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CHANGES TO THE *ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979* (NSW) ("the Act")

Summary of the changes

There have been a number of recent changes to the Act. They may be summarised as follows:

Renumbered/relocated provisions

The Act has been renumbered (using decimal numbers). The previous 8 parts of the Act are now rearranged into a 10-part structure, with some provisions being relocated and even modified in some cases.

A reference in any Act, instrument, contract or agreement, whether dated before or after the commencement of the amended Act on 1 March 2018, to a provision of the Act that has been renumbered or relocated (including modified) is taken to be a reference to the renumbered or relocated provision, and vice versa. Nonetheless, contracts and agreements should where possible refer to the new numbering despite this helpful provision of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017*.

Local planning panels

All local councils within Sydney and Wollongong must now have local planning panels (these are still commonly referred to as 'independent hearing and assessment panels' or IHAPs).

The Minister for Planning has now issued a direction to the new panels that sets out the types of development applications that must be referred to local planning panels (rather than being decided by local council officers). In very general terms, a development that is subject to vigorous objection (more than 10 unique objector submissions, 25 in the City of Sydney) must be sent to the local planning panels for decision, as must certain developments involving conflicts of interest, departure from development standards and sensitive development.

Community participation plans

In addition to the changes to local planning panels (and greater involvement of the community in strategic planning), Part 2 of the Act, "Planning Administration" requires that consent authorities prepare Community Participation Plans ("CPP's"). CPP's will describe how local councils and other consent authorities will undertake community participation activities, for example, community consultations or public exhibitions, when exercising their planning functions. Schedule 1 of the Act sets out which instruments and decisions must be notified to the community, the notification periods and other mandatory requirements and the exceptions to notification and exhibition periods.

Local strategic planning statements

Local councils will now be required to prepare and adopt a Local Strategic Planning Statement ("LSPS"). Local councils will be required to consider and adopt strategic planning priorities for their area. The LSPS must consider and describe the economic, social and environmental basis for the strategic planning of the local council area and describe actions to achieve those priorities. The LSPS must also describe the basis on which the council is to monitor.

Offences and undertakings

Parties who have breached the Act may enter into enforceable undertakings with the Department of Planning and Environment ("DPE") in respect of the breach. Breaching parties and local councils will commonly negotiate the terms and conditions of the undertakings. The amendments to the Act make provision for the Secretary of the DPE to accept and sign off on the terms of the enforceable undertakings. If an enforceable undertaking is subsequently breached, the Secretary may apply to the Land and Environment Court for orders to remedy the breach.

The new provision for enforceable undertakings largely reflects a provision in the Protection of the Environment Operations Act that provides for the Environment Protection Authority to accept such undertakings where that Act is breached. Otherwise, the offence provisions in the Environmental Planning and Assessment Act remain much the same as when they were significantly amended in 2016, although they have been renumbered, and a provision is now only intended to create an offence if the maximum penalty is stated underneath it.

Validity of CDCs – New section 4.31 of the Act

Pursuant to this new section of the Act, CDCs may be issued subject to deferred commencement conditions.

Now the Land and Environment Court ("LEC") may declare a CDC invalid if the proceedings are brought within three months of it being issued and if the LEC determines it was not authorised to be issued. This effectively reverses the decision of *Trives v Hornsby Shire Council & Ors* (2015) 208 LGERA 361.

The regulations may specify the kind of development for which an accredited certifier is not authorised to issue a CDC: s 4.28(2) of the Act.

New Part 6 of the Act – Commencing 1 September 2018

Part 6 was formerly Part 4A in the Act. Part 4A continues to apply to an application for a certificate under that Part pending on the repeal of that Part, and to any certificate issued. Notably, as the new Part 6 does not commence until 1 September 2018, the former Part 4A still continues to apply in full until then.

A new type of certificate has been introduced – a "*subdivision works certificate*"– to the effect that subdivision work completed in accordance with specified plans and specifications will comply with the requirements of the regulations. Pursuant to s 6.13 of the Act, a subdivision works certificate is not required for carrying out of subdivision work in accordance with a development granted before 1 March 2018.

A number of sections of the Act are useful to note:

- 6.27 owners building manual is to be issued to a building owner prior to an OC being issued.
- 6.31 directions by principal certifiers ("PC"). If a PC is not a Council and becomes aware of any non-compliance in respect of an aspect of development to which this section applies, that PC must issue a notice in writing to the person responsible for carrying out that aspect of the development, identifying the matter which has or would result in the non-compliance and directs the person to take specified action within a specified period to remedy the matter.
- Now the Land and Environment Court ("LEC") may declare a Part 6 certificate invalid if the proceedings are brought within three months of it being issued and if the LEC determines it was not authorised to be issued. This effectively reverses the decision of *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404.

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

STATE ENVIRONMENTAL PLANNING POLICY (EXEMPT AND COMPLYING DEVELOPMENT CODES) AMENDMENT (LOW RISE MEDIUM DENSITY HOUSING) 2017 ("MDH Code") – COMMENCING 6 JULY 2018

There is now a new Part 3B to the Exempt and Complying Development SEPP which sets out a complying development code for Low Rise Medium Density Housing, together with a revised Subdivision Code (Part 6) and related amendments to the SEPP, the Standard Instrument and the Regulations. The amendments have been made as of 6 April 2018, but do not come into force until 6 July 2018.

In light of recent media releases from the Minister's office, there is now some uncertainty regarding this commencement date, particularly as it applies to the Ryde and Canterbury Bankstown Local Government Areas.

The intention of the SEPP

According to the NSW Planning & Environment Department website, the MDH Code will do the following:

- "*Allow one and two storey dual occupancies, manor houses and terraces to be carried out under a fast track complying development approval*."
- "*Provide more housing choice to meet different household needs, and improve housing affordability*."
- "*Low rise medium density housing as complying development is only allowed where medium density development is already permitted under a Council's local environmental plan*."

The MDH Code makes specific provision and sets specific development standards of each of "manor houses", "dual occupancies" (and separate provision is made for "side by side" and "vertical" or "duplex" style dual occupancies) and "multi dwelling housing (terraces)", including provisions as to minimum lot size, height, setbacks and building orientation.

The MDH Code also requires consideration of the new Medium Density Design Guide ("MDDG"), and the design criteria therein by the architect and by the certifier determining the CDC application.

The MDDG moves away from strict numerical assessment and, in part at least, requires consideration and assessment of subjective criteria.

Amending Order

Where the provisions of the Standard Instrument (Local Environmental Plans) Order 2006 are amended, any LEP that adopts those provisions is automatically amended as well.

New definitions and land use table directions have been included in the Standard Instrument to assist in giving effect to the MDH Code, including definitions of "manor house" (2 storey, 3-4 dwelling RFB), "multi dwelling housing" and "multi dwelling housing (terraces)," (terrace style housing on a single lot) as well as a refinement of the definition of "residential flat building" ("RFB") to include manor houses.

The following new directions and specific zones have also been inserted into Standard Instrument:

- Direction 5: "Manor houses" and "multi dwelling housing (terraces)" have been added to the list of possible uses.
- Direction 6: Manor houses must be permissible wherever multi dwelling housing is permitted in the Land Use Table.
- Direction 7: Multi dwelling housing (terraces) cannot be prohibited in a zone if multi dwelling housing is permitted in that zone.
- Manor houses are now mandatory permissible uses in both the R1 General Residential Zone and the R3 Medium Density Residential Zone.
- Manor houses may be made permissible (by LEP amendment) in the R2 Zone, as may multi dwelling housing. Without action by Council, they will be prohibited.
- Manor houses are automatically permissible in the R4 Zone, as they are a species of RFB which is a mandatory permissible use in the zone.

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) Amendment 2018 ("Amending SEPP")

On 18 May 2018 the Minister for Planning published an amendment to the MDH Code. This amendment deletes Schedule 2 of the MDH Code, and in its place, inserts cl 3B.1A: "*Development for the purposes of manor houses*". Schedule 2 of the MDH Code had proposed to amend a number of LEPs to make the "manor houses" expressly permissible in certain low density zones.

Section 3B.1A relevantly states:

> "*Manor houses are, despite any other environmental planning instrument, permitted with consent on land in any of the following land use zones if multi dwelling housing or residential flat buildings (or both) are permitted in the zone:*
>
> *(a) Zone RU5 Village,*
> *(b) Zone R1 General Residential,*
> *(c) Zone R2 Low Density Residential,*
> *(d) Zone R3 Medium Density Residential*."

Thus manor houses are now mandatory permissible uses in residential zones where multi dwelling housing or RFBs are permissible (note RFBs are mandatory permissible uses in the R4 zone, and manor houses are a species of RFB).

For further information regarding this update, please contact Joshua Palmer or Bridget Armstrong.

DUTY TO TAKE REASONABLE CARE WHEN ISSUING AN OCCUPATION CERTIFICATE

***Ku-ring-gai Council v Chan* [2017] NSWCA 226 – NSW Court of Appeal – McColl JA, Meagher JA and Sackville AJA – 7 September 2017**

The main issue on appeal was whether the appellant Council (Ku-ring-gai Council) as the principal certifying authority ("PCA") owed the first and second respondents (the purchasers) of the residential premises a duty to take reasonable care in the issue of an occupation certificate ("OC") to avoid them suffering economic loss as a result of the previous owner-builder's defective building work.

The list of structural defects at the time the PCA issued the OC are as follows:

1. Defective construction of the lower ground floor.
2. Defective construction of lower ground block walls.
3. Defective construction of ground floor structural framing.
4. Defective construction of the ground floor external walls.
5. Defective construction of ground floor structural steel framing.
6. Defective construction of roof framing.

In determining whether the Council owed a duty of care to avoid pure economic loss, the Court made the following points:

- The relevant features of a claim for pure economic loss are foreseeability of harm, reliance and assumption of responsibility, and vulnerability. The significance of these factors will depend on the circumstances in which the duty is said to arise.

- The responsibility for ensuring that the building work is undertaken in accordance with the conditions of the development consent falls upon the owner or other person having the benefit of it. The function of the PCA is regulatory, in that the certifier is required to authorise an OC and certify that the works comply with the relevant rules under the Building Code of Australia.

- The OC does not, in terms or effect, certify that the building work does not, or is not likely to, contain defects (latent or structural) or that works comply with the approved development consent and plans.

- In some cases, the absence of vulnerability may be determinative against the existence of any duty – that is to say, the plaintiff must be able to show that it was unable to protect itself.

The Court held that the purchasers' case for economic loss failed for want of reliance, assumption of responsibility and vulnerability. In the circumstances the purchaser was protected by Home Building Act warranties, the ability to conduct pre-purchase inspections and the opportunity to negotiate protections into the purchase contract.

For further information regarding this update, please contact Joshua Palmer or Brian Walton.

SECTION 96 MODIFICATION – CHANGE OF LOCATION OF DRIVEWAY TO MORE FLOOD PRONE AREA "NOT SUBSTANTIALLY THE SAME DEVELOPMENT"

***DL Newport Pty Ltd v Northern Beaches Council* [2017] NSWLEC 1661 – Land and Environment Court of NSW – Dixon C – 21 November 2017**

This was an appeal to the Land and Environment Court for modification of a development consent for the construction of a three storey shop top housing development with an attached dual occupancy in Newport.

The application was to change the location of the sole vehicular access and driveway so that all traffic would be required to access the development from a new street that was classified as having a greater flooding hazard.

Northern Beaches Council ('Council') relied on evidence given by its flood expert to support its case that the development would not have the same essence in terms of potential for flood impacts and risk to life. During the hearing, the flood experts agreed that the risks to life would be increased unless satisfactory safety measures were put in place.

The Court took into account the agreed position of the flood experts. It held that the development as proposed to be modified was not "substantially the same" as that for which consent was originally granted on the basis that the essence would change from a safe development to a less safe development.
This continues the trend of assessing s 96 modification applications as set out in *Council of Trinity Grammar School v Ashfield Council* [2015] NSWLEC 1086, *Innerwest 888 Pty Ltd v Canterbury Bankstown Council* [2017] NSWLEC 1241 et al.

In those decisions, the Court found that a particular element of the original consent, or "essential component", was to be varied and therefore the development was not "substantially the same".

In light of these decisions, developers and Councils should carefully consider whether a s 96 modification application will vary an "essential component" of development.

The recently passed *Environmental Planning and Assessment Amendment Act 2017* requires the preparation of a statement of reasons in the granting of development consent.

Notably, that document will be particularly relevant, we assume, in determining the "essential components" of the consent.

"SUBSTANTIALLY THE SAME DEVELOPMENT" TEST

The Commissioner provided a useful summary of the applicable legal principles applying to the "substantially the same development" test at [44] of her judgment. These principles govern the exercise of the power contained in s 96(2) of the *Environmental Planning and Assessment Act 1979* as follows:

1. "First, the power contained in the provision is to "modify the consent". Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (*North Sydney Council v Michael Standley & Associates Pty Ltd*(1998) 43 NSWLR 468 at 475 and *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333; (2008) 166 LGERA 342 at [13]). Parliament has therefore "chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity" (*Michael Standley* at 440);
2. the modification power is beneficial and facultative (*Michael Standley* at 440);
3. the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (*Scrap Reality* at [16]);
4. the applicant for the modification bears the onus of showing that the modified development is substantially the same as the original development (*Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8);
5. the term "substantially" means "essentially or materially having the same essence" (*Vacik* endorsed in *Michael Standley* at 440 and *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]);
6. the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (*Scrap Realty* at [19]);
7. the term "modify" means "to alter without radical transformation" (*Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 42, *Michael Standley* at 474, *Scrap Realty* at [13] and *Moto Projects* at [27]);
8. in approaching the comparison exercise "one should not fall into the trap" of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made under s 96(2)(a) (*Vacik*);
9. the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their "proper contexts (including the circumstances in which the development consent was granted)" (*Moto Projects* at [56]); and
10. a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be "legally flawed" (*Moto Projects* at [52])."

For further information regarding this update, please contact Ryan Bennett or Alistair Knox.

WHOSE WALL IS THAT? – COUNCIL POWERS UNDER ITEM 21 SECTION 124 LOCAL GOVERNMENT ACT 1993

***Mailey & Ors v Sutherland Shire Council* [2017] NSWCA 343 – NSW Court of Appeal – Macfarlan JA, Meagher JA, Preston CJ of LEC - 20 December 2017**

The appellants owned land at Cronulla which was undergoing redevelopment. Mitchell Road laid to the east of the land and provided elevated pedestrian access to it. A series of five walls retained the elevated roadway. The walls extended along and across the boundary between the road and the land. Following demolition of some structures one of the retaining walls became dangerous and at risk of collapse. Sutherland Shire Council issued an emergency order under item 21 of the Table to s.124 of the *Local Government Act* 1993 (the Act) requiring the appellants to do certain things specified in the order to place the land in a safe condition.

The appellants did not appeal against the order and took some steps to comply with it, then brought judicial review proceedings in the Land and Environment Court challenging the validity of the order and seeking damages. Pain J dismissed the proceedings with costs.

Before the Court of Appeal the appellants argued that the primary judge had erred on the basis that:

a. the order did not conform to the power under s.124 ("narrow ultra vires") because the appellant's land was not land that was "not in a safe or healthy condition" and because the order required the appellants to do things on land other the appellant's land;

b. the exercise of the power under s.124 was beyond that power ("broad ultra vires") because the order was uncertain and was issued for an improper purpose;

c. If the order was ultra vires, damages should be award to the appellants to compensate them for the expenses that they had incurred in partly complying with the invalid order.

Preston CJ (who was sitting on the Court of Appeal) found that the order was not ultra vires and that the claim for damages had not been established. He dismissed the proceedings with costs. Macfarlan and Meagher JA agreed.

Narrow ultra vires

Preston CJ said that there was no justification in the text, context or purpose of item 21 of the Table to s.124 for limiting the circumstance to a situation where the cause of the lack of safety of health of the land was on the land. He found that the cause of the land lacking safety or health could be on adjoining or other land. He said that the circumstance of the item was concerned with the condition of the land (ie. whether it is not safe or healthy), not the cause of the land being in that condition.

He also found that item 21 of the Table to s.124 did not preclude the issue of an order that required the doing of things on land other than the land owned by the recipient of the order. The only qualification was that "such things" as are specified

in the order must achieve the result of sought by Item 21, namely, to ensure that the land is placed in a safe or healthy condition.

Preston CJ drew support for this conclusion from the absence of a specification within Item 21 of the location at which things were to be done such as appears in Items 20, 22A, 23, 24 and 25 of s.214. He agreed with Pearlman J in *Ranjon International Holdings Pty Ltd v Rockdale Council* (1994) 83 LGERA 10 that the power to give orders was for the purpose of regulating the general environment and protecting persons and properties and should be given a wide and beneficial interpretation consistent with the scope and purpose of the Act.

Preston CJ went on to say that an order can be construed as being subject to an implied condition that any requisite authority, at common law or under statute, to enter upon and carry out works specified in the order be obtained before doing those works. In this case, he said that the Council had, by issuing the order requiring work on its own land, impliedly given consent to the appellants to carry out that work.

The appellants had argued that an order would not be subject to the principles of severance so that if any part of the order was invalid, the whole of the order would be invalid. Preston J rejected this argument saying that if the provision of an order was in excess of a power under s.124, that provision could be severed, provided the severance did not result in the remainder of the order operating in a manner differently to the manner in which the whole order would have operated.

Broad ultra vires

The appellants made a number of arguments that aspects of the order made it uncertain. Pain J had held that the words "suitably qualified and registered professionals such as" were additional and arguably superfluous. Preston CJ disagreed and said that those words did not make the order uncertain. The other arguments regarding uncertainty turned largely on the facts and Preston CJ held that the order was not void for uncertainty.

Preston CJ also held that the evidence did not establish that Council issued an order for an improper purpose based on the unchallenged evidence of the decision maker as set out in the statement of reasons for the decision to issue the order.

Damages

As the order was not found to be invalid there was no basis to make any order under s. 676(1) of the Act, including awarding damages to a person who has incurred expense as a consequence of a breach of the Act. Although it was unnecessary for him to determine it, Preston CJ ventured a preliminary view that there was force in the Council's argument that s.181 of the Act was the sole source of the right to claim and the power to award compensation for expenses as a consequence of an order under s.124.

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

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