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RECENT LAND AND ENVIRONMENT COURT DECISIONS

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to Manly Council
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AFFORDABLE RENTAL HOUSING
COMPATIBILITY WITH THE CHARACTER OF THE AREA

Issue

There has been considerable public criticism of the impact of affordable housing developments on existing residential areas.

The incoming State government has responded by amendments to the SEPP which include the introduction of clauses 16A and 30A which provide that:

> *"A consent authority must not consent to the development to which this division applies unless it has taken into consideration whether the design of the development is compatible with the character of the local area."*

The problem with this is that no specific guidelines were introduced by the government to accompany these amendments so as to inform us as to how to apply this compatibility test.

The situation is further complicated by the fact that clause 16A relates to infill development (town houses, dual occupancies, residential flat buildings) whereas 30A relates to boarding houses.

Infill development is already reasonably well catered for because in most instances regard has to be had either to the Seniors Living Policy: Urban Design Guidelines for infill development or SEPP 65 – Design Quality of Residential Flat Development.

Query therefore what the need was for clause 16A.

Query also how we apply clause 30A which has identical wording but does not have the benefit of reference back to either of those design guidelines.

***Sterling Projects Pty Ltd v The Hills Shire Council* [2011] NSWLEC 1020**
8 February 2011 – Land and Environment Court – Tuor C

- This matter involved an appeal against refusal of a development application for a townhouse development at Carlingford which was infill affordable housing.

- The proposal was for four townhouses with garage parking for four cars on a site of 790m^2. Under the Baulkham Hills Local Environmental Plan 2005 ("the LEP") the proposal was prohibited, but it was permissible under the provisions of the SEPP (Affordable Rental Housing) 2009 on the basis that at least 50% of the dwellings in the proposed development would be used for affordable housing.

- Clause 14 of the SEPP provided certain standards that could not be used to refuse consent such as density and scale, site area, landscaped area and parking.

- Clause 15 provided that the consent authority must not consent to development for infill affordable housing unless it has taken into consideration the provisions of the Seniors Living Policy Urban Design Guidelines for infill development.

- The case turned on whether clause 15 had been satisfied. The Commissioner found that they had not been satisfied particularly in relation to compatibility with the neighbourhood character, impact on streetscape and unacceptable solar access to the occupants of the development.

- In considering compatibility with neighbouring character, the Commissioner said:

  - Character is not limited to a consideration of streetscape but includes the wider context of the site, in particular the characteristics of the properties which adjoin the site (predominantly detached two storey houses on large allotments).

  - The gun-barrel driveway design is "poor design" which gives rise to a building inconsistent in character.

  - The design creates a large expanse of built form clearly visible from the adjoining residents to the side and along the central driveway with little opportunity to provide landscaping to soften the building façade. This is inconsistent with the character.

  - The length of the proposal (including its intrusion into a green zone) is uncharacteristic of the area.

- The appeal was dismissed.

***White v Parramatta City Council* [2011] NSWLEC 1059**
1 March 2011 – Land and Environment Court – Brown C

- This matter involved an appeal against the refusal of two development applications, each with a construction of a two storey boarding house on a separate allotment.

- Each contained an entry foyer, a recreation room including a kitchen, self-contained boarding rooms each containing a kitchen/laundry/bathroom and a common open space area.

- Each site was zoned 2B Residential and boarding houses were a permissible use.

- The zone objectives were:

  "To enhance the amenity and characteristics of the established residential area, and to encourage redevelopment of low density housing including dual occupancy where such redevelopment does not compromise the amenity of the surrounding residential areas …

To ensure that building form … is in character with the surrounding built environment."

- The LEP imposed an FSR of 0.6:1. Residential flat buildings were not permissible within the zone and hence the "bonus" of floor space otherwise available under the Affordable Housing SEPP was not available.

- There were a number of heritage items nearby which were adversely impacted upon.

- Setting aside heritage considerations, it is interesting to see how the Court dealt with the interaction between the LEP, its DCP and the Affordable Rental Housing SEPP. The Court said:

  - Although the FSR anticipated by the LEP and the SEPP was exceeded (0.6:1 versus 0.74:1) the SEPP provided that this was not necessarily a barrier to approval.

  - The exceedence of the FSR must be assessed against the objectives of the zone.

  - This assessment should proceed in a manner similar to a SEPP 1 objection to see whether the additional FSR can be supported in the particular circumstances and characteristics of the proposed development.

  - In assessing impacts on the surrounding residential areas regard should not be had to some of the "mixed elements" in that area, ie the service station and the residential flat building, because these are not permissible in the zone.

  - Consideration should be given to desired future character by reference to what is permissible within the zone.

  - That in the circumstances, the proposed developments were too long and too narrow and of a density greater than anticipated for permissible multi-unit, dual occupancy and terrace housing development which was anticipated for the zone.

  - Inadequate setbacks deny opportunities for useful landscaping and screen planting (although this is not necessarily a solution itself to an inadequate design).

  - The provision of privacy screens to some windows and the removal of balconies, etc whilst improving adverse amenity impacts has the consequent effect of reducing the amenity of the proposed development.

- The appeals were dismissed.

DETERMINING PERMISSIBILITY BY REFERENCE TO THE LAND USE TABLE

***Aldi Stores v Newcastle City Council* [2010] NSWLEC 227**
3 November 2010 – Land and Environment Court – Pepper J

- This was a section 56A appeal by Aldi Stores ("Aldi") against the decision of the Senior Commissioner of the Land and Environment Court to refuse a development application for a new single storey supermarket with associated car parking and signage at Fletcher, a suburb of Newcastle.

The findings of the Senior Commissioner:

- The development application was refused by the Senior Commissioner on the basis that it involved two uses, namely that of a "local shop" permissible under the Newcastle Local Environmental Plan ("the LEP") and that of a "shop" (a prohibited use under the LEP).

- Local Shop was defined in the LEP as follows:

  > *"A shop that:*
  >
  > *(a) is of a nature and size that is suitable to serve a surrounding population of approximately 5,000 people; and*
  >
  > *(b) is not a bulky goods retail outlet, convenience shop or sex aid establishment."*

- The Senior Commissioner found that the proposed development was consistent with the zone and LEP objectives, did not involve an unreasonable environmental impact and would not have been refused based on an assessment of the merits.

- Further, the Senior Commissioner found that the proposed development would be of the required "nature" and "size" for a "local shop".

- Despite making these findings, the Senior Commissioner went on to examine the extent to which the proposed supermarket was in the future predicted to trade to a market beyond that of serving the community of Fletcher, ie whether its use would expand beyond that of a local shop to a shop.

- Based on consideration of anticipated trading patterns and evidence regarding the planned car park (which was larger than required under the DCP) the Senior Commissioner found that by the year 2016 the proposed development would be characterised as a shop rather than a local shop.

- Accordingly, the Senior Commissioner dismissed the appeal on the basis that a shop was a prohibited use which would be carried out on the site by 2016.

The appeal against the Senior Commissioner's decision:

- Aldi appealed against the Senior Commissioner's decision on two grounds: firstly, that the Senior Commissioner erred in his characterisation of the proposed development and, secondly, that in making his decision he denied procedural fairness to Aldi.

- Pepper J found that the Senior Commissioner erred when he went beyond the finding that the supermarket would be consistent with the definition of a "local shop" in the LEP. The Senior Commissioner should not have proceeded to examine the extent to which the proposed development was predicted to trade to a market beyond that of the community of Fletcher, because there was nothing in the definition of a term "shop" or "local shop" in the LEP that required this additional examination to be undertaken.

Issue

Although *Aldi* makes no reference to them, there is actually a very strong line of authority in the Court in support of the position adopted in *Aldi*.

In ***Doyle v Newcastle*** (1990) 71 LGRA 55 the application was for the erection of a pigeon loft associated with a residential use. The Land Use Table identified a number of permissible uses including "home occupations".

Development for purposes other than a dwelling house and nominated permissible uses was prohibited. The LEP contained a definition for agriculture and the Commissioner found the proposal to be agriculture and hence prohibited.

This was overturned by the Court on appeal. At that time, it was observed that innominate uses were prohibited and nominated uses permitted, so priority would be given to the nominated permissible use, ie as a home occupation.

This was expanded by the Court in ***Crosland v North Sydney*** (2000) 109 LGERA 244. Again, innominate uses were prohibited and nominated uses permitted. The nominated uses included a hospital. The innominate uses included a defined use for commercial premises.

In the circumstances, a medical centre was found to come within the definition of "hospital" without the need for any further enquiry as to separate commercial operation.

This has been further expanded in ***Bouchahine v Hornsby*** (2002) 124 LGERA 280. In that case, a home industry was permissible with consent but light industry prohibited. The definition of home industry included a reference to light industry and hence it was argued that the definition called up that of light industry and, as such, the proposal was necessarily prohibited.

The Court ruled otherwise, adopting its now settled practice that you *"enquire whether the category of development so applied for falls within the scope of the permissible categories of development. If the answer to that question is in the affirmative the question of categorisation need proceed no further."*

EXISTING USE

***Iris Diversified Property Pty Ltd v Randwick City Council* [2010] NSWLEC 58**
7 May 2010 – Land and Environment Court – Pain J

- The applicant, owner and operator of the Clovelly Hotel, sought to change the use of part of the site, which benefits as a whole from existing use rights for a hotel, to residential flats.

- As the proposal didn't comply with a number of development standards, the Court was asked to determine, as a preliminary point of law, whether or not the Applicant was required to comply with those standards.

- The preliminary point of law was heard by Pain J in *Iris Diversified Property Pty Ltd v Randwick City Council* [2010] NSWLEC 58 where it was held that the applicant must comply with the appropriate development standards or, alternatively, justify any non-compliance by an appropriate SEPP 1 objection.

- This judgment further reduces the utility of existing use rights, which has seen a gradual erosion since March 2006 when the Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006 came into force. Prior to this amendment, a site with existing use rights could be changed to another prohibited use in almost any circumstance.

- Thereafter, assessment of development applications with existing use rights was merit based and conducted by councils without applying development standards in Environmental Planning Instruments such as Local Environmental Plans or Development Control Plans.

- Pain J's decision further limits existing use rights because the development standards in Environmental Planning Instruments now must be applied in the assessment of development applications to change uses.

Rationale

Hitherto consent authority could not take into account development standards or similar controls in assessing a proposal based on existing use rights because section 108(3) of the Environmental Planning and Assessment Act 1979 provided that:

> *"An environmental planning instrument may in accordance with this Act contain provisions extending, expanding or supplementing the incorporated provisions but any provisions (other than incorporated provisions) in such an instrument that but for this subsection would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force."*

Justice Pain reasoned that the amended incorporated provisions which provided that a use may be *"changed to another use, but only if that use is a use that may be carried out with or without development consent under the Act, had the effect of enlivening development standards and other criteria that would be part and parcel of that development assessment process."*

NB Iris was taken on appeal to the Court of Appeal but the appeal was withdrawn because development consent was forthcoming for the project. Some experts in the field question the decision because it runs contrary to the prior jurisprudence of the Court.

APPLICANT'S ABILITY TO AMEND ITS MODIFICATION APPLICATION PRIOR TO ASSESSMENT THEREOF

***Jaimee Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 245**
17 December 2010 – Land and Environment Court of NSW – Craig J

- The applicant, Jaimee Pty Ltd ("Jaimee"), was granted development consent for alterations and additions to an existing warehouse in Alexandria.
- Jaimee subsequently submitted an application to the Council to modify the consent pursuant to section 96(1A) of the Environmental Planning and Assessment Act 1979 ("the Act"), seeking to delete two conditions and amend a third.
- The Council agreed to the deletion of one of the conditions, but refused the application in relation to the remaining two conditions.
- Pursuant to section 96(6) of the Act, Jaimee appealed to the Land and Environment Court in respect of Council's refusal. One of the conditions that remained in contention was condition 8, which required contributions in accordance with section 94 of the Act of $261,192.17 to be made. Jaimee sought to reduce this amount.
- The Council's Statement of Facts and Contentions in Reply identified an error with respect to its calculation of section 94 contributions. The Council sought to revise the amount payable pursuant to condition 8 to $386,926.50.
- Jaimee then filed a motion which sought to amend its application under section 96(1A), the class 1 application filed with the Court as well as its Statement of Facts and Contentions.
- Jaimee sought to withdraw the proposed amendment to condition 8, so that it would pay $261,192.17 in section 94 contributions (the original, and lower, calculation).
- Surprisingly, the Council argued that there was no power to accept an amendment to an application made pursuant to section 96(1A). Craig J found against the Council on this point.

- Whilst His Honour acknowledged that clause 55 of the Environmental Planning and Assessment Regulation enabled only the amendment of a development application and not a modification application, His Honour found an implied power to amend a modification in section 96 itself. His Honour had regard to the requirement for the Council to notify the modification application and accept submissions and found that there must implicitly be some means for an applicant to respond to submissions made, in particular in respect of minor errors in the application. This suggests a power to amend.

- His Honour also took the view that allowing an applicant to amend a modification application avoided the cost and time delay of lodging new applications for amendments of minor significance.

- Having determined that it was open to Jaimee to amend its section 96 application as lodged with the Council, Craig J found that pursuant to section 39(2) of the Land and Environment Court Act 1979, the Court had the power to accept an amendment made by Jaimee to its application. It then followed that there was power in the Court to allow the class 1 application to be amended in the way proposed by Jaimee.

- Craig J then considered whether as a matter of discretion the power should be exercised and determined that it was appropriate to allow the amendment as it had the capacity to reduce the time of the hearing and the costs occasioned to the parties involved in litigating the real issues that remained between them.