Article Information

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Court of Appeal determines that height of building control is not a jurisdictional fact in El Khouri v Gemaveld Pty Ltd [2023] NSWCA 78

In *El Khouri v Gemaveld Pty Ltd* [2023] NSWCA 78 (El Khouri), the NSW Court Appeal has determined that the height of building control is not a jurisdictional fact and therefore not a necessary precondition to the granting of development consent.

Background & Development Consent

El Khouri concerned a development application lodged by Gemaveld Pty Ltd for demolition works and the construction of a multi-level dwelling house, swimming pool, front fence, landscaping and siteworks (**Development Application**). Georges River Council (**Council**) refused the Development Application in October 2020 and Gemaveld commenced Class 1 Appeal proceedings in the Land and Environment Court of NSW (**Court**).

Relevantly, the Development Application was subject to a 9m height building standard under the applicable *Kogarah Local Environmental Plan 2012* (**KLEP**).

During the Class 1 appeal proceedings, the evidence before the Court and parties was that the proposed development complied with the building height control. Accordingly, at the Section 34 conciliation conference, the Commissioner of the Court was satisfied that the Development Application complied with the height of building standard and therefore made orders granting development consent in accordance with s 34(3) of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**).

Following the granting of development consent, the Applicants undertook further surveying of subject site. In doing so, it was determined that there was a tiny proportion of the land and the building envelope that exceeded the 9m height of building standard.

In July 2022, the Applicants commenced judicial review proceedings against the Commissioner's decision. The relevant ground pressed was that the granting of development consent was not decision that the Court have made because the height of the proposed development exceeded the height controls in the KLEP and no cl 4.6 variation request had been made.

Court of Appeal Decision

The appeal was first heard in the Supreme Court's Equity Division where it was held that the Development Applicant did exceed the building height control but only based on the updated survey information not before the Commissioner. The Applicants appealed to the Court of Appeal, where the question to be answered was whether the building height control was a jurisdictional fact and so needed to be satisfied before the Commissioner could grant development consent.

The Court of Appeal determined that Development Application did exceed the 9m height control imposed by cl 4.3 of the KLEP, but that such evidence, being the surveying undertaken by the Applicants post the Section 34 conciliation conference was not the evidence before the Commissioner at the time of the decision.

The Court of Appeal followed the reasoning of the Court in *Ross v Lane* [2022] NSWCA 235 and held that height of building control was a mandatory consideration by virtue of s 4.15(1) of the *Environmental Planning and Assessment Act 1979* (NSW), but not a pre-condition to the granting of development consent. As such, the development consent granted by the

Commissioner was not one that could be vitiated by evidence not before the Commissioner that the proposed development was in fact non-compliant with the KLEP.

Key Takeaways

Whilst the Court of Appeal's decision further clarifies that development standards are not jurisdictional facts and therefore not a matter that must be satisfied before the granting of development consent, proponents should still strive to ensure compliance with the development controls under the relevant Local Environmental Plan. It follows that where a proposed development fails to comply with a particular development control, a clause 4.6 variation request to seek approval for the extent of non-compliance must be submitted.