



## Development Control Orders – Why Subjective Facts Are Relevant

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The Land and Environment Court in *Reset & Sweat Pty Ltd v Northern Beaches Council* [2022] NSWLEC 1203 has upheld an appeal against a development control order claiming prohibition of use issued to a fitness gym.

### Key Takeaways

- Councils must take into consideration all relevant matters when issuing orders.
- The new planning reforms, if introduced, will result in the consolidation of current industrial zones IN1 and IN2 in the Northern Beaches Local Government Area into a single zone, E4 General Industrial.
- Despite the Court's decision, it is consistent with the public interest that any industrial zone be available for the industrial purposes for which it is intended.

### Background

In this case, Reset and Sweat Pty Ltd (the **Applicant**) operated a gym in Manly within an IN2 Zone. The Applicant failed to obtain development consent, operating the gym for over seven years without such consent.

The Warringah Local Environment Plan (**LEP**) stipulates that an indoor recreational facility is prohibited in an IN2 Light Industrial Zone.

On 5 July 2021, Northern Beaches Council (**Council**) issued the Applicant with a development control order. Council claimed that the Order was issued on the grounds that use of the premises is prohibited pursuant to LEP 2011.

### Potential Planning Reforms

Both parties submitted evidence regarding two planning reforms seeking to amend the LEP and introduce a principal LEP for the Northern Beaches Local Government Area:

1. The employment zones reform, which proposes to consolidate industrial zones IN1 and IN2 into a single employment zone named E4 General Industrial.
2. The creation of a principal LEP combining the three LEP's of the former Pittwater, Manly and Warringah Councils.

### Extension of time

Whilst the Applicant accepted that the current use of the premises is unlawful, the Applicant sought an extended period of 1 year and 7 months to comply with the Order.

Council asserted the validity of the Order, claiming that the appeal should be dismissed on a public interest basis. In doing so, Council relied on expert planning evidence indicating the Applicant's failure to complete a traffic assessment and prepare a flood evacuation plan.

The Court considered it appropriate to grant an extension of time to comply with the Order, having regard the following factors:

- Occupation of the premises by the Applicant since July 2013.
- Lack of evidence suggesting amenity or environmental concerns resulting from use of the premises.
- Lack of safety concerns.
- The financial and personal prejudice that the Applicant and its employees would suffer.
- The proposed implementation of a plan of management by the Applicant.
- The proposed planning reforms, either of which may allow the Applicant to lodge a Development Application permitting use of the premises as a gym.

The Court noted Council's lack of regard to the Applicant's subjective circumstances, including the lease between the owner and Applicant terminating on 10 September 2023.

Whilst Council alleged that granting an extension of time would bypass the development application process and set a precedent for other unlawful uses in the IN2 zone, the Court disagreed, emphasizing the unique circumstances of the matter.

In reaching its decision, the Court highlighted that use of the premises as an indoor recreation facility had occurred for an extraordinarily lengthy period, and the Applicant received no complaints in that period. Additionally, the Court accepted that had Council been concerned that the gym constituted a public safety risk or had an unreasonable impact on existing uses in the zone, Council would not have granted such a generous period of time to comply with the Order.

The Order modified pursuant to s 8.18(4)(b) of the *Environmental Planning and Assessment Act 1979* extended the period of time for compliance until 10 September 2023 to coincide with termination of the lease.

## Conclusion

This decision acts as a salient reminder for Councils issuing orders, such as development control orders, to ensure that regard is had to the full, subjective circumstances and facts of each matter.