Planning Law Reforms

PLANNING LAW REFORMS

A major overhaul of the Environmental Planning & Assessment Act 1979 is underway, via the Environmental Planning & Assessment Amendment Act 2017. Most of the changes commence on 1 March 2018, but a number require further consultation and development and will be phased in over time. The NSW Department of Planning & Environment ("DPE") has information online about when various provisions are expected to commence. Please click here for further information.

The stated objectives and discussion along the way indicate that the reform is intended to go beyond modernisation and improved efficiency and to support specific outcomes, e.g. a "thriving built environment" and "enhanced community participation in the planning system". How well those objectives will be achieved remains to be seen, as the form of the pending regulations and the approach taken by authorities in implementing the changes will be important.

DEVELOPMENT CONTROL PLANS

Development control plans are to be standardised, but with the regulations not yet available, it is not yet clear how this will work.

LOCAL PLANNING INSTRUMENTS

Planning authorities. The new act creates two different categories of planning authority, being the planning proposal authority (which drafts a plan) and the local plan-making authority (which makes the plan). Council will be able to perform both functions if authorised to do so under a gateway determination issued by the Minister.

Local strategic planning statements. Councils will be required to prepare a local strategic planning statement ("LSPS"), setting out planning priorities for each area and will be required to give effect to it when making Local Environment Plans ("LEP"). This could result in the critical milestone for local planning becoming the making of an LSPS, rather than the making of an LEP. The opportunity for public participation may be limited. Council must publicly exhibit an LSPS for a minimum of 28 days, but there is no requirement for an LSPS to be supported by technical studies or maps indicating impact for particular properties.

Public exhibition. Councils will be required to publicly exhibit local development applications, with a default period of 14 days for local development applications and 28 days for designated and state-significant development, with the days between 20 December and 10 January not counted.

Community participation plans. Councils and other planning authorities will also be required to

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prepare a community participation plan ("CPP"), which may supplement the mandatory requirements, but may also specify a shorter period of public exhibition or no public exhibition at all for some local development applications.

LEP review. Councils will be required to review LEPs every 5 years.

ASSESSMENT

Commencement of consents. Development consents will now have effect on and from the date that they are registered on the NSW Planning Portal.

Suspension of consents. An appeal by an applicant (or by a third party in relation to designated development), except for State significant development, will suspend a development consent pending determination of the appeal, delaying action under the consent.

Considerations. A consent authority will be required:

- When assessing development proposals, to have regard to a number of new objects, including "to promote good design and amenity of the built environment", "to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)" and "to promote the proper construction and maintenance of buildings, including the protection of the health and safety of any occupants".

- When determining a modification application, to take into account the reasons given by a consent authority in an original grant of consent.

Public notification. A consent authority will also be required to undertake public notification of certain decisions, including the reasons for the decision, having regard to any statutory requirements applying to the decision and how the planning authority took community views into account when making the decision.

Complying development certificates. The potential for voluntary planning agreements and State infrastructure contributions has been extended to complying development.

Infrastructure corridors. A State environmental planning policy may require a consent authority notify or obtain the concurrence of a specified public authority before carrying out an activity or granting an approval in relation to an activity, within an infrastructure corridor and the authority can refuse concurrence if it is satisfied that the activity will unreasonably interfere with the use for which the infrastructure corridor has been set aside, including unreasonably increasing the cost of constructing and operating the infrastructure.

Integrated development. There is increased provision for consultation and review and the Secretary of DPE has a new discretionary "step in" power.

Part 3A applications. Transitional arrangements are coming to an end. Further regulations are required, but the expectation is that the DPE will stop accepting Section 75W modification applications in relation to existing Part 3A approvals, probably within 2 months of the regulations. After that, modification applications relating to existing Part 3A approvals will be assessed as State significant development or State significant infrastructure.

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CERTIFICATION

Building and subdivision certification provisions have been simplified and consolidated and subdivision and construction certificates have been replaced with the new "subdivision works certificate", which is required for the erection of a building or the carrying out of subdivision work.

ENFORCEMENT

There is the new option of an enforceable undertaking negotiated with the Secretary of the DPE. Councils can't negotiate such undertakings in their own right, but can recommend that the Secretary do so and the Secretary can delegate enforcement to Council.

Council will be able to issue a stop work order in relation to work under a CDC for up to 7 days while compliance investigations are undertaken.

The Land and Environment Court will have additional discretionary powers:

- to declare a construction certificate invalid based on inconsistency with the relevant development consent. An application for such a declaration must be made within three months of issue of the certificate.

- to declare a complying development certificate invalid based on the subject development not a complying development. An application for such a declaration must be made within three months of issue of the certificate.

Available remedies for breaches of the act have been expanded to include recovery of profits gained from a breach, compensation and remedying damage caused.

Currently all breaches are criminal offences, but the new act will exclude minor procedural breaches and limit criminal offences to those provisions which specify a criminal penalty, e.g. development without consent or in breach of conditions of consent or building work without a construction certificate.

RECOMMENDATIONS

There are a lot of changes with which one needs to get up to speed. One is not aided by the fundamental rewrite which has taken place. The current 8 part structure is replaced with a 10 part structure. A decimal system has been adopted. Many provisions have been moved or renumbered. However, the DPE has published a helpful comparison table here, handy guide to the new Act and unofficial consolidation.

We have considerable experience with these issues and could help you pre-empt difficulties in this area.

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