

WHEN HAS A DEVELOPMENT 'COMMENCED'?

Dalia Cook
Maddock Lonie & Chisholm

Most planning permits will contain a condition requiring that the development 'commence' within a certain period of time, failing which the permit will expire. Sometimes only works which are considered to be 'minor' in the scheme of an overall development will have been carried out by the 'cut off date'. In these circumstances, responsible authorities might be uncertain about whether the development has 'commenced' under the permit.

Section 68(1)(a) of the *Planning and Environment Act 1987* (the Act) provides that a permit will expire if the development or any stage of it fails to start within the time specified in that permit. The Act defines 'development' to include 'works', which are defined to include 'any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil'. The language of the Act supports a broad reading of the concept of 'commencement', as do the relevant cases, which apply an objective test to determine when a development will be considered to have commenced.

The general rule as established in two leading decisions of the High Court is that the work must involve more than merely preparatory works falling outside the subject matter of the approval—rather, they must be within the scope of the approval to constitute commencement. In the case of *Drummoyne Municipal Council v Lebnan and Ors* [1974] 131 CLR 350 at 360, the decision of Gibbs J with whom Barwick CJ, Mason, Stephen and Menzies JJ agreed, formulated the test as follows in

relation to corresponding New South Wales legislation at that time:

Clearly the work and development which ... the Act and ... the ordinance require should have been substantially commenced is that to which the approval or consent itself refers, and it would seem to follow that work or development is not commenced when nothing more has been done than acts preparatory to the work or development which is the subject of the approval or consent.

The later decision of the High Court in *Dar v Pinglen Pty Ltd* [1981] 148 CLR 289 followed the test set down in *Lebnan*, but arrived at a different outcome. The Court also expressed the view that the demolition of existing houses on the site should not be regarded as a commencement of the work while, in contrast, the excavation work on the site was a substantial part of the work referred to in the approval and constituted commencement of the development.

The Supreme Court of Queensland in the case of *Ex parte Dackfield Pty Ltd* (1983) Qd R 10 considered whether the preparation of a working pad for a pile driver amounted to commencement. The Court (Connolly J) reiterated the test applied in *Lebnan* and outlined the following principles, which we think are generally applicable in Victoria:

- Whether building work has commenced does not depend on the motive or intention of the person performing the work—the test is an objective one. (For example, if the permit holder writes to the responsible authority stating their intention to carry out further works, this is not a relevant matter.)
- It is not correct to say that commencement must involve a continuing activity, so that if there is no continuance, there is no commencement.

- An alleged commencement is not nullified if the party who commenced the work does not him/herself intend to continue and complete the work.

In the Victorian case of *Brennan v City of Whittlesea* (1990) 5 AATR 249, the Administrative Appeals Tribunal found that a survey of the land, preparation and submission of a detailed plan of subdivision and marking of internal boundaries with pegs and trenches constituted 'commencement'.

One final consideration is that, as a matter of policy, where there is the potential for the removal of rights from an individual, there is a clear tendency for courts and tribunals to adopt an interpretation which preserves the rights of the individual. A responsible authority should therefore be cautious about forming the view that a permit has expired due to a failure to 'commence' a development.

Dalia Cook's article first appeared in Maddock Lonie & Chisholm's *Planning Update* (January 2002) and is reprinted with permission.
