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The law in relation to unlawful development in NSW

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1. When is Development Unauthorised?

The principal provisions which limit the carrying out of development in New South Wales are sections 76A and 76B of the *Environmental Planning and Assessment Act 1979* ['the Act'][1]. These provide:

> ***76A Development that needs consent***
>
> *(1)* ***General***
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> *If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless:*
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> *(a) such a consent has been obtained and is in force, and*
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> *(b) the development is carried out in accordance with the consent and the instrument.*
>
> ***76B Development that is prohibited***
>
> *If an environmental planning instrument provides that:*
>
> *(a) specified development is prohibited on land to which the provision applies, or*
>
> *(b) development cannot be carried out on land with or without development consent,*
>
> *a person must not carry out the development on the land.*

A development may therefore be unauthorised in one of three ways. Either:

(1) consent was required under s 76A and has not been obtained;

(2) consent has been granted, but the development is not being carried out in accordance with the consent; or

(3) the development is prohibited pursuant to s 76B.

Of course, in order to fall within these provisions, there must first be a "development" within the meaning of the Act. "Development" is defined in s 4, and includes "the use of land". So, for example, a change of use of a house from a dwelling to a boarding house is a form of development. Erection of a building, carrying out of a work, subdivision of land and demolition of a building or work are also included in the definition.

1.1. Environmental Planning Instruments

Most land in New South Wales is now affected by Local Environmental Plans ('LEPs'). Local Environmental Plans are one type of Environmental Planning Instrument ('EPI'). LEPs are statutory instruments drafted by councils and approved by the Minister administering the Act, which are published in the Government Gazette, whereupon they

[1] This paper does not deal with environmental assessment under Part 5 of the *EP&A Act 1979*, development by the Crown under Part 5A, or projects which are subject to Ministerial approval under Part 3A, which commenced in August 2005.

become binding on both planning authorities and citizens. Typically, LEPs divide local government areas into geographic 'zones' according to the type of development which can be carried out in each zone. Typically the LEP lists, in respect of each zone, development which may be carried out without consent, development which may be carried out only with development consent, and development which is prohibited.

Deciding which category a particular development falls into is a question of statutory interpretation. Some purposes of development listed in the zoning tables will be defined in the body of the LEP. Many LEPs adopt a set of standard definitions of types of development from the *Model Provisions 1980*. However in many cases, there are subtle differences in the definition of the same term in different LEPs.

In 2005 the State Government initiated a process of standardisation of LEPs through amendments to the Act and preparation of a Standard Instrument. At the time of writing, the draft Standard Instrument was on exhibition. Once the Standard Instrument is gazetted, all new planning instruments will have to include mandatory provisions from the Standard Instrument[2], therefore in the future there is likely to be greater consistency in the terms and therefore the interpretation of LEPs. However it is difficult to predict how long the process of standardising all LEPs will take. In the meantime the old definitions will continue to apply.

The interpretation of zoning tables is complicated by the fact that, rather than specifying all of the uses which are (1) permissible without consent, (2) permissible with consent and (3), prohibited, usually an LEP will only specify the uses in two of the categories, and the third category will encompass all uses otherwise listed. For example, the purposes for which development is prohibited in the zone may be defined as 'any purpose not listed' (in either the permissible with consent category or the permissible without consent category). Uses defined by their absence are referred to by the Court as 'innominate uses'[3].

The draft Standard Instrument similarly provides that LEPs must specify that uses which are not specifically referred in the instrument are either permissible with consent or prohibited[4]. The difference appears to be, that in the Land Use Matrix under the Standard LEP, the majority of uses will be either expressly prohibited or permissible, and the 'innominate' category will be a residual one.

Where Council has taken the trouble to define a comprehensive list of uses in an LEP, it often takes the view that each of these uses is discrete, and where one purpose is listed in the zoning table as prohibited, the prohibition does not affect another purpose defined elsewhere in the LEP, even though it may ordinarily be regarded as a sub-set of the prohibited use. For example, in *Egan v Hawkesbury City Council*[5] the LEP had a definition of 'industry' and 'extractive industry'. The LEP listed 'industry' as a prohibited use in the zone in which the development was located, and stated that uses which were not expressly prohibited were permissible. The Council took the view that this meant that an extractive industry was permissible, because it was a separately defined use not expressly prohibited, however the Court of Appeal treated 'extractive industry' as a sub-

[2] S 33A.
[3] *Drake & Ors; Auburn Council v Minister for Planning and Anor* [2003] NSWLEC 270 at [71].
[4] Draft Standard Instrument (Local Environmental Plans) Order 2004, cl 12.
[5] (1993) 79 LGERA 321.

set of 'industry' and therefore found that it was is prohibited along with other types of industry[6].

This principle was recently re-stated in *Drake & Ors; Auburn Council v Minister for Planning and Anor; Collex Pty Ltd* by Bignold J[7]:

> *Thus, the crucial question is whether the proposal ' truly ' falls within the ambit of the permissible purpose ' freight transport depot '. If it does, it is wholly irrelevant to go further to enquire whether it is also properly categorised as some other purpose of development….*

The LEP does not have the last word, however, on what development is permissible. The State government has gazetted a plethora of State Environmental Planning Policies ('SEPPs') and Regional Environmental Plans ('REPs') which vary or supplement the provisions of LEPs with respect to particular types of development or development in particular locations.

One of the most important is *State Environmental Planning Policy (Seniors Living) 2004*. This allows development for the purpose of seniors housing which complies with the policy to be carried out on any land zoned primarily for urban purposes, in spite of the fact that the development may be prohibited under the LEP (for example, this may consist of a hostel or medium density housing in a zone where only single dwellings are permissible). Certain types of seniors housing may also be carried out on land which *adjoins* land zoned for urban purposes[8]. The question of what land should be taken to be zoned for urban purposes and what constitutes "adjoining" land was the subject of consideration in a number of cases relating to SEPP 5, the predecessor of this instrument[9].

SEPPs and REPs may also be relevant to the interpretation of terms of an LEP, for example some provisions have been introduced into planning instruments to counter the effect of the interpretative approach adopted in *Egan* (cited above). Clause 9 of *SEPP No. 30 - Intensive Agriculture* provides that a reference to industry is not to be taken as a reference to rural industry. This means that where a LEP prohibits 'industry', and innominate uses are permissible, this does not make 'rural industry' prohibited, unless it is expressly included in the list of prohibited developments.

Perhaps the most frequently applied of the SEPPs is *SEPP 1 – Development standards*. The objective of the SEPP is expressed in cl 3:

> *This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.*

'Development standards' are defined in s 4 of the Act as follows:

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[6] *Ibid* at 329. Note that the effect of *Egan* specifically in relation to extractive industry has been reversed in many LEPs by changing the definitions of 'industry' to explicitly exclude 'extractive industries'. See *The Environmental Planning and Assessment Model Provisions 1980.*

[7] [2003] NSWLEC 270 at [60-61].

[8] SEPP (Seniors Living) 2004, cl 17.

[9] See *Modog v Baulkham Hills SC* (2000) 109 LGERA 443 and cases referred to therein.

development standards *means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

(b) the proportion or percentage of the area of a site which a building or work may occupy,

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

(d) the cubic content or floor space of a building,

(e) the intensity or density of the use of any land, building or work....

The list actually goes up to '(o)', but the above gives a general idea of the types of controls which will be treated as development standards.

The operative clauses of SEPP 1 are cl 6 and 7.

6 Making of applications

Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefor) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

7 Consent may be granted

Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3, it may, with the concurrence of the Director, grant consent to that development application notwithstanding the development standard the subject of the objection referred to in clause 6.

The need for *SEPP 1* arose because many LEPs prescribe the kind of development which may be carried out in each zone not only with reference to permissible uses in the zone, but also with reference to the physical characteristics of the development. So, for example, dwelling houses may be permissible in a 2(b) zone, but another clause may provide that consent shall not be granted to any dwelling house which is over 8m in height or occupies more than 50% of the lot on which it is situated. If such a clause were

given full effect, a dwelling house exceeding the controls would be prohibited, with or without development consent, and no application could be made to carry out such development unless it was subject to a direction by the Minister under s 89(1) of the Act.

SEPP 1 permits a development application to be made in respect of a development which does not comply with development standards, but is otherwise permissible. The application must be accompanied by a written objection to the effect that compliance with the development standard is unreasonable or unnecessary in the circumstances[10]. By virtue of SEPP 1, such development is not prohibited, but is permissible with development consent within the meaning of s 76A of the Act[11]. The manner in which SEPP 1 is applied in practice is described by Lloyd J in *Winten Property Group Ltd v North Sydney Council*[12].

The question of whether a particular development requires consent or is prohibited will often depend upon a disputed construction of terms in the applicable environmental planning instruments. The terms may be open to several interpretations. For example the question whether a particular building is a 'dwelling house'[13] and the meaning of 'natural ground level'[14] and 'mean high water mark[15]' have been the subject of argument in the Court.

In construing environmental planning instruments, the Court has frequently affirmed the relevance of the principles of statutory construction stated by the High Court in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)*[16]*:*

> *.... if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can intelligibly be applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem incongruous or unjust.*

Nevertheless, the instrument must be read as a whole[17], and when the meaning is ambiguous (and frequently it is), the Court will adopt a construction which tends to promote the purposes of the instrument and the Act in preference to one which does not[18]. The Court will ask – 'what is the purpose of the provision?'. Relevant factors may be the way in which terms are used elsewhere in the instrument, and whether reading a word in a particular way renders other sections in the instrument redundant.

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[10] Clause 6.
[11] See *Winten Property Group Ltd v North Sydney Council* (2001) 130 LGERA 79.
[12] *Ibid.*
[13] *Townsend v Lake Macquarie City Council* [2004] NSWLEC 38, *Wyong Shire Council v Ardi Pty Limited* (2000) 112 LGERA 85
[14] *Australand Holdings Ltd v Parramatta City Council* (2003) 128 LGERA 411, *Rizzi and Another v Rockdale Municipal Council* (1994) 85 LGERA 113 at 115, *MLC Properties and Another v Camden Council and Others* (1997) 96 LGERA 52 at 56.
[15] *Creighton v Sutherland Shire Council* [2001] NSWLEC 190.
[16] (1981) 147 CLR 297 (per Gibbs CJ at 305)[16].
[17] *Ibid* per Mason and Wilson JJ at 320.
[18] *Interpretation Act 1987*, ss 33, 34. See also subsection 5(6), inserted in June 2005.

1.2. Existing Uses

Developments which are plainly prohibited by an LEP may nevertheless be lawful because they enjoy existing use rights. An existing use is defined in s 106 of the Act as follows:

> *In this Division,* **existing use** *means:*
>
> *(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting that use....*

Section 107 provides protection for existing uses, subject to important qualifications:

> *(1) Except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.*
>
> *(2) Nothing in subsection (1) authorises:*
>
> *(a) any alteration or extension to or rebuilding of a building or work, or*
>
> *(b) any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or*
>
> *(c) without affecting paragraph (a) or (b), any enlargement or expansion or intensification of an existing use, or*
>
> *(d) the continuance of the use therein mentioned in breach of any consent in force under this Act in relation to that use or any condition imposed or applicable to that consent or in breach of any condition referred to in section 80A (1) (b), or*
>
> *(e) the continuance of the use therein mentioned where that use is abandoned.*
>
> *(3) Without limiting the generality of subsection (2) (e), a use is to be presumed, unless the contrary is established, to be abandoned if it ceases to be actually so used for a continuous period of 12 months.*

Section 107 effectively lifts the prohibition in s 76B of the Act with respect to an existing use. The limitations in subsection (2) prevent any change occurring or any further works being undertaken in reliance on an existing use without development consent being obtained. Section 108 of the Act (and the Regulations) further provide that consent may be granted to allow for rebuilding or alterations to buildings used for an existing use[19], and that consent may be granted to the enlargement, expansion or intensification of an

[19] s 108(1)(a), *Regs,* cl 41(1)(c).

existing use to a permissible use[20], or even to change the use of the land from an existing use [being commercial or light industrial] to another use [being commercial or light industrial] which would otherwise be prohibited[21]. Thus if land enjoys an existing use right [and if this existing use is commercial or light industrial in nature], this not only entitles the occupier to carry on the existing prohibited use, but also to apply for consent for another commercial or light industrial use which is unlawful under the applicable planning instruments.

It is important to arrive at an appropriate description of the 'existing use' carried out on the land to determine whether the use carried out on the land at the time when the existing use right was created is relevantly the same as the use carried on at the present time. An 'existing use' is not necessarily defined by reference to the categories of use as defined in the relevant planning instrument[22]. For example, the fact that an LEP separately defines use for the purpose of 'motor cycle repairs' and use for the purpose of 'car repairs' does not mean that an existing use right created when a motor cycle repair shop became prohibited cannot support legally a car repair shop at a later time, if the Court decides that the appropriate description of the existing use is 'motor mechanical repairs'[23].

Instead of looking at the categories in the LEP, the Court will ask *'what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date'*[24]. In *North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd*[25], Kirby P set out the following principles for defining existing uses:

1. *Defining the 'existing use' depends upon a detailed examination of the facts of each case. Inevitably there will be borderline cases where the characterisation of the use which is protected will be controversial and upon which minds may differ.*
2. *Nevertheless, the general approach to be taken is one of construing the 'use' broadly. It is to be construed liberally such that confining the user to precise activity is not required. What is required is the determination of the appropriate genus which best describes the activities in question.*
3. *In determining that genus, attention should be focused on the purpose for which the determination is being made. This is a town planning purpose. It therefore considers the use from the perspective of the impact of the use on the*

[20] s 108(1)(c), *Regs,* cl 41(1) as amended 29 March 2006 by the EP&A Amendment (Existing Uses) Regulation 2006 and amended on 9 February 2007 by the EP&A Amendment (Existing Uses) Regulation 2007.
[21] s 108(1)(b), *Regs,* cl 41(1) as amended 29 March 2006 by the EP&A Amendment (Existing Uses) Regulation 2006 and amended on 9 February 2007 by the EP&A Amendment (Existing Uses) Regulation 2007.
[22] *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 534-535
[23] The example is taken from *Dosan Pty Ltd v Rockdale City Council* (2001) 117 LGERA 363 at [68], however Lloyd J went on to find that no existing use had arisen in this case because, due to their separate definition and treatment in the LEP, neither the motor cycle repair shop nor the car repair shop were being carried on lawfully at a time when they became prohibited.
[24] *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 534-535.
[25] (1989) 16 NSWLR 50 at 59.

neighbourhood. This is because the regulation of the use within the neighbourhood is the general purpose for which planning law is provided.

To qualify as an existing use, the use must have been carried on lawfully at the time that the relevant planning instrument came into force prohibiting the use[26], for example development consent was required and the use had development consent, or development consent was not required and the use was carried on lawfully without development consent.

Often the situation is more complex. For example, the use may have commenced before any planning controls applied to the area. Later, a LEP came into effect which provided that this type of development was permissible with consent, however the development continued to be lawful without consent by virtue of s 109 of the Act which provides that *'(n)othing in an environmental planning instrument operates so as to require consent to be obtained for the continuance of a use of a building, work or land for a lawful purpose for which it was being used immediately before the coming into force of the instrument…*'. Section 109 enabled the use to be carried on lawfully up to the time when the latest LEP came into force which prohibited the use, and upon this date the use became an 'existing use' within the meaning of s 106.

The onus of establishing an existing use rests on the person asserting the existing use[27]. This involves proving all of the requisite elements, including that the use commenced lawfully or was subsequently sanctioned by the grant of consent[28]. Proving this can be difficult when uses stretch back to the first half of last century. Records of consents have often been lost, and witnesses who can testify to the ongoing use of the land for the alleged purpose may no longer be alive.

In some cases, the Court has been willing to use the presumption of regularity to assume that consent has been granted, where public authorities have taken subsequent steps which rely for their validity on the fact that consent was granted. In *Manicaland Pty Ltd v Strathfield Council*[29], Bignold J was willing to assume that consent had been granted to construction of a public housing development where actions which were subsequently taken by the Housing Commission depended for their regularity upon consent having been granted. However, in *Dosan v Rockdale*[30], Lloyd J said that the principle would not extend to inferring the existence of a consent when the only party who had acted in reliance on the supposed consent was the occupier of the land.

An existing use may be extinguished by abandonment[31]. If a use ceases for a period of 12 months or more, a rebuttable presumption of abandonment arises[32]. Whether a cessation in the use constitutes an abandonment is a question of fact to be determined having regard to all of the circumstances of the case. Abandonment of the use is not effected merely because the owner lodges a development consent to change the existing use to another

[26] *Steedman Baulkham Hills Shire Council* [No. 2] (1993) 80 LGERA 323.
[27] *Morris v Woollahra Municipal Council* (1966) 116 CLR 23 at 34.
[28] s 109A.
[29] [1997] NSWLEC 196.
[30] (2001) 117 LGERA 363 at 393.
[31] s 107(2)(e).
[32] s 107(3).

prohibited use[33]. The subjective intentions of the persons having control of the land, and their objective actions are both relevant considerations, as Hope AJA said in *Hudak v Waverley Municipal Council*[34].

> *... it is necessary to have regard to the whole of the circumstances, including the subjective intention of the relevant person, and to determine whether in the light of all those matters the cessation of actual use proved by the facts is outweighed by an asserted subjective intention to continue the use. Where there continues to be activity designed to continue a non-conforming use ... and the length of cessation of actual use is not very long, it may be easy enough to conclude that there has been no abandonment. If however years go by without actual use and particularly where the factor said to be delaying a resumption of the existing use is something of an indefinite character... there would be little difficulty in concluding that the cessation of use for a similar period of time involved an abandonment.*

1.3. Breach of Development Consent

Another circumstance in which development will be unauthorised is where a development consent has been granted, but the development is not being carried out in accordance with the development consent. Disputes often occur in relation to differences of opinion between the Council and the developer as to what the consent permits.

Consents for controversial developments may be granted after protracted negotiations between the consent authority and the developer over the details of the proposal, during which the parties may have made many representations to each other by way of reports, correspondence, undertakings etc, and the plans and conditions of consent may have been modified several times. This can lead to the conditions of consent being framed in terms which are not clear on their face, but rely on assumptions made by the parties in the course of discussions. Nevertheless, the Courts are obliged to construe a consent objectively, since a consent is a public document, and subsequent landowners, who were not party to original negotiations, will rely on the consent.

Interpretation of a consent is an exercise in objective textual construction. Mason P in *House of Peace Pty Ltd v Bankstown City Council* described the approach to be taken[35]:

> *How then is the language of historical consent to be construed? In* ACR Trading Pty Ltd v Fat-Sel Pty Ltd *(1987) 11 NSWLR 67 at 77 Kirby P (with whom Samuels JA and Hunt AJA agreed) referred to 'what, objectively determined, it might be said the Council meant by the permission which it gave to the... predecessor [in title]'. I respectfully agree, but with this emphasis. The search is not for what the council actually intended or what, if it had been interrogated about various possibilities, it would have said it intended. As an instrument [which operates in rem]... it must speak according to its written terms, construed in context but having regard to its enduring function....*

[33] *Woollahra Municipal Council v T.A.J.J. Investments Pty Ltd* (1982) 49 LGRA 123.
[34] (1990) 18 NSWLR 709 at 716-7.
[35] (2000) 106 LGERA 440 at 449.

Extrinsic evidence is usually not admissible to determine what the parties intended that the consent should mean, as the consent is a document which operates *in rem*, not an agreement between the parties. Hope JA in *Parramatta City Council v Shell Co of Australia Ltd* (No 2) said[36]:

> *.... it is not permissible, in order to determine what development has been approved, to construe the document constituting the approval in the same way as if it evidenced some inter partes transaction, for development approvals operate, as it were, in rem and may be availed of by subsequent owners and other occupiers of the land. The nature and extent of the approved development must be determined by construing the document of approval, including any plans or other documents which it incorporates, aided only by that evidence admissible in relation to construction which establishes, or helps to establish, the true meaning of the document as the unilateral act of the relevant authority, not the result of a bilateral transaction between the applicant and the council.*

In *Winn v D-G National Parks and Wildlife* the Court of Appeal held[37]:

> *As Hope J observed in* Auburn Municipal Council v Szabo *(1971) 67 LGRA 427, in determining what development a consent authorises, one looks primarily at the approval and construes it. The reason for this is that a consent is issued* in rem *and it would be inconvenient, to say the least, if one had to have regard to a series of documents to know what the consent authority intended to approve. The consent may incorporate another document if it does so expressly (not here relevant) or by necessary implication. In* Szabo *Hope J gave the example (at 434) of a council merely approving an application and no more. In such a case, the terms of the application would be incorporated by necessary implication.* Szabo *was applied by the Court of Appeal in* Sydney Serviced Apartments Pty Ltd v North Sydney Municipal Council (No 2) *(1993) 78 LGERA 404 at 407 - 408.*

2. Enforcement Measures

Councils seeking to stop unauthorised development may proceed in one of four ways: (i) an order under s 121B of the *Environmental Planning and Assessment Act 1979*, (ii) civil enforcement proceedings (iii) a criminal prosecution, or (iv) a penalty notice. Third parties such as neighbours, environment groups and trade competitors are also entitled to commence civil enforcement proceedings.

2.1. Section 121B Order

A section 121B order is often the first step taken by a council in respect of an unauthorised development. This is a relatively simple action from the Council's point of view, and may bring about the result of stopping an unauthorised development without involving the Council in costly legal proceedings.

Section 121B provides that a council may issue the following types of order in the following circumstances (applying to unauthorised development)

[36] [1972] 2 NSWLR 632 at 637.
[37] [2001] NSWCA 17 at [199].

- An order to cease using premises for a specified purpose – where development is prohibited or development consent is being breached, or development consent was required and has not been obtained. (Item 1)

- To demolish or remove a building – where building has been erected without consent, and/or without a construction certificate. (Item 2)

- Not to demolish a building or to cease demolishing a building – building is being demolished, or is likely to be demolished without development consent. (Item 3)

- An order to demolish an advertising sign – where the sign has been constructed contrary to a provision under the Act. (Item 5)

- An order to carry out work to restore premises to the state that they were in before building was unlawfully erected or work was unlawfully carried out – where work has been unlawfully carried out. (Item 12)

- To comply with a development consent – where development consent is not being complied with. (Item 15)

The table at s 121B also specifies the persons to whom the order may be issued. This differs depending upon the type of order which is being issued. For example, an order for demolition may only be made against the owner of the building, but an order to comply with a development consent may be made against the 'person entitled to act on the development consent or person acting otherwise than in compliance with the development consent'.

Except where orders are issued in respect of a life-threatening hazard, a threat to public health and safety, or in an emergency situation[38], councils must follow certain procedures in relation to the issuing of orders set out in s 121F-121K. This procedure includes giving the proposed recipient notice of the terms of the proposed order, and an opportunity to make representations. After hearing representations, the Council may decide not to issue the order, may issue an order as proposed, or may vary the terms of the order[39]. The council is not required to give further notice if it decides to issue a modified order[40]. Modifications do not need to be responsive to representations made during the notice period, however the proposed order and final order must relate to the same 'subject matter'[41].

Section 121B orders are binding on successors in title, as well as the original recipient of the order[42].

An order needs to be clearly expressed. Failure to express the order clearly may lead to any ambiguity being construed against the council, or the order may be simply found to be invalid.

[38] Section 121D
[39] Section 121K(1).
[40] Section 121K(2).
[41] *Lederer v Sydney City Council* (2001) 119 LGERA 350 at [148]-[149].
[42] Section 121Y.

In *Lederer v Sydney City Council*[43] the Council issued an order requiring the recipient to remove '*the wall sign located on the exterior western wall between floor levels 5 to 8 inclusive, and currently advertising "Some people just seem to know how to travel. Are you one of them?"'*. Lloyd J held that the order was ambiguous, as it was unclear whether it required the removal of the particular image displayed at the time, or the whole advertising structure. Given the serious consequences flowing from non-compliance with the order, including criminal sanctions, his Honour considered that any ambiguity should be construed against the Council, therefore the recipient was held to have complied with the order merely by taking down the particular advertisement referred to[44].

In *Foster v Sutherland Shire Council*[45], an order required the recipient to 'cease using the premises for short-term accommodation'. Council later wrote to the recipient to clarify that it would consider occupation of the unit for periods of less than 6 months to be short term accommodation, however this time-period was not specified in the order itself. Cowdroy J held that the order was invalid because it was uncertain:

> *The order has been issued without an objective standard against which the prohibited use sought to be restrained can be determined with certainty. As a consequence, the order does not 'tell him [the applicant] fairly what he has done wrong and what he must do to remedy it' (per Upjohn LJ in Miller-Mead v Minister of Housing and Local Government & Anor [1963] 2 QB 196 at 232)*[46].

The Council is also required to give its reasons for issuing the order at the same time as it issues the order (except in case of an emergency, when reasons may be given the next working day)[47]. In *Cassiniti v City of Canada Bay Council*, Pain J held that reasons did not have to be given in the notice, only in the final order[48].

In *Van Haasteren v South Sydney Council* Bignold J said that, since the power to issue orders is discretionary wherever the circumstances specified in s 121B exist, the 'reasons' for an order are intended to inform the recipient of why the Council decided to issue an order in the particular case[49]. In *Stutchbury v Pittwater Council*, Sheahan J held that reasons under s 124 of the *Local Government Act 1993* (which has a similar structure to s 121B) ought to 'make intelligible the true basis for the decision to issue the order so that.... the affected person has sufficient information to decide whether to accept the order or appeal it'[50].

In *J. & J. O'Brien Pty Ltd v South Sydney Council*, Stein JA (with whom Giles JA and Handley JA agreed) held[51]:

> *...I cannot accept that the circumstances which enliven the power to give an order can never be identical to the reason for exercising the power. I accept*

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[43] (2001) 119 LGERA 350.
[44] *Ibid* at 375.
[45] (2001) 115 LGERA 130.
[46] *Ibid* at 135.
[47] Section 121L.
[48](2002) 123 LGERA 53 at 58.
[49] (2000) 109 LGERA 252 at 258.
[50] (1999) 105 LGERA 1 at 16.
[51] (2002) 121 LGERA 223 at 231.

> *Mr Ayling's submission that the fact that work is non-complying may be capable of constituting both a basis for and reason for taking action. Common sense dictates this. In this regard, it may be that if* Van Haasteren v South Sydney City Council *(2000) 109 LGERA 252 is authority for a proposition of general application, it goes too far and should not be accepted without qualification in cases where the statement of the circumstances enlivening the power is sufficient without more to make plain to the recipient the basis and reason for the decision to issue the order.*

In deciding whether adequate reasons have been given, the Court will consider the whole of the order, and not merely the nominated 'reasons' in determining whether the order makes plain the council's reasons for exercising its discretion[52].

If the council mistakes the source of its power to issue the order, this does not invalidate the order, provided there is another source of power[53]. For example, in *J. & J. O'Brien Pty Ltd v South Sydney* the applicant challenged a s 121B order which required it to remove tiles from the facade of its building. The Council issued the order believing that the tiling constituted the 'erection of a building' for the purposes of the *Act*, however the Court held that the tiling was rather a form of 'development' because it was an 'act... controlled by an Environmental Planning Instrument', within the meaning of (f) of the definition of 'development' in s 4[54].

Nevertheless 'reasons' must not be misleading. In *Cassiniti v City of Canada Bay Council* (2002) 123 LGERA 53, an order was held to be invalid because the 'reasons' for issuing the order referred to a DCP and LEP which did not in fact govern the subject development.

A person who is issued with an order pursuant to s 121B can appeal against the order to the Land and Environment Court pursuant to s 121ZK. Such an appeal must be lodged within 28 days of service the order. A s 121ZK appeal is a Class 1 merits appeal, at which the question of whether the order should have been issued is considered *de novo*, and new expert evidence may be tendered by both the applicant and the Council. The appeal is not limited to the reasons for issuing the order originally articulated by the Council[55].

If the s 121B order requires compliance with the conditions of an existing development consent, the Court will not re-enter into the merits of the conditions of consent – they must be taken as a given. In addition, the applicant cannot challenge the validity of the conditions of consent upon which the order is based[56].

Applicants in s 121ZK appeals can, and often do, challenge the validity of the order itself, for example on grounds such as lack of power to issue the order, uncertainty or lack of reasons, at the same time as they challenge the merits of the order. While the Court cannot make a declaration regarding the validity of the order in Class 1 proceedings, a finding of invalidity will invariably lead to the Court deciding to revoke the order pursuant to s 121ZK(4)(a), and therefore achieve the same effect. Legal questions as to the validity of the order are decided by a judge of the Court rather than a commissioner.

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[52] *Ibid* at 232.
[53] *Ibid* at 231.
[54] *Ibid* at 228-230.
[55] *Ibid* at 232.
[56] *Singh v Byron Shire Council* [2003] NSWLEC 265, per Pain J

The applicant should formulate the question as a 'question of law' and notify the respondent and the Court that they will be asking for the matter to be heard by a judge[57].

Alternatively, the recipient of a s 121B order may commence Class 4 proceedings for a declaration of invalidity and a s 121ZK appeal simultaneously.

In deciding to challenge a s 121B order on procedural grounds, the applicant should keep in mind that a victory may only 'buy time', until the Council issues an order in the correct form.

The merits dispute in a s 121ZK appeal will often focus on the details of the order, rather than whether the order should have been issued at all. Alternative ways of carrying out the works proposed by the council may be suggested by the applicant's experts, to resolve the non-compliance at less expense. In the last resort, the applicant may merely obtain more time in which to carry out the work.

The recipient of a s 121B order may seek compensation for costs incurred in complying with the order if issuing of the order is shown to be unjustified, pursuant to s 121ZL. Compensation cannot be sought in a s 121ZK appeal, but must be applied for in separate proceedings in Class 3 of the Court's jurisdiction[58].

Issuing a s 121B order will not always be the most efficient way to stop unauthorised development, as it may cause further delay and expense in complex cases. If the recipient challenges the order by way of s 121ZK appeal, Council will have to defend its legal basis for issuing the order, its procedure in relation to the order and/or the merits of the order. If the s 121B order is declared invalid in these first proceedings, further delays will be incurred while Council either commences a Class 4 application in respect of the unauthorised development or issues a valid order. If the recipient simply ignores the order, Council still needs to commence Class 4 proceedings to enforce the order, or commence a criminal prosecution to penalise the recipient for breach of the order.

2.2. Penalty Notice

Section 127A of the Act provides that councils may issue penalty notices in respect of certain offences for breach of the Act.

The relevant offences and penalties are listed in Schedule 5 of the *Environmental Planning and Assessment Regulations 2000*. A breach of s 76A(1), that is, carrying out development without consent, or carrying out development otherwise than in accordance with a development consent, may be subject of a penalty notice for $600. A penalty notice may also be issued in respect of failure to comply with a s 121B order under (relevantly) Item 1, 2 or 15. These are, an order to cease using premises for a specified purpose where development is unauthorised, an order to demolish a building erected without consent or an order to comply with a development consent. A penalty notice of $1,500 may be issued to a person who fails to comply with such an order.

If a person who is served with a penalty order pays the prescribed penalty, he or she is not liable to any further proceedings for the alleged offence, although civil proceedings may

[57] See *Land and Environment Court Practice Direction No. 7.*
[58] *Land and Environment Court Act 1979,* s 19(g); *D'Arcy v Campbelltown CC* (2003) 126 LGERA 401.

still be undertaken in respect of the unauthorised development[59]. If he or she elects to have the matter dealt with by the Court, criminal proceedings for the offence will then be commenced in the Local Court[60]. In the Local Court a maximum penalty of $110,000 may be imposed if a breach of the Act is proved[61].

2.3. Civil Enforcement

Pursuant to s 123 of the Act, any person may bring proceedings in the Land and Environment Court to remedy or restrain a breach of the Act. This means that private persons and community groups who are concerned about unauthorised development (including breaches of consent conditions) can commence proceedings against a developer, rather than waiting for the Council or the Minister for Planning to take action.

Proceedings under s 123 are known as civil enforcement proceedings, and are commenced by an application in Class 4 of the jurisdiction of the Land and Environment Court[62].

To obtain orders, the applicant in civil enforcement proceedings must establish that a breach of the Act has occurred or is likely to occur if not restrained. The applicant has to prove the breach to the civil standard, using admissible evidence. The applicant cannot argue the merits of the approval, nor can the respondent escape liability by arguing that the development is environmentally innocuous (although this may influence the Court's exercise of discretion to make orders). The sole issue (on liability) is whether the Act has been breached. The alleged breach may be a breach of s 76B (carrying out development that is prohibited) or s 76A (carrying out development without consent where consent is required, or carrying out development otherwise than in accordance with conditions of consent).

The breach usually has a legal and a factual aspect. The first will involve establishing the legal status of the development in relation to the applicable environmental planning instrument and any consent. This will often involve disputes over the interpretation of planning instruments and the relationship between different planning instruments which apply to the land. The proper construction of the terms of the development consent (if there is one) is required, to determine whether the development falls within it.

The second task of an applicant in civil enforcement proceedings is to show that a breach has occurred or is occurring. This will usually require affidavit evidence from a person who has been on the site of the development shortly before the commencement of proceedings and observed the state of the development.

In the case of departure from the terms of development consent for physical works, it will be necessary to identify in what respects the current development is different from that which was permitted by the consent. Photographs will often be taken and exhibited of the unauthorised works, which must be properly marked and identified in an affidavit. In some cases it may be necessary for an expert, such as a surveyor, to take measurements to identify numerical departures from the terms of development consent, such as incorrect location of a structure, or an exceedance of permitted height.

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[59] Section 127A(4), (5).
[60] Fines Act 1996 s 37.
[61] EP&A Act 127(3).
[62] *Land and Environment Court Act 1979,* s 20(1)(c).

Proving that non-physical requirements of development consent have been departed from is often more complex.

Where the alleged breach consists of an unlawful use, the occupier of the building, rather than the owner, is usually the proper respondent. Mere ownership of land where an unlawful use is occurring does not put the owner in breach of the Act[63]. However, acquiescence of an owner in an unlawful use may put the owner in breach[64]. For example in *Holroyd City Council v Murdoch* (1994) 82 LGERA 197, Stein J found that a person who had allowed his land to be used for illegal dumping was in breach of the Act. His Honour observed (at 203):

> *In my opinion an owner of land may be liable under planning law to be restrained from leaving his land in such a condition so as to be an open invitation to illegal dumpers. Furthermore, an owner may be required to remove fill unlawfully dumped on his land without his authority, so long as he knows or is made aware of the situation and takes no steps to prevent its recurrence.*

The Court has broad discretion whether or not to make any orders where a breach of the Act has occurred. However, the applicant does not necessarily need to show that the breach has resulted in environmental or other harm to persuade the Court to make an order. Mahoney JA in *Warringah Shire Council v Sedevic* affirmed the proposition that 'the Court will take cognisance of the general harm resulting from breach of a statute and will not normally require proof of specific harm for an injunction to go at the suit of the Attorney-General or the Council' [65].

The principles governing the exercise of the discretion were set out usefully by Kirby P in *Sedevic*[66] and may be summarised as follows:

- The Court has a wide, unfettered, discretion. It is not limited to 'special cases'.
- The discretion permits the court to soften, according to the justice of particular circumstances, the application of rules which, though right in general, may produce an unjust result in the particular case.
- However, the legislative purpose, expressed in the Act is to uphold, in the normal case, the public interest in upholding planning law. If departures from the law were too frequently condoned by the exercise of the discretion under s 124, the orderly enforcement of the planning law would be undermined.
- It is undesirable to attempt to catalogue or classify all the circumstances which will enliven the exercise of the discretion, however in the cases to date, factors which have been considered relevant include the fact that the breach complained of was a purely technical breach, that the authority delayed bringing its action, or that the breach had a beneficial environmental effect.

[63] *Ashfield Municipal Council v Andrews* (1986) 60 LGRA 248.
[64] *Wilkie v Blacktown City Council* (2002) 121 LGERA 444 at [42]-[47].
[65] (1987) 10 NSWLR 335 at 346.
[66] *Ibid* at 339-340.

- Where an application for enforcement is made by the Attorney-General, or a council, a court may be less likely to deny equitable relief than it would in litigation between private citizens.

- The discretion may be more readily exercised in relation to physical development, which can only be remedied at great cost, than in relation to breach by conduct which can be easily modified to bring it into compliance with the law.

These principles continue to be used as a reference-point by the Land and Environment Court[67].

The need to uphold the orderly operation of the planning law is usually seen as an important consideration, and often leads the Court to grant orders restraining the breach, even when proceedings are brought by trade competitors and no negative environmental impacts are established.

For example in *Woolworths Ltd v The Warehouse Groups (Australia) Pty Ltd*[68] the respondent was held to be carrying out a development which was prohibited, namely a shop. The respondent argued that its premises was a 'bulky goods salesroom', a purpose which was permissible in the zone and for which it had development consent, however the evidence established that the development could not be properly described in this way.

Lloyd J found that the respondent had committed a significant breach of the Act by carrying out a prohibited development and granted orders restraining it from carrying out the use. His Honour considered the observations of Kirby P in *Sedevic,* and held that the public interest in enforcing the Act was an important consideration, and in this case it outweighed other considerations, including the fact that no negative impacts had been shown, the proceedings were brought by a trade competitor, and there had been no complaints from neighbours or the council[69].

The Court may exercise its discretion by giving the respondent an extended period of time in which to comply. For example in *Council of the City of Fairfield v Taouk*[70], the respondent was found to have used premises for the purpose of a brothel without development consent. He had lodged a development application, however the Council had apparently deferred consideration of the application until an amendment to the LEP was introduced which prohibited the development. No detriment to the local area had been demonstrated. In the circumstances, Lloyd J found that the imposition of an order immediately would create an unjust result, and postponed the order for 18 months to give the respondent time to relocate his business.

In addition to the general discretion under s 124(1), where a breach of the Act would not have been committed but for the failure to obtain a consent, the Court has a specific discretion under s 124(3)(a) to adjourn the proceedings to enable a development application to be made. This allows an opportunity for an unlawful development to be

[67] See for example *Sutherland Shire Council v Signorelli Investments Pty Ltd* [2003] NSWLEC 49 at [18] and *Ryde City Council v Zuger* [1999] NSWLEC 172 at [8].
[68] (2003) 123 LGERA 341.
[69] *Ibid* at 348.
[70] (1998) 100 LGERA 110.

regularised (to the extent permissible under the Act – see 'Regularising the Use' below) before any orders are made to demolish the works or cease the use.

Alternatively, in its discretion, the Court may grant orders but stay their operation for a period of time to allow a development application to be made and determined. This may lead to a long abatement, particularly if no application has yet been made and determination by the council and an appeal to the Court has yet to occur. In such circumstances, rather than grant a sufficiently long period of time for all of this to occur, the Court will usually grant a stay of 1-3 months only, and the respondent will need to make successive applications to the Court to have the stay extended until the development application is finally determined. In this manner the Court can monitor the progress of the application.

The Court may refuse to exercise its discretion to allow further time where it appears that the respondent has unduly delayed the lodgement of an application[71].

The usual order in Class 4 proceedings is that a successful party will receive its costs[72]. The Court has a wide discretion in relation to costs, however, which must be exercised in a judicial manner[73].

There is no general rule that a party which commences litigation in the 'public interest' cannot be ordered to pay the other parties' costs if it is unsuccessful[74], however the public interest nature of litigation is a relevant consideration. In *Oshlack v Richmond River Council,* the High Court upheld the decision of Stein J at first instance to make no order as to costs against the unsuccessful applicant who had brought the action for an environmental protection purpose. Special considerations in that case were (1) the prime motivation of the applicant was to uphold the public interest and the rule of law, (2) the applicant had nothing to gain personally from the litigation, (3) a significant number or members of the public shared the applicant's concerns (4) the basis of the challenge was arguable and raised significant issues as to the interpretation of the statute which it was in the public interest to resolve[75].

If enforcement proceedings are concluded without a hearing on the merits (for example, by consent orders or discontinuance), the Court will not hypothetically try the matter to determine who would have won if it had proceeded. If it appears that both parties have acted reasonably throughout in prosecuting and defending the proceedings, then no order for costs will usually be made[76].

However, Pt 15 r 7 of the Land and Environment Court Rules provides:

> *The Court may order the respondent to pay the costs of the proceedings where a respondent satisfies or causes to be satisfied the claim of the applicant after the proceedings have been commenced.*

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[71] *Tynan v Meharg* (1998) 101 LGERA 255 at 259.
[72] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 122.
[73] *Oshlack v Richmond River Council* at 121 per Kirby J.
[74] *Ibid* at 121.
[75] *Ibid at* 80-80.
[76] *Re Minister for Immigration & Ethnic Affairs v Ex parte Lai Qin* (1997) 186 CLR 622.

Where proceedings are brought to restrain unauthorised development, and the respondent agrees to consent orders in substantially the same terms as the orders sought by the applicant in the Class 4 application, this rule will normally lead to the respondent being ordered to pay the applicant's costs. However the reasonableness of the conduct of the parties will also be taken into consideration in deciding whether to award costs[77].

2.4. Criminal Proceedings

Breach of the Act, or of a s 121B order, is a criminal offence by virtue of s 125(1) of the Act. Carrying out unauthorised development will entail a breach of either s 76A (development that needs consent) or s 76B (development that is prohibited). The maximum offence for a breach of the Act is $1,100,000, and a further daily penalty of $110,000 is available[78].

Criminal proceedings may be brought in either the Local Court or the Land and Environment Court, however the maximum penalty in the Local Court is only $110,000[79]. Persons convicted in the Local Court of offences against the Act may appeal to the Land and Environment Court against conviction or sentence. In hearing such appeals the Land and Environment Court has power to impose a penalty up to the maximum of $1,100,000[80].

Changes to the Act in 2003 introduced a new limitation period of 2 years between the commission of the offence and the commencement of proceedings in all matters relating to a breach of the Act[81]. Prior to December 2003, the time limit was 12 months for 'carrying out development for which consent was required without obtaining development consent' and 6 months for other breaches of the Act. Savings provisions provide that the new limitation period does not apply to offences committed prior to the commencement of the amending Act[82]. Therefore proceedings in respect of offences committed prior to 10 December 2003 must be brought within the old time limits, but proceedings for offences committed thereafter may be brought within 2 years.

Carrying out development without consent is a strict liability offence. A person cannot raise a defence that he or she was not aware that consent was required, nor rely on assurances from the owner or head contractor that consent has been obtained. As Lloyd J said in *Mosman Municipal Council v Menai Excavations Pty Ltd*[83]*:*

> *It must be borne in mind that an offence against s 125(1) of the EP&A Act is one of strict liability. There is thus an onus on those who carry out development, including demolition work, to ensure that any necessary development consent has been obtained. The particular circumstances of this case, in which reliance was placed on others to obtain the necessary consent does not, in the case of a strict liability offence, operate to exculpate the defendant.*

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[77] *Newcastle City Council v Winwood* [2005] NSWLEC 294.
[78] Section 126(1).
[79] Section 127(1), (3).
[80] *Crimes (Local Courts Appeal And Review Act) 2001,* Pt 4, s 31; *Ristevski v Hurstville City Council* [2003] NSWLEC 409.
[81] Section 127(5).
[82] Sch 6, cl 79.
[83] (2002)122 LGERA at [32].

Factors commonly taken into consideration in imposing a penalty in relation to carrying out development without consent are the seriousness of the offence, the level of environmental harm, the defendant's subjective culpability, the need to provide a general and specific deterrent, whether an early guilty plea was entered, whether the defendant has expressed contrition, and the defendant's financial circumstances and ability to pay any fine[84].

The Court has said that the fact that the development the subject of the conviction has received consent since the offence was committed, or would likely have obtained consent if consent had been sought does not take away from the seriousness of the offence, since it is essential to the functioning of the planning system that consent should be obtained before development is carried out[85]. Nevertheless, in practice a consent usually does count in a defendant's favour in mitigation of penalty since it tends to show that there is no unacceptable environmental impact[86].

Section 10 of the Crimes (Sentencing Procedure) Act 1999 provides that if the Court finds the defendant guilty, it may nevertheless dismiss the charge if it is satisfied that it is 'inexpedient to inflict any punishment' on the person. Subsection 10(3) provides the following list of factors to be taken into consideration by the court in deciding whether to dismiss the charge:

> *(3) In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:*
>
> *(a) the person's character, antecedents, age, health and mental condition,*
>
> *(b) the trivial nature of the offence,*
>
> *(c) the extenuating circumstances in which the offence was committed,*
>
> *(d) any other matter that the court thinks proper to consider.*

Although there is no express limitation, experience indicates that the Court will only apply s 10 in fairly exceptional circumstances. The person's prior record and good character, or the fact that he or she was not aware that development consent had not been obtained, will not usually be considered sufficient grounds on their own to warrant the application of s 10[87].

In *Thorneloe v Filipowski*[88], a pollution case, the Court of Appeal held that it may be appropriate to apply s 10 where an offence was not caused by any positive act or omission of the defendant, and the defendant could not have done anything realistically to prevent the offence from occurring[89].

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[84] The last is a mandatory consideration under the Fines Act 1996 (NSW), s 6.
[85] *Cooper v Coffs Harbour Council* (1997) 97 LGERA 125 at 143; *Mosman Municipal Council v Menai Excavations Pty Limited* (2002) 122 LGERA 89 (consistency with reference above) .
[86] See for example *Willoughby CC v Bechara* (2003) 124 LGERA 416 and *Warringah Council v McNamee* [2003] NSWLEC 28.
[87] See for example *Willoughby City Council v P & V Masonry Pty Ltd* [2003] NSWLEC 312 at [56]–[62].
[88] (2001) 52 NSWLR 60.
[89] This decision was applied in relation to unauthorised development in *Mosman Municipal Council v Toltz* [2002] NSWLEC 175 at [11]

In *Ku-ring-gai Municipal Council v Moujalli*[90] an owner-builder contracted a building consultant to draw up plans and obtain approval for his development. The consultant actually forged an approval by the council, which he passed off to the defendant as a genuine development consent. The defendant did not build precisely in accordance with what he believed to be the approved plans. Had he built strictly in accordance with the forged plans, the defence of honest and reasonable mistake may have been available.

Pearlman J found the defendant guilty, but found that this was an appropriate case to apply s 10, having regard to 'Mr Moujalli's character, the nature of the offence, the triviality (of the departures from the forged approved plan) and in particular the extenuating circumstances in which the offence was committed'[91].

There are limitations on enforcing a breach by civil and criminal proceedings at the same time. Section 127(7) of the Act provides that a person may not be convicted of an offence under the Act where the matter constituting the offence is the subject of proceedings under s 123 (that is, civil enforcement proceedings), or the subject of an order in such proceedings. This would mean, for example, that a person could not be convicted of an offence for building a house without development consent while civil enforcement proceedings were pending in respect of the same development, or where an order had been made in civil proceedings to demolish the house.

This does not prevent both civil and criminal proceedings being brought in all cases, however. Where civil enforcement proceedings have concluded without making an order in respect of the subject development, either because the Court exercised its discretion against the making of an order, or because the development may have been 'regularised' in the meantime by the grant of a building certificate or modification application (see 'Regularising the breach' below), s 127(7) does not apply, and criminal proceedings may subsequently brought to penalise the developer who carried out unauthorised work, without any requirement to alter the works themselves.

An example of civil and criminal proceedings being brought in relation to the same development is *Willoughby City Council v Bechara*[92]. Initially the Council brought civil proceedings against the defendants for carrying out development not in accordance with the conditions of development consent. The Court found in favour of the Council and made orders requiring the unlawful works to be demolished, but stayed these orders to give the respondent an opportunity to have the works approved. Subsequently, Council consented to a s 96 application to modify the development consent, effectively 'regularising' the unlawful works. By consent, the orders made in the civil proceedings were vacated, however the Council also commenced criminal proceedings for the breaches of the Act entailed in carrying out development not in accordance with the development consent. The defendants pleaded guilty and were fined $20,000.

In the Land and Environment Court, criminal proceedings are most commonly brought in cases where civil enforcement proceedings would have little or no utility, or have been concluded with no orders against the respondent. This includes cases where:

[90] [2002] NSWLEC 188.
[91] *Ibid* at [18].
[92] (2003) 124 LGERA 416.

- the development was initially unlawful, but has since been regularised by the grant of development consent or a building certificate, to the extent that this is possible (see 'regularising the development' below)[93].

- the development was a one-off occurrence, such as an unauthorised public dance party[94], which has already finished when it comes to the attention of the Council, so there would be no utility in seeking restraining orders in civil proceedings.

- The development is of its nature irreversible, such as the unauthorised demolition of a heritage building[95], or the unauthorised clearing of trees[96].

Where a Court records a conviction against a person, costs may be awarded against the defendant. Such costs may themselves be a significant deterrent, as in many cases, the costs exceed the amount of the fine. Where a person is found guilty but no conviction is recorded, pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999*, costs may still be awarded[97]. A costs order will usually be made in favour of the defendant where the offence is not proven[98].

In *Latoudis v Casey* the High Court said that the normal exercise of the discretion to award costs would result in the successful party being compensated for their costs in the proceedings[99]. Nevertheless, there may be circumstances where the defendant has engaged in conduct which leads the court to find that it would not be just and reasonable for the defendant to receive costs. This may occur where the defendant has 'brought the proceedings upon himself' by declining earlier opportunities to explain his conduct and avoid a prosecution. Where a defendant has unnecessarily prolonged proceedings, the Court may find that it is appropriate to reduce the award of costs proportionately[100].

3. 'Regularising' Unauthorised Development

Where unauthorised development has occurred, and the development is permissible with consent, those who have carried out the development will often seek to obtain retrospective permission for the development. While this does not blot out the offence which occurred when development was carried out without consent, it can resolve the status of the existing building and will usually prevent demolition orders being made in the future. Without some sort of retrospective approval, the owner will have difficulty selling the building or obtaining insurance. In some cases, retrospective approval will be sought to enable an occupation certificate to be granted, without which a new building cannot be lawfully occupied (see 3.5 below).

In the current state of the law, developments which have been carried out in breach of an existing consent may be 'regularised' by modifying the development consent via a s 96

[93] *Willoughby City Council v Bechara* (2003) 124 LGERA 416.
[94] *Byron Shire Council v The Rising Damp Corporation Pty Limited* [2001] NSWLEC 260.
[95] *Mosman Municipal Council v Menai Excavations Pty Ltd* (2002) 122 LGERA 89.
[96] *Hornsby Shire Council v Mouawad* [2002] NSWLEC 191.
[97] *Land and Environment Court Act 1979,* s 41*, Criminal Procedure Act 1986,* s 253(1).
[98] *Criminal Procedure Act 1986*, s 253(1A).
[99](1990) 170 CLR 534 at 569 per McHugh J.
[100] *Ibid* at 544 per Mason CJ, and 565-6 per Toohey J; for a recent discussion in the context of environmental litigation see *Mantel v Anstee* (2001) 116 LGERA 269.

application, provided the altered development is 'substantially the same' as original consent. However, a *new* consent cannot be granted for a structure which was built without development consent. In the latter case, the structure may be 'regularised' to a limited extent by seeking a building certificate.

A fresh development consent may be issued in respect of a use which commenced without consent in an existing building.

3.1. Modification of an existing consent

Talbot J in *Windy Dropdown P/L v Warringah Council*[101] found that a modification could be made to an existing development consent, pursuant to s 96 of the *EP&A Act 1979,* to sanction works which had already been carried out in breach of that development consent.

The applicant had the benefit of a development consent which provided for the subdivision of a block of land and the construction of several houses. It had breached the consent by filling the subject land to a higher level than permitted in the conditions of consent. The terms of consent required that the block be filled to specified levels, which the applicant had exceeded in its works up to the time of the hearing. The Council brought Class 4 proceedings, in which the Court made orders requiring the applicant to remove the fill. The orders had been stayed, however, to give the applicant an opportunity to modify the development consent.

Talbot J heard the appeal against council's refusal of the application to modify the development consent. The first issue for determination before his Honour was whether the Court had the power to modify the development consent pursuant to the EP&A Act s 96, so as to retrospectively approve the works which had already been carried out. Prior authority seemed to indicate that the Court did not have the power.

Talbot J in *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council*[102] had held that an application under the then s 106 of the *Local Government Act 1919* could not grant consent for works already carried out. In *Connell v Armidale City Council*[103] Pearlman J extended this principle to modification applications under s 102 of the *EP&A Act*, the predecessor to the current s 96. Her Honour's decision was followed by Sheahan J in *Herbert v Warringah Council*[104].

The above decisions were based on a construction of the key words in s 76 of the Act, '*development may not be carried out...*', as being clearly prospective, indicating that approval could only be obtained *before* development was carried out. A structure which was built without development consent would remain a development which had been constructed contrary to s 76, and therefore unlawful, irrespective of the grant of a subsequent consent[105].

For this reason it was necessary to distinguish between unlawful *erection* of a structure and unlawful *use* of a structure. The Court has long held that it is permissible to modify or grant a new consent in respect of a use which was unlawfully commenced, but not in

[101] (2000) 111 LGERA 299.
[102] (1994) 82 LGERA 192.
[103] Unreported, NSWLEC, 25 Sep 1996.
[104] (1997) 98 LGERA 270.
[105] *Ibid* at 278, *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council* (1994) 82 LGERA 192 at 194.

respect of a building which as unlawfully erected[106]. A use is effectively carried out on each day that the use takes place, therefore a new consent will at least be effective to authorise the use prospectively from the date on which it is granted. Erection of a structure, on the other hand, is a development which is 'completed' at the time when construction is completed[107].

Talbot J in *Windy Dropdown* reviewed the above authorities and determined that they had not been correctly decided in relation to the modification of consents.

Firstly, his Honour noted that section 76A on its terms provided for a prospective consent to be granted. This was consistent with the overall scheme of the Act which was that development should not be carried out where consent was required unless 'consent has been obtained and is in force and the development is carried out in accordance with the consent'. Nevertheless, it was possible that section 96 could condone development which had previously been carried out in breach of the terms of a consent[108].

The terms of s 96 itself did not mandate against the granting of retrospective approval, and subsection (4) which distinguished between the modification of a development consent and the granting of a development consent envisaged that they were to take place in different contexts. This context, in the case of a modification application, might include the need to deal with unforseen anomalies which had arisen in the course of construction. Subsections 96(1) and 96(2) which provided that the development as modified must be 'substantially the same development' obviously envisaged some change between the original and the modified proposal[109].

His Honour held that the Court did have the power to retrospectively approve departures from the terms of the development consent pursuant to s 96. This power could be reconciled with the prospective effect of s 76A by holding that s 96(4) deemed any development already carried out in conformity with the consent as modified to have been carried out in accordance with the consent for the purposes of s 76A[110].

Windy Dropdown has not yet been examined in the Court of Appeal, however it was followed (with some differences in reasoning) by Cowdroy J in *Austcorp No. 459 Pty Ltd v Baulkham Hills SC*[111] and cited with approval by Bignold J in *Willoughby City Council v Dasco Design and Construction P/L*[112], and on various occasions it has been applied by Commissioners of the Court. It can now be regarded as the orthodox approach in relation to modification of a development consent to regularise unauthorised aspects of a development.

In *Willoughby City Council v Dasco Design and Construction Pty Ltd*, Bignold J agreed with the retrospective operation of s 96 identified in *Windy Dropdown*, but differed from Talbot J on the 'relation back' of the approval. Bignold J considered it was necessary to distinguish between a finding that the modification related back to the grant of the development consent that it modified, or alternatively that it ousted the prohibitory effect

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[106] *Ibid (Steelbond)* at 194.
[107] *Ibid* at 194.
[108] *Windy Dropdown P/L v Warringah Council* (2000) 111 LGERA 299 at 304.
[109] *Ibid* at 304.
[110] *Ibid* at 304-5.
[111] (2002) 122 LGERA 205.
[112] (2000) 111 LGERA 422.

of s 76A only from the date on which the modification was granted. Bignold J preferred the later construction on the basis that s 96(4) was a 'typical referential provision', whereby a reference in the *EP&A Act* or any other act to the development consent was to be construed as a reference to the development consent as modified, but this did not require a fictional dating back of the modification to the date that consent was granted. The difference was that back-dating would effectively 'blot out' the breach, whereas on the approach of Bignold J, it would still be open to the Council to bring a civil or criminal action in relation to the period before the breach was regularised[113].

An application for modification of a development consent may be made in respect of modifications involving correction of a minor error, misdescription or miscalculation (s 96(1)), modifications involving minimal environmental impact (s 96(1A)), or modifications involving more than a minimal environmental impact (s 96(2)). In the latter two cases, it must also be shown that the proposal will result in 'substantially the same development' as that for which consent was originally granted[114].

Whether two developments are substantially the same is a matter of judgment upon which reasonable minds may differ. The consent authority must undertake a comparison between each of the two proposals to determine whether the modified development proposal is 'essentially or materially' the same as that for which consent was originally granted[115].

3.2. Regularising a development where no consent has been granted

The Court continues to maintain that unlawful erection of a building cannot be retrospectively approved by grant of development consent. This principle has not been altered by the decision in *Windy Dropdown*, as the reasoning in that case entirely depended upon construction of s 96 of the *EP&A Act.* However a building may be 'regularised' by seeking a building certificate under the *EP&A Act* s 149A, in relation to the physical building and development consent, in relation to the use of the building.

The lack of power to approve retrospectively the unauthorised erection of a structure may be traced to the position under previous Acts regulating development. In *Tennyson Textile Mills Pty Limited v Ryde Municipal Council*[116] it was held there was no power under Part XI the *Local Government Act 1919* to approve buildings retrospectively, as the Act specifically required approval to be obtained 'beforehand'. Similarly the command in s 76A that '*a person must not carry the development out.... unless... a consent has been obtained and is in force'* arguably requires consent be obtained *prior* to the carrying out of the development[117]. This has lead to the orthodox view that neither the consent authority nor the Court has power to grant development consent in respect of a development that has already been carried out without consent, although there have been voices of dissent from time to time.

In *Lirimo Pty Ltd v Sydney City Council*[118] consideration of subsection 124(3) lead Cripps CJ to adopt the view 'that the applicant is not precluded from obtaining a proper and valid

[113] *Ibid* at 442-3.
[114] s 96(1A)(b), (2)(a).
[115] *Moto Projects (No. 2) Pty Ltd v North Sydney Council* (1999) 106 LGERA 298 at 309.
[116] (1952)18 LGR (NSW) 231.
[117] *Windy Dropdown P/L v Warringah Council* (2000) 111 LGERA 299 at 304.
[118] (1981) 66 LGRA 47.

application for consent to the use of the land or the erection of the building not withstanding the use or erection preceded the application for consent'.

Subsection 124(3) provides, in relation to the Court's powers to restrain unlawful development:

> *Where a breach of this Act would not have been committed but for the failure to obtain a consent under Part 4, the Court, upon application being made by the defendant, may:*
>
> (a) *adjourn the proceedings to enable a development application to be made under Part 4 to obtain that consent, and....*

This subsection strongly suggests that the legislature had in mind retrospective approval of unauthorised development. Nevertheless, the subsection is not without utility if one takes the orthodox view, since it will still be available in relation to applications to approve an unauthorised *use*[119]. Cripps CJ's observations in *Lirimo* were rejected by Talbot J in *Steelbond* as being contrary to authority.

In *Tynan v Meharg*[120], Handley JA of the Court of Appeal reviewed authorities to that date and held that there was no power to regularize the unauthorised erection of a structure *prior* to Act No. 152 of 1997 (which introduced significant amendments to the *EP&A Act*, including the provisions relating to building certificates), but left open the possibility that a different interpretation might be made of the current provisions. Following this, the Court has embraced building certificates as a means of 'regularising' unlawfully erected structures, but has not re-examined the law in relation to retrospective consents for wholly unauthorised works.

In *Ireland v Cessnock City Council*[121], Bignold J held that a s 149A certificate could be used to 'regularise' an unauthorised structure.

In that case, the applicant had applied for a building certificate in respect of a shed which had been constructed without development consent, and was used for the storage of agricultural machinery and equipment. In Class 4 proceedings the Court had granted a mandatory injunction for demolition of the shed, but stayed the injunction to give the applicant an opportunity to 'regularise' the position of the shed.

The applicant applied to the Council for a building certificate for the shed under Section 149B of the Act. The Council had refused the application.

Section 149D provides that Council must issue a building certificate in the following circumstances:

> *(1) The council must issue a building certificate if it appears that:*
>
> *(a) there is no matter discernible by the exercise of reasonable care and skill that would entitle the council, under this Act or the Local Government Act 1993;*

[119] See for example *Burwood Council v Dixon* [2002] NSWLEC 109.
[120] (1998) 101 LGERA 255.
[121] (1999) 103 LGERA 285.

(i) to order the building to be demolished, altered, added to or rebuilt, or

(ii) to take proceedings for an order or injunction requiring the building to be demolished, altered, added to or rebuilt, or....

(b) there is such a matter but, in the circumstances, the council does not propose to make any such order or take any such proceedings.

In the circumstances which were before the Court in *Cessnock v Ireland*, Council was not obliged to issue a building certificate, as there clearly were matters which would have entitled the Council to obtain an order for demolition of the structure, and it could hardly be said that the Council did not propose to take any action (it already had!). However Bignold J held that the Council could, in exercise of its discretion, decide to issue a building certificate in circumstances where it was not *obliged* to do so but decided to do so on the merits. His Honour held that in hearing the subject appeal under s 149F, the Court possessed the same discretion, and could order the Council to issue a building certificate if it saw fit[122].

Pursuant to s 149E of the Act, a building certificate operates to prevent the council from bringing proceedings, or making an order under the *EP&A Act* or the *Local Government Act 1993* requiring the building to be altered, demolished or rebuilt. It therefore provides protection for the owner and future owners from action by the council in respect of matters which existed at the time that the certificate was issued. It does not prevent the council from prosecuting the developer in criminal proceedings[123].

In the opinion of the authors, the current state of the law in relation to works undertaken without development consent is unsatisfactory.

It is unsatisfactory from the point of view of the owner of the development, because such development remains unlawful for as long as it stands. If the development is not a 'building' within the meaning of the Act, no certificate can issue, and there is no way of 'regularising' the work[124]. If it is a building, the owner may obtain a building certificate, but this only provides immunity from prosecution by the Council; it does not actually make the works lawful. This has two important consequences:

(1) The owner remains liable to an order for demolition in proceedings brought by third parties; the building certificate only protects him or her from prosecution by the council.

(2) There is no power to approve modifications to the building pursuant to s 96 of the Act because s 96 depends upon there being a development consent to modify; instead, each modification would have to be treated as a 'development' in its own right, and be subject to a fresh development application.

In the authors' view, the current approach is also contrary to the public interest, because sanctioning an unauthorised structure by means of a building certificate circumvents the procedures for determination of a development application set out in the EP&A Act. Although the Court has said that a major consideration in deciding whether to grant the

[122] *Ibid* at 300.
[123] Section 149E(3)(b).
[124] *Williams v Blue Mountains City Council* (2001) 115 LGERA 7.

building certificate is whether a notional development application would have been granted[125], it is not required to go through the same processes as are mandated for consideration of a development application. These include the submission of Statement of Environmental Effects and other supporting documents as required by the regulations, public exhibition and the consideration of submissions.

There is no power to impose conditions on a Building Certificate as such, although in practice the Court may refuse to issue a building certificate unless the owner consents to make certain changes to the constructed development. Because in proceedings relating to a building certificate, the Court is faced with the stark choice of either approving or not approving the building, there is a temptation be less rigorous in consideration of the merits of the proposal than if the Court were considering a normal development application.

In the authors' view, a better way of enforcing the law would be to recognise, either by amendments to the Act, or by a new construction of the Act, that there may be buildings which are in a form sanctioned by a development consent, although they were not actually 'carried out in accordance with' a consent, because the consent came into existence after they were built. This would enable a development application to be lodged in respect of such structures and considered in the same way as a normal development application. Applying the principles in *Kouflidis* (discussed below), this would put retrospective development applications on a level playing field with other development applications, with the difference that the unauthorised developer faces the prospect of having to demolish a completed building at his or her own cost if unsuccessful. Of course the Council would still have to bring Class 4 proceedings for a demolition order and the Court would still have discretion to refuse if this was seen as too drastic a remedy. However, the case for demolition would be much stronger where the proposal had been refused by the Court on the merits. Far from opening the floodgates to unauthorised development, this may actually provide a stronger deterrent than currently exists.

If development consent is granted, the structure should thereafter be treated in the same way as a structure which had been lawful from the start[126]. It would still be open to the Council to prosecute the developer in criminal proceedings for the breach of the Act which occurred when the development was initially constructed.

3.3 Merits Consideration of Unauthorised Development

Where the power exists to approve or sanction a development which has been carried out without prior consent, the Courts have stressed that an applicant should not be allowed to 'take advantage' of the applicant's unlawful actions, but neither will the Court adopt a punitive attitude in deciding whether to grant a planning approval. The decision remains

[125] *Taipan Holdings Pty Ltd v Sutherland Shire Council* [1999] NSWLEC 276.

[126] Some changes to the Act would be necessary to extend complete protection to such structures. For example the criteria for issue of s 121B orders includes where buildings have been erected without prior consent (No. 2). A qualification would need to be added to prevent the issue of a demolition order where the building had subsequently been sanctioned by the grant of development consent.

one to be made strictly on the planning merits. The classic statement of this approach was in *Kouflidis & Ors v City of Salisbury*[127]:

> *The learned judge in the Land and Valuation Court was rightly concerned with the activities of a person who, cynically and fraudulently, changes the use of his or her land, and who hopes, by doing so, to present planning authorities with a fait accompli, and thus to extract a planning consent to the changed use. His Honour posed the question: How should such a person fare when his or her application comes to be considered at the administrative and judicial level? The answer, it seems to me, is that the unlawful use should be ignored. It does not enter into the planning considerations upon which the planning decision must be made. The punishment of the unlawful conduct should be left to criminal proceedings. The supposed fait accompli should not be recognized as such. The unlawful user of the land should gain no advantage from having established an unlawful use. Any argument based either directly or indirectly upon the unlawful use should be firmly rejected. For instance, the argument put in the present case that the patronage given the unlawful business by the public indicates a local demand for the facility and is a consideration in favour of planning consent, should be rejected as an attempt to gain an advantage from the unlawful use by erecting an argument on the basis of that unlawful use.*
>
> *Although an applicant for consent should derive no advantage, direct of indirect, from the unlawful use, I do not think that it should be an impediment to the consideration of his application on its planning merits. If on the merits a planning consent should be given, it is desirable in the public interest that it should be given irrespective of the past conduct of the applicant. It is desirable that the position should be regularized leaving the past unlawful conduct to be punished by penal sanctions….*

The above observations have frequently been approved in judgments in the Land and Environment Court of NSW, dealing with the *Environmental Planning and Assessment Act*[128].

Where a s 96 modification application is lodged in respect of an unauthorised development, it is considered in the same way as a development application in respect of prospective development. The application is made to the consent authority, which attends to the normal procedures in relation to notification and exhibition. If the consent authority rejects the application, an appeal may be made to the Court in the form of an appeal under s 96(6) of the Act.

Such appeals are heard in Class 1 of the Court's jurisdiction, usually by a commissioner of the Court (although some complex cases are also heard by judges). In a Class 1 matter, the Court decides afresh whether to grant the modification, based on the merits of the application. The Court is not limited to a consideration of the information which was before the consent authority, but may receive new evidence from objectors and experts.

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[127] (1982) 49 LGRA 17 at 19-20 per King CJ.

[128] See for example the decision of Bignold J in *Willoughby CC v Dasco Design & Construction Pty Ltd* (2000) 111 LGERA 422 at para 75.

Where a structure is erected without development consent, an application may be made to the Council for a building certificate pursuant to s 149A of the Act. If the council refuses, an appeal may be made to the Court pursuant to s 149F. A s 149F appeal will also be heard in Class 1 of the Court's jurisdiction.

In *Taipan Holdings Pty Ltd v Sutherland Shire Council*[129] Bignold J examined the factors relevant to an application for a building certificate in respect of an unauthorised development. In that case, the applicant had unlawfully re-constructed a shed on the waterfront.

The Council raised a large number of factors militating against the grant of a building certificate, including the applicant's conduct. His Honour said that he gave little weight to such factors, and said that decisive weight was to be given to the question of whether the Court would grant development consent to the structure if a 'notional application' for development consent were before it. Having examined the provisions of the LEP and the merits of the development as it stood, his Honour found that development consent would be granted if an application had been made to erect the structure, therefore he directed the Council to grant a building certificate. This approach was endorsed by Pain J in *Mineral Wealth Pty Ltd v Gosford City Council*[130].

A building certificate does not authorise the use being carried on in the building, therefore if a building has been unlawfully constructed and occupied without development consent ever being obtained, the developer will need to lodge a development application for the use as well as a building certificate application for the structure. If the development application is refused, the applicant can then appeal to the Court under s 98 of the Act, which is also a Class 1 (merits) appeal. The building certificate appeal and the s 98 appeal would remain legally distinct, but the Court is likely to list them for hearing together.

For example, in *Mineral Wealth v Gosford City Council*[131], the applicant had built and commenced using a shed as a water bottling facility without authorisation. It subsequently lodged both a building certificate application for the structure, and a development application for use of the structure as a water bottling facility. Each was refused by the Council, and the applicant appealed to the Court in two separate appeals, however the appeals were heard together and were the subject of one judgment.

Where there are simultaneous proceedings in Class 4 and Class 1 of the Court's jurisdiction, the practice of the Court is to hear the Class 1 proceedings first[132].

This would happen, for example, where Council commenced civil enforcement proceedings (Class 4) in respect of a breach of development consent, which prompted the developer to lodge a s 96 application to 'regularise' the consent. Supposing the s 96 application is refused, and the developer lodges a s 96(6) appeal (Class 1), there would then be a Class 1 and a Class 4 application on foot at the same time in respect of the same development. It is logical that the Class 1 proceedings be determined first as, if the Court decides to grant consent to the modification, the Class 4 proceedings will be without utility and are likely to be discontinued. The Council may then decide to penalise the

[129] [1999] NSWLEC 276.
[130] (2003) 127 LGERA 74.
[131] *Ibid.*.
[132] *Land and Environment Court Practice Direction No. 8.*

breach by way of a criminal prosecution (Class 5), as occurred in *Willoughby City Council v Bechara*[133].

Nevertheless, the Court has discretion to vary this practice, if appropriate to the circumstances of the case. Considerations which may favour earlier hearing of the Class 4 proceedings would include where there is an element of urgency in having the unlawful development restrained (eg because it poses a risk to public safety), or where the developer has delayed making an application to regularise the development.

3.4 Certification of Unauthorised Development – Part 4A certificates

This paper will not analyse the difficulties that may be encountered when attempting to 'regularise' unauthorised development via Part 4A of the EP&A Act. See *Marvan Properties v Randwick City Council* [2005] NSWLEC 9 Talbot J and s.109F(1A) EP& A Act .

[133] (2003) 124 LGERA 416.