

Planning Issues - When things don't go according to plan

Nikki Cassar – Partner



Today's plan

- Council's responsibilities in relation to planning, development and certification
- Types of negligence claims we see arising out of planning issues
- Practical examples of claims
- Tips and lessons



Responsibilities

- Environmental Planning Instruments (LEPs)
- Development Assessment and Consent:
 - Receiving, considering and approving development applications
 - Receiving, considering and approving complying development certificates
- Building and Subdivision Certification:
 - Critical stage inspections
 - Issuing of occupation certificates
 - Issuing of construction certificates
- Issuing of Planning Certificates



Types of claims

- Failing to refer a development application to a relevant authority for comment:
 - Electricity authority
 - Mine Subsidence Board
- Not following the development application approval process
- Council appointed as Principal Certifying Authority
- Errors made in the information contained in s10.7 Planning Certificates
- Negligent misstatements



SEPP (Transport and Infrastructure) 2021

- Applies to development applications comprising or involving:
 - The penetration of ground within 2m of an underground electricity power line or an electricity distribution pole or within 10m of any part of an electricity tower,
 - Development carried out:
 - Within or immediately adjacent to an easement for electricity purposes; or
 - Immediately adjacent to an electricity substation; or
 - Within 5m of an exposed overhead electricity power line.
 - Installation of a swimming pool any part of which is:
 - Within 30m of a structure supporting an overhead electricity transmission line; or
 - Within 5m of an overhead electricity power line, measured vertically upwards from the top of the pool.

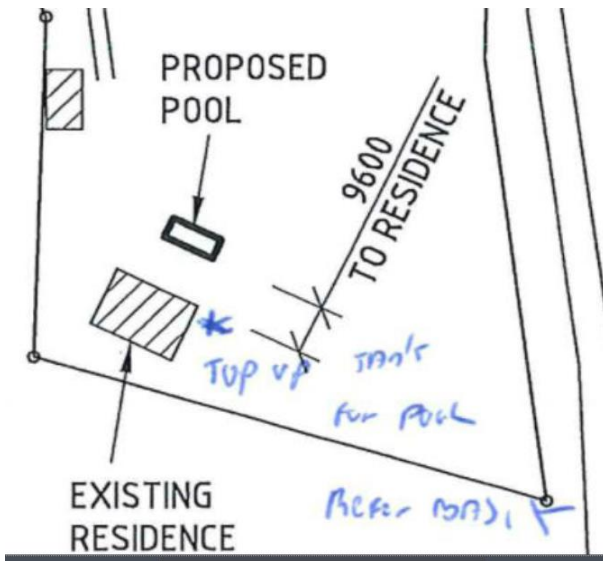


SEPP (Transport and Infrastructure) 2021





SEPP (Transport and Infrastructure) 2021



REQUIRED IN CERTAIN CIRCUMSTANCES		Y	N	NA
Advertising and Notification Fees - see [REDACTED] DCP A11.	-	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Integrated Development Special Requirements When: development requires permits from non-Council bodies. A cheque for \$320 (made payable to the relevant authority) and \$140 (made payable to [REDACTED] Council) is required for each approval body referral.	A.18	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
DCP A1 - Support Information (Preliminary Requirements-Mandatory Controls) When: a variation is sought to the mandatory controls or any proposed exemptions from the requirements of the Swimming Pools Regulations.	-	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Essential Energy Advice When: swimming pool is proposed for in front of the building line or adjacent to existing electricity infrastructure.	-	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>



SEPP (Transport and Infrastructure) 2021





Mine Subsidence Areas





Not following the process





Council as PCA





Council as PCA





Omissions in Planning Certificates





Omissions in Planning Certificates





Negligent misstatement in Planning Certificates





Negligent misstatement in Planning Certificates

The primary judge held that:

- The Resolution was a Council 'policy' which restricted the development of the property due to the likelihood of flooding;
- The policy had not been revoked or abandoned prior to the issue of the Planning Certificate;
- The Council therefore incorrectly answered Question 7 (Is the land affected by a policy adopted by the Council that restricts the development of the land because of the likelihood of flooding?) in the Planning Certificate;
- In breach of a duty owed to Ms Lorenzato, the Council did not use reasonable care in issuing the Planning Certificate;
- Section 43A of the *Civil Liability Act* 2002 did not apply. The Supreme Court found that the issue of a planning certificate was not the exercise of a special statutory power by the Council; and
- Section 733(1)(a) of the *Local Government Act* did not apply as the issue of a planning certificate was not the furnishing of advice in relation to the likelihood of flooding.



Negligent misstatement in Planning Certificates

On Appeal:

- Resolution was not a policy but rather an operative decision.
- The Resolution had been abandoned by Council by the time the planning certificate was issued and had been superseded so there was no misstatement.
- No misstatement in the planning certificate by not including a Code of Stormwater Management because that was not a *flood related development control*.
- Failing to disclose the stormwater pipe was not negligent and Council's duty of care did not extend to volunteering information beyond that specified in the Regulations.
- Overturned the Supreme Court's finding that the issuing of a planning certificate under s 149 was not the exercise of a special statutory power because it was a statutorily imposed obligation.
- The circumstances of this case was the precise circumstances to which s 733 was intended to apply and the defence was available.



Negligent misstatement relating to conditions of consent





Negligent misstatement relating to conditions of consent

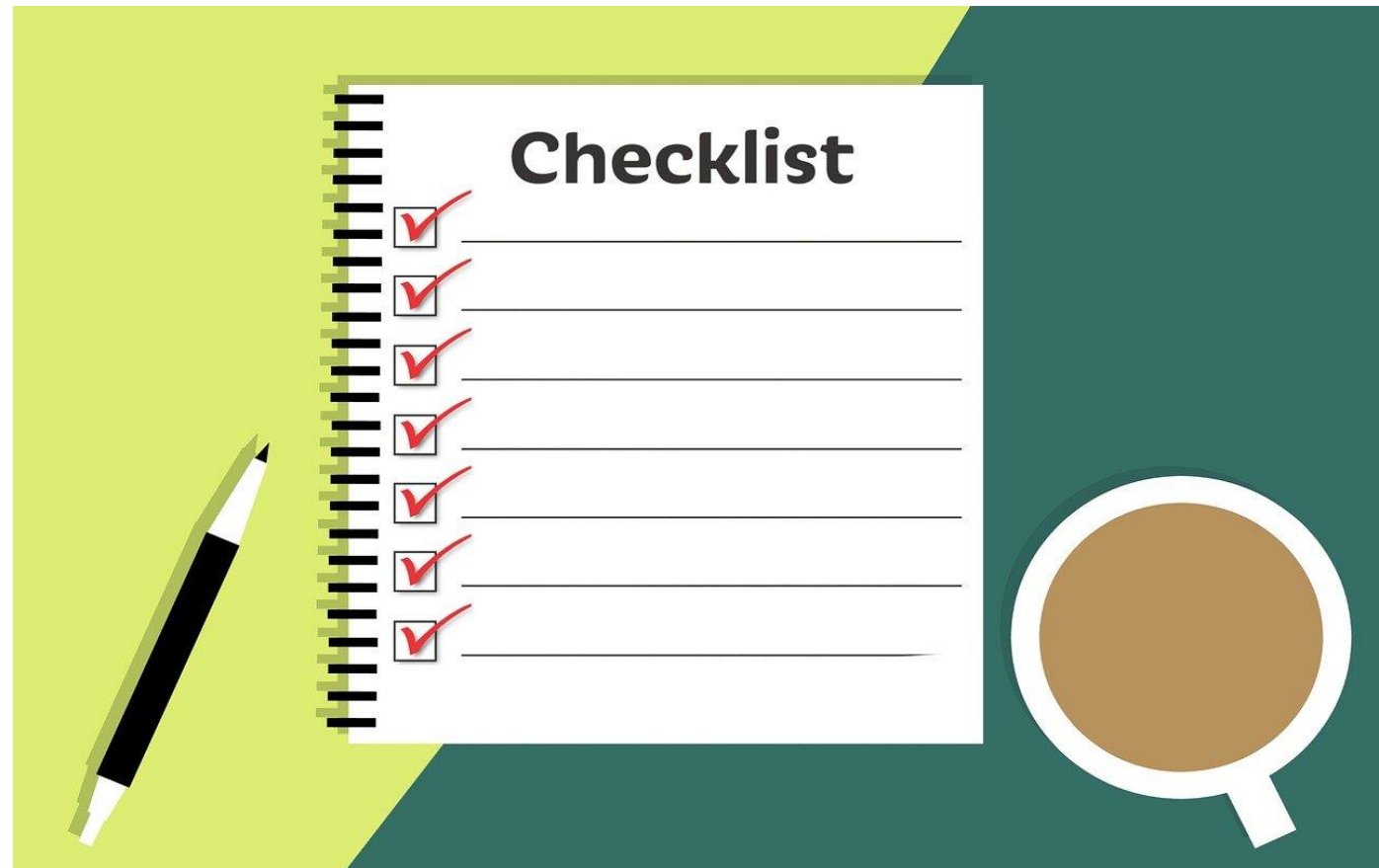
“The specialised nature of the information, the importance which it has to an owner or intending purchaser and the fact that it concerns what the authority proposes to do in the exercise of its public functions and powers, form a solid base for saying that when the information (or advice) is sought on a serious matter, in such circumstances that the authority realises or ought to realise, that the inquirer intends to rely act upon it, a duty of care arises in relation to the provision of the information and advice”.

Shaddock v Parramatta City Council (1981) ALR 385



Tips and lessons

Create checklists



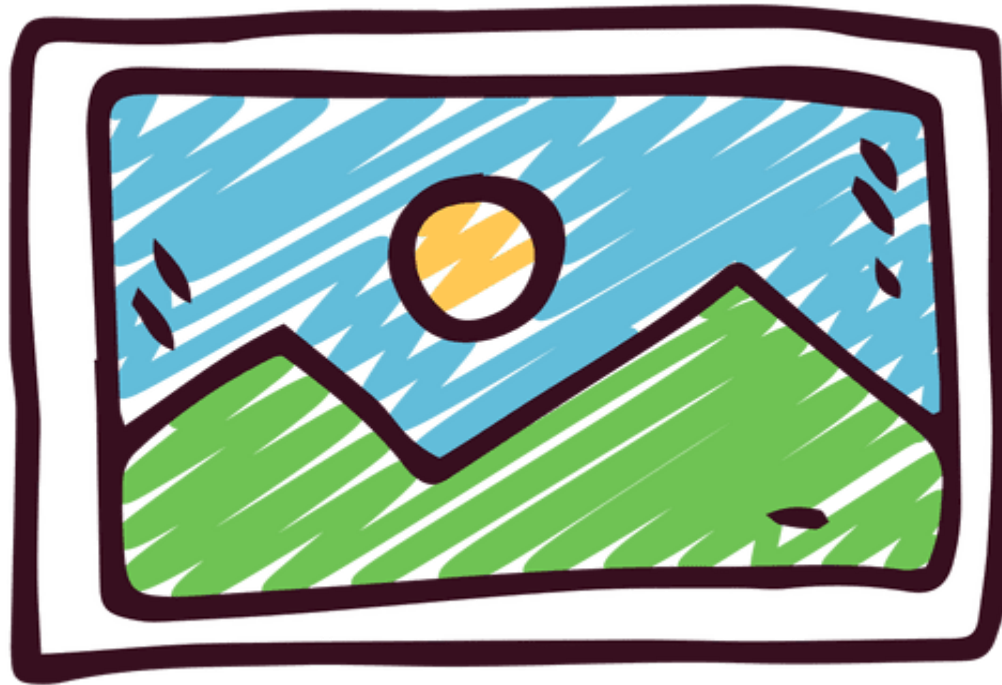


Tips and lessons

Document, document, document



Photos – lots of photos





CONTACT US

HEAD OFFICE

MELBOURNE

Level 6
530 Collins Street
Melbourne VIC 3000
T: +61 3 9670 9111
F: +61 3 9605 0933

SYDNEY

Level 7
151 Clarence Street
Sydney NSW 2000
T: +61 2 8289 5800
F: +61 2 9247 1315

BRISBANE

Level 23
66 Eagle Street
Brisbane QLD 4000
T: +61 7 3228 0400
F: +61 7 3012 8777

DARWIN

Level 16, Charles
Darwin Centre, 19 Smith
Street Mall, Darwin,
Northern Territory, 0800,
Australia
T: +61 8 8963 5600

CANBERRA

Level 1
121 Marcus Clarke
Street
Canberra ACT 2601
T: +61 2 6196 5200
F: +61 2 6196 5298

PERTH

Level 24
240 St Georges Terrace
Perth WA 6000
T: +61 8 6167 9800
F: +61 8 6167 9898

ADELAIDE

Level 8
91 King William Street
Adelaide SA 5000
T: +61 8 8330 2900
F: +61 3 9605 0933

Disclaimer

This PowerPoint presentation is intended to provide only a limited analysis of the subject matter covered. It does not purport to be comprehensive, or to provide legal advice. Any views or opinions expressed are the views or opinions of the presenter, and not those of Mills Oakley as a Firm. Readers should satisfy themselves as to the correctness, relevance and applicability of any of its content, and should not act on any of it in respect of any specific problem or generally without first obtaining their own independent professional legal advice.