

10 GOLDEN RULES ON CONDITIONS

Introduction

I have prepared in the folder a paper setting out a number of the legal principals with respect to conditions of consent and I recommend it to you all, however, rather than speak to that paper generally, I would prefer to set out some precautionary principals upon which Applicant's and Council's advisors should operate when dealing or determining Conditions of Consent.

There are exceptions to each of the rules but the general advice is that if you want to stay out of Court or away from a legal fraternity strict applications of the rules will get you there.

1. **"If it aint in the condition or specifically referred to therein, it doesn't form part of the consent".**

This is the principal adopted in *Ryde Municipal Council v The Royal Ryde Homes & Anor* (1970) 19 LGRA 321, consents operated in rem, that is that they run with the land not the person and the Court's have held as a matter of principle that the document must be clear on its face and that you shouldn't have to go behind the consent to determine or interpret it.

As I say, there are exceptions to that but do not rely on the mere adoption of a Statement of Environmental Effects or contents contained in the DA form, that's a recipe for litigation and disputation.

2. **The Newbury Test (House of Lords 1981)**

The three tests are as follows:

- i The condition must relate to a planning matter;
- ii It must relate to the development itself; and
- iii It must be reasonable.

In the Newbury matter itself, the condition related to the provision of housing which was determined by the House of Lords not to be a planning matter. Whether something is a planning matter or not is effectively determined by statute and the advice to Council is that you want to 'social engineer' or provide affordable housing or some other conditions of consent that you believe are relevant planning matters you should do so in a relevant DCP and bring it under the heads of consideration of the relevant statute.

On the 2nd and 3rd matters, the law seems to suggest that they are effectively interchangeable, reference in the paper that I provided is to *Dogild Pty Ltd v Warringah Council* (2009) 158 LGERA 429 at 440 decision of Biscoe J, where the Court held that a condition of consent imposing covenants and easement to provide access to other adjoining property owners had nothing to do with the development itself and therefore beyond power.

I ask the question; imagine if the development was your development and whether you would consider the conditions reasonable. If you answer that question, you'll probably get it right every time.

3. The benefit and burden argument

This is the old *Progress and Securities Pty Ltd v North Sydney Municipal Council* (1988) 66 LGRA 236 at 241 decision and basically run on the concept of private treaty law; ie where 2 commercial parties have determined to accept both the benefit and the burden of the arrangement and you can't come back later and ways the term you don't like.

The bottom line is that the benefit and burden argument is bad law in planning and you should NOT rely upon it. There are a number of Court decisions, but *Fairfield City Council v N and S Olivieri Pty Ltd* [2003] NSWCA is one of them. The reference made to the comments of Cripps J in that case are referred to in my paper, but essentially taking principals of private treaty and transferring them over to planning law is not an appropriate mechanism for dealing with development consents and section 96 issues. It is however relevant to look at the circumstances of the case such as time and delay of s96 applications.

4. Consent is valid until declared invalid

This principal is enunciated in decision of *Swadling v Sutherland Shire Council* (1994) 82 LGERA 431 and is very important because neither Councils nor Applicants can simply not rely upon a condition of consent because its determined to be unreasonable. Unless it is struck down by an order of the Court it is a valid condition of consent. This is particular important in circumstances where there is advertised consent not capable of being challenged after 3 months so the mere failure to test the terms of any condition might of itself make the condition enforceable at law (tread carefully).

5. Conditions that defer the consideration of the matter to be determined.

The most notable cases of these are *Mison and Ors v Randwick Municipal Council* (1991) 73 LGRA 349 and *Weal v Bathurst City Council and Anor* (2000) 111 LGERA 181.

In the Mison case the condition imposed was that the overall height of the development be reduced to the satisfaction to Council's chief town planner. The background relating to it was a dispute as to the determination of natural ground level and the implications of reducing the height and the Court made it clear that there is a fundamental obligation on the Council to determine all the relevant planning matters in the consideration of the development application.

The other matter in dispute in that case was whether a condition could significantly alter the terms of that development consent to make it either a different development or one fundamentally in opposition of that which was being sought and the Courts have held that to be beyond power.

6. Never appeal against a condition of consent

Appeals against conditions of consent bring the whole application under review, they become an appeal de novo and such an appeal can put the whole consent at risk. The reality is that in the Land and Environment Court consent comes under much more substantial scrutiny than might otherwise be the case before a Council. No consent is perfect and the likelihood of losing the whole of the consent can never be discounted no matter how confident one is of the overall outcome.

7. Some conditions go to the heart of the consent

The famous case on this matter is *Greek and Australia Finance v Botany Municipal Council*. In the particular circumstance the Council imposed a contribution for carparking because carparking was unable to be provided on the site. Challenge was made to the condition of consent and the Court determined that although the consent might be unreasonable because there was no availability to provide the carparking within a remotely reasonable location to the development the condition was so intricate to the grant of development consent that the whole of the consent was struck down.

So a condition might be held to be unreasonable but not severable from the whole of the consent; A warning light to all developers and people wishing to challenge the terms of any condition as to its status relative to the original consent.

8. Beware of the section 96 application and the operation and ability to impose conditions of the same, see *1643 Pittwater Road Pty Ltd v Pittwater Council [2004] NSWLEC 685*

I make reference to 2 judgments, one extempory which is yet to see the light of day called *Matsoukas v Woollahra Municipal Council* and the other is *Yugaro v Waverley Municipal Council*.

Essentially the question of whether a condition reasonably relates to an application is a question of fact. Applicants should be aware that the Council is going to treat the Pittwater decision broadly with a view to extending a power to revisit the terms and conditions of the original consent and there will be an inevitable conflict and tussle between the power and the fairness with respect to those conditions.

I make reference to the Yugaro case only because it was a matter where the determination was made by the Applicant whom I advised to lodge a development application for alterations and additions to an existing consent rather than a section 96 because I was concerned both with respect to the question of whether the development was substantially the same and secondly whether the Council might impose additional conditions with respect to affordable housing and that might be more onerous than what might otherwise be capable of being demanded on a new DA.

9. **Bond and penalty clauses other than those specifically contemplated by s80(a)(6) are generally outside the powers of the Land and Environment Court and Council's to impose, see *Charalambous v Ku-Ring-Gai Council* (2007) 155 LGERA 352**
10. **The Land and Environment Court discourages covenant and easement on title as conditions of consent, see *Challster v Blacktown***

The exception relates to drainage easements and the like to create rights and obligations varying between parties. The Court does not however, see it as being appropriate to use property law to enforce planning conditions and on balance those covenants and easements will not be upheld by the Court.

11. **Deferred commencement conditions**

The bottom line for Councils and Applicants is that the Land and Environment Court is very reluctant and will rarely if ever impose deferred commencement conditions unless there is no alternative. The Court would prefer to defer or adjourn the application to get the relevant information so that they can be satisfied that the development is capable of proceeding on a specified basis rather than to leave any argument that the nature or outcome of any development consent is to be left uncertain (see *Mison and Ors v Randwick Municipal Council* (1991) 73 LGRA 349 and *Weal v Bathurst City Council and Anor* (2000) 111 LGERA 181).

From a Council Planner and Applicant perspective, never assume when you go to Court that a matter will be capable of being dealt with by deferred commencement unless there is simply no alternative.

These are the ten golden rules from a Lawyer who can't count.