

# Update

## Issue #3

### Planning & Construction



## Development Contributions Council 'double dipping' prohibited

The circumstances in which a responsible authority can require a developer to pay development levies has recently been examined in some detail - *Dennis Family Corp v Casey CC*[2006] VCAT 2372 (23 Nov 2006). The decision draws a clear line between contributions required by planning permit conditions and those that can be sought via a levy imposed by a development contributions plan incorporated into the planning scheme.

### Facts

Casey CC had passed a development contributions plan that provided for collection of levies to fund the construction of Linsell Boulevard. The plan provided simply that Linsell Boulevard should be built within the next 20 years. It is also worth noting that the development contributions plan was poorly drafted so that the development would not be fully funded by the levies.

Dennis Family Corporation were building in the area and their development had reached a point where it was necessary to build Linsell Boulevard. The work was in fact carried out by Dennis Family Corporation. However a dispute arose as to a number of questions concerning the operation of the plan, the ability of Casey CC to collect additional monies and the obligation upon Casey CC to carry out the development

before the expiry of the 20 year time frame.

### Outcomes

The case explores some interesting practical questions and provides answers which can roughly be summarised as follows:

- Can a developer provide work in lieu, to be offset against liabilities to pay a levy under the plan?

Answer: Yes—in this case the works done by the Dennis Family Corporation could be offset against any levies past, present or future.

- Who has responsibility for providing works set out in a development contributions plan?

Answer: The responsible authority, even if there is not sufficient money in the fund.

- When should works and developments be carried out when the plan lacks details in this regard?

Answer: Whenever the need for the development arises—even if it is earlier than the authority would like and there is insufficient funding available at that time. It is the role of a properly drafted development contributions plan to provide sufficient funding at the appropriate times.

- Can Council 'double dip' by collecting

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levies under the plan and work/money under a permit?

Answer: No. The two should be mutually exclusive, this is made clear by the statutory language.

### Implications

This case raises issues that are relevant for all developers and responsible authorities. The law surrounding these requirements is complex and often the ways in which contributions are sought is not well planned. It is particularly relevant locally given the decision of Geelong City Council in relation to the development of Armstrong's Creek, where a development contributions plan is going to be used to provide some of the funding for the relevant infrastructure.

## Who Owns the intellectual property in the architectural plans for a proposed development. This question was recently explored by the High Court

Following the recent High Court ruling purchasers of land in respect of which a development has been approved may have the right to use the plans provided by the original architect .

### Facts

In this matter a joint venture was formed involving Landmark Building Developments Pty Ltd and Toyma Pty Ltd. The purpose of the joint venture was to develop some land at Nelson Bay on the New South Wales coast. Initial plans were drawn up for a 6 unit development by Mr Fares, an architect and a principle of Landmark and Parramatta Design. Those initial plans were used to obtain the necessary planning approvals.

Subsequently, before any work had started, another nearby site obtained approval for a 16 unit development. The joint venturer then decided to increase their development to a 14 unit development and Mr Fares drew up some new plans to amend the planning permits. This additional work was done for free by Mr Fares. The joint venturers then fell out and the land was sold by court appointed trustees. The purchaser (**Concrete**) sought to use the plans that had been drawn up by Mr Fares. In response Parramatta asserted copyright over the plans.

### Proceedings

Concrete commenced proceedings under the Copyright Act alleging that Parramatta had made unjustified threats. In those proceedings a declaration was sought by Concrete that they had an implied licence to use the plans. Parramatta counterclaimed, asserting copyright over the plans.

Through a series of appeals and cross appeals the matter reached the High Court where it was found that Concrete did have a implied licence flowing from the purchase of the land. Parramatta's copyright claim was dismissed.

## The *Implementation Guidelines for the National*

## *Code of Practice for the Construction Industry (Code Guidelines)* were recently updated by the Department of Employment and Workplace Relations

From 3rd November 2006, the Code Guidelines will be infringed where employers enter into *unregistered* agreements containing provisions that would be regarded as 'prohibited content' if they were included in a registered agreement (as specified in the *Workplace Relations Regulations 2006*).

Prior to the changes, 'prohibited content' was only banned from Industrial instruments such as awards and registered agreements.

It has been common practice amongst employers in the construction industry to negotiate union collective agreements by agreeing to side deals with unions to avoid the proscription against 'prohibited content' in workplace agreements. From the 3rd November, that practice is no longer available to companies if they wish to comply with the Code Guidelines.

Companies who have entered into unregistered agreements that include 'prohibited content' before 3rd November will not have infringed the Code Guidelines.

Importantly for players in the construction industry, should they not be code compliant they may be prevented from tendering for Federal Government construction work.

## Greenhouse Gas Emissions and Environmental Impact Assessments

The NSW Land and Environment Court recently found that the proposed developer of Anvil Hill coal mine had failed to provide an adequate assessment of the environmental impact of the mine because the environmental impact statement failed to properly assess climate change impacts.

What are the implications of this decision?

- At the very least the decision shows that the judiciary are ready to tackle head on the issue of climate change.
- It has been argued by some that this decision is likely to encourage additional climate change litigation in Australia, following the US trend.
- It emphasises the need to have climate change issues addressed more thoroughly by way of legislation to provide exposed industries with legal certainty surrounding their rights, obligations and potential liabilities.

### The Decision in Brief

Mr Gray (a NSW environmentalist) sought to review decisions made by the Director-General of the Department of Planning. Essentially he sought a ruling on whether the environmental assessment that had been prepared by the developer met the statutory requirements. There was no dispute about the fact that the development of the site would be responsible for massive amounts of greenhouse gas emissions.

## For further information



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Whilst the court rejected some of Mr Gray's more technical legal arguments it did find that the greenhouse gas emissions from the burning of coal should have been considered in the environmental assessment and this proved to be sufficient:

*"The coal intended to be mined is clearly a potential major single contributor to GHG emissions deriving from NSW given the large size of the proposed mine. That the impact from burning the coal will be experienced globally as well as in NSW, ...*

The court also criticised the Director-General for its failure to have regard to the principles of ecologically sustainable development (commonly referred to as ESD). The Court found that the decision of the Director-General was unsustainable because the environmental impact statement (which informed his decision) was void.

## Disclosure of Information to Vulnerable Persons

The normal rule in commercial transactions is that the vendor does not need to be concerned for the interests of the buyer. Where the vendor is selling land for a commercial development the vendor would not normally expect to be under any obligation to inform the buyer about facts that might affect the suitability of the land for the proposed development. In those cases it is generally considered that the buyer should check out the suitability of the land.

### Noor Al Houda Islamic College v Bankstown Airport

The Federal Airports Corporation (FAC) leased land to Noor Al Houda Islamic College (College). During the negotiations for the site it had been pointed out by an Airport employee that the site was noisy and that there were limited services available which might make it unsuitable for development as a college. However, whilst the lease was being negotiated the Airport (but not the employee involved in the negotiations) was aware that the land was contaminated. At no stage was the College advised that the site was contaminated.

The College subsequently discovered the contamination which rendered the site unsuitable for the proposed development.

On the face of it the lease offered no assistance to the College. It provided that the Airport were not liable for any loss other than loss caused by the Airport's negligence or default. The lease also provided that the College were to make its own enquiries in relation to the suitability of the land.

Ultimately the Court found that there

was a positive obligation on the Airport to disclose the fact of the contamination to the College during the lease negotiation stage. The failure to provide disclosure amounted to misleading and deceptive conduct. The obligation appears to have been founded on the fact that the Airport knew the purpose for which the College intended to use the site and should have known that it would be a material consideration. It was also noted that the Airport were liable in negligence because they owed a duty of care to the College and that the scope of that duty was increased because of the vulnerability of the College. These findings in relation to the negligence of the Airport meant that the Court allowed the College to recover damages for pure economic loss.

### Implications

The case should cause anybody engaged in property transactions and developments to be wary of withholding information, particularly where the other party might be said to be vulnerable. The use of protective exclusion clauses will not necessarily provide the protection that might previously have been assumed to be the case.