GETTING IT JUST RIGHT

The Mint Wednesday 15 September 2010

What the Court expects of conditions of consent

TIM MOORE LLB GRAD DIP PLANNING
Senior Commissioner
LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

It goes without saying that conditions of consent are a fundamental and necessary element for consideration in any development appeal being heard and determined by the Court. Whilst, from time to time, we may threaten a tardy local council (that has not provided draft conditions) with the issuing of development consent with **no** conditions attached, I am not aware of that threat ever actually having been implemented.

Timeliness of provision of conditions of consent

However, that said, conditions of consent are one of the two fundamental documentary underpinnings of the development assessment process. Comprehensive and potentially appropriate conditions, although contestable by an applicant, cannot be done without (as is also the necessity for the proponent of a development to provide compliant and adequate plans to enable the assessment to be undertaken).

The necessity for both elements is reflected in the Court's Practice Note – Class 1 Development Appeals effective from 14 May 2007. The requirements for proper plans, a matter upon which I do not propose to dwell at length, are set out in Schedule A to the Practice Note.

In passing, however, I observe that I was recently required to deal with a set of plans that had been endorsed by a town planner with 21 years experience (and who held himself out as an appropriately qualified expert) when the succession of plans were manifestly inadequate and incapable of providing a foundation for a development consent (including showing, on one plan, a north point that was at right angles to the north point on another plan in the same series)[1].

However, for conditions of consent, the Practice Note sets a default standard time of 14 days before the hearing for the filing and serving of without prejudice conditions of consent. That provision is contained in Schedule D Part G Direction 14 and is in the following terms:

[1] *Ekermawi v Great Lakes Council* [2010] NSWLEC 1227 at paras 37 to 51

> *The respondent consent authority is to file and serve draft conditions of consent (in both hard copy and electronic form) by # [14 days before the hearing].*

It is the general experience of Commissioners that this time requirement is regularly breached – even in comparatively modest development proposals where the reasonably anticipated conditions (for a structure such as a carport) are unlikely to require more than two or three pages of conditions.

However, as a general proposition, there really is no excuse why this time standard should not be observed.

As we now operate in an era where many, if not virtually all, local councils have a suite of computerised conditions with menu selection and automatic formatting of the selected conditions into a coherent set of conditions, there will be little need to customise any or many of the conditions apart from inserting the titles, references, dates and authorship of the relevant plans and other documents proposed to be incorporated in the development consent by the terms of condition 1 of the operative conditions of consent.

Whilst, less frequently, some customising of deferred commencement conditions or special conditions to have regard to the idiosyncratic nature of the site may be required, the timeline set by the Practice Note still allows an appropriate and sufficient interval for this to be attended to prior to the hearing and within the nominated timeframe.

Possible costs consequences of failure to provide conditions in a timely fashion

Although I am not aware of it having occurred, it is possible that the late provision of without prejudice conditions of consent may cause a hearing to extend unreasonably and to do so beyond the amount of time allocated by the Court and anticipated by the applicant for hearing of the issues in an appeal. This is a matter potentially relevant to any costs application.

I make two short observations about this. The first is that, obviously, except for mandatory costs orders[2] for development applications that are amended (in other than a minor fashion), Commissioners do not have the power to make orders for costs. That being said, Commissioners do have the power to refer[3] a matter to the Chief Judge and such reference could encompass the question of whether or not some costs order might be appropriate against the local council if the hearing were unnecessarily extended because of the

[2] Pursuant to s 97B of the *Environmental Planning and Assessment Act*, 1979 (the EPA Act)
[3] Pursuant to s 36(5) of the *Land and Environment Court Act*, 1979 (the Court Act)

failure to provide the without prejudice conditions of consent in a timely fashion.

The second observation is that, within the framework of a hearing, costs can be dealt with by a Commissioner within the general discretion to allow adjournments on terms (as to costs wasted or "thrown away") rather than dealing with the costs of the whole of the hearing.

This means that, if there were a particularly egregious case where the failure to provide the without prejudice conditions of consent caused significant cost prejudices to an applicant, it might well be possible that, in the eyes of a Judge of the Court on a reference by Commissioner or in the eyes of a Judge or the Registrar, upon a Notice of Motion filed by an applicant, it was regarded as fair and reasonable[4] (that being the relevant test), that the additional costs incurred by an applicant because of tardiness in providing without prejudice conditions of consent might warrant a costs order on that element of the proceedings – even if the applicant were to have been otherwise entirely unsuccessful on the merits of the case.

As a consequence:

1. **Conditions of consent should be provided to the proponent and to the Court in a timely fashion compliant with the standards set in the Practice Note for Class 1 Development Appeals unless some varied direction is given.**

Usability of conditions of consent

The next matter to which I turn my attention is the usability of the conditions of consent. For the Court, usability falls for two separate considerations. One is entirely process related and frequently arises whilst the other is comparatively rare but, as in the extreme case in which I propose to refer, can potentially create difficulties in dealing with the merits of an application.

The practical and largely mechanical difficulty that the Court is faced with in using without prejudice conditions of consent arises in circumstances where, for the provision of orders of the Court granting an approval for development or modification of a development, the Court is obliged to incorporate, as an annexure to the formal orders, the conditions of consent that have been provided in an electronic form.

It should be a straightforward and simple process to incorporate the electronic terms of the conditions of consent provided electronically –

[4] See, for example, the discussion by Preston CJ in *Grant v Kiama Municipal Council* [2006] NSWLEC 70

whether provided by e-mail, by uploading to e-Court or by provision on a compact disc or thumb drive.

However, this is regularly not the case. The problems, ones that cause frustration to Commissioners (and to the very limited number of persons in the Registry who provide assistance to us) mean that we spend considerable periods of time undertaking routine clerical processing tasks, in a highly unnecessarily waste of time, because electronically provided conditions of consent are provided in a format incapable of easy replication by copying into Court orders.

Some years ago, the Court endeavoured to address this issue by Practice Direction No 2 of 2005 – Use of Electronic Documents and Images. That practice direction remains in force and it is in the following terms:

> Any electronic material that is filed or lodged with the Court (either at the instance of a party or at the direction of the Court) must only be in the form that conforms to the following standards or requirements—
>
> **(a) Documents other than those referred to in paragraphs (b) and (c)**
> Rich Text Format (RTF file).
>
> **(b) Images**
> JPG or JPEG File Interchange Format (*.jpg or *.jpeg files) or Graphics Interchange Format (*.gif files)that do not exceed:-
>
> (i) 500 kilobytes (500 KB) in file size; and
> (ii) 19 cm by 28 cm
>
> (c) **Spread sheets**
> Microsoft Excel (*.xls file format)

It is my experience that the requirements of this Practice Direction are almost universally ignored in the provision of electronic information to the Court. Indeed, it is my experience that the vast majority of legal practitioners or council officers who have roles to perform in the provision of such information are entirely ignorant not merely of the terms of this Practice Direction but of its very existence.

Having said that, such non-compliance is not the primary cause of the frustration we experience with electronic materials that are provided.

Although it is tempting to blame Bill Gates and the various bells and whistles that have been incorporated over the years in Microsoft Word, it is not the software itself that is at fault – the finger of blame can and should certainly be pointed to those who wish to mix more the arcane and esoteric opportunities for the insertion of headers and footers that are unable to be removed

together with the arcana of watermarks, non-transferable shading and the like.

These frustrations, however, are but a single aspect of the difficulties we face in trying to use, in a purely process fashion, such documents.

It is probably unnecessary for me to explore or, indeed, rant about, those who regard the formatting of such documents as a challenge akin to playing on-line combat in World of Warcraft – a combat in Word where use of the greatest range of electronic subtleties in the formatting, multilayer numbering and other elements of the armoury provided by Bill Gates is deployed to defeat the opponent (being a humble Commissioner who is seeking merely to use the document provided).

In addressing the process frustrations of extreme documents provided using Microsoft Word, I do not even commence to scratch the surface of documents provided has locked, non-copyable .PDF files where the only way to reproduce them is either to incorporate the document as a scanned image (rather than incorporating the text) or where optical character recognition software must used to enable us to recreate and reformat the text within a document – solely in order to create something capable of use for the Court's legitimate purposes.

For those who are attracted to electronic sadism, online combat games are a more appropriate outlet than the Commissioners and Commissioner support staff of the Court!

This, necessarily, leads me to the second of the aspects of conditions of consent and that is a heart rendered plea that:

2. **Conditions of consent, when provided electronically, should be in the least complex formatting possible consistent with a comprehensible layout of the document (and preferably complying with *Practice Direction No 2 of 2005 – Use of Electronic Documents and Images*.**

Legal foundations of conditions of consent

I now turn my attention to matters that relate to the content of conditions of consent. There are two aspects to this. The first is a comparatively simple one, one would think. It is the proposition that, when reading conditions of consent, one should be able to understand what is sought to be covered and what is required to be done or not done in order to satisfy the condition.

One the legal tests for conditions of consent are those that are derived from the decision of the House of Lords in *Newbury District Council v Secretary of State of the Environment*[5]. They are that in conditions of consent must satisfy three tests:

- they must be for a planning purpose;
- they must reasonably relate to the development to which they are addressed; and
- they must, in themselves, be reasonable.

These tests, one could be forgiven for thinking, do not require mental gymnastics to be understood.

3. Conditions of consent must satisfy the Newbury tests.

However, even before getting to these tests, it is necessary that the conditions of consent are ones that are lawfully capable of being imposed. The broad tests, in this regard, are provided by s 80A of the *Environmental Planning and Assessment Act*, 1979. The section sets out a range of matters capable of founding conditions of consent. Amongst the elements of the section is s 80A(6) – a provision that is in the following terms:

> (6) **Conditions and other arrangements concerning security** A development consent may be granted subject to a condition, or a consent authority may enter into an agreement with an applicant, that the applicant must provide security for the payment of the cost of any one or more of the following:
>
> (a) making good any damage caused to any property of the consent authority (or any property of the corporation) as a consequence of the doing of anything to which the consent relates,
> (b) completing any public work (such as road work, kerbing and guttering, footway construction, stormwater drainage and environmental controls) required in connection with the consent,
> (c) remedying any defects

Despite this, contrary to the restriction that arises from s 80A(6), a number of councils persisted, for a number of years in face of pronouncements by various members of the Court[6] that the imposition of financial securities for the maintenance of landscaping on private property was neither appropriate

[5] [1981] AC 578; (1980) 1 All E R 731
[6] *Datum Pty Ltd v Botany Bay City Council* [2003] NSWLEC 62 (Pearlman CJ); *Allen & Hawkes v Ku-ring-gai Council* [2005] NSWLEC 227 (Roseth SC); *Falcomata v Ku-ring-gai Council (No 2)* [2005] NSWLEC 459 (Moore C)

nor within lawful power, in seeking to require such bonds in their conditions of consent.

It was not until the emphatic rejection of this practice in 2009 by Lloyd J in *Charalambous v Ku-ring-gai Council*[7], that this practice appears to have ceased.

As a consequence:

4. **Conditions of consent must have a lawful foundation in s 80A of the *Environmental Planning and Assessment Act*, 1979.**

Conditions of consent must be comprehensible

The worst case of incomprehensible conditions of consent provided by local council of which I am aware occurred in a case[8] that I heard involving a new Stockland shopping centre at Balgowlah. Several of the council's conditions of consent were in contention and came to be heard by me in an appeal that was confined to dealing with those contested conditions. To enable an understanding of the nature of Manly Council's document that had been imposed as the conditions on this development, it is appropriate that I read to you a number of paragraphs of my decision in the matter – as they more than adequately encapsulating the frustration I felt in dealing with such an incompetently prepared document. The relevant portions of the decision are as follows:

> 3 *The development consent conditions in the twelve full and two half pages to which I have adverted comprise an extraordinarily curious document. The first eighteen conditions of the standard conditions run from DA16 to DA61 (in order) but with, obviously from those beginning and ending numbers, significant omissions in this sequence.*
>
> *4 Condition DA61 is immediately followed by Conditions DA344, DA345 and DA357 before returning to Condition DA69. DA9, on my assessment the numerically earliest condition, is not reached until approximately nine pages into the conditions of consent and it immediately follows Condition DA316.*
>
> *5 It is difficult to tell why this has occurred and whether charitable forgiveness might be given, on the basis of either a Sudoku addiction on behalf of the author or the ingestion of the sort of opiates beloved by Samuel Taylor Coleridge during the writing of his poetry.*
>
> *6 However, into this random, eclectic, anarchic and kaleidoscopic range of conditions, I am obliged to venture in order to endeavour to make sense of*

[7] [2007] NSWLEC 510; (2007) 155 LGERA 352
[8] *Stockland Development Pty Ltd v Manly Council* [2009] NSWLEC 1242

> *the emergency stop work order issued by the council to the applicant in these proceedings.*
>
> **and**
>
> *15 There are four relevant standard conditions of development consent. Two of them deal expressly with the council's Paving Design Guide. The first, which inclines me to the Samuel Taylor Coleridge assessment of the authorship of the conditions, is Condition DA224. It reads as follows:*
>
> > "The reconstruction and/or construction of the footpath paving and any associated works along all areas of the site fronting {insert street name/s}. These works shall be carried out prior to the issue of the occupation certificate by a licensed construction contractor at the applicant's expense and shall be in accordance with the council's Specification for Civil Infrastructure Works in Paving Design Guide."
>
> *16 I am unable to find any annotation on a street directory in the vicinity of this site of any topographic feature known as **{insert street name/s}**. I therefore disregard in its entirety the first sentence of DA224.*

The defects of the document are adequately explained by these extracts and lead to my next proposition:

5. **Conditions of consent should be proofread to ensure that they are in a logical order, appropriately grouped and sequentially numbered.**

Note: This does not preclude the notation "DELETED" against a number in such sequence where a standard condition that would ordinarily be imposed is not imposed and its absence is appropriate to be noted a fashion that is grammatically correct; preserves any automatic internal cross-referencing; and makes sense.

Simple, avoidable mistakes should be avoided!

I recently received a set of conditions of consent (for consent orders!) that included the following:

> ***CONSENT TO OPERATE FROM:***
>
> *Error! Unknown document property name.*

This is clearly sloppy and unprofessional – to be charitable.

I addition, if an error is made in the conditions (such as a council under stating a s 94 contribution due to be paid for a development) and the

condition is not contested, the council is unlikely to be able to correct the error and recover the additional monies[9].

6. Conditions of consent should be proofread to ensure that they are properly and accurately prepared.

Conditions of consent must be capable of compliance

Before turning to the final two aspects of the content of conditions of consent or, more accurately, what should not be in the content of conditions of consent, I should recount to you an incident that took place in one of my past lives, that is during the period when I was Minister for the Environment.

In the best sense of jousting between the bureaucracy and Minister shown in the satirical British comedy series of *Yes, Minister* and *Yes, Prime Minister*, the public service sometimes likes to test new ministers and discover whether they are going to become what is known as "house trained" – that is simply compliant to the desires of the bureaucracy – or whether they have some independent capacity for analysis and control of the ebb and flow of information being provided to them.

The most common way that this is tested is for a department to deliver a package of ministerial letters for a new ministers of the sign – a bundle in which an early letter to Mrs Smith will say something like "*The problem that you are having with mosquitoes on government land at the rear of your property is a matter of great concern and I have authorised the department to spend $20,000 eradicating the problem."* whilst another letter, some 30 or 40 later in the pile of correspondence, will also be addressed to Mrs Smith but will say that "*The problem of the mosquito infestation that you are experiencing does not arise from the drain located on the department's property and I have accepted advice that no works are required to be undertaken on the property to rectify your problem*."

A new, docile minister will sign that both such letters.

After I had experienced several instances of this being tried on me and sending the correspondence back to the department with a terse note indicating that I was not amused, I explained this process to the then primary school teacher of my twin daughters. She made a present to me of a smiley face stamp that she put on the work of the young pupils as an encouragement. She suggested to me that, in the context within which I might utilise it, encouragement would not be the result. I accepted the stamp

[9] See *Australand Holdings Pty Ltd v Hornsby Council* [1998] NSWLEC 128 per Lloyd J

and used it with vigour on many occasions during my four years as a minister. The stamp was a smiley face that said "***Nice try, try again!"***

Occasionally, in dealing with conditions of consent, a condition that will be slipped in that merits the treatment of such a smiley face stamp.

There are two types of such condition. The first is one that, in essence, if imposed, would amount to constructive refusal of the development. This may arise on a broad scale such as that faced by Preston CJ in the Taralga wind farm case[10] where the proposition was an advanced that, to reduce the visual impact of the wind farm to acceptable levels, approximately half the turbines in the wind farm should be deleted – although there had earlier been evidence that the removal of such a large number of turbines would render the proposal economically unviable.

A more prosaic but blindingly obviously inappropriate example is something that was tried on me in my early days as a new Commissioner. The case was a simple one concerning whether or not a truck driver should be permitted to park his prime mover in his residential property. This residential property was located in a newish development of allotments of approximately 450 m² with streets that were the minimum permitted, kerb-to-kerb, in such developments.

One of the council's proposed without prejudice conditions of consent required that, whenever the truck driver was driving his prime mover from his property to the nearest identified main road, the prime mover was not to cross the centre line of any of the intermediate roads between the residence and that main road.

An innocuous, innocently worded and not unreasonable little condition one would think at first blush! There is, however, a viper lurking in the bosom of that condition.

The curious thing about the prime mover in this case was that, if one halved the width of each of the local feeder roads from the truck owner's residence to the identified main road, the resulting dimension was less than the width of the truck. As a consequence, had I imposed this condition, it would have been physically incapable of compliance. Such a condition, also, constitutes constructive refusal.

7. Conditions of consent, if imposed, must not amount to constructive refusal of a proposal.

[10] *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59; (2007) 161 LGERA 1

Gratuitous advice endnotes to conditions of consent

Conditions of consent in orders of the Court form part of a document that imposes legal obligations on the parties to the proceedings. They are not properly vehicles for the type of well-meaning but gratuitous advice regularly given by councils in development consents.

Such advice regularly includes comments entirely irrelevant to and in conflict with the Court process. Two recent examples in a document provided to me for incorporation in Court orders were:

> *Under section 82A of the Environmental Planning and Assessment Act, 1979 an applicant may request the council to review its determination except where it relates to a complying development certificate, designated development or integrated development. The request must be made within twelve (12) months of the date of the receipt of the determination, with a prescribed fee of 50% of the original DA fee.*

and

> *Section 97 of the Environmental Planning and Assessment Act, 1979 confers on an applicant who is dissatisfied with the determination of a consent authority a right of appeal to the Land and Environment Court which can be exercised within twelve (12) months after receipt of this notice.*

The first of these is a complete nonsense as the decision making is, by this stage, entirely out of the hands of the council and such a review is simply not available.

The second of these is equally a complete nonsense in the context of orders being made by the Court and the lawyers (who deal with these matters on an everyday basis and understand the self-evident absurdity of suggesting that a s 97 appeal right lies to the Court against the Court's own orders) – if not the council officers preparing the conditions – should know better.

It follows that:

8. **Conditions of consent should be confined to precisely that and not seek to use the Court to provide gratuitous advice (that may also be inaccurate).**

Conditions that are contrary to public policy

The final class of condition that I mention of those that are simply unacceptable as contrary to any reasonable public policy.

In the particular instance that I have in mind, it was not necessary to conduct any detailed examination of the proposed condition to see whether or not it satisfied the public interest test as, on first principles, the condition's unacceptability should have been self evident.

Such circumstances rose in a recent case where I was being asked to determine whether or not a proposed brothel (to be located immediately adjacent to a McDonalds Family Restaurant and immediately above a shop that had, as a significant element of the business, supplying of children's party needs) was appropriately located.

Leaving aside the merits of the location, the council proposed, as one of its without prejudice conditions of consent, 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 who would attend the premises;
- whilst there, he would partake of such services as were provided on the premises; and
- as part of that process, he would make observations on the sexual health and hygiene operations of the premises.

Whatever might be any private moral view of the appropriateness of public authorities undertaking such activities (and I express no opinion on that matter), it is nonetheless undoubtedly within the inspection and consent enforcement role of the council to choose to adopt such an inspection regime if it wishes.

However, in this instance, in addition to proposing such an inspection regime, the council proposed that the conditions of consent should require 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 to the private investigator during the course of his activities.

Such a condition is clearly contrary to public policy and ought not be proposed let alone imposed!

9. Conditions of consent that are clearly contrary to public policy ought not be proposed by a consent authority and cannot imposed by the Court.

Conclusion

In summary, the Court wishes to receive, as without prejudice conditions of consent from local councils, a suite of conditions that:

- are provided in accordance with the timetable required by the Practice Note for Class 1 Development Appeals;
- when provided in electronic format, are provided in a format that is readily able to be used by the Court without requiring major reformatting or other electronic intervention;
- satisfy the Newbury tests;
- have a proper basis in s 80A of the EP&A Act;
- are provided in a properly numbered, ordered and grouped basis to deal with the topics that should be covered;
- are checked so that avoidable mistakes are corrected;
- do not contain provisions that, if adopted, would amount to constructive refusal of the application;
- do not seek to use the Court to provide gratuitous advice (that may also be inaccurate); and
- are not contrary to public policy.

Tim Moore
Senior Commissioner

15 September 2010