

**STACKS // NORTHERN RIVERS**

29 August 2006

The General Manager  
Tweed Shire Council  
Tumbulgum Road  
MURWILLUMBAH NSW 2484

Attention: ~~Lindsay McGavin~~ Col Lutton/Bob Hanby

Dear Sir

Re TWEED SHIRE COUNCIL *ats* JMS CAPITAL P/L

We refer to previous correspondence and enclose herewith judgment of Lloyd J handed down in the Land & Environment Court on 28 August 2006

Yours faithfully  
**STACKS //NORTHERN RIVERS**  
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LAND + ENV COURT

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<b>TWEED SHIRE COUNCIL</b>	
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Land and Environment Court  
of New South Wales

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<b>CITATION</b>	JMS Capital Pty Limited v Tweed Shire Council [2006] NSWLEC 535
<b>PARTIES</b>	<b>APPLICANT</b> JMS Capital Pty Limited ACN 108 749 355  <b>RESPONDENT</b> Tweed Shire Council
<b>FILE NUMBER(S)</b>	10156 of 2006
<b>CORAM</b>	Lloyd J
<b>KEY ISSUES.</b>	Development Consent - lapse of consent - physical commencement - engineering work - does survey work constitute physical commencement?
<b>LEGISLATION CITED.</b>	Environmental Planning and Assessment Act 1979 (NSW) s 99 (as at 22 December 1988) of s 95 (as currently in force)
<b>CASES CITED</b>	Drummoyne Municipal Council v Lebanon (1974) 131 CLR 350, Hunter Development & Brokerage Pty Ltd v Cessnock City Council (2005) 63 NSWLR 124, United Dominions Corporation Ltd v Woollahra Municipal Council [1973] 1 NSWLR 616
<b>DATES OF HEARING</b>	07/08/2006
<b>DATE OF JUDGMENT</b>	29/08/2006
<b>LEGAL REPRESENTATIVES:</b>	<b>APPLICANT</b> T F Robertson SC SOLICITORS Woolf Associates  <b>RESPONDENT</b> P J McEwen SC SOLICITORS Stacks Northern Rivers

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**IN THE LAND AND  
ENVIRONMENT COURT  
OF NEW SOUTH WALES**

**Lloyd J**

**Tuesday, 29 August 2006**

**LEC No. 10156 of 2006**

**JMS CAPITAL PTY LIMITED v TWEED SHIRE COUNCIL  
[2006] NSWLEC 535**

**JUDGMENT**

**Background**

- 1 **HIS HONOUR** On 22 December 1988 Tweed Shire Council granted development consent for a tourist resort on two adjoining parcels of land at Wooyung. The development involved the creation of an artificial lake, a nine-hole golf course, accommodation units, tennis courts, and other facilities. Parts of the site were set-aside as conservation areas.
- 2 The consent was granted subject to 30 conditions, including a condition specifying the surface dimensions, boundaries and the maximum depth of the proposed lake (condition 10), and a condition requiring consolidation of the separate parcels of land into one lot and under one title (condition 29).
- 3 On 8 December 2005 the applicant made an application to modify the consent to enable the development to be carried out in two substages. The stated intention of the modification is to enable the substantial earthworks to be carried out as a first stage prior to construction of buildings, car parking, infrastructure and other ancillary components.

- 4 On 28 February 2006 the applicant appealed to the Court against the failure of the council to determine the application. On 22 March 2006 the council resolved to defend the appeal on the ground that the consent has lapsed.
- 5 The following questions have now been referred to me for separate determination
- (1) Whether in the circumstances the purported survey work carried out at the subject land constitutes "*physical commencement*"?
  - (2) Whether in the circumstances the Court can grant consent to the application for modification of the consent?

### The relevant legislation

- 6 The position is governed by s 99 of the *Environmental Planning and Assessment Act 1979* (NSW) ("the *EP&A Act*") as it was when the consent was granted on 22 December 1988. (That section has since been substantially re-enacted as s 95). That section relevantly stated that a development consent shall lapse unless the development the subject of that consent is commenced within two years of the grant of consent. Subsection 99(2)(a) of the *EP&A Act* is of particular relevance

Where the development comprises the erection of a building or the carrying out of a work or the subdivision (involving physical work) of land (including, where applicable, the subsequent use of that building when erected, that work when carried out, or that land when subdivided) – that development is commenced when building, engineering or construction work relating to that development is physically commenced on the land to which the consent applies,

## The evidence

- 7 The basic facts are not in dispute. Mr A P Hart, registered surveyor, carried out some survey work on the land prior to the making of the development application in September 1988. That survey comprised the following.
- a) a survey to allow the production of a contour and detail plan of the land, sufficient to allow volume calculation for earthworks design,
  - b) a long section was performed to confirm the earthworks calculation,
  - c) survey traverses along the perimeter and across the site were performed to provide survey control to the site,
  - d) the property boundaries were redefined and a plan of redefinition prepared, and
  - e) the boundary corners in the plan of redefinition were pegged.
- 8 Mr Hart had available to him the architect's conceptual design for the project before he commenced his survey work.
- 9 Following the grant of development consent, Mr Hart was asked by the developer, Mr P Muller, in early January 1989 to "*peg the site ready to control the earthworks*". Condition 10 of the development consent required accurate heights and positional set-out so as to control the depth of the proposed lake and the balance between cut and fill earthworks, together with accurate positioning of all construction elements of the development. According to Mr Hart, each of the previously marked survey stations was required to be found and re-measured. These stations were to be used to control the set-out of the development during the construction period.

- 10 Mr Hart then returned to the site and carried out the survey over several days in January 1989. That work, as I understand the evidence, involved the following
- a) the survey traverses performed prior to the lodgement of the development application were repeated and this involved clearing each line of sight;
  - b) although no new survey stations were placed, it was necessary to reinstate a lot of pegs and stakes and nailing pegs (for fixing levels) because many of these markers had been removed, presumably by trespassers
- 11 According to Mr Hart, whose expert evidence I have no reason to doubt, he considered it was necessary to conduct the traverses so as to comply with condition 10 of the development consent which fixed a maximum depth of the lake at RL 3 00
- 12 Mr Hart again returned to the site on 4 and 5 February 1989 and carried out a consolidation survey as required by condition 29 of the development consent. This involved a full field survey to measure and mark the external boundaries of the land and complete a linen plan of survey for registration. All the boundary corners in the plan of consolidation were pegged or physically marked appropriately. Line pegs were also placed. The northeast corner of the land was the only new corner to be marked - the other corners had been previously marked but required marking again as the pegs had been removed. A linen plan of survey was prepared but it has not been registered
- 13 In carrying out his work on the site in January and February 1989, after the grant of development consent, Mr Hart and his survey team encountered problems with the constant removal by others of stakes and boundary pegs that had been placed during the surveys for the preparation of the

development application. This necessitated repeating the survey traverses, replacing missing markers and re-pegging boundary corners.

- 14 According to Mr R D Hanby, the council's senior development engineer, the only purpose for undertaking the survey work in January 1989 was to re-establish and re-instate the physical markers that had been placed prior to the lodgement of the development application so as to enable work to be done on the site.
- 15 According to Mr C J Lutton, the council's surveyor, the only additional work required to be done after the consent for the production of the plan of consolidation and the linen plan was the placing of the peg at the north-eastern corner, which was not part of the earlier survey in 1988.

### The relevant principles

- 16 The test of whether there has been a commencement is principally an objective one, depending upon what has in fact been done. *United Dominions Corporation Ltd v Woollahra Municipal Council* [1973] 1 NSWLR 616, approved by the High Court in *Drummoyne Municipal Council v Lebnan* (1974) 131 CLR 350 at 360. Moreover, commencement does not necessarily involve an activity which is a continuing activity, so that it is not correct to say that if there is no continuance there is no commencement. *United Dominions Corporation Ltd v Woollahra Municipal Council, supra*.
- 17 In *Hunter Development & Brokerage Pty Ltd v Cessnock City Council* (2005) 63 NSWLR 124, Tobias JA (Santow JA and Stein A-JA concurring) held that survey work associated with and forming a necessary part of the physical work contemplated by a development consent, is capable of being relevantly "engineering work" within the composite phrase "building, engineering or construction work" within the meaning of s 95 of the EP&A

Act I have noted that s 95 is relevantly in the same terms as s 99 was when the development consent was granted. Tobias JA went on to say, however, that the relevant work must be more than merely notional or equivocal in that it must truly be work relating in a real sense to that which has been approved (at 142 [86]).

That is not to say that any survey work, albeit of a physical nature, would so qualify. Simply entering land in respect of which a subdivision has been approved and knocking in one or two pegs would not, in my view, necessarily qualify. There is an element of fact and degree in each case. Although in *Besmaw Pty Ltd [v Sutherland Shire Council]* (2003) 127 LGERA 413, Talbot J (at 436 [112]) observed that once Parliament had decided to delete the requirement of substantiality, there was little room for an argument that the works must not be *de minimus*, and that it was therefore reasonable to exclude any test of the degree and extent of the work under the present statutory regime, nonetheless the requirement that the relevant work *relate* to the approved subdivision requires a real nexus between them. In particular, the concept that the work must be "physically commenced", requires physical activity which involves an appearance of reality and which is not merely a sham. In other words, the relevant work must be more than merely notional or equivocal in that it must truly be work relating in a real sense to that which has been approved. cf *Besmaw Pty Ltd* (at 436 [111]).

- 18 Tobias JA also said (at 147 [111]) that in applying the statutory provision to the facts, the only relevant questions are
- a) was the work relied upon building, engineering or construction work, if so,
  - b) did it relate to the approved development; if so,
  - c) was it physically commenced on the land to which the consent applied prior to the relevant lapsing date?
- 19 On the particular facts before the Court of Appeal, Tobias JA said (at 148 [117])



So in the present cases, I accept that the survey work and the geotechnical investigation work were preparatory to, but necessary for, the commencement of the actual road and sewerage works. They were also carried out for the purpose of facilitating the further detailed engineering design work. The latter purpose did not, on the approach I have adopted, disqualify the work from being carried out for a purpose which bore a real relationship to the approved subdivision works.

## Conclusion

- 20 I now turn to the three questions identified by Tobias JA in *Hunter Development & Brokerage Pty Ltd*
- (a) ***Was the work relied upon building, engineering or construction work?***
- 21 In *Hunter Development & Brokerage Pty Ltd* Tobias JA held (at 142 [83]) that the composite phrase "*building, engineering or construction work*" should be given a broad meaning to include all those activities associated with, and forming a necessary part of, the discipline of engineering. Moreover, a necessary first step in engineering or construction, including the physical works contemplated thereby, is the setting out by survey upon the land of each of the component elements of the work in accordance with the approved plan (at 142 [84]), and the carrying out of survey work is capable of constituting the first step in the performance of the engineering and or construction work (at 142 [85]).
- 22 In the present case, the council does not contend that the survey work, even limited to that which was done after the grant of development consent, did not constitute engineering work. In my view this concession was properly made in the light of the judgment of Tobias JA in *Hunter Development & Brokerage Pty Ltd*.

**(b) Did the work relate to the approved development?**

- 23 It is here that the parties part company. The council contends that (i) the only new work which was done after the grant of development consent was the placing of the additional peg at the north-east corner of the site for the plan of consolidation, (ii) this work falls within the category of "knocking in one or two pegs" and is thus *de minimis* and cannot count, and (iii) the other work done after the grant of development consent merely replicated the work which was done before the grant of consent and which did not and could not relate to the approved development because the development had not been approved at that time -- that is, repeating work previously done is not a new and necessary step in, or part of, the process required. The council submits that to "commence" required a fresh start - a beginning.
- 24 I am unable to concur with the council's submissions. The work relates to the approved development if it involved at the very least some real relationship or connection between the work and that for which the consent had been granted, and that relationship is satisfied if the relevant work is a necessary step in, or part of, the process required for the work which is authorised by the consent. *Hunter Development & Brokerage Pty Ltd* at 146 [104]. The survey work that was done after the grant of development consent was engineering work done to fulfil conditions of the consent. Moreover, as Tobias JA stated in *Hunter Development & Brokerage Pty Ltd* at 146 [109] the consent must be taken to have authorised so far as the *EP&A Act* is concerned not only the construction of the works the subject of the consent, but also the carrying out of engineering work associated therewith and/or which was necessary to enable those works to be undertaken.
- 25 It is true that much of the survey work done in January 1989 after the grant of development consent replicated work which had been done before. But the survey work was nevertheless necessary to enable any construction work to proceed. It was necessary because physical markers that had

been placed on the land had been removed by others and the markers had to be in place so that condition 10 of the consent could be complied with. That is, none of the earthworks could be done unless the markers were in place, which they were not. Mr Hart described the need for this work, which I have summarised in pars [9] to [11] above. None of this work could be described as *de minimis* and it all related to the development which was the subject of the consent.

- 26 The further survey work which was done on 4 and 5 February 1989 was required by condition 29 of the consent. The extent of that work was described by Mr Hart and is summarised in par [12] above. Again, although much of it replicated work which had previously been done, the preparation of the linen plan of consolidation could not be done without it.
- 27 The clear conclusion is that the survey work carried out by Mr Hart after the grant of development consent was not only substantial but was necessary in order to implement the consent and specifically to enable compliance with conditions 10 and 29 of the consent, and which if not done then those conditions could not have been complied with. The work clearly related and could only have related to the development that had been approved.

**(c) Was the work physically commenced on the land to which the consent applied?**

- 28 The council again relied upon the fact that the only new work which was done after the grant of development consent was the placing of a single peg in the northeast corner of the site and that this failed the test of fact and degree required so as to amount to a commencement.
- 29 As noted above, however, the work done on the site by Mr Hart in January and again in February 1989 was extensive, albeit replicating much of what had been done before and all of which was necessary in order to implement the consent and to comply with conditions 10 and 29 in

particular As conceded by Mr Hanby, the council's senior development engineer, the reinstalment of the physical markers was necessary to enable work to be done on the site

30 The overall conclusion must be that the survey work that was done by Mr Hart after the grant of development consent was the physical commencement of engineering work relating to the approved development on the land to which the consent applies

31 I therefore answer the two questions which have been referred to me for separate determination, as follows

(1) Whether in the circumstances the purported survey work carried out at the subject land constitutes physical commencement?

Answer: Yes

(2) Whether in the circumstances the court can grant consent to the application for modification of the consent?

Answer Yes

*I hereby certify that the preceding 31 paragraphs are a true copy of the reasons for judgment herein of the Honourable Mr Justice D H Lloyd*

Associate

Dated 29 August 2006

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