

Application Modification

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The recent NSW Court of Appeal case of *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 raises concerns as to the power to modify an existing development consent. The bench included Meagher, Leeming JJA and Chief Judge of the Land and Environment Court Preston CJ.

The case involved an application to modify an underground coal mine in the Hunter Valley. The Court found that the Land and Environment Court judge has erred in joining the objectors and ordered that the joining of the objectors be set aside.

Preston CJ, however, provided extensive consideration in his judgment as to the issue of whether there is power to amend an application to modify a development consent. His Honour concluded that there is no expressed or implied authority to permit the amendment of an application by developers or relevant consent authorities under the *Environmental Planning and Assessment Act 1979* (NSW) ('**EPA Act**'). Conversely, his Honour emphasised that the absence of authority is contrasted to clause 55 of the *Environmental Planning and Assessment Regulations 2000* (NSW) ('**EPA Regulations**') which expressly permits the amendment of an application to modify a development consent before the application has been determined.

As this is a Court of Appeal judgment, Preston CJ's consideration of the function of powers under the EPA Act to amend an application to modify a development consent will not be considered binding. This is because the other two judges not expressly address the issue. As a result, this issue is left to be determined by the Land and Environment Court.

Key Takeaways

Currently, amending an application to modify a development consent is still permitted. However, Preston CJ's judgment has raised concerns as to the practicality of future development consent modifications. Such concerns could be addressed by the Land and Environment Court in the near future in the hope of alleviating confusion around the practical application of the EPA Act in modifying development consents.

If made binding by the Land and Environment Court, it will impose a burden on the applicant to ensure the development application is correct once submitted at first instance. This will negate the ability to modify the development consent once it has been determined regardless of whether Council or the relevant consent authority agrees with the modification proposed. This entails that the withdrawal and re-application of the development is the only option to modify the original application, leading to an unnecessary and costly process.

Since the publication of this article the comments have been adopted and followed in the Land and Environment Court: *Duke Developments Australia 4 Pty Limited v Sutherland Shire Council* [2021] NSWLEC 69