



Newsflash

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Release of draft reform package for the NSW planning system

On 3 April 2008 the NSW Government released its long awaited planning reform package, designed to build upon the significant changes introduced over the past three years. Once implemented, these changes will significantly alter numerous aspects of planning law and practice in NSW. The reform package includes the *Draft Environmental Planning and Assessment Amendment Bill 2008* and the *Draft Building Professionals Amendment Bill 2008*.

Some of the key areas of reform are discussed below.

Introduction of the Planning Assessment Commission

The current legislative framework does not permit the Minister to delegate his authority in relation to Part 3A major projects, a matter which has raised some concerns over recent months. In response, the reform package introduces the Planning Assessment Commission (PAC), a body established to determine applications under delegated authority from the Minister, and specifically those projects and concept plans under Part 3A of the EP&A Act. The PAC will also be called upon to advise the Minister on planning matters as required. The decision

to delegate matters to the PAC will be retained by the Minister (s.23D(1)(a)).

The PAC will have broad powers, arguably broader than the existing powers retained by the Minister in relation to the Part 3A approval process, including the power to conduct public hearings and to require a person to give evidence or produce documents for the purposes of a hearing (s.23E). No appeal rights exist for decisions made by the PAC following a public hearing (s.23F).

The Minister anticipates that the PAC will deal with about 80% of State significant projects, while "critical infrastructure" and "major strategic projects" will continue to be dealt with by the Minister and his Department.

Amendments to Developer Contributions

At present, local developer contribution levies vary widely between councils for no discernable reason. There is, moreover, no clear definition under the current Act in relation to the sort of things contributions can fund. This has resulted in councils using contributions to fund such items as dog pound facilities, computer upgrades, information rest bays, lookouts and administration buildings.

Some of the key reforms to development contributions include:

- The introduction of "key principles" which local councils and the Minister must address before approving a new or revised contributions plan (s.903). Significantly, one of the principles to be considered is the anticipated impact that the proposed contribution will have on the "affordability" of the proposed development (s.903(c)).
- Power to the NSW Government to define the key "community infrastructure" which can be outlined in a council contribution plan. Key "community infrastructure" includes local roads and bus infrastructure, local parks, drainage and water management works, local sporting, recreational, cultural, civic and social services facilities, etc. Beyond these specified categories, local councils will need to obtain approval from the Minister.
- Power to the NSW Government to direct a council to spend funds, where a council has not been able to satisfactorily justify a delay in building a facility for which it collected funds.
- More stringent requirements for the drafting of planning agreements, including the mandatory insertion of dispute resolution provisions; and clarification that planning agreements, upon registration by the Registrar-General, will run with the land and, until satisfied, remain enforceable against successors in title.

The reforms continue the existing arrangements for councils to require direct contributions (formerly known as section 94 levies), typically in new release areas. Direct contributions will normally be levied on developments in greenfield sites. These contributions can fund existing facilities, but only if the development to be levied will benefit from the existing infrastructure.

Indirect contributions (formerly known as section 94A levies) will also continue to be permitted, with a standard rate to be up to one per cent of the total development cost. Councils may be able to levy at a higher rate on presentation of a business case and assessment of the impacts on development viability.

Indirect contributions are typically used in existing urban areas, rather than in new fringe housing

estates. These contributions must still meet the “key principles” discussed above but can more freely fund existing infrastructure.

Both direct and indirect contributions will not be able to be levied on the same development.

Introduction of Planning Arbitrators

The draft legislation introduces “planning arbitrators” (s.23K). Their primary role will be to review determinations made by local councils up to a specified threshold, or what the draft reform package calls “planning arbitrator matters” (s.96B). These matters, and the specific roles and responsibilities of planning arbitrators, will be fleshed out in amended regulations in due course. What is clear from the numerous circulars released by the Department, however, is that “planning arbitrator matters” will include development proposals valued at up to \$1,000,000.

As stated by the Minister, the introduction of planning arbitrators is aimed at making it more affordable for people to resolve planning disputes outside of the Land and Environment Court.

Significantly, planning arbitrators will be deemed to have the same functions and powers as the

consent authority had in relation to the original application and determination. They can affirm or overturn the original decision of the council or amend the conditions of consent imposed by the council. The decision of a planning arbitrator will be taken for all purposes to be a decision of the consent authority (s.96H(2)).

One of the obvious concerns of the planning arbitrator scheme will be the perceived independence of the appointed arbitrators. The draft legislation currently provides that the selection of a planning arbitrator for a particular appeal will be made by the relevant council – the very authority whose decision is being appealed against (s.96C(2)). Planning arbitrators who routinely overturn the decisions of a council may be less likely to be selected by that council in subsequent applications.

Planning arbitrators will be required to hold qualifications in planning, architecture, heritage conservation or urban design (s.23K(4)).

Expansion of the Use of CDCs

The reform package sets out a framework for significantly increasing the use of complying development certificates (CDCs) for development considered to

be "routine in nature". The scope of development caught by the new CDC threshold will be set out in new development standards. Initially, these standards will be prepared by local councils through their LEPs, with the principal objective of "substantially increasing" the number of complying development matters and reducing the number of development applications. Any council which fails to achieve this objective will be directed by the Minister to adopt a "mandatory default code" (setting out the government's development standards for complying development), to be prepared by a specially appointed panel. Councils will retain the option of simply adopting the mandatory code at any time, as many councils are expected to do.

These new complying development standards are anticipated to include most residential development applications, including new dwellings and alterations to existing dwellings.

In addition, CDCs may also be issued for routine development applications in circumstances where some "non-compliances" exist with the development standards (s.85A(7A)). Those standards may be departed from where the non-compliance:

- is of a "minor nature"; and
- is not likely to cause any "substantial net adverse impact" on owners of adjoining or adjacent land or the land on which the development is carried out.

There is no definition of "substantial net adverse impact", leaving considerable scope for discretion by council or accredited certifiers. In any event, the concession marks a notable departure from the strict compliance requirements for CDCs under the current regime.

Expansion of Acquisition Powers

The reform package introduces new powers to local councils and other designated authorities to compulsorily acquire land (s.9A). The power to acquire land under this new provision will be limited to urban renewal proposals and urban land releases, and may only be exercised in circumstances where the council or other designated authority is of the opinion that the proposal will result in a "net public benefit".

The phrase "net public benefit" is not defined, though presumably will be construed broadly. Compensation to disposed landowners will be addressed in

accordance with the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991*.

Land acquired under this new regime may, for the purposes of facilitating be the urban renewal proposal or land release, be re-sold or conferred on a public authority or the private sector, whether for profit or otherwise.

The proposed amendment arguably marks a departure from the existing acquisition regime which, in effect, limits compulsory acquisition powers to land required for a "public purpose". The amendment is likely to be one of the more controversial aspects of the reform package.

Power to Impose Conditions

The power of local councils to impose conditions of consent on development approvals remains largely unchanged under the reform package, with two noticeable exceptions. Firstly, the reform package provides that the regulations may set out circumstances in which work is or is not taken to be "physically commenced" for the purposes of section 95 of the EP&A Act. The proposed changes to the regulations have yet to be produced, but it must be assumed that the threshold of what constitutes

"physical commencement" will be significantly raised for many types of development. The amendment is a direct rebuttal to recent decisions of the NSW Court of Appeal which effectively ruled that physical commencement need only constitute limited works, such as surveying work for a subdivision approval or, in the words of the Minister, "a few pegs in the ground".

Secondly, a development consent granted subject to a condition specifying hours of operation for the development may be granted subject to a condition that the consent authority may review those hours of operation at any time. This effectively means that hours of operation may, upon the carrying out of a review, be significantly curtailed with corresponding commercial consequences. This amendment represents something of a departure from the principle that conditions of consent must be certain in their operation and effect. Any such decision, however, will be reviewable in the usual way.

Timeframe for Commencing Appeals

Importantly, the timeframe for commencing appeals against determinations of councils is proposed to be shortened. The current timeframe for appealing

the determination of councils is 12 months. The reform package introduces a much reduced 3 month deadline for commencing appeals in the Land & Environment Court (s.97(1)).

Where a council decision relating to a "planning arbitrator matter" is made, any appeal to a planning arbitrator must be made within 3 months. Thereafter, if dissatisfied with the decision of a planning arbitrator, an applicant may appeal the decision to the Land & Environment Court, provided it is made within 3 months of the arbitrator's decision.

A number of other amendments are set out in the reform package relating to the assessment

process, rezoning, certification and the conduct of appeals in the Land & Environment Court. The development industry will need to grapple with these reforms in the days ahead. Overall, however, the industry is expected to embrace most of the proposed reforms, although the jury remains out on some of the finer details, which will necessary have to wait until the draft regulations are available.

The draft bills are expected to be introduced to the NSW Parliament in May 2008.

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