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**DEVELOPMENT CONTROL PLANS: CLARIFICATION OF THE
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The *Environmental Planning and Assessment Amendment Act 2012* ("the Amending Act") was passed on 15 November 2012 and assented to on 21 November 2012. Significant among the changes to the *Environmental Planning and Assessment 1979* ("the Act") are amendments to the provisions dealing with the content and function of development control plans ("DCPs") and how DCPs are to be considered when assessing a development application ("DA"). These provisions are not expected to commence until early 2013.

In making the Amending Act, the Government expressed a view that DCPs are impeding housing development, as they are overly complex and prescriptive, are being given too much weight in the development assessment process and are being too strictly applied. The amendments are intended to rectify these problems, although it is noted that the changes ultimately made are far less drastic than those contained in the Amending Act in its original bill form.

It is apparent from a review of the Amending Act that it has been prepared, and altered, on the run. The result is an ill-drafted document, at times unclear on its face, that arguably fails to achieve the Government's aims.

CHANGES

Role, scope and content of DCPs

Section 74C(1) of the Act currently sets out the circumstances in which a DCP may be made and in so doing sets out the matters which a DCP may include.

No general "purpose" or "function" of a DCP is set out in the Act, although it is implicit that the function of the DCP is to do that which s74C(1) permits.

Section 74C(1)(a) is a key provision and allows a DCP to make "more detailed provision" in respect of development to achieve the purpose of an environmental planning instrument. This provision has been applied by the Courts to permit Councils to impose more stringent controls on development than are contained in an applicable Local Environmental Plan (see for example *North Sydney Council v Ligon 302 Pty Limited* [No 2] (1996) 83 LGERA 23; *Zhang v Canterbury City Council* (2001) 115 LGERA 373; *7-Eleven Stores Pty Limited v Sydney City Council* (2004) 138 LGERA 125; *Stockland Development Pty Limited v Manly Council* (2004) 136 LGERA 254).

This provision of the Act is to be replaced by a new s74C(1)(a) which provides that a Council may prepare a DCP if it considers it necessary or desirable "to provide the guidance referred to in s74BA(1)".

Section 74BA is a new provision introduced by the Amending Act and describes the purposes of a DCP. S74BA(2) confirms that the purpose of a DCP is to make provision for the matters described in section s74C(1), however s74BA(1) identifies the "principal purpose" of a DCP, namely to "provide guidance on specified matters to both a prospective developer and to a consent authority". The matters on which a DCP is to provide guidance are:

- a Giving effect to the aims of any environmental planning instrument,
- b Facilitating development that is permissible under such instrument,
- c Achieving the objectives of land zones under any such instrument.

The Act currently permits a DCP to give effect to or achieve the aims of an environmental planning instrument through s74C(1)(a), although the changes make explicit that those aims and objectives include zone objectives.

Of greater significance is subparagraph (b), whereby a DCP is to provide guidance on "facilitating development that is permissible." Giving "facilitating" its ordinary everyday meaning, one of the principal purposes of a DCP will thus be to provide guidance on making permissible development easier to carry out.

The Government's intention in making this change is to attempt to ensure a DCP does not restrict or make it more difficult to carry out development, particularly having regard to the deletion of s74C(1)(a). It is not clear that this is what the provision achieves, however.

Whilst the provision of guidance is given primacy over the other s74C(1) matters, there is no priority between the matters on which a DCP is to give guidance. Indeed, s74BA(1) does not expressly require that a DCP provide guidance on all of those matters listed. It can readily be read to mean that the principal purpose of a DCP is to provide guidance on one or more of those matters.

Thus it is still conceivable that in seeking to give effect to the aims of an environmental planning instrument or in achieving the objectives of a zone the "guidance" that a DCP might indicate a preferred form of development that is more constrained than would otherwise be permissible under an LEP. Arguably the DCP has been prepared to achieve one purpose or provide guidance on one matter, but not another. An example might be a maximum height requirement, more restrictive than in the LEP, to achieve the preservation of views in the residential zone, which is specified as a zone objective. The DCP provides guidance on achieving the zone objective, but arguably does not provide guidance on "facilitating development" (except to the extent that it guides how development that is consistent with the zone objectives might be facilitated).

Such a DCP would, on the analysis above, likely be valid.

A proposed amendment that explicitly provided that a provision of a DCP had no effect to the extent that it would have the practical effect of preventing or unreasonably restricting development that was otherwise permissible and compliant with the development standards in an LEP, was not passed in the Amending Act.

Section 74C(5) (which deals with the circumstances in which the provisions of a DCP would have no effect) is the subject of a minor amendment. The Act currently provides that a DCP provision will have no effect to the extent that it is "inconsistent with" an LEP provision or will prevent compliance with an LEP provision. The Amending Act removes any reference to a DCP which may prevent compliance with an LEP but provides that a DCP provision will have no effect to the extent that it is "inconsistent or incompatible" with an LEP provision.

Whilst there may be an argument that having regard to the amendments made by the Amending Act as a whole, "inconsistent or incompatible" should be read expansively to preclude a DCP control that varies an LEP control, it is unlikely that the Courts, having regard to the words used, would construe "inconsistent or incompatible" any differently to "inconsistent" as the sole adjective.

Development assessment: changes to s79C

The Amending Act introduces a new s79C(3A). It does not vary the requirement to consider the provisions of a development control plan under s79C(1), however the new subsection does deal with how a consent authority is to consider the provisions of a DCP.

It should be noted at this point that the provisions of the new subsection (3A) were significantly watered down between the first draft of the bill for the Amending Act and the Amending Act as made. Originally the bill expressly required a consent authority to give DCP provisions less weight and significance than environmental planning instruments and that a consent authority could not have regard to how the provisions had been applied previously or might be applied in the future.

Those provisions were deleted entirely.

S79C(3A) as introduced by the Amending Act:

- a Prevents a consent authority from requiring more onerous standards than are set out in a DCP; and
- b Requires a consent authority, where a proposal does not comply with DCP standards, to be flexible in applying provisions and to allow reasonable alternative solutions that achieve the objects of those standards; and
- c Provides that a consent authority may consider those provisions only in connection with the assessment of that DA.

"Standard" is defined to include performance criteria.

Currently a consent authority cannot impose its own arbitrary standards in place of DCP controls (*Zhang v Canterbury City Council* (2001) 115 LGERA 373; *Premier Customs Services Pty Ltd v Botany Bay City Council* (2009) 172 LGERA 338).

Similarly, although DCP controls may at times be applied more rigidly than is required by the Act, and DCP controls are a mandatory consideration (s79C(1), *Zhang v Canterbury*), there is no requirement for strict adherence to their provisions where an alternative solution would meet the DCP objectives. *Zhang v Canterbury* did not require (and nor has any subsequent judicial decision) that DCP provisions be strictly adhered to but rather that the provisions or standards in the DCP be taken into consideration.

On its face subparagraph (c) seems to do no more than reiterate that a consent authority, in considering a DA, must assess the DA that is before it on its merits having regard to the controls applicable to, and the environmental impacts of, that proposed development.

There may be an argument that subparagraph (c) is intended to prevent consideration of how DCP provisions have been applied in the past (and so how they will be applied to the current application) or how they might be applied in the future (ie precedent effect of the approval of the application). There is an inherent fallacy in this as those matters would be matters that are to be considered in connection with the subject DA in any event. Additionally, if that was the intention of the drafters, clearer words could have been used and indeed a subsection was deleted from the original bill that specifically prohibited

the consent authority from having regard to how the DCP provisions had been applied in the past or might be applied in the future. Further, the consistency of the application of the DCP controls in the past is a matter that goes to the weight to be given to the DCP in balancing all of the s79C(1) considerations (*Stockland v Manly*) and is therefore a necessary consideration under s79C(1).

Savings and Transitional Provisions

The Amending Act includes a savings provision in respect of the above changes. The existing provisions of the Act are not saved as they apply to DCPs, and the changes will apply to any DCP in force immediately before the commencement date. Curiously this includes the new s79C(3A), which does not pertain directly to DCPs, but rather to the use of DCPs in the assessment process. This is particularly odd given that the savings provision provides that the new s79C(3A) does not apply to the determination of a DA lodged before the commencement date.

Thus whilst existing DCPs will be subject to the new provisions immediately, existing DAs will not be affected by s79C(3A). Whilst there does not appear to be any provision (over and above any existing provision) in the amendments which would cause any DCP to be invalid, or to have no effect, it may be that a DCP that is not in accordance with the new provisions, including s74BA(1), is to be given less weight under s79C(1).

PRACTICAL ADVICE FOR COUNCILS

The intention behind the Amending Act, as it relates to DCPs, is to limit the extent to which a DCP can provide more restrictive controls for development than are contained in a relevant LEP (or SEPP), and to seek to ensure that DCPs are applied flexibly when considering DAs.

It is questionable whether the provisions, drafted as they are, achieve this.

It nevertheless remains possible that an argument could be mounted, having regard to second reading speeches, Hansard records and other extrinsic materials, that the Amending Act is to be construed so as to achieve the Government's intentions.

Accordingly it would be prudent for a Council that wishes to maintain development control that allows proper responses to fine-grained differences between sites and localities review its planning controls and to approach development assessment in a manner that responds to the new provisions and the Government's intentions.

Councils have, in the past, been encouraged to minimise the number of controls in their LEPs and to put a greater degree of detail into their DCPs. If the Amending Act is taken to have the effect of making it more difficult to include restrictive controls in a DCP than in an LEP, then a logical response may be to include those more detailed controls directly in the LEP.

However, the Minister, in his second reading speech on the bill, advised that he would not accept such a response from Councils.

Further, where a DCP contains more restrictive or different controls to those contained in an LEP, those controls (or standards or performance criteria) should be linked to one of the s74BA(1) guidance matters. This is most likely to be the achievement of the aims or objectives of the LEP or zone. This in turn suggests that the objectives or aims in the LEP be drafted in such a way as to give scope for the DCP controls to be made.

A broader base of controls (whether in a DCP or LEP) is also likely to assist in compliance with s79C(3A)(a). That section prevents a Council from imposing a more onerous standard than is set out in a DCP. Clearly no issue arises if the more onerous standard comes from an LEP, but similarly where a DCP contains multiple related standards (for example a height standard and a view loss performance criteria) one of which is more onerous than the other, requiring compliance with the more onerous standard is permissible as it is still a "standard" in the DCP.

In reality, amending LEPs and DCPs is likely to be a lengthy and time consuming process. In the interim, when development applications are being assessed Councils should give consideration to how particular controls achieve the s74BA(1) purpose. Do the controls give guidance (and how do they do so) as to:

- how to facilitate development?
- how to give effect to the objectives of the LEP? or
- how to achieve the aims of the relevant zone?

Do they achieve a different function of DCPs under s74C(1)?

Section 79C(3A) does not apply to existing DAs, however it will need to be adhered to in assessing any DA that is made after commencement of the new provisions. We are not of the view that the provision requires any more from a consent authority than the current law, although it does perhaps make clear that both the controls and the objectives of those controls need to be considered and applied flexibly. If the control is met (and no other control or performance criteria relevant to that aspect of the development is breached) then it will be difficult to rely on that aspect of the development as a reason for refusal. Similarly, if the objective of the control or standard is met, and the "alternative solution" is reasonable, then that aspect of the development should not warrant refusal. Whether an alternative solution is reasonable will be at the discretion of the consent authority, although will presumably be assessed having regard to other planning and s79C considerations.

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