Amendment of consents

102. (1) 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 under this Division may modify the consent where:

(a) it is satisfied that the development to which the consent as modified relates is substantially the same development;

(b) it is satisfied that no prejudice will be caused to any person who objected to the development application the subject of that consent; and

(c) it has consulted with the relevant Minister or public authority in respect of a condition referred to in section 82(1) and that Minister or authority has not, within 21 days after being consulted, objected to the modification of that consent.

[Subs (1) am, Act No 228, 1985, s 5 and Sch 1.]

(1A) In the case of a development consent referred to in section 93(4) that is the result of an appeal, a copy of such an application is to be lodged by the applicant with the council of the relevant area or with such other person as may be prescribed by the regulations.

[Subs (1A) added, Act No 90, 1992, s 4 and Sch 1.]

(1B) An application under this section must be accompanied by the fee as prescribed by the regulations.

[Subs (1B) added, Act No 90, 1992, s 4 and Sch 1.]

(2) A development consent shall not be modified under this section where it relates to designated development or development which is required to be notified as if it were designated development, unless notice has been given, in accordance with the Regulations, to the persons (if any) who made submissions under section 87 in relation to the application for the consent, and the consent authority shall consider any further submissions made by any of those persons within the prescribed period.

[Subs (2) am, Act No 32, 1989, Sch 1; Act No 90, 1992, s 4 and Sch 1.]

(3) Where the development consent referred to in subsection (1) is a consent referred to in section 93(4) or 101(9)(b), the Court or the Minister, as the case may be, shall be deemed for the purposes of this section to be the consent authority.

[Subs (3) am, Act No 228, 1985, s 5 and Sch 1.]

(3A) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 90 as are of relevance to the development the subject of the application.

[Subs (3A) added, Act No 90, 1992, s 4 and Sch 1.]

(4) Modification of a development consent in accordance with this section shall not be construed as the granting of development consent under this Division but a reference in this or any other Act to a development consent shall be a reference to the development consent so modified.

(5) A person making an application under subsection (1), and dissatisfied with the determination of the application or the failure of the consent authority to determine the application within 40 days of the application being made, may, except where the application is made in relation to a consent granted by the Minister under s 101, or except as may otherwise be provided by this section, appeal to the Court, and the Court may determine the appeal.

[Subs (5) am, Act No 228, 1985, s 5 and Sch 1.]

(5A) Nothing in subsection (5) enables an appeal to be made against the determination of, or the failure to determine, an application to modify a development consent, being a development consent granted by the Court.

[Subs (5A) added, Act No 228, 1985, s 5 and Sch 8.]

(6) Nothing in this Act prevents the making and determination of a development application where the development to which the application relates is the subject of a development consent, and the foregoing provisions of this subsection apply whether or not that consent could be modified under this section.

[Subs (6) am, Act No 228, 1985, s 5 and Sch 8.]

[S 102 am, Act No 228, 1985; Act No 32, 1989; Act No 90, 1992.]

Defined at s 4: consent authority; Court; designated development; development; development application; development consent; public authority.

Application in prescribed form

An application referred to in s 102(1) shall be made as prescribed by cll 47(1), (3) and 48 of the Regulation.

Notice by consent authority

A notice referred to in s 102(2) shall be made as prescribed by cl 47(2) of the Regulation.

Modification of consents

When an application is made under s 102 of the Act for modification of a development consent, certain procedural steps (such as the giving of notice of an application for the modification of a consent authorising designated development) must be followed by a council if the council granted the consent.

The council of an area in which development is intended to be carried out (or, where there is no such council, a person nominated by the regulations) is required to take those procedural steps in the case of an application to modify a consent for that development which was granted by the Land and Environment Court on an appeal.

Relationship between ss 97 and 102

Section 102 of the Act permits a modification of a consent notwithstanding that the condition sought to be modified could have been made the subject of an appeal at the time of the granting of consent. The council (and the court on appeal) has a discretion as to whether modification should be granted. Where there has been no change in circumstances giving rise to the application for modification and the

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application is merely an attempt to appeal against a determination out of time and amounts to an attempt to avoid the burden of the consent after accepting its benefit the court will exercise its discretion to refuse the application: *Progress & Securities Pty Ltd v North Sydney MC* (1988) 66 LGRA 236.

In that case the application was to delete a condition imposing contributions which were paid to council at the time the consent was granted, on the ground of unreasonableness. The application was outside of the time limit imposed in s 97 of the Act in respect of appeals and so the court refused to exercise its discretion: ibid.

Modify . . . details of

Until the 1985 amendment (see above at [889]) s 102(1) read: ". . . a consent authority . . . may modify details of the consent . . .". In several cases the courts had to consider what those words meant and how far-reaching alterations could be before the amended consent was something different from that which was granted and therefore invalid. Quaere the effect of the repeal by Act No 228 of 1985 of the words "details of" in s 102(1) of the Act. The cases discussed below should be read, therefore, in light of that amendment.

Held that the power to "modify details" in s 102(1) was a power to alter without radical transformation of the whole consent and included a power to so alter a condition or conditions which limited a consent. Whether the alteration or abrogation of a condition or conditions constituted a modification of details within s 102(1) was a question of fact and degree. A condition upon which a consent was wholly dependent could not be treated as a *detail* of the consent capable of modification under subs (1): *Sydney CC v Ilenace* [1984] 3 NSWLR 414 (C/A). Priestley JA in a dissenting judgment considered the words "modify details" meant "change any of the parts": ibid.

Interpreting this judgment Cripps J has said that the right to have details of a consent modified pursuant to s 102 does not necessarily depend on there being an express condition to the effect that the building is to be erected in accordance with the plans and specifications: *Double Bay Marina Pty Ltd v Woollahra MC* (1985) 54 LGRA 313.

It is open to the Court to modify the details of a consent by substituting the plans submitted in the building application for the plan originally submitted to council when development consent was applied for: ibid. In that case his Honour varied the consent to permit a larger building and the erection of a sailboard storage unit, not previously before council and not attached to the proposed building.

Cripps J also said that he was prepared to modify the consent to permit the description "office", "store", "workshop" in lieu of "broker, officer, secretary, office (yard manager)" appearing in the original application, but that it was not necessary to do so because existing use rights attached to the land permitting such a use anyway.

In *John Bruce & Partners Pty Ltd v North Sydney MC* (1984) 55 LGRA 238, the Court was prepared to consider the reduction of an open space requirement to one-fifth of the area originally required as a "detail" modification only and not as a modification which would substantially change the development: ibid.

The appellant conducted a secondary school on an appeal site for nearly sixty years. To enable it to comply with directions from the Commonwealth Schools Commission (upon which it was dependent for grants) it obtained planning permission for construction of a new classroom block, additions to the existing building, and the provision of various facilities. It appealed against certain conditions.

The planning consent pursued by the local planning authority described the total work as including demolition of certain houses and the provision of temporary portable classrooms. The appellant demolished the houses referred to in that description, provided the temporary portable classrooms, and lodged an application with the respondent in its capacity as a local authority for the street closure referred to in the off-street parking condition. The respondent contended that those actions by the appellant precluded it from appealing against the other conditions.

In the course of producing working drawings to accompany the application for a building permit it was found necessary to increase the height of the new classroom block and to rearrange various of the teaching areas with the consequent floor area increase of about 15 per cent. The respondent contended that those changes required a new application for planning permission. The applicant appealed.

The respondent prepared a draft local environmental plan which, if brought into force, would prohibit development for schools if that development would involve the demolition of houses.

Holding that the building application did not constitute a new proposal but was for "substantially the same development" within s 102(1)(a) the court said that the law of land development must have regard to the practicalities and the accepted practice of the development industry and to the realities of building construction. Reference to the "details" of the consent to the erection of a building must include those details shown on the drawings and in the specification. A modification of what is shown on the plans accompanying an application for planning permission is just as much a modification of the conditions of the consent. Whether a particular modification is of a detail or is so substantial that it falls outside the scope of s 102 is a question of fact and degree: *Catholic Education Office v Newcastle CC* (1985) 15 APA 1.

Commercial district—colonnading requirement. Applications under SEPP No 1 for dispensation from a colonnading requirement were made in respect of two buildings adjoining an appeal site, landscape setbacks being allowed in place of colonnading. A similar application was made in respect of the appeal site, the developer submitting that such an approach "complements" the adjoining multistorey buildings with their landscape setbacks and would "extend and continue the landscape treatment. The plaza at ground level is a more appropriate and pleasant contribution to the streetscape for visual and functional use than would be provided by colonnades". Dispensation from the colonnading requirement was granted in respect of the appeal site on that basis.

The proposed development consisted of two buildings with a connecting link around a semi-enclosed open courtyard.

After planning permission had been granted the developer applied for modifications bringing the buildings much closer to the street alignments, with consequent loss of landscaping, introducing an additional central building element, providing bridged access points between the buildings in close proximity to the street, and providing for more numerous and more prominent vehicular access with consequent loss of uninterrupted footpath to crossovers.

Held: (1) The most significant effect of the modifications sought was the loss of landscape space, substantial visual change, and the loss of continuity of landscape setting which was a characteristic of development in the immediate vicinity of the appeal site.

(2) The effect of those changes was such that it could not be concluded that the building as proposed to be modified would be substantially the same as that for which a consent had been issued.

(3) If the modifications were granted, little opportunity would remain for any meaningful landscape setting which was needed to provide continuity and be in character with the landscape setting of the adjoining developments.

(4) Accordingly, there was no power to grant a variation under s 102: *Peterson v Parramatta CC* (1987) 28 APA 444.

Court may go beyond terms of consent. Held that the court may go beyond the terms of the consent and to the *purpose* for which various conditions were imposed to see whether the modification of the conditions would, conformably with the *Ilenace* decision, be "modifications of details of the consent". In the *Double Bay Marina* case Cripps J said he was entitled to have regard to the judgment in previous litigation between the parties and to the proceedings in the Court: ibid.

Change of circumstances since consent

The operation of s 102 of the Act is not limited to cases involving a change in relevant circumstances occurring after the grant of development consent: *Progress & Securities Pty Ltd v North Sydney MC* (1988) 66 LGRA 236.

Power to modify—existing use rights

The constraints to the power to modify consents under s 102 of the Act are to be found only in s 102 and, subject to those constraints, the court was empowered to modify the consent. Because s 102(4) provides that a modification is not to be construed as the granting of a development consent the use of land in accordance with a modification of consent granted under s 102 would not result in a breach of the Act, notwithstanding the restrictions on intensification of existing uses contained in s 107. The power to modify consents under s 102 of the *Environmental Planning and Assessment Act* 1979, is not limited to those consents which do not involve "existing use" rights: *Valhalla Cinemas Pty Ltd v Leichhardt MC* (1986) 60 LGRA 241.

Appeals

An appeal under s 102 of the *Environmental Planning and Assessment Act* is in the nature of a rehearing of the application made to the council as the consent authority.

An assessor's decision on the appeal is a discretionary judgment and he is the sole arbiter of fact. Judicial review of an assessor's decision is possible only if there be an error of law: s 56A of the *Land and Environment Court Act*.

Where an assessor makes a finding of fact in these circumstances, there is no error of law even if that finding be perverse, unreasonable, demonstrably unsound, or of little weight compared with different conclusions which were reasonably open. His power to modify is, however, limited by the constraints contained in s 102—see *Progress and Securities Pty Ltd v North Sydney MC* (1988) 66 LGRA 236, and the applicant for modification bears an onus to show cause why a consent should be modified: *Seaforth Services Pty Ltd v Byron SC [No 2]* (1991) 72 LGRA 44.

Revocation or modification of development consent

103. (1) If at any time it appears to—

(a) the Director, having regard to the provisions of any draft State environmental planning policy or draft regional environmental plan; or

(b) a council (being the consent authority in relation to the development application referred to in this subsection), having regard to the provisions of any draft local environmental plan,

that any development for which consent under this Division is in force in relation to a development application should not be carried out or completed, or should not be carried out or completed except with modifications, he or it may, by instrument in writing, revoke or modify that consent.

(2) Before revoking or modifying a consent as provided by subsection (1), the Director or council shall by notice in writing inform each person who in his or its opinion will be adversely affected by the revocation or modification of the consent of his or its intention to revoke or modify that consent and afford that person the opportunity of appearing before the Director or council or a person appointed by him or it to show cause why the revocation or modification should not be affected.

(3) The revocation or modification of a development consent shall, subject to this section, take effect from the date upon which the instrument referred to in subsection (1) is served upon the owner of the land to which that consent applies.

(4) Within 3 months of the date upon which the revocation or modification of a consent referred to in subsection (1) takes effect, the applicant for the consent, or any other person entitled to rely upon the consent, who is aggrieved by the revocation or modification may appeal to the court, and the court may determine the appeal.

(5) The court shall determine the appeal under subsection (4) by affirming, varying or cancelling the instrument of revocation or modification.

(6) Where a development consent is revoked or modified under this section, any person aggrieved by the revocation or modification shall be entitled to recover from—

(a) where the Director is responsible for the issue of the instrument of revocation or modification—the Government of New South Wales; or

(b) where a council is responsible for the issue of that instrument—that council,

compensation for expenditure incurred pursuant to that consent during the period between the date on which that consent becomes effective and the date of service of the notice under subsection (2) which expenditure is rendered abortive by the revocation or modification of that consent.

(7) The Director or council shall, on or as soon as practicable after the date upon which the instrument referred to in subsection (1) is served upon the owner of the land referred to in subsection (3), cause a copy of the instrument to be sent to each person who is, in his or its opinion, likely to be disadvantaged by the revocation or modification of the consent.

(b) a council (being the consent authority in relation to the development application referred to in this subsection), having regard to the provisions of any draft local environmental plan,

that any development for which consent under this Division is in force in relation to a development application should not be carried out or completed, or should not be carried out or completed except with modifications, he or it may, by instrument in writing, revoke or modify that consent.

(2) Before revoking or modifying a consent as provided by subsection (1), the Director or council shall by notice in writing inform each person who in his or its opinion will be adversely affected by the revocation or modification of the consent of his or its intention to revoke or modify that consent and afford that person the opportunity of appearing before the Director or council or a person appointed by him or it to show cause why the revocation or modification should not be affected.

(3) The revocation or modification of a development consent shall, subject to this section, take effect from the date upon which the instrument referred to in subsection (1) is served upon the owner of the land to which that consent applies.

(4) Within 3 months of the date upon which the revocation or modification of a consent referred to in subsection (1) takes effect, the applicant for the consent, or any other person entitled to rely upon the consent, who is aggrieved by the revocation or modification may appeal to the court, and the court may determine the appeal.

(5) The court shall determine the appeal under subsection (4) by affirming, varying or cancelling the instrument of revocation or modification.

(6) Where a development consent is revoked or modified under this section, any person aggrieved by the revocation or modification shall be entitled to recover from—

(a) where the Director is responsible for the issue of the instrument of revocation or modification—the Government of New South Wales; or

(b) where a council is responsible for the issue of that instrument—that council,

compensation for expenditure incurred pursuant to that consent during the period between the date on which that consent becomes effective and the date of service of the notice under subsection (2) which expenditure is rendered abortive by the revocation or modification of that consent.

(7) The Director or council shall, on or as soon as practicable after the date upon which the instrument referred to in subsection (1) is served upon the owner of the land referred to in subsection (3), cause a copy of the instrument to be sent to each person who is, in his or its opinion, likely to be disadvantaged by the revocation or modification of the consent.

(8) This section does not apply to or in respect of a consent granted by the Court or by the Minister.

Defined at s 4: consent authority; council; development; Director; local environmental plan; owner; regional environmental plan; State environmental planning policy.

Revocation of consents

Even though there is a motion before council to revoke a consent it would seem that a council is estopped from refusing to carry out its discretionary duty under the Act before it does so: *Vanden Pty Ltd v Blue Mountains CC* (1992) 77 LGRA 16. In that case the council was ordered to cause its engineer to take the necessary steps to consider final engineering plans and do all things necessary to give them a proper consideration, pursuant to its consents for development and subdivision, given previously.

47. (1) An application referred to in section 102(1) of the Act shall—

(a) be made in writing to the consent authority;

(b) clearly identify the development consent to which the application relates;

(c) clearly indicate the details of the modification sought; and

(d) show cause why the consent authority should modify the development consent.

(2) For the purposes of section 102 (1A) of the Act, the person prescribed (being the person with whom a copy of the application is to be lodged) is the consent authority which made the decision that is the subject of the appeal.

[Subcl (4) subst, Gov Gaz No 49, 1993.]

(3) An application referred to in subclause (1) shall be available for public inspection, without charge, at the office of the consent authority during ordinary office hours.

[Cl 47(2) subst, Gov Gaz No 49, 1993.]

Defined at s 4: consent authority; development consent; objector.
Defined at cl 4: Act.

Fee for application for modification of consent

47A. (1) The fee to accompany an application under section 102 of the Act is a fee made up of:

(a) an amount calculated under subclause (2), or such lesser amount as the consent authority may require in a particular case, payable to the consent authority; and

(b) if notice of the application is required to be given under section 102 (2) of the Act to a person or persons who made submissions in relation to the application for consent—an additional amount of $500 payable to the consent authority required to give the notice.

(2) The fee payable under subclause (1)(a) is:

(a) if the fee paid to the consent authority (including the Court) in respect of the application resulting in the development consent concerned was less than $100—30 per cent of the fee paid; or

(b) in any other case—30 per cent of the fee paid to the consent authority (including the Court) in respect of the application resulting in the development consent concerned or $100 (whichever is the greater).

(3) The consent authority required to give notice under section 102(2) of the Act is to refund so much of the fee paid under subclause (1)(b) as is not expended in giving that notice.

[Cl 47A added, Gov Gaz No 49, 1993.]

Defined at s 4: consent authority.

Notice of application for modification to consent

47B. (1) For the purposes of section 102 (2) of the Act, notice of an application for modification of consent is to be given by the consent authority, unless the application relates to a consent referred to in section 93 (4) of the Act (a consent resulting from an appeal), in which case the notice is to be given by the consent authority which made the decision the subject of that appeal.

(2) The notice is to be in writing and is to be given within 7 days after the application or a copy of that application is received by the consent authority required to give the notice.

(3) The notice is to:

(a) contain a brief description of the development consent, the land to which that consent relates and the details of the modification sought; and

(b) indicate that submissions in writing may be made to the consent authority in relation to the application within the prescribed period; and

(c) indicate that the application may be inspected during the prescribed period at the office of the consent authority giving the notice; and

(d) indicate that if the application is approved there is no right of appeal by an objector under section 98 of the Act.

(4) The prescribed period for the purposes of section 102 (2) of the Act (being the period within which a person's submissions in relation to the application must be made to the consent authority) is 21 days after notice under this clause is given to the person.

(5) In the case of an application for modification of a consent referred to in section 93 (4) of the Act (a consent resulting from an appeal), the consent authority required to give notice of the application under this clause is to notify the Court of the date on which that notice is given.

[Cl 47B added, Gov Gaz No 49, 1993.]

Defined at s 4: development consent.

Notice of determination of application to amend consent

48. (1) Notice in writing of the determination of an application referred to in clause 47(1) shall be given to the applicant as soon as practicable after the determination is made.

(2) Where the determination is made by the granting of consent subject to conditions or by the refusing of consent, the notice referred to in subclause (1) shall—

Record of amendment of consent

49. Where a development consent has been modified under section 102 of the Act, the council shall forthwith record that fact in the register of consents referred to in section 104 of the Act and file in that register a copy of the determination (including any decision of the Land and Environment Court in respect of an appeal under section 102(5) of the Act).

Register of consents

50. (1) The register of consents required by section 104 of the Act to be kept by a council shall contain in relation to each consent the following information—

(a) a copy of the development application which has been determined under section 91 of the Act by the granting of the consent;

(b) a copy of the notice given under section 92 of the Act of the determination granting the consent;

(c) a copy of the decision of the Land and Environment Court in relation to an appeal made under section 97 of the Act having the effect of granting the consent;

(d) a copy of the Minister's determination under section 101(8) of the Act granting the consent, as notified to the consent authority under section 101(10) of the Act;

(e) the date on which the consent becomes effective ascertained in accordance with section 93 of the Act;

(f) a copy of any memorandum of surrender or modification of the consent delivered to the consent authority in accordance with clause 42;

(g) any modification of the consent effected in accordance with section 102 of the Act;

(h) any revocation or modification of the consent effected in accordance with section 103 of the Act; and

(i) a copy of the decision of the Land and Environment Court in relation to an appeal made under section 97 or 98 of the Act in relation to the consent.

[Cl 50(1) am, Gov Gaz No 18, 31.1.1986.]

(2) The register shall separately index the development consents referred to in subclause (1) by reference to—

(a) the description of the land to which each consent relates; and

(b) the chronological order of the granting of each consent.

(3) The index referred to in subclause (2)(a) shall—

(a) be in alphabetical order according to the name of the street to which the land (to which the consent relates) has frontage or, where there is no frontage, is most closely situated; or

(b) be in the form of a map or series of maps in respect of the council's area identifying the land to which each consent relates.

(4) The register may be kept in loose-leaf form or in the form of a book record, a computer record or a combination of those methods.

Defined at s 4: consent authority; council; development application.
Defined at cl 4: Act.

Validity of development consents

50A. The granting of a consent is publicly notified for the purposes of section 104A of the Act if—

(a) public notice is given by the consent authority or, where the consent authority is not the council, by the consent authority or by the council;

(b) the notice is published in at least one local newspaper circulating at least once weekly in the area;

(c) the notice describes the land and the development the subject of the consent; and

(d) the notice contains a statement to the effect that the consent is available for public inspection, without charge, at the office of the council during ordinary working hours.

[Cl 50A subst, Gov Gaz No 18, 31 Jan 1986.]

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