

My development consent is about to expire!

What can I do?



"A development consent is a valuable asset. It is a statutory permission that authorises the carrying out of development on land, mostly for economic gain... It adds value to the land. Hence the prospect of a consent lapsing is apt to engender dismay in the holder of the consent."

CJ Preston in para 1 *Kinder Investments Pty Ltd v Sydney City Council* [2005]NSWLEC 737

Development consents don't last forever, but they can... sort of

So when does my development consent lapse?

Development consents will eventually lapse **unless physical commencement** of "building, engineering or construction work relating to the building, subdivision or work" the subject of the consent takes place on the site before the date the consent would otherwise lapse.

Q. If there is no physical commencement then when does a development consent lapse?

A. Check the development consent - the development consent will specify a lapsing date. Depending on the Council/consent authority, the lapsing date will be anywhere from 2 to 5 years after the date from which the consent operates.

But... it's not that simple for development consents that:

- operated before, and specified a lapsing date after, 22 April 2010; or
- were granted between 22 April 2010 and 1 July 2011;

and where the operating period of those development consents was less than 5 years.

Those consents automatically have 5 years from operation of the consent until lapsing.

[s.95 *Environmental Planning & Assessment Act, 1979* (NSW) ("**EP&A Act**") for all of the above.]

Can I extend the operational period of my development consent?

Maybe - if the development consent was originally granted for a period of less than 5 years and you apply to the Council for an extension showing "good cause" why the extension should be granted.

An extension of 1 year only can be granted through an application to the Council.

If the Council rejects the application then you can appeal to the Land & Environment Court ("**L&E Court**") to consider the application.

Any 1 year extension will apply from the later of the date:

- the consent would have lapsed (except for the extension); or,
- the application for the grant was granted by the Council or approved by the L&E Court.
[s.95A EP&A Act]

What is physical commencement?

If there is **physical commencement** of building, engineering or construction work on the site that relates to the subject of the consent before the lapsing date of the consent then your development consent stays operational beyond the lapsing date indefinitely, or at least until a supervening event.

Usually the test is applied to cases where often only minimal physical work has been carried out on a site or sometimes work that does not result in any noticeable change to the appearance of the site. Many of the cases involve questions as to whether survey work, demolition or testing on the site constitutes "physical commencement".

A leading case involving "physical commencement" is:

- *Richard & Ors v Shoalhaven City Council* [2002] NSW LEC 11, which related to a consent for subdivision of land. The question determined in this case was whether the survey work carried out was an essential part of the engineering work required for the approved subdivision. The Judge found that *"the taking of levels, placing pegs, the removal of vegetation and the establishment of marks, including the centre point of a road"* were *"part of the engineering work required for the establishment and construction of the subdivision"*. As that survey work had taken place before the lapsing date, the consent had not lapsed.

but... the work has to be **legal**, including in compliance with the conditions of the development consent:

- *Biwazu Pty Limited v Cessnock City Council* [2004] NSWLEC 411 involved a 29 lot subdivision in the Hunter region. The conditions of the development consent required that:
 - certain detailed plans prepared by a Civil engineer be approved by the Council prior to commencement of "subdivisional works"; and
 - *"Engineering design plans shall be submitted to Council's Works Department for approval prior to commencement of any works on the site."*

In this case the Judge was not satisfied by the evidence that certain works had taken place after the consent had been issued. However, even if that work had taken place, the Judge decided that he was not satisfied the work was essential. Further, as the works had been carried out without obtaining approved engineering plans from the Council as required by the conditions, they were unauthorised and could not be relied upon as constituting "physical commencement".

- In *K & M Prodanovski Pty Ltd v Wollongong City Council* [2013] the NSW Court of Appeal ruled that demolition and geotechnical works relied on by the applicant as evidencing "physical commencement" were not carried out in accordance with the conditions of the

development consent. As a result, the works were deemed illegal and could not be relied on as "physical commencement" to prevent the lapsing of the consent.

Consent to a section 96 (modification) application does not extend the time before lapsing

An approval to an application to modify a development consent does not re-start the clock.

Also, applying to modify a consent through a section 96 application solely to extend the lapsing date on a consent is unlikely to be a successful strategy - see below:

- *Kinder Investments Pty Ltd v Sydney City Council* [2005] NSWLEC 737

In this case an applicant having previously been granted a 1-year extension to the consent sought a further extension by applying to modify the consent through a section 96 modification application to change the lapsing date. Sydney City Council refused the application on the basis that it did not have the power to change the lapsing date through a section 96 application.

It was a novel approach that, given the subject of the development was an 8-storey extension to a 12-storey building in the city, was probably worth a shot.

Unfortunately for the applicant in this case, the L&E Court determined that section 96 did not permit modifications that altered the lapsing date of a consent. Sections 95 & 95A of the EP&A Act "*were the only possible means and timings of lapsing of a development consent permitted by the statutory scheme*" [para 40].

The lapsing date on any consent is the starting point. The provisions of the EP&A Act need to be checked as well as what steps have been undertaken with respect to acting on the consent.

The sooner that advice can be sought and any necessary action taken, the more likely the potential loss of a consent, and any legal proceedings to establish whether a consent has lapsed or not, may be avoided as can, hopefully, the engendering of dismay.

Eakin McCaffery Cox Lawyers can help by advising you through the DA process and available options as well as acting as your legal representatives in L&E Court proceedings on a cost effective basis.

Please contact **Eakin McCaffery Cox Lawyers on (02) 9265 3000** for advice and action on planning, Council and the Land & Environment Court matters.

This paper is a summary providing general information and should not be construed as specific legal advice. Each development application and consent is different and is made in different circumstances which require subjective assessment before legal advice may be provided



Level 28, 1 Market Street
SYDNEY NSW 2000
DX 1069 SYDNEY
T 02 9265 3000
F 02 9261 5918
E info@eakin.com.au
W www.eakin.com.au