Justice Bongiorno held Version 3 of Gunns' statement of claim to be embarrassing [at para 23-24]:

> *"It is fundamental to the proper conduct of civil litigation that a defendant be apprised of the case he, she or it has to meet with precision and with such degree of specificity and clarity as will enable a case to be prepared on that defendant's behalf. The judgment of 18 July 2005 dealt with this very issue in some detail. Version 2 of the plaintiff's statement of claim was inadequate in that respect and was struck out. V3 is an improvement on V2 but it is still embarrassing as a statement of claim. This is at least partly because a fundamental problem with this litigation, which has been evident since the proceeding commenced, is that too much has been sought to be alleged against too many defendants in the one proceeding. This has led to a number of apparently insoluble problems, the first of which is that of embarrassment. At least if those problems are soluble, the plaintiffs to this proceeding have not solved them.*
>
> *The fact that a defendant has to grapple with a document as long as V3 with perhaps a further 2000 or so paragraphs of particulars, is, in itself, embarrassing. The search for the case made against a single individual is a daunting one for trained litigation lawyers. It would be extremely difficult ever to be completely certain that an important allegation had not been overlooked or that the case was understood as intended. An individual defendant is at an even greater disadvantage."*

Justice Bongiorno referred to various "... other obstacles in the way of justice posed by litigation such as this" [para 25]. His Honour also stated [at para 34], ".... whatever [the plaintiffs] do they will need to radically alter the way they have pleaded this case to date."

Justice Bongiorno struck out Version 3 of Gunns' statement of claim. His Honour ordered that the proceeding be stayed pending an ex parte application by Gunns for leave to proceed and gave Gunns until 19 October 2006 to make such an application. The question of the costs of the strike out application was stood over until 9 October 2006 [para 35-36].

Source: *Gunns Ltd v Marr (No. 2)* [2006] VSC 329 (28 August 2006) <http://www.austlii.edu.au/au/cases/vic/VSC/2006/329.html> and AAP, "Court blow for Gunns", *The Age*, August 28, 2006 <http://www.theage.com.au/news/national/court-blow-for-gunns/2006/08/28/1156617248396.html>

VICTORIA

Dennis Family Corporation v Casey City Council [2006] VCAT 2372 (23 November 2006) - Council responsible for infrastructure under development contribution plan

By Kim Piskuric, Solicitor, DLA Phillips Fox

The recent decision of the Victorian Civil and Administrative Tribunal (VCAT) in *Dennis Family Corporation v Casey City Council* [2006] VCAT 2372 (23 November 2006) provides a comprehensive overview of the evolution and operation of Development Contributions Plans (DCPs) and clearly establishes the principle that the responsibility for the provision of infrastructure identified in a DCP rests with the responsible authority. Significantly, in the context of this case, the Tribunal held that the City of Casey (Council) was responsible for the provision of infrastructure included in its DCP despite the fact that its DCP was significantly under funded.

Background

The matter came before the Tribunal on application from Dennis Family Corporation, made pursuant to section 149 of the *Planning and Environment Act 1987*, which sought review of Council's decision on the manner in which certain works were to be provided in order to satisfy conditions 26 and 27 of planning permit P130/04.

Permit P130/04 was issued for certain stages of the Hunt Club Estate, a residential and mixed use development of more than 1600 lots in Cranbourne East. Conditions 26 and 27 related to the 'provision' and construction of a section of Linsell Boulevard, a major east-west arterial road that had been partially constructed under a previous permit, and the construction of a major intersection. Both items of

infrastructure were identified as items to be fully funded under the relevant DCP, namely the *Development Contributions Plan for Local Structure Plan 3 Cranbourne-East.*

Despite the fact that these works were included in the DCP and despite the fact that the permit also contained conditions requiring Dennis Family Corporation to pay development contribution levies under the DCP (conditions 41 and 42 of the permit), Council argued that in order to satisfy conditions 26 and 27 of the permit Dennis Family Corporation were required to undertake the works at their own cost. Council agreed to reimburse Dennis Family Corporation for the cost of works but only at the rate included in the DCP and only to the extent that funds were available. It was widely acknowledged however, that the DCP was under funded and accordingly the funds required to pay for the infrastructure were not available. In light of this, Council argued that if Dennis Family Corporation wanted to proceed with the provision of infrastructure prior to funds being available it would need to pay for that infrastructure itself.

Dennis Family Corporation sought reimbursement of the actual costs of constructing the works from Council and offered to be reimbursed by way of "offsets" or "credits" against future development contributions levies payable for later stages in the Hunt Club Estate. However, Council argued that it could only offset the cost of construction against levies payable under Permit 130/04 and not against future levies that may be payable under the DCP.

The Tribunal's reasoning

The Tribunal found that the provisions of Part 3B of the Act, when read in conjunction with the *Development Contributions Guidelines* (published by the Department of Sustainability and Environment), demonstrated that the nature of a DCP is that of a funding mechanism, introduced to assist Councils in collecting funds for the provision of infrastructure by placing an obligation on the developer to pay a levy. It acknowledged that the DCP framework enabled Council to accept works or land in lieu of payment but noted that this did not change the nature of the obligation, which was to pay rather than an obligation to carry out or provide the works, services or facilities in the DCP.

It noted that this interpretation was supported by the explicit distinction between the roles of the collecting agency and the roles of the development agency under the Act. The Tribunal stated:

> *Although the same person may be both collecting agency and development agency, the roles are different and each role carries separate obligations and responsibilities. The council's responsibilities as a development agency to provide the works, services or facilities therefore do not arise under part 3B of the Planning and Environment Act or under the development contributions plan itself. Its responsibilities for the provision of infrastructure arise from its local government role. Likewise the responsibility of other development agencies arise under their respective roles as defined by legislation.*

Accordingly, it concluded that:

> *Thus the essence of a development contribution or levy is that it is a monetary contribution (which may be satisfied by a contribution in cash or in kind) towards the provisions of works, services or facilities by the public sector, be this a municipal council or other development agency. The responsibility for the provision of works, services or facilities rests squarely with the municipal council or other body as development agency. A development contributions plan is simply the means by which the development contribution or levy is calculated and justified ...*
>
> *The responsibility for the provision of infrastructure remains with the council in its local government role, and once an approved development contributions plan is included in the planning scheme the council is committed to the provision of the infrastructure included in it and for which levies are payable.*

In coming to its decision the Tribunal considered the case law and amendments to the Planning and Environment Act that shaped the way in which development contributions or levies could be collected, together with the findings of the development contributions review (*A New Development Contributions System for Victoria*, May 2003) and the *Development Contributions Guidelines* published by DSE. In particular, it noted that the *Development Contributions Guidelines* provided that:

> ***A commitment to provide the infrastructure***

> *A DCP imposes a binding obligation on the infrastructure provider to provide the infrastructure by the date or criteria specified in the DCP.*

It also highlighted that the Guidelines outlined an accounting and tracking system, which indicated that the levies were merely a contribution towards Council's responsibility to provide infrastructure, which may need to be funded from other sources in addition to development contributions.

Accordingly, it concluded that in the event that there are insufficient funds in a DCP account, Council must provide funding from other sources to ensure that the infrastructure included in the DCP is provided in accordance with any staging or timing outlined in the DCP.

'Double dipping'

The Tribunal held that if an item of infrastructure is included in a DCP, a Council can not then require a developer to pay for the construction of that piece of infrastructure other than by way of a condition requiring payment of a development contribution levy. It concluded that to do otherwise would be unfair and inequitable and would constitute 'double dipping', which would be contrary to the combined operation of section 62(5) and 62(6).

The Tribunal noted that section 62 (5) outlines the types of conditions that may be included on a permit to either implement an approved DCP or require particular works, services or facilities to be provided or paid for. It highlighted that the options included a condition requiring the payment of a levy under a DCP, the provision or payment of infrastructure under a section 173 agreement, or the provision of or payment for works, which are to be provided either wholly by the developer or partly by the developer and partly by the Minister, public authority or Council. The Tribunal noted that the section 'does not provide any option for the provision or payment for works, services or facilities where they are to be contributed towards partly by the applicant and partly by other developers'. It further found that section 62(6) precluded such a situation and therefore 'eliminated the possibility of a de facto development contributions plan that is not an approved development contributions plan in accordance with Part 3B of the Act'.

The Tribunal acknowledged that there was nothing in the Act that prevented a Council from including a condition requiring the payment of a levy and a condition requiring the provision of works, services and facilities in the same permit provided that the conditions related to different items of infrastructure.

The Tribunal dismissed any argument that Dennis Family Corporation should pay for the cost of works because the works were needed as a result of the development. It clarified that the nexus between works and development was to be established at the time the DCP was approved and as the DCP identified that the works would be fully funded under the DCP there could be no argument as to nexus.

The Tribunal highlighted the distinction between the issue of who was responsible for the cost of the works and who was responsible for the cost of requiring the works to be constructed ahead of the schedule outlined in the DCP. It noted that:

> *If there is a staging schedule for the infrastructure included in a development contributions plan, and if a developer wishes to depart from that staging by bringing forward works to suit its own convenience, then we consider that the additional cost of bringing forward those works would be the responsibility of the developer. But this relates only to the cost of bringing forward the works to provide for them out of sequence; it does not relate to the cost of the works themselves.*

The Tribunal also made reference to the decision in *Carson Simpson Pty Ltd v Casey CC* [2006] VCAT 1725, which contained extensive comment on the issue of 'double dipping' in connection with the same DCP and generally the same items of infrastructure but in relation to a different development. The Tribunal's decision in that matter has been appealed and the Supreme Court is yet to hand down its decision.

Development Contribution 'Offsets' or 'Credits'

Finally, the Tribunal held that where a developer provides land, works, services or facilities in satisfaction of the requirement to pay a levy under a particular permit and the value of the land or works exceeds the

value of the levy payable, the additional value may be credited or offset against a developer's future liability for levies under the DCP.

Accordingly, the Tribunal made the following orders in relation to offsets:

1 *The decision of the Responsible Authority regarding its requirements in respect of conditions 26 and 27 of permit 130/04 is varied to provide that the value of the construction of Linsell Boulevard Stage 2 (the section of road between the constructed Linsell Boulevard Stage 1, at Rochester Road, to Narre Warren-Cranbourne Road) and the construction of the intersection at Linsell Boulevard and Narre Warren-Cranbourne Road to a standard agreed between the applicant and the Responsible Authority in consultation with VicRoads is to be fully offset against present and future development contributions to be made by the applicant pursuant to the development contributions plan for Local Structure Plan 3 Cranbourne East.*

Conclusion

This decision is an important reminder for Councils and developers as to the nature of the obligations to contribute to the cost of, or provide, works services and facilities. Councils and developers should ensure that any requirement for the provision of works, services and facilities complies with section 62(5) of the *Planning and Environment Act* 1987. Councils should also ensure that Development Contribution Plans are periodically reviewed and amended as necessary, as Councils will be liable for any shortfall.

SOUTH AUSTRALIA

Sunline Developments Ltd v City of Campbelltown and Genesis Equity (2006) SASC 270 – land management agreement

In Sunline Developments Ltd v City of Campbelltown and Genesis Equity (2006) SASC 270 the Full Court of the Supreme Court set aside an order made by the trial Judge granting a permanent restraining order against Sunline Developments. The Court found that following the grant of an interim injunction against Sunline Developments, a land management agreement entered into by the parties was sufficient in permanently preventing tree-damaging activities from continuing. Consequently, the permanent injunction ordered by the trial judge did 'no more than echo existing legal obligations,' and was set aside.

Hall v City of Burnside (2006) SASC 283 – extension of time for review

In Hall v City of Burnside (2006) SASC 283, the Full Court of the Supreme Court set aside an order made by a single Judge of the Supreme Court granting an extension of time for an action of judicial review. The Full Court found that the public interest was best served by strict application of the limitation period (r 98.06 *Supreme Court Rules* 1987) applicable to claims for judicial review. In relation to the competing considerations, Doyle CJ stated that he was simply not persuaded that the interests of justice call for the extension of time.

Hagger v Development Assessment Commission [2006] SAERDC 56 – proceedings for division of Crown Lease

By David Billington (Associate – Norman Waterhouse)

In *Hagger v DAC* [2006] SAERDC 56 the appellant made two applications for development approval to divide land held by him under a perpetual Crown Lease ("the Land"). The latter application relied upon the first. The applicant appealed against the refusal of the second application.