



**In this issue:**

Court continues strict approach to interpreting whether conditions have been satisfied prior to lapsing

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***Cameron v Woollahra Municipal Council [2026] NSWLEC 106***

**Overview:**

The Land and Environment Court (**Court**) has recently found that a development consent had lapsed, in circumstances where the Applicants had submitted materials to Woollahra Municipal Council (**Council**) in furtherance of a deferred commencement condition (**DCC**) prior to the lapsing date, but where the Council had not in fact assessed this material (prior to the lapsing date).

The Court found that in these circumstances (and given the wording of the particular DCC), the Council was unable to achieve a state of satisfaction that the materials addressed the various matters required.

**Background:**

Council granted the Applicants a development consent on 13 April 2021, subject to a DCC which stated as follows:

***“A.3 Deferred Commencement - (section 4.16(3) of the Act, clause 95 of the Regulation)***

*Development consent is granted subject that this consent is not to operate until the Applicant satisfies the Council, in accordance with the Regulations, as to all matters specified in this condition:*

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1. The submission of revised stormwater plans addressing the following:

a) It is noted from the submitted architectural plans and survey plan that the nature strip in Suttie Road slope away from the kerb and gutter. As such, the proposed stormwater piped connection to the street kerb by gravity is considered impractical due to insufficient cover across the nature strip. Roof water shall be connected to the proposed rainwater tank with overflow being directed to the absorption system.

b) The installation of rainwater tanks based on 60m<sup>3</sup> of 1000m<sup>2</sup> of site area shall be provided to comply with Chapter E2.2.9 of Council's DCP. In this regard, rainwater tanks with a minimum storage of 42.132m<sup>3</sup> shall be provided for this development. Stormwater runoff from all roof area shall be directed to the proposed rainwater tank for non-potable uses such as toilet flushings, laundry devices and garden irrigations etc.

c) Full Calculation for the absorption system must be provided for assessment. Note that stormwater runoff from all paved, landscape areas and rainwater tank overflow is to be directed to the proposed on-site absorption system via a stormwater treatment system to minimise blockages. The size of the absorption trench system shall be determined for a 20 year ARI storm based on the absorption rate and the rainwater tank is to be assumed to be full and cannot be included as part of the absorption storage. The absorption system must be located at least 3 metres from the footing of any structures and property boundaries and be parallel to the contour. If this is not achievable, Council may allow the absorption system to be located less than three (3) metres from the footing of any structures subject to certification from a qualified and experienced structural engineer certifying that there will be no adverse impacts to these structures.

#### **Period within which evidence must be produced**

The Applicant must produce evidence to Council sufficient enough to enable it to be satisfied as to those matters above within 365 days (1 year) of the date of determination.

Clause 95(4) of the Regulation:

"The applicant may produce evidence to the consent authority sufficient to enable it to be satisfied as to those matters and, if the consent authority has specified a period for the purpose, the evidence **must be produced within that period.**"

If the evidence is not produced within 365 days (1 year) of the date of determination this deferred commencement consent is of no effect, the consent does not operate and no Construction Certificate can be issued. No development can lawfully occur under this consent unless it operates.

Note: Nothing in the Act prevents a person from doing such things as may be necessary to comply with this condition. (See section 4.16(3) of the Act)

This consent does not operate until Council has acknowledged compliance with this condition in writing.

Note: Implementing the development prior to written confirmation of compliance may result in legal proceedings. If such proceedings are required Council will seek all costs associated with such proceedings as well as any penalty or order that the Court may impose. No Construction Certificate can be issued until all conditions including this condition required to be satisfied prior to the issue of any Construction Certificate have been satisfied."

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The Applicants sought to rely upon the COVID-19 arrangements, to argue that the period to satisfy the DCC was extended to 5 years. Shortly before this extended lapsing date, the Applicants submitted revised stormwater plans to Council on 4 March 2026. These were assessed by Council but assessed to be insufficient. A further set of plans was submitted by the Applicants on 30 March 2026. Although the Applicant's architect followed up with Council on 9 April 2026, the amended stormwater plans were not assessed until 29 April 2026 when the officer completed a review and determined that those plans were adequate. As this occurred after the lapsing date, Council advised the Applicants on 9 July 2026 that in its opinion the consent had lapsed.

### **Issues in dispute:**

The Applicants sought a declaration in class 4 of the Court that the consent had not lapsed. The primary issue in dispute was the interpretation of condition A3. The Applicants contended that the condition required submission of amended stormwater plans prior to the lapsing date which were sufficient to enable it to be satisfied, relying on the wording of the now repealed clause 95 of the *Environmental Planning and Assessment Regulation 2000 (EPAR 2000)*, which provided that *"The applicant may produce evidence to the consent authority sufficient to enable it to be satisfied as to those matters and, if the consent authority has specified a period for the purpose, the evidence must be produced within that period."*

The Council contended that the wording of condition A3 required that it actually reach a state of satisfaction prior to the lapsing date.

There was also a secondary dispute as to the proper interpretation of the COVID-19 extension, and how this applied to extend the timeframe for meeting deferred commencement conditions.

### **Judgment:**

Justice Beasley of the Court considered that what condition A3 required was the attainment by Council of a state of satisfaction that the Plans addressed the matters listed in the DCC. Prior to the lapsing date, Council had to form a mental state of satisfaction not only that the Plans had been produced, but that they addressed the matters listed in the DCC. That state of satisfaction could only be reached from a consideration as to the contents of the Plans. It could not be reached merely on the submission or production of the Plans to Council by the Applicants.

For the Council to be satisfied that the Plans "addressed the three matters specified in the condition", it had to look at and consider the Plans to determine this and reach the required state of satisfaction. His Honour distinguished other cases, where the wording of the condition required that materials be prepared and provided to Council, but did not necessitate a discrete determination that those materials were satisfactory. As the evidence was that the Council did not in fact assess the material, and thus achieve a state of satisfaction, until after the consent had lapsed, his Honour found that the DCC had not been satisfied.

As the proceedings were determined on the issue of whether the DCC had been satisfied, his Honour did not consider it necessary to determine the question of how the

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temporary COVID-19 arrangements applied to the deferred commencement condition.

**Take home lessons:**

The Courts will take a very strict approach to interpreting conditions of a DCC or other pre-requisites to be undertaken prior to a consent lapsing.

Whilst every case will turn on the specific wording of the condition(s), this case highlights the challenges which can be faced in ensuring that a consent does not lapse.

To minimise the risk that a DCC is not met, owners/applicants should ensure that steps are taken to activate the consent promptly, to ensure that there is sufficient time to either achieve Council's confirmation that an operational consent has been achieved, or for any necessary appeals to be lodged and determined prior to lapsing.

**For more information about this update, please contact Kristyn Glanville.**

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