Marsdens Law Group

Local Government, Planning and Environmental Law Update

21 June 2019

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The Topics:

- **Clause 4.6 - Contravening Development Standards**
- **Design Excellence and Concept Development Applications**
- **State Environmental Planning Policy (Affordable Rental Housing) 2009 and the definition of accessible area**
- **Deferred commencement consents and lapsing**
- **GIPA and copyright**
- **Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7 - greenhouse gas emissions from development and the impact upon measures to limit climate change** – presented by Adriana Kleiss

Clause 4.6 - Contravening Development Standards

Every Local Environmental Plan in NSW in the Standard Instrument format contains a clause that allows a consent authority to grant consent to a development that contravenes a development standard unless the particular development standard is expressly excluded from the operation of the clause.

The clause is known as clause 4.6. The objectives of the clause are specified as:

> (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
>
> (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The permissive power in cl 4.6 to grant consent to development that contravenes a development standard is subject to conditions that must be met before the power can be exercised.

The relevant conditions of the clause that must be met are:

> (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered **a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating**:
>
> > (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
> >
> > (b) that there are sufficient environmental planning grounds to justify contravening the development standard.
>
> (4) Development consent must not be granted for development that contravenes a development standard unless:
>
> > (a) the consent authority is satisfied that:
> >
> > > (i) **the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and**
> > >
> > > (ii) **the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and**
>
> (b) the concurrence of the Secretary has been obtained.

The relevant cases

Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248

- Case concerned the construction of clause 4.6 in the context of a non-compliance with a development standard relating to the height of buildings

- The Commissioner was not satisfied in the circumstances of the particular case that the written request had adequately addressed the matters required to be demonstrated by cl 4.6(3), namely that compliance with the standard is unreasonable or unnecessary in the circumstances of the case, and that there were sufficient environmental planning grounds to justify contravening the development standard.

- The environmental planning grounds identified in the written request were the public benefits arising from the additional housing and employment opportunities that would be delivered by the development. The Commissioner was not satisfied that these grounds were particular to the circumstances of the proposed development or were within the scope of the "environmental planning grounds" referred to in cl 4.6(4)(a)(i).

- The Court of Appeal said that it was not an error of law for the Commissioner to find, as a matter of fact in the circumstances of the particular case, that merely pointing to the benefits from additional housing and employment opportunities delivered by the development, was not sufficient to constitute environmental planning grounds to justify contravening the development standard.

Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

- The Chief Judge, Justice Preston confirmed in this case the nature of the task to be undertaken in relation to a request made under clause 4.6 as follows:

> *"the Commissioner could not grant development consent for the development unless the Commissioner considered the cl 4.6 objections (the requirement in cl 4.6(3)) and was satisfied that, **first**, the cl 4.6 objections adequately addressed the matters required to be demonstrated by cl 4.6(3) (the requirement in cl 4.6(4)(a)(i)) and, **second**, the development will be in the public interest because it is consistent with the objectives of the height standard and the FSR standard and the objectives for development with in the R3 zone in which the development is proposed to be carried out (the requirement in cl 4.6(4)(a)(ii)).*" (Emphasis is added)
>
> *…*
>
> *The matters about which the Commissioner was obliged to be satisfied before being able to grant development consent for the development were those in cl 4.6(4)(a). One of these matters is that "the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)". The two matters in subclause (3) are that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (para (a)) and that there are sufficient environmental planning grounds to justify contravening the development standard (para (b)).*
>
> *39.Hence, **the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary**."*

- In other words, Justice Preston said that the consent authority does not need to be satisfied that compliance with the relevant development standard is unreasonable or unnecessary in the circumstances of the case or that there are sufficient environmental planning grounds to justify contravention of the standard rather it

needed to be satisfied that the written objection **"adequately addressed"** those matters.

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

- Case concerned a DA for a residential flat building that did not comply with the applicable development standard for height under Woollahra Local Environmental Plan 2014.

- Justice Preston noted that there are 2 preconditions in clause 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard:

    1. The consent authority, or the Court on appeal exercising the functions of the consent authority, must form **two positive opinions of satisfaction** under cl 4.6(4)(a)(i) and (ii).

    2. The concurrence of the Secretary (of the Department of Planning and the Environment) must be obtained (cl 4.6(4)(b)). (Note: Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.)

- In relation to the **first precondition**, the consent authority needs to be positively satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed:

    (i) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (the common ways this may be done are summarised in Wehbe v Pittwater Council:

        - the objectives of the development standard are achieved notwithstanding non-compliance

        - the underlying objective or purpose is not relevant to the development

        - the underlying objective or purpose would be defeated or thwarted if compliance was required

        - that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard

        - that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate)

    (ii) that there are sufficient environmental planning grounds to justify contravening the development standard. In relation to this matter justice Preston said:

- The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

-The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”.

-There are two respects in which the written request needs to be “sufficient”.

- First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) **is on the aspect or element of the development that contravenes the development standard, not on the development as a whole**, and why that contravention is justified on environmental planning grounds. **The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole**

- Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter

- The consent authority does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but **only indirectly** form the opinion of satisfaction that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b).

-The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant’s written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction.

- In relation to the second opinion of satisfaction, in cl 4.6(4)(a)(ii), the consent authority must be **directly** satisfied.

-The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

Chief Justice Preston also said:

- *Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.*

- *Clause 4.6 does not directly or indirectly require that the development, which contravenes the development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the development standard. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

- *There is no provision that requires compliance with the objectives of clause 4.6. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development".*

Brigham v Canterbury Bankstown Council [2018] NSWLEC 1406

Senior Commissioner Dixon said:

- *At the outset, I wish to make clear my view that when dealing with a cl 4.6 written request it is useful to address each element of the clause in the order in which it is read. This approach helps to avoid legal error and ensure that all relevant subclauses are referred to in the written document. …*

- *Clause 4.6 mandates a discussion about certain matters and the written request must address these matters in order for the consent authority (including the Court on appeal) to consider and form a view about its satisfaction or not. This is better achieved by using the exact wording from the clause specifically rather than paraphrasing the words when addressing particular considerations in respect of the development.*

- *The written request in this case seeks to address the mandatory matters in cl 4.6 by reference to headings. It also purports to summarise "several key LEC planning principles and judgments" which it is asserted "have refined the manner in which variations to development standards are required to be approached". The key findings and directions of each of the judgments are then outlined in the written request in some detail.*

- *clause 4.6 by its terms does not invite a discussion of the historical case law about the former SEPP1 or for that matter any case law or comment by a commissioner or judge.* ***Rather, cl 4.6 mandates a planning assessment of the matters directly raised by the clause and relevant to the particular development and the circumstances of the case.*** *This is not to say that a legal interpretation of what a particular phrase or clause means cannot be referred to if relevant and ultimately relied upon. For example, the discussion of the meaning of the phrase "unreasonable and unnecessary" by the Preston CJ in Wehbe at [42] – [48] accepted and endorsed more recently in Micaul can be relevant. However, you do not need to list all five tests from Wehbe if the first test is relied upon and said to be satisfied.*

Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245 at [23]

- This case concerned a DA for an eight-storey residential apartment building that was approved by the Court following a conciliation conference, which resulted in agreement between Huajun and the City of Canada Bay Council. The development did not comply with the maximum height development standard and was the subject of a request to allow a contravention of the standard under clause 4.6. The neighbour who wasn't a party to the original proceedings, took proceedings in the Supreme Court challenging the validity of the approval given by the Court on various grounds including that the Commissioner who made the decision was required to be satisfied of the matters in clause 4.6(4) of the LEP in relation to the request for contravention of the height standard and had not formed the relevant opinion or state of satisfaction.

- In the judgment, Justice Basten provided commentary on the construction of clause 4.6(4) and whether the requirement to be satisfied that the written request adequately addressed the matters in subclause 3 required the Commissioner to be satisfied that the matters in fact justified the contravention. He said:

> *"**…the matters would not be "adequately" addressed unless they in fact justified the non-conformity. In other words, the Commissioner had to be satisfied that there were proper planning grounds to warrant the grant of consent, and that the contravention was justified…."***

Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61 at [75]-[80].

- Case concerned a DA to carry out alterations to an approved but as yet unconstructed residential flat building that exceeded the maximum FSR in Sydney Local Environmental Plan 2012.

- The Applicant contended that the Commissioner who heard the matter had applied the wrong test of needing to be directly and personally satisfied that compliance with the development standard is unreasonable or unnecessary rather than whether the written request had adequately addressed that matter.

- Justice Preston said:

> *"Legally, it would not necessarily have been an error for the Commissioner to have formed her own opinions about the matters required to be demonstrated by cl 4.6(3) provided this was done in order to, first, consider the applicant's written request under cl 4.6(3) and, secondly, determine whether the Commissioner was satisfied under cl 4.6(4)(a)(i) that the applicant's written request had adequately addressed the matters required to be demonstrated by cl 4.6(3). …*
>
> *…*
>
> ***The requirement that the matters in cl 4.6(3) be demonstrated by the written request refers to an outcome, not a process.** Although the written request "seeks" to justify the contravention of the development standard, it must do this by "demonstrating" the matters in paragraphs (a) and (b) of cl 4.6(3). These matters are outcomes: that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are environmental planning grounds to justify contravening the development standard.*

> *The consent authority's consideration of the applicant's written request, required under cl 4.6(3), is to evaluate whether the request has demonstrated the achievement of the outcomes that are the matters in cl 4.6(3)(a) and (b). Only if the request does demonstrate the achievement of these outcomes will the request have "adequately addressed the matters required to be demonstrated" by cl 4.6(3), being the requirement in cl 4.6(4)(a)(i) about which the consent authority must be satisfied. The request cannot "adequately" address the matters required to be demonstrated by cl 4.6(3) if it does not in fact demonstrate the matters. Again, the requirement is one of outcome, not process.*
>
> ***The upshot is that a consent authority, and the Court on appeal, in order to determine whether the applicant's written request has demonstrated the achievement of the matters (the outcomes) in cl 4.6(3)(a) and (b), might need to form a view about whether the matters have in fact been achieved.*** *Take, for example, the matter in cl 4.6(3)(a). One of the ways in which compliance with the development standard might be shown to be unreasonable or unnecessary in the circumstances of the case is if the development achieves the objectives of the development standard, notwithstanding that the development contravenes the development standard. Demonstrating that the development achieves the objectives of the development standard involves identification of what are the objectives of the development standard and establishing that those objectives are in fact achieved. The applicant's written request will need to demonstrate both of these things: correctly identifying the objectives of the development standard and establishing that the objectives are in fact achieved. The consent authority may not be in a position to be satisfied that the applicant's written request does demonstrate both of these things unless the consent authority forms its own view about these things."*

RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130

- Case concerned a DA for a 5 storey residential flat building that did not comply with the applicable development standard for height under North Sydney Local Environmental Plan 2013.

- One of the issues raised in the appeal to the Court of Appeal was whether, in order for a consent authority to be satisfied that an applicant's request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters **have in fact been demonstrated**.

- The appellant contended that clause 4.6(4)(a)(i) should be read as requiring the consent authority to be satisfied that the written request covers or deals with the required matters and that it was not necessary for the consent authority to agree with the conclusions of a request, nor the accuracy of the factual assertions contained within it. In other words the appellant asserted that the consent authority only needed to be satisfied that the written request **contained an argument** about each of the matters required to be demonstrated by cl 4.6(3).

- Justice Payne said:

> *"Clause 4.6(3) requires the consent authority to have "considered" the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request must demonstrate that compliance with the development standard is "unreasonable or unnecessary" and that "there are*

> *sufficient environmental planning grounds to justify" the contravention.* ***It would give no work to subcl 4.6(4) simply to require the consent authority to be satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced."***

- Justice Preston (sitting in the Court of Appeal) said at 51:

> *"…in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3),* ***the consent authority needs to be satisfied that those matters have in fact been demonstrated****. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).*"

Design Excellence and Concept Development Applications

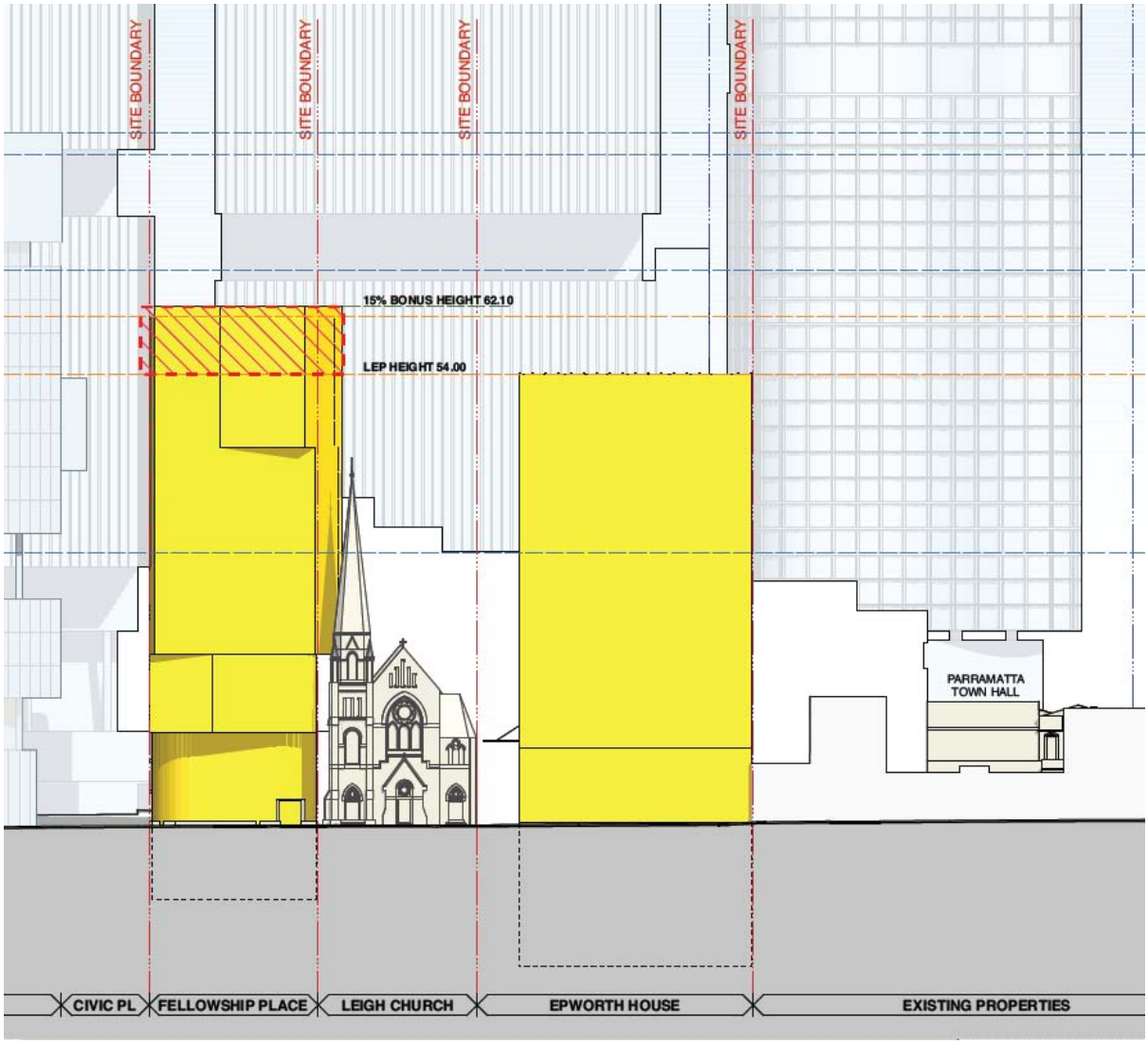
- Division 4.4 of the EP&A Act enables the making of a "concept development application". A "concept development application" is defined in section 4.22(1) of the EP&A Act as:

  > *"a development application that sets out concept proposals for the development of a site, and for which detailed proposals for the site or for separate parts of the site are to be the subject of a subsequent development application or applications."*

- A consent authority determines a concept development application under the same power as it determines all development applications, namely s 4.16 of the EP&A Act, by granting consent to the application, either unconditionally or subject to conditions, or refusing consent to the application.

- The conditions the consent authority can impose on a consent to a concept development application are the conditions that the consent authority may impose under s 4.17 of the EPA Act on consents generally. However, if consent is granted to a concept development application, the consent does not authorise the carrying out of development on any part of the site concerned unless consent is subsequently granted to carry out development on that part of the site following a further development application in respect of that part of the site.

- In some concept development applications, the concept proposals for the development of the site are building envelopes like the envelopes in the case of **The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council [2018] NSWLEC 158.**



The Uniting Church concept proposal building envelopes

- In the **Uniting Church case** a question arose as to whether the consent authority needed to be satisfied that the applicant's concept proposals for the development of a site in Macquarie Street Parramatta that comprised of 2 building envelopes (one being for a 13 storey mixed use building and the other for a 19 storey mixed use building) exhibited "design excellence".

- There is a clause in the Parramatta Local Environmental Plan 2011 (7.10) that applies to *"development involving the erection of a new building or external alterations to an existing building on land"* and requires the consent authority to form the opinion that the proposed development exhibits **design excellence** in order to have the power to approve the application. The clause also sets out the matters to which the consent authority is to have regard in considering whether the development exhibit design excellence. Those matters are:

> (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,
>
> (b) whether the form and external appearance of the proposed development will improve the quality and amenity of the public domain,
>
> (c) whether the proposed development detrimentally **impacts on view corridors**,
>
> (d) how the proposed development addresses the following matters:
>
> > (i) the **suitability of the land for development**,
> >
> > (ii) the **existing and proposed uses and use mix**,
> >
> > (iii) any **heritage and archaeological issues and streetscape constraints or opportunities**,
> >
> > (iv) the **location of any tower proposed**, having regard to the need to achieve an acceptable relationship with other towers (existing or proposed) on the same site or on neighbouring sites **in terms of separation, setbacks, amenity and urban form**,
> >
> > (v) the **bulk, massing and modulation of buildings**,
> >
> > (vi) **street frontage heights**,
> >
> > (vii) **environmental impacts, such as** sustainable design, **overshadowing and solar access**, visual and acoustic privacy, noise, **wind** and reflectivity,
> >
> > (viii) the achievement of the principles of ecologically sustainable development,
> >
> > (ix) pedestrian, cycle**, vehicular and service access and circulation requirements**, including the permeability of any pedestrian network,
> >
> > (x) the impact on, and any proposed improvements to, the public domain,
> >
> > (xi) the **impact on any special character area**,
> >
> > (xii) achieving appropriate **interfaces at ground level between the building and the public domain**,
> >
> > (xiii) excellence and integration of landscape design.

- The applicant argued that the clause did not apply to a concept development application for concept proposals comprising of building envelopes because:

  - *"[a] concept development application simply cannot exhibit "design excellence" when it is a concept only"*; *and*

  - it is not an application that involves the erection of a building because further consent would be required to allow the actual erection of the building; and

- it was not possible to apply all of the factors to be considered in respect of design excellence to a building envelope.

- Justice Preston did not agree. He said that it is important to recognise that a concept development application is still a development application under the EP&A Act. He also noted that a consent granted on the determination of a concept development application for a site sets the parameters for the determination of any further development application in respect of the site because Section 4.24(2) of the EP&A Act provides:

> *"While any consent granted on the determination of a concept development application for a site remains in force,* ***the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals*** *for the development of the site."*

- Justice Preston said:

> *"The concept proposals for the development of the site answer the description of being "development involving the erection of a new building". It is true that the concept development application did not seek consent to the carrying out of the development of the erection of the building in each of these building envelopes. Nevertheless, the development application sought consent for the building envelopes within which the two mixed use buildings could be erected once consent is subsequently granted to further development applications for the erection of the buildings."*

- He also said:

> *"Concept proposals for the development of a site can exhibit design excellence. The concept proposals for the development of the site, which were the subject of the concept development application in this case, were building envelopes for 13 storey and 19 storey mixed use buildings. The proposed building envelopes set the key planning parameters of the form of the buildings, including their height, setbacks, bulk and massing. The form of each of the building envelopes could be evaluated in terms of its design excellence…"*

- In relation to the matters to be considered in respect of design excellence His Honour said it is to be construed as a requirement to have regard to such of the matters in the clause as are of relevance to the development the subject of the development application and If a matter is not of relevance to a particular development, the consent authority is not able to (or required) to have regard to it.

- Another important statement of Justice Preston is found at paragraph 44 where he said:

> *"If the concept proposals for the development of the site are building envelopes, any development consent to those building envelopes will fix the envelope within which any building can be erected. Any further development application could not seek consent to erect a building that would be inconsistent with the building envelope approved by the consent granted on the determination of the concept development application.* ***A building could be inconsistent if it exceeds the approved building envelope, but equally it could be inconsistent if it is less that the approved building***

> ***envelope.*** *A building of 20 storeys is inconsistent with an approved building envelope of 15 storeys, but so too a building of 10 storeys is inconsistent with an approved building envelope of 15 storeys."*

- The matter that was not required to be resolved in the Uniting Church case was whether the requirement in the design excellence clause for a **"competitive design process"** to be held applied to a concept development application involving the erection of a new building. This issue has been raised in the Roxy Theatre case that was heard last week in the Land and Environment Court – we await the outcome of that matter.

State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) and the definition of accessible area

- Some of the provisions of SEPP ARH only apply if the development proposed is within an "accessible area", for example:

  - the provisions relating to infill development in the Sydney Region which permit the maximum floor space ratio for dual occupancies, multi dwelling housing all residential flat buildings to be increased by up to 0.5:1

  - The provisions that permit boardinghouse development to be carried out and provide concessions to such development.

- The term "accessible area" is defined in clause 4 of SEPP ARH and means land that is within:

  (a) 800 metres walking distance of a public entrance to a railway station or a wharf from which a Sydney Ferries ferry service operates, or

  (b) 400 metres walking distance of a public entrance to a light rail station or, in the case of a light rail station with no entrance, 400 metres walking distance of a platform of the light rail station, or

  (c) 400 metres walking distance of a bus stop used by a regular bus service (within the meaning of the Passenger Transport Act 1990) that has at least one bus per hour servicing the bus stop between 06.00 and 21.00 each day from Monday to Friday (both days inclusive) and between 08.00 and 18.00 on each Saturday and Sunday.

- The reference to an accessible area being land that is within 400 m walking distance of a bus stop used by regular bus service has caused some controversy in recent times. It is an awkward definition and obviously bus timetables can change from time to time so that one day there is a bus stop providing a service during the relevant hours and the next day, when the bus timetable changes, the service may no longer be provided during the requisite hours. As the Court of Appeal said many years ago in Calleja v Botany Bay City Council [2005] NSWCA 337:

  *"**any attempt to always find planning logic in planning instruments is generally a barren exercise**".*

- There are two recent cases where the controversy was considered.

- In ***Touma v Liverpool City Council*** [2018] NSWLEC 1635 the proposed residential flat building development was within 400m walking distance of two bus stops however, neither of those bus stops provided the required hourly bus services on their own but did so if they were combined.

- It was contended on behalf of the Council that the required hourly bus services had to be servicing a bus stop and that the definition did not permit two bus stops to be combined to make up the services.

- Whilst section 8(b) of the Interpretation Act 1987 (NSW) says "a word or expression in the singular form includes a reference to the word or expression in the plural form" it is subject to section 5(2) of the Act that says the Act applies to

an Act or instrument *except in so far as the contrary intention appears in this Act or in the Act or instrument concerned*.

- Commissioner Dixon agreed that there was a contrary intention and accepted Council's argument that the Interpretation Act did not apply to allow "bus stop" to be read as "bus stops" because the specific words in the clause set out a contrary intention to a reading of "plural". In that regard the text used the indefinite article "a" to nominate a particular bus stop and the subsequent definite article "the" to identify that bus stop. The Commissioner said:

  > *"After careful consideration of the cases relied upon by the parties and their submissions, it is my view that this is not a case where the language is unclear in a situation where it may be appropriate to give rather less weight to precise textual considerations as discussed in Tovir Investments Pty Ltd v Waverley Council [2014] NSWCA 379 at [54] to [55].*
  >
  > *The parliamentary drafter has not been "less than careful", indeed has been precise in their choice of language and this delegated legislation must be interpreted in accordance with the statutory rules as discussed in 4nature Incorporated v Centennial Springvale Pty Limited (2017) 95 NSWLR 361; [2017] NSWCA 191 at [106] - [107] (per Leeming JA); DM & Longbow Pty Ltd v Willoughby City Council [2017] NSWLEC 173. There is no general proposition that the task of ascertaining the legal meaning of delegated legislation differs from the construction of primary legislation."*

- In the case of **Bella Ikea Ryde Pty Ltd v City of Ryde Council (No 2) [2018] NSWLEC 204** which was decided a few weeks later and without reference to the Touma decision Justice Sheahan considered the definition of "accessible area".

- In the Bella case there were 3 bus stops within 400m of the development site and they all were serviced by a bus every hour during the relevant hours on Monday to Saturday. However, on Sundays one of the bus stops had a service every hour with two exceptions: 9.54-11.00 (1 hour 6 minutes) and 12.00-13.02 (1 hour 2 minutes). The bus stop across the road heading in the opposite direction had a bus servicing the stop at 10.20 am and 12.20 pm on Sundays.

- Justice Sheahan accepted the Applicant's argument that the word bus stop in the definition of accessible area could be pluralised and read as bus stops. Accordingly, by taking into account the bus stops on both sides of the road, any 'gaps' in time, where a bus did not stop within a one hour time frame on one side of the road, would be filled by reference to stops made on the opposite side of the road.

- Justice Sheahan also accepted an alternative argument that it was sufficient for a bus to service a bus stop every chronological hour to meet the required frequency of services. In that regard the submission of the Applicant was:

  > *"…if we use the chronological hour…the matter can be approached in this way. In the 8 o'clock hour, eight till nine, we have an 8.54 bus. In the 9 o'clock hour, we have a 9.54 bus. In the 10 o'clock, if we interpret ten as being ten to 11, we have an 11 o'clock bus. In the 12 o'clock hour, we have a 12 o'clock bus. In the 1 o'clock hour, we have a 1.02 bus. In each following relevant hour, we have a bus at two minutes past the hour; so, it's plainly within the hour. If it be permissible, as we submit it is, to have regard to chronological*

hours as opposed to the spacing between the buses, then I don't even need to have resort to plurality under the Interpretation Act."

- His Honour noted that there was also merit in the Applicants argument that the de minimis principles could be applied in the circumstances to conclude that a gap of six minutes or two minutes, if one is confined only to one bus stop, is sufficient to meet the intent of the SEPP:

  "that the law is not concerned with trifles and trifling matters; that the application of the de minimis rule adopts a purposive construction and that involves determining what's the purpose of the legislature with respect to a provision, choosing a meaning from alternative meanings which may be available which gives effect to purpose, and understanding that meanings which have no relevance to achieving the purpose would not be given to a particular purpose."

Deferred commencement consents and lapsing

- Section 4.16 of the EP&A Act provides that a development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition. This is called a deferred commencement consent.

- Clause 95(3) of the EP&A Regulation specifies that a consent authority may specify the period within which the applicant must produce evidence to the consent authority sufficient enough to enable it to be satisfied as to the matters in the deferred commencement condition.

- There is no restriction in the legislation as to the period that may be imposed for satisfying the condition.

- However, Section 4.53(6) of the EP&A Act provides:

  "(6) Despite any other provision of this section, a development consent that is subject to a deferred commencement condition under section 4.16 (3) lapses if the applicant fails to satisfy the consent authority as to the matter specified in the condition within 5 years from the grant of the consent or, if a shorter period is specified by the consent authority, within the period so specified."

- Section 4.53(6) appears to require that the Applicant satisfy the consent authority as to the matters specified in a deferred commencement condition within the period specified in that condition in order to prevent a deferred commencement consent from lapsing. In that regard, the requirement of satisfaction would seem to implicitly require both the production of the Applicant's evidence and the Council's consideration and confirmation of its satisfaction with the same within the specified period.

- The operation of sub-section 4.53(6) of the EP&A Act was recently considered by Chief Justice Preston in the case of ***Dennes v Port Macquarie Hastings Council*** [2018] NSWLEC 95 ("*Dennes*"). The *Dennes* case concerned a development consent for the construction of a dwelling house on flood prone land granted by the Land and Environment Court subject to a deferred commencement condition. The deferred commencement condition at issue was cast in the following terms:

  "*(1) The proponent is to submit to Council for approval a Flood Emergency Response Plan ('FERP') for the proposed development. The FERP must be determined to be satisfactory by Council."*

- The deferred commencement consent specified a period of 12 months from the date of the determination of the consent within which Mr Dennes was required to satisfy Council as to the matter specified in the condition, as permitted under cl 95(3) of the EP&A Regulation.

- Mr Dennes produced a Flood Emergency Response Plan to Council for its consideration prior to the expiry of the 12-month period. However, the Council subsequently issued correspondence to Mr Dennes confirming that the submitted plan "*is not capable of being supported in its current form*" and "*accordingly the deferred commencement condition on development consent DA 2014-539 is not*

satisfied." Mr Dennes did not take any action in response to this notification from the Council prior to the expiry of the 12-month period prescribed in the condition.

- Following the expiry of that period, Mr Dennes commenced proceedings in the Court pursuant to former section 97(3) (now 8.7(2)) of the EP&A Act appealing against the Council's decision that it was not satisfied with the plan and sought for the Court to substitute its decision that the submitted plan is satisfactory with the decision of the Council, thereby making the development consent operative.

- As a preliminary matter, the Court was required to determine whether the deferred commencement development consent had lapsed in order to determine whether it had jurisdiction to hear the appeal.

- The Council had submitted that the operation of section 95(6) (now section 4.53(6)) of the EP&A Act caused the consent to lapse because Mr Dennes had failed to satisfy the Council as to the matter specified in the condition within the required time period. It was therefore submitted that because the development consent had lapsed, there was no effective development consent which could be the subject of an appeal or any order or decision of the Court. Further, any decision of the Court on appeal in relation to the matter specified in the condition would not be a decision made within the required 12-month period and could not cause the consent which had previously lapsed to have effect again.

- Mr Dennes submitted that it was not open for the Council to contend that the Court did not have jurisdiction to hear the appeal based on the fact that the consent had lapsed. In that regard, Mr Dennes claimed that the failure to comply with the time limit in the condition was a result of the Council's determination to obstruct the development by refusing to approve the plan.

- Chief Justice Preston found the deferred commencement consent had lapsed. He said (with **emphasis** in bold added):

  "***The deferred commencement consent has lapsed***

  38 I find that the deferred commencement consent granted by Commissioner Fakes on 17 August 2016 has lapsed. Mr Dennes failed to satisfy the Council as to the matter specified in the deferred commencement condition within the period specified of 12 months from the date of determination of the consent (i.e. by 17 August 2017).

  39 It was necessary but not sufficient for Mr Dennes to have provided evidence to the Council to enable the Council to be satisfied as to the matter specified in the deferred commencement condition. Mr Dennes provided an amended Flood Emergency Response Plan to the Council that he considered to be satisfactory and in accordance with the guidance provided by the Commissioner. ***But the mere submission of the Flood Emergency Response Plan to the Council did not satisfy the deferred commencement condition. The deferred commencement condition expressly requires the Council to determine that the Flood Emergency Response Plan is satisfactory. Hence, the deferred commencement condition can only be satisfied if and when the Council determines that the Flood Emergency Response Plan submitted by Mr Dennes is satisfactory. This never occurred.*** *To the contrary, the Council decided on 20 June 2017 that the Flood Emergency Response Plan submitted by Mr*

Dennes "is not supported" and that "accordingly, the deferred commencement condition…is not satisfied."

40 *As a matter of fact, therefore, Mr Dennes failed to satisfy the Council as to the matter specified in the deferred commencement condition within the 12 month period specified.* ***Section 95(6) of the EPA Act operated to cause the deferred commencement consent to lapse upon the expiry of the specified 12 month period (on 17 August 2017).***

41 *Once the deferred commencement consent lapsed, there was no effective development consent upon which Mr Dennes could rely for the purposes of making his appeal under s 97(3) of the EPA Act seeking for the Court to substitute its decision of satisfaction for the Council's decision of non-satisfaction as to the matter specified in the deferred commencement condition of the development consent…*

42 *There was also no effective development consent in respect of which the Court on the appeal under s 97(3) could make a decision as to satisfaction of the matter specified in the deferred commencement condition that could make the lapsed consent operate. Even if the Court were to decide that the Flood Emergency Response Plan submitted by Mr Dennes was satisfactory for the purposes of the deferred commencement condition, that decision would not have been made within the period specified for satisfying the deferred commencement condition of 12 months from the date of determination of the consent (i.e. by 17 August 2017). The Court's decision, therefore, could not alter the occurrence of the factual event in s 95(6) (the applicant failing to satisfy the consent authority as to the matter specified in the deferred commencement condition within the 12 month period specified) that triggered the lapsing of the deferred commencement consent.*

43 *As there is no decision that the Court can make on the appeal under s 97(3) that can revive the lapsed consent and cause it to operate, the appeal should be dismissed. I note that the same conclusion was reached in Roberts v Blue Mountains City Council at [63] that, as the deferred commencement condition had not been satisfied within the period specified and the consent had thereby lapsed, the appeal under s 97(3) must be dismissed.*

44 *The submissions of Mr Dennes as to the jurisdiction of the Court are not an answer to these conclusions that the deferred commencement consent has lapsed and the Court cannot on the appeal under s 97(3) revive that consent and cause it to operate.*

…

62 *… In the present case, the applicable provision is s 95(6) of the EPA Act governing the lapsing of a deferred commencement consent unless the applicant satisfies the consent authority as to the matter specified in the deferred commencement condition within the specified period.*

63 *These different legal provisions have different factual triggers for the lapsing of the consent. The factual trigger under s 95(4), which prevents an operative development consent lapsing, is the undertaking of physical work relating to the building, subdivision or work.* ***The factual trigger under s 95(6), which prevents a deferred commencement consent lapsing, is the applicant***

satisfying the consent authority as to the matter specified in the deferred commencement condition.

64 *Hence, the factual findings of the Court of Appeal in Detala Pty Ltd v Byron Shire Council in relation to the factual trigger in s 95(4) are of no relevance or applicability in deciding whether the factual trigger in s 95(6) has or has not been satisfied in this case.* ***In particular, the fact that Mr Dennes might have done all that he could on his part, by producing evidence to the Council, to enable the Council to be satisfied as to the matter in the deferred commencement condition (assuming this to be the case) is of no relevance to the factual trigger under s 95(6) of the EPA Act,*** *regardless of whether it was relevant to the factual trigger under s 95(4) of the EPA Act in Detala Pty Ltd v Byron Shire Council.* ***The factual trigger under s 95(6) is that the applicant must satisfy the consent authority as to the matter specified in the deferred commencement condition within the period specified. It is not sufficient for an applicant merely to produce evidence as to the matter specified in the deferred commencement condition to the Council; it is necessary that the Council determine that it is satisfied as to the matter specified in the deferred commencement condition.***

65 *The requirements of the deferred commencement condition in this case and of s 95(6) are, therefore, different to the requirements of the particular condition of the operative development consent in Detala Pty Ltd v Byron Shire Council and s 95(4) of the EPA Act.*

66 ***The consequence is that any failure of the Council to determine that the Flood Emergency Response Plan submitted by Mr Dennes was satisfactory within the specified period (as Mr Dennes has argued occurred) does not and cannot prevent the deferred commencement consent from lapsing but instead actually causes the deferred commencement consent to lapse by operation of s 95(6) of the EPA Act.***

67 *For these reasons, the deferred commencement consent granted by Commissioner Fakes lapsed on 17 August 2017. The Court has no power on the appeal under s 97(3) to make a decision or order that could revive the lapsed consent and make it operate. The appeal should therefore be dismissed.*"

- It seems that sub-section 4.53(6) of the EP&A Act provides for the lapsing of a deferred commencement consent in circumstances where an Applicant produces evidence as to satisfaction of the matter specified in a deferred commencement condition but a council does not determine or confirm it is satisfied as to the matter within the time period specified. Therefore, in Mr Dennes' circumstances, even though he had attempted to provide what he considered was sufficient evidence of the satisfaction of the deferred commencement condition at issue in his case prior to the lapsing date, Council's failure to determine it was satisfied within that specified period caused the consent to lapse as a result of sub-section 4.53(6) of the EP&A Act.

GIPA and copyright

- On 1 March 2013 section 158A (now section 10.14) was inserted into the EP&A Act. The section provides as follows:

"10.14 Copyright in documents used for purposes of this Act—indemnification

(1) A relevant person who is not entitled to copyright in a document that is part of a planning matter is taken to have indemnified all persons using the document for the purposes of this Act against any claim or action in respect of a breach of copyright in the document.

(1A) The regulations may require a relevant person who is entitled to copyright in a document that is part of a planning matter to give (in the planning matter or otherwise) a licence to the State or a council to use the copyright material for the purposes of this Act. The regulations may also require a relevant person who is not so entitled to that copyright to give a warranty (in the planning matter or otherwise) that the relevant person has a licence to so use the copyright material from the person who is entitled to copyright in any such document.

(2) For the purposes of this section:

(a) a development application or an application for a complying development certificate (or an application to modify a development consent) is a planning matter, and the applicant is the relevant person, and

(b) an application for approval to carry out State significant infrastructure (or an application to modify an approval of State significant infrastructure) is a planning matter, and the applicant is the relevant person, and

(c) a Part 3A project or concept plan application within the meaning of Schedule 6A (or a request to modify an approval or concept plan under Part 3A), and any environmental assessment or report under Part 3A, is a planning matter, and the applicant is the relevant person, and

(d) an environmental impact statement under Division 5.1 or 5.2 (including any preferred infrastructure report under Division 5.2) is a planning matter, and the proponent under Division 5.1 or 5.2 is the relevant person, and

(e) a planning proposal under Part 3 is a planning matter, and the person preparing the proposal is the relevant person, and

(f) a planning agreement referred to in section 7.4 is a planning matter, and the developer under the agreement is the relevant person, and

(g) a matter or thing under this Act that is declared by the regulations for the purposes of this section is a planning matter, and the person declared by the regulations is the relevant person in respect of that matter or thing.

(3) For the purposes of this section, a document is part of a planning matter if it forms part of or accompanies the planning matter, or is subsequently submitted by the relevant person in support of the planning matter or is exhibited or made public in accordance with a requirement made by or under this Act in relation to the planning matter.

(4) The regulations may limit the operation of this section.

(4A) This section extends to planning matters in paper or electronic form.

(5) This section extends to a planning matter that was made or submitted before the commencement of this section.

- The section was described in the explanatory note as follows:

> *".makes provision that continues and extends indemnification against possible copyright breaches of documents submitted by persons who do not have copyright where the documents are publicly notified or made use of under the principal Act."*

- In the Second Reading speech relating to the Environmental Planning and Assessment Amendment Bill 2012 the Minister said:

> *"The State cannot overrule the Federal copyright legislation but the bill expands the regulation-making power for a statutory copyright indemnity for all types of information published by councils during all planning processes and encourages councils to make all relevant documents publicly available to the community."*

- Section 10.14 does not provide a council with an exemption from liability for infringing copyright. The section does not provide a defence to an action taken for infringement of copyright nor does it provide a council with an implied licence from the author of a document submitted in connection with a development application to do acts comprised in the copyright in the document.

- Section 10.14 simply means that the Council would be entitled to an indemnity from and to be compensated by an applicant who has made a development application for damage or loss suffered by the Council resulting from a claim made against Council for infringement of copyright. The indemnity may prove to be of little or no value if the applicant has insufficient financial resources to satisfy the amount awarded in a claim for infringement of copyright.

- In the knowledge update issued by the NSW Information Commissioner titled "Copyright and compliance with the GIPA Act" (March 2012) it is stated (in respect of the former clause 57 of the Regulation):

> *"This provision means that councils and their staff (and any other persons using the plans in accordance with the EPA Act) are entitled to claim an indemnity from the person who applied for the DA to cover costs they incur arising from claims they have infringed copyright in the plans and the DA, where these materials were being used in accordance with the EPA Act. Section 79 of the EPA Act requires councils to make DAs and accompanying information, including plans, publicly available, and provides a right for people to inspect and make copies of the plans during the submission period.*
>
> *Accordingly, local councils may make and distribute copies of DA plans in accordance with their functions under the EPA Act. However, this indemnity applies only to things done under the EPA Act."*

- The knowledge update includes the following suggestion:

> *"For the purpose of fulfilling their functions under the EPA Act, local councils should continue to provide copies of DA plans and other copyright material, relying on the indemnity in clause 57 of the EPA Regulation."*

- The above suggestion fails to recognise or appreciate the substantial risk to a council of relying on the indemnity if the applicant has insufficient financial resources to satisfy the amount awarded in a claim against the council for infringement of copyright.

- Whilst the reproduction of development application information online may be seen as increasing transparency and accountability in the process of determining a development application the issue of copyright infringement has still not been satisfactorily resolved and a council is not exempted from liability for infringement of copyright when it reproduces copyright material relating to a development application online or electronically using the internet.

- Having regard to the current state of the commonwealth copyright laws, the safest course presently remains for the Council to allow inspection only of plans, drawings and other material accompanying development applications that are protected by the Copyright Act 1968 (Cth). In our view, councils should not publish any copyright material on websites, or provide any copies (including by email) unless the copyright owner has expressly consented.

- In the recent case of ***Sandy v Kiama Municipal Council*** [2019] NSWCATAD 49 the Applicant sought review of a decision of the Council to refuse access to information under the **Government Information (Public Access) Act 2009** (the GIPA Act). The applicant applied for access to information held by the Council relating to a development application for an abattoir adjacent to the applicant's property including reports prepared by consultants and plans associated with a development application for a proposed abattoir site (surveys, stormwater drainage plans, and building plans).

- Section 72 of the GIPA Act says that an agency must provide access to information in the way requested by the applicant unless (relevantly):

  > *"(c) to do so would involve an infringement of copyright,.."*

- The Council had stated that to provide copies of the information sought by the Applicant in relation to the DA, which comprised plans, drawings and reports, to the applicant, as requested, would be a breach of copyright. It stated:

  > *"On 3 July 2018 we invited you to contact the copyright owner directly to obtain the information you are seeking with his/her consent but you declined to do so. As at the date of this decision I do not have the copyright owners' consent to the release of these documents subject to copyright protection.*
  >
  > *Section 72(2) of the GIPA Act expressly acknowledges that access can be provided in a different way to that requested, including where to provide access in the way requested would involve an infringement of copyright. I have therefore decided to release the documents listed above on a "view only" basis."*

- It was confirmed by the NSW Civil and Administrative Tribunal that it was clear that the Council would infringe copyright if it reproduced, or authorised the applicant to reproduce, the information in question.