Savings, transitional and other beneficial provisions in NSW planning legislation and instruments

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Various amendments have been made to NSW planning legislation during the pandemic. These have often included provisions softening the effect of statutory changes and/or temporarily extending development rights. Three Land and Environment Court decisions in 2022 emphasise the need to carefully interpret these beneficial provisions.

Chu v Inner West Council [2022] NSWLEC 14

Applicants in an appeal against a Stop Work Order asserted that the relevant demolition was authorised by a complying development certificate (CDC). However, Council argued that the CDC had lapsed.

The case turned upon whether amendments made on 14 May 2020 to section 4.53 of the *Environmental Planning and Assessment Act 1979* (the EP&A Act) extend to CDCs. Relevantly, section 4.53(1)(c) of the EP&A Act provides a two-year extension to physically commence work to avoiding lapsing a **development consent**, if the lapsing date would otherwise have been within the 'prescribed period' of 25 March 2020 to 25 March 2022.

The applicants' CDC was issued on 8 July 2015, and (on the face of section 4.29 of the EP&A Act) lapsed on 8 July 2020. Section 4.29 was not amended by the Emergency Measures Act, and provides that a CDC lapses 5 years after the date endorsed on the certificate (absent physical commencement), and that no proceedings may be taken to extend the 5-year period.

Nonetheless, the applicants argued their CDC had benefit of the 2-year extension in section 4.53(1)(c) of the EP&A Act. Section 1.4(1) defines 'development consent' as follows:

(1) *In this Act, except in so far as the context or subject-matter otherwise indicates or requires… **development consent** means consent under Part 4 to carry out development and includes, unless expressly excluded, a complying development certificate.*

Justice Pain determined that it was clearly intended by the EP&A Act that the 2-year extension did not apply to CDCs. Her Honour agreed with the Council that separate divisions in the EP&A Act *"have been carefully drafted to apply differentially to development consents and CDCs in relation to lapsing of these different instruments."* Her Honour found the words "except in so far as the content or subject-matter otherwise indicates or requires" in section 1.4(1) of the EP&A Act clearly applied in this case. She then went on to find, on the evidence before the Court, that the relevant CDC was not physically commenced for the purposes of section 4.29(3) of the EP&A Act.

Commitment Pty Ltd v Georges River Council (No 2) [2022] NSWLEC 94

This decision concerned when a development application (DA) is 'made' for the purposes of clause 1.8A of *Georges River Local Environmental Plan 2021* (GRLEP). Clause 1.8A provides:

1.8A Savings provisions relating to development applications

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

The relevant DA had been submitted on the NSW Planning Portal and given a PAN reference. However, the GRLEP commenced on the same day that the DA fees were paid. The applicant argued that the DA was 'made' before commencement of the GRLEP, whereas Council argued that this new instrument applied.

In either case, the relevant DA was 'made' when the *Environmental Planning and Assessment Regulation 2000* (2000 Regulation) applied. The case turned upon clause 50 of the 2000 Regulation, which relevantly provided that:

- A DA must (among other things) be 'lodged' on the Portal;
- The applicant must be notified, by means of the Portal, that the DA has been lodged; and
- A DA is taken not to have been lodged until fees notified to the applicant by the Portal have been paid.

Legal questions in this matter were determined by Justice Pain. Whilst noting that there was no ability to pay a fee on the Portal at the relevant dates, her Honour concluded that a DA is made for the purposes of clause 1.8A of the GRLEP when there is **substantial compliance with** each of the requirements of the EP&A Act and the 2000 Regulation applicable to the making of DAs. Her Honour found that section 4.12(1) of the EP&A Act and clause 50 of the 2000 Regulation were key provisions in this regard. As DA fees were paid when the GRLEP commenced, the relevant DA was not 'made' before that commencement. As a result, the GRLEP applied.

CK Design Pty Ltd v Penrith City Council (No 2) [2022] NSWLEC 97

This matter involved determining whether a DA fell within a savings provision in a new environmental planning instrument. Relevantly, section 2 of Schedule 7A to *State Environmental Planning Policy (Housing) 2021* (SEPP Housing) provides as follows:

2 General savings provision

(1) *This Policy does not apply to the following matters—*
   (a) *a development application made, but not yet determined, on or before the commencement date,…*

(2) *The provisions of a repealed instrument, as in force immediately before the repeal of the repealed instrument, continue to apply to a matter referred to in subsection (1).*

In this case the relevant DA (for a boarding house) had already been refused before SEPP Housing commenced. After that commencement, the applicant appealed against this refusal.

Justice Robson of the Court accepted that *"when an appeal has been commenced, until the time of the final determination, by reference to s 4.16 of the EPA Act, the development application is not 'determined' in the sense required by the wording of the Savings Provision."* Among other reasons, this is because section 39(5) of the *Land and Environment Court Act 1979* provides that the Court's determination of a DA is substituted for the decision of the consent authority and is deemed the 'final decision'.

His Honour found that adopting a strictly literal approach (construing 'determined' as confined to the determination of the consent authority) "*simply does not reflect the context that a decision of a consent authority, when an appeal is lodged, is not, in reality, the end of the matter.*" Accordingly, SEPP Housing did not apply to the Court's determination of the appeal. ■