

NEWSLETTER

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“PICKING THE MARK” IN RESIDENTIAL PROJECTS



The current Sydney residential marketplace is certainly a progressive sector of the building industry due to unprecedented demands and low interest rates. However, architects, builders, developers or private home owners need to “pick the mark” when it comes to quality vs cost for any new or refurbishment project.

There appears to be two types of purchasers in the market place. The purchaser who understands and acknowledges that a premium is required to be paid for a quality product and the purchaser who does not understand, or is not concerned, that ‘you get what you pay for’. This leaves the developer in the difficult position of determining the correct balance of delivering a product that best meets the demands of the market whilst obviously providing the best return for their efforts.

From experience the most efficient and beneficial outcomes are normally achieved where a well managed approach is undertaken from

a projects inception. Initially comprehensive market research is vital, but equally important, is the formation of a team of professionals early in the programme. Subject to the type and size of a project, thorough research needs to be undertaken in regards to design, compliance, and cost to enable a decision to be made on how best to deliver an end product that meets the specific requirements of all parties.

For obvious reasons the location of the building should always depict the vision and design of a project but deciding on the level of quality to be provided needs to be carefully managed. The balance and perception of the quality also needs consideration. Visible items such as kitchens, appliances, light fittings etc. are most critical but what about the unseen items such as insulation, structure, etc. It has been long known in the industry that if two houses of identical design were built next to each other, one with 13mm plasterboard linings to walls and ceilings complete

with insulation, 100mm wide wall studs, 120mm skirtings, architraves, quality floor finishes, etc and the other house had 10mm wall & ceiling linings with no insulation, 75mm wide wall studs and 50mm skirtings, architraves and low end floor finishes that the market price would probably be the same. The house with the better quality would probably sell first but it is more than likely that unless advised, most purchasers would not notice the difference between the two houses yet the cost to build the higher quality house would be more.

Especially in residential construction determining the correct mix that meets the market is a process that needs to be well coordinated, not only from a cost perspective but also in regards to design, and if managed correctly positive outcomes can be achieved.

David Noble
Director

CERTAINTY

A Fundamental Prerequisite for Confidence in the Planning System



The revoked approval of a \$27 million 89-bed residential care facility and dementia clinic at Middle Head, Sydney by the federal government indicates that despite 4 years of effort on behalf of the applicant and approval by the Federal Department of Environment and the Sydney Harbour Federation Trust in October 2014, the need for improved certainty is a fundamental prerequisite for confidence in the planning system.

In NSW, the metropolitan strategy for Sydney (currently known as 'A Plan for Growing Sydney' and often referred to as 'the metro strategy') is an overarching plan that has the ability to restore greater confidence in the planning system.

Rather than being limited to reactive changes with each term of State government (often in an attempt to reflect election promises), constituents and stakeholders would benefit from greater certainty in the planning system if the metro strategy had the chance to be properly

implemented in line with a traditional 25 year projection period.

The metropolitan strategy (and its suite of sub-regional strategies) is arguably the most important plan that guides the preparation of a State Environmental Planning Policy (SEPP), Local Environmental Plan (LEP), or other plan for appropriate land uses within a region, yet it has minimal statutory significance in which to give it appropriate weight during the decision making process.

On 14 January 2015, Ministerial Direction 7.1 was introduced under Section 117 of the Environmental Planning and Assessment Act 1979 (the Act) in which to ensure that any proposed rezoning/planning proposal is 'consistent' with the metro strategy. Whilst this is a step in the right direction, more needs to be done in order to provide greater certainty and confidence in the planning system at a Local, State and Federal government level.

Key recommendations to improve certainty (and therefore confidence) in the planning system may not necessarily be limited to the following:

1. Include greater detail in the metro strategy, so that 'consistency' cannot be simply construed by way of locating higher density development in areas that are well serviced and close to public transport;
2. Amend Section 5 of the Act, so that one of the objects of the Act is to implement the metro strategy; and
3. Amend Section 79C of the Act, so that the metro strategy becomes a matter for consideration for all development.

Please contact SPS for strategic and statutory town planning assistance with your next project.

John McFadden
Managing Director

OTHER WORK UNDER CONTRACT, NEE PRELIMINARIES



EPM has taken an initiative, coupled with poignant legal advice, to adjust the traditional approach to the trade commonly known as Preliminaries or the Preliminaries Specification. This will now be referenced as Other Work Under Contract.

Over the passage of time, the aspect of Other Work Under Contract has become increasingly expansive, brought about by the experience(s) of previous projects. Commensurate with the intent to develop a more comprehensive specification, the Other Work Under Contract has manifest into a particularly prescriptive document. This has in turn led to difficulty with the administration of the Other Work Under Contract in that Contractors are tending to adopt an approach that if an item is not described in the Other Work Under Contract, then it is not included in the contract price.

By way of background, the Works as defined in a contract, means the whole of the work to be carried out and completed in accordance with the Contract, ie the physical elements that are built and remain when the Contractor has left site at Practical Completion. The Work under Contract (WUC) as defined in a contract, means the Work which the Contractor is or may be required to carry out and complete under the Contract and includes variations, remedial works, construction plant, and temporary works. The WUC incorporates the Works.

The Other Work Under Contract for a project is the complement of items required to properly facilitate and enable completion of the Works. Therefore the Other Work Under Contract forms part of the WUC. For this reason, it is the responsibility of the Contractor to provide all the

Other Work Under Contract required to properly complete the Works and therefore the Contractor is to decide and determine the items required to carry out the WUC.

EPM's approach to Other Work Under Contract is to therefore document the minimum requirements to be contained within the Other Work Under Contract and leave the necessary inclusions to the Contractor. In this way EPM is able to capture the elements of Other Work Under Contract that are important to the Client (eg signboard, hoarding style) whilst the remaining necessary items are left to the Contractors learned and competitive experience.

Mark Blizzard
Director

CHALLENGES AHEAD FOR NSW BUILDING CERTIFIERS



The National Construction Code (NCC), or how the majority of people in the industry term the document as the BCA, will see the latest edition BCA 2015 adopted on 1st May 2015. In this edition there have not been any significant changes to the deemed-to-satisfy (DTS) provisions of the Code. The majority of amendments to the DTS provisions relate to editorial changes and the improvements to the structure of some of the provisions to simplify the use of the document.

However there are some significant changes to the Building Code in respect to the release of future editions and performance based solutions.

In terms of the future editions the BCA will now be released on a triennial basis. This change has been introduced due to the timeframe normally taken to make amendments to the BCA. It was considered by the Australian Building Codes Board (ABCB) a 3 year time frame for future editions would allow for increase stability and to improve the usability of the BCA.

From the writers' perspective over the last four years there have been significant changes to the BCA in respect to provisions governing access and facilities for people with disabilities and energy efficiency and to keep abreast of the changes on a yearly basis has been a challenge. And then to add to this the regular changes to the Planning Act and Regulations and to the State Environmental Planning Policies trying to keep abreast of the all changes has become a challenging task.

The ABCB has advised if the necessity arises any significant and critical amendments to the BCA can still be adopted within the 3 year cycle.

BCA Performance Based Approach

The ABCB will continue to embark on the effectiveness of performance-based solutions to the BCA in an effort to continue to deliver significant economic benefits nationally. A recent report by the Centre of International Economics found that over the last 20 years the building regulatory reforms has delivered \$1.1 billion per annum in benefits, with an additional \$1.1 billion per annum potential benefits to be realised. The enhancements towards a more effective Performance Based Approach to the BCA will be the catalyst in realising the additional savings.

To facilitate the performance based approach the ABCB has introduced the following initiatives:

1. To develop and implement measurable performance in the BCA. The ABCB will continue to introduce new "Verification Measures" which will enable the quantification of Performance Based Approaches to the Performance Requirements of the BCA.
2. The introduction of a guidance document to assist in the preparation of performance based approaches. This can be found at the ABCB website – www.abcb.gov.au

3. The release of a Performance Clip on You Tube to outline the pathways to achieving compliance with the Performance Requirements of the BCA

4. The development of appropriate education and training to increase practitioner competencies in dealing with performance based approaches to the BCA.

BCA Online

This year the ABCB has released free online the National Construction Code. It has been estimated that releasing the NCC free online will extend the reach from 12,000 registered practitioners to approximately 200,000 practitioners in the building and plumbing industry as well as to consumers who have an interest in the regulations.

It has been a concern of the industry that the NCC has only been accessed by a small number of users due to the costs of annual subscriptions. This has prevented numerous practitioners not having access to the Code and leading to design and construction non-compliances.

The jury is still out on this one to see if this initiative will have a marked improvement in compliance as hoped by the ABCB.

Vic Lilli
Director

TRAFFIC IMPACT ASSESSMENT - SCHOOLS ON NOTICE



Lawyers | **McCullough
Robertson**

Two recent decisions in the Land and Environment Court have made the assessment of traffic impacts for development applications (and modifications) for new and existing schools a key planning issue.

In the *Presbyterian Church (NSW) Property Trust v Woollahra Municipal Council* [2015] NSWLEC 47 Pain J dismissed an appeal by the Church Trust of a decision of Senior Commissioner Moore who refused to grant development consent for change of use of a residential building to an educational establishment in Woollahra.

The case related to an application by the Scots College to relocate its existing kindergarten to premises in Kambala Road. The proposed relocation would not increase student or staff numbers beyond an existing cap set by a condition of consent for the preparatory school and early learning centre, being 500 students and 65 staff.

Before Senior Commissioner Moore the School submitted because the cap on student numbers would not change as a result of the proposed development, there would be no change in local traffic conditions. In her judgment, Pain J noted that the evidence before the Court (Moore SC) demonstrated that the development would have unacceptable impacts, particularly 'the unsafe behaviour of parents near the proposed educational establishment' and that the school did not conduct a survey of parents to determine if their drop off and pick up behaviour would change as a result of the proposed development.

Senior Commissioner Moore, refusing development consent, posed the following question:

'Can I be satisfied, to the degree of comfortable

satisfaction necessary in light of the potential consequences if I am wrong, that there will be no increase in the exposure of pedestrians (particularly young children) to the unsafe parental behaviours in Kambala Road?'

Moore SC stated he could not be satisfied that the alleged unsafe behaviour would change and hence refused development consent for the change of use.

Pain J dismissed the school's appeal which was based on several administrative law grounds.

On 8 April 2015 in *Council of Trinity Grammar School v Ashfield Council* [2015] NSWLEC 1086 Commissioner Dixon refused a modification application submitted by Trinity Grammar School to the Court to modify a court ordered development consent for the school.

The school sought approval from the Court to increase its student numbers by 200 students. Ashfield Council opposed the application arguing the proposal would have significant traffic and noise impact. Commissioner Dixon stated that the alleged noise impacts being incremental cumulative impacts were not a determinative issue in the appeal. However, traffic impacts generated by the application were determinative and the application was refused.

The Court determined that the proposed increase in student numbers at the school would have a significant environmental impact on traffic volumes, particularly Victoria Street, Ashfield.

The principal reasons given by the Court were:

- (a) queuing in a public street;
- (b) double parking in a public street;

- (c) bad driver behaviour;
- (d) traffic congestion; and
- (e) operational problems in the school's underground car park.

During the proceedings the school submitted a revised car park layout plan and revised transport management plan to the court, but the Commissioner commented that the 'revised documents tend to raise more problems (including student safety) than they resolved'.

These two decisions make it clear that if schools are considering a development application which may or may not result in an increase in student and staff numbers and that the proposed development is likely to have traffic impacts, then it is important the application include:

- (a) a comprehensive traffic impact assessment which includes a count of vehicles using relevant local roads during both school and holiday periods;
- (b) a survey of parents to obtain information about drop-off and pick-up behaviour; and
- (c) a traffic management plan.

These two decisions make it clear that traffic impact assessment is a critical merit issue for development applications associated with schools. It should also be noted that in both decisions the court also considered objector evidence including photographs, reports and video evidence which demonstrated poor driver behaviour on local roads during the morning and afternoon peak periods..

*Patrick Holland
Partner*

LATENT CONDITIONS

Kennedys

Legal advice in black and white

A latent condition is a physical condition encountered during construction work that differs from the conditions anticipated when the parties commenced the project. People familiar with the Australian Standards contracts may be surprised to learn that latent conditions are not always the responsibility of the landowner and that risk can be allocated in different ways.

Allocation of Risk

Allocation of risk for latent conditions can vary. The moderate position reflected in Australian Standards contracts has not always prevailed. On one view, the landowner is deemed to know the land better than anyone else, a position sympathetic to the argument that landowners should assume full responsibility for latent conditions. On the flipside, the builder is more skilled than the landowner in construction matters. Adopting that logic, risk for latent conditions should shift to the builder. After all, the builder can undertake any site inspections it

deems necessary and plan construction around the risks that those inspections disclose better than the land owner could.

The modern latent conditions clause sits between these two opposing positions, shifting risk for things that the builder cannot have anticipated, back to the land owner.

Unusual Latent Conditions

Most latent conditions are subterranean. That makes sense: underground conditions can be very hard to detect. Items such as rock and water are relatively common. But what about unusual latent conditions? We undertook an informal poll and came up with several real (but anonymous) strange latent conditions.

1. A train – yes readers, an actual train buried beneath a slab.
2. Buried 44 gallon drums of heavy metals.

3. A deceased horse.
4. A pool, inside the shell of a pool, inside the shell of another pool.
5. A chicken burial ground.
6. A well and a series of drainage pipes buried deep underground from the 19th century.

Treatment of Latent Conditions

When a latent condition is discovered, the terms of the contract will be critical when determining allocation of risk. Additionally, representations that the land owner has made about site conditions (if any), the thoroughness of a builder's site investigations and any descriptions of ground conditions and excavation contained in the scope of works will also provide context.

Tamara Helm
Senior Associate



Contact Us

WEBSITE www.epmprojects.com.au

supporting clients nationally

PO Box 124
Suite 2, Level 5, 655 Pacific Highway
ST LEONARDS NSW 2065
Phone: (612) 9452 8300
Facsimile: (612) 9452 8388

KEY CONTACTS

Andrew Graham

Managing Director
Mobile: 0419 732 021
Email: agraham@epmprojects.com.au

Stephen Welsh

Director
Mobile: 0417 307 860
Email: swelsh@epmprojects.com.au

Mark Blizard

Director
Mobile: 0438 126 778
Email: mblizard@epmprojects.com.au

Johan O'Brien

Director
Mobile: 0414 917 904
Email: jobrien@epmprojects.com.au



Acknowledgements

The following organisations regularly partner with EPM and contributed to the content of this newsletter.



Patrick Holland
Partner

Environmental Planning Law

McCullough Robertson
Level 16, 55 Hunter Street
Sydney NSW 2000
Ph: (02) 9270 8610
Fax: (02) 9270 8699
E PHolland@mccullough.com.au
W www.mccullough.com.au



John McFadden
Managing Director

Strategic & Statutory Planners

State Planning Services
P.O. Box 394
Pyrmont NSW 2009
Ph: (02) 9552 1525
Fax: (02) 9552 1525
E jmcfadden@stateplanningservices.com.au
W www.stateplanningservices.com.au



Vic Lilli
Director

BCA & Certification

Vic Lilli & Partners
Suite 7, Level 2, 1 -17 Elsie Street
Burwood NSW 2134
Ph: (02) 9715 2555
Fax: (02) 9715 2333
E vlilli@viclilli.com.au
W www.viclilli.com.au



Helena Golovanoff
Partner

Construction Law

Kennedys
Level 31, 2 Park Street
Sydney NSW 1235
Ph: (02) 8215 5999
Fax: (02) 8215 5988
E h.golovanoff@kennedys-law.com.au
W www.kennedys-law.com.au



David Noble
Director

Cost Management & Control

MDA Australia
Level 3, 160 Pacific Hwy
North Sydney NSW 2060
Ph: (02) 9929 8000
Fax: (02) 9929 8363
E david@mda-aust.com.au
W www.mda-aust.com.au