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**PLANNING APPEALS LEGISLATION AMENDMENT ACT 2010**

The uncommenced provisions of this Act (relating to new rights of review, amendments to appeal time limits and section 97B costs orders), have been proclaimed to commence on 28 February 2011.

For a summary of the provisions of the Act, see our November 2010 Legal Update (available on our website at [www.pikeslawyers.com.au](http://www.pikeslawyers.com.au)).

The amendments only relate to development applications lodged from 28 February 2011.

**For further details about this legislation please contact Julie Walsh or Ryan Bennett.**

**PROPOSED WORKS ON PUBLIC ROAD – RELEVANT  
CONSIDERATIONS**

***Appwam Pty Ltd v Ashfield Council* [2011] NSWLEC 1001**

**5 January 2011 – Land and Environment Court of NSW – Morris C**

This was an appeal against Council's refusal of a development application for construction of a building for a warehouse and industrial use.

In the course of the proceedings the proposal was amended to provide for an acoustic wall of between 3 metres and 3.9 metres in height, such wall to be located upon the public road between the subject site and nearby residential properties.

The Council contended that the structure should not be approved because the Council would not grant consent under the Roads Act 1993 for the construction of the wall.

The question the Court had to consider was whether consent should be granted for the construction of the acoustic wall on the public road and whether such construction would be in the public interest. Further, whether approval under the Roads Act would be consistent with the objects of the Roads Act.

The Court considered the decision of Preston CJ in *Australian Leisure and Hospitality Group Pty Limited v Manly Council (No. 4)* [2009] NSWLEC 226 (reported on in our February 2010 Judgments Bulletin) where the Court made it clear that the Roads Act and the Environmental Planning and Assessment Act 1979 ("the EP&A Act") require separate approvals for development on a public road. Further, the Court noted that the objects of the Roads Act are quite different to those of the EP&A Act.

The Council objected to the acoustic wall on the basis that if constructed on land under the control of the Council it would become the responsibility of the Council for any approval to carry out works to the wall and any liability that might arise in the event of any damage caused to or from it.

The Applicant contended that a condition of consent could be imposed burdening the owners of the development site with the responsibility, liability and maintenance of the wall and further argued that the Roads Act provided sufficient protection to the Council to require the maintenance of the wall, including the ability to direct the owner of the development site to remedy damage.

The Court accepted that the Roads Act allowed the construction of structures on the Council road reserve and that section 142 of that Act provides for the Council to require certain works to be carried out. That was a burden that did not currently exist and to enforce the provisions in this case provided no public benefit.

The Court was not satisfied that the liability for consequential damage that might arise from the construction of the wall on public land could be transferred to the owners of the site referring to the earlier Judgments of *Hutchinson 3G Australia Pty Ltd v Waverley Council* [2002] NSWLEC 151 and *Galandon Pty Ltd v Narrabri Shire Council* (1983) 51 LGRA 5 concluding that a condition requiring an indemnity would not have a basis under section 79C of the EP&A Act.

On the basis of general planning principles, the Court did not consider that it was appropriate for the Applicant to rely on constructing ameliorative measures within the public realm and considered that all such measures should be contained within the site.

The Commissioner required a re-design of the development to require any acoustic treatment to be wholly within the site.

**For further details about this case please contact Peter Jackson or Andrew Simpson.**

## **POWER TO AMEND SECTION 96 APPLICATIONS**

***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.

**For further details about this case please contact Colleen Schofield or Amy O'Callaghan.**

## ASSESSMENT OF JRPP APPLICATIONS: WHOSE JOB IS IT ANYWAY?

***Ku-ring-gai Council v Sydney West Joint Regional Planning JRPP (No 2) [2010] NSWLEC 270***

**31 December 2010 – Land and Environment Court of NSW – Biscoe J**

This was a successful challenge by Ku-ring-gai Council (“the Council”) to an approval granted by the Sydney West Joint Regional Planning Panel (“the JRPP”) for a residential flat development in Roseville. Council had recommended refusal of the development application.

The development application was made under the Ku-ring-gai Planning Scheme Ordinance (“the PSO”). A portion of the subject land was a road reservation. Whether the reserved land could be taken into account in calculating site area determined whether the proposal complied with site coverage and landscaped area controls, and thus whether an objection pursuant to State Environmental Planning Policy No. 1 (“SEPP 1”) was required.

Clause 13 of the PSO prevented permanent development on the reserved land except where the “responsible authority” was satisfied that the land would not be used for the reserved purpose. There was evidence that it would not be. If the opinion was formed, development could be carried out “with the consent of the responsible authority”.

Clause 13F of State Environmental Planning Policy (Major Development) 2005 (“SEPP Major Development”) confers on a JRPP any consent authority function to determine development applications for development with a capital investment of more than \$10 million (which criterion the proposal met). Clause 13F(2) leaves with Council the function of receipt and assessment of development applications. Clause 13F(3) provides that Council is to remain the consent authority for the development subject to the functions conferred on the JRPP.

There were three grounds of challenge to the JRPP’s approval:

- 1 Neither Council nor the JRPP formed the opinion required by clause 13 of the PSO;
- 2 The JRPP could not accept a SEPP 1 objection in the absence of Council assessment; and
- 3 A failure to notify a SEPP 1 objection, lodged directly with the JRPP, resulted in a denial of procedural fairness.

The Court upheld ground 1, finding that the “consent of the responsible authority” in clause 13 of the PSO is “development consent”. The Court further held that the “consent” function under clause 13 could not be separated from the function of forming the relevant opinion. Thus, the “opinion” function under clause 13 was conferred on the JRPP by SEPP Major Development as part of the determination function.

The Court found that the JRPP had not formed the necessary opinion.

With respect to ground 2, the Court found that the consideration of development standards and SEPP 1 assessment is an essential part of the assessment of a development application and as such was required

to be carried out by the Council as a pre-condition to the determination of the development application by the JRPP. The JRPP is not bound to adhere to the Council's findings but the SEPP 1 objection must be assessed by the Council. The Applicant could not avoid this requirement by lodging the SEPP 1 objection late and directly with the JRPP.

Ultimately however, the Court found that the SEPP 1 objection was not required as the site area was properly construed to include the road reservation. Accordingly, the development was compliant and the SEPP 1 objection was irrelevant.

This led the Court to reject ground 3 as there could not be denial of procedural fairness for failure to notify a legally irrelevant matter.

**For further details about this case please contact Julie Walsh or Joshua Palmer.**

## VALUATION – AN ART NOT A SCIENCE

***Halley v Minister Administering the Environmental Planning and Assessment Act 1979 [2010] NSWCA 361***

**17 December 2010 – Court of Appeal – Giles JA; Hodgson JA and Tobias JA**

In our February 2010 Judgments Bulletin we reported on the Judgment in *Halley v Minister Administering the Environmental Planning and Assessment Act 1979 [2010] NSWLEC 361* in which the Land and Environment Court determined the compensation payable to a dispossessed owner under the Land Acquisition (Just Terms Compensation) Act 1991 for the compulsory acquisition of 466m<sup>2</sup> of waterfront land at Longueville at \$1.3 million. The Valuer General's valuation was \$2 million and the amount claimed by the dispossessed owner was \$2.4 million (reduced from the original claim of \$3.5 million).

The Court of Appeal unanimously dismissed an appeal against this Judgment.

**For further details about this case please contact David Baxter or Kim Probert.**



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