
Retrospective approvals, consents and certificates in New South Wales

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For the most part superior courts in New South Wales have been reluctant to embrace the concept of a so-called “retrospective” (or ex post facto) approval or consent in the context of a statutory scheme for obtaining some form of approval, consent or certificate. However, the case law on this matter has by no means been entirely consistent or predictable, and various judges have approached the matter in different ways, resulting in some confusion. The author submits that the whole idea of a retrospective or ex post facto approval, consent or certificate is misguided and not in the public interest, and that attempts to justify their invocation are generally forced and artificial in nature. It is one thing to provide an opportunity to deal with anomalies in, say, design unforeseen at the date of granting an approval or a consent, it is another to give encouragement, tacit or otherwise, and even retrospective approval, to persons who deliberately offend against the terms of an approval or a consent for their own personal or private benefit and often to the detriment of adjoining or adjacent landowners and residents, not to mention the public at large.

INTRODUCTION

Local councils and similar bodies have traditionally been conferred with regulator functions of various kinds. Perhaps the most common form or type of regulatory function is the imposition of some statutory requirement for a person to obtain some type of approval, consent or certificate prior to carrying out some activity.¹ Ordinarily, the statute governing the approvals process makes it an offence to carry out the activity, or any one of a number of specified activities, without the approval

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¹ See, eg, s 68, *Local Government Act 1993* (NSW); s 76A, *Environmental Planning and Assessment Act 1979* (NSW).

(sometimes expressed and qualified as “prior approval”) of the local council or similar body.²

For example, the table to s 68 of the *Local Government Act 1993* (NSW) (the “LG Act 1993”) sets out a number of activities which may be carried out only with the “prior approval” of the council, except in so far as the Act, the regulations or a “local policy” allows an activity to be carried out without approval. In addition, as regards the carrying out of “development” in New South Wales is concerned, s 76A(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (the “EPA Act”) states:

- (1) **General** 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:
- (a) such a consent has been obtained and is in force, and
 - (b) the development is carried out in accordance with the consent and the instrument.³

THE EARLY LINE OF JUDICIAL AUTHORITIES

Insofar as the LG Act 1993 is concerned, the previous comparable legislation, namely, the now repealed *Local Government Act 1919* (NSW) (the “LG Act 1919”), contained a section, namely s 311 (in Part 11 of that Act, dealing with the erection and approval of buildings), which provided that a building shall not be erected or altered “unless the approval of the council [was] obtained therefor beforehand”.

Over the years there were many cases on the meaning of those words (or similar words in other Parts of that Act, eg, Part 12A, dealing with the carrying out of development and the granting of development consents), and it was invariably held that a so-called retrospective (sometimes referred to and known as an ex

² See, eg, s 626, *Local Government Act 1993* (NSW); s 125 (read in conjunction with s 76A), *Environmental Planning and Assessment Act 1979* (NSW). See also s 317 of the now repealed *Local Government Act 1919* (NSW).

³ See the definition of “development” in, relevantly, s4(1) of the EPA Act.

post facto) approval or consent could not be granted⁴ to erect a building which was already in existence (that is, where the building had already been completed).⁵ Thus, any approval or consent granted in respect of a building that had already been erected, or in respect of a use which had already commenced, was strictly *prospective* in nature and operation and provided no protection nor relieve against the consequences of past breaches of the legislation.⁶ As Sugerman J (as he then was), sitting in the NSW Land and Valuation Court, stated in the seminal and oft-cited decision of *Tennyson Textile Mills Pty Ltd v Ryde Municipal Council*:⁷

In so far as the appeals relate to building approval under Pt XI of the *Local Government Act 1919-1951* the Court can make no order. The appellant has chosen to do the whole of the work included in two of the applications, and a considerable portion of that included in the third, notwithstanding the absence of approval. The Council's approval must be obtained "beforehand" (s.311). The Court's decision is to be deemed the final decision of the Council (s.341(3)), which can only be a decision given "beforehand". The whole scheme of the Act is directed to the necessity for obtaining approval before work is commenced. The work here in question was done in contravention of Part XI and, more particularly, of s.311, and nothing can be done by this Court to affect that situation or its consequences.⁸

*Lowe v Mosman Municipal Council*⁹ was also a decision of Sugerman J, again sitting in the NSW Land and Valuation Court. The main issue before the court was whether a development consent could issue in respect of a building already erected in whole or in part, as opposed to a "proposed building". His Honour

⁴ Whether by the local council or by some appellate body: see, eg, *Tennyson Textile Mills Pty Ltd v Ryde Municipal Council* (1952) 18 LGR (NSW) 231; *Lowe v Mosman Municipal Council* (1953) 19 LGR (NSW) 193; cf *Minty v Wagga Wagga Municipal Council* (1929) 9 LGR (NSW) 105.

⁵ See, eg *Tennyson Textile Mills Pty Ltd v Ryde Municipal Council* (1952) 18 LGR (NSW) 231; *Lowe v Mosman Municipal Council* (1953) 19 LGR (NSW) 193; *Waverley Municipal Council v Parker* (1960) 77 WN (NSW) 243; 5 LGRA 241; *Roeder v Marrickville Municipal Council* [1972-73] LGATR 298; *Longa v Blacktown City Council* (1985) 54 LGRA 422; cf *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council* (1994) 82 LGRA 192. The last mentioned case involved the construction of the comparable provision in s 68 of the LG Act 1993.

⁶ See *Lux Motor Auctions Pty Ltd v Bankstown Municipal Council* (1955) 20 LGR (NSW) 178; *Holland v Bankstown Municipal Council* (1956) 2 LGRA 143.

⁷ (1952) 18 LGR (NSW) 231. The case concerned the requirement under what was then s 311 of the LG Act 1919 that a council's approval for the erection of a building must be given "beforehand".

⁸ (1952) 18 LGR (NSW) 231 at 232.

⁹ (1953) 19 LGR (NSW) 193.

referred to *Tennyson* (at 194) as authority for the proposition "that the appellant could not succeed in an appeal to the Court against the refusal of the building approval under Part XI [of the LG Act 1919] where the building in question had already been erected, and, as I understand the matter, the application of that to this case is not questioned". Later in his judgment, his Honour had this to say about the matter:

The whole of the work has been completed before the matter has come before the Court for decision. I do not see how I can in this case, any more than in the *Tennyson Textile Mills* case in relation to the Part XI [of the LG Act 1919] approval, approach the matter otherwise than on the same footing as that on which the Council would be bound to approach it if there were submitted to it an application for consent under cl 27 [of the *County of Cumberland Planning Scheme Ordinance*] in respect of a building which had already been completely erected. So approaching the matter, it appears to me for the reasons I have given that the application made is for a consent which is not the kind provided for by the Ordinance. It is not a consent to a future or proposed building which, in my opinion, is what the Ordinance contemplates, but is a consent to that which has already been done. For that reason alone it appears to me that this appeal could not succeed.¹⁰

The case of *Longa v Blacktown City Council*¹¹ involved an appeal pursuant to s 317B(5) of the LG Act 1919 in respect of a demolition order issued by the respondent council in respect of a partly erected building that had been erected without the council's required approval. Cripps J (as he then was) had this to say on the matter of retrospectivity:

It is clear that Mr Longa is required, in law, to obtain building approval for the balance of the uncompleted work. As I have said, he cannot obtain approval for work that has been completed but it is open to him to make an application [for a "certificate of compliance"] pursuant to s 317A [of the LG Act 1919] and to make a building application in respect of the uncompleted work. In these circumstances, I have considered whether these proceedings should be adjourned to await the outcome of applications Mr Longa may make to the council and/or any appeals he may undertake or whether the notice should be set aside at the present time. I have come to the conclusion that it is appropriate for me to set aside the notice. I

¹⁰ (1953) 19 LGR (NSW) 193 at 197. It was held in *Lowe* that consent could not be obtained under the *County of Cumberland Planning Scheme Ordinance* for the erection of a building which had already been erected, and it was also suggested that similar considerations would probably apply to an application for development consent to the use of land after such use had commenced, at least as regards prior use that had already been unlawfully commenced: cf *Lux Motor Auctions Pty Ltd v Bankstown Municipal Council* (1955) 20 LGR (NSW) 178.

¹¹ (1985) 54 LGRA 422.

have concluded on the evidence that the building has been properly built in accordance with plans and specifications. Its attachment to the house will not put anybody else at risk in the area. Furthermore, the setting aside of the notice in no way inhibits the council or this court on appeal considering any applications made hereafter: *Ellmoos v Sutherland Shire Council* [(1962) 79 WN (NSW) 709; 8 LGRA 16].¹²

In view of the words “prior approval” in s 68(1) of the LG Act 1993 (cf “beforehand” in s 311(1) of the LG Act 1919), it would, on the face of it, seem fairly clear that a NSW local council cannot grant a so-called retrospective approval to the carrying out of an activity which has already been commenced or carried out.¹³ In that regard, in *Steebond (Sydney) Pty Ltd v Marrickville Municipal Council*,¹⁴ which concerned the ability, if any, to amend a building approval following completion of the relevant building work,¹⁵ Talbot J said:

Consistently with the reasoning in *Tennyson Textiles* there is no power to grant an approval pursuant to chapter 7 [of the LG Act 1993], which would have the effect of overcoming a breach of s 68 already committed. That reasoning which concluded that the Court lacked jurisdiction to determine an application for a building permit for the erection of a building which has already been erected can be applied to an application made under the new Act. The wording of s 78 confirms that conclusion by referring to the applicant as a person seeking to carry out the activity. That is to

¹² (1985) 54 LGRA 422 at 426. As regards the effect of what was then known as a “certificate of compliance” issued pursuant to (then) s 317A of the LG Act 1919, its effect was to declare *ex post facto* that the building the subject of the certificate complied with the LG Act 1919 and the ordinances made under that Act and need not be rectified: see *Hayes v Cable* (1961) 7 LGRA 341 at 350. As to the legal ability of an applicant to make an application for building approval in respect of the *uncompleted* work see also the later decision of Hemmings J in *Hooper v Lucas* (1990) 71 LGRA 27.

¹³ There have been some cases where development consent has been granted by the Court on appeal despite the fact that the subject development (in some cases, the erection of a building, in others the use of land) had been completed or carried out prior to the consent being granted: see, eg, *Ellmoos v Sutherland Shire Council* (1962) 79 WN (NSW) 709; 8 LGRA 16; *Kerslake v Ryde Municipal Council* (1970) 19 LGRA 318; *Lux Motor Auctions Pty Ltd v Bankstown Municipal Council* (1955) 20 LGR (NSW) 178; *Holland v Bankstown Municipal Council* (1956) 2 LGRA 143. However, most, if not all, of these cases can be explained on the basis that the consent issued was intended and understood to be only “prospective” in nature: see, especially, *Hazell v Parramatta City Council* (1954) 19 LGR (NSW) 301. For example, in *Lux Motor Auctions* Hardie AJ appeared to proceed on the basis that the fact the subject land had been used *prior* to the date of application for the particular purpose for which consent was sought did not operate to prevent the making of a valid application for consent in respect of the use *per se*. See also the comments of Bignold J in *South Sydney City Council v M & D Cooper* [1997] NSWLEC 72 (28 May 1997).

¹⁴ (1994) 82 LGRA 192.

¹⁵ A pergola had been erected in excess of the height which had been approved under the building approval granted by the local council.

say that the application is directed only towards the prospect of doing or carrying out the subject activity.

The effect of ss 68 and 78 bears upon the present question which arises in respect of an application made pursuant to s 106. Section 106 entitles a person to whom an approval is granted to apply to the council to amend the approval. Section 106(2) provides that s 78 applies to an application to amend an approval in the same way as it applies to an application for approval. Accordingly the person to whom an approval has been granted or who is entitled to act on an approval may only apply to the council to amend the approval if they are still seeking to carry out the activity for which the council's amended approval is required. If the work contemplated by the amendment is already complete it is too late to make an application under s 78 or s 106.

Such a conclusion does no damage to the scheme established by the Act. Part 4 of ch 7 establishes a system for the issue of a building certificate in relation to a building or part of a building, notwithstanding that the council is entitled to make an order requiring or prohibiting the doing of things on the premises pursuant to s 124. Application for the issue of a building certificate is a remedy available to the present applicant.

The application for amendment was not lodged with the council by the applicant until after all of the work had been completed. By that point in time, the applicant was no longer a person seeking to carry out the activity of erecting the building or, at least, that part of the building the subject of the application for amendment.

The present application is misconceived. The council was not entitled to entertain the application and accordingly there is no jurisdiction for the Court to hear the appeal.¹⁶

THE LEGAL POSITION BECOMES MORE COMPLEX

However, the position may well be otherwise with respect to certain other types of approvals under the LG Act 1993.¹⁷ Relevantly, s 676(2)(a) of the LG Act 1993 provides that where a breach of that Act would not have been committed “but for the failure to obtain approval” under Pt 1 of Ch 7 of the Act, the court on application being made by the “defendant” (ordinarily referred to as the “respondent” in NSW Land and Environment Court proceedings) may adjourn the proceedings “to enable an application to be made ... to obtain that approval”. This provision (in respect of which there was no comparable provision in the LG

¹⁶ (1994) 82 LGERA 192 at 195-6. The “system for the issue of a building certificate in relation to a building or part of a building” is now contained in ss 149A-149G [in Pt 8] of the EPA Act.

¹⁷ (1994) 82 LGERA 192.

Act 1919) clearly contemplates and, by necessary implication, confers the ability to grant an *ex post facto* approval at least in some circumstances.¹⁸ In that regard, Talbot J in the NSW Land and Environment Court had this to say about the matter in *Steelbond*:¹⁹

There is no obvious reason why an approval could not be forthcoming pursuant to ch 7 [of the LG Act 1993] in respect of the prospective carrying out of some of the activities referred to in the Table [in s 68 of that Act], notwithstanding that a person has already carried out or is continuing to carry out that activity. The result in each case will depend on the nature of the activity which is the subject of consideration. For example there should be no impediment to consideration of an application for approval to the future operation of a public car park even though the applicant has been operating the public car park for some time. It is nevertheless difficult to perceive a situation where prior approval of the council can be obtained to erect a building which is already in existence. Section 676(2) [of the LG Act 1993] could have no application to the latter case but in respect of a mere use or the carrying out of an activity, such as a public car park, it would be open to the Court to adjourn the proceedings to enable the application to operate the car park to be made and, if necessary, restrain the continuance of the use while the proceedings are adjourned.²⁰

Thus, in the light of the decision in *Steelbond* the legal position under the LG Act 1993 in relation to so-called retrospective approvals would not appear to be any different from that which applied under the 1919 Act, at least in circumstances where all of the relevant work has been completed or the whole of the activity has already been carried out. This is supported by the decision in *Rancast Pty Ltd v Leichhardt Council*²¹ in which Bignold J in the NSW Land and Environment Court held that to approve a building application for only the 30 per cent of the work which was unconstructed would be to grant an approval to something entirely different than that for which approval was sought. Nevertheless, in *Hooper v Lucas*²² it was held by Hemmings J in the NSW Land and Environment Court that s 311(1) of the LG Act 1919 did not prevent the making of an application for, and the granting by the local council of, an approval for alterations, additions or extensions to building work that was unauthorised in the

¹⁸ Cf s 124(3)(a) of the EPA Act. See *Lirimo Pty Ltd v Sydney City Council* (1981) 66 LGRA 47.

¹⁹ (1994) 82 LGERA 192.

²⁰ (1994) 82 LGERA 192 at 195.

²¹ LEC, Bignold J, 17 November 1995, No 20159/95, unreported.

²² (1990) 71 LGRA 27.

sense that the prior approval of the council had not been obtained in respect of the original building work.²³

Thus, the legal position as regards so-called retrospective approvals may well be otherwise in relation to other types of approvals in circumstances where there is *still something to be done* that is capable of being made the subject of a prospective - note, prospective, *not* retrospective - approval or consent.²⁴ The result in each case will depend on the nature of the activity which is the subject of consideration. Some activities *by their very nature* are simply incapable of so-called retrospective approval once fully carried out or completed.

Be that as it may, the legal position was suggested to be *otherwise* than as stated above (that is, no retrospective approvals) very early in the life of the EPA Act in the context of development consents, at least as regards the erection of buildings, and possibly also with respect to the use of land. In that regard, Cripps J (as he then was) in *Lirimo Pty Ltd v Sydney City Council*²⁵ made certain obiter remarks that a development consent could be granted under the EPA Act despite the fact that a building had been erected.²⁶ In so doing, his Honour distinguished the previous decisions of Sugerman J in *Tennyson Textiles* and *Lowe*. However, in *Steelbond* Talbot J had this to say about the matter:

It has long been established that the whole scheme of Part XI of the Local Government Act 1919 (the former Act) was directed to the necessity for obtaining approval before work is commenced because of the prohibition on building without

²³ As Talbot J pointed out in *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299 at [34] the decision in *Hooper* appears to be “authority for the proposition that under the LG Act 1919 there was power to grant approval for building work that depended for its efficacy on unauthorised building work”.

²⁴ See *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council* (1994) 82 LGERA 192 at 195. See also *Hooper v Lucas* (1990) 71 LGRA 27.

²⁵ (1981) 66 LGRA 47. It should be noted that *Lirimo* concerned some minor demolition work that had been required to be carried out in preparation for a proposed upgrading of a building (a boarding-house) and its conversion into strata title units.

²⁶ (1981) 66 LGRA 47 at 52. However, Cripps J appeared to adopt a different view (again, admittedly obiter dicta) in *Longa v Blacktown City Council* (1985) 54 LGRA 422, which “supports the proposition that there is no power in a consent authority or the Court to approve unauthorised work which has already been carried out”: *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299 at 301 per Talbot J.

approval obtained "beforehand" (see *Tennyson Textile Mills Pty Limited v Ryde Municipal Council* [(1952)] 18 LGR (NSW) 231). The same constraints have not been applied by the Court in respect of applications for development consent to the use of land or buildings.

The Court has not been reluctant to grant consent to the prospective use of a building notwithstanding that development consent may not have been obtained to the erection of that building or to its prior use.

Support for this proposition can be obtained from the obiter remarks made by the former Chief Judge of this Court in *Lirimo Pty Limited v Sydney City Council* [(1981)] 66 LGRA 47, and the authorities cited by him at p 52. His Honour, however, also made specific reference to consent for the erection of a building as well as for the use of land. I can find no other authority for the proposition that where the erection of a building has already been completed, the Court has been prepared to grant development consent for the erection of that building.²⁷

THE OLD LINE OF AUTHORITIES IS RE-AFFIRMED

In *Connell v Armidale City Council*,²⁸ an *ex tempore* decision of Pearlman J of the NSW Land and Environment Court, which concerned 2 applications, one brought under s 106 of the LG Act 1993 for amendment of a building approval and the other an application under s 102 (now s 96) of the EPA Act for modification of a development consent, Pearlman J appeared to accept the submission made on behalf of the respondent council that the provisions of s 106(1) of the LG Act 1993,²⁹ at least when read in conjunction with s 78 of that Act,³⁰ are prospective in wording, nature and intent. However, her Honour stated that the position was less clear as regards (then) s 102 of the EPA Act:

When I come ... to the development application, the decision is ... not so clear. Section 102 is the section under which Mr Connell makes his application. Its opening provide that: "Upon application being made in the prescribed form by the applicant or any other person entitled to act upon the consent, a consent authority which has granted development consent ... may modify the consent ...". Certain

²⁷ (1994) 82 LGERA 192 at 194.

²⁸ LEC, Pearlman J, 25 September 1996, Nos 10272/96 and 20068/96, unreported.

²⁹ Section 106(1) of the LG Act 1993 relevantly states that a person to whom an approval is granted may apply to the council to amend the approval.

³⁰ Section 78 of the LG Act 1993 states that an application for an approval may be made by the person seeking to carry out the activity for which the council's approval is required.

conditions are prescribed which are not presently relevant.³¹

Ultimately, her Honour accepted the submission made on behalf of the respondent council that the provisions of the EPA Act were prospective despite the obiter remarks of Cripps J in *Lirimo*. Reliance was placed, firstly, on the wording of s 76(2)(a) of that Act³² which then relevantly provided:

“(2) Subject to this Act where an environmental planning instrument provides that development specified therein may not be carried out except with consent under this act being obtained therefore, a person shall not carry that development ... unless:

(a) that consent has been obtained ...”

Her Honour noted that Talbot J in *Steelbond* had expressed the opinion, admittedly obiter, that it was difficult to read (then) s 76 of the EPA Act as having anything other than a prospective effect. Reliance was also placed on the wording of s 124(3) of the EPA Act which provides as follows:

(3) 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
- (b) in its discretion, by interlocutory order, restrain the continuance of the commission of the breach while the proceedings are adjourned.

The reference in s 124(3)(b) to the “the continuance of the commission of the breach” was accepted by her Honour as further support for the view that the EPA Act has a “prospective nature”. She noted that s 124(3)(b) did not appear to have been referred to by Cripps J in *Lirimo*, whereas Talbot J had this to say about the matter in *Steelbond*:

... Although s 124 of the *Environmental Planning and Assessment Act 1979* (NSW) contemplates that a consent might be obtained, notwithstanding an existing breach of the Act, the section by its terms does not necessarily condone retrospective

³¹ LEC, Pearlman J, 25 September 1996, Nos 10272/96 and 20068/96, unreported, p 4.

³² Now see s 76A(1)(a) of the EPA Act.

approval. The provisions of s 124(3)(b) suggest that subs (3) is directed only to those instances where the breach is a continuing one rather than one that has been completed. If it is to be asserted that the former Chief Judge intended to go beyond that proposition in *Lirimo* then, with respect, I cannot agree with him. In the present case, it is not necessary to finally resolve the question in respect of an application for consent under the *Environmental Planning and Assessment Act 1979* (NSW).³³

Her Honour proceeded to hold that, not only was there no power to entertain an application for amendment of an approval granted by a NSW local council under Pt 1 of Ch 7 of the LG Act 1993, there was also no power to entertain an application for modification of a development consent under the EPA Act “where the work the subject of the amendment has already been carried out”.³⁴

In *Herbert v Warringah Council*³⁵ Sheahan J in the NSW Land and Environment Court, after reviewing a number of salient judicial authorities such as *Lirimo*, *Steelbond* and *Connell*, held that (then) s 102 of the EPA Act only makes provision for the prospective approval of works the subject of the modification application and could not be used to modify a development consent where the works the subject of the modification application had already been carried out.

Handley JA, sitting singly in the NSW Court of Appeal, in *Tynan v Meharg [No 2]*,³⁶ appeared to affirm the long line of judicial authorities against retrospectivity when he said:

Development consent may regularise for the future what had hitherto been an unlawful use of land or buildings, but the line of authority in the Land and Environment Court or its predecessor which was analysed by Sheahan J in *Herbert* establishes that these powers were not available, prior to Act No 152 of 1997, to regularise the unlawful erection of a structure.³⁷

³³ (1994) 82 LGERA 192 at 195.

³⁴ LEC, Pearlman J, 25 September 1996, Nos 10272/96 and 20068/96, unreported.

³⁵ (1997) 98 LGERA 270.

³⁶ (1998) 102 LGERA 119.

³⁷ (1998) 102 LGERA 119 at 121. The reference by Handley JA to Act No 152 of 1997 is a reference to the powers now contained in ss 149A-149G relating to the issue of building certificates. With respect, the ability of a NSW local council to grant a building certificate to “regularise” unauthorised building work (whether under the LG Act of the day or the EPA Act) had

In *Ireland v Cessnock City Council*,³⁸ a decision of Bignold J of the NSW Land and Environment Court involving 2 merit-based appeals being, respectively, an appeal pursuant to s 97 of the EPA Act in respect of the respondent council's deemed refusal of a development application for the use of a certain building which had not lawfully been constructed with the consent or approval of the council and which did not otherwise comply with any building approval granted by the council, and an appeal pursuant to s 149F of the EPA Act in respect of the council's refusal to issue a building certificate in respect of the same building. His Honour had this to say concerning the vexed issue of "retrospectivity versus prospectivity":

... [I]t is to be understood that it is common ground that the **highest** and best result for the Applicants in the development appeal is the grant of consent to the **prospective** use of the building. That this is the most favourable outcome of a development appeal involving a use of land or buildings that had already been commenced unlawfully, was recognised as long ago as 1956 in the judgment of Sugerman J in *Holland v Bankstown Municipal Council* (1956) 2LGRA 143 at 146.³⁹

In *Jacklion Enterprises Pty Ltd v Sutherland Shire Council*⁴⁰ Pearlman J was content to assume, but only for the purpose of determination of the question of law in that case, that *Steelbond, Connell* and *Herbert* established the proposition that there is no power to grant retrospective consent for development already carried out. It was not necessary for Her Honour to further consider the proposition in *Jacklion* because she decided on the facts of the case that the modification application did not seek to obtain retrospective consent.⁴¹

existed in one form or another since 1 January 1988, and did not need to await the inclusion in the EPA Act in 1997 of the building certificate provisions previously contained in the LG Act 1993 (on and from 1 July 1993) and before that in the LG Act 1919 (on and from 1 January 1988).

³⁸ (1999) 103 LGERA 285.

³⁹ (1999) 103 LGERA 285 at 305, [77] [*original emphasis*].

⁴⁰ [1998] NSWLEC 152 (8 July 1998).

⁴¹ However, as Talbot J pointed out in *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299 at [22], *Jacklion* is judicial authority for the proposition that a condition of development consent controlling the impact of a subdivision is capable of being modified under what is now s 96 of the EPA Act even if the building work the subject of the condition has been carried out in a manner contrary to the condition. By reason of that alone *Jacklion* marked a turning point in the court's approach to the question of retrospectivity.

A CHANGE IN DIRECTION

Regrettably, the Court's decisions in *Connell*, *Herbert* and *Jacklion* proved not to be the final word on the matter. In *Windy Dropdown Pty Ltd v Warringah Council*,⁴² a decision of Talbot J in the NSW Land and Environment Court, his Honour took the opportunity to review the previous judicial authorities on so-called retrospective approvals and the like:

There is a long line of authority in this Court, exemplified by the observations made by Cripps J in *Longa [v Blacktown City Council (1985) 54 LGRA 422]*, which supports the proposition that there is no power in a consent authority or the Court to approve unauthorised work which has already been carried out.

In *Longa*, Cripps J accepted that although it was not open to the council or the Court to approve a structure already erected on the land, other than perhaps pursuant to s 317A of the [LG Act 1919], as it then stood, nevertheless it would be open for the builder to obtain building approval for future work in respect of the partly completed building that had been erected without council approval. It should be noted, however, that *Longa* was an appeal against an order for demolition of a partly erected building under s 317B of the LG Act 1919 and accordingly, the comments by Cripps J were strictly obiter dictum.

Furthermore, the observations by Cripps J in *Longa* appear to be inconsistent with his earlier obiter remarks in *Lirimo Pty Ltd v Sydney City Council (1981) 66 LGRA 47* when he stated that "the inclusion of s 124 of the Environmental Planning and Assessment Act lead me to the view that an applicant is not precluded from obtaining a proper and valid application for consent to the use of land or the erection of a building notwithstanding the use or erection preceded the application for consent".

There is no reason to depart from the approach taken by me in *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council (1994) 82 LGERA 192* in respect of an application made under s 106 of the [LG Act 1993] to amend a building approval. I decided that consent could not be given to approve work already carried out. The approach was subsequently embraced by Pearlman J in *Connell v Armidale City Council* (unreported, Land and Environment Court, NSW, Pearlman J, 25 September 1996).

In *Connell*, Her Honour extended the principle which stands against the capacity to grant retrospective approval to the application of s 102 of the [EPA Act].

After considering a number of authorities, including *Lirimo*, *Steelbond* and *Connell*, in *Herbert v Warringah Council (1997) 98 LGERA 270*, Sheahan J found that s 102

⁴² (2000) 111 LGERA 299.

requires approval of works prospectively and cannot be used to amend a consent where the works referred to in the application have already been carried out.

Although Her Honour in *Connell* appears to have considered the relationship between s 76, s 124 and s 102 of the [EPA Act] (as it then applied) to conclude that s 102 could only have a prospective effect, it is not clear from the judgment of Sheahan J in *Herbert* how he reached the conclusion that "(t)he cases clearly find s 102 requires approval of works prospectively". The only case cited by His Honour in *Herbert* that bears upon the present issue is the ex tempore decision of the Chief Judge in *Connell*. In that case Her Honour was hampered by the circumstance that Mr Connell appeared without legal representation, a fact which she lamented in the judgment (at p 4).⁴³

In *Windy Dropdown* Talbot J ultimately held that the provisions of s 102 of the EPA Act could be used to modify a development consent where the works the subject of the modification application had already been carried out. His Honour had this to say about the matter:

Section 124(3) does not contain any reference to modification of a development consent. The relevant phrases are "failure to obtain a consent" and "to enable a development application to be made". ... The effect of s 124(3) therefore has little factual bearing on the present application or on the prospective or retrospective effect of an application for modification.

The language of s 96 (or the former s 102) itself does not mandate against retrospective development. The only prospective language is the reference to "the proposed modification" in subs 1A(a). A practical purpose of s 96 is to provide an opportunity to deal with anomalies in design unforeseen at the date of grant of development consent or, as the history of the legislation suggests, to legitimise partial changes that do not have the effect of radical transformation. The original concept of the modification of the details of a consent appears to have been reintroduced by s 96(1), although not in the same terms.

Subsection (4) of s 96 is the same as the previous subs (4) of s 102. It expressly distinguishes modification of a development consent from the granting of development consent, thereby suggesting that at least in some respects the consideration and approval of an application for modification is to take place in a different context to the consideration of an application for development consent. Furthermore, the subject of an application made pursuant to s 96 is the development consent, not the development itself.⁴⁴

With respect, his Honour's reliance upon s 96(4) of the EPA Act is somewhat curious. He says:

⁴³ (2000) 111 LGERA 299 at 301-2, [8]-[14].

⁴⁴ (2000) 111 LGERA 299 at 304, [26]-[28].

Section 76A ["Development that needs consent"] as well as s 78A ["Application (for development consent)"] clearly operate in the context of a prospective proposal whereas a modification of consent pursuant to s 96 operates retrospectively by dint of s 96(4). ...⁴⁵

Section 96(4) of the EPA Act simply reads as follows:

(4) The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified.

It is hard to read into or otherwise interpolate any language or intent of retrospectivity into s 96(4) other than it is self-evidently the case that any modification of a development consent occurs at a later point in time than the date on which the consent first issued. Be that as it may, it is clear that Talbot J was in favour of what he referred to as a "broad construction"⁴⁶ of s 96 of the EPA Act.

In *Willoughby City Council v Dasco Design and Construction Pty Ltd*,⁴⁷ another decision of the NSW Land and Environment Court, Bignold J was clearly also in favour of a broad construction of the modification power contained in s 96 of the EPA Act:

Having considered for myself the competing authorities in this Court, I would respectfully agree with Talbot J's conclusion that the power of modification conferred by the [EPA Act], s 96 construed in its context and having regard to its obvious purpose in the legislative scheme, is available even in a case where the relevant works have already been carried out. The proper effect of s 96 is principally to be found in the language of that section rather than in the text of other provisions of the [EPA Act], most notably s 76A and s 124(3) and in the legislative policy that has been discerned therein. Those sections deal with the question of the need for development consent, but in view of the express terms of s 96(4) reference to those sections is not a likely source of illumination of the true meaning of s 96.⁴⁸

⁴⁵ (2000) 111 LGERA 299 at 304, [30].

⁴⁶ (2000) 111 LGERA 422 at [31] and [32].

⁴⁷ (2000) 111 LGERA 422.

⁴⁸ (2000) 111 LGERA 422 at 441, [94].

His Honour referred to the decision of Handley JA in *Tynan v Meharg [No 2]*,⁴⁹ stating:

In context, I do not think that Handley JA's reference to *Herbert* can be taken as a clear and deliberate endorsement of the actual decision in *Herbert* holding that the statutory modification power was not available in a case where the works had already been carried out. This is because "the line of authority" so referred to, going back to the predecessor of this Court, could not have included the statutory modification power because it simply did not exist under the planning laws that were in force prior to the enactment of the [EPA Act].⁵⁰

With respect, true it is that some of the cases comprising the "line of authority" predate the commencement of the EPA Act on 1 September 1980, but the principle against retrospectivity did not rely wholly upon that earlier line of cases,⁵¹ and his Honour's reference to and invocation of the NSW Court of Appeal decision in *North Sydney Council v Michael Standley and Associates Pty Limited*⁵² dealing with the modification power contained in what was then s 102 of the EPA Act seems misplaced and inappropriate as the main proposition for which that case stands is that a development consent may be modified even if it involves a breach of what would otherwise have been, in the context of the consideration and determination of a development application, mandatory development standards.⁵³

Be that as it may, the combined weight of *Windy Dropdown* and *Dasco Design and Construction* is such that there can no longer be any doubt about the power of a consent authority in NSW to modify a development consent is available even where the relevant works have already been carried out. Sadly, too few of the cases on the question of retrospectivity have alluded to the facility afforded by a building certificate insofar as unapproved building work is concerned, for it is a

⁴⁹ (1998) 102 LGERA 119.

⁵⁰ (2000) 111 LGERA 422 at 441, [93].

⁵¹ See, eg *Tennyson Textile Mills Pty Ltd v Ryde Municipal Council* (1952) 18 LGR (NSW) 231; *Lowe v Mosman Municipal Council* (1953) 19 LGR (NSW) 193; *Waverley Municipal Council v Parker* (1960) 77 WN (NSW) 243; 5 LGRA 241; *Roeder v Marrickville Municipal Council* [1972-73] LGATR 298.

⁵² (1997) 97 LGERA 433.

⁵³ Cf *State Environmental Planning Policy No 1 - Development Standards*.

building certificate, and prior to that what was known as a “certificate of compliance” under what was then s 317A of the LG Act 1919, that was intended by the legislature to be the mechanism for dealing with the consequences of unauthorised building work.⁵⁴

Both Talbot J in *Windy Dropdown* and Bignold J in *Dasco Design and Construction* spoke of the supposed need to give the statutory modification power now contained in s 96 of the EPA Act a wide construction and application but, as someone who has worked intimately with NSW local councils for a great number of years, the unfortunate result of those decisions, along with certain other statutory “innovations” such as private certification, has been a demonstrable upsurge in unauthorised building work, with retrospective reliance being placed upon s 96 by offenders if and when the local council becomes aware of and takes issue with the unauthorised work. It is one thing to “provide an opportunity to deal with anomalies in design unforeseen at the date of grant of development consent”,⁵⁵ it is another to give encouragement, tacit or otherwise, and even retrospective approval, to persons who deliberately offend against the terms of a development consent for their own personal or private benefit and often to the detriment of adjoining or adjacent landowners and residents.

In *Marvan Properties Pty Ltd v Randwick City Council*,⁵⁶ a decision of Talbot J of the NSW Land and Environment Court, the courts had before it an appeal against the refusal of the respondent council to issue a construction certificate to the applicant in respect of certain building works. The council submitted that the whole of the scheme contained within the EPA Act in relation to the certification of development was directed to the necessity for obtaining upfront approval for

⁵⁴ See Arraj D, “Building Certificates, Demolition Orders and Defects in Title Leave Purchasers Barking Mad” (1988) 36 (10) *LSJ* 66; Ellis-Jones I, “Can ‘NO’ to a Building Certificate Mean ‘YES’?” (2002) 40 (5) *LSJ* 59. However, unlike the former “certificate of compliance” issued under (then) s 317A of the LG Act 1919, a building certificate (being, in effect, a “certificate of non-action”) does *not* declare *ex post facto* that the building the subject of the certificate complies with any or all of the otherwise relevantly applicable legislation (viz the LG Act 1993 and the EPA Act 1979). Cf *Hayes v Cable* (1961) 7 *LGRA* 341 at 350.

⁵⁵ *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 *LGERA* 299 per Talbot J at [27].

⁵⁶ [2005] *NSWLEC* 9 (11/01/05).

work certified in a construction certificate, that is, *before* any building work work is commenced. That was not the case here, as the applicants had commenced and effectively completed the building work without the benefit of a construction certificate. Nevertheless, it was submitted on their behalf that a construction certificate was not a certificate with respect to the building constructed in consequence of the plans and specifications, rather a certificate only in respect of certain plans and specifications.⁵⁷ On that basis, submitted the applicants, there was no legal impediment to the issue of a retrospective construction certificate, that is, one in respect of building works that had already been carried out.

Talbot J, after referring to and quoting from judgment of Sugerman J in *Tennyson Textile Mills Pty Ltd v Ryde Municipal Council*⁵⁸ as well as his own decision in *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council*,⁵⁹ then went on to note that the reference to the erection of a building in the Table to section 68 of the LG Act 1993 “was omitted when the amendments were made to the [EPA Act] to introduce the concept of a construction certificate”.⁶⁰ His Honour also noted that, unless the applicants could obtain a construction certificate, it would never be possible for them to obtain an occupation certificate under the EPA Act authorising occupation or use of the subject premises.⁶¹ He then went on to compare and contrast the “building approval” formerly contained in the LG Act 1919 and later in the LG Act with the “construction certificate” regime in the EPA Act:

The schemes under the LG Act 1919 and the LG Act 1993 incorporated an

⁵⁷ Section 81A(2)(a) of the EPA Act relevantly provides that the erection of a building in accordance with a development consent must not be commenced until a construction certificate for the building work has been issued.

⁵⁸ (1952) 18 LGR (NSW) 231.

⁵⁹ (1994) 82 LGERA 192.

⁶⁰ [2005] NSWLEC 9 (11/01/05), at [10].

⁶¹ Section 109H of the EPA Act prohibits the issue of an interim occupation certificate or a final occupation certificate to authorise a person to commence occupation or use of a new building unless the certifying authority is satisfied, in the case of building erected pursuant to a development consent, that a construction certificate has been issued “with respect to the plans and specifications for the building”.

application for an approval to erect a building and the obtaining of that approval beforehand or, latterly, prior to carrying out of the activity.

The contrasting scheme under the current legislation involves a system of certification following an approval by development consent where a development application is required. There is no specific temporal provision in relation to the issue of a construction certificate except in so far as section 81A(2) provides that the erection of a building in accordance with a development consent must not be commenced until a construction certificate for the building has been issued. Nevertheless, there is an element of future performance contemplated by the description of a construction certificate in section 109C as being a certificate to the effect that work completed in accordance with specified plans and specifications will comply with the requirements of the regulations. However there is sufficient tolerance in the use of the words in section 109C for me to accept a construction that allows for the certificate to operate solely on the basis of what is shown in the plans and specifications rather than by reference to, or by inspection of work already commenced at the date the certificate is issued.⁶²

His Honour proceeded to hold that a construction certificate may be lawfully issued pursuant to s 109F of the EPA Act notwithstanding that the work has been commenced.⁶³

Not long after the decision of Talbot J in *Marvan Properties* the NSW Parliament amended the EPA Act to render nugatory, indeed reverse the effect of, his Honour's decision.⁶⁴ In that regard, s 109F(1A) of the EPA Act now states that a construction certificate has no effect "if it is issued after the building work or subdivision work to which it relates is physically commenced on the land to which the relevant development consent applies".⁶⁵ The NSW Department of Planning,

⁶² [2005] NSWLEC 9 (11/01/05), at [28] and [29]. Talbot J stated that a retrospective modification of a consent still did not prevent a civil or criminal sanction being sought for breach of s 81A(2) of the EPA Act (which prohibits the commencement of the erection of a building until a construction certificate has been issued).

⁶³ [2005] NSWLEC 9 (11/01/05), at [35]. McClellan J, a former Chief Judge of the NSW Land and Environment Court, had previously expressed a tentative view to the same effect in *Austcorp No. 459 Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 318 (28 November 2003), unreported.

⁶⁴ See s 96 of, and Sch 3 (3.2) [12] to, the *Building Professionals Act 2005* (NSW).

⁶⁵ The amendment to section 109F of the EPA Act came into effect on 3 March 2006. The amendment (s 109F(1A)) applies to all construction certificates for building or subdivision work, except to construction certificates issued before 3 March 2006 as well as building or subdivision work that was physically commenced on the land (to which a relevant development consent applies) before 3 March 2006.

in a planning circular⁶⁶ issued to all NSW local councils a short time before the commencement of the amending legislation, gave its reasons for the reversal of the decision in *Marvan Properties*:

The Department is of the view that it is preferable that construction certificates be issued before building work commences.

If a construction certificate could be issued after building or subdivision work has started, the likelihood of the work not being designed and constructed in accordance with the relevant consent and required standards would increase. In many cases it is far more difficult to assess the compliance of building or subdivision work after work has commenced.⁶⁷

CONCLUSION

In the opinion of the author, the view of the Department of Planning makes perfect good sense.⁶⁸ There need to be effective deterrents to unauthorised development ... of all kinds. The only disappointment is that the legislature did not take the opportunity to insert a similar provision in s 96 of the EPA Act with respect to “retrospective” modifications of development consents.

The present state of the law in New South Wales with respect to the retrospective approvals and consents is, to put it mildly, quite unsatisfactory and confusing. However well-intentioned some of the more recent judicial decisions may have been, the fact is that, for the most part, the practical effect of those decisions has been, as already mentioned, to give encouragement to persons

⁶⁶ NSW Department of Planning, Planning Circular PS 06-004, 13 February 2006.

⁶⁷ NSW Department of Planning, Planning Circular PS 06-004, 13 February 2006, p 1.

⁶⁸ The only *possible* down side to the effect of s 109F(1A) of the EPA Act is that the Act does not contain any *express* mechanism for *lawful* occupation of a building erected in circumstances where a construction certificate cannot lawfully issue. However, the building certificate provisions contained in Pt 8 of the EPA Act can be relied upon to seek a building certificate such that, if and when such a certificate is issued, the certificate would operate to prevent demolition of building work that is otherwise unauthorised (including, relevantly, where building work has been carried out without a required construction certificate). However, a building certificate was *never* intended to “cure” breaches of the legislation (in the sense of providing protection against *prosecution* in respect of unlawful building work or development), but operates only to prevent the taking by the local council of *certain* types of action in respect of the unauthorised work.

who deliberately offend against the terms of a development consent for their own personal or private benefit and often to the detriment of adjoining or adjacent landowners and residents. Such a state of affairs is demonstrably not in the public interest.

The whole notion of granting retrospective approvals or consents, or retrospective modifications to approvals or consents, is contrary to the basis rational behind the existence and need for an approvals or consent system. Despite some unfortunate, overly pragmatic watering down of this principle in recent times, it is indubitably the case that the whole approvals schemes contained over the years in statutes such as the LG Act 1919, the LG Act 1993, and the EPA Act 1979, has been, expressly or otherwise by necessary statutory implication, directed to the necessity for obtaining approval or consent *before* work is commenced. The reason for this is not hard to understand. Any approvals system, in order to be fully effective and have sufficient deterrent value, needs to be truly prospective in the following manner:

1. An applicant, intending to carry out some activity that, as a matter of law, requires some statutory approval or consent in respect of its lawful carrying out, makes an application in the proper form, and that is otherwise capable of lawful determination,⁶⁹ to the appropriate approvals or consent authority, for approval or consent.
2. The applicant's applicant is duly assessed by the approvals or consent authority on its respective merits, and otherwise according to law, giving real, proper and genuine consideration to the application in all material respects, taking into account all those relevant matters for consideration that the decision-maker is duty bound, as a matter of law, to take into account, and so forth.⁷⁰

⁶⁹ See the decision of Pearlman J (then Chief Judge of the NSW Land and Environment Court) in *Byron Shire Business for the Future Inc v Byron Shire Council* (the *Club Med* case) (1994) 84 LGERA 434.

⁷⁰ See, eg, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

3. In due course, an approval or a consent issues, having a *prospective* operation.
4. Rights of merit-based appeal exist in most cases, with the subject application for approval or consent being, once more, duly considered on its merits, with the matter before the court being determined by reference to the circumstances - *both* the facts and the law - as they exist at the time of the appeal.⁷¹

It is the author's firm view that, *if* there be a need *from time to time* to "provide an opportunity to deal with anomalies in design unforeseen at the date of grant of development consent"⁷² or the like - and there *may* well be - then bold, forward-looking mechanisms such as the building certificates regime contained in Part 8 of the EPA Act, or the introduction of some similar statutory mechanism, is the appropriate way to go. In the apt words of the American humourist, satirist and cartoonist James Thurber:

Do not look back in anger, or forward in fear, but around in awareness.⁷³

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⁷¹ See, eg, *Builders Licensing Board (NSW) v Sperway Constructions (Sydney) Pty Ltd* (1976) 51 ALJR 260; 14 ALR 174; *Ristevski v Mahoney* (1984) 52 LGRA 324.

⁷² *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299 per Talbot J at [27].

⁷³ Thurber J, quoted in E Segarra, "Current State and Future Directions of SAEA" *Journal of Agricultural and Applied Economics* 30, 1 (July 1998): 1-19, p 1, [Online] viewed 4 August 2008, <<http://ageconsearch.umn.edu/bitstream/15089/1/30010001.pdf>>.