Section 34 Conciliation Conferences – Requirement for Reasons

Date : December 11, 2018

A recent development consented to by a Commissioner of the Land and Environment Court during a Court mandated section 34 conference has been set aside by the Court of Appeal due to the fact that the Commissioner failed to give proper and adequate reasons for their decision. The Commissioner further failed to give proper reasons with respect to her satisfaction as to the legal perquisites to their power to grant the consent.

Huajun Investments Pty Ltd filed a class 1 appeal against ***City of Canada Bay Council's*** deemed refusal of their DA which sough to demolish pre-existing structures on the DA site and replace it with an 8 storey-residential flat building.

After being sat down for a section 34 conference pursuant to section 34 of the *Land and Environment Court Act 1979* ("**the Act**") , The Commissioner overseeing the matter granted development consent in accordance with the agreed terms under section 34(3) of the Act. Section 34(3) states that once an agreement is reached, the Commissioner must:

1. Dispose of the proceedings in accordance with the decision, and
2. Must set out in writing the terms of the decision

This case questioned whether the decision made by the Commissioner in this instance was lawfully made, and whether the reasons for the decision reflected this.

Al Maha Pty Ltd (who was the owner of the adjoining site as well as an objector to the DA on the basis that the proposed DA encroached on Al Maha Pty Ltd's land without owner's consent) initiated judicial review of the decision of the Land and Environment Court on the basis that the consent granted was invalid. He further claimed that the Commissioner did not have the power to grant the Consent because the Commissioner had failed to form the opinions of satisfaction in accordance with clause 4.6 of the *Canada Bay Local Environmental Plan 2013.*

The DA in question was in breach of 4.3 of the *Canada Bay Local Environmental Plan 2013,* despite this, Consent can still be granted as long as it satisfies the requirements of clause 4.6(4)(A) which reads:

"*(4) Development consent must not be granted for development that contravenes a development standard unless:*

a. ***the consent authority is satisfied that****:*
    i. the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
    ii. the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development

within the zone in which the development is proposed to be carried out, and"

During this application, ***Huajun Investments Pty Ltd*** followed the correct protocol with respect that they filed a Clause 4.6 written request. The Commissioner failed to disclose evidence of any consideration of the clause 4.6 request in their reasoning of the decision. Due to this, and in particular where s34(3) states that a Commissioner set out in writing the terms of the decision, the Court of Appeal inferred that the Commissioner had failed to form the necessary opinions therefore did not have the power to grant the consent.

Further than this, the *Environmental Planning Assessment Act 1979* states that a development application needs to include evidence that the owner of which the land is being developed on consents to the application. Given that part of the application fell on land owned by ***Al Maha Pty Ltd*** and ***Al Maha Pty Ltd*** did not consent to it, the Commissioner erred in their decision to grant consent in the first instance.

This case highlights the importance of ensuring that Commissioners give proper and adequate reasoning with respect to granting consent during the course of a section 34 conciliation conference. Commissioners need to ensure that they consider any essential prerequisites before granting consent, and ensure they address these prerequisites in their reasoning.