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LEGAL UPDATE

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IMPROVING THE NSW PLANNING SYSTEM?

A OVERVIEW

- 1 This summary briefly examines the Environmental Planning & Assessment Amendment Act 2008 and the Building Professionals Amendment Act 2008.
- 2 This summary also reflects policy statements issued by the Minister relating to complying development, certification, concurrences and referrals, planning arbitrators and joint regional planning panels.
- 3 The Bills passed both houses of Parliament on 18 June 2008 and were assented to on 25 June. The office of the Minister for Planning anticipates a staged roll-out of the new provisions in the following order:
 - a Miscellaneous provisions intended to correct errors or problems in the existing Environmental Planning and Assessment Act 1979.
 - b Enforcement provisions, sanctions and responsibilities for certifiers.
 - c Provisions relating to the Planning Assessment Commission, Joint Regional Planning Panels and Planning Arbitrators.
 - d Plan making provisions.
 - e Provisions relating to developer contributions.

As part of this process various bodies have been or are to be commissioned with preparing codes and implementation procedures to ensure the smooth implementation of the amendments and to flesh out some of the detail, for example with respect to complying development. A number of provision have commenced.
- 4 The expressed intent of the amendments is to simplify, speed up and make cheaper the processing of development applications and appeals, improve certifier accountability and also impose greater accountability on Councils in the collection and subsequent application of section 94 contribution monies.
- 5 A number of important provisions are to be the subject of (yet to be made) Regulations.

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B NEW PLANNING BODIES

New planning bodies are proposed:

1 Planning Arbitrators (PA)

PAs will have functions in relation to:

- Reviews of "small scale" development applications where applicants have requested reviews; and
- Resolving disputes between Councils and applicants about the content of development applications.

The class of development subject to PA review is to be specified in the Regulation (see page 7).

2 Joint Regional Planning Panels (JRPP)

JRPP functions will include:

- Acting as consent authority where designated by an environmental planning instrument.
- Acting as planning administrators and panels.
- Giving advice to the Minister.
- Third party merit reviews (see below).

Council staff will undertake the assessment of relevant applications and report recommendations to the JRPP.

3 Planning Assessment Commission (PAC)

The PAC will have the following functions:

- Decision maker for Part 3A projects (where delegated by the Minister).
- Consent authority for development applications (where delegated by the Minister).
- Providing planning advice to the Minister.
- Third party merit appeals (see below).
- Functions of a JRPP where a JRPP has not been appointed.

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The Minister has stated that it is anticipated that 80% of Part 3A projects will be determined by the PAC with the Minister reserving to himself only critical infrastructure projects and other major strategic projects.

Project assessment for Part 3A projects will continue to be carried out by the Department of Planning.

4 Complying Development Expert Panel

This is a non-statutory body engaged by the Department of Planning to develop State-wide codes for complying development with the intention of bringing 50% of development applications within such standards (currently only 11% of development applications apparently constitute complying development).

C DEVELOPMENT APPLICATIONS

1 Development Assessment by Council

The period within which Councils can reject development applications has increased from 7 to 14 days.

The following further changes are proposed by amendment to the Regulation:

- Abolition of the "stop the clock" provisions during assessment.
- Alteration of "deemed refusal" times:
 - 50 days where no other agency is involved.
 - 90 days for integrated development or development which requires concurrence.
 - 70 days for other developments.
- Shortening of concurrence timeframes from 40 days to 21 days. Where concurrence is not received with 21 days concurrence will be deemed and Council must proceed to determine the application.

2 Complying Development

- Complying development will be designated in Environmental Planning Instruments and can now apply to land that is critical habitat, part of a wilderness area, subject to an interim heritage order, or an item of environmental heritage.

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- Public notification requirements are to be removed from Council DCPs and inserted in the Regulation.
- In the Exposure Bill, non-complying development was to be treated as complying if Council or the certifier considered the non-compliance to be of a minor nature and “not likely to cause any substantial net adverse impact on owners of adjoining land or the land on which the development is carried out”. This provision has not been included in the Act.
- It has been suggested in Ministerial statements that the Regulations will oblige Council or the certifier to give public notice of the determination prior to the commencement of work.
- The Complying Development Expert Panel is preparing State-wide codes and standards for complying development, responding to different lot sizes, environmental and amenity issues.
- The Codes will be given effect by a State Environmental Planning Policy, which will set out general limitations, including limitations excluding environmentally sensitive land from the operation of the codes.
- In principle, it is envisaged that complying development will be capable of being certified within ten days of lodgement of an application.

3 Regional and State Significant Development

- The Minister will continue to be the consent authority for critical infrastructure and major strategic projects.
- The PAC is expected to deal with about 80% of state significant projects.
- JRPPs will deal with projects of regional significance as classified by amendments to the Major Projects SEPP and with nominated subdivisions and certain other development in the coastal zone currently dealt with under Part 3A of the Act.

D APPEAL PROCEDURES

- 1 The current system provides for section 82A reviews by Council of their initial decision and appeals to the Land and Environment Court, whether or not there has been a section 82A review. The proposed new system will abolish section 82A reviews (although a new right of review to Council will be available in non PA matters – see below).

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- 2 The time limits for appeals to the Land and Environment Court are significantly reduced from twelve months to three months (although the period for appealing against refusal of modification applications is extended from two months to three months, presumably to provide uniformity).

PA Review of Council Development Application Decisions

Unless Council and the Applicant agree to the contrary, appeals against “small scale development” must initially be referred to a PA. This will apply only to certain classes of development yet to be specified in the Regulation, but is anticipated (based on Ministerial statements) to include:

- Single or dual occupancy residential dwellings not exceeding 2 storeys and alterations and additions to such dwellings;
- Commercial or retail premises under 9m in height or with gross floor area less than 2000m² (not including bulky goods or licensed premises); and
- Change of use of commercial or retail premises with gross floor area less than 2000m² to another permissible use.

Development that comprises integrated development, designated development, Crown development and development subject to review by third parties is likely to be excluded from PA matters.

- 1 The PA's decision is deemed to be that of Council, and there is then a subsequent right of appeal by the Applicant to the Land and Environment Court.
- 2 Council has no right of appeal against the PA's decision.

Council Development Application Decisions - Non-PA Matters

- 1 Where the proposal is not for small scale development, the Applicant may seek a review of the decision by Council (the new section is 96D) or appeal to the Court (note that the right to seek a review by Council cannot be exercised if an appeal has been lodged with the Court).

JRPP Consent Authority

- 1 The Act provides a right of appeal to the Land and Environment Court.

PAC Consent Authority

There is a right of appeal to the Land and Environment Court by the Applicant against a determination of the PAC unless there has been a public hearing.

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Third Party Objector Appeals

- 1 The Act extends the classes of development in respect of which objectors can appeal on the merits.
- 2 The new objector review is only available to certain qualified objectors and only in relation to certain kinds of applications:
 - i A qualified objector is someone who has made a submission, and who owns land within one kilometre of the site, or has been the occupant of such land for at least six months. Commercial competitors may not qualify as objectors to whom this right of review is available: a consent authority may reject a submission that it considers has been made primarily to secure or maintain a direct or indirect commercial advantage for the objector.
 - ii The new objector review is available in respect of:
 - Residential developments greater than two stories or with at least five dwellings on site areas over 2,000 square metres, and which exceed height or floor space ratio controls by more than 25%; and
 - Commercial, retail or mixed use development greater than 9 metres high and on a site area greater than 2,000 square metres, and which exceeds height or floor space ratio controls by more than 25%.

Land and Environment Court – Costs

- 1 The Land and Environment Court will be required to make an order for payment of the costs of the consent authority thrown away in respect of the assessment of the original application if the Court allows the applicant to amend its plans (save for minor amendments).

E ACCREDITED CERTIFIERS

- 1 This topic is primarily covered by the Building Professionals Amendment Bill 2008 and Regulations that are yet to be drafted.
- 2 The essential provisions are that:
 - Council officers must hold accreditation to certify building work. Councils may be exempted from this requirement by the Building Professional's Board with the Minister's approval.
 - Bodies corporate may now be accredited to certify building work where a director of that body and two other persons (either director or employee) are accredited specialists.

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- Private certifiers may not earn more than a certain amount of their total annual income from certification work from the same person or company. The amount is to be specified in the Regulations, but is anticipated to be 20%. This limit will not apply to income earned from certification work done on behalf of a Council or as an employee of an accredited body corporate.
- Accredited certifiers engaged by a Council or employed by an accredited body corporate may not issue more than a certain number of certificates in respect of development that involves the same owner, principal contractor or person who engages the principal contractor. The number is to be specified in the regulations but is anticipated to be 50% of the total number of certificates issued in a year.

3 Councils will be allowed to:

- Require certifiers and builders to answer questions and provide information. Failure to do so will be an offence.
- Obtain a performance bond which can be used to fund action taken to deal with unauthorised building works.
- Recover the costs of issuing orders under section 121B by way of a compliance cost notice.

4 There are stricter record keeping and reporting requirements imposed on accredited certifiers.

5 Certifiers acting as principal certifying authority will be given powers to direct a land owner to comply with a development consent.

6 Penalties will be substantially increased.

7 A new accreditation scheme will be introduced to allow accredited fire safety engineers to prepare designs and issue design certificates, including the preparation of fire safety systems which were alternative solutions to the BCA requirements.

8 Before issuing a construction certificate or final occupation certificate, a certifying authority may request advice from Councils as to whether the design and construction of buildings are consistent with development consents. Failure to respond within twenty one days will be deemed to be advice in the affirmative.

Advice of consistency (or where such advice is deemed) will prevent Councils from taking proceedings or action to challenge the issue of a construction certificate or occupation certificate on the basis of such non-consistency. The Regulations will make provision for the form of such advice and the fees payable.

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9 In relation to complaints upheld regarding misconduct, the Building Professionals Board will be allowed to suspend or cancel a certificate of accreditation without having to go to the Administrative Decisions Tribunal. The certifier will then have a right of appeal to that Tribunal.

10 The Minister may suspend a Council's authority to exercise the functions of a certifying authority following an investigation and recommendation by the Building Professionals Board.

11 Limitation periods relating to the bringing of proceedings relating to building or subdivision work have been clarified to account for circumstances where no occupation certificate or subdivision certificate was issued.

This provision does not apply to building or subdivision work commenced prior to the amendment coming into force.

12 The requirement that a proposal be shown to comply with the Building Code of Australia prior to issue of a construction certificate is now stricter. The proposal must "be consistent with" the BCA, rather than be "not inconsistent with."

13 A final occupation certificate cannot be issued unless the design and construction of the development is consistent with the consent or complying development certificate (as relevant).

An interim occupation certificate can be issued despite inconsistency, however the nature and extent of any inconsistency must be shown on the certificate.

F STRENGTHENING ENFORCEMENT

1 Consent authorities (mainly Councils) are able to require payment of a security bond by way of condition for ensuring compliance with a development consent. The detail of when such security may be retained by the consent authority is to be set out in Regulations, as is the maximum security that may be imposed.

2 A certifying authority will be required to issue directions where the authority is aware of non-compliance with a condition of development consent, requiring compliance. Where the direction is not complied with the certifier will be required to notify the consent authority. Details in relation to procedure and follow up action is to be provided in the Regulation.

3 Councils will be able to issue a new stop work order under s121B to cease carrying out specified building or subdivision work where that work is in contravention of the Act or is affecting the support of

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adjoining properties. No notice of intention to issue such an order is required.

- 4 A body issuing an order will be able to recover the costs of monitoring action under the order, ensuring compliance with the order and other associated matters from the person against whom the order was issued, by issuing a compliance costs notice.

A right of appeal against the compliance cost notice lies to the Local Court. Where the order itself is appealed against however, an appeal against the compliance cost notice may be lodged in the Land and Environment Court along with the order appeal.

- 5 New Penalty Infringement Notices are to be introduced in the Regulation to ensure compliance with development consent and provide higher fines for more complex developments and where the offender is a body corporate.

- 6 New Penalty Infringement Notices are to be introduced to enable the Building Professionals Board to deal with breaches by accreditation holders and provide higher fines for bodies corporate (it is anticipated up to \$110,000.00)

- 7 The Regulation is to specify the circumstances in which a construction certificate or final occupation certificate is or is not consistent with a development consent.

G DEVELOPER CONTRIBUTIONS

The existing provisions relating to development contributions and planning agreements have been repealed and replaced with a new Part 5B.

There will be two types of contributions:

- Community infrastructure contributions.
- State infrastructure contributions.

The Act and Regulation details the types of infrastructure for which a contribution maybe required and sets out the considerations a Council must have regard to in making a contributions plan.

H OTHER MISCELLANEOUS MATTERS

- 1 Building certificates – Councils may charge a fee equivalent to a development application fee (and construction certificate fee) where the Applicant carried out unauthorised building work (or caused it to be carried out) in the previous twenty four months.

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- 2 Councils can impose a reviewable condition under section 80A(10B) in respect of certain premises being hotels, nightclubs, entertainment facilities, clubs and function centres.

Where a consent is subject to a condition limiting the hours of operation or a maximum number of persons permitted in the building, the consent may be subject to an additional condition that the consent authority may review those conditions subject to further provisions provided in the Regulations. There is a right of appeal.

- 3 References to places of public entertainment are omitted as they are no longer necessary following the integration of separate licensing provisions under the *Local Government Act 1993* into the planning approvals and control processes of the Act.

- 4 Definition of "physical commencement" to be prescribed by regulation. The amendments also require that an approved development be "substantially commenced" within two years of physical commencement. These provisions will not apply to development consents granted prior to the commencement of the relevant provision.

- 5 The Exposure Bill had contained a provision enabling the Minister to acquire private property in conjunction with urban land releases. This provision has not been included in the Act.

- 6 The Act now makes express that a modification application is to be assessed as though it were an application for development made at the time the consent authority is determining the application, such that the provisions of any EPI are expressly made to apply to a modification application as though it were a development application.

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