When does a savings provision apply? Three cases to help navigating savings provision

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Savings provisions are commonly found in environmental planning instruments such as Local Environmental Plans (**LEP**) and State Environmental Planning Policies (**SEPP**). Usually, their intended effect are to carve out certain types of development applications, usually by reference to the lodgement date, from being determined according to the environmental planning instrument containing the savings provision. Whilst this sounds straightforward at first, it is not always easy to discern when and how savings provisions should apply to a development application. Both councils and developers must carefully interpret savings provisions, as incorrect application of planning instruments could lead to errors in the preparation and assessment of development applications. Today, we look at three common problems in the interpretation of savings provision and how the Courts have addressed them.

Problem 1: Treating Enacted Instrument as if It Is Still a Draft

Often, a savings provision in an environmental planning instrument requires certain development applications to be assessed as if the instrument containing the savings provision "had been exhibited but had not been made". A common variation of this phrase is "as if this [instrument] has not commenced".

The meaning of this expression was considered in *Terrace Towers Holdings Pty Ltd v Sutherland Shire Council* [2003] NSWCA 289 (***Terrace Towers***). In *Terrace Towers,* the Court of Appeal was asked to construe the savings provision in the *Sutherland Local Environmental Plan 2000* (**LEP 2000**), which provided: -

"Local environmental plans (including Sutherland Shire Local Environmental Plan 1993) and deemed environmental planning instruments, as in force immediately before the commencement of this plan, apply to a development application that was made but had not been finally determined before that commencement as if this plan had been exhibited but had not been made."

The development application in this case was lodged before the LEP 2000 had come into force. The LEP 2000 introduced new floor space standards, which the proposed development had contravened. In the Land and Environment Court, Cowdroy J refused to grant consent for the development. His Honour found whilst the savings provision meant the earlier LEP 1993 (which was repealed by the LEP 2000) should continue to apply to the development application in question, the LEP 2000 should be taken into consideration as if it is a draft instrument pursuant to the then section 79C(1)(a)(ii) of the *Environmental Planning and Assessment Act 1979* (NSW) (**Act**) (now s 4.15(1)(a)(ii)). Furthermore, his Honour held that the new development standards introduced in the LEP 2000 should be given significant weight, because the new standard should be treated "as if they were certain and imminent because LEP 2000 [had] been gazetted".

The developer then challenged Cowdroy J's approach in the Court of Appeal, which dismissed the appeal. The Court of Appeal upheld that it was appropriate for his Honour to give significant, but not determinative, weight to provisions in the LEP 2000 on account of the fact that the LEP 2000 has already come into effect when the determination was made.

What if the savings provision stipulates the development application is to be assessed "as if this [instrument] has not commenced"? In *Alamdo Holdings Pty Ltd v Hills Shire Council* [2012] NSWLEC 1302, Commissioner Dixon (as Senior Commissioner then) found the removal of the words "had been exhibited" indicates the savings provision should be construed differently from that considered in *Terrace Towers*. The Commissioner construed the phrase "as if this [instrument] has not commenced" as commanding the consent authority to not consider the newly enacted instrument, even as a draft instrument.

Commissioner Dixon's interpretation was overruled, however, in *Maygood Australia Pty Ltd v Willoughby City Council* [2013] NSWLEC 142 (***Maygood***). In *Maygood*, Pepper J found that it is wrong to equate the phrase "as if this [instrument] has not commenced" with "as if this [instrument] has never existed". Thus, her Honour found the newly enacted instrument had to be taken into consideration as if it is a draft instrument under section 4.15(1)(a)(ii) of the Act.

Problem 2: Do Savings Provisions Apply to an Amendment to Instrument?

Although not a mandatory clause under the Standard Instrument, LEP generally contains a savings provision that provides for when a development application, made but not finally determined before the commencement date of the new Plan, should be determined as if the new Plan has not commenced. The decisions in *Maygood* and *Terrace Towers* deal with the application of savings provisions to newly enacted LEP, but do savings provisions also apply to amendments to the existing LEP?

The question of whether savings provisions apply to amendments to the instrument was the subject of the Court of Appeal's decision in *Wingecarribee Shire Council v De Angelis* [2016] NSWCA 189 (***De Angelis***). In *De Angelis*, the appellant made a development application to use the subject land for commercial purpose, which was a permissible use on the land under the Wingecarribee LEP at that time. After the application was lodged, the Wingecarribee LEP was amended to prohibit commercial use on the subject land. The amendment to the Wingecarribee LEP does not contain a savings provision, but clause 1.8A of the Wingecarribee LEP provided: -

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

The appellant contended that this provision has an "ambulatory operation" – that is, not only does it preserve the law applicable to the determination of a development application that had been made but not determined when WLEP 2010 first commenced, but the provision should also be interpreted as operating in respect of development applications that have been made but not determined at the time of amendment to that instrument.

Whilst the appellant's contention prevailed in the Land and Environment Court, the decision was overturned by the Court of Appeal. Basten JA held, with whom McColl and Payne JJA agreed, that interpreting the savings provision of the Wingecarribee LEP as applicable to subsequent amendments could not be justified as it would effectively re-write the savings provision. Without some further provision, an amendment to a zoning plan in an LEP "could not possibly be read as intending to amend a savings provision which operated at the commencement date of the LEP".

Problem 3: When is a Development Application "Determined"?

Generally, a savings provision excludes development applications from being assessed under the new instrument if the development applications were "made, but not (finally) determined" before a certain date. Issues can arise when a consent authority is required to review an earlier determination that was made before the relevant date. In such scenario, is the development application considered as "determined"?

In *Manzie v Willoughby City Council* [1995] NSWLEC 205, the Land and Environment Court considered whether it should apply the repealed instruments in circumstances where the respondent council had already determined to refuse the development application. The new instrument, the *Willoughby Local Environmental Plan 1995*, contained a savings provision that provides that an environmental planning instrument in force immediately before the commencement of the 1995 LEP continue to apply to a development application that was "made but had not been finally determined before the commencement" of the 1995 LEP. Bignold J determined that the 1995 LEP does not apply notwithstanding the council has already made an earlier determination. His honour found such construction was harmonious with the scheme of the Act that relate to the grant of development consents, including the relationship between the grant of development consent and the provisions of the relevant instrument.

Sometimes, savings provisions do not use the phrase "finally determined", but instead refers to developments applications that are "not yet determined". For instance, the savings provision in the recently introduced *State Environmental Planning Policy (Housing) 2021* (**Housing SEPP)** provides the Housing SEPP does not apply to applications that are "made, but not yet determined" before its commencement. Does the removal of the word "finally" change the effect of the savings provision?

In *CK Design v Penrith City Council (No 2)* [2022] NSWLEC 97, the Land and Environment Court was asked to determine whether the Housing SEPP or the former *State Environmental Planning Policy (Affordable Rental Housing) 2009* applies to a development application that the council had already determined to refuse. His Honour Robson J found that whilst the term "determined" in the savings provisions has generally been used in the context of the Act as referring to determination by consent authority, the term could not be construed literally. Instead, his Honour found that the phrase "not yet determined" should be construed as applying to development applications that have not been finally determined by the Land and Environment Court, which operations harmoniously with the statutory scheme and its purpose.