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**PIKES NEWS**

We congratulate Amy O'Callaghan, one of our lawyers, who has recently completed a Master of Laws through Sydney University, concentrating on environmental and planning law subjects.

Amy assists both our council and developer clients, principally in the Land and Environment Court.

**YOUR HOME (OR BLOCK OF LAND) IS NOT YOUR CASTLE**

**Barry Edward and Thelma June Harrington v Greenwood Grove Estate Pty Ltd [2011] NSWSC 833**

**4 August 2011 – Supreme Court of NSW – Slattery J**

Nowhere is the tension between property and planning law more evident than in the operation of section 28 of the Environmental Planning and Assessment Act 1979 ("the Act").

Section 28 provides:

*"For the purpose of enabling development to be carried out in accordance with an environmental planning instrument in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument."*

"Regulatory Instrument" is defined as follows:

*"Any Act (other than this Act), regulation, by-law, proclamation, agreement, covenant or instrument by or under whatever authority made."*

The effect of a section 28 clause in an environmental planning instrument (an LEP or a SEPP) is that where development consent is granted under that instrument, if it is in breach of a regulatory instrument

(such as a covenant), the development may nevertheless be approved and proceed and the party with the benefit of the regulatory instrument loses their right to entitlement to enforce their rights thereunder.

In this case, the purchasers of land in a residential estate at Lennox Head on the North Coast of New South Wales sought an injunction to restrain the developer of the estate (which owned residue lots) from carrying out development on those residue lots in breach of a Management Plan on the basis that the Management Plan constituted a contract between the developer and the purchasers.

The Management Plan provided that the residue lots would be subdivided into substantial lots (in excess of 1200 square metres each) containing individual houses.

Subsequent to the sale of land to the purchasers, the developer lodged a development application for the erection of 74 "affordable rental housing" dwellings pursuant to SEPP (Affordable Rental Housing) 2009 ("the SEPP"), quite a different proposal to that contained in the Management Plan.

The developer argued, and the Court accepted, that a clause in the SEPP, inserted pursuant to section 28 of the Act, operated to suspend the operation of the relevant provisions of the Management Plan if development consent was granted under the SEPP.

The Court, applying earlier Judgments, including the Court of Appeal Judgment in *Coshott v Ludwig* [1977] NSW Conv 55-810 held that **but for** the operation of the relevant clause of the SEPP, the developer was in breach of its contractual obligations to the purchasers to comply with the Management Plan and the Court would have granted an injunction to restrain the proposed development. However, the section 28 clause in the SEPP operated to suspend the rights of the purchasers to enforce their rights under the Management Agreement. The proceedings were accordingly dismissed.

**For further details please contact Julie Walsh or Kim Probert.**

## **COSTS IN CLASS 3 PROCEEDINGS**

### **Halley v Minister Administering the Environmental Planning and Assessment Act 1979 (No 3) [2011] NSWLEC 94**

#### **31 May 2011 – Land and Environment Court of NSW – Pepper J**

This was a decision concerning an application for costs by the Minister for Planning in a case relating to the compulsory acquisition of land in Longueville.

The relevant facts can be summarised as follows:

- 18 July 2008 – Minister gave notice of compulsory acquisition of foreshore land at Longueville for the purpose of open space.
- 15 August 2008 – Minister offered compensation of \$2,016,500, as determined by the Valuer General ("VG").

- 5 December 2008 – In class 3 proceedings, the Applicant's Points of Claim sought \$3,500,000.00 plus disturbance and legal costs.
- 27 February 2009 – Minister filed Points of Defence contending compensation in the sum of \$2,115,000.
- 1 May 2009 – Minister filed amended Points of Defence contending compensation in the sum of \$1,315,000.
- 7 to 9 December 2009 – Hearing before Lloyd J. In closing submission, the Applicant reduced her claim to \$2,385,000 and the case was determined on that basis.

The Applicant's claim was based on an assumption that the land could be subdivided. Lloyd J concluded that the likelihood of any consent for subdivision of the waterfront land was extremely remote. He rejected the Applicant's valuation and determined market value in the sum of \$1,315,000, which was less than the VG's valuation.

In considering the Minister's claim for costs, Pepper J examined the principles relevant to an award of costs in compulsory acquisition cases. She called into question the correctness of the "general principle" in *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* [2010] NSWLEC 27 that a person who has lost their land by compulsory acquisition should generally not bear their own costs.

Pepper J considered the legislative framework relevant to the question of costs in compulsory acquisition cases, in particular:

- The Civil Procedure Act 2005.
- The Uniform Civil Procedure Rules 2005.
- The Land and Environment Court Rules 2007.

Pepper J considered that combined, these provisions indicated an unequivocal intention by the legislature that costs should follow the event in such cases. She noted that the Land Acquisition (Just Terms Compensation) Act 1991 was silent as to the costs of proceedings and concluded that the "general principle" cannot be maintained in relation to compulsory acquisition cases and that to do so would be to disregard the express and unambiguous language of the legislation.

Pepper J reviewed the authorities cited in support of the "general principle" and considered that each decision could be limited to the facts and circumstances of each case and could be distinguished from the present case.

In determining the claim for costs, Pepper J had regard to the following factors:

- The ordinary rule is that costs should follow the event.
- Market value as determined by the Court was \$701,500.00 less than the VG's valuation.
- Market value as determined by the Court was \$800,000.00 less than the Minister's initial position in its Points of Defence.

- The Applicant did not reduce the claim from \$3.5 million to \$2.385 million until the conclusion of the hearing.
- On a fair reading, the Minister's case was a strong one.
- There was no disentitling conduct by either party.
- The claim was not vexatious or dishonest.
- The case was not conducted in a disorganised manner by the Applicant.

Considering all of these factors, Pepper J determined that the Applicant should pay the Minister's costs of the proceedings.

While the disparity between the market value as determined by the Court, the Applicant's claim and the Minister's response were significant factors in the award of costs, Pepper J has clearly defined the approach to be taken in relation to costs in compulsory acquisition cases. That approach should commence with the consideration of the legislation which states that costs in these cases should follow the event unless some other orders ought to be made in the circumstances.

**For further details please contact David Baxter or Roslyn McCulloch.**

## **CHARACTERISATION OF USE – STILL A VEXED QUESTION**

**Paynter Dixon Consultants Pty Ltd v Fairfield City Council [2011] NSWLEC 127**

**27 July 2011 – Land and Environment Court of NSW – Craig J**

In this case, Craig J sitting with Brown C, considered an application for an "accommodation facility" and elevated car parking structure at the Leo McCarthy Memorial RSL Club at Smithfield. The two main issues considered in the appeal were:

- 1 Whether the development was permissible under Fairfield Local Environmental Plan 1994 ("the LEP").
- 2 Whether consent should be granted as a matter of merit.

### **Permissibility**

The proposed accommodation facility was to have, at ground level, an entry foyer, reception area, offices, staff room and amenities as well as an undercover car park. The three upper levels of the accommodation facility was to have 133 rooms each with a floor area of about 28 m<sup>2</sup>. The typical room layout indicated a double bed, single bed, bench, cupboard and ensuite bathroom. The accommodation building was to be erected over a portion of the existing car parking area. As a consequence a new car parking structure was proposed over the remaining at-grade parking area with a capacity for 466 cars.

Documents accompanying the development application stated that there would be no separate service of meals to accommodation guests and that the accommodation facilities would only be available to members or temporary members of the Club. Under the Registered

Clubs Act, temporary members could be members of another registered club with similar objects, members of another registered club participating in organised sport or competition on the Club on that day or any person whose ordinary place of residence was not within 5km of the club.

The site was zoned 2(a1) – Residential A1 under the LEP. Development for the purpose of “motels” was prohibited.

The Club submitted that the development was for the purpose of a “club” within the meaning of the LEP, either because it was club development itself or was ancillary to the use of the land for a club. Alternatively, the Club contended that the purpose of the development should be characterised as “club related accommodation” and within the innominate category of development in the zoning table and therefore permissible.

The Club's submissions were rejected. Craig J concluded that the proposed development was for the purpose of a motel for the following reasons:

- The fact that the development would provide temporary or short-term accommodation which met the definition of “motel” in the LEP.
- Neither restriction of the use of the development by members or temporary members of the Club or employment of staff by the Club altered the nature of the proposed use.
- Whilst the Club facilities were available to guests, there was no necessity for them to make any use of those facilities.

Craig J considered the observations of Preston CJ in *Chamwell v Strathfield City Council* (2007) 151 LGERA 400 that when characterising development it is necessary to do so in a “common sense and practical way”. Craig J did not consider that the use of the accommodation building was so inextricably bound to the use of the Club that it must be seen, for planning purposes, as subordinate to and not independent of the use for the purpose of the Club. Craig J said that there was nothing that identified the proposed accommodation building as “club related accommodation” other than the label assigned to it by the Applicant. He determined that the use of the proposed accommodation building was independent of the use of the site for the Club and was for a motel which was prohibited under the LEP.

### **Merits**

The planning consultant retained by the Applicant and the Council's staff planner agreed that in built form, the structures intended to be erected by the Club were acceptable in their impact. A number of local residents did not agree including the owners of two residential properties adjoining the site to the west adjacent to the proposed car parking structure.

Somewhat unusually, Craig J held that notwithstanding the expert evidence of both planners to the contrary, the impact of the proposed elevated car parking structure upon adjacent residential properties was wholly unacceptable.

Accordingly, the appeal was dismissed.

At the risk of mixing metaphors, this case is a good example of why dressing the proverbial motel "wolf" in the Club related accommodation "sheep's clothing" will not be effective to pull the characterisation of use "wool" over the consent authority's eyes.

**For further details please contact Peter Jackson or Roslyn McCulloch.**



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