Amber Light Approach - Where to from Now?

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The term ‘Amber Light Approach’ was first coined in *Ali v Liverpool City Council* [2009] NSWLEC 1327 to describe an approach that had been favoured by the Court at the time. Under this approach, the decision-maker in the Land and Environment Court exercising its class 1 appeal jurisdiction would consider whether an otherwise unacceptable development proposal could be approved after making identifiable amendments. If the answer to this question is yes, then the Court may approve the development proposal after the requisite amendments have been made (*Vigor Master Pty Ltd v Warringah Council* [2011] NSWLEC 1096).

The types of amendments the Court has ordered under the Amber Light Approach are quite diverse. These amendments include reducing the number of apartments in a residential apartment development (*Benevolent Society v Waverley Council* [2010] NSWLEC 1082), incorporating a wild life management plan (*Riordans Consulting Survey Pty Ltd v Lismore City Council* [2010] NSWLEC 1333), and changing the length of the proposed trial period in a brothel development (*Tl & Tl Tradings Pty Ltd v Parramatta City Council* [2017] NSWLEC 142). However, what exactly constitutes the Amber Light Approach has never been clearly defined, which, as will be seen below, makes the application of the approach problematic.

Limitations of the Amber Light Approach

Despite its popularity at one point, the Amber Light Approach has come under judicial scrutiny and criticism, especially since the mid-2010s.

One of the first major limitations imposed by the Court is the finding that a Commissioner of the Court disposing a merits appeal is not obliged to take the Amber Light Approach. In *Luxe Manly Pty Ltd v Northern Beaches Council* [2016] NSWLEC 156, the Court rejected an appeal by the Applicant on the basis the Commissioner’s failure to consider the Amber Light Approach amounted to a breach of procedural fairness. Sheahan J in *Luxe Manly* downplayed the importance of the Amber Light Approach, describing it as ‘the Court’s occasional discretionary decisions’ and not a component of its ‘standard procedure’. Because of its highly discretionary nature, there is no ‘legitimate expectation’ that the Commissioner would take the Amber Light Approach, and a Commissioner’s failure or refusal to consider the Amber Light Approach accordingly did not deny the Applicant procedural fairness. Sheahan J’s findings were followed in a number of subsequent cases, including by Preston CJ in *Saffioti v Kiama Municipal Council* [2019] NSWLEC 57.

In *Tl & Tl Tradings Pty Ltd*, the Applicant, after being given an approval for a modification application under the Amber Light Approach, sought an order for costs against Council. Moore J in this case found the Applicant is not entitled to a costs order on the basis that having the modification application approved on an Amber Light basis means the Applicant had not, in fact, succeeded in the proceedings.

In early 2019, Preston CJ delivered what is probably the most stinging criticism of the Amber Light Approach in *Ku-Ring-Gai Council v Bunning Properties Pty Ltd* [2019] NSWCA 28. In *Bunnings*, his Honour found the Amber Light Approach has no statutory basis, it risks diverting the Court's attention away from considering the proposed development to a hypothetical development (which the Court has no power to determine), and its constraints, including the requirement to making only 'minor and identifiable' amendments, have no statutory basis and thus risk diverting attention away from the Court's statutory functions.

Notwithstanding harsh criticism of the Amber Light Approach, his Honour distinguished the Amber Light Approach and the making of an interim judgment. In *Bunnings*, the Commissioner in the first instance gave two judgments. In the first judgment, the Commissioner found the proposed design to be unacceptable and thus the appeal would be dismissed unless the Applicant takes up an offer to amend the design. The applicant took up the offer and the Commissioner approved the amended design in the second judgment. By contrast to the Amber Light Approach, Preston CJ found the first judgment to be an 'interim judgment', which is a permissible way for the Court to exercise its functions.

Where to from now?

After the findings in *Bunnings*, it is likely that the Land and Environment Court would be more reluctant to adopt the Amber Light Approach in determining development appeals. However, since the Court can still 'invite' amendments to be made after a hearing, make suggestions as to appropriate amendments to be made, and consider the amended application in the final judgments, it also seems the demise of the Amber Light Approach will not radically change the ways in which the Court can determine development appeals.