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LEGAL UPDATE
October 2017

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State Environmental Planning Policy (Educational Establishments and Childcare Facilities) 2017

Introduction

This SEPP commenced on 1 September 2017.

The aim of the policy is to "facilitate the effective delivery of educational establishments and early education and care facilities across the State".

Educational Establishments

"Educational establishment" is defined as a building or place used for education, being a school, or a tertiary institution including a university or TAFE establishment, that provides formal education and is constituted by or under an Act.

Schedule 1 sets out general categories of exempt development in connection with educational establishments.

This includes certain building alterations, demolition, fences, portable offices, rainwater tanks and at grade car parks.

Clause 38 sets out categories of exempt development within the boundaries of existing schools including:

- A sporting field, tennis court, basketball court or any other type of court used for sport

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- The use of existing facilities or buildings for the purposes of school based childcare, or for the physical, social, cultural or intellectual development or welfare of the community (whether or not it is a commercial use of the establishment).
- Portable classrooms

Clause 36 sets out development permitted without consent where it is carried out by or on behalf of a public authority on land within the boundaries of an existing school. This includes:

- Construction, operation and maintenance of a library or administration building
- Portable classroom
- Permanent classrooms
- Kiosk
- Café
- Bookshop
- Car park
- Security measures including fencing, lighting and security cameras.

Clause 39 sets out categories of complying development for schools including construction of and alterations to:

- Administration buildings and libraries
- Teaching facilities
- Outdoor learning or play areas
- Gyms, indoor facilities or halls

Clause 49 sets out categories of complying development for existing universities and TAFE establishments.

Clause 48 sets out categories of exempt development for existing universities.

Universities, TAFE establishments and schools are made permissible with consent in all "prescribed zones", which are most of the zones in the standard instrument.

Child care Centres

The SEPP defines a "centre-based child care facility" to include a pre-school, long day care, out of school hours care and occasional child care.

Clause 22 requires the concurrence of the NSW Regulatory Authority for centre based child care facilities where the proposal does not comply with the minimum unencumbered outdoor and/or internal space requirements under the Education and Care Service National Regulations.

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Clause 23 requires the consent authority to take into account before determining a development application for a centre based childcare centre any applicable provisions of the *Childcare Planning Guidelines*. These are Guidelines published by the Department of Planning (current version is August 2017).

Clause 25 sets out non-discretionary development standards which if complied with, prevent the consent authority from requiring more onerous standards in respect of a centre based childcare facility.

Clause 26 provides that the following reports and/or considerations are now not required to be provided as part of a development application for a centre based childcare facility if there are controls requiring their provision or consideration within a Council development control plan:

- Provision of a Plan of Management,
- Demonstrated needs assessment,
- Identification and proximity to other childcare facilities,
- Any matter relating to parts 2 and 4 of the *Childcare Planning Guideline* (except building height, setbacks and car parking).

Clause 24 requires the consent authority to consider the following matters before determining a development application for the purpose of a centre based childcare facility on land zoned IN1 General Industrial or IN2 Light Industrial:

- Whether the proposed development is compatible with neighbouring land uses, including its proximity to restricted premises, sex services premises or hazardous land uses,
- Whether the proposed development has the potential to restrict the operation of existing industrial land uses,
- Whether the location of the proposed development will pose a health or safety risk to children, visitors or staff.

For further information regarding this update, please contact Julie Walsh or Alistair Knox.

Be Careful Not To Extend The Stopped Clock!

***Corbett Constructions Pty Ltd v Wollondilly Shire Council* [2017] NSWLEC 135**

9 October 2017 – Molesworth AJ

In these proceedings the Council sought by motion to have the proceedings dismissed on the basis that they were incompetent because they had been commenced beyond the period prescribed by s.97 *Environmental Planning and Assessment Act* 1979 (EPA Act).

The pertinent facts are as follows:

- 1 July 2016 DA lodged.
- 11 July 2016 Council sent letter requesting additional information which referred to clauses 50, 60, 67, 109, 110 and 111 *Environmental Planning and Assessment Regulation* 1979 (EPA Regulation) and said:

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"If we do not receive the requested information within 28 days, or if alternative arrangements have not been made, the application may be determined on the current information provided and your application may be refused…"

- 20, 23 and 29 September 2016 (after the expiry of the 28 day period on 8 August 2016) the applicant and Council exchanged emails regarding the development application which indicated the applicant's intention to provide additional information.

- 11 October 2016 Council letter to applicant noting that the additional information had not been received and stating:

  "if the information is not received within seven (7) days it will be assumed that you wish to have the application determined on the information already submitted".

- 18 October 2016 Council email to applicant stating:

  "If this information is not provided by the end of this week (21 October 2016) I will prepare my assessment report to the JRPP based on the information provided."

- 18 October 2016 applicant email to Council confirming delivery to Council that day of outstanding information.

Justice Molesworth held that a consent authority retains a discretion to extend the time for the provision of additional information pursuant to a "stop the clock" letter, even after the expiry of the original time for the provision of that information. In the facts of this case the Court found that the Council had clearly elected to allow a further (significantly lengthier) period of time for the applicant to provide the additional information, namely, until 21 October 2016.

Accordingly, pursuant to clause 54(6)(b) of the EPA Regulation the clock stopped between 11 July 2016 when the initial request for additional information was made and 18 October 2016 when the applicant provided that information.

The respondent had also argued that the initial period of 28 days was unreasonable given the nature of the additional information which was sought. His Honour did not need to and did not determine that question but he did caution that consent authorities should avoid a pro-forma response period and should tailor the period to the request which is made.

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

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