



Deferred Commencement Consents

Date : September 6, 2018

On 21 June 2018, the Land and Environment Court of NSW handed down a decision which reinforced the importance of time limits on deferred commencement conditions.

The decision of Commissioner Preston in *Dennes v Port Macquarie-Hastings Council* [2018] NSWLEC 95 found that the Court had no jurisdiction to grant the appeal on its merits regardless of whether the evidence submitted as part of the deferred commencement condition was satisfactory given the fact that Consent had lapsed.

Background

On 17 August 2016 the Applicant appealed against Council's refusal of an application for development consent (**Consent**). Commissioner Fakes upheld this appeal and granted development consent subject to a deferred commencement condition which required the Applicant to submit to Council for approval a Flood Emergency Response Plan ('FERP') by 17 August 2017.

The deferred commencement condition had to be fulfilled to Council's satisfaction by 17 August 2017. The applicant submitted its FERP to Council in April 2017. Following this submission, Council advised the applicant that the deferred commencement condition had not been satisfied to the requisite standard on 20 June 2017.

Following Council's notification that the deferred commencement condition had not been satisfied, the applicant did not take any action until 22 December 2017 when an appeal was lodged under s 97(3) of the *Environmental Planning and Assessment Act 1979* ('EPA Act') (as it then was) against Council's decision.

The Deferred Commencement Consent had lapsed

Council submitted to the Court that it did not have jurisdiction to hear and determine the appeal because the Consent had lapsed. Council's submission was as follows:

'there was no matter as to which the Court could be satisfied which could cause the deferred commencement consent to operate'

The Court found that the deferred commencement consent granted on 17 August 2016 had lapsed and that the applicant had failed to satisfy the Council within the period specified of 12 months.

Commissioner Preston noted that *it was necessary but not sufficient* for the applicant to provide Council with the FERP. It was held that the only way in which the deferred commencement condition could be satisfied is if Council determined the FERP as being satisfactory.



The Court also held that once the consent had lapsed, it has no jurisdiction to grant orders sought by the Applicant.

This case highlights the importance of properly construing deferred development conditions. When considering the effect of deferred commencement conditions, Councils should have regard to what exactly needs to be completed for the condition to be satisfied.

Visit: <https://www.caselaw.nsw.gov.au/decision/5b2c55bbe4b0b9ab4020d287> for the full judgement.