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COUNCIL OR JRPP; WHO SHOULD DETERMINE A DEVELOPMENT APPLICATION?

In this case *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWCA 189, the Court of Appeal was asked to revisit a decision of Justice Biscoe in the Land & Environment Court and determine whether the Council or the relevant Joint Regional Planning Panel (JRPP) had power to determine a development application. The case focused on whether the proposed development had a capital investment value exceeding \$10 million. Developments with a capital investment value exceeding \$10 million are determined by the relevant JRPP. The proposed development would have a capital investment value exceeding \$10 million if the tenancy fit-out costs of the proposed development were included. The Court of Appeal determined, based on the facts of this case, that the tenancy fit-out costs were not included in the capital investment value. Accordingly, the Council had power to determine the development application.

This case has significance beyond determining whether or not Council or a JRPP have the power to determine a development application. *State Environmental Planning Policy (Major Development) 2005 (SEPP)* requires the Minister to consider the 'capital investment value' of a project when determining if a project is a Part 3A project.

Background

Pipven Pty Ltd (**Pipven**) owns the 'Penrith SupaCenta' which has approximately 27,561sqm gross floor area. On 16 July 2008, the Council granted consent to increase the retail floor space of the SupaCenta to almost double its current size. Pipven activated the consent by placing fill to provide a foundational base for the extension, as well as pouring a reinforced concrete slab on the eastern side of the existing building and the installation of drainage and plumbing.

On 5 August 2009, Pipven lodged another development application, which only proposed an increase in the retail gross floor area of 6,468sqm. The proposed development was described in the development application as:

Alterations and additions to an existing bulky goods retail development.

The drawings supporting the development application proposed the division of the extension into 10 new tenancies (separated by partitions and divisions) together with the creation of mall space.

The Council approved the development on 13 November 2009 subject to conditions. Condition 3 said:

Prior to occupation of the building or a tenancy within the building, a separate development approval is to be obtained from Penrith City Council to use the building or each tenancy within the building/complex.

On 7 December 2009, Pipven surrendered its previous consent, which it had undertaken to do prior to lodging the second development application.

Calardu Penrith Pty Ltd (**Calardu**) owns land adjacent to the land owned by Pipven. The buildings erected on Calardu's land are known as the Harvey Norman Homemakers Centre. The tenants in the centre include Harvey Norman, Domayne and Bunnings.





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Both Pipven and Calardu's land is zoned 4(b) Special Industry under the *Penrith Local Environmental Plan 1996*. The effect of the zoning is that shops trading principally in bulky goods are permissible with consent but shops generally are otherwise prohibited.

Calardu commenced proceedings in the Land & Environment Court challenging the Council's approval of the development application. It advanced six grounds of invalidity, all of which were dismissed by Justice Biscoe. You may recall that in an update in April this year (see <http://tinyurl.com/342lr6r>) we reported on Justice Biscoe's decision. Calardu appealed Justice Biscoe's judgment on only one ground. It was expressed by Calardu in the following terms;

In purporting to grant the [2009] Consent, the [Council] acted *ultra vires* as it did not have jurisdiction to grant development consent to any development application for development having a Capital Investment Value exceeding \$10 million. The development the subject of the [2009] Consent has a Capital Investment Value exceeding \$10 million.

Statutory Framework

Clauses 13B and 13F of the SEPP state that the relevant JRPP may exercise the functions of the Council to determine development applications where the proposed development has a capital investment value of more than \$10 million. 'Capital investment value' is defined non-exclusively in the SEPP to include:

all costs necessary to establish and operate the development, including the design and construction of buildings, structures, associated infrastructure and fixed or mobile plant and equipment.

The Contest

The Court of Appeal was required to determine whether the 'capital investment value' of the 'development' the subject of the consent included the estimated tenancy fit-out costs of the extension as well as the costs previously incurred in the carrying out of works under the previous consent including, in particular, the cost of the partial construction of the ground floor reinforced concrete slab.

Calardu alternatively submitted that, even if the tenancy fit-out costs were excluded from the capital investment value, they should, nevertheless, be included as the development application was a 'staged development application' within the meaning of the SEPP. Clause 13G of the SEPP provides that the 'capital investment value' is the capital investment value of the whole of the development likely to be covered by all the development applications under a staged development application.

Were the estimated costs of the tenancy fit-out, costs of the development and, therefore, within the definition of capital investment value?

The Court of Appeal determined that the tenancy fit-out costs should not be included in the definition of capital investment value. Justice Tobias said that it was necessary to determine the 'development' the subject of the development application. In this case, the 'development' did not include any particular bulky goods retail use of any part of the extension. The Court concluded that what was being proposed was the erection of a building divided into mall space and 10 tenancy units and minor alterations to the existing building so that the extension could be married together with the existing building.

Justice Tobias accepted the Council and Pipvin's submissions that the words 'establish and operate' in the definition of the 'capital investment value' refers, in the present case, to the building the subject of the application being in such a condition as to be available to be occupied by bulky goods retail tenants. It did not include the fit-out costs of specific tenants, who may have different requirements depending on the different types of bulky goods retailers that may use the premises in the future.

The decision of the Court of Appeal was the same as determined by Justice Biscoe in the Land & Environment Court. However, the Court of Appeal distinguished Justice Biscoe's judgment in one regard. Justice Biscoe had determined that in the definition of 'capital investment value' costs are confined to capital

items. The Court of Appeal disagreed and said costs, including those not of a capital nature such as consultants fees, should be included when determining the 'capital investment value'.

Were the costs incurred pursuant to the previous consent to be included in the determination of the capital investment value in the development the subject of the current consent?

Calardu submitted that the works commenced under the previous consent were necessary to establish and operate the extension of the bulky goods retail centre. It submitted that there was a factual overlap and that the previous works were necessary for the contemplated works. Therefore, the costs incurred should be included in the determination of the 'capital investment value'.

The Court of Appeal agreed and said that there was an intimate connection between the works that were proposed and works that had been completed. However, the Court of Appeal also noted that this would not always be the case. It said that there will be cases where a development is dependent on an existing building, but the costs of erecting that building are too remote to be included in the cost of establishing the development under consideration. For example, the renovation within the shell of a very old heritage building. Justice Tobias said that, in each case, it will be a matter of fact and degree.

Was the development a "staged development application"?

The Court of Appeal determined that the development application was not a staged development application. Section 83B of the *Environmental Planning & Assessment Act 1979* provides that a staged development application is one that 'sets out concept proposals for the development of a site'. Justice Tobias said that the development application was the antithesis of a concept proposal. It was a concrete proposal. Therefore, it could not be a staged development application.



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