CONSISTENCY WITH THE DEVELOPMENT CONSENT: INCREASING OBLIGATIONS ON CERTIFIERS

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In the beginning…

The current certification regime, comprising construction certificates, compliance certificates and occupation certificates, was first introduced, at least in broad framework terms, on 1 July 1998.

On introduction there was a prohibition against the issue of a construction certificate unless the certifier was satisfied that the plans and specifications relied on for the issue of the construction certificate were not inconsistent with the terms of the development consent.

This requirement, originally contained in clause 79G of the Environmental Planning and Assessment Regulation 1994 and subsequently in clause 145 of the Environmental Planning and Assessment Regulation 2000, was examined by both the Land and Environment Court and the Administrative Decisions Tribunal on a number of occasions.

The Court and the Tribunal generally took differing approaches to assessing this consistency question, largely because they were looking at the question through different lenses. The Court was undertaking an assessment of whether a construction certificate had been validly issued, or the terms of the Environmental Planning and Assessment Act breached, whilst the Tribunal was considering whether in issuing a certificate the relevant certifier was guilty of unsatisfactory professional conduct or professional misconduct.

The Tribunal's focus was thus on whether the construction certificate was in fact not inconsistent with the development consent, as even if the certifier was satisfied of that consistency, that satisfaction and the subsequent issue of a certificate could amount to unsatisfactory professional conduct if in fact the construction certificate plans were not consistent with the development consent.

The Land and Environment Court, on the other hand, took the view that there was only a breach of the Act where the relevant certifier issued a certificate in

circumstances where the certifier was not satisfied that the construction certificate plans were consistent with the consent. The Court's focus was on the satisfaction. If the certifier was so satisfied, there was no breach of the Environmental Planning and Assessment Act.

Obligation Clarified

Two significant cases, *Lesnewski v Mosman Municipal Council* [2004] NSWLEC 99 and *Warringah Council v Moy* (2005) 142 LGERA 343, identified differences between the relevant construction certificates and consents, but nevertheless found that there was no breach of the Act as the relevant certifier (Mosman Council in the *Lesnewski* matter and a private certifier in the *Warringah* matter) was satisfied that the differences did not amount to inconsistency.

On 20 July 2007, the Environmental Planning and Assessment Regulation 2000 was amended to remove reference to the certifier's satisfaction. Instead the requirement is now simply that the construction certificate must not be issued unless the design and construction of the building as depicted in the construction certificate plans are not inconsistent with the development consent.

Whether or not the certifier is satisfied of that is no longer to the point, the question is whether or not there is inconsistency. In short, certifiers now need not only be satisfied that there is no inconsistency, they must also be right.

The Current Burden

Whilst the construction certificate provisions have at all times incorporated some form of a consistency test, the same cannot be said for the issue of an occupation certificate, although as a matter of good practice, many certifiers have taken the approach that there should be some consistency between the finished development and the consent and construction certificate before issuing an occupation certificate. The simple fact is that this has not, until very recently, been a formal requirement of the certification regime, nor a part of the function of an occupation certificate.

Rather, the purpose of an occupation certificate was in effect to warrant that a building as built had the benefit of a consent and construction certificate (where required) and was fit for purpose according to its BCA classification. In effect an occupation certificate said that a building was safe to occupy. This changed on 1 March 2013 with the introduction of clause 154(1B) to the Environmental Planning and Assessment Regulation 2000.

Clause 154(1B) provides:

> *"An occupation certificate authorising a person to commence occupational use of a new building, or a partially completed new building, must be issued unless the design and construction of the new building, or any part of the new building that is completed, are not inconsistent with the development consent in force with respect to the new building.*

> *This subclause applies only if the development consent (excluding any construction certificate forming part of the consent) was issued on or after 1 March 2013."*

The same consistency test that has applied to the issue of construction certificates now applies to the issue of occupation certificates. For many certifiers this change was of limited practical impact given that many certifiers are generally reluctant to issue occupation certificates unless satisfied that the building as built was generally in accordance with the consent and construction certificate.

The extent of any discrepancy which they were prepared to accept was, however, entirely within their own discretion prior to the change. It is uncontroversial to say that during the course of construction, circumstances and difficulties arise which necessitate variation from the detailed construction certificate plans. The extent of variation which a certifier was prepared to accept was entirely within a certifier's discretion. A certifier could elect, if they saw fit, to refuse to issue a construction certificate on the basis of only minor variations (and if they saw that there is no statutory obligation on a private certifier to issue a construction certificate).

Conversely a certifier could recognise and acknowledge more significant changes, that might otherwise require a modification to the development consent, but nevertheless find that the building is the subject of a consent and a construction certificate, is fit for purpose in accordance with its BCA classification and is safe for occupation and determine to issue the occupation certificate.

Any discrepancies between what was built and what was approved at the development and construction certificate stage was a matter to be resolved between the Council and the developer or landowner by way of Court proceedings or orders and need not trouble the certifier.

There may be dispute from some quarters as to whether the unamended Regulations did indeed allow that broad a discretion, however it is arguable that the difference in formulation of the requirements for a construction certificate and an occupation certificate supported this approach and certainly the March 2013 amendment was designed to address a perceived lacuna in the legislation. The PCA now must assess the building as built and determine its consistency with the development consent and construction certificate.

If it Looks like a Duck, and Quacks Like a Duck…

There is, however, only limited guidance as to what the acceptable level of inconsistency is. As with construction certificates, it must be acknowledged that the requirement is not that the plans and specifications be identical to the final built form, but rather that they be "not inconsistent". This provision in the context of the new occupation certificate provision has not yet been judicially considered, but some guidance may be gleaned from the Court's consideration of the construction certificate provision. In *Lesnewski v Mosman* Her Honour Justice Pain said this:

> *"It is difficult to precisely qualify the meaning of inconsistent. Each case will need to be decided on its own facts. A single minor difference between the construction certificate plans and the development consent plans is likely to*

be acceptable. Where there are a number of minor differences then the collective impact of these differences will need to be assessed to determine whether they combine to result in unacceptable inconsistency. A major difference is likely to give rise to an inconsistency. Whether a difference is major or minor and whether, in the case of a number of minor differences, the cumulative effect is a major difference will depend on the circumstances. Consideration of whether or not an s96 modification is warranted is not of great assistance, as that threshold addresses a different statutory context.

It may be that there will be a finding of inconsistency under clause 145(1)(a) before the necessity for a s96 modification arises. I consider that provided the development and construction certificate plans are largely similar so that they depict substantially the same development they are not inconsistent."

Regrettably, in terms of general guidance as to how to approach the inconsistency question, this is probably the clearest answer there is. Her Honour is correct to say that inconsistency will need to be assessed on a case by case basis and in undertaking that task on a day to day basis as a PCA the prudent approach would be to exercise caution.

If you as the PCA do not believe that the building as built is consistent with the occupation certificate then the occupation certificate should not be issued. If you have some doubt as to whether the building is inconsistent with the consent and construction certificate, then there is a chance that somebody will deem it to be inconsistent and that somebody could be the Building Professionals Board, the Administrative Decisions Tribunal or the Land and Environment Court. At the very least advice should be sought as to what the Court or the ADT have done in similar factual circumstances.

Of course conflict could readily arise between a developer or landowner and an accredited certifier who has been contracted by that client to issue a given certificate. Obviously given that an occupation certificate enables a home to be occupied or a business to be opened and operated, they are very valuable certificates to that developer or landowner. Care should be taken then to ensure that in any contract of engagement, provision is made to allow refusal of the issue of an occupation certificate without penalty to the PCA, not in circumstances where there is inconsistency but rather in circumstances where the certifier is not satisfied that there is not inconsistency. Build a right to rely on your discretion in to your contract.

Where to Next?

Looking to the new Planning Bill and the broader planning regime anticipated by the Government's White Paper, it is fair to say that the obligations on principal certifying authorities to ensure that development is being carried out in accordance with what has been approved will be increased. That said, the Government also proposes to allow certifier to draw assistance from other accredited certifiers in making relevant decisions and determinations.

The two most significant changes in this regard relate to critical stage inspections and a new requirement to issue notices to developers regarding observed non-compliances.

At present, houses require six critical stage inspections and other development requires two or three, dependant on the type of development. There is no clear indication as to exactly what critical inspections will be required under the new planning regime, however the White Paper makes clear that it is proposed to increase the number of critical stage inspections and to tie those inspections to the risks and complexity of a building's design and construction. It is also proposed to require certifiers to assess those aspects of a development which are commonly the subject of building defects complaints, notably fire safety, structure and sound installation.

It is also proposed that during each critical stage inspection the building certifier is to ensure the building work is consistent with development consent and is complying with the conditions of consent. This is encapsulated in proposed s8.24 of the new Planning Bill.

Currently under the Environmental Planning and Assessment Act 1979 a PCA has the power to issue a notice on a developer generally in the same terms as a s121B order (which can encompass orders to demolish or remove buildings built without consent to carry out fire safety upgrades, or to comply with a development consent). This is currently, however, entirely at the discretion of the PCA and is not linked to any particular inspection or investigation by them.

The notice is not itself an order, however if the landowner does not take steps to rectify the issues of concern, the Council can then immediately issue an order without further notice.

The new provision, however, mandates that where a certifier for an aspect of development becomes aware of any non-compliance, the certifier must issue a notice in writing to identifying the matter that has resulted or would result in the non-compliance and directing the person to take specific action would in a period of time to remedy the matter.

Whilst not mandatory to Councils, private certifiers, whether the building certifier (the equivalent of the PCA under the new provisions) or a sub-certifier, must issue the notice.

A "noncompliance in respect of an aspect of development" is defined in the new section to mean:

> *(a)* *"A failure to comply with a condition of a development consent (or a construction or subdivision work certificate) relating to the manner in which construction of that aspect of development is carried out on a relevant site (including, for example, a condition relating to the hours during which construction may be carried out, or the measures to be taken to reduce impacts on an adjoining land), and*

(b) *Any matter arising during the course of carrying out that aspect of development that would prevent the issuing of an occupation certificate or a subdivision certificate in respect of that aspect of development."*

The new provision has, combined with the proposed requirement for additional critical stage inspections, two broad effects. The first is to increase the responsibility on certifiers to ensure that development is being carried out in accordance with the conditions of consent. Where a certifier becomes aware that development is not being so carried out, the certifier must take steps to bring that to the attention of first the developer, to give them a chance to rectify the issue, and secondly the Council, in order that the Council may take necessary steps to enforce compliance with the consent(should the Council so choose).

The second effect is to enable a certifier to put a developer on notice that there is a problem that could give rise to a decision not to issue an occupation certificate. This then gives the certifier some protection when the application for an occupation certificate is made and questions of consistency with the consent or compliance with PCA arise. The developer cannot then claim ignorance or hardship as they were on notice that steps were required to change the development at an early stage to permit the issue of the occupation certificate.

A Shared Burden

It is not all extra responsibility for PCAs, however, as the White Paper proposes that provision will be made to enable building certifiers, and for more complex development to mandate that building certifiers, call on the expertise of other experts and professionals to certify that construction plans are not inconsistent with the development consent. Those other professionals or experts will also need to be accredited or registered.

There will also be a requirement to prepare consent compliance reports that demonstrates how the development will achieve compliance with the development consent. Whilst this is an additional role for the certifier, it will provide a template guideline document that the certifier is able to refer to throughout the course of construction to enable to compliance and consistency to be assessed at all relevant stages.

Stay Tuned

It should be noted that many of the details of the proposed changes are anticipated to be included the regulations and are not expressly contained in the Planning Bill. There is no doubt much to be further specified as the new planning regime continues to be developed and, whilst what appears to be set in stone today may not be that which is set in stone tomorrow, it is clear that the State Government envisages a much greater role with a greater degree of responsibility for private certifiers in the future.