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LAWYERS

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DEVELOPMENT APPLICATIONS FOR CONTAMINATED LAND – GETTING IT RIGHT

**Lippmann Partnership Pty Ltd v Canterbury-Bankstown
Council [2017] NSWLEC 1601 – Land and Environment
Court of NSW – Dickson C – 27 October 2017**

This was a Class 1 appeal against refusal of a development application for a mixed commercial/residential development.

There was an issue between the parties about how to deal with a factual finding that the site was contaminated having regard to the provisions of clause 7 of SEPP 55.

A preliminary site investigation indicated that part of the site had previously been used as a service station and it was unclear from the information available whether the former underground storage tanks had been removed from the site. The report concluded that a detailed site investigation should be undertaken, and if that investigation concluded that remediation was required, then a Remediation Action Plan should be prepared.

Council had prepared draft 'without prejudice' conditions of consent including a deferred commencement condition dealing with the preparation of a further report.

It was however the Council's primary submission that the applicant had provided insufficient information to enable the Court to be conclusively satisfied that the site was suitable for the use proposed by the development application.

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The applicant accepted that further investigation and remediation of the site was required, however sought the imposition of the proposed deferred commencement condition as an operational condition to be satisfied prior to the release of the construction certificate.

The Commissioner cited paragraphs from the judgment of Preston CJ in *Moorebank Recyclers Pty Ltd v Benedict Industries Pty Ltd* [2015] NSWLEC 40 which confirmed that clause 7 of SEPP 55 establishes two sets of preconditions to the exercise of the power by a consent authority to determine a development application, as follows:

1. The consent authority must consider a report (in accordance with the contaminated land planning guidelines) identifying the findings of a preliminary investigation of the land.
2. (a) The consent authority must consider whether the land is contaminated.
 - (b) If the land is contaminated, the consent authority must be satisfied that the land either is:
 - (i) suitable in its contaminated state; or
 - (ii) will be suitable after remediation, for the purpose for which the development is proposed to be carried out; and
 - (iii) if the land requires remediation, the consent authority must be satisfied that the land will be remediated before the land is used for the purpose for which the development is proposed.

The Commissioner found that the preliminary contamination report prepared by the applicant did not provide sufficient certainty to confirm the extent of the historic use of the use as a service station, to locate the presence of contamination within the site, or to support a conclusion as to the extent of site contamination remaining. Therefore, the Commissioner considered that it was appropriate to require the applicant to carry out and provide a report on a detailed investigation of the site prior to the final determination of the application by the Court.

The Court therefore directed the applicant to complete a stage 2 detailed site investigation, as recommended in the preliminary contamination report, and if the site investigation concluded that the land was not suitable for the proposed use in its present state, the report was to incorporate recommendations for the remediation of the land.

Following this, the Council was to prepare updated conditions of consent to include a mechanism for dealing with the contamination.

For further information regarding this update, please contact Roslyn McCulloch or Tom Bush.

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