months plus 40 days of lodgement of the development application or the right to appeal will be lost if the Council does not actually determine the application.

In these proceedings, the applicant sought an order in Class 4 of the Land and Environment Court requiring Council to determine a development application after the appeal period had lapsed (a remedy known as "mandamus").

The development application ("the DA") had been the subject of a report to a Council meeting recommending approval.

The DA was controversial, relating to the redevelopment of the Paddington Bowling Club for a 120 place child care centre.

The land was the subject of a Crown Land lease.

The DA was lodged on 14 March 2013.

Council resolved on 18 August 2014 that consideration of the DA be deferred until the outcome of a referral to ICAC in relation to the transfer of the Crown Land lease to the applicant was known.

Relevantly, the DA had been lodged with owner's consent from the office of the Minister for Crown Lands ("the Minister") but, subsequently, that office advised Council that had the findings of a review into the transfer of lease been known at the time, owner's consent would not have been granted.

The DA was deemed to have been refused on or about 15 July 2013. Therefore, the appeal period against the deemed refusal of the DA expired on or about 15 January 2014.

The applicant argued that the Council had failed in its duty to determine the DA by resolving on 18 August 2014 to defer determination to an unspecified time in the future contingent on the outcome of an enquiry by ICAC, the status and scope of which was unknown. Therefore, deferral of determination in this matter was unreasonable given the time that had already lapsed since lodgement of the DA and that the assessment of the merits of the application was otherwise complete.

The Land and Environment Court noted that the High Court has stated on a number of occasions that where legislation is silent as to the period in which a statutory decision must be made, a reasonable time limit is implied. What amounts to a reasonable time is ultimately a matter for determination by the Court, having regard to the circumstances of the particular case within the context of the decision-making framework established by the legislation.

In the circumstances of this case, there was an allegation that the owner's consent given by the Crown may have been vitiated by corrupt conduct.

The Court referred to the discretionary nature of the remedy of mandamus and noted that each case must be determined on its own facts.

The Court held that the determining factor in the exercise of the discretion was whether the Council had acted unreasonably in deferring the DA for an undefined time in these particular circumstances.

The Court did not consider that the Council had acted unreasonably in deferring the DA in the circumstances, nor had it constructively failed to determine the DA.

Accordingly, the application was dismissed.

For enquiries about this judgment, contact Julie Walsh or Roslyn McCulloch.

POWER OF THE LAND AND ENVIRONMENT COURT TO ORDER ATTENDANCE AT A SECTION 34 CONFERENCE

***Golden Max Pty Limited v Hurstville City Council* [2015] NSWLEC 16 dated 11 February 2015 – NSW Land and Environment Court – Biscoe J**

This was a Class 1 appeal against the refusal by Council of a development application for construction of a multi-dwelling development.

At the first directions hearing, the applicant had sought for the matter to be referred to a section 34 conference.

The Council had opposed this on the following grounds:

1. The Council had not delegated authority to any Council staff attending such conference to enter into a binding agreement on behalf of the Council.

2. The proposed development did not meet the minimum lot size standard in the Council's Local Environmental Plan ("LEP") to such a substantial degree that the matter was not suitable for conciliation.

The Registrar refused to fix the matter for a section 34 conference and fixed the matter for a hearing.

The applicant was successful in reviewing the Registrar's decision before a Judge.

The Judge noted that he reached this conclusion with the benefit of evidence and submissions that were more comprehensive than those presented to the Registrar.

In relation to the submission that there was no utility in a section 34 conference because of the Council's "blanket" position in all cases in the Court not to give delegated authority to a Council officer, the Court held that this was an insufficient reason to refuse to order a section 34 conference, noting that the legislature gave the Court a coercive power in section 34 to order parties to conciliate.

The position adopted by this Council was apparently founded on the argument that the obligation to "participate in good faith" at a section 34 conference includes an obligation that the person representing a party at a section 34 conference must have authority to bind that party by any action taken or position agreed at the conference.

The Court noted that this is strongly desirable and usual; however, it is alternatively sufficient if each party represented at a section 34 conference has authority to enter into a legally non-binding agreement as to the terms of the decision in the proceedings that the representative thinks may be acceptable to that party and this may require any such legally non-binding agreement to be submitted by the representative to that party for later ratification.

The Court also noted that in the present case the Council only declined to give its representative authority to enter into a binding agreement and that is no impediment to enter into a
section 34 agreement.

Thus the first argument was not relevant.

As to the second argument, the Court noted that the Council's Statement of Facts and Contentions identified six reasons why the development application should be refused, only one of which concerned the minimum lot size for multi-dwelling housing.

The Court noted there was therefore scope for agreement or narrowing of issues in relation to the other five reasons.

The Court also noted that the LEP required a minimum lot size of 500m^2 for each dwelling and the applicant's proposal for a development containing four dwellings halved that requirement.

The applicant had submitted amended plans for three dwellings with lot sizes which still fell short of the minimum requirement, but were closer to compliance.

The Court noted that there was provision in clause 4.6 of the LEP for consent to be granted for development even though it contravened such a development standard.

The applicant wished to negotiate with the Council at a section 34 conference as to whether a variation of the proposed development might be favourably considered by the Council under clause 4.6.

The Court held that this was not an unreasonable position and it was not satisfied that the Council's second reason for proposing that there should not be a section 34 conference was sufficient.

Accordingly, the matter was listed for a section 34 conference.

For queries about this judgement, contact Gary Green or James Fan.

SECTION 34 CONFERENCE – DUTY TO PARTICIPATE IN GOOD FAITH

***Gilles v Valuer General of New South Wales* [2011] NSWLEC 1114 dated 19 May 2011 – NSW Land and Environment Court – Registrar Gray**

Although this judgment is not recent, it is nevertheless relevant to the issue decided in the above case.

This was an application made by the respondent, the Valuer General of New South Wales ("the VG"), for the applicant to pay its costs of a section 34 conciliation conference which was unsuccessful.

The matter had been listed for a section 34 conciliation conference with the consent of both parties.

The matter did not resolve at the section 34 conference, and the presiding Commissioner made the following notation in the section 34 report:

> *The applicant considered that there was no point in arranging for its valuer to attend the conference as the applicant came to the conclusion that the matter could not be resolved at the conference where Mr Glitsos was the valuer. The applicant's experience is that when Mr Glitsos is the valuer, he has never shifted his value in the past. The applicant considered it to be futile to have his valuer here incurring costs for the purposes of today.*

The applicant only had his solicitor present at the conference, whereas the respondent had its valuer, solicitor and counsel present. The applicant's solicitor was not in a position to discuss methods of valuation, but was in a position to negotiate a figure up to that which had already been offered by the applicant and refused by the respondent prior to the conference.

The respondent submitted that it was not sufficient for the solicitor to attend alone without the ability to discuss methods of valuation in circumstances where it was known that the VG cannot agree on a quantum without understanding the method by which that quantum has been reached.

The respondent submitted that the failure to do so caused the respondent to incur costs unnecessarily.

The Court noted that a party's failure to attend a section 34 conference in good faith is a potential circumstance in which it is appropriate for there to be an exception to the general rule that each party should pay its own costs in Class 1 proceedings.

The Court concluded that the fact that the applicant's solicitor who attended the conference only had instructions to make an offer up to the value of an offer that had previously been rejected by the respondent was evidence that the applicant did not intend to participate in good faith.

Further, the evidence contained in the affidavit of the applicant clearly showed that prior to the conciliation conference the applicant had formed the view that there was no utility in participating in negotiations at the conference.

The Court noted that the applicant's solicitor had made no attempt to indicate this to the solicitor for the respondent prior to the section 34 conference.

The Court held that the applicant was therefore unreasonable firstly in failing to take steps to vacate the conference in circumstances where the applicant was not prepared to negotiate and had formed the view that there was no utility in the conference and, secondly, in merely attending the conference through his solicitor without the genuine intention of participating in a negotiation or conciliation process.

The Court held that as a result of that unreasonable conduct, the respondent incurred the costs of attendance at the section 34 conference including the attendance of its solicitor, counsel and expert.

The Registrar ordered the applicant to pay the respondent's costs of the section 34 conference in the sum of $2,459.00.

For queries about this judgment, contact Ryan Bennett or Joshua Palmer.

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