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CONDITIONS OF CONSENT & THE ROLE OF THE CERTIFIER

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Conditions of Consent and the Certifier

Certifiers in carrying out their role in certifying development are often called upon to interpret the terms of a development consent as a whole, or an individual development consent condition, either in issuing Part 4A certificates including construction certificates and complying development certificates or in defending a decision to issue those certificates – most commonly in issuing construction certificates, occupation certificates and complying development certificates. The issue also arises in determining to issue Notices of Intention to issue an Order for breach of development consent.

Given this role, it is centrally important that certifiers have a sound understanding of the power of consent authorities to impose conditions upon development and the ambit of their authority in interpreting and authorising variations from the approved consent without requiring the development consent to be modified by way of s96 modification application.

The Importance of a Consent

A development consent regulates the way in which a development is to be implemented and carried out. In that respect, it must be remembered that the consent will persist indefinitely and any failure to construe the consent in accordance with its terms can have significant consequences for a certifier including disciplinary action being taken by the BPB or possibly civil enforcement proceedings being commenced against a certifier for permitting development to be carried out other than in accordance with the approved development.

Key matters to remember are:

1. The consent runs with the land;
2. Is a valuable right to deal with land; and
3. Is an on going obligation upon the land owner and its users.

Legal Foundation for Conditions of Consent

When a Council determines a development application, they have 3 options available: grant an unconditional consent; refuse consent; or grant a conditional consent (s80(1) *Environmental Planning and Assessment Act 1979*).

Although it would be most developers' dream to receive an unfettered approval for development, Council rarely, if ever, approve development without imposing conditions.

The legal test of validity of conditions of consent is found in the House of Lords decision of *Newbury District Council v Secretary of State for the Environment* [1981] AC 578. This authority espouses three basic tests for valid conditions:

- (i) Conditions must be for a planning purpose;
- (ii) Conditions must reasonably relate to the development to which they are addressed; and
- (iii) Conditions must themselves be reasonable.

For a Planning Purpose

Generally, if a condition can be tied to a matter arising under s80A(1), it will be for a planning purpose. The Courts have traditionally given a wide interpretation to a "planning purpose". However, certain conditions have been found by the Court not to be for a proper planning purpose, these include:

1. Conditions requiring an applicant for development to sell certain land to a Council and the Council to purchase it (see *Lean Lackney & Haywood Liverpool Pty Ltd v Baulkham Hills Shire Council* (2003) 137 LGERA 1);
2. Conditions requiring an applicant for development to provide an indemnity to Council in consideration of approving development. Such a condition was found not to be in the public interest, as referred to in s79(c)(1)(e); and
3. Conditions requiring the provision of a bond to ensure protection of existing vegetation on private property.

The Condition Must Relate to the Development

There must be a nexus between the development and the condition. Again, this requirement has been fairly broadly interpreted by the Court. For example, in the case of *Andrews v Botany Bay Council* (2008) 158 LGERA 451, the Court held that conditions of consent attached to a development for a new residential flat building requiring the developer to pay for undergrounding of power lines in the road reserve were valid on the basis that they provided a significant aesthetic benefit.

In relation to modification applications, the consent authority can only impose conditions in relation to the aspect of the consent that is being sought to be modified (see *1643 Pittwater Road Pty Ltd v Pittwater Council* [2004] NSWLEC 685). For example, a condition on an application that sought to delete a dormer could not give way to a condition that required the carrying out of works on someone

else's land. Such a condition would not fairly and reasonably relate to the development sought.

The Condition Must Be Reasonable

Provided a condition is for a planning purpose and relates to the development, it is likely that such a condition will be reasonable. Generally, the Court has found conditions that have no nexus to the development, or which are contrary to the public interest, to be unreasonable and have declined to impose the condition.

A good example of this involved an application for a brothel upon which Council sought to impose a condition concerning regular inspections of the operation of the brothel if it were to be approved.

The basis of the proposed inspections were to be that:

- The Council would hire a private investigator to attend the premises;
- Whilst there, the inspector would partake in the services provided on the premises; and
- As a part of that process, the inspector would make observations on the sexual health and hygiene of operations.

The process was within Council's enforcement powers, but the kicker was that following inspections, the condition required the proprietor of the brothel to reimburse the Council for the cost of the private investigator's time and for any fees charged for the sexual services provided.

The Court held that the condition was contrary to public policy and ought not be imposed.

Another example of an unreasonable condition, drawing on the example of undergrounding of power lines above, would be where the cost of carrying out the requirement far exceeded the scope of the development. An application for minor alterations and additions could not therefore require such an onerous and costly exercise.

Lawfully Capable of Being Imposed: Section 80A of the *Environmental Planning and Assessment Act*

Conditions must be lawful, or more specifically, conditions must have a lawful foundation in s80A of the EPA Act. Section 80A sets out a range of situations in which a condition of consent can be imposed. As long as the conditions imposed by Council fall within one of the categories set out in s80A of the Act, the condition will be for a lawful purpose.

1. "Conditions – generally

A condition of development consent may be imposed if:

- (a) it relates to any matter referred to in section 79C(1) of relevance to the development the subject of the consent, or*

- (b) *it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or*
- (c) *it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or*
- (d) *it limits the period during which development may be carried out in accordance with the consent so granted, or*
- (e) *it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or*
- (f) *it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 79C(1) applicable to the development the subject of the consent, or*
- (g) *it modifies details of the development the subject of the development application, or*
- (h) *it is authorised to be imposed under section 80(3) or (5), subsections (5)–(9) of this section or section 94, 94A, 94EF or 94F."*

Example of Types of Conditions that a Council Can Make

In *Hilltop Planners Pty Ltd v Great Lakes Council* (2003) 127 LGERA 333, the Court held that the grant of development consent is the exercise of a statutory power and not a power at large. In that respect, the Court has identified a number of broad categories of conditions of consent:

1. Conditions modifying aspects of the development application (s80A(1)(g)).
A simple example of such a condition might state:
"The Dormer window shown on plan no. X is to be deleted";
2. Conditions requiring compliance with requirements of other agencies.
An example of such a condition might state:
"The proposal must comply with the requirements of the Roads and Maritime Services or Fire and Rescue NSW";
3. Conditions controlling the construction of a development. Such a condition might state:
"The proposal shall comply with the provisions of BCA 2013";
4. Conditions controlling the operation of the proposal once it is completed. For example, a development consent for a boarding house might include a condition stating:

"Once completed, the proposed development is to have an on site manager at all times";

5. Conditions placing time limits on how long an activity may continue (s80A(1)(d); and
6. Conditions requiring removal of building works at the end of a specified period (s80A(1)(e).

Certifying Authorities

Private certifying authority have wide ranging power vested in them to approve later details of some aspect of a development which may be significantly different from that envisaged by a consent authority when granting a consent.

A relevant example is approving changes to what are regarded as "Ancillary Aspects" of development. The recent decision of *Burwood Council v Ralan Burwood Pty Ltd* [2013] NSWLEC 173 (discussed in detail below) is a good example of this.

The EPA Act contains the following relevant provisions:

Section 80A Imposition of conditions

Ancillary aspects of development:

A consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction and determined in accordance with the regulations of the consent authority or a person specified by the consent authority.

Section 109O Certifying authorities may be satisfied as to certain matters

For the purpose of enabling a Part 4A certificate or a complying development certificate to be issued by a certifying authority, the regulations may provide that any requirement for a consent authority or Council to be satisfied as to any specified matter (or any matter of a specified class of matters) is taken to have been complied with if the certifying authority is satisfied as to that matter.

This section applies whether the requirement is imposed by or under:

- (a) This Act, the regulations or an environmental planning instrument, or
- (b) The terms of a development consent or complying development certificate.

161 Certifying authorities may be satisfied as to certain matters: section 109O

This clause applies to the following matters:

- (a) Any matter that relates to the form or content of the plans and specifications for the following kind of work to be carried out in connection with the erection of a building or the subdivision of land:
 - (i) Earthwork,

- (ii) Road work, including road pavement and road finishing,
- (iii) Stormwater drainage work,
- (iv) Landscaping work,
- (v) Erosion and sedimentation control work,
- (vi) Excavation work,
- (vii) Mechanical work,
- (viii) Structural work,
- (ix) Hydraulic work,
- (x) Work associated with driveways and parking bays, including road pavement and road finishing,

(b) Any matter that relates to the external finish of a building.

Any requirement of the conditions of development consent that a consent authority or Council is to be satisfied as to a matter to which this clause applies is taken to have been complied with if a certifying authority is satisfied as to that matter.

My experience has been that it is clause 161(1)(b), together with clause 145, of the EPA Regulation that provides a fertile source of disputes.

Clause 145 of the Environmental Planning & Assessment Regulation 2000 provides that a certifying authority must not issue a construction certificate for building work unless:

...(a) the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent...

In the matter of *Burwood Council v Ralan Burwood*, the Council brought proceedings concerning a major development regarding its external appearance against the developer and its principal certifying authority. It sought a series of declarations and mandatory orders to demolish or rectify the building because of changes made to some design features in breach of the consent granted. In doing so, it challenged six construction certificates issued, and two interim occupation certificates.

Essentially, the Council tried to say the building didn't look like what was intended. The Council argued that the buildings constructed were inconsistent with the development consent in a number of respects. The two major changes of concern to Council were:

1. the deletion of external louvres which Council alleged were a 'major and important design feature'; and
2. changes to the finishes of the building, including the windows and frames, and their colours.

Despite that, the Court found that the construction certificates were validly issued. It found that the fundamentals of this development remained after the issue of the construction certificates, and therefore the construction certificates were valid.

The matter is presently on appeal. However, if the Court's interpretation of the design changes in the construction certificate is correct, it means that Councils will be (or at least should be) ever more proactive in detailing the types of finishes it wants in developments.

Consistency of Development with Development Consent/ Modification Applications

Another significant issue that the Court and the Building Professionals Board continue to deal with is certifiers who allow a range of changes to approved development in the construction certificate plans which by and of themselves appear relatively minor but which taken as whole result in the development being found to be inconsistent with the approved consent.

Two significant cases, *Lesnewski v Mosman Municipal Council* [2004] NSWLEC 99 and *Warringah Council v Moy* (2005) 142 LGERA 343, identified differences between the relevant construction certificates and consents but, nevertheless, found that there was no breach of the Act as the relevant certifier (Mosman Council in the *Lesnewski* matter and a private certifier in the *Warringah* matter) was satisfied that the differences did not amount to inconsistency.

On 20 July 2007, the *Environmental Planning and Assessment Regulation 2000* was amended to remove reference to the certifier's satisfaction. Instead, the requirement is now simply that the construction certificate must not be issued unless the design and construction of the building as depicted in the construction certificate plans are not inconsistent with the development consent.

Whether or not the certifier is satisfied of that is no longer to the point, the question is whether or not there is inconsistency. In short, certifiers now need not only be satisfied that there is no inconsistency, they must also be right.

Two recent cases which demonstrate the continued importance of this issue to certifiers are seen in:

Case Studies

BPB investigation – 13 June 2014

The Building Professionals Board has recently published notice of its investigation of a certifier who issued a construction certificate and endorsed detailed construction certificate plans that involved 53 changes to the approved development consent plans.

The Facts

The development consent was for substantial alterations to a Federation style building that had to be reconfigured as a duplex.

Many conditions in the consent had been imposed by Council to retain the buildings heritage significance. The construction certificate authorised changes to the approved plans that affected the fire safety of the building and its appearance.

In brief, the development consent allowed the ridge height to be raised and an attic to be created. The duplexes were then to share a single ridge cap rather than

two individual ridges, a change which affected the fire safety measures required under the BCA. The Board found that a component certifier would have required a fire separating wall between the duplexes, this was not specified in the CC plans.

The certifier also permitted significant internal features identified within the consent as being required to be kept to be replaced. The Board found a component certifier would have identified the significance of the features and not have permitted the changes.

The resulting development was found to be inconsistent with the approved consent and, given the sheer number, scope and cumulative impact of the changes, the board found that the certifier should not have issued the construction certificate.

This case example is a pertinent reminder to certifiers of the following:

- You must continually have regard to the approved consent and the extent and impact of a number of minor changes to the development as a whole. Such changes when considered as a whole may make the development inconsistent with what was approved.
- You must consider the Council's reason for imposing the condition in the first instance and how that condition impacts upon the overall development. In this instance, the heritage significance of the building in question was compromised.

Conversion of Existing Building Into a Hotel – Ambiguity in Consent Condition

I have recently been involved in advising as to a development compliance issue which may lead to our client commencing civil enforcement proceedings in the Land and Environment Court against both the owner of the land and the Private Certifier.

Those proceedings are likely to seek a finding that the approved development consent has been breached, that any occupation certificate issued is invalid and that the development as completed has not been carried out in accordance with the approved development consent and construction certificate.

The issue in dispute arises from compliance with a condition of consent that requires certain fire rating works to the boundary of the development site adjacent to our client's side boundary.

The implications for our client as to the interpretation of the relevant condition by the certifier have the potential to result in an encroachment of fire sprinklers onto our client's land and leave a suite of existing windows, which we assert are required to be bricked up, open and operable. Such that the potential fire rating solution will not comply with the BCA and will materially impact upon our client's ability to redevelop the land in the future and impact upon the redevelopment potential of our client's land generally.

The condition in question is clearly loosely worded and a number of alternative constructions are open.

The certifier has declined generally at this stage to take any action by way of NOI or to provide an interpretation of his understanding of the condition and, in our view, is exposed if a move is made to issue an occupation certificate.

In our view, this case provides a good example of what a certifier could do to protect himself and his client in the circumstances. In this regard, the certifier ought require his client to lodge a s96 application to remove the ambiguity in the condition, however, the certifier and the developer have chosen not to adopt that course.

In all of the circumstances that approach may land the developer and certifier in contested and costly legal proceedings and the certifier being the subject of a professional complaint to the Board.

The lesson:

If in doubt as to the terms of a consent condition or if the nature of the change proposed will result in a potential inconsistency of the approved development and construction certificate or occupation certificate, a certifier should err on the side of caution, issue a notice and require a modification application to be lodged which removes the ambiguity to the condition and protects the interpretation that the certifier is adopting.