

No 'Character of the Local Area' in diverse neighbourhoods

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Under clause 16A of the *State Environmental Planning Policy (Affordable Rental Housing) 2009*, a consent authority must not consent to a development if the design is incompatible with the *character of the local area*.

In the recent decision of *Louden Pty Ltd v Canterbury-Bankstown Council* [2018] NSWLEC 1285 (**Louden**), clause 16A played a prominent role in Commissioner Gray's judgment. In that case, the Council had refused the development, *inter alia*, because the development's design did not match the local aesthetic. The Council relied on the argument that the setbacks and design of the proposal were inconsistent with other residential flat buildings in the local area.

However, Commissioner Gray rejected this argument in favour of the Applicant's reliance on *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 (**Project Venture**). There, Roseth SC stated [at 22]: "**Compatibility** is thus different from **sameness**. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve."

Commissioner Gray stated that all buildings of all typologies must be incorporated into the assessment of the local area character. In *Louden*, the surrounding neighbourhood in question was an eclectic bag of buildings ranging from various decades and designs. This was to prove the undoing of the Council's objection to the Applicant's Class 1 Appeal.

The decision in *Louden* established a potentially disquieting precedent. If your local area is devoid of any obvious and consistent homogeneity in built form – your local area has no character.

In such an event, the only objective standard that will be available is the test established in *Project Venture*, which is simply put is the "the relationship of built form".

Therefore, in order to establish a local character in diverse area, the plans must reasonably match the other structures in the vicinity, whereby the assessment relies upon the following:

1. Building forms.
2. Setbacks and Scale.

However, in that case of *Louden*, Commissioner Gray found the site, and the surrounding area in question, to consist of such a heterogeneous collection of building types from multiple periods, sizes, and designs – that there was "no well-defined existing character". As a result, the Council's local area character objections were rejected.



As a result, the Council further argued in *Louden*, that such a decision by Commissioner Gray would set an undesirable precedent. If a diverse neighbourhood could not prove its character of the local area – it effectively established that these neighbourhoods had none and previously rejected applications could be made again, because no objections could be made to any building, no matter the inconsistency of the proposal, with reference to the character of the local area. The Council relied upon the decision of Lloyd J in *Goldin & Anor v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995* [2002] NSWLEC 75. In this decision, Lloyd J refers to the concept of a consent operating as a precedent and says (at [28]):

“...if the Court is entertained with an application for a proposed development which is both objectionable in itself and where there is a sufficient probability that there will be further applications of a like kind, then the fact that a consent would operate as a precedent may be taken into consideration.”

However Commissioner Gray also rejected this argument from Council as Lloyd J's test comprised of two steps, the first being whether something is objectionable about the development. At this, Commissioner Gray stated “I am not satisfied that the Council has met the first step of this test... Council has not established that there is anything objectionable about the proposal... as such it cannot be said to be an undesirable precedent.”

This is quite right too. So long as you remove the ability of Council to object on local area character grounds.