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COMPLYING DEVELOPMENT CHANGES – A FEW MATTERS OF NOTE

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On 22 February 2014 State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 ("Codes SEPP") was substantially amended, largely by the introduction of two new complying development codes: Part 5 Commercial and Industrial Alterations Code and Part 5A Commercial and Industrial (New Buildings and Additions) Code. Detailed changes were also made to the Housing Codes.

It is not proposed here to examine those changes in detail, the codes largely speak for themselves. Rather the purpose of this paper is to draw attention to a number of apparently minor but ultimately important specific changes to not only the Codes SEPP but also the Environmental Planning and Assessment Regulation 2000 ("the Regulation") as they apply to the assessment and determination of complying development applications.

DEVELOPMENT CONTRIBUTIONS

Since the introduction of complying development into the NSW planning regime in 1998 there has always been power for Council's to specify that an accredited certifier, in issuing a complying development certificate ("CDC"), is required to impose a condition on that approval requiring the payment of development contributions in respect of the subject development. That specification was to be made in the contributions plan, and it was at the Council's discretion as to whether the plan included a requirement that certifiers impose such a condition on a CDC.

Many Councils did impose such a requirement, although most commonly in s94A plans, pursuant to which contributions are calculated as a percentage of construction cost rather than by reference to the demand generated by the development for public amenities or services.

Clause 136K was introduced to the Regulation on 22 February 2014 and provides:

> ***136K When complying development certificates must be subject to section 85A (9) condition***
>
> *(1) This clause applies if a council's contributions plan provides for the payment of a monetary section 94 contribution or section*

> *94A levy in relation to development for a particular purpose (whether or not it is classed as complying development under the contributions plan).*
>
> *(2) The certifying authority must issue the relevant complying development certificate authorising development for that purpose subject to a condition requiring payment of such contribution or levy, as required by section 85A (9) of the Act.*
>
> *(3) Subclause (2) applies despite any provision to the contrary in the council's contributions plan.*

Accordingly, a certifier is now obliged to impose a condition requiring payment of a monetary contribution for any development of a type for which contributions are payable, irrespective of whether the contributions plan makes specific provision for complying development. This would generally include subdivision, any new building, or a change of use of or alterations to an existing building that gives rise to an intensification of the use of the land, although regard must be had to each plan on a case by case basis.

In addition to this requirement, cll 136L and 136N were also introduced. Cl 136L(1) provides:

> *A complying development certificate issued subject to a condition required by section 85A (9) of the Act must be issued subject to a condition that the contribution or levy must be paid before any work authorised by the certificate commences.*

Cl 136N provides:

> *(1) This clause applies to building work or subdivision work that is the subject of a complying development certificate.*
>
> *(2) A principal certifying authority for building work or subdivision work to be carried out on a site, and over which the principal certifying authority has control, is required to be satisfied that any preconditions in relation to the work and required to be met before the work commences have been met before the work commences.*

Thus not only must a certifier impose a condition requiring payment of contributions, it is now also incumbent on the PCA to ensure that the approved work does not commence until such time as the contributions have been paid to Council.

What are contributions payable for

The following factual circumstances do not turn on the changes to the Regulation or the Codes SEPP, but nevertheless demonstrate that care must be taken when considering contributions, particularly given the onus now on certifiers to ensure contributions are levied and payed.

Development contributions are payable under s94A as a percentage of the cost of carrying out the development. Clause 25J of the Regulation sets out what is and is not to be included in the cost of carrying out the development, and broadly defines the costs as "all the costs and expenses that have been or are to be incurred by the applicant in carrying out the development" including incidental costs. Certain costs are expressly excluded, however, by cl 25J(3):

> *The following costs and expenses are not to be included in any estimate or determination of the proposed cost of carrying out development:*
>
> *(a) the cost of the land on which the development is to be carried out,*
>
> *(b) the costs of any repairs to any building or works on the land that are to be retained in connection with the development,*
>
> *(c) the costs associated with marketing or financing the development (including interest on any loans),*
>
> *(d) the costs associated with legal work carried out or to be carried out in connection with the development,*
>
> *(e) project management costs associated with the development,*
>
> *(f) the cost of building insurance in respect of the development,*
>
> *(g)* ***the costs of fittings and furnishings, including any refitting or refurbishing, associated with the development (except where the development involves an enlargement, expansion or intensification of a current use of land),***
>
> *(h) the costs of commercial stock inventory,*
>
> *(i) any taxes, levies or charges (other than GST) paid or payable in connection with the development by or under any law,*
>
> *(j) the costs of enabling access by disabled persons in respect of the development,*
>
> *(k) the costs of energy and water efficiency measures associated with the development,*
>
> *(l) the cost of any development that is provided as affordable housing,*
>
> *(m) the costs of any development that is the adaptive reuse of a heritage item.*
>
> [emphasis added]

A CDC was issued in respect of a shop in a large shopping centre. The CDC authorised the amalgamation of a number of smaller shops, across two levels,

into a single clothing shop as well as the inclusion of public corridor space within the new large shop. The CDC was framed as being for fit out and refurbishment of a part of the existing shopping centre, but as well as authorising the usual shop fittings, sale points and interior design elements, authorised a stairwell be cut into the slab between the two levels, and construction of the staircase. Non-structural walls between the pre-existing shops were also required to be demolished.

The CDC application documents gave a cost of construction, but no detail as to how that cost was calculated.

There was a s94A plan in place that required the levy of contributions by accredited certifiers in issuing CDCs, however no condition was imposed.

On receipt of notification of the grant of the CDC, Council wrote to the applicant and certifier challenging its validity in part on the absence of a condition requiring a contribution. The certifier's response was that the CDC was for a refit and refurbishment of an existing shop use, and there were no works not excluded by cl25J(3)(g).

There is no case law examining precisely what is excluded by cl 25J(3)(g), however it clearly does not contemplate structural changes to a building. A further question arises as to whether the extension of the shop into corridor space constituted an expansion or intensification of the use.

What is clear, however, is that close regard must be paid by a certifier to the details of the work and the costs thereof in light of an obligation, now extant in almost all circumstances, to levy development contributions in issuing a CDC. If it is said by an applicant that certain costs ought not be included, there ought be a breakdown of those costs in order that the certifier can make that assessment.

This dispute is ongoing, and Council has complained to the BPB

LATE BREAKING NEWS

On Friday 18 July 2014 a further round of amendments was made to the Codes SEPP. Significantly changes were made to the development standards in relation to car parking for internal building alterations, change of use of premises and first use of premises under the Commercial and Industrial Alterations Code, as well as development under the Commercial and Industrial (New Buildings and Additions) Code. These changes are largely in response to the potential for a requirement under cl 136K for a certifier to impose a condition requiring a contribution for carparking.

The language of the new provisions is clumsy, however it would appear that for change of use or first use of an existing building the parking requirements are now either in accordance with the last consent, or if that is silent, then in accordance with the local controls, unless a contribution is levied for parking by the CDC, in which case no parking need be provided.

Similar arrangements are made for new buildings and additions, albeit no reference is made to pre-existing consents (on the assumption that there is no such consent relevant to the new building or addition).

There are no longer any requirements for parking for internal building alterations.

HERITAGE

On its introduction the Codes SEPP contained a blanket prohibition against the issue of a CDC in respect of development of any land in a heritage conservation area (or draft heritage conservation area) or land that comprised or on which was situated a heritage item or draft heritage item. That exclusion has progressively been softened. CDCs may now be issued for certain types of development in conservation areas (or draft conservation areas) under the Housing Alterations Code, the General Development Code and the Commercial and Industrial Alterations Code.

The provisions relating to application of the Codes SEPP to heritage items was explicitly amended on 22 February 2014.

Prior to the amendments cl17A(1)(d) of the Codes SEPP provided that to be complying development, the development could not:

> *(d) be on land that comprises, or on which there is, an item of environmental heritage:*
>
> *(i) that is subject to an interim heritage order under the Heritage Act 1977, or that is listed on the State Heritage Register under that Act, or*
>
> *(ii) that is identified as such an item in an environmental planning instrument…*

Thus a CDC could not be issued for development on any land on which there was a heritage item. It did not matter that land itself was not the item and that the item may have occupied only a small portion of the site. If there was an item on the land, no CDC could be issued.

As of 22 February, cl 1.17A(1)(d) provides:

> *(d) be carried out on land that:*
>
> *(i) comprises an item that is listed on the State Heritage Register under the Heritage Act 1977 or on which such an item is located, or*
>
> *(ii) is subject to an interim heritage order under that Act or on which is located an item that is so subject, or*

> *(iii) is identified as an item of environmental heritage or a heritage item by an environmental planning instrument or on which is located an item that is so identified…*

On its face, not a radical change. Cl1.17A(3) and (4), newly introduced, are more interesting:

> *(3) If an item listed on the State Heritage Register is not located on, or does not comprise, the whole of the relevant land, subclause (1) (d) applies only to the part of the land that is described and mapped on that register.*
>
> *(4) If an item not listed on the State Heritage Register but identified as an item of environmental heritage in an environmental planning instrument does not comprise, or is not located on, the whole of the relevant land, subclause (1) (d) applies only to the part of the land that is described and mapped on that instrument.*

Now, where there is a heritage item on land, a CDC can be issued for development on any part of the land that is not "described and mapped" in the relevant register or instrument.

The key here is that the land on which complying development cannot be carried out must be both described and mapped for the exclusion to apply. What this means has not really been tested yet, and there is no doubt work for the court to do to define the scope of this clause. On one view, it could be construed to mean that where development is proposed on multiple lots ("the land") and one of those lots is described and mapped in an LEP as being land on which an item is located, the development will not be complying development (or no complying development can be carried out) on that lot so described and mapped.

Having regard to the Department of Planning and Environment's explanatory material however, the preferred construction would appear to be that it is only the specific part of a lot ("the land") that is both described and mapped as the part of the lot on which the item is located – something akin to the footprint of the building.

Significantly, in all LEPs based on the Standard Instrument (Local Environmental Plans) Order 2006, heritage item is defined:

> *a building, work, place, relic, tree, object or archaeological site the location and nature of which is described in Schedule [XX].*

It is important to note that there is no reference to the heritage map in the definition. The only description of the item (and hence of the land) is that set out in the Schedule in which heritage items are listed. Thus even if the whole of the lot is mapped, the description will be more limited.

This frees up more land for the carrying out of complying development, but also puts a burden on Council's to ensure that their heritage listings are

sufficiently detailed to ensure that everything that is intended to be preserved is in fact preserved. If, for example, an item is listed in an LEP as simply a particular house on a large lot, that would arguably not be sufficient to preserve the grounds, gardens, retaining walls or outbuildings if those were also thought to have heritage value. Given that the requirement of cl 1.17A(4) is that the land be described in the LEP, it would be of no moment that those other parts of the land might be ascribed value in a separate heritage study or development control plan.

A recent example

A private school, occupying a number of adjoin lots of land, initially sought development consent for a new pool and gymnasium which the Council was unlikely to grant. A number of the lots comprising the school were mapped in the LEP heritage map, and listed collectively in the LEP heritage items appendix. The description of the item was "School – headmaster's house and chapel." Shortly after the Codes SEPP was amended the DA was withdrawn, and the school sought a CDC for the works proposed under SEPP Infrastructure 2007.

Ultimately the view was formed that the CDC would be valid given the relationship between SEPP Infrastructure and the Codes SEPP (the Codes SEPP not applying to complying development under SEPP Infrastructure), however the question of cl1.17A needed to be examined. The whole of the land was a school and so fit that part of the description, however a number of other schools were also listed in the LEP. The description there was simply "school" however. Arguably, the additional words for this item must have work to do. Accordingly the item is arguably limited to those two buildings only, and it is only on the land occupied by those two buildings that complying development may not be carried out. The rest of the school was free game.

Although not arsing in that matter, as the new development was some distance from the heritage buildings, if it is correct that cl1.17A(4) operates to exclude only that part of a lot on which the heritage item is located, a further question arises as to the heritage curtilage.

In short, the space surrounding a heritage building forms part of its heritage value, not only by allowing it to be seen but by allowing an appreciation of its history and its significance in context. The heritage item cannot be solely the building itself, it must include some part of the surrounding land, perhaps less than the lot, but more than the foot print of the building. A complying building built within an inch of a heritage item, preventing some part of the item from being observed or appreciated, although not on or attached to the item, cannot be within the intendment of the clause.

No guidance is given to certifiers as to what room to allow, other than by the description in the LEP. These rarely run to more than a few words and may be of limited assistance. Regard could be had to the heritage studies on which the listing is based, but these are specialist documents written and construed by specialist consultants. Much money has been made by lawyers in the Land and Environment Court arguing over the construction of competing

heritage studies and working out exactly what is valuable about an item and what is not.

The better approach, unless the description is entirely unambiguous, is probably to let well alone unless and until the relevant Council incorporates the necessary detail in its LEP. The applicant can always lodge a DA for the development that they seek, and have the questions assessed by specialist heritage experts.