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CONDITIONS OF CONSENT – GETTING IT RIGHT

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Introduction

I have been asked by a number of people to speak today about conditions of consent. Conditions can be difficult to draft and are often read down by a Court when expressed poorly. A poorly drafted condition can have direct consequences upon the anticipated form of development which, once completed, is very hard to undo.

The Importance of a Consent

When Council is approving the grant of development consent, it must be remembered that a consent will persist indefinitely and so it must be right from the outset.

Key matters to remember are:

1. The consent runs with the land;
2. Is a valuable right to deal with land; and
3. Is an on going obligation upon the land owner.

Legal Foundation for Conditions of Consent

When a Council determines a development application, they have 3 options available: grant an unconditional consent; refuse consent; or grant a conditional consent (s80(1) *Environmental Planning and Assessment Act 1979*).

Although it would be most developers' dream to receive an unfettered approval for development, Council rarely, if ever, approve development without imposing conditions.

The legal test of validity of conditions of consent is found in the House of Lords decision of *Newbury District Council v Secretary of State for the Environment* [1981] AC 578. This authority espouses three basic tests for valid conditions:

- (i) Conditions must be for a planning purpose;

- (ii) Conditions must reasonably relate to the development to which they are addressed; and
- (iii) Conditions must themselves be reasonable.

For a Planning Purpose

Generally, if a condition can be tied to a matter arising under s80A(1), it will be for a planning purpose. The Courts have traditionally given a wide interpretation to a "planning purpose". However, certain conditions have been found by the Court not to be for a proper planning purpose, these include:

1. Conditions requiring an applicant for development to sell certain land to a Council and the Council to purchase it (see *Lean Lackney & Haywood Liverpool Pty Ltd v Baulkham Hills Shire Council* (2003) 137 LGERA);
2. Conditions requiring an applicant for development to provide an indemnity to Council in consideration of approving development. Such a condition was found not to be in the public interest, as referred to in s79(c)(1)(e); and
3. Conditions requiring the provision of a bond to ensure protection of existing vegetation on private property.

The Condition Must Relate to the Development

There must be a nexus between the development and the condition. Again, this requirement has been fairly broadly interpreted by the Court, however, a condition, for instance, on a s96 application that sought to delete a dormer could not give way to a condition that required the deletion of an approved floor of the same dwelling. Such a condition would not fairly and reasonably relate to the development sought.

Similarly, a requirement to carry out works on another persons land not the subject of the application would lack the required nexus.

The Condition Must Be Reasonable

Provided a condition is for a planning purpose and relates to the development, it is likely that such a condition will be reasonable. Generally, the Court has found conditions that have no nexus to the development, or which are contrary to the public interest, to be unreasonable and have declined to impose the condition.

A good example of this involved an application for a brothel upon which Council sought to impose 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 to attend the premises;
- Whilst there, he/she (they didn't say) would partake in the services provided on the premises; and
- As a part of that process, he/she would make observations on the sexual health and hygiene of operations.

The process was within Council's enforcement powers, but the kicker was that following inspections, the condition required 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.

The Court held that the condition was contrary to public policy and ought not be imposed.

I also suspect, although can't be sure, that there was a genuine concern that if the condition was endorsed, there would be a rush of Council Officers wanting to change professions, become private investigators and offer to personally enforce the condition.

Lawfully Capable of Being Imposed: Section 80A of the *Environmental Planning and Assessment Act*

Conditions must be lawful, or more specifically, conditions must have a lawful foundation in s80A of the EPA Act. Section 80A is a good starting point when drafting conditions as it sets out a range of situations in which a condition of consent can be imposed. As long as the conditions imposed by Council fall within one of the categories set out in s80A of the Act, the condition will be for a lawful purpose.

1. *“Conditions – generally*

A condition of development consent may be imposed if:

- (a) it relates to any matter referred to in section 79C(1) of relevance to the development the subject of the consent, or*
- (b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or*
- (c) it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or*
- (d) it limits the period during which development may be carried out in accordance with the consent so granted, or*
- (e) it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or*
- (f) it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 79C(1) applicable to the development the subject of the consent, or*
- (g) it modifies details of the development the subject of the development application, or*

- (h) *it is authorised to be imposed under section 80(3) or (5), subsections (5)–(9) of this section or section 94, 94A, 94EF or 94F."*

Example of Types of Conditions that a Council Can Make

In *Hilltop Planners Pty Ltd v Great Lakes Council*, the NSW Court of Appeal held that the grant of development consent is the exercise of a statutory power and not a power at large. In that respect, the Court has identified a number of broad categories of conditions of consent:

1. Conditions modifying aspects of the development application (s80A(1)(g)). A simple example of such a condition might state:

"The Dormer window shown on plan no. X is to be deleted";

2. Conditions requiring compliance with requirements of other agencies. An example of such a condition might state:

"The proposal must comply with the requirements of the Roads and Maritime Services or Fire and Rescue NSW";

3. Conditions controlling the construction of a development. Such a condition might state:

"The proposal shall comply with the provisions of BCA 2013";

4. Conditions controlling the operation of the proposal once it is completed. For example, a development consent for a boarding house might include a condition stating:

"Once completed, the proposed development is to have an on site manager at all times";

5. Conditions placing time limits on how long an activity may continue (s80A(1)(d); and

6. Conditions requiring removal of building works at the end of a specified period (s80A(1)(e).

A Good Example of an Unlawful Condition

An example of a condition that Councils, over a number of years, have tried to impose is a requirement for a developer to provide some form of security bond, for example, to ensure the protection of existing vegetation during development.

Councils, in this instance, have sought to rely upon the power in s80A(6) of the Act which provides for the imposition of a security bond for certain nominated purposes, most directed to making good works on Council or public land.

In the authority of *Charalambous v Ku-ring-gai Council* [2007] NSWLEC 510, the Court has held that this practice is unlawful and beyond power. In principle, the only circumstances in which a Council may impose a bond are those identified in s80A(6) and no other.

The Golden Rule for Councils

Where a Council has determined to grant conditional consent, the Council should always remember that where the Council has made a mistake in drafting its conditions of consent, it is the Council's responsibility and the Council must face the consequences of that failure. In other words, any ambiguity in the condition will be construed strictly as against Council.

The principle arises from the authority of *Ryde Municipal Council v Royal Ryde Homes* [1970] 19 LGRA 321.

That decision concerned the grant by the Council of development consent for a laundry. The Council, in granting its consent, did not include a condition restricting the hours of operation of the laundry. The Court held that Council's failure to impose a condition limiting the operating hours of the laundry meant that the laundry could operate at all hours. This, of course, is not something that the Council wanted and presents a good cautionary tale for all Council's imposing conditions of consent to make sure that they get it right!

Time Limits

Time limits can be imposed to allow trial periods during which the impacts of a development can be assessed. Such conditions can require that, prior to expiry of the relevant period (usually not less than 1 year), a further development application is required to be made to continue the use and to obtain a non time limited consent.

A good example of a use that might benefit from a time limited consent is a brothel. Such a condition might be coupled with a requirement that a complaints register be maintained for the assessment of Council in considering any new development application or s96 application to remove the time limit requirement.

Certifying Authorities

Generally, as my experience goes, Council Officers have a fear and a loathing of certifying authorities other than themselves. There are a number of reasons for this, the most common being the power vested in a certifying authority to approve later details of some aspect of a development.

The EPA Act contains the following relevant provisions:

Section 80A Imposition of conditions

Ancillary aspects of development:

A consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction and determined in accordance with the regulations of the consent authority or a person specified by the consent authority.

Section 109O Certifying authorities may be satisfied as to certain matters

For the purpose of enabling a Part 4A certificate or a complying development certificate to be issued by a certifying authority, the regulations may provide that

any requirement for a consent authority or Council to be satisfied as to any specified matter (or any matter of a specified class of matters) is taken to have been complied with if the certifying authority is satisfied as to that matter.

This section applies whether the requirement is imposed by or under:

- (a) This Act, the regulations or an environmental planning instrument, or
- (b) The terms of a development consent or complying development certificate.

161 Certifying authorities may be satisfied as to certain matters: section 109O

This clause applies to the following matters:

- (a) Any matter that relates to the form or content of the plans and specifications for the following kind of work to be carried out in connection with the erection of a building or the subdivision of land:
 - (i) Earthwork,
 - (ii) Road work, including road pavement and road finishing,
 - (iii) Stormwater drainage work,
 - (iv) Landscaping work,
 - (v) Erosion and sedimentation control work,
 - (vi) Excavation work,
 - (vii) Mechanical work,
 - (viii) Structural work,
 - (ix) Hydraulic work,
 - (x) Work associated with driveways and parking bays, including road pavement and road finishing,
- (b) Any matter that relates to the external finish of a building.

Any requirement of the conditions of development consent that a consent authority or Council is to be satisfied as to a matter to which this clause applies is taken to have been complied with if a certifying authority is satisfied as to that matter.

My experience has been that it is clause 161(1)(b) of the EPA Regulation that provides a fertile source of disputes.

I suggest there is a simple solution to this problem – make the details of the external finish a deferred commencement condition which takes it out of the domain of the certifier.

Other Types of Conditions

Deferred Commencement Condition

Another useful type of condition, particularly for Councils, is a condition which states that the consent does not operate until the applicant satisfies the Council as to a particular matter. An example of such a condition imposed on a consent for a cemetery was:

“Part A – Deferred Commencement Conditions

This development consent shall not operate until such time as the following matters are completed to the satisfaction of the Council: A water allocation license is to be obtained for the site in order to make use of the water from the dams on the subject site, as advised by the Office of Water. Such water allocation license is to be obtained prior to any burial occurring upon the site.”

The condition ensured that Council would retain control over when the consent would become operable from and maintained in Council's hands certification of an essential aspect of the development and of considerable concern to residents.

Some General Tricks for Getting Conditions Right

1. Conditions of consent must be comprehensible. That is, conditions of consent should be written clearly so that people can understand what they are required to do. The more detail to a condition the better, the condition should be clearly expressed and make sense. It is important that a consent document can be understood as a complete document.
2. Conditions should be proofread to ensure that they are in a logical order, appropriately grouped and sequentially numbered.
3. Conditions of consent should not contain an over abundance of endnotes.
4. Conditions of consent should not be contrary to public policy.
5. Conditions of consent, if imposed, must not amount to a refusal of the consent.