

## Article Information

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## Timing is everything: deferred commencement conditions and the Covid prescribed period under the Environmental Planning and Assessment Act 1979 (NSW)

***In the recent decision of the Land and Environment Court (LEC) in Norman v Central Coast Council [2022] NSWLEC 120 (Norman), Justice Pepper identified a drafting error in section 4.53 of the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) that creates textual inconsistencies. The decision indicates to proponents that timing is everything when dealing with deferred commencement conditions for consents.***

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Deferred commencement conditions of consent are commonly imposed by consent authorities pursuant to section 4.53 of the EPA Act. Deferred commencement conditions allow for project certainty and a prospective go-ahead, so long as certain requirements are satisfied in the future.

When dealing with deferred commencement conditions in *Norman*, Justice Pepper found that section 4.53 of the EPA Act contains a drafting error that warrants the intervention of the LEC. In particular, section 4.53(6A) of the EPA Act should be read down to exclude the reference to section 4.53(6)(b).

The resulting effect is that a consent authority is not authorised to reduce the five year deferred commencement period for consents issued which were issued within the prescribed period. Accordingly, any conditions imposed on consents granted between 25 March 2020 to 25 March 2022 which reduce the time limit for a proponent to satisfy the deferred commencement conditions are invalid.

### Background to the *Norman* proceedings

On 12 October 2021, Central Coast Council (**Council**) granted consent to a rural subdivision and the construction of a dwelling on each subdivided lot of land. Pursuant to section 4.16(3) of the EPA Act, four deferred commencement conditions were imposed by the Council which provided the Applicant with 12 months to satisfy those conditions. If the Applicant did not produce evidence to the Council showing that the deferred commencement conditions had been complied with in this time, the consent would lapse.

The Applicant commenced Class 4 proceedings, seeking judicial review on the basis that the time period condition contravened s 4.53(6)(b) and (6B) of the EPA Act.

### The problem provisions

The principal issue for determination concerned the proper construction of section 4.53 of the EPA Act and whether it prohibits a consent authority from imposing a condition that reduces the time period within which to satisfy deferred commencement conditions to less than five years when granting development consent.

Section 4.53 of the EPA Act relevantly provides (emphasis added):

(6) *Despite any other provision of this section, a development consent that is subject to a deferred commencement condition under section 4.16(3) lapses if the applicant fails to satisfy the consent authority as to the matter specified*

in the condition within—

- (a) 5 years after the grant of consent if the consent is granted after the prescribed period, or
- (b) 5 years after the grant of consent if the consent is granted during the prescribed period, or
- (c) 2 years after the date on which the development consent would otherwise have lapsed if—
  - (i) the grant of consent was before the commencement of the prescribed period, and
  - (ii) the development consent has not lapsed at that commencement.

(6A) A consent authority may reduce a period specified in subsection (6)(a) or (b) in granting development consent.

(6B) Subsection (6A) does not authorise a reduction to be made that would cause a development consent granted during the prescribed period to lapse within 5 years after the date on which it was granted.

### **Covid-19 amendments and the prescribed period**

Before dealing with Justice Pepper's construction of the section, it is necessary to explain in more detail the history behind the prescribed period.

The *Covid-19 Legislation Amendment (Emergency Measures - Miscellaneous) Act 2020* (NSW) (**Covid-19 Amendment Act**) brought about widespread amendments to various legislative acts in NSW, including to the EPA Act. The most notable change to the EPA Act was the introduction of the "prescribed period" between 25 March 2020 to 25 March 2022.<sup>[1]</sup> The prescribed period operates as a savings and transitional provision, with development applications determined during this period subject to special and more liberal procedural standards, such as extended time to appeal a consent authority's decision.

Prior to the Covid-19 Amendment Act, section 4.53(6) of the EPA Act had granted a consent authority wide discretionary powers to impose variable time limits within which deferred commencement conditions had to be satisfied. In effect, a proponent had a maximum of five years within which *deferred commencement conditions had to be complied with but a lesser time period could be specified for by the consent authority*.

The Covid-19 Amendment Act reshaped section 4.53(6) to incorporate the prescribed period. As a result, the distinction between consents granted before, during and after the prescribed period was created. The decision in *Norman* shows that this has led to textual inconsistencies that require resolving.

### **The proper construction of section 4.53**

The operation of section 4.53 gives rise to an internal consistency which should be construed by the LEC in a way that corrects the perceived drafting error.<sup>[2]</sup>

As it currently sits, section 4.53(6A) empowers consent authorities to impose a lesser time period for the satisfaction of deferred consent conditions however this is expressly contradicted by section 4.53(6B), which prohibits such reductions for consents granted during the prescribed period. Significantly, Justice Pepper held that sections 4.53(6A) and 4.53(6B) are "wholly contradictory and cannot be reconciled".<sup>[3]</sup>

With reference to the extrinsic materials regarding the enshrining of the Covid-19 Amendment Act, Justice Pepper construed that the legislative intention was to provide additional time for a proponent to comply with deferred commencement conditions.<sup>[4]</sup> This took into consideration the constraints imposed on economic activity by the pandemic and associated public health measures.<sup>[5]</sup> Therefore, section 4.53(6A) should be read to exclude the reference to "or b" (i.e. section 4.53(6)(b)) and a consent authority is not authorised to reduce the deferred commencement time for consents falling within the ambit of section 4.53(6)(b).

As the relevant consent in *Norman* was granted on 12 October 2021 and during the prescribed period, it fell within the ambit of section 4.53(6)(b) and the five year deferred commencement time applied. Accordingly, the condition imposed by Council to reduce the time for compliance with the four deferred consent conditions to 12 months was declared invalid.

### **Key takeaways**

There is now an express prohibition on conditions imposed on consents granted during the prescribed period which seek to reduce the time period for an applicant to comply with deferred commencement conditions.

In the aftermath of *Norman*, it would be prudent for proponents to review their date of approval and conditions of consent to see whether their consent falls within the prescribed period and whether the consent authority has imposed invalid deferred commencement conditions.

*Norman* reiterates the importance of paying close attention to the implications of the prescribed period and how it may affect

[1] *Environmental Planning and Assessment Act 1979* (NSW) s 4.53(8).

[2] *Norman v Central Coast Council* [2022] NSWLEC 120 [66] (***Norman***).

[3] *Norman* [50].

[4] *Norman* [65].

[5] *Norman* [65]; New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 May 2020, 2037 (Mark Speakman, Attorney-General).