

The importance of lodging a submission within the public notification period

10 October 2022

7 min. read

Worthwhile read for: Town Planners, Local Governments, Property Developers, Environmental Consultants

[planning / environment / government / property / development /](#)

A recent Court decision is a timely reminder that a submission about a development application must be lodged to the local government within the public notification period. It is only those submissions that enshrine rights for submitters to commence (or participate) in litigation in the Planning and Environment Court. Whilst the Court has a discretion to excuse the failure to lodge within time, it should not be assumed that the Court will exercise that discretion in any given case, and submitters run the risk of losing their opportunity to prosecute an appeal against a proposed development.

Rights of submitters

Certain development applications are required to be publicly notified under the *Planning Act 2016* and any member of the public has the right to make a submission about the application.¹ However, a submission will only be a “properly made submission” where (amongst other requirements) that submission is lodged during the official public notification period, which typically runs for 15 business days (or 30 business days for some applications).² If a submission is not lodged within that period, it will not be a properly made submission.

This is important because of the consequences that follow. It is only those persons who make a “properly made submission” that accrue appeal rights under the *Planning Act 2016*.³ Those rights include the right to institute an appeal against a local government’s decision to approve a development application, or the right to join an applicant’s appeal against local government’s decision to refuse a development application. A person who lodged a submission that was not taken to be a properly made submission does not have this right.

Lodging a submission “out of time”

The recent case of *Chiodo*⁴ is a timely reminder of the importance of ensuring compliance with the statutory requirements for lodging a submission. In that case, a solicitor was monitoring a development application for a client with the intention that a submission would be lodged once the application was publicly notified. The solicitor did this by monitoring the local government’s website on a regular basis, looking for a notice of commencement of public notification. After some time, the solicitor called the local government which revealed that the public notification period had come and gone.

Whilst the failure to lodge a submission within time was due to a mistaken belief, the consequence was that the submission was not a properly made submission. The submitter therefore did not have a right of appeal against the local government’s approval of the development application.

The Court’s discretion to rectify non-compliance

The Court has a broad discretionary power to deal with a non-compliance with a provision of the *Planning Act 2016* in any way that the Court considers appropriate.⁵ The Court has confirmed that this discretion can extend to rectify a submission that is lodged out of time so that it is taken to be a

properly made submission.⁶ However, whether it is appropriate to exercise the discretion will depend upon the facts and circumstances of the case in question.

The submitter in *Chiodo* commenced an appeal and sought an order from the Court to excuse the failure to lodge the submission within time. It contended that:

- its failure to lodge within time was the product of its mistaken belief that public notification had not yet occurred in circumstances where it had taken steps to ensure that it was informed at the appropriate time;
- it acted promptly to remedy the situation; and
- it would be prejudiced if the relief was not granted because it would not be able to prosecute an appeal against the Council's approval of the development application.

The mistaken belief

The Court was not satisfied that the mistaken belief was adequate. The submitter placed reliance upon the local government's failure to post the notice of commencement of public notification on its website. That was considered risky and unreasonable. A local government's website is not the vehicle for giving public notification. Public notification occurs by placing a notice on the premises the subject of the development application, by publishing a notice in a local newspaper, and by giving notice to owners of adjoining premises. There was no explanation for failing to monitor the official forms of public notice.

The delay to remedy the situation

The Court rejected that the submitter had acted promptly to remedy the situation. Whilst a submission was lodged after becoming aware that the public notification period had ended, the Court noted that the submitter:

- did not seek excusatory relief from the Court prior to the Council deciding the application;
- did not seek excusatory relief from the Court when it subsequently filed its notice of appeal, and did not disclose in the notice of appeal the fact that it had no right of appeal; and
- only sought excusatory relief from the Court well over a month after the appeal had been filed.

The submitter did not lead evidence to explain the delay. That delay was not itself decisive, but a relevant consideration in the exercise of the discretion to grant excusatory relief.⁷

Whether there was prejudice to deny the excusatory relief

The fact that a submitter would be denied the opportunity to prosecute and participate in an appeal if excusatory relief was not granted does not, in and of itself, justify the grant the relief.⁸ It is a question of the weight to be placed on the prejudice in the circumstances.

The main issue for the submitter in this case was that it did not lead evidence to explain how its interests might be affected if it was not able to participate in the appeal. This was not addressed in its submission to the local government, the notice of appeal, nor in any affidavit material filed in support of its application for excusatory relief. Once again, this was a relevant consideration as to whether the excusatory relief was appropriate.

Comparison to a neighbour who lodges "out of time"

It is interesting to note that the Court distinguished this case to a situation where a neighbour whose

property stands to be affected in some identified or material way seeks relief in order to be able to exercise a right of appeal against an approval that would otherwise go unchallenged. Whilst the Court did not expressly state a neighbour in those circumstances would obtain excusatory relief for lodging out of time, it may be suggested that the prejudice in that situation is more significant given the consequences that follow.

Take-aways

In *Chiodo*, the Court did not grant excusatory relief and the submitter's application was dismissed. The submitter was therefore denied the opportunity to prosecute an appeal.

It can be observed from this case that if a submitter finds themselves in a situation where it lodges a submission out of time that:

- it could not justify the mistake if it sought to rely upon what a local government publishes on its website;
- it would need an adequate reason to explain why it did not observe the public notice during the public notification period;
- it should bring an application to the Court to excuse the non-compliance expeditiously, which potentially could be before the local government decides the development application; and
- it should lead evidence to explain its interest in the development application and how its interests would be potentially affected if it was denied the opportunity to challenge the development application.

For more information or assistance with a submission in respect of a development application, please contact HopgoodGanim's [Planning](#) and [Environment](#) team.

1.Planning Act 2016 (PA), s. 53(6)

2. PA, s. 53(4)(b)

3.PA, s. 229 & Schedule 1

4.Chiodo Corporation Operations Pty Ltd v Graben Pty Ltd (Appeal No. 1677/2022) and Douglas Shire Sustainability Group et al v Douglas Shire Council & Graben Pty Ltd (Appeal No. 1276/2022) [2022] QPEC 34

5.Planning and Environment Court Act 2016, s. 37

6. Chiodo at [12]

7.Chiodo at [22]

8. Chiodo at [24]

10 October 2022

[planning / environment / government / property / development /](#)
[Previous article](#) [Next article](#)