PIKES & VEREKERS
LAWYERS

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PIKES & VEREKERS' NEWS

We are pleased to announce that Joshua Palmer and James Fan have been promoted to Senior Associate and Associate respectively. Joshua and James have been an integral part of our firm's Planning and Local Government practice and we look forward to their continuing contribution.

CLAUSE 4.6 VARIATIONS – NOT AS TOUGH AS RECENT HISTORY SUGGESTS?

***Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 – Land and Environment Court – Preston J**

These proceedings relate to an appeal to the Land and Environment Court against the deemed refusal of a development application to construct a residential flat building which did not comply with the height and floor space ratio standards in the Local Environmental Plan.

The Commissioner hearing the appeal accepted the written requests to vary a standard under clause 4.6 of the Standard Instrument and upheld the appeal. The Council, having been unsuccessful before the Commissioner, appealed on a question of law on the basis that the Commissioner, in making her decision, erred in three main respects.

The appeal against the Commissioner's decision was heard by the Chief Judge of the Land and Environment Court and the first basis of challenge was that the Commissioner failed to be satisfied about the requirements in clause 4.6(4).

Alternatively, it was argued that the Commissioner failed to give adequate reasons. The Council also contended that the Commissioner failed to consider a requirement of a Development Control Plan. Essentially, the Council argued that the Commissioner set the bar too low in assessing the variation request.

The Chief Judge dismissed the appeal and accepted Commissioner's approach to clause 4.6. His Honour held that the Commissioner had set out the correct tests under clause 4.6 and expressly stated in the judgment that she was satisfied the proposal satisfied those tests. As the correct tests had been applied, the result was could not be disturbed.

Importantly, it was said that the Commissioner is not required to be directly satisfied that compliance with each of the standards was unreasonable or unnecessary in the circumstances of the case. Rather, the Commissioner only needed to be satisfied that the clause 4.6 objections adequately addressed the issue that compliance with the standards was unreasonable or unnecessary.

The decision follows from earlier decision of the Court in *Four2Five v Ashfield Council* (and adopted in *Moskovich v Waverley Council*) where a restrictive approach appeared to take hold. Those reasons included:

- claimed additional housing and employment opportunities arising from the proposal were not sufficient environmental planning grounds because they were not particular to the site;
- demonstrating compliance with the standard was unreasonable or unnecessary does not automatically lead to the conclusion that the proposal was consistent with the objectives of the standard.

Ultimately, the decision confirms that a consent authority has a broad discretion as to the matters required to be satisfied under clause 4.6(4) of the Standard Instrument. Such a broad discretion exists once the consent authority has undertaken an analysis of those matters as they apply to the application.

For enquiries about this judgment, please contact Ryan Bennett or James Fan.

COMPLYING DEVELOPMENT – HOW IT CAN GO WRONG AND THE CONSEQUENCES

***Hornsby Shire Council v Trives (No 3) [2015] NSWLEC 190 & (No 4) [2016] NSWLEC 28* – Land and Environment Court – Biscoe J and Craig J**

In this litigation, which has only recently been finalised, Hornsby Shire Council challenged three complying development certificates which were issued by a private certifier. The CDCs were for three "detached studios" similar to granny flats, on lots with existing houses, on land zoned R2 low density residential, where the LEP prohibited "dual occupancy", "secondary dwellings", and "multi-dwelling housing".

The CDCs were granted to three land owners on the basis that the 2-3 bedroom studios fell under the definition of "ancillary development" as defined under the Codes SEPP which encompasses the phrase "detached studio" and so the proposals were permissible. One of the "detached studios" granted was described during the proceedings as:

> *A rectangular building divided internally by a fire rated wall. West of that wall is an area described as "studio 2" with one bedroom, a bathroom/laundry with shower, toilet and wash basin; a living/dining area; and a kitchen with kitchen bench, designated space for a refrigerator, hot plates and a sink. There is no internal access between that area and the area of the building to the east*

> *of the dividing fire rated wall. East of the fire rated wall is an area described as "studio 1" containing two bedrooms one of which has an ensuite bathroom with shower and toilet; a second bathroom with a bath, sink and toilet; a separate laundry cupboard, a living/dining area; and a kitchen with the features I have earlier described for the other buildings.*

At first instance, Justice Craig set aside the certificates on the grounds that characterisation of the development as "detached studios" was a matter which could be determined by a judge of the Land and Environment Court upon an objective basis, and objectively, the proposals were not "detached studios".

However, upon appeal, after analysis of sections 85A(1) and (3) of the *Environmental Planning and Assessment Act 1979*, the Court of Appeal found that Parliament's intention was that, when considering the validity of the CDCs, the Court could not undertake the task to characterise whether the proposed studios were in fact "complying development" because that was a job for the certifier alone. The Court held the judicial review process was simply to consider whether the certifier had considered the characterisation and that the conclusion was not grossly unreasonable.

When the matter was remitted back to the Land and Environment Court, the Court underwent a review of whether that opinion had been formed reasonably. Justice Biscoe heard the preliminary question of reasonableness. His Honour found that on the correct interpretation of the relevant provisions of the Codes SEPP, the structures could not reasonably be characterised as complying development or a 'detached studio' because:

- they were not ancillary to a dwelling house on the lot as required by clause 3.5 of the Codes SEPP;
- they were not established 'in conjunction with a dwelling house' and therefore not within the definition of 'detached studio' in clause 1.5 of the Codes SEPP;
- they resulted in there being 'more than one dwelling house' on the lot contrary to clause 3.8(1)(a) of the Codes SEPP; and
- they were not 'permissible with consent' within the relevant zone as required by clause 1.18(1)(b) of the Codes SEPP.

Final orders were made by Justice Craig on 24 March 2016. Those orders allowed the owners six months to demolish the structures erected. The extra time afforded to the owners is to allow them to seek consent from Council to use the structures as a separate dwelling.

Because a certifier is not required to provide reasons in issuing a CDC, it may be difficult in some cases to determine whether they have acted unreasonably in being satisfied that development the subject of a CDC is complying development. This may impact upon a decision whether to bring legal proceedings challenging a decision of a certifier to issue a CDC.

However, if a CDC is challenged, the task of the Court is to ask, by reference to the plans, whether the development is one which is complying development for the purposes of section 85A where identified by an environmental planning instrument as being complying development.

Ultimately, certifiers should take extreme care in approving CDCs by reference to the numerical requirements under the codes, but also having regard to the characterisation of the development proposed. Failure by a certifier to do so will not only result in sanction from the Building Professionals Board, but also expose themselves to civil claims from owners.

For enquiries about this judgment, please contact Peter Jackson or Alistair Knox.

TEMPORARY USES UNDER THE STANDARD INSTRUMENT – ASSESSMENT OF IMPACTS

***Marshall Rural Pty Limited v Hawkesbury City Council and Ors* [2015] NSWLEC 197 & [2015] NSWLEC 210 – Land and Environment Court – Moore AJ**

These proceedings relate to a judicial review challenge to development consents issued by Council for temporary use as a function centre pursuant to clause 2.8 of *Hawkesbury Local Environmental Plan 2012*. The subject sites are zoned RU2 and contain polo fields with associated structures. The temporary use granted was for weddings to be held on the site, function centres being prohibited in the RU2 zone. The challenger was a company which owns one of the neighbouring landholdings hosting polo and related activities. The consent holder defended the proceedings and Council entered a submitting appearance.

The grounds of challenge included failure to consider a mandatory relevant consideration, consideration of an irrelevant consideration, incorrect application of a relevant test, failure to afford procedural fairness and deferral of a matter which should have been determined prior to consent being granted. The challenger sought, and was granted, leave to add a further ground of challenge at hearing, namely the validity of the owner's consent provided for each application.

Ultimately, the Court found that the consents were invalid as a result of Council's failure to consider properly the test pursuant to clause 2.8(3). The Court also found that the owner's consents were invalid.

Clause 2.8(3) states:

> *(3) Development consent must not be granted unless the consent authority is satisfied that:*
>
> *… (b) the temporary use will not adversely impact on any adjoining land or the amenity of the neighbourhood,…*

His Honour found that Council had considered whether the applications could be rendered compliant with technical standards derived from those applied by an external regulator, the Office of Liquor, Gaming and Racing. Those standards envisage an acceptable impact rather than absence of adverse impact, being the test required under clause 2.8(3)(b). Due to the fundamentally prohibitive nature of the terms of that subclause, in failing to consider the correct test, His Honour found that Council fell into impermissible error. His Honour made orders declaring the consents invalid and restraining the consent holder from further using the subject site for the purposes of a function centre.

Subsequent to his finding in the substantive proceedings, His Honour heard further submissions from the parties as to when the injunctive provisions should take effect. His Honour heard evidence that new development applications had been lodged with Council for use as a function centre at the subject sites. Taking into account certain undertakings made by the consent holder, His Honour stayed the injunctive orders until a determination was made by Council in relation to the new development applications.

For enquiries about this judgment, please contact Stephen Griffiths or Alistair Knox.

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