



GREENWAY CHAMBERS

# DEVELOPER CONTRIBUTIONS AFTER BUYOZO

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## Introduction

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1. Challenging a contributions condition
2. *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177
3. *Intrapac Skennars Head Pty Ltd v Ballina Shire Council* [2021] NSWLEC 83
4. Charting a way forward



### Environmental Planning and Assessment Act 1979

1. Development that will, or is likely to, require the provision of or increase the demand for public amenities and public services: s 7.11(1).
2. Condition can only require a *reasonable* contribution: s 7.11(2).
3. Allowed by, and determined in accordance with, a contributions plan: s 7.13(1).

## Reasonableness

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*Rose Consulting Group v Baulkham Hills Shire Council* [2003]

NSWCA 266

1. *'Contributions plans ... do not ... render immune a condition mandated or authorised by the contributions plan when such condition, objectively considered, is shown to be unreasonable.'*
2. Does not need to be so unreasonable that no decision maker would have imposed that condition.
3. *'Simply requires reasonableness to be tested according to its ordinary connotation.'*



## The old approach

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### Four options to challenge

1. Appeal
2. Section 8.2 review
3. Judicial review
4. Apply to modify the condition



## Challenging a contributions condition

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### Why not appeal?

1. The consent is in the interim rendered ineffective;
2. The court could decide:
  - a. not to grant the consent at all; or
  - b. impose some other requirement unrelated to the contributions condition.



### Environmental Planning and Assessment Act 1979

1. 4.55(1): correct a minor error or miscalculation
2. 4.55(1A):
  - a. Modification of minimal environmental impact;
  - b. Development as modified is substantially the same as development for which consent granted;
  - c. Notification requirements.
3. 4.55(2):
  - a. Development as modified is substantially the same as development for which consent granted;
  - b. Consultation and notification requirements.
4. 4.56: where consent granted by a Court.

## *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177

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- Development application for construction and use of storage and other commercial premises.
- Consent granted subject to a condition requiring the payment of \$987,242.37 in contributions.
- Buyozo:
  - Paid the contribution.
  - Completed the development.
- Lodged a modification application to lower the contribution amount.





## First instance

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*It was agreed that the Court had jurisdiction to vary a condition under s 7.11 of the EPAA even after though the contributions had been paid (Arncliffe Development Pty Ltd v Rockdale City Council [2003] NSWLEC 297; (2003) 129 LGERA 189 at [11]-[12]).*

*There is also no doubt that the Court has the power to modify condition 30 [the contributions condition] pursuant to s 4.55 of the EPAA. There is no relevant statutory limit on the exercise of that power other than the question of whether the development as modified will be “substantially the same”, which it was agreed is not an issue in this appeal.*



**Basten and Payne JJA**

- Conditions on the exercise of the power (in s 4.56 and 4.55) demonstrate that there must be a proposal to modify the *development*.
  - Minor environmental impact;
  - Substantially the same development.
- ‘*A modification is only available where some change is proposed with respect to the development for which consent was granted*’.
- There was no proposal to modify the development, ‘*the same building (which had already been completed) was to be used for the same purpose (which was its current use)*’.
- Power to modify was never engaged.

Preston CJ of the LEC

- Textual indicators that there must be a proposal to modify the development:
  - Minor environmental impact (s4.55(1A)- *‘Only the carrying out of a development can have an environmental impact’*)
  - Development as modified must be substantially the same as the development for which consent was granted (s 4.55(1A), 4.55(2), and 4.56)
  - Requirement for public notification: *‘the public are interested in changes to the development that might result from the modification of the development consent, not mere changes in the terms of the development consent that do not effect any change to the development...’*

Can a condition be modified after contributions are paid?

**Preston CJ of the LEC**

- Grant of consent, and approval of a modification application, is *prospective*.
- A condition of development consent can never be modified so as to require the doing of something retrospectively, but rather only to do something prospectively.
- Cannot modify a condition where the contributions have already been paid.

## How to challenge a contributions condition

### Preston CJ of the LEC

- Three options:
  1. Section 4.55(1) if the modification is *only* to correct a minor error, misdescription or miscalculation;
  2. Appeal under s 8.7 of the EPA Act; only
  3. Judicial review.

### Outstanding question

- What if a modification application proposes changes to the development *and* changes to a contributions condition?

Preston CJ of the LEC

*The upshot of this analysis is that the power in s 4.56(1), as with the powers in s 4.55(1A) and s 4.55(2), can only be exercised to modify a development consent if the modification will effect some change to the development the subject of the development consent. **This need not be the only effect of the modification** but it must be at least one of the results of the modification of the development consent.*

- Development application for residential subdivision.
- Consent granted subject to a condition requiring the payment of \$4.58 million in contributions.
- Development included parks, roads, open space.
- Intrapac:
  - Did not pay the contribution.
  - Applied to modify the contribution amount to account for the public benefits that would be provided as part of the development.

## Challenging a contributions condition

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### Environmental Planning and Assessment Act 1979,

#### § 7.13

*(3) A condition under section 7.11 that is of a kind allowed by a contributions plan (or a direction of the Minister under this Division) may be disallowed or amended by the Court on appeal because it is unreasonable in the particular circumstances of that case, even if it was determined in accordance with the relevant contributions plan (or direction). This subsection does not authorise the Court to disallow or amend the contributions plan or direction*

***Arkibuilt Pty Ltd v Ku-Ring-Gai Council (2006) 67 NSWLR 529***

- Power can be exercised on appeal of a refusal to modify a consent.





**Preston CJ**

- s 7.13(3) only applies at the time of the imposition of a contributions condition (‘a condition under s 7.11’).
- Contributions can only be imposed on the grant of ‘*development consent*’.
- Constraints on exercise of modification power in s 4.55 or 4.56 are found only in those provisions.

*... the power of dispensation in s 7.13(3) is not available to be exercised by the Court on an appeal under s 8.9 of EPA Act against the determination of an application to modify a development consent.*

**Is the potential relief under s 4.55 broader?**

- s 7.13(3) cannot operate to constrain the power to modify a development consent.
- Contributions can only be imposed on the grant of ‘*development consent*’.
- If s 7.13(3) applied, it would constrain any modification of a development consent that might be permitted by an applicable power in s 4.55 or s 4.56 only to the actions of disallowance or amendment of a condition under s 7.11 and the ground for such disallowance or amendment only to the condition under s 7.11 being unreasonable in the particular circumstances of the case.

## Section 7.11(5)(b)

*(5) The consent authority may accept—*

*(a) the dedication of land in part or full satisfaction of a condition imposed in accordance with subsection (3), or*

*(b) the provision of a material public benefit (other than the dedication of land or the payment of a monetary contribution) in part or full satisfaction of a condition imposed in accordance with subsection (1) or (3).*

## Preston CJ

- Section 7.11(5) recognises a two step process:
  1. The Council imposes the contributions condition.
  2. Acceptance of the dedication of land or material public benefit.
- Where a material public benefit has not yet been provided (or offered), that public benefit cannot render the condition unreasonable. This conflates the two steps.
- The EPA Act only authorises a consent authority to take into consideration a material public benefit in two circumstances:
  1. Where the material public benefit was provided prior to the grant of development consent and was not provided as a consequence of a prior development consent or planning agreement: s 7.11(6);
  2. After the grant of consent and as a discretionary power to accept the material public benefit in part or full satisfaction of a contribution required by a contributions condition which has been imposed: s 7.11(5).

# After Buyozo

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## Four options to challenge

1. Appeal
2. Section 8.2 review
3. Judicial review
4. Apply to modify the condition, *only where*:
  - a. it is a minor error, misdescription, or miscalculation;*
  - or*
  - a. some change to the development is proposed; and*
  - b. the contributions have not already been paid.*

