New Form of Complying Development Certificate – “Deferred Commencement”

Introduction

A certifying authority in NSW will soon have the power to issue a deferred commencement complying development certificate. This and other changes are proposed in the Environmental Planning and Assessment Amendment Bill 2017 (‘the Bill’), which passed both houses of Parliament on 15 November 2017. The Bill will amend the Environmental Planning and Assessment Act 1979 (‘EP&A Act’). Commencement of the Bill is awaiting Royal Assent, which is expected in the near future.

Under the current EP&A Act, a development consent can be granted "subject to a condition that the consent is not to operate until the applicant satisfies the consent authority as to any matter specified in the condition". The Bill proposes to apply that power to the issue of complying development certificates, in the form of a new section 85A(9A) of the EP&A Act.

A certifier can use the facility of a deferred commencement certificate to the certifier’s and the certifier’s client’s advantage. The new power can be exercised to enable certain additional information and plans to be provided to the certifier after the certificate is issued, but before the certificate begins to operate. However, there are limits to the nature and scope of the power. This article explores some of those limitations.

The new concept of a deferred commencement certificate

The Bill amends the EP&A Act by introducing a new section 85A(9A). The purpose of this new subsection is to allow a council or private certifier to issue a deferred commencement complying development certificate.

The proposed section 85A(9A) reads:

(9A) “Deferred commencement” Certificate

A complying development certificate may be granted subject to a condition that the certificate is not to operate until the applicant satisfies the council or certifier who issued the certificate, in accordance with the regulations, as to any matter specified in the condition. Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition.

1 Section 80(3) of the EP&A Act
The form of, and procedure for issuing a deferred commencement development consent is prescribed by the Environmental Planning and Assessment Regulations 2000 (‘Regulations’). There is no regulation or draft regulation at present prescribing the form of a deferred commencement certificate. The Department of Planning and Environment has indicated that the Regulations will be reviewed once new Act has commenced. However for the purpose of this article, we assume that the prescribed form of a deferred commencement certificate will be similar to the current requirements for a deferred commencement consent. Those requirements are set out at clause 95 of the Regulations.

Section 95 of the Regulations currently reads:

**95 Deferred commencement consent**

(1) A “deferred commencement” consent must be clearly identified as a “deferred commencement” consent (whether by the use of that expression or by reference to section 80 (3) of the Act or otherwise).

(2) A “deferred commencement” consent must clearly distinguish conditions concerning matters as to which the consent authority must be satisfied before the consent can operate from any other conditions.

(3) A consent authority may specify the period within which the applicant must produce evidence to the consent authority sufficient enough to enable it to be satisfied as to those matters.

(4) The applicant may produce evidence to the consent authority sufficient to enable it to be satisfied as to those matters and, if the consent authority has specified a period for the purpose, the evidence must be produced within that period.

(5) If the applicant produces evidence in accordance with this clause, the consent authority must notify the applicant whether or not it is satisfied as to the relevant matters.

(6) If the consent authority has not notified the applicant within the period of 28 days after the applicant’s evidence is produced to it, the consent authority is, for the purposes only of section 97 of the Act, taken to have notified the applicant that it is not satisfied as to those matters on the date on which that period expires. Note. See also section 109O of the Act and clause 161 of this Regulation

Compliance with these requirements is essential to render a deferred commencement development consent (and presumably a deferred commencement certificate) valid. Therefore, certifiers are encouraged to ensure that a deferred commencement complying development certificate is in strict compliance with the form prescribed for deferred commencement certificates under the (yet to be commenced) Regulations.

**How have the Courts dealt with ‘deferred commencement’ development consents?**

There are a number of decisions of the Land and Environment Court and Court of Appeal that provide guidance on the legal requirements for a deferred commencements consent. We expect these principles will be applied to deferred commencement certificates.
In *Cameron v Nambucca Shire Council*\(^2\), the Court held that the grant of a deferred commencement development consent did not relieve a consent authority from its legal duty to consider all relevant matters (such as the impact of the development) under section 79C of the EP&A Act, prior to the granting of the consent.

This principle was also reflected in *Remath Investments [No 6] Pty Ltd v Botany Bay City Council [No 2]*\(^3\) where the Court held that the deferred commencement provisions of the EP&A Act did not offer a consent authority the ability to leave issues undecided and unassessed in terms of their impact on the development.

The principle established in *Cameron* and *Renmath* was endorsed by the Court of Appeal in *Weal v Bathurst City Council*\(^4\). *Weal* dealt with a consent issued by a Council to a transport company for use of land as a rail freight terminal. The Council issued a deferred commencement consent subject to a condition relating to noise. The condition required that the consent remained deferred until such time as the applicant had obtained approval to the proposed noise emissions from the Environment Protection Authority.

In *Weal*, the Court held that the Council did not in fact assess noise impact, despite noise being a relevant matter to the application. The Council simply avoided its assessment of noise by deferring commencement of the consent subject to approval from an Environmental Protection Authority. The Court of Appeal held that in order to discharge its legal obligation to consider all relevant matters prior to granting consent, the Council had to properly understand the state of affairs, and an evaluate for itself all relevant matters with that understanding.

**Lapsing of a ‘deferred commencement’ Certificate**

Presently under the EP&A Act, a complying development certificate:

- becomes effective and operates from the date endorsed on the certificate, and
- lapses 5 years after the date endorsed on the certificate, unless the development to which it relates is physically commenced on the land to which the certificate applies within that time.\(^5\)

It is not clear how these provisions will work with deferred commencement certificates. A deferred commencement certificate does not “operate” until the deferred commencement matters are satisfied. If the lapsing period commences when the certificate begins to operate, then the certificate will remain in force indefinitely until the deferred commencement condition is satisfied. The lapsing period will then commence on the date that the deferred commencement condition is satisfied. This may not have been the intention of the drafters of the Bill.

A similar issue to that described above arose with deferred commencement development consents, and was addressed by the insertion section 95(6) to the EP&A Act. Section 95(6) of the EP&A Act presently reads:

\[(6) \text{Despite any other provision of this section, a development consent that is subject to a deferred commencement condition under section 80(3) lapses if the applicant fails to satisfy the consent authority as to the matter specified in the condition within 5 years from the grant}\]

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\(^2\) (1997) 95 LGERA 268  
\(^3\) (unreported, NSWLEC, Talbot J, 11 December 1996)  
\(^4\) (2000) 111 LGERA 181  
\(^5\) Section 86A EP&A Act
of the consent or, if a shorter period is specified by the consent authority, within the period so specified.

If the consent authority specifies a period less than 5 years within which an applicant must satisfy the deferred commencement condition, the development consent lapses if the applicant has not satisfied the condition within that period.

Section 95(6) of the EP&A Act will not automatically apply to deferred commencement certificates, and the Bill as passed does not include an equivalent to section 95(6) for deferred commencement certificates. Until such provision is made, the recipient of a deferred commencement certificate will have an unlimited period of time to commence the development.

If you need further advice on ‘deferred commencement’ certificates contact the team at Planning Law Solutions.

This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact Planning Law Solutions.