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**DON'T PUSH THE ENVELOPE**
**Presented By Kim Lovegrove**

**What does "consistent" mean?**

We are alerted that the meaning of "consistent" remains an issue for private certifiers who are confronted with changes to plans and what to do with them!

So let's go back to basics - the word consistent, by definition in the Encarta English Dictionary, means: *reasonably or logically harmonious* or *containing no provable contradiction.*

This definition alone tells us that notwithstanding what it might mean for private certifiers, consistent does not mean "exactly the same".

As a legal concept, the term *consistent* has probably been argued for centuries in a number of different contexts, but in our context today, we were asked:

***Does consistent mean exactly the same or are minor variations allowed between the Development Consent and the plans submitted with a Construction Certificate?***

Our response is that it does not mean exactly the same. This is on the basis that there is judicial opinion which supports this view.

There is some case law on point in NSW, particularly in the **Land and Environment Court**.

The planning and development scheme in NSW is of course governed by the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulations 2000.*

Clause 145 of the EPA Regulation states that a construction certificate, which certifies compliance of construction plans with the BCA and the Development Consent, may not be issued unless the certifying authority (being the Council or private accredited certifier) is satisfied that:

*The design and construction of the building as depicted in the plans and specifications and as described in any other information furnished to the certifying authority,* ***are not inconsistent*** *with the development consent.*

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The term 'not inconsistent' has created a concern in that private accredited certifiers struggle to understand just what it is that will constitute, in their case, "non-inconsistency".

The Land and Environment Court is the forum in NSW which hears planning matters.

The meaning of "not inconsistent" has come before the LEC Court on a number of occasions and has found itself the subject of some extensive judicial consideration.

The LEC Court in NSW has on at least two occasions upheld that, so long as a development is 'substantially the same' or 'essentially the same in character', consistency is achieved, or rather, "non-inconsistency" is achieved.

We refer to *McIntosh Properties Pty Ltd v Warringah Council*, unreported in the LEC in 2002 before Commissioner J Murrell which dealt with inconsistencies of the sort where:

(a) Car parking on the development application was shown to be below ground whereas the car park on the construction certificate plans showed that the car park was above ground;

(b) Heights and level of the building approved by the construction certificate plans were increased compared to the development application;

(c) The southern façade, western and eastern walls of the construction certificate plans depict a three storey building whereas the development consent depicts a two storey building consent; and

(d) The southern front setback and the side eastern and western setbacks have been reduced on the construction certificate plans.

Commissioner Murrell was of the view that the building was still substantially the same development and stated that:

> "*in this case I am satisfied that the development as proposed to be modified is substantially the same development to that approved by the Council. I make this finding of fact based on a comparative assessment of the two sets of plans and elevations of not only the whole of the development but the various features elements and components……"*
>
> *"……In my assessment the application will not radically transform the development as approved or change its character and it will remain essentially the same as the development approved by the Council. That is a residential flat building of similar height, size, bulk and scale with two levels of residential above parking."*

And further stating that:

> *"I am not only satisfied that the modifications are substantially the same development but there are no significant adverse impacts, including privacy and overlooking concerns, that would warrant refusal of the application".*

Perhaps more on point, we refer to Her Honour Justice Pain in *Lesnewski v Mosman Municipal Council and Anor [2004]* in the New South Wales Land and Environment Court on 29 March 2004 and her comment in paragraph 32:

> ***It is clear that "inconsistent" does not mean that a construction certificate must be identical to the development consent plans. Accordingly, the possibility of some variation between the terms of a development consent and the design and construction of the building is contemplated by the legislation.***

In Lesenewski the inconsistencies were:

(a) With respect to the balcony support which on the development application plans was glass and on the construction certificate plans, the balcony support was solid columns;

(b) The distance from the boundary was 0.55m further on the construction certificate plans than on the development application plans; and

(c) The height of the swimming pool, in that it was 12 cm higher on the construction certificate plans than on the development application plans.

Her Honour considered that each of these matters alone would not have justified a conclusion that the certifying authority (the Council in this case) had acted unreasonably in issuing the construction certificate on the basis of the plans submitted to it for that purpose.

She further considered that the cumulative effect of the inconsistencies was not significant enough either, to deem the construction certificate invalid.

Another case which recently came before the Land and Environment Court in NSW was *Warringah Council v Moy [2005] NSWLEC at page 416.*

An accredited private certifier, Moy, in this matter was charged with two offences under the *EPA Act* relating to his conduct as an accredited certifier.

Warringah Council alleged that two offences had been committed with regard to the issue of the construction certificate. The alleged offences were pursuant to Sections 109ZH and 125(1) of the EP&A Act which provide as follows:

> ***S109ZH False Representations***
> *(1) A person who:*
>
> *(b) makes any statement that is false or misleading in a material particular in, or in connection with, a Part 4A certificate or complying development certificate,*
>
> *is guilty of an offence under this Act.*

***S125(1) Offences against this Act and the Regulations***

*Where any matter or thing is by or under this Act, other than by or under the regulations, directed or forbidden to be done, or where the Minister, the Director- General, a council or any other person is authorised by or under this Act, other than by or under the regulations, to direct any matter or thing to be done, or to forbid any matter or thing to be done, and that matter or thing if so directed to be done remains undone, or if so forbidden to be done is done, a person offending against that direction or prohibition shall be guilty of an offence against this Act.*

The basis of the Council's allegations was that in the circumstances in which the construction certificate was issued the Defendant (the accredited certifier) was not satisfied that the design and construction of the building as depicted in the plans and specifications for the construction certificate were not inconsistent with the development consent. This alleged breach of the Act and Regulations was therefore the basis for the section 125(1) offence and furthermore, in representing that he *was* satisfied, the accredited certifier was making a false and misleading statement.

In other words, the issue was whether the accredited certifier in issuing the construction certificate was not satisfied that the design and construction of the building, as depicted in the plans and specifications referred to in the construction certificate, *was not inconsistent* with the relevant development consent.

The documentary material with respect to the relevant construction certificate issued by the accredited certifier was tendered to the Court. This included the contents of the plans and specifications the subject of the construction certificate and the content of the relevant development consent. This material, along with the expert evidence of two witnesses, was the basis of the Prosecution case on behalf of the Warringah council.

The two expert witnesses were also accredited certifiers under the EP&A Act.

Both expert witnesses expressed opinions to the following effect:

(i) That the differences in the DC plans and the CC plans were significant;

(ii) That the design and construction of the building as depicted in the construction certificate plans and specifications were **inconsistent** with the DC plans; and

(iii) That no reasonable certifier could have been genuinely or properly satisfied that the design and construction of the building as shown on the construction certificate plans was not inconsistent with the building as shown in the DC plans given the degree of differences identified between the two sets of plans.

To set the technical scene, we refer to the differences in the two sets of plans as identified by Justice Bignold.

(a) Differences of between .855m -1.5m in natural ground levels;

(b) Differences of between .7m ad 1.1m in the finished ground levels at corners of buildings;

(c) Reduced street frontage setback and increase length of building by approximately 1.25m;

(d) Reduction in side east and west setbacks by .8m and .5m respectively;

(e) Increase in height of building above finished ground level between .3 and .6 metres;

(f) Carpark went from below ground to above ground and deletion of mechanical ventilation and alteration to drainage;

(g) Changes to 77 of the external openings on the DC (out of a total of 79) by either increase in height, wider, narrower or removed (98% of the openings);

(h) Changes in length and/or width of balconies;

(i) Changes to the floor areas to 14 of the 16 units of between 1.5m2 – 8m2;

(j) Change to the layout of all the units; and

(k) Change from face brick work to rendered finish from ground level to widow sills of the top storey.

Ultimately, it was held that the accredited certifier had been duly satisfied that the above issues did not render the development inconsistent and hence did not offend Clause 145 of the EP&A Regulation, or Sections 109F and 125(1) of the EP&A Act.

This case gives us further examples of what may still be "consistent", notwithstanding, that it may be "different". It also is a valuable case for the notion that the opinion of the certifier in assessing and determining consistency, is paramount and is to be assessed subjectively.

**Don't Push the Envelope**

In NSW there is a surprising amount of latitude afforded to accredited certifiers and what in their opinion is "not inconsistent". The extent of latitude has even seen the accredited certifier in NSW become somewhat of an arbiter.

It is evident from the pattern of case law emerging in NSW that Council's are slightly troubled by the latitude being afforded by the case law, since its is evident that it is commonly a Council instituting proceedings to strike out the validity of a construction certificate issued by an accredited certifier.

However, not even the NSW position articulates definitively what "consistent" is. What the NSW cases do articulate however, are the type of differences or inconsistencies which will NOT render a development substantially different from that depicted on the approved plans.

However, notwithstanding the flexibility of which we speak today, we note that there is yet to be a case, in any jurisdiction, which demarcates a threshold or provides a factual situation where a threshold has been exceeded. It is thus with caution that we maintain that as private certifiers, *do not use the latitude traditionally afforded by the courts as an opportunity to "push the envelope"*.

We act in a number of matters before the Land and Environment Court in NSW and sought to uphold construction certificates on the bases discussed today. We also provide representation in misconduct matters which stem from the very inconsistencies which are alleged to have occurred. On point, we can refer you to the article written by Kristy Ranaldo and subsequent reply from Brett Daintree of DIPNR, respectively, in the two most recent editions of TABS.

**Kim Lovegrove has twenty years experience in construction law and was the lawyer who developed the Building Act in Victoria. He is also an immediate past president of the Australian Institute of Building (Victorian Chapter).**

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