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LEGAL UPDATE
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NEW BUILDING AND SUBDIVISION CERTIFICATION REGIME COMMENCING 1 DECEMBER 2019

On 30 August 2019, the *Environmental Planning and Assessment Amendment (Building and Subdivision Certification) Regulation 2019* was made. When it commences on 1 December 2019, it will amend the building and subdivision certification provisions in the *Environmental Planning and Assessment Regulation 2000* (**EP&A Regulation**), and also bring into force the related provisions in Part 6 (in place of the former Part 4A) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

Principal effect of amendments

Notably, the new provisions of the EP&A Act and the amended provisions of the EP&A Regulation will only apply to development consents granted from 1 December 2019 (**not** before). Similarly, the new and amended provisions will **not** apply to occupation certificates (whether interim or final) issued before that date. This will result in the former Part 4A of the EP&A Act continuing to apply to projects approved recently or even over the coming weeks, in circumstances where physical commencement of the approved development may not take place for up to 5 years after the granting of consent.

The provisions will largely bring into force the additional statutory detail that was required to be incorporated into the EP&A Regulation before the new Part 6 of the EP&A Act was ready to commence. The key differences between the

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building and certification provisions in the current Part 4A of the EP&A Act and the new Part 6 thereof were briefly summarised in a previous article (noting that the previously-slated commencement date of 1 September 2018 was deferred to allow more time for the amendments to the EP&A Regulation to be finalised).

Summary of key amendments to Regulation (in addition to prior amendments to Act)

In addition to providing the statutory detail referred to above, the amendments to the EP&A Regulation provide for a number of matters that appear to be intended to require stricter adherence to development consents when issuing compliance certificates, construction certificates (**CCs**) and occupation certificates (**OCs**) for development. In summary, these include the following:

- A compliance certificate for building and subdivision work "*must not be issued unless any required development consent or complying development certificate is in force with respect to the building or subdivision to which the work relates*" (clause 138A of the EP&A Regulation).

- If an OC is issued to authorise the occupation and use of the first completed stage of a partially completed building, that certificate must be subject to a condition that an OC must be obtained for the whole of the building within 5 years after the partial OC is issued (clause 156A of the EP&A Regulation).

- Directions by principal certifiers must be issued within 2 business days to the person responsible for non-compliance with a development consent or complying development certificate, in all cases where the certifier becomes aware of the non-compliance (clause 161A of the EP&A Regulation).

The amendments also include a key change in relation to how consistent plans approved by a CC or OC must be with the development consent for the relevant building work. This matter is discussed separately below.

Replacement of "are not inconsistent" with "is consistent" for CCs and OCs

An interesting change to the EP&A Regulation will arise from what, on the face of it, would appear to only be a minor change of wording to clauses 145(1)(a) and 154(1B). However, the change actually carries much more meaning than that and will likely give rise to future Court decisions clarifying its meaning and scope.

Currently, clauses 145(1)(a) and 154(1B) of the EP&A Regulation prevent a certifying authority issuing a CC or an OC unless the design and construction of the building "*are not inconsistent*" with the relevant development consent.

From 1 December 2019, the words "are not inconsistent" will be replaced with "*is consistent*". The current phrase "not inconsistent with" has been interpreted by the NSW Court of Appeal as directing "*attention to whether the two sets of specifications were inconsistent, in the sense of lacking harmony between different elements or lacking congruity*", and described the relevant task as follows (*Burwood Council v Ralan Burwood Pty Ltd and Others (No 3)* (2014) 206 LGERA 40; [2014] NSWCA 404 at [147]-[148]):

> *No doubt this is not a straightforward task. Not every difference between the DA and the plans and specifications furnished to the certifying authority and approved*

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> *in the CCs amounts to an inconsistency in the relevant sense … a difference does not necessarily constitute an inconsistency. Some adjustment to approved plans and specifications … may be inevitable in a large and complex project.*

The changed wording in clauses 145(1)(a) and 154(1B) of the EP&A Regulation will, it seems, require CC and OC plans to adhere more strictly to the relevant development consent than under the present provisions. How strict that adherence needs to be however may well be clarified in future litigation, particularly given that section 4.16(12) of the EP&A Act will remain in force after 1 December 2019 and (arguably) envisage some degree of difference between development consent and CC plans continuing to be lawful in relation to consents granted from that date.

Conclusion

Given that CCs issued for building work under development consents granted from 1 December 2019 will be able to be declared invalid by the Land and Environment Court if the plans and specifications or standards of building work specified in the CC are not consistent with the development consent for the building work (section 6.32 of the EP&A Act), the Court may sooner rather than later (in relation to a consent granted from 1 December 2019) be asked in a judicial review challenge to a CC to determine what degree of difference with the approved DA plans is permissible. The commencement of Part 6 of the EP&A Act and the related amendments to the EP&A Regulation will strengthen the legal requirements for certification of building and subdivision work in New South Wales, however the full extent of this will become more apparent in due course.

For further information regarding this update, please contact Mark Cottom.

CLAUSE 4.6 VARIATION NOT REQUIRED TO EXCEED HEIGHT & FSR STANDARDS IN LEP FOR SENIORS HOUSING UNDER SEPP

***Eastern Suburbs Leagues Club Ltd v Waverley Council* [2019] NSWLEC 130**

This case concerned a proposed seniors living residential development on the site of the former Waverley Bowling Club. The application was made pursuant to *State Environmental Planning Policy (Housing for Seniors or People with a Disability)* 2004 (**Seniors SEPP**). The proposed development had a building height which significantly exceeded the "cannot refuse" building height development standard of 8 metres in cl 50 of Seniors SEPP and the building height limit of 8.5 metres in cl 4.3 of *Waverley Local Environmental Plan* 2012 (**WLEP**). The proposed development also had an FSR which significantly exceeded the "cannot refuse" standard of 0.5:1 in cl 50 of Seniors SEPP and the FSR development standard of 0.5:1 in cl 4.4 of WLEP.

An issue arose in the proceedings as to whether the breaches of cll 4.3 and 4.4 of WLEP required dispensation pursuant to cl 4.6 of WLEP. The Council argued that the applicant needed to make a request pursuant to cl 4.6 to dispense with the development standards in cll 4.3 and 4.4 which would otherwise apply for maximum building height and FSR. The applicant contended that such a request was not a necessity but provided a cl 4.6 request nonetheless.

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Moore J held that, consistent with the Court of Appeal decision in *Hastings Point Progress Association Inc v Tweed Shire Council* [2009] NSW CA 285 (*Hastings Point*) the Seniors SEPP, by virtue of cl 5(3), ousted the necessity for a successful cl 4.6 request.

In *Hastings Point* the Court was examining the inconsistency between cl 8 of *Tweed Local Environmental Plan* 2000 (**TLEP**) and cl 17 of *State Environmental Planning Policy (Seniors Living)* 2004 (**SEPP Seniors Living**), a predecessor of Seniors SEPP. Cl 17 was in the same terms as the current version of cl 15 of Seniors SEPP and provided:

> **17 What Chapter does**
> This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy—
>
> (a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and
>
> (b) development on land that adjoins land zoned primarily for urban purposes for the purpose of any form of seniors housing consisting of a hostel, a residential care facility or serviced self-care housing.

Section 36 (1)(a) *Environmental Planning and Assessment Act* 1979 (**EPA Act**) provided that in the event of an inconsistency between environmental planning instruments and unless otherwise provided there is a general presumption that a State environmental planning policy prevails over a local environmental plan made before or after the policy. Section 3.28 (1)(a) of the current version of the EPA Act is to similar effect.

By way of reinforcement of those provisions cl 5(3) of Seniors Living (and Seniors SEPP) provide:

> (3) If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency.

Cl 8(1) TLEP as considered in *Hastings Point* was in the following terms:

> **8 Consent Considerations**
>
> (1) The consent authority may grant consent to development…only if:
>
> (a) it is satisfied that the development is consistent with the primary objective of the zone within which it is located, and
>
> (b) it has considered those other aims and objectives of this plan that are relevant to the development, and
>
> (c) it is satisfied that the development would not have unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole.

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McColl JA said that because cl 8 TLEP mandated that the council may only grant consent to development if the three conditions to which it referred are satisfied, it could not operate concurrently with cl 17 of SEPP Seniors Living. She noted that if cl 8 of TLEP had been drafted in a manner which required the Council to "take into consideration" the factors to which it referred, there would have been no inconsistency.
In the *Eastern Suburbs Leagues Club* matter Moore J held that the *Hastings Point* decision was clear and clearly applicable and binding for the purposes of the consideration of the proposed development.

He said that cll 4.3 and 4.4 of WLEP were in mandatory terms and therefore in conflict with cl 15 of Seniors SEPP. He acknowledged that cl 4.6 permitted variations of those standards and did not itself impose numerical standards. He noted that cl 4.6 did impose a series of mandated states of satisfaction to be achieved before the beneficial and facultative power to dispense with compliance with the development standards could be invoked. He said that cl 4.6 is, in qualitative terms, quite thematically compatible with cl 8(1) in TLEP in the *Hastings Point* decision.

His Honour concluded that there was no necessity for the applicant to rely on a successful request pursuant to cl 4.6 of WLEP to permit consent to be granted for a development which did not otherwise comply with the building height or FSR development standards in cll 4.3 and 4.4 of that LEP.

The outcome of the proceedings was that consent was granted to the development subject to further amendments which included the removal of one floor of a building within the development.

For further information regarding this update, please contact Roslyn McCulloch.

Pikes & Verekers Lawyers

Level 2
50 King Street
SYDNEY NSW 2000

DX 521 Sydney
T 02 9262 6188
F 02 9262 6175

E info@pvlaw.com.au
W www.pvlaw.com.au

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