



Removal of Shrubs to Prevent Consents from Lapsing

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The Court of Appeal (**Court**) in the recent judgment of *Cardo Management and Maintenance Pty Ltd v Cumberland Council* [2019] has established easier criteria to prevent a lapse of consent, assisting developers and landowners in protecting their development rights. Section 4.53 of the *Environmental Planning and Assessment Act 1979* (**Act**) stipulates that a development consent for the erection of a building, subdivision of land or the carrying out of work will lapse if no physical commencement of the development occurs after 5 years.

Land and Environmental Court Judgment

Within the recent judgment, the Land and Environment Court (**LEC**) had found that the developer had failed to establish that lawful works had physically commenced before the lapsing date of the consent. The developer had removed shrubs and trees as well as erecting fences and disconnecting the water.

The LEC found that the demolition of the trees and shrubs were not completed by a certified arborist as required by the consent, and further, the work of the fence and disconnection of water hadn't been approved by the Principal Certifying Authority as per the consent. As such, the work done did not lawfully constitute physical commencement of the development.

Court of Appeal Judgment

On appeal, the Court mostly agreed with the LEC's judgment regarding the consent requirements. The Court, however, agreed with the developer's submission stating that the removal of shrubs was not apart of Condition 44 which required an arborist for '*pruning work and tree removal*'. The Court held that the difference between tree and shrub was understood and as such there was no requirement for an arborist to complete such work lawfully in the consent.

The council put forward that the removal of the shrubs was a part of demolition work, and could not be completed without meeting multiple preconditions. The Court, however, treated the removal of the shrubs in the same manner as tree removal, deeming it as '*construction work*'. As a result, the Court held that the removal of shrubs were lawful works in accordance with the consent in providing the physical commencement and thus prevented the lapse of the consent.

Effects of the Judgment

The removal of shrubs provides developers and landowners with an easy way to prevent the lapse of consent as it is deemed '*construction works*'. It must be noted that any removal of shrubs still must satisfy the terms of the consent and that any preconditions relating specifically to shrubs must be met.