

LG Alert

When are consents "consistent" for the purposes of Regulation 46 of the *Development Regulations 2008? Liu & Anor v City of Playford [2014] SAERDC 31*

In this judgment, the ERD Court has, for the first time, considered and limited the scope of consistency checks which are undertaken in respect of staged consents under Regulation 46 of the *Development Regulations*.

In January 2013 the Appellants lodged a development application for a glasshouse of 2 hectares on size, which would operate in conjunction with existing glasshouses on the land for the growing of vegetables for sale and in which a number of staff would work.

After obtaining Development Plan consent from the Respondent Council, the Appellants engaged a private certifier to assess the proposed development against the Building Rules.

As part of the private certifier's assessment the private certifier assigned a building classification to the proposed development – being class 10a – for the purposes of section 66 of the *Development Act*.

The Building Code of Australia defines a class 10a building as "a private garage, carport, shed or the like."

The private certifier subsequently granted Building Rules consent to the proposed development.

Following a review of the building rules consent undertaken pursuant to Regulation 46, the Council asserted that the building class assigned to the proposed development (class 10a) was inconsistent with the nature of the development granted Development Plan consent and as such, there existed an inconsistency between the Development Plan consent issued by the Council and the Building Rules consent issued by the private certifier.

For this reason the Council refused to grant Development Approval.

The question before the Court was whether a dispute as to the assignment of a classification of a building

can give rise to an inconsistency between the Development Plan consent and the Building Rules Consent for the purposes of Regulation 46 of the Regulations.

Significantly, the Court found that:

- the assignment of a classification to a building is a separate and distinct process from the grant of Building Rules consent;
- as Regulation 46 is concerned with ensuring that "consents" are consistent with each other, councils **cannot** review the classification assigned to a building by a private certifier before it issues development approval;
- even if the assignment of a classification to a building could be said to be part of a Building Rules consent, section 36(4) of the Development Act 1993, which **requires** councils to accept that building work complies with the Building Rules where such compliance is certified by a private certifier, prevents councils from refusing to issue development approval where it disagreed with the classification assigned.

"In this judgment, the ERD Court has, ... considered and limited the scope of consistency checks which are undertaken in respect of staged consents..."

This judgment provides clear guidance as to the scope of consistency checks under Regulation 46 – they are limited to identifying inconsistencies in plans and documents relevant to the siting, size, appearance and materials of a building and do not extend to apparent inconsistencies in the assignment of building classification, nor do they extend to circumstances where a council considers that the plans and details approved in a Building Rules consent are inadequate.

If you have any questions please contact Philippa Metljak on 8113 7112 or pmetljak@kellyjones.com.au, or Victoria Shute on 8113 7104 or vshute@kellyjones.com.au