

Guiding Development – Practice Notes

When is a section 96 modification required?

The purpose of this practice note is to provide advice to councils and applicants on when an application is required to modify a development consent and on how the process operates.

Section 96 of the *Environmental Planning and Assessment Act 1979* (the Act) allows you to modify a development consent that has been granted without the need for a new consent to be issued.

There are two types of modification applications that can be made — a minor modification under section 96(1) or an application under section 96(2) for other modifications.

To modify a development consent you must be entitled to act on the consent. That is, you must be either the applicant or the owner of the land, or authorised by the owner to act on the consent.

How do you correct minor errors?

If your application is to correct a minor error, misdescription or miscalculation, the council does not need to advertise, assess the environmental impacts or determine whether the development will remain substantially the same. This is allowed under section 96(1) of the Act.

To use the minor error modification provision you will need to convince the council that:

- an error has been made in the approved plans, or a condition imposed by council, that is an incorrect description or is numerically incorrect, for example, a miscalculation of the height of a window
- the error is minor or trivial.

Council decides whether the minor error provisions can be used to modify a development consent.

When would you need to modify a development consent?

You may need to modify the consent when your detailed building plans are different to the plans approved with the consent. Alternatively, you may wish to change an operational aspect of the development (such as hours of operation for commercial premises).

Because your building plans will be compared with the approved development application (DA) plans when you apply for a construction certificate, it will be at this stage that the need for any modifications will be identified.

Plans that are different to the approved plans because they show compliance with consent conditions, or include additional details to show compliance with the Building Code of Australia (within the building), would not require an application to modify the consent.

You will need to modify the consent where you change your plans so that:

- the external envelope of the building is changed — where windows are moved, heights are changed or plant rooms are added
- rooms are moved or enlarged
- a specific requirement of a condition of consent has not been met.

A modification would also be required if you want to intensify the use approved by the consent, or change an operational aspect of the development so that it will cause different environmental impacts.

How do I modify an old development consent? Why?

Under section 96 of the new legislation. Development consents granted before July 1998 are taken to be development consents under the new legislation.

Notification and referral requirements

Where the original DA was for designated development, if council's LEP specified certain development as 'advertised development', or if the original DA was notified under a notification development control plan, then the minimum notification requirement is for notice to be published in a local newspaper in accordance with clause 72A of the Environmental Planning and Assessment Regulation 1994.

Consultation is required with the Minister, a public authority or an approval body in respect of any conditions imposed as a result of concurrence or integrated development procedures. They have 21 days to object. In addition, where the original consent involved threatened species, council must obtain the concurrence of the National Parks and Wildlife Service.

Who do you apply to?

Whoever issued the consent. This is normally the council, but it may be the Land and Environment Court (the court) or the Minister for Urban Affairs and Planning. You will need to contact the consent authority to get an application form.

What issues will be assessed in your application?

To consider your application, the council will examine:

- the environmental impacts of the modification (see section 79C of the Act)
- whether the modified development remains substantially the same development
- any submissions resulting from notification and referrals.

There have been many court cases that have focused on what is, or is not, 'substantially the

same development'. When you apply to modify a development consent you will need to convince the council that the development remains substantially the same.

A development will not be substantially the same if a fundamental condition of consent is modified.

How is an existing building approval amended? Why?

Under section 96(2) of the Act, or by issuing a construction certificate for the modified works, if work is proposed. The existing building approval is taken to be both a development consent and a construction certificate (clauses 45 and 46 of the Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 respectively).

Conditions of the development consent may need to be amended under section 96(2) to enable the issue of a construction certificate.

In other circumstances this will be unnecessary. The modification can be achieved by the issue of a modified construction certificate (because the building approval is deemed to be a construction certificate). Examples of this situation could be technical changes internal to the building that do not result in external change or affect the nature of the approval, such as redesigning the kitchen layout or moving internal doors.

Can I modify my Part 12 subdivision consent? How?

Yes. In the same way it was amended or modified before the new legislation came into force. Part 12 subdivision consents have been treated differently from development and building approvals and have not been given an equivalent under the new legislation.

Appeal rights

Applicants have a right of appeal to the court against council's or the Minister's decision (including a deemed refusal period of 40 days). However, there is no such appeal in relation to State significant development or where the consent was granted by the court.

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