

Guiding Development — Practice Notes

Conditions of development consent

The purpose of this practice note is to provide advice to councils on imposing conditions on development consents.

A fundamental shift

In the new process conditions of consent play a different role. Matters previously addressed at the building application stage (such as site management requirements and construction hours) must be brought forward to the development consent. This is because conditions generally cannot be attached to a construction certificate.

Furthermore, now that the entire development and construction process (through to occupation) is covered in the one piece of legislation, the opportunity exists to coordinate conditions to better reflect the stages in the process.

When can conditions be imposed?

The starting point on conditions is the provisions of the Environmental Planning and Assessment Act 1979 (the Act). Section 80A(1) outlines the scope for conditions:

'Conditions — generally

- (1) A condition of development consent may be imposed if it:
- (a) relates to any matter referred to in section 79C(1) of relevance to the development the subject of the consent, or
 - (b) requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or
 - (c) requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or
 - (d) limits the period during which development may be carried out in accordance with the consent so granted, or

- (e) requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or
- (f) requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 79C(1) applicable to the development the subject of the consent, or
- (g) modifies details of the development the subject of the development application, or
- (h) is authorised to be imposed under section 80(3) or (5), subsections (5)-(9) of this section or section 94.'

Division 10 covers existing uses; section 80(3) and (5) refer to deferred commencement and staged development respectively; section 80A(5) refers to regulations for modification and surrender of consents or existing uses; section 80A(6)–(9) details conditions concerning security arrangements and section 94 refers to developer contributions.

Section 80A also covers ancillary aspects of development, using performance-based conditions (both covered below), and use of the regulations to prescribe conditions (subsection 11).

Prescribed conditions in the Regulation

The Environmental Planning and Assessment Regulation 1994 (the Regulation), in Part 7 (clauses 78–78I), lists various conditions that are prescribed (and therefore mandatory) for all development consents and complying development certificates.

The conditions relate to:

- compliance with the Building Code of Australia (BCA) and possible exemptions
- compliance with Class 1 fire safety provisions for change of building use
- requirements of the *Home Building Act 1989*
- excavation and backfilling requirements
- retaining walls and drainage considerations

- support for neighbouring buildings (where necessary)
- protection of public places
- signage on-site
- adequate toilet facilities.

Councils, in the case of development applications (DAs) and complying development certificates, and accredited certifiers in relation to the latter, should advise applicants of this by advisory note (see below).

Conditions previously imposed at the BA stage

The role of construction certificates (unlike building applications (BAs) under the old system) is, among other things, to certify compliance with the BCA. They are non-conditional (with a few minor exceptions). As a result, some conditions councils may have imposed at BA stage could now be imposed on development consents. For instance, conditions relating to construction hours, erosion and sediment control, control of dust, pedestrian movement, tree protection, and other site and construction management requirements.

Councils should not nominate the inspections required as this should be at the discretion of the principal certifying authority (PCA) — an accredited certifier or the council (in this other capacity). Councils may use an advisory note to list the inspections it would require if chosen as the PCA (see Practice Notes: The role of the principal certifying authority and The use of compliance certificates).

Framing conditions mindful of the role of certification

1 Nominating clear, unambiguous outcomes

As a result of the new certification regime, with the potential for private certification of all post-development consent actions, conditions need to be carefully drafted to enable clear interpretation by accredited certifiers. Certifiers must be able to come to the same conclusion as council officers.

There are a number of options:

- tying conditions to Australian Standards and other established codes
- tying conditions to standards/criteria in development control plans (or other technical policies)

- nominating performance outcomes (for instance, noise levels at property boundaries) — see section 80A(4) of the Act which expressly allows for such conditions.

2 Requiring compliance certificates

Councils need to be careful if requiring compliance certificates (certifying plan/specification details or as evidence of work completed) to ensure that a sufficient pool of accredited certifiers exists in the market place. Otherwise the condition may only be satisfied by council staff, defeating the competitive spirit of the legislation.

In addition, councils must ensure that the PCA (who may be private) is not precluded from relying on other forms of evidence.

It is suggested that, at least in the short term, conditions refer to ‘a compliance certificate or other form of documentary evidence’.

3 Tying conditions to post-determination stages: what information and when?

In drafting standard conditions and in determining submission requirements for applications it is suggested that councils consider the timing of requirements — what information or action and when.

- Detailed design and specifications will accompany the construction certificate application (see Practice Notes: Construction certificates for building work and Construction certificates and the BCA).
- Certain actions may be required before work begins or buildings are occupied.

In the last case the notice that council receives two days before work begins is an opportunity to check compliance and take appropriate action. For instance, that site management measures are in place. Similarly, a service agreement with a private PCA (or council’s PCA policy) may include a check on pre-occupation conditions. If not, in cases with a private PCA, receipt by council of the occupation certificate is an opportunity for action (including enforcement).

Ancillary matters to be finalised

Conditions can still require ancillary details to be provided to the satisfaction of council (or delegate). However, the Act (section 109O) and Regulation (clause 79V) state that, for the following matters, such conditions are to read as council or accredited certifier (as both are certifying authorities):

'Certifying authorities may be satisfied as to certain matters: section 109O

Any requirement for a consent authority or council to be satisfied as to any of the following matters, being a requirement that arises from the conditions of a development consent, is taken to have been complied with if a certifying authority is satisfied as to that matter:

- (a) any matter that relates to the form or content of the plans and specifications for the following kind of work to be carried out in connection with the erection of a building or the subdivision of land:
 - (i) earthwork
 - (ii) road work, including road pavement and road finishing
 - (iii) stormwater drainage work
 - (iv) landscaping work
 - (v) erosion and sedimentation control work
 - (vi) excavation work
 - (vii) mechanical work
 - (viii) structural work
 - (ix) hydraulic work
 - (x) work associated with driveways and parking bays, including road pavement and road finishing
- (b) any matter that relates to the external finish of a building.'

Councils should note that, where such matters are deferred commencement requirements, accredited certifiers can issue a compliance certificate, and the consent can operate.

In addition, section 80A(3) of the Act and clause 67A(3) of the Regulation specify a 28-day deemed refusal period (for the purposes of an appeal) for resolution by council of ancillary details.

Conditions on rationalised approvals

Rationalised approvals are those development consents that also cover certain Local Government Act approvals, such as stormwater drainage, sewerage works or the installation of solid fuel heaters. Including these matters with the DA is the applicant's choice.

In these cases councils must check if there are any prescribed conditions in the Local Government (Approvals) Regulation 1993 and may add them to the consent. Such conditions may be time-limited or may attach to the applicant not the land (see section 78A(6) of the Act).

Complying development conditions

The prescribed conditions listed above also apply to complying development. In addition, councils must pre-determine other conditions to be automatically applied to complying development certificates (see Practice Note: Complying development).

Use of Advisory Notes

There are a number of instances where it is inappropriate to specify requirements as conditions of consent:

- advising that a construction certificate is required
- advising of the prescribed conditions in the Regulation
- listing inspections council will require if chosen as PCA
- advising of requirements of other Acts (such as a *Roads Act 1993* approval).

In such cases, advisory notes are appropriate. Such notes are provided as advice only and do not have the status of conditions. Standard notes can be developed accordingly.

Conditions concerning security

Councils are able to impose conditions requiring security to repair damage or to complete certain works. The security may be provided at the applicant's choice by way of either a deposit with council or a guarantee satisfactory to council. Any balance not spent for the purpose of the security must be refunded. See section 80A(6)–(10) of the Act.

There are new specific appeal rights for applicants who are dissatisfied with a condition concerning security or with the failure or refusal of council to release a security: see section 98A of the Act.

Conditions for integrated development

Integrated development is development that requires one or more approvals from specified State agencies as well as a development consent. Councils must refer these DAs to the relevant State agency and impose the conditions identified by that agency — council is able to impose any condition on the consent that the agency could impose as a condition of its own approval.

Councils should make sure that the other conditions of consent are consistent with and do not contradict the general terms specified by the agency. While it is possible to negotiate integrated development conditions, the final requirements are for the State agency to decide.

Is there any change to the collection of section 94 contributions?

Currently section 94 contributions or requirements need to be imposed as conditions of a development consent. The 1998 amendments have not changed these operations. When a contribution is to be paid, works carried out, or security given for works to be completed, depends upon the type of development and the drafting of the development consent conditions.

Is there any change to the lapsing of development consents?

Councils still have the ability to limit, as a condition of development consent, the period during which the development can be carried out. This can be less than a five-year period (but must be at least two years).

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Update Note

Since this practice note was issued in September 1999, the department has changed its name to PlanningNSW. This practice note has been updated to reflect this, along with changes to contact details.