

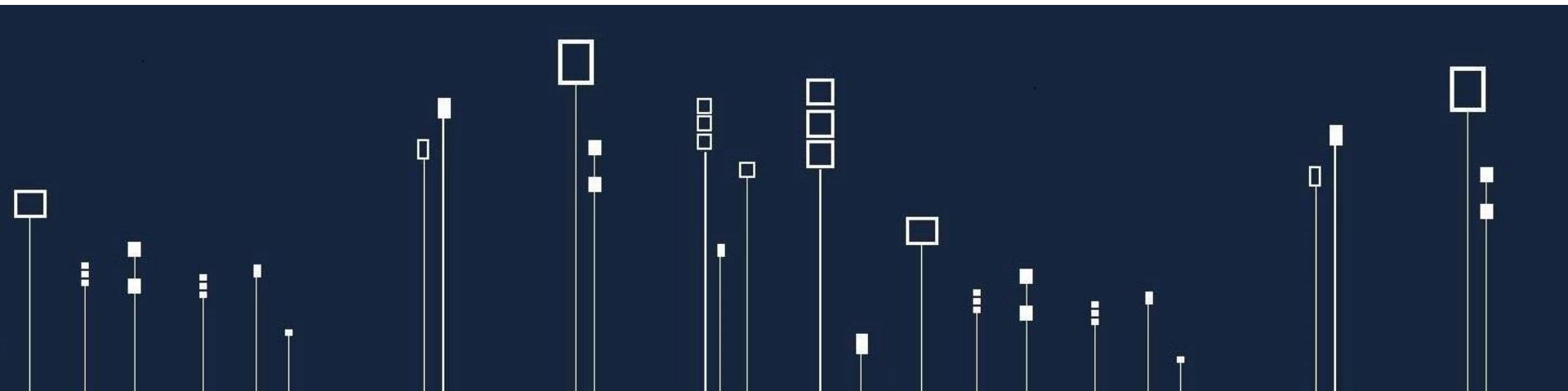


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LTL Lunchtime Seminar Series

Development Consent Issues

30 April 2020

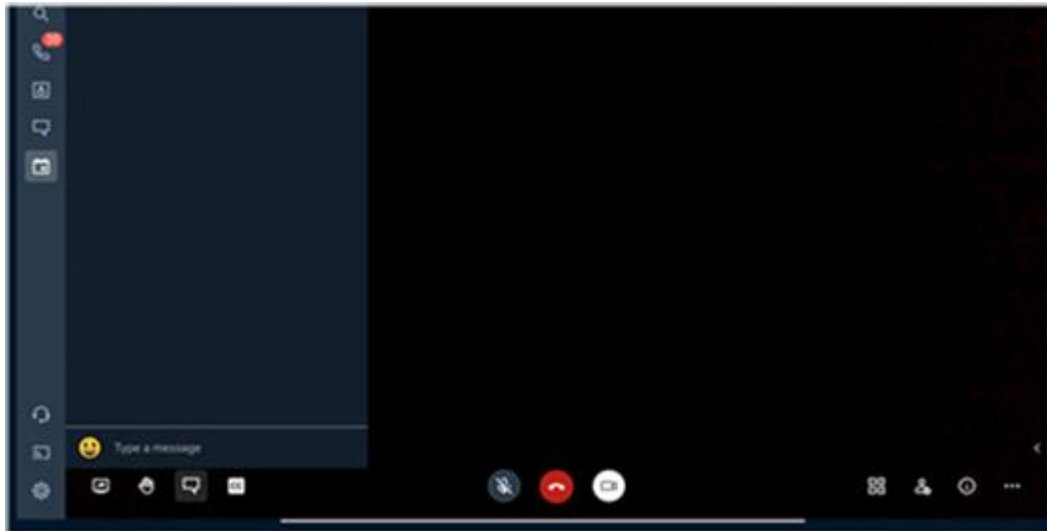


Preliminary matters

- This seminar is being recorded, and we have muted all participants for the purpose of the recording. If for some reason you become unmuted, then please re-mute yourself, or we may do this for you
- You can turn off your computer camera to save bandwidth
- We will answer all questions during the Q&A at the end of the seminar

Preliminary matters

- Please send through your questions here:



- Please note that your questions will be seen by the group

Development Consent Issues

Topics

- Principles of Construction of Development Consents
- Extrinsic Material
 - The principles about documents “incorporated” into a development consent
 - The recent Court of Appeal decision in *Hunter Industries v Dungog Shire Council*
- Multiple Development Consents
 - The principles when multiple development consents apply to the same land
 - The recent LEC decision of *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd*

Development Consent Issues

Principles of Construction

- A development consent is to be construed according to its terms, and having regard to its enduring nature:
 - A development consent has an enduring nature because it is not personal to the applicant but is a public document operating in *rem* for the benefit of third parties such as subsequent owners, occupiers and security holders
 - In some respects is equivalent to a document of title

Development Consent Issues

Principles of Construction

- A development consent is to be construed not as a document drafted with legal expertise, but to achieve practical results

However,

- The ordinary rules of construction and principles of interpretation apply to a development consent as with any other statutory instrument
- For example:
 - The document must be read as a whole
 - The 'context' may mean that some words do not have their ordinary meaning or their meaning departs from their defined meaning
 - An interpretation that is absurd or inconsistent with other parts of the consent will be avoided and a Court will try to give each clause of a consent meaning

Development Consent Issues

Principles of Construction

- The nature and extent of the approved development must be determined by construing the document of approval, including any plans or other documents which it incorporates aided only by evidence which establishes the true meaning of the document:
 - Evidence of the nature of the site will almost always be admissible
 - Evidence as the meaning of marks on plans or the absence of them are admissible
 - Matters relating to title, such as easements, or covenants are admissible

Development Consent Issues

Principles of Construction

- As a consent is unilateral act of the authority, communications between the parties about the development consent do not form part of the matrix of material relevant to its construction

Development Consent Issues

Principles of Construction

- Any lack of clarity or certainty in a development consent is the responsibility of the authority which must take the consequences



Development Consent Issues

Principles of Construction

- A development consent that requires development to proceed “generally in accordance with” approved plans, allows for some latitude and deviation from the approved plans but only of a relatively minor nature
- Don’t use that language unless you intend to allow such deviations.

Development Consent Issues

Incorporation of extrinsic documents

- The Courts have, for many years, fought a battle against allowing reference to be made to material extrinsic to the consent in interpreting the consent
- For example, some cases held that it was not possible to refer to documents in the development application unless expressly incorporated
- The rationale was that that it would be confusing or it may be impossible to interpret a consent if one has to locate and review other documents
- But the Courts still agreed that the consent would incorporate such other documents as were 'necessarily implied' to be incorporated
- Usually this will be documents available at some stage before consent was granted, particularly documents forming part of the development application

Development Consent Issues

Incorporation of extrinsic documents

- A recent case, *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* [2019] NSWCA 147 has revisited the scope of the restriction having regard to its true rationale
- LEC civil enforcement proceedings commenced by Council in relation to Martins Creek Quarry. Subsequent appeal by quarry owner
- Issue was whether court could take into account the EIS which was not referred to in the consent but which:
 - stated where quarrying activities were to take place
 - was not expressly incorporated by reference in the consent

Incorporation of extrinsic documents

- The NSWCA held:
 - It is generally permissible to have regard to the development application to determine the scope and nature of the proposed development
 - In order to construe a consent in accordance with its “*enduring functions*” it is necessary to have regard to the manner in which the determination of the consent authority is made available to the public
 - At the time the subject consent was granted, the EPA Act required that Council maintain a public register of consents including “*a copy of the development application*”

Incorporation of extrinsic documents

- The plan attached to the EIS established that quarrying was to take place only on a particular lot. But the Court did not need to decide whether the EIS was part of the DA
- The description of the development in the EIS was incorporated in the consent because the DA form indicated that the full description of the development 'could be included' in the EIS – which it was:

"In reaching that conclusion [that the EIS was incorporated in the development to the extent necessary to provide a full description of the development], it is significant that an environmental impact statement is not a private document available only to the applicant and the consent authority, but a document prepared for the purposes of public notification and possibly a public inquiry." at [64]

- Therefore the quarry operation was limited to that area

Incorporation of extrinsic documents

Current legislative scheme

- Clause 264 (1) EPA Reg

A council must maintain a register containing details of the following matters for each development application that is either made to it as the consent authority or furnished to it in cases where it is not the consent authority

- (a) the registered number of the application,*
- (b) the date when the application was made,*
- (c) the amount of any fee payable in connection with the application,*
- (d) the date or dates when any such fee, or any part of such fee, was paid,*
- (e) the date when the application was determined.*

- Clause 266 (1) EPA Reg

(1) A council must keep the following documents for each development application made to it and each development consent resulting from a development application made to it:

- (a) a copy of the development application,*

Development Consent Issues

Multiple Development Consents

- Principle:
 - there is no constraint on the number of development applications that a person can make in respect of the same land
 - there can be more than one valid and operating consent in existence at any one time and it is possible to undertake works pursuant to more than one consent at a time

Development Consent Issues

Multiple Development Consents

- Principle:
 - Where multiple development consents apply to the same parcel of land, all of the consents may operate unless the implementation of one consent is no longer a practical possibility due to development already having been undertaken pursuant to another consent

Development Consent Issues

Multiple Development Consents

- Principle:
 - A later development consent does not, of itself, take precedence over an earlier approval

Development Consent Issues

Multiple Development Consents

- Principle:
 - Non-compliance with a condition of an earlier development consent, where that condition has an ongoing effect (i.e. including beyond the life of the existing development consent) constitutes a breach of the EPA Act

Development Consent Issues

Multiple Development Consents

Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4) [2019] NSWLEC 58:

- Leda was charged with three offences of carrying out bulk earthworks in contravention of conditions of a project approval granted under the then Pt 3A of the EPA Act for its major residential development
- The conditions of the Part 3A project approval limited the amount or nature of earthworks that could be carried out at the site, and the location that they could be carried out
- Numerous historic and existing development consents applied, which permitted earthworks across the land.

Development Consent Issues

Multiple Development Consents

- Leda's defence was that:
 - The bulk earthworks the subject of the three charges were attributable to bulk earthworks approved under prior consents
 - The concept approval for the project specifically preserved prior consents, and the Part 3A approval could not impose limits on prior consents
 - Earthworks were permitted by a development consent issued after the concept approval and the project approval, which was independent and mutually exclusive of the project approval, and not constrained by it

Development Consent Issues

Multiple Development Consents

- Pepper J held:
 - Although prior consents were preserved by the Part 3A project approval, this did not relieve Leda of its obligation to comply with the conditions of the project approval
 - Rather, it preserved the operation of prior consents only, and any obligation that they imposed in respect of the works carried out under them
 - Leda still had to comply with the conditions of the Part 3A approval even though the bulk earthworks were carried out in the same areas where earthworks were permitted under prior consents

Development Consent Issues

Drafting Tips

- Where appropriate, define term and use language consistently
 - Be careful to specify the documents intended to be incorporated or left out
 - Ensure that the consent is consistent with any other consents that apply to the site
- OR
- Impose a condition requiring the surrender or modification of the inconsistent consent or condition: s 4.17(1)(b) and cl 97 of the Regulations



Development Consent Issues



Questions?



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