From: Aaron Gadiel <agadiel@millsoakley.com.au>
Date: 2 July 2021 at 11:48:34 am AEST
To: Tom Forrest <tom@urbantaskforce.com.au>
Cc: David Tanevski <David@kwc.com.au>
Subject: The Court decision affecting modification applications for development consents

Hi Tom

As you are aware I represent the Urban Taskforce on the Land and Environment Court Users Group.

As we discussed, there has been a Court decision affecting modification applications for development consents.

The decision is *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112. This decision was handed down on 3 June 2021.

It raises an issue about whether a consent authority can allow (or the Court can give leave to) a request to amend a modification application that has been lodged.

The sensible management of any pending planning applications, including a modification application, generally requires the application to be amended in response to issues raised by the consent authority. This is normally helpful to the process — because it can remove or narrow issues that are in dispute and reduce the costs for both an applicant and a consent authority.

However in *AQC Dartbrook Management* the Chief Judge of the Land and Environment Court (Preston CJ) said that there was no legal power for the Court (or a consent authority/local council) to allow a pending modification application to be amended. The other two judges hearing the matter stayed neutral.

Arguably it means that the existing authority of the Court on this point remains undisturbed, namely *Jaimee Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 245. This decision allowed amendments to pending modification applications. However, it seems that the Land and Environment Court has already moved to cease allowing pending modification applications to be amended via the Court process. We have also received anecdotal feedback that some local councils are telling people to withdraw modification applications (and not agreeing to allow amendments to pending applications).

I raised this issue at a meeting of the Land and Environment Court Users Group on 30 June 2021. The Chief Judge of the Court agreed that the following steps could be taken in the Court process to manage this situation:

1. Where the applicant wishes to propose alternative drawings (over those that constitute the formal modification application) in response to issues raised by a local council in a ‘statement of facts and contentions’, those drawings could be annexed to the formal reply filed by the Applicant. This reply would propose that those drawings be adopted by the consent authority in lieu of the formally proposed drawings **via a condition of approval**.

2. Later in the Court process, the Applicant could also annex drawings to any proposed conditions of consent filed for a hearing.

3. At a contested hearing, the Applicant could, in submissions, pursue conditions that give effect to modifications that are responsive to the evidence.

Of course, any drawings and conditions proposed would still need to relate to the management of the impacts of a proposed modified development, etc. It would not be a vehicle to radically transform what was being sought.

We consider that an analogous approach is available to applicants who are dealing with a consent authority directly, prior to the commencement of any Court proceedings.

Of course, the ideal solution would be for the NSW government to amend the relevant regulations to restore the previous situation (that is to allow amendments to pending modification applications). Nonetheless, this is not a matter for the Court. The regulation can be amended by the government at the stroke of a pen (advance parliamentary approval is not required).

Regards

Aaron

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