



Guide to writing conditions of consent

May 2021



Published by NSW Department of Planning, Industry and Environment

dpien.nsw.gov.au

Title: Guide to writing conditions of consent

First published: May 2021

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About this Guideline

This Guideline aims to simplify development consents and facilitate best practice.

The Guideline provides general advice around conditions of consent and notices of determination, as these are applied to local and regionally significant development under Part 4 of the *Environmental Planning and Assessment Act 1979* (the Act).

The Guideline does not provide advice in relation to conditions of consent for State significant development.

Why is the Guideline necessary?

The Department of Planning, Industry and Environment (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 conditions and solutions that will make conditions easier to implement for both councils and registered certifiers
- 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.

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.

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.

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 identify the responsible individual or entity that needs to act on the condition, and identify the timing for when the condition will take effect and when the requirements of 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 refuse the DA. Similarly, a condition should not be so onerous that it is effectively a refusal of the DA.

Through consultation we've identified poor conditions are those that:

- lack specific criteria;
- go beyond the scope of the power to impose conditions;
- are superfluous or too extensive – 150 conditions for a dwelling house is excessive;
- 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.

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.

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 Part 6 Division 8A of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation).

Conditions of consent

Development applications 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.

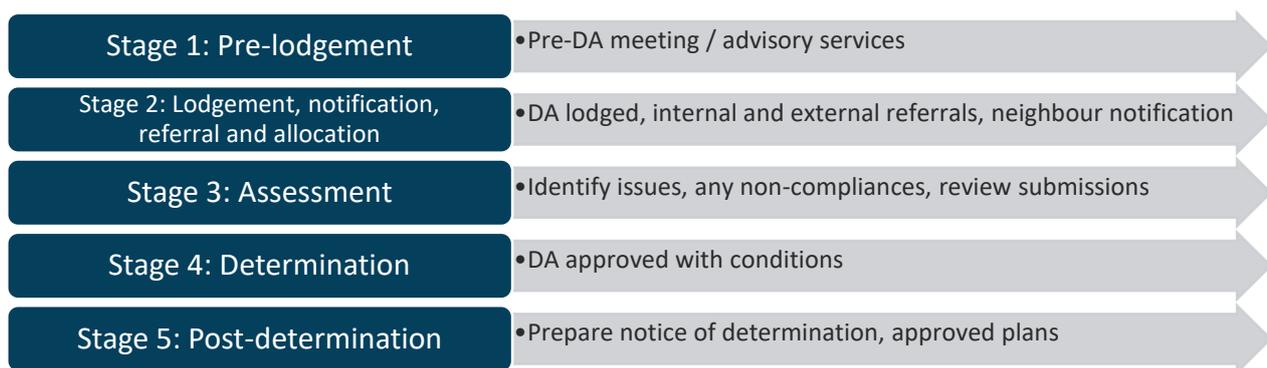


Figure 1 – Development Approval Process Overview

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 – for example, by specifying height limits;
- ensure construction is undertaken safely in a manner that minimises any associated environmental impacts for adjoining or surrounding properties;
- amend minor aspects of a development in a way that brings about the best possible environmental and planning outcomes – for example, by raising the heights of window sills or requiring the installation of a privacy screen on first-floor windows on the development site where necessary to address unreasonable overlooking 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 or ongoing noise limits; and
- comply with legal and statutory requirements.

Most importantly, conditions provide certainty to both the consent holder¹ and the community about the consent holder's obligations throughout the life of the development - from the time the development consent is granted to how the development is used.

¹ Consent holder means the applicant 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, using examples.

Validity

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

- be authorised by the Act, particularly section 4.17; and
- satisfy the **Newbury Test**.

As well as section 4.17 of the 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 *Coastal Management Act 2016* and section 7.13(3) of the *Biodiversity Conservation Act 2016*.

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.

The Newbury Test

The Newbury Test is named after a 1981 court case,² 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; and
- not be so **unreasonable** that no planning authority would have imposed it.

Planning purpose

The condition must have a **planning purpose**; that is, it must be related to a matter either expressly permitted or implied in the Act. For example, a planning purpose would include addressing any relevant matter for consideration that a council must take into account when determining a DA under section 4.15 of the Act.

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

Example

A 2004 case,³ 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,⁴ 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 Act does not allow a council to acquire land; this power is found in the *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,⁵ the court found that a condition imposed for a right of carriageway at the back of a four 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**.

Example

In a 2005 case,⁶ 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.

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

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

⁵ *Dogild Pty Ltd v Warringah Council* [2008] NSWLEC 53.

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

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 Act, and amount to an offence and may lead to enforcement action and penalties.

All conditions of consent should be written using plain English to promote clarity and enforceability – see the section on writing conditions for further information.

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.

Consistency is a simple but effective way to create an easier system for applicants and certifiers, while also reducing workloads for assessments planners and limiting unlawful conditions and delays in the development assessment process.

Example – Consents involving building works

You should generally structure a development consent involving building work in the following way:

- **Part A – General conditions**
- **Part B – Before the issue of a construction certificate**
- **Part C – Before the commencement of building work**
- **Part D – While building work is being carried out**
- **Part E – Before the issue of an occupation certificate**
- **Part F – Occupation and ongoing use**

You may require additional parts – for example, you may need a section on conditions that must be satisfied before demolition work or the issue of a subdivision certificate (where applicable).

The structure of a consent should reflect the nature of the development and the manner in which it is to be carried out. Whilst the above structure may be suitable for development involving building works, it may not be appropriate, for example, for other types of development, such as the use of land, or development that has several stages.

Notice of determination

The notice of determination provides the consent authority's decision in relation to the DA. Clause 100 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:

- dates from which the consent operates and lapses;
- the approval bodies (as in, the relevant State agencies) that have given General Terms of Approval (GTAs);
- whether the applicant and any objector has a right of appeal against the determination; and
- deferred commencement (if required).

Advisory notes

Advisory notes may be provided in the notice of determination but won'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.

Examples include the need to:

- obtain other separate approvals if required (for example, approvals under section 68 of the *Local Government Act 1993* and section 138 of the *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; and
- 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 clause 100(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”⁷;
- reasons should not be expressed in “vague generalities”⁸; 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”⁹.

Best practice compliance with the above principles and the requirement in clause 100(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.

⁷ *Comcare Australia v Lees* [1997] FCA 1415.

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

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

Writing the conditions

Structure of individual conditions of consent

A consistent structure should be used within each condition that follows four simple considerations: when, who, what and how:

- **When** is the condition to be enacted or fulfilled?
- **Who** are the responsible parties in this condition?
- **What** are the specific requirements?
- **How** the requirements are to be satisfied?

Example - Basement car parking details

Before the issue of the relevant construction certificate [WHEN], a suitably qualified civil/traffic engineer [WHO] must review the vehicle access and parking layout and provide written certification on the approved plans to satisfy the certifier that [HOW]:

- All parking space dimensions, driveway and aisle widths, driveway grades, transitions, circulation ramps, and other trafficked areas comply with AS 2890.1-2004 Off street parking facilities. [WHAT]
- A height of <XXm> (depends on the size of the trucks to be used) must be provided over the designated garbage collection truck manoeuvring areas within the basement (if onsite garbage collection is proposed). [WHAT]
- No doors or gates are located in the access driveways to the basement car park that prevent access for internal garbage collection from the basement garbage storage and collection area. [WHAT]

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 (DCP) (either “as modified” or at a particular point in time).

Number of conditions

Consent authorities should aim as far as possible to minimise the number of conditions imposed on a development consent – doing so will make it easier for the consent holder to understand what is required by the consent. While limiting the number of conditions imposed on a consent 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; and
- 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).

Drafting principles

Other important principles in drafting conditions include:

Use plain English wherever possible. This means avoiding terms like “pursuant to” or “prior to” and just saying “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.

Be aware that expressions like “generally in accordance with” will allow some variance in compliance – avoid them as much as possible, particularly if strict compliance with a requirement is necessary.

Example - Hours of operation

In an instance where a council had failed to outline the approved hours of operation for a commercial laundry, the court¹⁰ found the premises were effectively afforded 24/7 operational hours.

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 as 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 as this will result in 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, the consent holder must ensure all wastewater and stormwater treatment devices (including drainage systems, sumps and traps, and onsite detention) are regularly maintained to remain effective and 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.

¹⁰ *Ryde Municipal Council v Royal Ryde Homes* (1970) 19 LGRA 321.

Avoid restating legislative requirements and instead consider using advisory notes to draw the applicant'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 (NCC)) because the prescribed conditions under Part 6 Division 8A of the EP&A Regulation require this already.

Where necessary, provide advisory notes to communicate the purpose or objective of a condition - remembering 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 DCP provisions. Clearly establish the obligation within those documents that must be satisfied to ensure it can be enforced in the future as these documents often change over time.

Clarify whether the reference to a DCP is at a point in time or refers to the DCP as amended from time to time, depending on whether flexibility is needed. If the former, reiterate the specific requirements of the DCP 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 which 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.

A 2019 court¹¹ decision provides that although a document which 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 DCPs are correct and there are no conflicting requirements between different conditions. Compliance with one condition should not prevent compliance with any other condition.

Common conditions

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 clause 55 of the EP&A Regulation.

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

¹¹ *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* [2019] NSWCA 147.

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 1500 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 applicant must provide the relevant construction certificate plans 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 DCP.

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 2.0m 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 standard conditions

Many councils prepare standard conditions of development consent for different types of development to provide clear and consistent conditions for their local government area. As the impact of each development may vary, ensure each standard condition is necessary and appropriate for the proposed development.

Examples of standard conditions could include:

- preparation of a construction site management plan; or
- preparation of an erosion and sediment control plan.

Example council standard condition - Detailed stormwater drainage system design

Before the issue of a construction certificate, the certifier must approve a detailed stormwater drainage plan for the safe disposal of stormwater from the site, prepared in accordance with Council's "Appendix <x> – Engineering Specifications of the <Council>Development Control Plan" (as amended from time to time).

Order standard conditions to align with the timeline of the development process.

Deferred commencement conditions

Deferred commencement conditions¹² 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.¹³

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 a consent being declared invalid, if it is legally challenged.

Example - Seniors housing deferred commencement for civil works

A 2020 court case¹⁴ 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 which is critical for the operation of the consent.

¹² Imposed under section 4.16(3) of the EP&A Act.

¹³ Clauses 95 and 100(4) of the EP&A Regulation.

¹⁴ *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41.

For example, securing a right of carriageway to enable access to a site which 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; and
- 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.¹⁵ Clause 161(2) of the EP&A Regulation "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".¹⁶

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."

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 clause 161(2) of the EP&A Regulation.

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.

¹⁵ Section 6.29 of the Act and clause 161(2) of the EP&A Regulation.

¹⁶ *Baulkham Hills Shire Council v Dix* [2004] NSWLEC 404, Talbot J at [15].

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 DCP controls;
- use separate conditions for the preparation, approval, and implementation (including timing) of the plan; and
- 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.

Prescribed conditions

Prescribed conditions are conditions that must be applied to certain types of development.¹⁷

Part 6 Division 8A of the EP&A Regulation sets out the prescribed conditions, which are to be included in development consents if relevant to the type of development the subject of the relevant consent.

These prescribed conditions relate to:

- compliance with the Building Code of Australia and insurance requirements under the *Home Building Act 1989*;
- erection of signs relating to the principal certifier;
- notification of building requirements under the *Home Building Act 1989*;
- specific requirements for entertainment venues and maximum capacity signage; and
- specific requirements relating to shoring and adequacy of adjoining properties.

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.

Modification 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 Act).

It is well-established¹⁸ that modifying a consent may involve modifying or imposing additional conditions of consent. Therefore:

- 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.

Staging development

Part 6 of the 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.

¹⁷ See section 4.17(11) of the Act.

¹⁸ *1643 Pittwater Road Pty Ltd v Pittwater Council* [2004] NSWLEC 685 at [51]-[52].

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.