When has your development substantially commenced?

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Worthwhile read for: Town Planners, Local Governments, Property Developers, Environmental Consultants
planning / environment / government / property / development / building / approval / renewal / expired

A recent case which considers issues associated with substantial commencement is *Auscon Pty Ltd and Town of Cambridge [2021] WASAT 116* (**Auscon**). The case reinforces the obligation on local governments to consider, amongst other things, whether works approved under development approvals have been substantially commenced.

Section 71(a) of the *Planning and Development (Local Planning Schemes) Regulations 2015* (**Deemed Provisions**) requires development to be substantially commenced either within the period specified in the approval, or if no period is specified in the approval within two years of the date of that approval, or as otherwise approved by the local government.

If development has not substantially commenced within the period specified, the development approval will lapse.

The term "substantially commenced" is defined in Clause 1 of the Deemed Provisions to mean:

> *"that some substantial part of work in respect of a development approved under a planning scheme or under an interim development order has been performed."*

While the definition may appear somewhat straight-forward, Auscon recognises that the concept of substantial development in planning matters can be difficult to ascertain and should be approached with caution.

In Auscon, conditional development approval granted on 31 October 2014 for the development of a new three story dwelling with undercroft garage was valid for 24 months from the date of the approval. The then applicable planning scheme also contained a provision that development approval would expire, if not substantially commenced within two years from the date of approval.

Site works involved not-insignificant partial demolition of the existing dwelling, but as the demolition works did not require development approval those works did not form part of the development approval.

The Town of Cambridge (**Town**) subsequently issued a building permit for the development on 21 July 2015, which was valid until 21 July 2017. This was then renewed for one year on 18 July 2017, by which time the development approval had expired. The building permit was again renewed on 13 July 2018 for two years, expiring on 13 July 2020.

On 3 July 2020, the Applicant sought yet a further extension of the building permit. Realising the development approval had lapsed, the Town requested the Applicants submit a further development application as it could not renew the building permit unless application was made. The Applicants refused to submit the application on the basis the development had been substantially commenced.

The Applicants gave substantial evidence to the Tribunal about the works undertaken at the site, involving:

- the removal and reinstatement of Western Power services;
- removal of external brick payment and concrete;
- excavation works;
- installation of stormwater facilities;
- works associated with accessing the retaining walls; and
- the demolition of the front pergola, the rear alfresco and various retaining walls.

The Tribunal accepted that the works involved were substantial and complex, particularly with respect to physical attributes of the site, and also accepted the works involved a significant amount of time and expense. Notwithstanding that, the Tribunal found the demolition and other works undertaken by the Applicants were not works the subject of the 31 October 2014 development approval.

The Tribunal found that *s.20(1) of the Building Act 2011* was enlivened on each and every occasion an application to extend a building permit was made, and that it was incumbent on local governments to satisfy themselves of the requirements of that section.

In considering whether the proposed development had been substantially commenced, the Tribunal found this was answered primarily by the building works that had been undertaken which required a positive and unequivocal step towards the construction of the proposed development. Although expensive, tedious and time consuming works had been undertaken, they were not the subject of the 31 October 2014 development approval and considered to merely be steps to ready the site for the proposed development.

The Tribunal found that the Town's administration of the building permit and extension process was not ideal. In concluding, the Town was not estopped from refusing the extension of the building permit the Tribunal referred to the decisions in ***Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*** *(1990)* 21 FCR 192 that *"Any doctrine of estoppel in that context would threaten to undermine the doctrine of ultra vires by enabling public authorities to extend their powers both de facto and de jure by making representations beyond power, which they would then be estopped from denying."*; and **Enoka v Shire of Northampton** *(1996) 15 WAR 483* that *"There is, on the other hand, an obvious public interest in ensuring that the public authority concerned does not, by its conduct, render nugatory schemes which have been gazetted in the interest of an entire community and which are required to be approved of by the Minister."*

This case serves as a timely reminder to developers and local governments that there are instances where building and planning matters intersect.

With respect to the renewal of building permits there is a positive obligation on local governments to ensure a development approval is either in effect or that the works have been substantially commenced by ascertaining the positive and unequivocal steps taken towards the construction of the approved development.

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Previous article Next article