

Planning & Environment Matters

Time is of the Essence:

Making sense of the Recent Changes to Consent Lapsing Periods and their implications for Temporary Consents, Council Powers to Amending Lapsing Periods and Changes to "Physical Commencement"

Changes to the Rules for Consent Lapsing Periods

On 26 May 2010, changes were made to the rules for consent lapsing periods. These were intended to preserve and extend consents which had been issued with lapsing periods of less than 5 years in order to stimulate the development industry.

Under the changes, consents that have been granted with lapsing periods of less than 5 years (under section 95(2) of the *Environmental Planning and Assessment Act 1979 (the Act)*), are automatically extended to 5 years if:

- the consent operated before, and lapses after, 26 May 2010 or lapsed between 22 April 2010 and 26 May 2010; or
- the consent operated before, and lapses after, a date after 1 July 2011 prescribed by the regulations.

In addition, at least for the time being, consents may no longer be granted with a lapsing period of less than 5 years. This prohibition will last until at least 1 July 2011 but may be extended by the regulations.

Implications for Temporary Consents

Importantly, these changes to the rules for consent lapsing periods do not affect the capacity for Councils to grant temporary consents for a limited duration under section 80A(1)(d) of the Act. The lapsing provisions are only relevant if a development is not commenced before the end of the lapsing period. Where a development subject to a temporary consent is commenced before the end of the lapsing period, its duration will remain limited pursuant to the relevant condition under section 80A(1)(d).

To avoid confusion, care should be exercised with the terminology used in granting temporary consents and in drafting conditions limiting the duration of these



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Public Exhibition of the Draft Environmental Planning and Assessment Regulation 2010

On 17 September 2010, the Department of Planning released the Draft *Environmental Planning and Assessment Regulation 2010* for public exhibition. While many of the existing provisions will be retained, key reforms are proposed to the Part 4 DA assessment system, fees, planning certificates, designated development, development certification procedures and other miscellaneous changes. We will monitor the proposed reforms and report in our upcoming issues of *Planning and Environment Matters*.

consents. For example, rather than providing that the consent will "lapse" or will only be "valid until" a certain date, it is preferable to say that the consent is granted only for a limited period and will cease to operate on a specified date.

Amendment of Consent Lapsing Periods

In light of these recent changes, it is also timely to review the power of Councils to amend lapsing periods for consents. Following *Kinder Investments Pty Ltd v Sydney City Council* (2005) 143 LGERA 237, it has been well established that the statutory scheme under section 95 of the Act exhaustively prescribes the means by which development consents lapse and by which lapsing periods may be extended under section 95A. The fixing of the lapsing period is a one off exercise which can only be done at the time of granting development consent under section 95 and the extension of the fixed period may only be undertaken under section 95A. Councils may therefore not amend a consent under section 96 of the Act to extend the time before which the consent will lapse. Once granted, the nominated lapsing period can only be extended if:

- an application for the review of the Council's determination is made in accordance with section 82A (this is different to the amendment of the consent under section 96 as, on a review under section 82A, the changed determination replaces the earlier determination from the date of the review (section 82A(9)); or
- an extension is made under section 95A (but keep in mind the current automatic extension of consents outlined above).

Amendment of Deferred Commencement Consents Lapsing Periods

The time within which applicants are required to satisfy Councils about the matters covered in deferred commencement conditions is fixed by Councils in accordance with section 95(6) of the Act and clause 95 of the *Environmental Planning and Assessment Regulation (2000)*, not by a condition of development consent, and the legislation makes no provision for the modification or extension of any period so fixed. As such, applying the principles in *Kinder Investments*, Councils also cannot approve a modification application to modify a consent to extend a deferred commencement lapsing date.

Regulations for "Physical Commencement"

Concurrent with the changes to lapsing periods, provisions were also enacted to allow for regulations to be made to prescribe the circumstances in which work is or is not taken to be "physically commenced" for the purposes of section 95(4) of the Act. Clause 160 of the Draft Regulation provides that, for the purposes of section 95(7) of the Act, work is not taken to be physically commenced if it only comprises the carrying out of a survey. Pending the enactment of this regulation, the common law position requires that to have "physically commenced", work must be lawful, commenced in a physical sense and real, positive and unequivocal (*Hunter Development Brokerage v Cessnock City Council* [2005] NSWCA 169). It will be important to carefully monitor the Draft Regulation and whether this clause is enacted to vary this common law position.

Changes to the Proposed Development Contributions Reforms

The NSW Government has announced the following further changes to development contributions reforms:

- ◆ the \$20,000 cap per dwelling or per residential lot in existing areas will be retained;
- ◆ the cap will be \$30,000 per dwelling or per residential lot in new release (greenfield) areas to recognise the higher costs of creating well-planned communities in these areas;
- ◆ a list of essential infrastructure that will apply to contributions plans over the relevant caps will be set;
- ◆ development areas where applications for more than 25 per cent of the expected dwelling yield have been lodged will be exempted from the relevant cap;
- ◆ a \$50 million Priority Infrastructure Fund for projects on the essential works list above the cap will be established.

The revised requirements relating to the cap and essential infrastructure will apply as soon as the Ministerial Directions are issued.

Risky Business—Failure to Comply with Council's Code of Practice

The Pecuniary Interest and Disciplinary Tribunal recently handed down an important decision where a councillor was held to have breached Division 3 of Chapter 4 of the *Local Government Act 1993 (Director-General, Department of Premier & Cabinet Re Councillor Martin Ticehurst, Lithgow City Council, PIDT No 1/2010.D0028 Determination)*. The matter involved the councillor breaching the relevant Code of Practice by appearing on Channel Seven's Today-Tonight show where he alleged that council resources had been used improperly with the knowledge of council officials. The Council referred the matter

to the Director General for investigation after the councillor failed to publicly apologise for breaching the Code in accordance with the Council's resolution (which was made in accordance with the Council's Code of Conduct Committee report). The matter was then referred to the Tribunal via the Director-General's investigation report. The Tribunal held that the Councillor had breached the Code by:

- failing to follow due process and the requirements contained in the Code to raise his concerns regarding the use of council resources;
- making comments while appearing on 'Today-Tonight' bringing the council into disrepute and creating the impression that council property and official services were being improperly used for another person's private benefit or gain.

In deciding on an appropriate penalty, the Tribunal had regard to the fact that the councillor was aware of the substance of the Code of Practice and had previously been suspended from civic office for misbehaviour. However the Tribunal did not have regard to the fact that the councillor had been a defendant in related defamation proceedings. The Tribunal considered the councillor's behaviour serious and suspended him from civic office for 2 months. The Tribunal recognised that if complaints:

'were able to be dealt with by councillors how and when they felt fit, regardless of the provisions of the Code of Conduct, then the process of administering local councils would be at the very least difficult, and probably amount to administrative anarchy. It is for that reason that the legislature...introduced the

Model Code of Conduct and the adoption of the Code of Conduct by individual councils which must be consistent with the Model Code'.



Introducing: Kate Harvey

Kate Harvey is an experienced planning and environment lawyer. After working as a tipstaff to the Honourable Justice D H Lloyd of the Land and Environment Court, Kate developed strong practical legal skills working for several years within the specialist planning and environment division of a major commercial law firm in Sydney. Kate has wide experience advising both public and private sector clients on a diverse range of planning, environment and local government issues, such as planning and development, council regulatory and business operations, environmental assessment and protection, and energy and water services and infrastructure.

Kate has completed a Masters of Laws specialising in planning and environment law. Her knowledge of these issues was further broadened by working as a legal officer for a year with the Asia Regional Environmental Law Program of the International Union for Conservation of Nature in Thailand.



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