HOLDING REDLICH --- #Property, Planning & Development

Tiptoeing around the 'tipping point' – limits to amending a development application before it is determined

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Developers and consent authorities will be intimately familiar with the mechanism for proponents to amend a development application (and more recently, modification application) before the application is determined.

The power to amend an undetermined application allows applicants to respond to matters raised, usually by Council, while the application is under assessment, or during class 1 appeal proceedings before the Land and Environment Court.

However, the power to amend an undetermined application has limits.

In two recent Registrar's decisions, the Land and Environment Court found that proposed amendments to two development applications on appeal were outside the power to amend because the proposed amendments would push the development past the "tipping point" into being a new application.

These decisions were *Goldcoral Pty Ltd v Richmond Valley Council* [2023] NSWLEC 1540 (***Goldcoral***) and *Reid v Woollahra Municipal Council* [2023] NSWLEC 1611 (***Reid***). At the date of publication of this article, the Applicant in *Goldcoral* has filed a motion seeking review of the Registrar's decision.

Summary of principles in Goldcoral *and* Reid

Goldcoral and *Reid* have confirmed:

- the case law on the power to amend a DA in the EPA Regulation 2000 applies when considering the power to amend in the EPA Regulation 2021
- the power to amend a DA is the power to change an application, not to propose a new or original application – the focus remains on whether the proposal as amended could "answer the overall description and essence of the development as originally proposed"
- the proposed amendments are to be considered cumulatively
- while the addition of a new type of development to an application may fall within the power to amend a DA, the substitution of the proposed land use wholly for another will not
- the catalyst for the amendments and the environmental impact of the proposed development as amended does not have bearing on whether the amendments fall within the power to amend under the EPA Regulation.

These principles are looked at in more detail below.

Equivalent provisions in the EPA Regulation 2000 and EPA Regulation 2021

For development applications lodged after 1 March 2022, sections 37 and 38 of the EPA Regulation 2021 allow an applicant to seek to amend a development application before it has been determined.

Under the previous EPA Regulation 2000 this power was contained in different terms in clause 55.

In *Reid*, the Registrar accepted that despite being in different terms, ss 37 and 38 of the EPA Regulation 2021 correspond to the former power in clause 55 of the EPA Regulation 2000.

The Registrar held that the reasoning in the extensive authorities relating to clause 55 of the EPA Regulation 2000 applied when considering the power and scope of subsection 37 and 38 of the EPA Regulation 2021.

The tipping point

In considering whether leave should be granted to amend a DA, the Court in *Reid* and *Goldcoral* adopted the questions posed by the Court on this issue in *Radray Contructions Pty Ltd v Hornsby Shire Council* (2006) 145 LGERA 292; [2006] NSWLEC 155:

- is the power to amend available as a matter of statutory construction having regard to its scope and the proposed amendments?
- should the power to amend be exercised on discretion?

The Applicants in both *Reid* and *Goldcoral* fell at the first hurdle, with the Court finding in both cases that the amendments proposed were outside the power available under the relevant regulation.

At its core, the power to amend is the power to change an application, not to propose a new or original application – the focus remains on whether the proposal can "answer the overall description and essence of the development as originally proposed": *Orico Properties Pty Ltd v Inner West Council* [2017] NSWLEC 90 at [10] (***Orico***).

The 'tipping point' described by Robson J in *Orico* is where the extent of the amendments render the development so different as to constitute a new development application.

Finding the tipping point

Unlike *Reid*, consideration of the amendments in *Goldcoral* did not focus on one element of the proposed amendment that pushed the development past the 'tipping point' as referred to by Robson J in *Orico*.

In *Goldcoral*, the development application was a concept DA for subdivision, clearing, earthworks, roadworks and other associated works.

The proposed amendments included a multi-dwelling housing lot and proposed community title subdivision (which were previously not proposed), a reduction in the total areas of residential subdivision and road reserve, a significant reduction in the proposed earthworks and abandoning previously proposed crown foreshore embellishment works.

To support this amendment, the applicant relied on several authorities where the Court had granted leave for amendments of a similar nature to certain elements of Goldcoral's proposal.

The Registrar found that the Applicant's proposed amendments had reached the "tipping point" without identifying any single amendment that pushed the development too far.

The Registrar found that the prior decisions referred to were not determinative as the Registrar was required to consider the cumulative effect of the amendment as a whole.

Amendments involving different development – no substitutions

In *Reid*, the applicants sought amendments relating to the proposed built form, and substitution of the proposed use from a dual occupancy to a single dwelling.

The Council submitted that as a separate and distinct use, the change in use between the DA as lodged and the proposed amendment, would have changed the 'essence' of the development.

Further, and as a matter of practicality, the DA as lodged had been assessed as a **dual** occupancy. A change of the use of the proposed building to a **single** occupancy would warrant reassessment, further indicating that the amendment would constitute a new development application.

This was distinguished from the caselaw that an amendment that adds an **additional** type of development may fall within the power to amend a DA: see for example *Australian Enterprise Holdings Pty Ltd (t-as AEH Group) v Camden Council* (2010) 173 LGERA 226.

The distinguishing factor in *Reid* was the substitution of the proposed land use wholly for another.

Cause and impact of the changes irrelevant to power to amend

The test undertaken by a consent authority is not concerned with **why** the amendments are being made or the **impact** of the changes.

While these factors may inform the exercise of discretion to accept a proposed amendment, the threshold question of whether there is power to amend the development application is confined to the scope of the amendments, and whether the changes to the proposed development are, as a matter of fact, so different as to constitute a new development application.

ends.