

Do Councils owe a duty of care to an applicant in assessing a development application?

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A recent decision by the majority of the NSW Supreme Court of Appeal has rejected a claim of negligence brought by the applicant developer against the respondent council for a breach of its duty on a purely economic basis.

In *Dansar Pty Limited v Byron Shire Council* [2014] NSWCA 364, the applicant's claim arose from the council's failure to properly manage the council's development application process due to the council's sewerage system nearing capacity which resulted in the development application initially being rejected.

In this alert we give a brief snapshot of the case and the implications arising from the case.

Facts

The Byron Shire Council (**Council**) was both development consent authority and water and sewerage authority for the Byron Shire. In 1997 the Council resolved to limit the number of new developments approved in the area due to the limited capacity of its two sewerage treatment plants.

The Council's planning controls prevented it from approving development applications unless the Council was satisfied that prior adequate arrangements had been made for the provision of sewerage services to the land proposed to be developed.

In 2001, Dansar Pty Ltd (**Developer**) applied to the Council for development approval to carry out a residential development. At the time of application, there was sufficient capacity in the sewerage system for the development. However, the Council failed to correctly calculate the capacity of the sewerage system, which, resulted in the Developer's application initially being rejected.

The Developer re-submitted its application, which was approved by the Council in 2005. The Developer claimed that but for the Council's error, development approval would have been granted in a timely manner.

Developer's claim

The Developer commenced proceedings in 2007 claiming damages from the Council for a breach of a common law duty of care allegedly owed to them. The Developer claimed that the delay in approval was largely caused by the Council failing to exercise reasonable care in carrying out the task of allocating the spare capacity which it had determined should be allocated to new developments.

The Developer alleged that the Council owed a duty of care to the Developer to ensure that it did not suffer economic loss resulting from the Council's refusal or delay in implementing its decision.

On appeal, the first instance decision was upheld by the majority of the bench on a 2:1 basis.

Implications

The decision is good news for councils around the country because it confirms that when councils are exercising statutory functions such powers are unaffected by a duty owed to private interests,

including those of developers.

Dansar held that there was an inconsistency between a council's duty of care and the free and proper exercise of its statutory functions and this is ordinarily sufficient reason in and of itself for denying the existence of any duty when deciding on development applications.

As the decision of the Appeal Court was not unanimous, it does raise the possibility that at some point in the future a court may decide that a council does have a wholly economic duty of care to a developer when exercising its statutory functions.

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