

LAND AND ENVIRONMENT COURT UPDATE

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Environmental Development and Allied Professionals
Western Group Conference

Dubbo – 27-29 April 2016



1.

DAMIAN v HULAK



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LAWYERS

1. Damian v Hulak

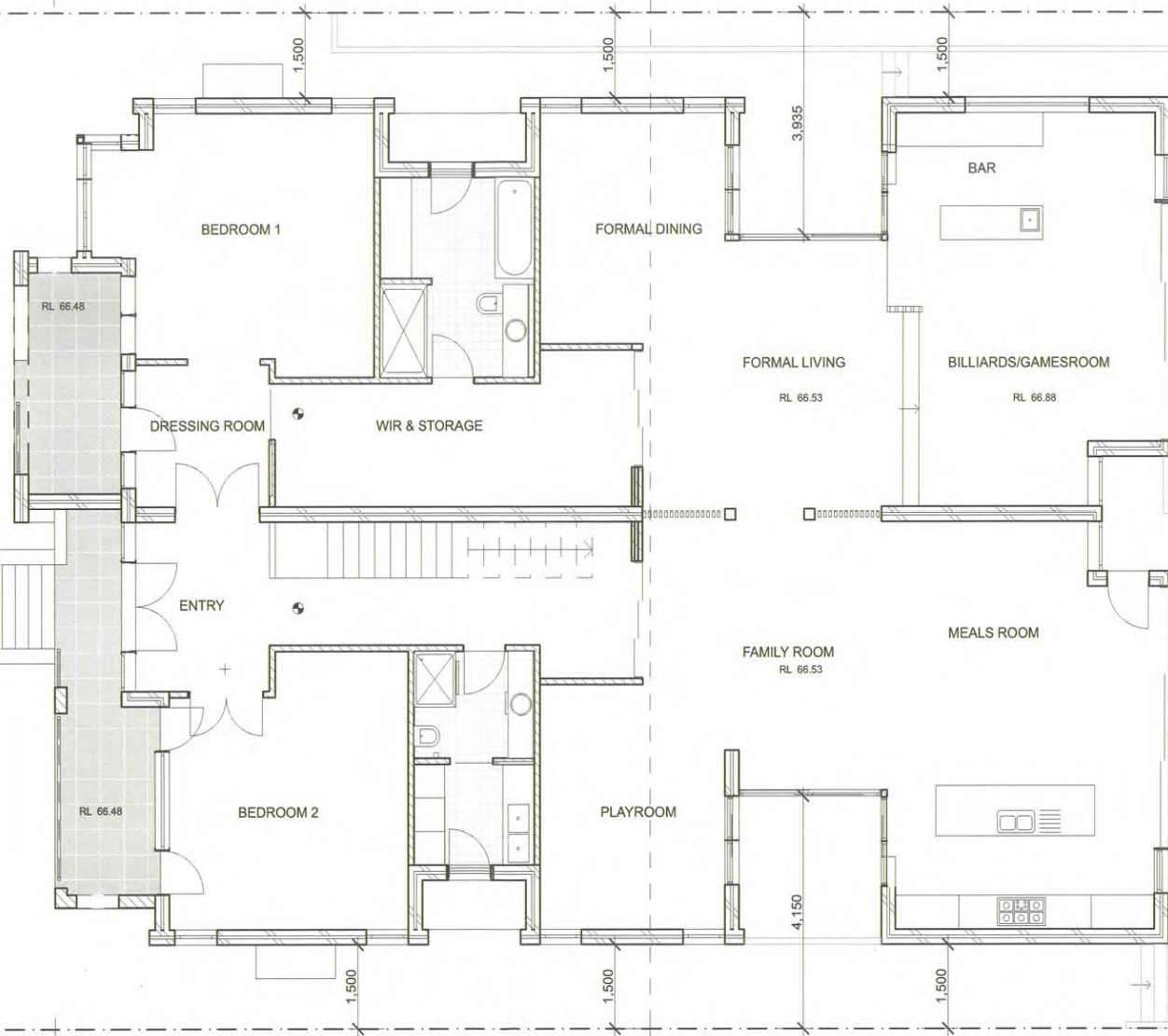
- Applicant commenced proceedings challenging the decision of a private certifier to issue a complying development certificate for a single dwelling
- The basis of the challenge is that the CDC is a “sham”

1. Damian v Hulak

- Applicant had earlier lodged with Council, a DA for a dual occupancy;
- The DA met opposition and Council advised it would not be approved;
- DA for dual occupancy was withdrawn; and
- CDC application for a single dwelling was lodged with private certifier.



9,478



6,978



APPROVED

- 6 NOV 2015

*ANTHONY PROTAS
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COMPLYING DEVELOPMENT

Drawing

1. Damian v Hulak

- What are your thoughts?



1. Damian v Hulak

- Section 85A(3) of the EP&A Act provides:

The council or accredited certifier must consider the application and determine:

- (a) whether or not the proposed development is complying development, and
- (b) whether or not the proposed development complies with the relevant development standards, and
- (c) ...

1. Damian v Hulak

- Section 85A(7) of the EP&A Act provides:

The council or an accredited certifier must not refuse to issue a complying development certificate **if the proposed development complies with the development standards applicable to it and complies with other requirements prescribed by the regulations** relating to the issue of a complying development certificate.

1. Damian v Hulak

- Issues for hearing:
 - Is the intention of the owner relevant?
 - Should the certifier be aware of the owner's intention?
 - Isn't CDC simply by the numbers?



1. Damian v Hulak

- Issues for hearing:
 - Can an owner have multiple consents?
 - Isn't it an issue of compliance when building?
 - Why declare CDC invalid when any person could obtain such an approval?



1. Damian v Hulak

- Result?
- Watch this space



2.

HORNSBY SHIRE COUNCIL

v

TRIVES



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2. Hornsby v Trives

1. **Hornsby Shire Council v Trives [2014] NSWLEC 171**
2. **Trives v Hornsby Shire Council [2015] NSWCA 158**
3. **Hornsby Shire Council v Trives (No 3) [2015] NSWLEC 190**
4. **Hornsby Shire Council v Trives (No 4) [2016] NSWLEC 28**



2. Hornsby v Trives

IS THIS A “DETACHED STUDIO”?

- A rectangular building divided internally by a fire rated wall.
- The building contains two studios either side of a fire rated wall.
- First studio contains a bedroom, bathroom and laundry, living and dining area, kitchen with space for a refrigerator and cooking facilities.
- Second studio has two bedrooms (one with an ensuite).
- No access between the two studios.

2. Hornsby v Trives

1. Could the opinion that the proposed “detached studio” was “complying development” be formed reasonably?

HELD: the structures could not reasonably be characterised as complying development.

2. Hornsby v Trives

- Why were the detached studios not complying development?
- What does the SEPP say?



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2. Hornsby v Trives

1. They were not ancillary to the dwelling house on the lot as required by the SEPP
2. They were not established “in conjunction with a dwelling house” and so fell outside the definition of “detached studio” under the SEPP
3. The result would be that there was “more than one dwelling house” on the Lot contrary to the SEPP
4. Not permissible within the zone under the EPI



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2. Hornsby v Trives

**CONSEQUENTLY NOT A REASONABLE
OPINION, AND SO INVALID**



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3.

CRIMINAL & ENFORCEMENT
PROCEEDINGS



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Recent Enforcement Issues

Zhang v Woodgate [2015] NSWLEC 10

Council powers to issue Notices to Attend Interview

- Power not available once prosecution proceedings commenced
- Power is related to investigation and enforcement, not to supplement evidence in Court proceedings

Recent Enforcement Issues

Leichhardt Council v Geitonia Pty Ltd [2015] NSWLEC 79

Developer authorised demolition of heritage façade – development contrary to consent

- Builder, Project Manager and Developer all found guilty
 - Developer fined \$150,000, others fined \$50,000
 - Matter on appeal

Recent Enforcement Issues

Tweed Shire Council v Furlonger [2014] NSWLEC 156

Defendant prosecuted for failure to comply with LG Act Order

- Court held defendant not guilty as Order not properly served
- Order was served through officer placing order in letterbox

4.

MARSHALL RURAL

v

BASSCAVE



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4. Marshal Rural v Basscave

- These proceedings concerned judicial review proceedings brought by Marshall Rural Pty Ltd, a company that owned an agricultural landholding on the Hawkesbury River used for hosting polo.
- Hawkesbury Council granted 2 development consents for the use of the subject land as a “function centre” for buildings known as the Polo Barn and Sunnybrook Barn located on the land.



4. Marshal Rural v Basscave continued

- Marshal Rural challenged the consent on a number of basis', however, most relevantly, on the ground that the use of the land as a “function centre” was prohibited in the RU2 Rural Landscape Zone and the temporary uses could not be granted.
- Marshal Rural sought orders in the proceedings that the operator Argosy (trading as the Sydney Polo Club) be prevented from relying upon the consents.
- Hawkesbury LEP 2012 is a standard instrument LEP which instrument contains clause 2.8 – Temporary Use of Land.

4. Marshal Rural v Basscave continued

- The subject land was located within the RU2 – Rural Landscape Zone within which function centres were not permitted either with or without development consent and, as such, that use was prohibited.
- Clause 2.8 of the LEP permits development consent to be granted for a use that would otherwise be prohibited by a land use table to a particular zone for a time limited period of 28 days within any 12 month period.
- Council, in granting the subject consents, permitted 28 functions to take place within any 12 month period, however, allowed the consents to operate for periods of 18 months and 24 months respectively.

4. Marshal Rural v Basscave continued

2.8 Temporary use of land

- (1) The objective of this clause is to provide for the temporary use of land if the use does not compromise future development of the land, or have detrimental economic, social, amenity or environmental effects on the land.
- (2) Despite any other provision of this Plan, development consent may be granted for development on land in any zone for a temporary use for a maximum period of 28 days (whether or not consecutive days) in any period of 12 months.
- (3) Development consent must not be granted unless the consent authority is satisfied that:
 - (a) the temporary use will not prejudice the subsequent carrying out of development on the land in accordance with this Plan and any other applicable environmental planning instrument, and
 - (b) the temporary use will not adversely impact on any adjoining land or the amenity of the neighbourhood, and
 - (c) the temporary use and location of any structures related to the use will not adversely impact on environmental attributes or features of the land, or increase the risk of natural hazards that may affect the land, and
 - (d) at the end of the temporary use period the land will, as far as is practicable, be restored to the condition in which it was before the commencement of the use.

4. Marshal Rural v Basscave continued

- Marshal Rural challenged that temporary use on grounds which can be summarised as follows:
 1. Consents for a period exceeding the maximum allowed by cl 2.8(2)
 2. Failure to consider, properly, the preconditions required by cl 2.8(3)
 3. Council took into account an irrelevant consideration
 4. Failure to afford procedural fairness
 5. Invalid owners consent

4. Marshal Rural v Basscave continued

- Marshall advanced the position that on the construction of clause 2.8 that there were 2 tests to be satisfied:
 1. a limitation imposing a maximum of 28 days of operation; and
 1. that the overall span during which the use may be undertaken for it to be understood to be a temporary use required the consents to run for a maximum of 12 months.

4. Marshal Rural v Basscave continued

- The Court rejected the submissions of Marshal and found that no limiting second test could be read into the clause which required that the relevant consents be time limited for a period of 12 months in order to be regarded as a temporary use.
- The ordinary reading of the provision prevailed such that provided the temporary uses were limited to no more than 28 days of operation within any period of 12 months, such temporary use could be granted under the terms of the clause.

4. Marshal Rural v Basscave continued

- The Court found that Council had considered whether the acoustic impact was acceptable.
- The correct test under cl 2.8(3) is whether there is no adverse acoustic impact.
- That test sets a higher standard and therefore Council fell into impermissible error.

4. Marshal Rural v Basscave continued

- Owners consent issue
- Stay of injunctive orders
- Subsequent development applications
- Polo world cup

5.

QUESTIONS



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