

## THIS ISSUE | AUG 2008

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### INTRODUCTION

This is the first issue from our newly combined firm, following the merger in May of pre-eminent law firms Home Wilkinson Lowry and Ebsworth & Ebsworth. HWL Ebsworth has a staff in excess of 500 in 4 locations across Australia - Brisbane, Melbourne, Norwest Business Park and Sydney

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The information provided in this document is in summary form and is designed to alert clients to developments of general interest. The information is not comprehensive, is not offered as advice and should not be used to formulate business or other fiscal decisions.

### DRAFT NSW HOUSING AND COMMERCIAL BUILDING CODES

#### INTRODUCTION

On 8 May 2008, the NSW Government released the Draft NSW Housing and Commercial Building Codes ("the Codes") for public comment. The object of each of the Codes is to clarify the planning system and expedite the process of obtaining development approval, in that applicants (who are small business owners, home builders and renovators) will not have to go through the complete development assessment/approval process as determined by a local council. Development approvals under each of the Codes can be determined by alternative approval authorities other than local councils.

Each of the Codes was created in response to criticism of the Government's planning reform package which was considered to lack detail. Proponents of the Codes suggest that their implementation will bring greater certainty to neighbourhood amenity. Critics however, are of the opinion that if implemented, these Codes will function to manipulate the approval process to suit the scale of any proposed development.

The Codes were on exhibition until 4 July 2008.

#### DRAFT NSW HOUSING CODE

The object of this Code is to allow homeowners to achieve approval of small scale home designs, within 10 days (provided such designs comply with the Code), in circumstances where the designs:

- ensure the protection of privacy and sunlight access for neighbours
- provide sufficient outdoor space
- do not overcrowd the block upon which they are to be constructed

This Code adopts objective development standards said to ensure that good design prevails and that the amenity of neighbours is preserved.

New homes and home renovations usually fall within the category of complying development (i.e. development which complies with

pre-specified development standards). The assessment path for complying development set out in the Code provides an alternative method of obtaining development consent. If development can be classified as "complying development" under the Code, it can be approved within 10 days by an accredited certifier or by a local council acting as a certifier, without having to proceed to a full scale development application.

This Code also addresses exempt development, which is development of minimal environmental impact that does not require approval - provided it meets the criteria set out in the Code (e.g. carports, letterboxes, fences, awnings and solar water heaters).

It is intended that additional codes will be released over the next 12 months which will expand the categories of development that can be dealt with as exempt and complying development.

Under this Code, adjacent neighbours are to be issued with a "courtesy notification" before any building works begin. The Code sets out criteria for an envelope of space on a lot, within which building works can occur. It then provides objectives and guidelines for setbacks and height controls (amongst other things) for a typical house on an averaged size lot. Such criteria have been set out to ensure that any adjacent neighbours' amenity is protected and maintained. It is anticipated that a series of codes will be developed over time for different house and lot sizes. Under this Code, all housing must also still comply with BASIX, which defines energy and water reduction targets and thermal comfort criteria.

If applicants seek to go beyond the limits of the Code in respect of bulk, scale or amenity impacts, then they can lodge a development application with the council and go through the traditional merit-based assessment.

Critics of the Code are concerned that its implementation will allow for anything to be built next door. Chris Johnson, former NSW Government Architect and director of the development of the NSW Housing Code, points out in his article in the Sydney Morning Herald on 9 June 2008, that this Code is "*conservative*"

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and only allows new houses that are “*similar to others in the street*”. This is in reference to the fact that in a single-storey area, the “code envelope” for a new dwelling will be controlled to the extent that any proposed setbacks and heights for new buildings will be in keeping with that which exists in the surrounding environment. According to Mr Johnson, it is not the intention of this Code to influence design character as such, despite the Code seeking to standardise setbacks and some lot sizes. At the time of writing, heritage conservation areas and items have been excluded from this Code.

### DRAFT NSW COMMERCIAL CODE

The NSW Commercial Code addresses commercial and industrial exempt and complying development. It covers minor development (such as fences, letterboxes, carparks and shade structures), other ancillary development and advertising signage, change of use (for example, change of use from “industrial” to “light industrial”) and internal alterations, which have little or no impact upon other occupiers of commercial or industrial space.

This Code provides a simple approval process which requires that if proposed development complies with the relevant criteria set out in the Code, it will warrant approval by an accredited certifier or by a local council acting as a certifier, without the need for a complete development application. The Code establishes a clear compliance path for streamlining approvals for simple forms of common commercial and industrial developments. It also standardises the application of common exempt and complying commercial and industrial development requirements across the State.

### CONCLUSION

A code-based approach is not new, with many NSW councils having adopted it already. Other states have also already implemented standard state-wide codes (e.g. Western Australia adopted similar codes in 1991).

During the exhibition period, ten councils, including Randwick, Penrith, Blacktown and Sutherland agreed to trial the Draft Codes. The

Minister for Planning has also foreshadowed that the Codes could be implemented through an enabling State Environmental Planning policy.

Written by Catherine Bracks, Solicitor

### A NEW LIQUOR ACT

On 5 December 2007 the NSW Parliament passed the *Liquor Act 2007*. The new Act contains extensive law reforms and came into effect on 1 July 2008.

The new laws are intended to be much simpler and more flexible than existing liquor laws. It is intended that the Liquor Act will regulate all liquor sales including sales in registered clubs. *The Registered Clubs Act 1976* has been retained but will focus on club management and governance issues.

The objects of the new laws recognise the importance of minimising alcohol related harm whilst understanding the social and cultural role played by responsible alcohol use. All persons exercising functions under the new Act must have regard to the Act’s objects. These are to:

- Regulate the control and sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community
- Facilitate the balanced development, in the public interest, of the liquor industry through flexible and practical system of regulation with minimal formality and technicality, and
- Contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.

### THE NEW REGIME

Liquor and gaming licence applications (including applications to extend trading hours) and disciplinary matters will be considered by a new Casino, Liquor and Gaming Control Authority (the CLGCA).

The CLGCA will replace the Liquor Licensing Court and Liquor Administration Board which

previously dealt with those applications.

The CLGCA will be responsible for the imposition of penalties, including the suspension or cancellation of licences arising from breaches of licence conditions.

The Director of Liquor and Gaming’s enforcement role under the new regime will also be expanded. The Director will be able to determine noise and disturbance complaints against venues, have the power to impose or vary licence conditions, issue directions to licensees and also impose late hour declarations (lockouts or curfews) to reduce alcohol related anti-social behaviour.

### NEW TYPES OF LICENCES – SMALL BARS AND RESTAURANTS

The much publicised reform of bar licences includes provisions relating to bars that do not provide gaming or sell take away alcohol. Those bars will be able to obtain a new type of hotel licence called a “general bar” hotel licence for a \$500.00 fee.

Venues will be able to obtain an on premises licence where the primary product or service is the provision of entertainment to patrons. Community Impact Statements will be required to guarantee stakeholder input for such applications.

The existing dine-or-drink authority with its high fees will be abolished under the regime. Restaurants will be able to seek approval to allow liquor sales without a meal, with conditions to be determined by the CLGCA for no fee. The provision of such a licence to a restaurant is conditional on the sale of alcohol not being the primary purpose of the business. The new laws do not permit restaurants to trade as bars.

### HOTEL LICENCES

Hotel licences will apply to premises where the primary purpose is the sale and supply of alcohol. This includes a variety of hotel venues (including accommodation hotels), as well as small bars.

New hotels will be required to prepare Community Impact Statements to ensure

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that community consultation is undertaken before the granting of a new licence. Trading hours will remain unchanged, (i.e. from 5am to midnight Monday to Saturday and 10am to 10pm Sunday). Applications for extension of trading hours will also require a Community Impact Statement.

Many of the safeguards that existed in the old act for breaches of licence conditions have been carried over in the new act. Section 104 (Quiet and Good Order of Neighbourhood) has been replaced with similar provisions in section 79 of the new Act. This allows for the making of complaints by Councils or local residents to the Director and for sanctions to be imposed. The provision allowing for short term closure to be enforced has also been carried through to the new act.

### REGISTERED CLUBS

Club licences will apply to registered clubs. Existing clubs will continue to have unrestricted trading hours, and other registered club privileges will be maintained for all existing clubs. Newly licenced clubs will be subject to Community Impact Statements to ensure local stakeholders have their say during the application process.

Newly licensed clubs will also be subject to the standard trading period for hotels mentioned above.

### NEW TOOLS TO MINIMISE ALCOHOL RELATED HARM

New offences for antisocial behaviour have been created. It will now be an offence for a drunk, violent or quarrelsome person who has been refused entry or ejected from a licensed venue to attempt to re-enter the premises or remain in the vicinity of the premises. On the spot fines of \$550 apply for each offence.

### A MODERN SYSTEM

The new liquor laws are said to be based on a modern administrative licensing system with the object of reducing the complexities and costs that have long been associated with the regime. Community Impact Statements required for most new applications are aimed at ensuring that community consultation

is undertaken and properly weighed when licensing decisions are formulated.

Law reform of this scale never comes without uncertainty. The grant of a liquor licence will now be almost unrecognisable from the former system. Issues such as processing times for assessments and total application times have not yet been commented on by the Office of Liquor Gaming and Racing. It remains to be seen whether the new reforms will result in a fairer and more cost effective system.

If you have any questions about the proposed changes or how the new reforms will affect your business, please contact Jane Hewitt on (02) 9334 8639 or Emma Adams on (02) 9334 8653.

Written by Tim Davis, Paralegal

### **BARTON V ORANGE CITY COUNCIL – DAMNED IF YOU DO AND DAMNED IF YOU DON'T**

#### COUNCIL LIABLE FOR COSTS DESPITE ENTERING SUBMITTING APPEARANCE

Prior to *Barton v Orange City Council*, the filing of a submitting appearance by a council, in proceedings brought challenging the validity of a Development Consent was thought to provide the council some measure of protection in an application for costs.

General guidelines were set by Justice Biscoe in 2006, in the matter of *Cutliffe v Lithgow City Council*. In most instances, a council could limit its costs to no more than the costs associated with the declaration of invalidity if it entered a submitting appearance. Costs expended by the applicant and consent holder on the question of discretion and subsequent orders could be avoided.

#### *BARTON V ORANGE CITY COUNCIL*

Biscoe J held that Development Consent for the construction of a second storey addition to the rear of a dwelling house was invalid and made an order for demolition of the works carried out in accordance with that consent. The council entered a submitting appearance two months after the proceedings were commenced but

well before the hearing of the matter.

Following the Court's findings, the council agreed to pay the other party's costs relating to the declaration of invalidity, but it opposed any order that would make it liable for the costs expended on the issue of discretion and the consequential demolition order.

Biscoe J referred to a passage in *Cutliffe, where Sydney Harrison Pty Limited v City of Tea Tree Gully (No. 2)* was cited:

*"There are steps by which a planning authority is able to minimise costs of any proceedings seeking to satisfy the Development Consent. It may indicate to a plaintiff they recognise that there are defects in the manner in which it has handled an application and might even be able to assist a Court in framing appropriate orders with, of course, proper notice to the person who has the benefit of the Development Consent."*

No such admission was made or assistance rendered, other than to make available to the parties and to the Court documents relevant to the complaint that was made by the applicants. Such documents were in any event, not produced until the hearing in response to a Notice to Produce.

Biscoe J outlined 5 reasons why the Council's conduct took the matter beyond the general guidelines in *Cutliffe*.

1. The conduct of the council officers in processing the Development Application fell well short of that which could be expected of a reasonably competent official. The applicants were not notified. The council officer participated in the preparation of the Statement of Environmental Effects (SEE) in a way that contributed to the failure to identify the severe impact. The Council failed to identify the severe impact once the complete application was before it.
2. The conduct of the council officers in dealing with the applicant's complaints was careless. The applicant was assured that a stop work request would be issued. The Council drafted a "Stop Work" letter

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of 12 April 2007 which was never sent. This letter only came to light at the hearing in response to the Notice to Produce.

3. The council's conduct during the proceedings fell short of that which might be expected from a model litigant. It failed to produce all documents promptly and informally. It refused to make its officers available for interview. It did not itself bring evidence forward that would have assisted the Court in understanding the basis upon which the council's decision had been made. While strictly speaking, the council may have complied with the Practice Note concerning the production of documents, these issues were given weight.
4. The applicants delay in putting the consent holder on notice of their intentions was central to the discretionary argument advanced at trial. The council however had indicated that it was going to send a "Stop Work" letter while the objections were investigated. This was never done. Had the council advised the parties of the existence of the draft letter early in the proceedings, the issue of the delay may not have been argued and ultimately a decision may have been taken that the discretionary argument was not worth pursuing.
5. The council's submission that the consent holder's SEE and shadow diagrams contributed in a way to the invalidity was rejected. The documents were in fact completed by a council officer.

The council was ordered to pay the costs of the applicant and the consent holder and to indemnify the consent holder in respect of her liability for costs to the applicant.

Written by Jeff Reilly, Special Counsel

### TABLE OF TROUBLE

Council reports regularly feature tables or summaries of objectors' submissions. The importance of ensuring that a summary of submissions contained in a table is accurate was reinforced in the recent Land and Environment Court decision in *Castle Constructions Pty Limited v. North Sydney*

*Council & Anor [2008] NSWLEC 137.*

### BACKGROUND

In *Castle Constructions*, the applicant sought a declaration that resolutions made by Council to forward a draft Local Environmental Plan to the Department of Planning, and thence to the Minister to be made, were invalid.

One of the submissions made by the applicant turned upon whether the Council had complied with section 68(3) of the *Environmental Planning & Assessment Act 1979 (EP&A Act)*, which requires the Council to consider submissions made to Council whilst a draft Local Environmental Plan is on exhibition.

The applicant's case was that Councillors had not considered the actual submissions or, alternatively, if they had read the submissions from the public, the summary table provided by the Council staff, when read, would still have misled the Councillors.

The summary of submissions table prepared by staff noted two separate submissions in relation to a perceived reduction in potential floor space produced by the draft local environmental plan. In relation to both submissions, the Council response provided in the table was that "*this matter is covered in the main body of the report*". However, the Court found that an examination of the report revealed that the issue was not specifically addressed.

On the applicant's submission, because the table was not complete and accurate, it misled Councillors in advising them not to direct their minds to fundamental questions raised by the submissions. If the Councillors were then misled, the applicant asserted that it was not possible to infer that the Council had given genuine and realistic consideration to those submissions, as required by section 68(3) of the EP&A Act.

### DECISION

The Court accepted the applicant's assertions and held, on the basis that the summary table was misleading, that it could not be said that Council had given proper, genuine and realistic consideration to the submissions. Accordingly,

section 68(3) of the EP&A Act had not been complied with. The Council resolutions were therefore invalid and of no effect.

### IMPLICATIONS

It is common for assessment reports to contain summaries of information received in tabular form.

This case illustrates the importance of ensuring that summary tables, particularly in relation to submissions made by objectors, are adequately dealt with, either in the table itself, or specifically within the rest of the report. The case also has potentially wider ramifications in development assessment, where tables in relation to compliance with development standards and DCP controls are widespread. It is possible to imagine a scenario where a report placed before the Council is misleading (particularly say in relation to a variation to a development standard), and the decision is struck down because proper, genuine and realistic consideration has not been given to the issue at hand.

If you require further information please contact Kirston Gerathy on 02 9334 8628 or Jeff Reilly on 02 9334 8642.



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