

Development Consent Conditions

the good, the bad &

the... rest.



Great news! - Your development has been approved!

Let's read through these conditions, I'm sure they will be fine...

Unfortunately for some, the joy of an approval can be fleeting.

Conditions on a development consent ("**a Consent**") can sometimes become another hurdle to overcome just when an applicant thought they were getting to the end of the development application part of the process.

In more serious cases a council may impose conditions on a Consent that can significantly undermine the value of the Consent to the point where the proposed development is not viable or worthwhile.

For example, conditions may require that:

- the developer carry out some construction; or other tasks such as ongoing monitoring and testing; or make some payments or contributions; that were never contemplated or part of the development application ("**DA**") process;
- the proposed development be significantly changed by deleting parts of buildings; or,
- certain works or other tasks are required to be undertaken which do not relate to what is proposed to be built but relate to neighbouring locations and concerns.

If you find yourself in this position you will need to know what you can do about potentially removing or amending that condition.

Maybe the condition isn't valid

If the condition isn't valid then this may be the best argument available to argue for its removal.

Section 80A of the Environmental Planning & Assessment Act 1979 (NSW) ("**EP&A Act**") sets out a prescriptive list of requirements for conditions. Here is a link to that section:

[\[http://www.legislation.nsw.gov.au/maintop/view/inforce/act+203+1979+cd+0+N\]](http://www.legislation.nsw.gov.au/maintop/view/inforce/act+203+1979+cd+0+N)

Apart from section 80A however there are also past cases which set out tests as to whether a condition of consent is valid or not.

One of the leading cases applied by the Land & Environment Court of NSW ("**L&E Court**") to help determine whether a condition is valid or not is *Newbury District Council v Secretary of State for*

Environment [1981] AC 578. That case set out the Newbury principles which consists of three principles or tests which remain relevant today to help determine whether a condition imposed on a development consent is valid or not.

The three principles are:

- the condition must be imposed for a planning purpose;
- the condition must fairly and reasonably relate to the development proposed in the application; and,
- the condition must be reasonable.

There have been later cases that have expanded on those three principles however they remain a useful and relevant starting point.

A recent case where the test was successfully applied by an applicant in challenging the validity of a condition is *Cavasinni Constructions Pty Ltd v Fairfield City Council* [2010] NSWLEC 65

- In this case the Council imposed a condition of consent requiring a right of way be created and registered over the land the subject of the development for the benefit of three neighbouring properties. The Commissioner of the L&E Court who dealt with the application to remove the condition decided that the condition was valid.
- On appeal to a Judge of the L&E Court, Justice Craig applied the Newbury principles and decide that the condition failed the second Newbury principle, that is, he found that the condition did not fairly and reasonably relate to the proposed development and therefore was invalid.

Even if it is valid, it doesn't mean you can live with it

There are other circumstances which do not involve any invalidity claims but the condition is simply not possible or acceptable to an applicant.

It could really be any condition that adversely affects any part of the proposed development but the more common examples of these types usually involve:

- conditions which reduce the size of a proposed building by removing rooms or levels or otherwise requiring a reduction in the size of the proposed building; and,
- conditions which limit the operating hours or a proposed use such as a restaurant or bar.

How do you remove unfavourable conditions?

There are a few different ways but the options are really to apply to either the Council or the L&E Court or both.

In respect of the Council, the options are to:

- lodge a s82A review application with the Council and the application to review the development consent will be reviewed by another Council officer (if it was originally approved by a Council officer) or the Council members (if it was originally approved by the Council members); or

- lodge a section 96 modification application with the Council for its consideration. [If the Council does not approve the application it is possible to apply for a review of that decision as well but at that point it may not be worthwhile applying again to Council].

In respect of the L&E Court, it may be possible to lodge a Class 1 appeal to the L&E Court seeking deletion or amendment of the condition from the development consent. A Class 1 appeal may also be lodged from a refusal (deemed or actual) of a section 96 modification application.

[refer to "["I want to go to the Land & Environment Court!"](#) for more information.]

It may also be possible to lodge Class 4 proceedings in the L&E Court in respect of potentially invalid conditions in which case the question of validity will be dealt with by a Judge of the L&E Court. This may be the best strategy in certain circumstances but such an application would be exceptional rather than the normal course to seek amendment or removal of a condition.

Invalid conditions can sometimes mean invalid consents

In the case of *Ben-Menashe v Ku-ring-gai Municipal Council [2001]* NSWLEC 168 the L&E Court considered whether the Council could validly impose a condition requiring that subdivision of a previously approved dual occupancy be a strata subdivision despite the applicant seeking a Torrens title subdivision in its development application.

Justice Lloyd decided that *"The condition in effect and in substance converts the application from that for which consent was sought into something substantially different."* Justice Lloyd found that in his opinion *"there had been no consent to the application in this case"*. The outcome being that the applicants were left with an undetermined development application.

Time limits!

There are time limits for lodging s82A review applications, s96AB review applications and commencing L&E Court proceedings. These time limits are strict and it is recommended that advice is sought on the time limits that apply so that any review or appeal rights are not lost.

Eakin McCaffery Cox Lawyers can help by advising you through the DA process and available options as well as acting as your legal representatives in L&E Court proceedings on a cost effective basis.

Please contact **Eakin McCaffery Cox Lawyers on (02) 9265 3000** for advice and action on planning, Council and the Land & Environment Court matters.

This paper is a summary providing general information and should not be construed as specific legal advice. Each development application is different and is made in different circumstances which require subjective assessment before legal advice may be provided.



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