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PIKES NEWS

Pikes was a sponsor of the Australian Institute of Building Surveyors (NSW and ACT) conference at Darling Harbour on 1 and 2 August 2011.

The conference was attended by over 750 delegates including council employed building surveyors, private certifiers and other building professionals.

A number of our partners and senior lawyers attended the conference and enjoyed catching up with a number of clients and other building professionals with whom we have had a close association over many years.

We look forward to continuing our relationship with the Australian Institute of Building Surveyors in the future.



LIMITS TO CONDITIONS REQUIRING A REDESIGN

**Ecological Centre Pty Limited v Council of the City of Sydney (No 2) [2011] NSWLEC 1206
20 July 2011 – Land and Environment Court of NSW – Moore SC**

This class 1 development appeal considered the limits of the Court's power to impose a condition requiring the redesign of a proposal.

The development application was for a mixed commercial/residential development on a site area of 16,500 square metres in Alexandria. The

site was mapped as flood prone in the 1 in 100 year rainfall event. The maximum floor space ratio under the relevant planning controls was 1.5:1. The development application the subject of the appeal had a floor space ratio of 2:1.

The Senior Commissioner indicated that he would not be prepared to approve a development with a floor space ratio exceeding 1.5:1 in the circumstances of the case. Consequently, the proposed floor area of approximately 33,000 square metres would need to be reduced to approximately 24,750 square metres.

The proposal involved six buildings and the evidence was that four of those buildings would require substantial redesign to reduce the floor space.

The Applicant argued that the Court could approve the application subject to a condition requiring the reduction in floor area and a redesign of the buildings.

The Senior Commissioner noted as follows:

"My ability to impose conditions, as a general proposition, only permits me to impose such conditions that would approve a development and have it remain generally a development of the nature for which approval has been sought. I do not need to set out authority for that, it is such a fundamental planning proposal – that one cannot, on an application for an elephant, approve a lion or vice versa."

Accordingly, the Senior Commissioner determined that it was appropriate to dismiss the appeal.

For further details please contact Stephen Griffiths or Ryan Bennett.

HOW MANY EXPERT WITNESSES IS ENOUGH?

Hinset Pty Ltd v Lane Cove Council [2011] NSWLEC 120 11 July 2011 – Land and Environment Court of NSW – Pepper J

This was an application to the Land and Environment Court in a class 1 development appeal for a direction to limit the number of expert witnesses on a specific issue, namely bushfire risk.

The development application sought consent for the demolition of three dwelling houses and a construction of a residential flat building containing 32 units with associated car parking.

The site was located in North Lane Cove and was partly mapped as bushfire prone land.

The Council raised issues concerning the bushfire prone nature of the site and the adequacy of an evacuation route in the event of a bushfire emergency.

The Applicant had obtained the services of a bushfire expert to prepare a report to accompany the development application.

Following the commencement of the proceedings, the Applicant retained the services of an additional bushfire expert. The Applicant

proposed to bring evidence from both of the experts.

The Council sought a direction that only one bushfire expert could give evidence on behalf of the Applicant.

The Applicant argued that there were two distinct issues in the proceedings, namely:

- 1 Whether there was an unacceptable risk to the development of bushfire in the adjacent reserve; and
- 2 Whether the local area could be safely evacuated in the event that this was necessary.

The Applicant argued that the two experts were required to give evidence on the two separate issues. Council argued that one expert could give evidence on both of the issues.

The Council argued that limiting the number of experts would tend to advance the "just, quick and cheap" resolution of the real issues in the proceedings as required pursuant to section 56 of the Civil Procedure Act.

The Council acknowledged that the only prejudice it would suffer as a result of the Court permitting more than one bushfire expert to give evidence for the Applicant was the possible elongation of the hearing to deal with the expert evidence.

The Court accepted the Applicant's arguments that it was necessary to bring evidence from the two different experts on the two discrete issues and, accordingly, the application was dismissed.

For further details please contact Peter Jackson or Amy O'Callaghan.

TREES (DISPUTES BETWEEN NEIGHBOURS) ACT 2006 VIEWS VERSUS PRIVACY

Boddington v Julian & Anor 3 June 2011 – Land and Environment Court of NSW – Fakes C

This case was an application under the Trees (Disputes Between Neighbours) Act 2006 ("the Act") by the owner of a property in Mosman against the owners of an adjacent property on which a Leighton Green hedge had grown up to partially block views from two windows of the Applicant's house.

The Applicant appeared on her own behalf and the Respondents were legally represented.

The hedge had been planted in 1997 to provide privacy to the Respondents' house and back garden from an elevated entertaining deck of a house up-slope. The hedge was approximately 4.5 metres high.

The evidence established that the view impact from the kitchen window was not severe, therefore there was no jurisdiction to make an order in respect of the obstruction of view from that window.

In relation to the sunroom window, although the view obstruction was

found to be severe, the Court held that the Applicant's interest in having the obstruction caused by the hedge removed or pruned did not outweigh the Respondents' need for privacy.

The Court noted that the Applicant was able to obtain expansive views of Middle Harbour and the surrounding district from many portions at the rear of her house. The views which the Applicant sought to regain were views in a relatively narrow corridor over side boundaries and those views were already affected by vegetation well beyond the Respondents' property principally in a Council reserve.

Accordingly, the application was dismissed.

For further details please contact Julie Walsh or Colleen Schofield.

WINNERS AND LOSERS - KU-RING-GAI TOWN CENTRE LEP DECLARED INVALID

**Friends of Turramurra Inc v Minister for Planning [2011] NSWLEC 128
28 July 2011 – Land and Environment Court of NSW – Craig J**

These proceedings were a challenge to the validity of the controversial Ku-ring-gai Local Environmental Plan (Town Centres) 2010 ("Centres LEP").

There were a number of grounds of challenge, the successful grounds being:

- Substantial amendments were made to the Draft LEP by the Ku-ring-gai Planning Panel ("KPP") without further exhibition so that the Centres LEP was not the product of the processes under Part 3 of the Environmental Planning and Assessment Act ("EPA Act").
- The amendments by the Minister to the draft LEP were substantial and were not subject to further notification such that the Centres LEP was not the product of the processes under Part 3 of the EPA Act.

The relevant facts were:

27 May 2004 - Direction pursuant to section 55(1) of the EPA Act to Ku-ring-gai Council to prepare a draft LEP for certain zoned land under Ku-ring-gai Planning Scheme Ordinance ("KPSO") aimed at encouraging the provision of additional dwellings. No LEPs had been made by early 2008.

28 February 2008 - Order pursuant to section 118(1)(b) of the EPA Act appointing KPP to exercise Council's functions to make planning instruments for Ku-ring-gai Town Centres.

12 August 2008 - Director General delegated to KPP his functions under section 65(1) and section 69(1) of the EPA Act with respect to the Draft LEP.

5 November 2008 - KPP chairperson signs section 65 certificate for Draft LEP.

17 November to 19 December 2008 - Draft LEP advertised.

27 May 2009 - KPP resolved to adopt the Draft LEP as amended and submit it to the Minister under section 69.

25 May 2010 - The Minister made the Centres LEP with further amendments. There was no further notification of the Draft LEP following amendments by KPP or the Minister.

The reasons for upholding the two grounds of challenge are set out below:

Amendment of Draft LEP following exhibition

The Applicant identified a number of changes to the Draft LEP which were not the subject of a further exhibition process, namely:

- 1 Proposed controls on certain schools and sub-station land included in the Draft LEP were omitted from the Centres LEP as made.

In accordance with a Department of Planning Practice Note the draft LEP indicated the school and sub-station sites to be zoned in the same manner as adjoining land. The Draft LEP imposed lot size, height and floor space ratio (FSR) controls by reference to the colour of that land on certain maps. Submissions were made in respect of the draft LEP by the relevant schools and Energy Australia, all objecting to the proposed zonings and seeking a zoning of SP2 Infrastructure. The Council staff report recommended such a zoning. KPP accepted the recommendation and the sites became uncoloured on the relevant maps.

Further representations were made by the Department of Planning regarding the sites to the effect that they should be zoned the same as adjoining land. KPP acceded to those representations and the section 69 report to the Minister showed those sites zoned the same as adjoining land however no change was made to the maps controlling lot size, height and FSR (i.e. the sites remained uncoloured).

The Centres LEP was made in that form in May 2010.

Craig J held that there was a significant difference between the Draft LEP as exhibited and the Centres LEP as made as a result of the absence of development controls on the school and substation lands.

- 2 Alterations to Bio-diversity Controls

The Draft LEP identified certain areas within each of the town centres as being of either high or special biodiversity significance. Part 3 of the Draft LEP provided that exempt or complying development could not be carried out on land of high biodiversity significance. The Centres LEP as made altered the bio-diversity provisions with the consequence that exempt and complying development could then be carried on such land.

Craig J held that the diminished biodiversity controls in the Centres LEP as made appeared to be significant.

3 Reduction in Gordon Park Heritage Conservation Area

Under the Draft LEP, 19 lots comprised the Gordon Park heritage conservation area. The Centres LEP as made included only 7 of those 19 lots in that conservation area. Craig J said that at a local level the removal of 12 lots from the conservation area would seem to be a matter of some significance although it was debateable whether it would be significant in the context of the Centres LEP as a whole.

4 Other Amendments made by KPP

These included the up-zoning of some 14 properties in Lindfield from R3 Medium Density to R4 High Density, the up-zoning of 4 properties in Gordon from low to high density, the re-zoning of 17 properties to permit dual occupancy and the alteration of the Turrumurra Senior Citizens Club site from Public Recreation RE1 to Local Centre B2.

Craig J said that at an individual level each of the alterations may not be significant but it was the totality of the amendments which needed to be considered.

Amendments by the Minister

The draft LEP proposed that Masada College be zoned R2 Low Density Residential (two storey, FSR 0.3:1), consistent with adjoining land. The Department considered submissions by Masada and recommended the up-zoning of the site to R4 High Density. This zoning was adopted in the Centres LEP as made and permitted 5 stories and an FSR of 1.3:1.

The Applicant asserted that the significance of the change meant that the Centres LEP as made was not truly the product of the Part 3 process.

Significance of alterations

Craig J identified six aspects of the alterations made by the KPP that *prima facie* had significance to planning in the town centres. He said that alterations to the draft instrument without further public notification seriously undermined the public participation process in Part 3 of the EPA Act.

Similarly, he considered the Minister's alterations regarding Masada College to be of considerable significance.

His Honour concluded that when the alterations were considered in their totality the Centres LEP was not the outcome of the Part 3 process and was therefore invalid.

Severance

The Court was unable to sever the invalid portions of the Centres LEP as the Applicant's ground regarding biodiversity had been sustained. That invalidity affected large numbers of lots throughout each of the town centres and Craig J concluded that severance was not appropriate in the circumstances.

Craig J declared that the Centres LEP had been made contrary to the provisions of Part 3 of the EPA Act and was of no legal force or effect.

This decision highlights the dilemma faced by Councils and other Authorities when making environmental planning instruments: when does an alteration to the draft instrument require the draft instrument to be readvertised? As Craig J said: "There is no bright line that determines the point beyond which the process of alteration to a draft planning instrument will require the altered draft to be re-advertised. As the authorities earlier cited make clear, the determination is made by considering the extent of difference in important respects between the instrument as made and the draft which was exhibited."

For further details please contact Gary Green or Roslyn McCulloch.



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