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Department of Planning and Environment

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# Guide to writing conditions of consent

August 2022



# Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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Guide to writing conditions of consent

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# About this guideline

This guideline aims to simplify development consents and promote best practice.

The guideline provides general advice about conditions of consent and notices of determination, as applied to local and regionally significant development under Part 4 of the NSW *Environmental Planning and Assessment Act 1979* (EP&A Act).

The guideline does not provide advice in relation to conditions of consent for state significant development.

The guideline should be read in conjunction with reforms to introduce standard conditions of consent. Standard conditions will provide greater consistency and certainty and make development consents easier to navigate. The changes introduce a standard form for development consents, and best practice conditions that consent authorities can adopt for certain types of development. Further information on the standard conditions of consent is available on the [Standard conditions of consent pages](#) of our website

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## Why is the guideline necessary?

The Department of Planning and Environment (the department) is introducing a suite of reforms to deliver a better planning system for NSW as part of the Planning Reform Action Plan. Work is underway to reduce assessment time frames for all development types, improve certainty and ensure development consents can be implemented without significant costs or delays.

Ultimately, these improvements will facilitate development, keep the economy moving and support the state's recovery from the COVID-19 pandemic.

The department is working to achieve a more consistent approach to the preparation and application of development consent conditions across all local government areas in NSW.

This guideline aims to:

- provide general assistance to consent authorities (such as councils and planning panels) in preparing appropriate, well-structured and legally enforceable conditions and development consents
- identify when to apply site-specific conditions
- highlight the key issues that arise with unclear or inconsistent conditions and provide solutions that will make conditions easier to understand and implement
- help others who interact with the planning system – from builders and developers to home renovators or affected landowners – to understand more about conditions of consent.

For many, much of what is in this guideline may reflect what you do every day – in that case, it is a reminder of best practice. For others, the guideline will help you to understand the purpose of conditions and provide general advice in drafting plain English conditions.

The way conditions of consent are written can differ between councils – this might mean that a builder working on two sites on opposite sides of a road, but in different local government areas, has to address different conditions for the same work, such as site fencing.

A more consistent approach, especially for elements common across all types of development, will help to reduce the complexity associated with complying with those conditions.

Improvements to the way conditions of consent are written and applied will not only assist economic recovery in the short term, it will help to reduce approval timeframes, increase consistency and certainty, and make development consents easier to navigate and apply.

## Quality conditions

Conditions should be valid, easy to implement, enforceable and easy to understand. All parties must be clear on their obligations.

Quality conditions are those that:

- are within the statutory power to be imposed;
- are drafted in plain English using specific and clear language;
- provide criteria that will ensure a clear and enforceable outcome;
- do not duplicate information;
- are relevant to the likely impact of the development;
- are logically ordered according to development stages; and
- have considered the nexus (or direct relationship) between the condition of consent and the development for which consent has been granted.

For conditions to be easily understood and complied with, you should write them in plain English, clearly set out what the obligations are and when they must be carried out and identify how the obligations under the condition are to be satisfied.

Conditions cannot be used to redesign significant aspects of a proposed development. Generally, if the only way a development application (DA) can be approved is through the imposition of conditions that require significant changes or redesign, it may be necessary to consider whether to request further information before approving the DA or refusing the DA. Similarly, a condition should not be so onerous that it is effectively a refusal of the DA.

Through consultation we've identified lower quality conditions are those that:

- lack specific criteria;
- go beyond the scope of the power to impose conditions;
- are superfluous or too extensive (for example 150 conditions for a dwelling house);
- relate to issues that should be resolved before determination of the DA;
- use ambiguous standards, making them difficult to implement;
- lack a specific timeline for when conditions must be satisfied;

- are not appropriate for the site or are unrelated to the development for which consent has been granted; and
- are overly legalistic and complex.

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## Who will use the guideline?

This guideline is targeted to development assessment planners at councils who generally draft the conditions of development consent for local and regionally significant development under Part 4 of the Act. It may also be relevant to other technical staff in councils, members of planning panels and registered certifiers. For example, council officers who are specialists in engineering, heritage, landscaping or waste may be required to draft conditions.

The guideline may also be used by other groups who interact with the planning system, such as homeowners, builders, architects and specialist consultants.

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## What does it cover?

This guideline begins with an introduction about conditions of consent, how they fit within the NSW planning system and how they are used, in practice, every day.

It also addresses how to:

- prepare conditions of development consent and use a standard format for development consents;
- use consistent wording and structure, including examples on how to structure the condition;
- prepare clear, measurable and consistent conditions in plain English that can also be used to ensure compliance and be enforceable;
- provide advice on common types of conditions imposed by councils; and
- work with the prescribed conditions contained in Division 2 Part 4 of the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation).

# Conditions of consent

Development applications (DAs) require approval from a consent authority in the form of a development consent (also called a notice of determination). A DA may be determined by:

- granting consent unconditionally
- granting consent subject to conditions
- refusing consent.

Consent is rarely granted without the imposition of conditions. Consent may also be granted for only part of the development that was the subject of the DA, with subsequent applications required to obtain consent for the balance of the development.

The development approval process generally follows 5 stages:

1. **Pre-lodgement** – pre-DA meeting and advisory services
2. **Lodgement, notification and referral** – DA lodged, internal and external referrals, neighbour notification
3. **Assessment** – identify issues, any non-compliances, review submissions
4. **Determination** – DA approved (subject to conditions or unconditionally) or refused
5. **After determination** – issue notice of determination.

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## Imposing conditions

Conditions of consent control and regulate the implementation and operation of approved development.

Conditions are designed to:

- eliminate or mitigate environmental impacts – for example, the risk of a development leaching soil or debris across the neighbourhood or building material polluting waterways
- ensure compliance with existing development controls and building standards – for example, by specifying height limits, or that specific building work is compliant with the relevant Australian Standards
- ensure construction is undertaken safely in a manner that minimises any associated environmental impacts on the amenity of adjoining or surrounding properties
- amend minor aspects of a development in a way that brings about the best possible environmental planning outcomes – for example, by raising the heights of windowsills or requiring the installation of a privacy screen on first-floor windows on the development site where necessary to preserve privacy of the principal area of private open space available to the occupants of adjoining properties (e.g. a paved alfresco dining area used more intensively than the remainder of the backyard)
- ensure the payment of relevant fees and charges such as long service levy payments or development contributions
- regulate the ongoing use of a development – for example, hours of operation and ongoing noise limits; and

- comply with legal and statutory requirements.

Most importantly, conditions provide certainty to both the consent holder<sup>1</sup> and the community about the obligations that must be carried out throughout the life of the development- from the time development consent is granted to when the development is used.

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<sup>1</sup> Consent holder means the applicant (including any person who may be carrying out development under a consent from time to time) or any other person entitled to act on a consent granted by the consent authority.



# Best practice when preparing conditions

This section details the processes that represent best practice when preparing conditions of consent and gives relevant examples.

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## Validity

Every condition must be valid if it is to be legally enforceable. In this regard, every condition must:

- be authorised by the EP&A Act, particularly section 4.17
- satisfy the **Newbury Test** (see below).

Section 4.17 of the Act provides for the imposition of conditions of development consent in both general and specific circumstances. A condition of consent must have a lawful foundation. This section of the Act provides a framework on:

- the circumstances in which a condition of consent may be imposed
- where a condition may be imposed in relation to ancillary aspects of development
- conditions expressed in terms of outcomes or objectives
- conditions requiring modification or surrender of consents or existing use rights
- conditions and other arrangements regarding security
- reviewable conditions
- conditions that may be prescribed by the regulations.

As well as section 4.17 of the EP&A Act, conditions of consent can be imposed under other parts of the Act (for example, section 4.47(3) for integrated development) or other legislation in certain circumstances, such as section 27(1)(b) of the *NSW Coastal Management Act 2016* and section 7.13(3) of the *NSW Biodiversity Conservation Act 2016*.

## The Newbury Test

The Newbury Test is named after a 1981 court case,<sup>2</sup> the findings of which make it clear that a condition must:

- be imposed for a **planning purpose** – not an ulterior one
- **fairly and reasonably relate to the development** that is the subject of the development application
- not be so **unreasonable** that no planning authority would have imposed it.

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<sup>2</sup> *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

## Planning purpose

The condition must have a **planning purpose**. It must be related to a matter either expressly permitted or implied in the EP&A Act. For example, a planning purpose would include addressing any relevant matter that a council must consider when determining a DA under section 4.15 of the Act.

### Example

A 2004 case<sup>3</sup> found:

‘A planning purpose is one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning.’

In a 2003 court case,<sup>4</sup> a condition required the applicant to negotiate with the council over the purchase of land for open space and drainage. If no agreement was made on the price, council was to compulsorily acquire it.

The court decided the condition was not for a planning purpose because the EP&A Act does not allow a council to acquire land – the power is found in the NSW *Local Government Act 1993*.

## Fairly and reasonably relates to the development

Whether a proposed condition fairly and reasonably relates to the development depends on each situation. Generally, there should be a nexus between the proposed condition and the development for which consent is granted. Nexus relates to a reasonably perceived connection between the proposed condition and the environmental impact that the condition seeks to mitigate.

### Example

In a 2008 case,<sup>5</sup> the court found that a condition imposed for a right of carriageway at the back of a 4 storey, mixed-use development did not fairly and reasonably relate to the permitted development. The development would not generate the need for it and, instead, the condition was being used to fulfil a long-standing intention of the council to address existing traffic issues.

## Unreasonableness

Generally, the Land and Environment Court of NSW has found conditions that have no nexus with the development, have no regard to the scale or scope of the proposed development, or which conflict with public policy, are **unreasonable**.

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<sup>3</sup> *Western Australia Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63.

<sup>4</sup> *Lean Lackenby & Haywood Liverpool Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 406.

<sup>5</sup> *Dogild Pty Ltd v Warringah Council* [2008] NSWLEC 53.

## Example

In a 2005 case,<sup>6</sup> the court found that a condition requiring the applicant to alter the terms of a drainage easement and to pay the council's legal costs and disbursements for checking related documentation was unreasonable. The condition required the applicant to accept an open-ended obligation to pay the council's legal costs.

A condition of consent that does not satisfy the principles under the Newbury Test is at greater risk of a successful court challenge, where it could be declared to be invalid.

## Enforceability

Conditions on a development consent must be enforceable. Non-compliance with conditions of consent may constitute a breach of the consent, a breach of the EP&A Act, and amount to an offence and may lead to enforcement action and penalties.

All conditions of consent should be written using plain language to promote clarity and enforceability.

See the section 'Writing the conditions' for further information.

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## Notice of determination

The notice of determination provides the consent authority's decision in relation to the DA. Section 88 of the EP&A Regulation sets out the information that must be included in a notice of determination if a DA is approved, including the conditions of consent.

This includes but is not limited to:

- dates from which the consent operates and lapses
- the approval bodies (the relevant state agencies) that have given general terms of approval
- whether the applicant and any objector have a right of appeal against the determination
- deferred commencement (if required).

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## Structuring the consent

Consistent structure, language and terminology will lead to development consents and conditions that are easy to understand and that are more easily satisfied.

For this reason, the department has introduced a standard format for notices of determination for development applications, modifications and review letters that all consent authorities will be required to use for local and regionally significant development.

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<sup>6</sup> *Pickwell v Ku-ring-gai Council* [2005] NSWLEC 59 at [28].

The standard format for notices of determination for DAs and modifications address different types of work, including building work, subdivision work, demolition work, remediation work, subdivision of land, strata subdivision and change of use. This allows consent authorities to use these standard notices of determination for one or more of these types of work.

Under the standard notices of determination format for DAs and modifications, each consent contains the heading ‘general conditions’ and further stages will depend on the type of work. The length of the consent is tailored to the type of work proposed. For example, the headings/stages for building work are:

- General conditions
- Before issue of a construction certificate
- Before building work commences
- During building work
- Before issue of an occupation certificate
- Occupation and ongoing use.

## Advisory notes

Advisory notes don’t form part of the consent and are not legally enforceable. Make sure advisory notes don’t contain any obligations that require enforcement – only include them to provide relevant advisory information about the consent. As part of the changes introduced with the standard conditions of development consent, a separate advisory notes document has been prepared and is linked to the notice of determination to provide relevant advisory information about the consent.

Examples include the need to:

- obtain other separate approvals if required (for example, approvals under section 68 of the NSW *Local Government Act 1993* and section 138 of the NSW *Roads Act 1993*)
- advise certifiers and others that all conditions should be carefully read, and not to assume they are all listed under the relevant headings of the consent
- explain or provide information relating to a condition (for example, a condition regarding payment of development contributions may need a note outlining methods of payment or reference to the relevant development contributions plan).

## Reasons for imposition of conditions

The EP&A Regulation requires a notice of determination to contain the consent authority’s reasons for imposing conditions except for conditions prescribed under section 4.17(11) of the Act.

The requirement to provide reasons in section 88(1)(c) of the EP&A Regulation is supported by the following general principles regarding the giving of reasons:

- reasons should be “expressed in clear language so that they are capable of being understood”<sup>7</sup>;

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<sup>7</sup> *Comcare Australia v Lees* [1997] FCA 1415.

- reasons should not be expressed in “vague generalities”<sup>8</sup>; and
- reasons should be given “so far as is necessary to indicate to the parties why the decision was made and to allow them to exercise such rights as may be available to them in respect of it”<sup>9</sup>.

Best practice compliance with the above principles and the requirement in section 88(1)(c) of the EP&A Regulation means that a consent authority should include a clear reason under each condition imposed on a notice of determination. It must not be a generic statement at the beginning or end of the notice of determination advising generally of the reasons all conditions of the consent were imposed.

Doing so will enhance transparency and accountability and assist the consent holder to comply with the relevant conditions and/or to exercise review or appeal rights under the Act. It also allows the consent authority to adequately explain the context and background for each condition.

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<sup>8</sup> *Re Ansett Transport Industries (Operations) Pty Ltd and Another v Kenneth F Wraith and Others* [1983] FCA 179.

<sup>9</sup> *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* (1983) 3 NSWLR 378 at 386

# Writing the conditions

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## Structure of individual conditions of consent

A consistent structure should be used within each condition that follows these three considerations:

- **When** is the condition to be enacted or fulfilled?
- **What** are the specific requirements?
- **How** the requirements are to be satisfied?

### Example – Dilapidation report

Before any site work commences [WHEN], a dilapidation report must be prepared by a suitably qualified engineer detailing the structural condition of adjoining buildings, structures or works and public land [WHAT] to the satisfaction of the principal certifier or to council where a principal certifier is not required [HOW].

No less than <INSERT NUMBER> days before any site work commences, adjoining building owner(s) must be provided with a copy of the dilapidation report for their property/properties and a copy of the report(s) must be provided to council (where council is not the principal certifier) at the same time.

This format will make the purpose of the condition and requirements to satisfy it explicit. The intended outcome will be both clearly defined and enforceable.

Where possible, link the conditions to a definitive set of criteria/objectives. This could include a requirement for a condition to comply with an Australian Standard or specifications set out in a development control plan (either ‘as modified’ or at a particular point in time).

When drafting conditions of consent, make sure the conditions focus on the obligations that are to be complied with, rather than attempting to identify who must comply with them, or who is responsible for ensuring that others comply with the obligations. This is because a development consent ‘runs with the land’ and is not granted in a personal capacity<sup>10</sup>. Additionally, section 4.2(1) of the EP&A Act makes it clear that the responsibility to comply with obligations in a condition of consent is shared by all persons carrying out development approved under the consent.

This approach does not apply to drafting conditions that require:

- a third party to be satisfied of some aspect of the development that must and could only be carried out by the third party with special expertise (see s 4.17(2) of the Act)
- a report or record to be made by a third-party expert such as a suitably qualified engineer.

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<sup>10</sup> *Dravin Pty Ltd v Blacktown City Council* [2017] NSWLEC 38

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## Number of conditions

Consent authorities should aim to minimise the number of conditions imposed on a development consent. This will make it easier for the consent holder to understand what is required by the consent. While limiting the number of conditions is not an objective of condition writing, the development consent should deal with all relevant issues as succinctly as possible.

Before imposing a condition of consent, consider whether the condition:

- is necessary to achieve the best outcome for the development
- is covered by another condition of consent
- could be combined with another condition of consent.

The number of conditions is likely to vary depending on the scale or complexity of the development (for example, the number of conditions for a single dwelling house is likely to be fewer than for a residential flat building).

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## Preparing consistent conditions

It is usual practice for development assessment planners at councils to refer development applications to other technical council staff to consider the impact of the proposed development. This includes council officers who are specialists in engineering, heritage, landscaping or waste.

These officers may propose draft conditions that address their specialist area. However, there may be circumstances where the proposed condition is at odds with another condition in the consent.

The development assessment planner should ensure conditions are not repeated and are consistent across the notice of determination. For example, make sure an engineering condition does not require something that would be inconsistent with a heritage condition.

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## Drafting principles

Other important principles when drafting conditions:

**Use plain language** wherever possible. This means avoiding terms like ‘pursuant to’ or ‘prior to’ – use ‘under’ or ‘before’.

**Make the conditions clear** so they can be easily interpreted by those they impose obligations on, including a council or a registered certifier, depending on who is appointed to certify the approved development. Avoiding ambiguity will also enable the person acting on the condition to understand what is required of them. Remember that if a poorly drafted condition is ambiguous or a requirement is not stated, a court will likely interpret it favourably for the consent holder and this may cause an unintended outcome.

### Example - Hours of operation

In an instance where a council had failed to outline the approved hours of operation for a commercial laundry, the court<sup>11</sup> found the premises were effectively afforded 24/7 operational hours.

Be aware that expressions like 'generally in accordance with' will allow some variance in compliance. Avoid these sorts of phrases as much as possible, particularly if strict compliance with a requirement is necessary.

**Use definitive wording** such as 'must' or 'will'. Avoid words such as 'should' or 'may', which create a discretion and could render the condition unenforceable.

**Be concise** because conditions covering multiple requirements or issues can become complex. This makes it harder for a consent holder to be satisfied as to what the condition requires for compliance and hinders future enforcement of potential non-compliances.

**Write the condition in a way that helps the consent holder to comply with the condition**, which will give a better outcome for the consent holder and those affected by the development. A clear condition will also make it easier to assess compliance (or non-compliance) – especially for ongoing conditions that will apply for the life of the development (these create an ongoing obligation for consent holders, who may not be the original applicant, and an ongoing compliance role for council).

### Example - Maintenance of wastewater and stormwater treatment device

During occupation and use, all wastewater and stormwater treatment devices (including drainage systems, sumps and traps, and onsite detention) must be regularly maintained so they remain effective and work in accordance with any relevant positive covenant created under this consent. All solid and liquid waste collected from the wastewater and stormwater treatment devices must be disposed of in accordance with section 68 of the *Local Government Act 1993* and the EPA's Waste Classification Guidelines.

**Set fair and achievable outcomes** and consider whether the condition is practical and reasonable.

**Align with the consent authority's legislative powers** – if writing for a council, ensure the council has the jurisdiction to impose the condition.

**Consider the intent of the condition** and whether a condition is the right way to address that intent. Conditions might not always be the right response.

**Avoid restating legislative requirements** and instead consider using advisory notes to draw the consent holder's attention to relevant legal requirements. For example, do not outline how aspects of an approved development must comply with parts of the Building Code of Australia (or National Construction Code) because the prescribed conditions under section 69 of the EP&A Regulation already require this.

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<sup>11</sup> *Ryde Municipal Council v Royal Ryde Homes* (1970) 19 LGRA 321.



**Where necessary, provide advisory notes** to communicate the purpose or objective of a condition. Remember that advisory notes are not legally binding parts of the consent but should accurately reflect any legal requirements.

**Be careful when referring to other documents** such as plans, specialist reports or development control plan provisions. Clearly establish the obligation within those documents that must be satisfied to ensure it can be enforced in the future – documents often change over time.

Clarify whether the reference to a development control plan is at a point in time or refers to the development control plan as amended from time to time, depending on whether flexibility is needed. If the former, reiterate the specific requirements of the development control plan in the condition. Include critical matters in the condition rather than by reference to an external document.

**Ensure the consent clarifies exactly what development has been approved** and what documents have been relied on in reaching the determination. Ambiguity about the nature or scope of the development that has been approved may make it necessary for additional (non-approved) documents, which formed part of the development application, to be considered in order to properly understand the limits of the approved development.

### Example

A 2019 court decision<sup>12</sup> provided that although a document that formed part of the development application may not be expressly incorporated in the notice of determination or conditions of consent, regard may be had to that document if necessary in order to properly understand, identify or describe something in the consent. Such a document will be incorporated in the consent to the extent necessary for the interpretation of the consent or the relevant condition.

**Do a final check of the conditions** to ensure the approved plan numbers or the dates of various documents such as development control plans are correct and there are no conflicting requirements between different conditions. Compliance with one condition should not prevent compliance with any other condition.

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## Categories of conditions

To achieve a more efficient development assessment process across NSW local government areas, the department has released standard conditions of consent for local and regionally significant development (see further information on the department's website at [Standard conditions of development consent](#)).

### Standard conditions

The standard conditions of consent have been prepared as best practice conditions that can be used to improve clarity, certainty and consistency across local government areas. They provide best examples of conditions of consent and apply to multiple types of development.

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<sup>12</sup> *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* [2019] NSWCA 147

The standard conditions expand on the standard conditions for residential development, which were released in May 2021 following extensive consultation with stakeholders. In addition to residential development, the standard conditions can now be applied to different types of work, including building work, demolition work, subdivision work, and change of use, where applicable. The standard conditions are available on the department's website at [Standard conditions of development consent](#) and in the NSW Planning Portal.

## Prescribed conditions

Prescribed conditions are conditions that must be applied to certain types of development.<sup>13</sup>

Division 2, Part 4 of the EP&A Regulation sets out the current prescribed conditions, which are to be included in development consents if they relate to the development the subject of the consent.

These prescribed conditions relate to:

- compliance with Building Code of Australia and insurance requirements under the Home Building Act 1989
- erection of signs
- notification of Home Building Act 1989 requirements
- entertainment venues
- maximum capacity signage
- shoring and adequacy of adjoining property
- build-to-rent housing
- in-fill affordable housing
- boarding houses
- residential flat buildings—social housing providers, public authorities and joint ventures
- co-living housing
- seniors housing.

Relevant prescribed conditions should be included in the notice of determination so that all parties understand the responsibilities set out in the EP&A Regulation are included in the consent. However, even if they are not included in the notice of determination, the relevant prescribed conditions will nevertheless apply to the development by virtue of section 4.17(11) of the EP&A Act.

## Bespoke conditions

Consent authorities can continue to prepare bespoke conditions for site-specific issues that are not addressed by the standard conditions.

Bespoke conditions could be prepared to address outstanding issues relating to matters such as heritage conservation, protection and retention of significant trees, or creation of easements for access for drainage. For example, a bespoke condition could require a photographic archival recording of significant heritage fabric prior

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<sup>13</sup> See section 4.17(11) of the EP&A Act.

to demolition, where this aspect of the development application had been considered and approved by the local council.

Bespoke conditions should be prepared in accordance with the drafting principles and advice in this guide.

## Conditions requiring minor design changes

In some cases, a condition of consent can be used to make minor changes to the proposed development – these should only be used to redesign minor aspects of the development.

Conditions of consent are not always the solution to making a development more worthy of consent. If extensive design changes are required, it is important to question the merit of the DA and whether it should be approved. It may be more appropriate to refuse consent to the development, request further information, and/or recommend the applicant lodge an amendment or variation to the DA on the NSW Planning Portal under section 37 of the EP&A Regulation.

The following examples illustrate appropriate conditions for amending the design of a development:

### Example conditions

#### Design modifications - inclusion of onsite stormwater detention

Before the issue of a construction certificate, the certifier must be satisfied the approved proposal has been amended to provide suitable onsite stormwater detention whereby the capacity of the approved 1,500-litre rainwater tank identified as a BASIX commitment is augmented to 2500 litres (more than one tank can be used). Details demonstrating compliance must be shown on the relevant construction certificate plans.

Reason: This condition mitigates stormwater run-off from the site.

#### Additions to the approved plans

Before the issue of a construction certificate, the certifier must be satisfied the relevant construction certificate plans detail the following information:

- Existing trees to be retained must be clearly numbered on the landscape plans.

Reason: This condition protects existing trees on the site.

#### Landscaping

Before the issue of a construction certificate, the relevant construction certificate plans must be provided to the certifier which demonstrate:

- The front landscaped area on the northern side of the driveway must not have paving or any other hard surface area.

Reason: This condition addresses the minimum soft landscaped area requirement contained in the council's development control plan

#### Installation of privacy screen

Before the issue of a construction certificate, the certifier must be satisfied the construction certificate plans provide for the installation of a privacy screen (1.5 m high x 2.0 m wide) on the eastern side of the approved first floor balcony.

Reason: This condition prevents overlooking of the private open space of the adjoining property to the east (12 Smith Street) and will ensure a satisfactory privacy relationship between the site and 12 Smith Street.

## Council library of conditions

Over time, many councils have developed their own library of conditions of consent for different types of development to provide clear and consistent conditions for developments within their local government area. However, the impact of each development may vary, and councils need to ensure each condition is necessary and appropriate for the proposed development.

We encourage councils to review their library of conditions and use the department's standard conditions in every development consent, as relevant. The standard conditions are examples of best practice to help achieve certainty and consistency for builders, developers, investors and certifiers who work across multiple local government areas. Consent authorities should not prepare their own conditions of consent when there is an applicable standard condition.

## Deferred commencement conditions

Deferred commencement conditions<sup>14</sup> require certain matters to be satisfied before the consent can operate. While they can be useful in certain circumstances, impose them with caution.

**Clearly outline the matters to be satisfied before the consent can operate.** The consent authority may specify the period in which the applicant must produce any evidence that the matters are satisfied. Only a consent authority can assess whether a matter in a deferred commencement condition has been satisfied and, as required under the EP&A Regulation, must notify the applicant as to whether the consent authority is satisfied of the relevant matters and the date from which the consent operates.<sup>15</sup>

A deferred commencement condition should not defer consideration of a critical component of the development assessment process. The likely impacts of the development need to be considered during the assessment of the DA, before the consent is granted. A failure of the consent authority to properly consider a likely impact of the development before the consent is granted may result in the consent being declared invalid if it is legally challenged.

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<sup>14</sup> Imposed under section 4.16(3) of the EP&A Act.

<sup>15</sup> Sections 76 and 88(3) of the EP&A Regulation.

### Example - Seniors housing deferred commencement for civil works

A 2020 court case<sup>16</sup> upheld an appeal against a consent that allowed the extension of a seniors housing development. A deferred commencement condition required the application for and grant of approval for 'all works (civil, road and infrastructure) in the road reserve of North Creek Road'.

The court found that any decision needed to assess whether the likely impacts of road, civil and infrastructure works in the road reserve fell within the scope of the mandatory relevant consideration of the 'likely impacts of that development'. and if so, to take those impacts into consideration in determining the development application for the proposed development.

The court determined that the Commissioner failed to understand the likely impact of civil works in a road reserve by granting consent subject to a deferred commencement condition and so deferring for later consideration 'a complete environmental assessment of all [the relevant civil] works'. The Commissioner thereby failed to take into consideration a mandatory relevant matter.

Deferred commencement conditions should be certain in the outcome sought to be achieved and should relate to a matter that is critical for the operation of the consent.

For example, securing a right of carriageway to enable access to a site that doesn't have a direct frontage to a road could be dealt with by a deferred commencement condition. This would require the consent authority to:

- consider all likely environmental impacts of the proposal (including those associated with the right of carriageway) before granting consent
- consider supporting documents to confirm written, in-principle agreement from the affected adjoining property owner
- confirm that the use of a deferred commencement condition is appropriate as the outcome sought to be achieved by the condition is certain.

In this example, the consent will not operate until the applicant has obtained the right of carriageway and provided evidence to this effect to the council's satisfaction.

### Conditions requiring ancillary matters

A council or a registered certifier may be appointed as the principal certifier for a development and will be responsible for approving some post-consent matters.<sup>17</sup> Section 73(2) of the EP&A (Development Certification and Fire Safety) Regulation 2021 'effectively places the certifier in the position of the council in relation to the approval of any matters that are required to be approved pursuant to development consent conditions'.<sup>18</sup>

This is even the case where a council uses conditions requiring ancillary matters to be finalised to its satisfaction, such as 'a drainage plan for the site is to be submitted to the council's satisfaction'.

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<sup>16</sup> *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41

<sup>17</sup> Section 6.29 of the EP&A Act and section 73(2) of the EP&A (Development Certification and Fire Safety) Regulation 2021.

<sup>18</sup> *Baulkham Hills Shire Council v Dix* [2004] NSWLEC 404, Talbot J at [15]

**Clearly express what any post-approval plan or document must include** and specify clear standards a certifier or the council can assess the plan or document against.

**List the job title of the person who must approve the ancillary matter** if the ancillary matter must be assessed by a specific person in the council, rather than a certifier. This should only be used for matters not listed in section 73(2) of the EP&A (Development Certification and Fire Safety) Regulation 2021.

**Ongoing obligations** should not be required to be done to council's or someone else's satisfaction, as this may be an excessive burden on the consent holder.

However, this does depend on the nature of the consent, the type of approved development and the condition. Exceptions to this may be updates to management plans or similar operational plans on a recurring (e.g. annual) basis – it would not be unreasonable to require the council to be satisfied with the annual update of such plans.

## Conditions requiring management plans

Management plans are commonly used in conditions to cover the construction and ongoing operation of a development. For example, a traffic management plan may be required during construction or a plan of management may be required to mitigate impacts of the development once it is operating.

Where possible, management plans (especially ongoing ones) should be prepared so they can be assessed during development assessment, as the management plan will be necessary to understand the impacts of the development.

For example, an ongoing plan of management for a serviced apartment complex, a boarding house or a backpackers' hostel would need to be assessed before the development consent is issued, whereas for many developments, a construction management plan will have similar impacts and can be dealt with through a standard condition of consent.

If a management plan is to be prepared or amended as part of a condition:

- clearly state inclusions such as meeting relevant Australian Standards or development control plan controls
- use separate conditions for the preparation, approval, and implementation (including timing) of the plan
- consider making other matters – such as an ongoing obligation to minimise noise or meet noise criteria in addition to a noise management plan – part of a separate condition.

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## Modification of applications

A consent authority can modify a development consent if it is satisfied the development is substantially the same as that originally approved or that it is of minimal environmental impact (if the modification is sought under section 4.55(1A) of the EP&A Act).

It is well-established<sup>19</sup> that modifying a consent may involve modifying or imposing additional conditions of consent.

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<sup>19</sup> *1643 Pittwater Road Pty Ltd v Pittwater Council* [2004] NSWLEC 685 at [51]-[52].

A 2021 case<sup>20</sup> has clarified that:

- a modification application must seek to modify some aspect of the development the subject of the consent (in addition to any condition(s) sought to be modified); and
- a condition that has already been fulfilled cannot subsequently be modified.

Therefore, when modifying a consent:

- clarify in the notice of determination for the modification which conditions are being amended;
- check that modifying one condition does not have unintended or undesirable consequences for other conditions (including by making compliance with other conditions impossible);
- ensure the modifications to the conditions do not result in a development that is no longer 'substantially the same' as the originally approved development (when this is a relevant consideration); and
- only modify or impose additional conditions that relate directly to the modification or its impacts. For example, a modification application seeking to reconfigure basement car parking cannot require additional privacy screening on top floor balconies if the modification sought does not cause such an impact.

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## Staging development

Part 6 of the EP&A Act allows an occupation certificate to be issued for either 'part of' or 'a whole building'. This enables a development to be carried out, and subsequently occupied in stages, i.e. before all construction work for the whole development has been completed.

Staging of a development under a consent can be complicated, however consent authorities should ensure the conditions articulate clearly what must happen at each stage and what is required before the next stage can commence.

Normally conditions of consent require certain actions, reporting or monitoring to be undertaken before a construction certificate or occupation certificate is issued. When drafting conditions, consider whether the matter is required when issuing 'the first' or 'the relevant' construction certificate as well as 'the first', 'the relevant partial', or a 'whole' occupation certificate.

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<sup>20</sup> *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 17