



## CURRENCY OF DEVELOPMENT APPROVALS

### WHEN CAN DEVELOPMENT START

(see s72)

Typically, a development approval will take effect when it is given to the applicant, or at the end of an appeal or appeal period (see s71). Development under a development approval may only commence when all necessary development permits have started to have effect pursuant to s 71 of the *Planning Act 2016 (PA)*, and any development conditions of the permits that are required to be complied with before development starts, have been complied with.

If there is an appeal, the tribunal or P&E Court may make an order permitting the development to commence notwithstanding the usual position. This power can be particularly helpful when, for instance, an appeal is commenced about a condition applying only to a later stage of a development, and the applicant is keen to proceed with the early stages.

### DEFAULT CURRENCY PERIODS

(see s85)

- |                        |  |
|------------------------|--|
| • <b>MCU</b> – 6 years | • <b>Any other part of an approval</b> – 2 years |
| • <b>RAL</b> – 4 years | • <b>A variation approval</b> – 5 years          |

The default currency periods can be varied by a statement within the approval about the lapsing of the approval, or part of the approval (note – this need not be a condition, except for variation approvals, which can only be varied by a condition, or by nomination in the development application) (see s 88(2)).

It may also be necessary to consider the effect of the three **Ministerial Extension Notices** issued to address the impacts of COVID.

The notices will extend currency periods and sunset clauses for approvals that were in force between 8/7/2020 – 31/10/2020, 1/9/2021 – 30/9/2021, and 29/4/2022 – 24/6/2022 for up to a total of 2 years, depending upon the circumstances of each approval.

### PREVENTING AN APPROVAL FROM LAPSING

(see s85)

For an **MCU approval** the change of use permitted under the approval, or the first change of use, must ‘happen’ within the currency period.

In *McDonald v Douglas Shire Council* (2003) 126 LGERA 96, the Court of Appeal found (when considering a provision not materially different from the one in the PA) that it is not sufficient that work had been done to facilitate the use but instead, the permitted use must have actually commenced – in that case, using the premises as a resort. Practically, certificates of classification / occupancy are often taken as an indication that the use has commenced.

For an **RAL approval** a plan for the reconfiguration, which is required by the *Land Title Act 1994* to be given to the Council, must be given to the Council within the currency period.

The Act recognises that there may be more than one plan of reconfiguration required under a permit and so lodging a plan for the first stage will be sufficient to prevent the approval from lapsing.

For any **other part** of an approval – the development must ‘substantially start’ within the currency period.

Whether a development has ‘substantially started’ is a question of fact and degree to be determined in each case.

One must look at the extent of work permitted and consider whether the work performed is a substantial component. Subjective intentions of the developer are not relevant. Consideration may be given to work performed off-site.

The part of a **variation approval** that is a ‘categorising instrument’ will cease to have effect when the development is completed or the approval lapses (see s71).

A variation approval will lapse according to any development condition imposed on the approval, or the period nominated in the development application, or 5 years after the approval takes effect. Applicants should be proactive and nominate a lapsing period/s in their development application for a variation approval. Any condition imposed by Council under s88 should allow sufficient time for all aspects of the development to be completed.

For **all approvals**, note that a ‘**sunset clause**’ may be included as a condition of approval, causing an approval to lapse on the nominated day if the development is not completed, irrespective of the default position described above (see s88(1)). Those conditions may be changed by making a change application (which might be coupled with an extension application).

## EXTENDING CURRENCY PERIODS

An application to extend a currency period must be made before the approval lapses. In limited circumstances, it may be possible to apply to the P&E Court to revive a lapsed approval for just long enough to make an extension application.

When assessing an extension application, the Assessment Manager may consider any matter that the Assessment Manager considers relevant, even if the matter was not relevant to assessing the development application (see s87).

These considerations can include personal circumstances, such as an explanation for the delay in completing the development.<sup>1</sup>

When deciding an extension application, the Assessment Manager’s decision must advance the purpose of the Act (see s5). An extension application may be approved to avoid the public and private expense of repeating a development application process, where, in the broadest sense, there is no ‘good town planning reason’ to do otherwise.<sup>2</sup>

Other relevant considerations might include:

1. steps taken by the applicant to progress the development; and
2. the justification for the length of extension sought – is it required to complete the development imminently or is it sought to ‘warehouse’ the approval.

The Assessment Manager cannot approve the extension subject to conditions but may grant an extension for a different period to that applied for. It may be helpful to also make a change application if there are matters that can be addressed to increase compliance with current planning requirements.

<sup>1</sup> Room2Move v Western Downs Regional Council [2019] QPEC 34 at [101]

<sup>2</sup> Emzay Pty Ltd v Bundaberg Regional Council [2023] QPEC 20 at [10] – [12] and the cases cited therein



Andrew Williams



Lestar Manning

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### Brisbane

Level 9, 53-55/231 North Quay, Brisbane Qld 4000  
PO Box 12213 George Street, Brisbane Qld 4003

P 07 3067 8827

E [brisbanereception@paelaw.com](mailto:brisbanereception@paelaw.com)

### Cairns

Level 1 Bolands Centre, 14 Spence  
Street Cairns Qld 4870  
PO Box 2337, Cairns Qld 4870

P 07 4041 7622

E [cairnsreception@paelaw.com](mailto:cairnsreception@paelaw.com)

### Maroochydore

4/59 The Esplanade, Maroochydore Qld 4558  
PO Box 841, Maroochydore Qld 4558

P 07 5479 0155

E [reception@paelaw.com](mailto:reception@paelaw.com)