

# Summary of Selected Complaints & Investigations

Edition 2: June 2010

The Summary details selected complaints made to the Board about the conduct of accredited certifiers. It is intended to assist accredited certifiers, consent authorities and the public to achieve good outcomes from the certification process.

Complaints relating to the certification process can, in most cases, be avoided when all parties to the process – the landowner/developer, consent authority and certifier – are completely aware of their responsibilities and obligations.



Building  
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# Case study 1: Lapsing of development consents – required notice details

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## The complaint or issue

The certifier issued a construction certificate after the development consent had lapsed.

## Details

Council issued development consent to allow for alterations and additions to an existing dwelling house. Council identified the 'Notice of Determination' as being 1 June 2004. An 'advisory note' on the development consent stated:

*This consent will lapse unless the development is physically commenced within two (2) years from the endorsed date of this consent, in accordance with section 95 of the Environmental Planning and Assessment Act 1979.*

Section 95 of the *Environmental Planning and Assessment Act 1979* (the EP&A Act) states that, in the absence of works physically commencing on the land, a development consent lapses five years after the date from which it operates. At the time of issuing the consent, legislation allowed for the consent authority to reduce the life of the consent to two years (as sought by the council in the advisory note).

A certifier was engaged to issue the construction certificate for the approved buildings works and this was issued on 20 April 2007.

Council was of the view that without an extension to the consent being granted, the development consent lapsed on 1 June 2006 and a construction certificate should not have been issued.

## Findings and outcome

Clause 100(1) of the Environmental Planning and Assessment Regulation 2000 (the EP&A Regulation) states that a notice of determination of a development application must contain, amongst other things:

- The date the determination was made
- The date from which any development consent granted operates
- The date on which any development consent granted lapses.

While the development consent identified the date on which the determination was made, the determination notice failed to specify the date on which the consent would lapse.

The Board found that the allegation was not proven.

### TIP: Councils are reminded:

- A notice of determination of a development application must contain the information required by clause 100 of the Regulation.
- With the commencement of the Environmental Planning and Assessment Amendment (Development Consents) Act 2010 on 26 May 2010 where a development consent was the subject to a reduction in the lapsing period under section 95(2) of the EP&A Act and the consent was operating on 22 April 2010, a consent will not lapse until five years after the date from which the consent operated.
- <http://www.planning.nsw.gov.au/PlanningSystem/Circularsandguidelines/PlanningSystemCirculars/tabid/21/language/en-US/Default.aspx>

- The date from which the consent operates and the date it lapses must be clearly marked, preferably on the front of the notice or as a condition of the development consent.
- 'Advisory notes' to development consents do not have the status of conditions.

## Case study 2: Consistency of construction certificate plans with development consent

### The complaint or issue

Plans that accompanied the construction certificate and approved by the certifier differed from those approved by the development consent.

### Details

Council issued development consent allowing for the demolition of an existing building and the erection of a new two storey dwelling. A certifier was engaged to issue the construction certificate. The certifier issued the construction certificate allowing for, amongst other things, a change to the roof profile, a change to the front balcony and a change to the roof material.

### Findings and outcome

The plans accompanying the construction certificate were found to be inconsistent with the development consent.

Clause 145(1) of the EP&A Regulation states that the certifying authority can only issue a construction certificate for building work if:

- the plans and specifications for the building include matters as required by a BASIX certificate
- the building complies with the relevant requirements of the Building Code of Australia (BCA)
- the design and construction of the building are not inconsistent with the development consent.

By not requiring that the design and construction of the building to strictly accord with the development consent, the EP&A Regulation recognises that limited variations may occur.

The certifier was of the view that the differences between the plans approved by the development consent and those approved by the construction certificate were, in part, due to the extraordinary amount of detail that was provided on the construction certificate drawings.

It is widely recognised that plans and specifications relied upon for the purposes of obtaining a construction certificate will invariably contain a greater level of detail than those submitted with the development application. The additional details provided on the construction certificate plans were seen as modifying the development.

The Board found that the allegation was proven and the certifier was reprimanded.

**TIP:** Practice Notes entitled 'When is a section 96 required?' and 'Construction certificates for building work', from the Department of Planning's *Guiding Development: Better Outcomes*, continue to be particularly relevant to the issue of consistency between the development consent and the construction certificate.

## Case study 3: Access requirements and consistency with development consent

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### The complaint or issue

A certifier issued a construction certificate which was inconsistent with the development consent in that an access ramp was provided external to the development.

### Details

Council issued development consent allowing for alterations and additions to an existing hotel to provide a dining area, kitchen, poker machine area and toilet facilities on the ground floor and a function room on the first floor. A certifier was engaged to issue the construction certificate for the proposed building works.

A condition of the development consent required the building to be provided with adequate means of access for persons with disabilities to comply with the BCA and the *Disability Discrimination Act 1992*. To satisfy this condition, the construction certificate drawings identified a step ramp to the main entrance to the building which encroached on council's footpath. Plans approved by the development consent did not identify a step ramp on the public footpath. The certifier issued the construction certificate allowing the step ramp on council's footpath.

The certifier believed it was necessary for the access arrangements to be external to the site's boundaries to preserve the hotel's heritage values and argued that to enable the alterations and additions to the hotel to occur, as approved by the consent, the required access arrangements would need to be provided on the public footpath.

### Findings and outcome

Notwithstanding that a condition of the consent required adequate access to be provided for persons with disabilities, the plans approved by the development consent did not permit works to encroach on the public footpath.

If the certifier believed that to satisfy the condition the hotel's heritage values would be adversely impacted upon or that works sought to be undertaken could not reasonably proceed, the certifier should advise the applicant to enter into discussions with council to modify the development.

The Board found that the allegation was proven and the certifier was reprimanded.

#### TIP: Councils and certifiers are reminded:

- When imposing conditions, councils should consider whether the works triggered by a condition can be reasonably undertaken or have the potential to affect other aspects of the development such as heritage.
- Where a certifier proposes to approve significant design changes to comply with a condition of consent, they should consult with council to ensure the intent of the condition is understood and met.

# Case study 4: Issuing a construction certificate without ensuring the payment of section 94 contributions

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## The complaint or issue

An accredited certifier issued a construction certificate prior to section 94 contributions being paid to council.

## Details

Council issued development consent for the demolition of an existing dwelling house and the erection of a pair of semi-detached dwellings. A certifier was engaged to issue the construction certificate.

A condition of the development consent required the payment of section 94 contributions to council prior to the issue of the construction certificate. A cheque was drawn by the applicant (made payable to the council) and provided to the certifier, who indicated it would be forwarded to council together with the approved construction certificate.

Council did not have a record of receiving the construction certificate or the accompanying cheque. The applicant subsequently cancelled the cheque and arranged for a new cheque to be drawn.

The condition relating to the payment of section 94 contributions stated that the contribution rates would be indexed against the Consumer Price Index and that the amount to be paid would be determined at date of payment.

As a result of the delayed payment, the applicant was required to pay a higher section 94 contribution.

## Findings and outcome

The section 94 contribution should have been paid prior to the certifier issuing the construction certificate as required by clause 146(b) of the EP&A Regulation. The delay in paying the section 94 contributions resulted in financial hardship for the applicant.

Section 31(4)(g) of the *Building Professionals Act 2005* (BP Act) allows the Board to require the certifier to pay a complainant an amount (not exceeding \$20,000) by way of compensation for any damage suffered.

The Board found that the allegation was proven and the certifier was reprimanded. As a result of other investigations the certifier was fined \$2,000 and required to pay compensation to the complainant in the order of \$200.

### TIP: Certifiers are reminded:

- Where a condition of consent requires payment of section 94 contributions prior to the issue of a construction certificate this does not permit payment with the lodgement of the construction certificate with council.
- Cheques or other payment intended for someone else should not be handled by certifiers.

## Case study 5: Impact of development consent conditions on construction certificates

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### The complaint or issue

Plans accompanying the construction certificate were inconsistent with development consent.

### Details

Council considered a development application for an attached dual occupancy with a floor space ratio of 0.57:1. Council issued development consent for the development subject to a condition requiring the floor space ratio to be reduced so as not to exceed 0.5:1.

A certifier was engaged to issue the construction certificate. Plans accompanying the construction certificate issued in June 2004 were not amended to reduce the floor space ratio. Construction of the dual occupancy development proceeded in accordance with plans approved by the construction certificate. Council became aware of the non-compliance with the condition of consent following an application being submitted to council in 2007 to subdivide the site into two Torrens title lots.

In February 2009, the Land and Environment Court dismissed an appeal against council's refusal of a section 96 application to delete the relevant condition. The applicant converted a number of the bedrooms to balconies to satisfy the condition of consent.

### Findings and outcome

As the complaint was lodged with the Board more than three years after the issue of the construction certificate, the complaint was dismissed, pursuant to section 23(g) of the BP Act.

**TIP:** Consent authorities are reminded that conditions of development consents are required to provide certainty for the applicant, the developer and the general public. While the condition provided for a definable outcome (a floor space ratio not exceeding 0.5:1 consistent with the requirements of council's DCP), a definable outcome with respect to the design, form and appearance of the development could not be similarly guaranteed.

It is the certifier's responsibility to review consent conditions and to incorporate changes in the construction certificate drawings. If this is unclear the person with the benefit of consent should discuss with council.

## Contacting the Board

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