

# Two steps back and one step forward – extensions and ‘roll-ons’ for development permits

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*This is an extract from a longer paper delivered on 30 May 2007. The sections of the paper which are no longer relevant have been omitted from this version.*

## Introduction

Some fairly major changes have been made to Queensland's development approvals framework by the *Integrated Planning and Other Legislation Amendment Act 2007*, notwithstanding the claims (in the Second Reading Speech and Explanatory Notes) that it is just about 'a series of technical amendments'. An example of these 'technical amendments' is the somewhat bizarre move to make simple applications for extension of the 'currency periods' of development approvals more difficult, while at the same time opening up a 'back door' for a series of potentially indefinite automatic 'roll-ons' of those currency periods, by-passing any decision of the assessment manager as to whether or not an extension is appropriate. In principle, there are reasonable policy arguments available either to tighten up extensions or to make them easier, but it just seems inconsistent to tighten up the formal process while creating an easy 'back-door' process.

### Currency period becomes 'relevant period'

First, the old term 'currency period' has become 'relevant period'. This was a change in terminology that was supported by the Queensland Law Society. Lawyers often came across people who were confused by the old term 'currency period' because it was easily mixed up with what we commonly refer to as a 'sunset period'. A 'sunset period' is the maximum time that a development is permitted to continue to operate and has most often been imposed on quarry approvals, in locations where long-term planning contemplates that the area should be developed for residential purposes at a later stage.<sup>1</sup> On the other hand, a 'currency period' (now called a 'relevant period') is the period allowed after a development approval is obtained before a development needs to have substantially started or 'happened', in order to avoid the lapsing of the approval. The QLS suggested that a 'neutral term' such as 'relevant period' might help to avoid this confusion.

### The new 'roll-ons'

The new 'roll-on' provisions are extremely complex and lengthy. To explain simply how the new 'roll-on' provisions work, it is probably most effective to use an example.<sup>2</sup>

Using the example of a development permit for material change of use (MCU), normally the use would need to have 'happened' within a 'relevant period', which is usually 4 years.<sup>3</sup>

The first step is to lodge an application for a development permit for either building work or operational work, which is '*necessary for the material change of use of premises to take place*' within 2 years of the MCU having taken effect. Let's say the application was for operational work for earthworks. The application does not need to have been approved within the 2 years, but only lodged. Once it is approved, the MCU 'relevant period of 4 years' is taken to have started again is on the day this operational works 'related approval' has taken effect.<sup>4</sup> Given that operational works approvals are normally for 2 years, this means that the total 'relevant period' for the MCU is now about 6 years.

Then the developer can keep seeking more and more 'related approvals' indefinitely, provided that each application has to be '*lodged within 2 years of the day the last related*

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<sup>1</sup> There are many examples. *Rio Pioneer Gravel v Warringah Shire Council* (1969) 17 LGRA 153 was one example.

<sup>2</sup> Refer to the replacement Section 3.5.21 *Integrated Planning Act 1997* (Qld).

<sup>3</sup> This is the default period for MCU under Section 3.5.21, although a different period can be stated by the development permit itself.

<sup>4</sup> New Section 3.5.21(4).

*approval [took] effect*'. Each one of these related approvals extends the original 'relevant period' again. For example, the next 'related approval' might be building work for a construction site office; the one after that might be operational work for vegetation clearing.

In her second reading speech, the former Minister, the Hon Desley Boyle MLA stated that the provisions 'contain safeguards against abuse'. However, no doubt there are many local governments wondering what safeguards these were supposed to be.

There are similar provisions to use 'roll-ons' to extend preliminary approvals and reconfiguration development permits. In the case of preliminary approvals, the 'related approvals' are, of course, for the corresponding development permits. In the case of reconfiguration development permits, the 'related approvals' are for operational work.

There were obviously some cogent arguments presented by the development industry in favour of 'roll-ons'. For example, if a development was being held up only by a delayed decision on a related operational works application that was lodged in time, it is easy to see why it would be fair to allow the operational works application to extend the original MCU approval. However, it is questionable whether the indefinite 'roll-ons' procedure went further than was strictly necessary to address the original problem. It is also questionable why such a generous 'back door' system should have been introduced at the same time as making it more difficult to go through the 'front door' of simply applying for an extension.

### Extensions

The normal statutory default period for MCU 'relevant periods' is 4 years, while the normal default period for other types of development is 2 years. Assessment managers have the power to state a different period in the development permit, overriding the statutory default. For example, the development permit might state 1 year.

Even with the statutory default period of 4 years, this is quite a short time in practical terms to implement a major, complex development. During this period it is first necessary to comply with any conditions of the development permit which are prerequisites to the use; otherwise, the development cannot lawfully start and so the development permit could lapse anyway.<sup>5</sup>

Before the amendments, Section 3.5.23 of IPA did not list criteria for assessing an application for extension of a currency period. The provisions were essentially procedural only, including addressing the relationship with concurrence agencies. This meant that there was considerable flexibility to take into consideration a range of potential justifications for seeking an extension and also an unlimited range of arguments to the contrary. In contrast, the new criteria fail to include any suggested examples of positive justifications for extensions and instead focus on a limited range of negative or neutral criteria only.

The new criteria are as follows:

*'In deciding a request under section 3.5.22, the assessment manager must **only** have regard to—  
(a) the consistency of the approval, including its conditions, with the current laws and policies applying to the development, including, for example, the amount and type of infrastructure contributions, or infrastructure charges payable under an infrastructure charges schedule; and*

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<sup>5</sup> For example, refer to *Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Friendly Society Inc* (1992) 81 LGERA 132 (NSW Court of Appeal). However, a minor non-compliance may not have this effect *Oshlack v Iron Gates Pty Ltd* (1997) 130 LGERA 189.

- (b) the community's current awareness of the development approval; and
- (c) whether, if the request were refused—
  - (i) further rights to make a submission may be available for a further development application; and
  - (ii) the likely extent to which those rights may be exercised; and
- (d) the views of any concurrence agency for the approval.'

It is particularly unfortunate that the word 'only' appears in the opening line. In the leading case of *Best and Zygier v City of Malvern*,<sup>6</sup> the Court said: "it would be undesirable for us to attempt to define all the criteria which should be taken into account". This is because the range of human circumstances which could justify an extension (or which are relevant against an extension) cannot be foreseen without a crystal ball. It would have been better to say that these criteria are relevant, 'without limitation'.

The Queensland Law Society lodged a submission about the extension provisions and suggested some factors which could be taken into account:

- '-Whether the application is the first request for extension;
- Second, whether the original currency period was only the default period or less. In *Best and Zygier v City of Malvern*, the way this was expressed was: "Whether the time originally limited was in all the circumstances reasonable and adequate taking into account the steps which would be necessary before the construction could actually commence."
- Third, whether the approved development is reasonably complex. In *Fima v Toowoomba City Council*,<sup>7</sup> the Planning and Environment Court pointed out that: "Longer periods for more complex projects are expressly contemplated by the explanatory memoranda.")
- Fourth, whether development has not substantially started for reasons beyond the reasonable control of the owner. In *Best and Zygier v City of Malvern*, the way this was expressed was: "Whether any intervening circumstances have rendered it unreasonable that the appellant should be held to the time originally fixed." Examples might include illness, natural disasters and industrial action. In *Best and Zygier v City of Malvern*, it was relevant that one of the active appellants had been ill.
- And finally, whether planning instruments have changed in favour of the development in the interim.'

On the other side of the ledger, factors against an extension which ought to have been included, but which were not included:

- Whether planning instruments have changed significantly adversely to the approved development in the interim. It is difficult to see why minor inconsistencies should be relevant. Also, the original approval may have been granted despite inconsistency with the planning scheme, for overwhelming planning reasons, and it would be unreasonable to hold against an applicant that the planning scheme provisions have simply remained the same. In *Best and Zygier v City of Malvern*, it was only a change in planning scheme policy which was listed as a relevant factor.)
- Secondly, whether the request for extension was lodged late, without reasonable justification;
- Thirdly, logically it should only be if the original development application was impact assessable, that it is relevant to consider whether there would be a greater adverse impact on the community as a result of the extension than for the original development approval.

Looking at the way the provision turned out, it is difficult to imagine that this submission by the QLS was actually considered. If an assessment manager is 'only' allowed to consider the listed criteria,

<sup>6</sup> [1975] 1 VPA 284.

<sup>7</sup> [2004] QPELR 381.

then it would logically follow that it is not considered fair and reasonable to take into consideration factors such as whether a landowner has been in hospital at the relevant time, which is surely absurd.

The provision places assessment managers in a very difficult position and will tend to encourage the 'back-door' alternative involving 'roll-ons', instead of a more transparent and accountable approach.