PIKES & VEREKERS
LAWYERS

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NSW PLANNING AND CERTIFICATION REFORM CONTINUES APACE

In recent editions we have outlined legal changes that have been taking place to the NSW planning system, some of which have at least been contributed to by the economic circumstances surrounding the COVID-19 pandemic. This article is intended to outline some more recent and possible future changes that have arisen since our last newsletter.

CHANGES TO PLANNING AND COURT LEGISLATION ARISING FROM COMMENCEMENT OF BUILDING AND DEVELOPMENT CERTIFIERS ACT ON 1 JULY 2020

In our October 2019 and June 2018 editions, we outlined the new building and subdivision certification regime under Part 6 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) and the associated provisions of the *Environmental Planning and Assessment Regulation 2000* (**EP&A Regulation**), both of which ultimately commenced on 1 December 2019. It is now worth briefly noting that as a result of the *Building and Development Certifiers Act 2018* (**BDC Act**) on 1 July 2020, some minor amendments have been made to this regime to make it consistent with the BDC Act.

Further, as part of the new BDC Act the Land and Environment Court now has civil and criminal enforcement functions in relation to contraventions of that Act. These functions are provided separately to the Court's existing functions under the EP&A Act and in some respects the two

judicial enforcement regimes differ.

Background

When the EP&A Act was renumbered on 1 March 2018, a new object was added into section 1.3 (formerly section 5) of the Act in the following terms:

> *(h) To promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

This object is largely addressed in Part 6 of the EP&A Act (which relates to building and subdivision certification) as well as Division 5 of Part 4 of that Act (relating to complying development). When those provisions commenced on 1 December 2019 and 1 March 2018 respectively, the *Building Professionals Act 2005* and associated regulations remained in force and regulated the certification of development by accredited certifiers in conjunction with the relevant provisions of the EP&A Act and its associated regulations. Those provisions have been repealed and replaced by the BDC Act and its associated regulations.

Requirements before building or subdivision work commences

The requirements of the BDC Act and associated regulations are discussed in detail in Joshua Palmer's presentation to the AAC Annual Conference on 18 August 2020. Apart from updating references in the EP&A Act and the EP&A Regulation so that they are consistent with the changed language used in the BDC Act, the new Act has incorporated an additional subsection (4A) into sections 6.6 and 6.12 of the EP&A Act. The new provisions allow the EP&A Regulation to:

> *(a) prescribe circumstances in which a principal certifier is to be appointed by the Registration Secretary, and*
>
> *(b) prescribe classes of development in which the principal certifier is to be appointed in a manner prescribed by the regulations (including, but not limited to, being appointed in accordance with a scheme prescribed by the regulations), and*
>
> *(c) require that a council or other person must not refuse to be appointed as a principal certifier where the appointment is in accordance with a regulation made under this subsection, and*
>
> *(d) prescribe the fees that may be charged by principal certifiers for particular matters or classes of matters, including maximum fees that may be charged, and*
>
> *(e) prescribe the circumstances in which an applicant for certification may request that a different principal certifier be allocated, and*
>
> *(f) prescribe the circumstances in which the appointment of a principal certifier may be terminated, and*
>
> *(g) prescribe the circumstances in which the appointment of a principal certifier may be revoked or changed by the Registration Secretary, and*
>
> *(h) despite paragraph (c), prescribe circumstances in which a principal certifier may refuse appointment, and*

(i) provide for any other matter that is ancillary to the scheme under this subsection.

At the time of this article being published, the EP&A Regulation does not appear to have been independently amended to prescribe some of the matters listed above. Some were already dealt with in some fashion by existing provisions of the Regulation, however it remains to be seen whether further provisions will be introduced (given the number of matters that are now able to be prescribed relating to requirements before building or subdivision work commences).

Powers of Land and Environment Court under BDC Act

In addition to its wide-ranging civil and criminal jurisdictions under the EP&A Act and various environmental and other legislation, the Land and Environment Court is now empowered to determine the following:

- Civil environment proceedings under section 105 of the BDC Act; and
- Summary (i.e. criminal) enforcement proceedings under section 119 of the BDC Act.

Section 105 of the BDC Act empowers the Court, on the application of the Commissioner for Fair Trading or the Secretary of the Department of Customer Service, to grant interim and final injunctions to restrain actual or threatened contraventions of the BDC Act or its associated regulations. For the purposes of any such application, the Secretary need not show a likelihood of damage or give an undertaking as to damages.

Notably, the Court's power to make orders under section 105 of the BDC Act is only to "restrain" rather than to "remedy" contraventions. This is unlike the Court's power under section 9.46 of the EP&A Act to make orders to "remedy or restrain" breaches.

Similar to section 9.57 of the EP&A Act, section 119 of the BDC Act provides for proceedings for offences against the BDC Act to be prosecuted in either the Land and Environment Court or the Local Court of NSW. The jurisdictional limits concerning penalties in each Court appear to also mirror those in the EP&A Act.

The differences between the prosecution provisions in the EP&A Act and the BDC Act mostly concern limitation periods. Unlike the two-year period for commencement of a prosecution provided by the EP&A Act (which can apply either from the date of the offence or the date on which evidence of the alleged offence first came to the attention of an investigation officer), a three-year period is provided for commencing prosecutions for offences against the BDC Act (regardless of when the alleged offence came to the prosecutor's attention).

DEFERRAL OF SOME DEVELOPER CONTRIBUTIONS

As part of the miscellaneous emergency measures that were introduced by the State government on 14 May 2020, a key provision relating to deferral of some developer contributions was introduced into the EP&A Act. Namely, the new section 7.17(1B) of the EP&A Act provides:

A provision of a development consent granted before and inconsistent with a direction under subsection (1)(h) is taken to be modified so as to be consistent with the direction,

but only for a contribution or levy (or a component of a contribution or levy) that has not been paid before the direction is given.

On 25 June 2020, the Minister for Planning and Public Spaces gave the *Environmental Planning and Assessment (Local Infrastructure Contributions – Timing of Payments) Direction 2020* (**Direction**). Given pursuant to the new section 7.17(1)(h) of the EP&A Act, the Direction applies to building work requiring an occupation certificate where the estimated cost of the proposed development is $10,000,000 or more.

In relation to such projects approved before 25 June 2020, section 7.17(1B) of the EP&A Act has the effect that local infrastructure contributions need not be paid until the issuing of an occupation certificate for the development. From 25 June 2020 until the end of the COVID-19 "prescribed period" (currently 25 September 2020, but extendable by regulation to 25 March 2021), when granting consent to such projects and imposing a condition requiring payment of a local infrastructure contribution, the consent authority must only require the contribution to be paid prior to occupation certificate (or at an earlier stage, if that stage occurs after 25 September 2022).

Aligned with the above amendments is the *Environmental Planning and Assessment Amendment (Occupation Certificates) Regulation 2020*. Introduced to ensure that deferred contributions are paid as required by law, clauses 149(2AA) and 154F have been introduced into the EP&A Regulation to (respectively):

- require the application for occupation certificate to be accompanied by a document from the relevant council certifying that any required developer contribution has been paid; and

- prevent the certifier to whom the application for occupation certificate has been made from issuing the certificate unless they have received the relevant council document.

NSW PLANNING REFORM ACTION PLAN

The various planning law reforms noted in this and other recent newsletters do not appear to be the last. On 15 July 2020, the State government announced its NSW Planning Reform Action Plan to "*build on momentum created by the NSW Government's efforts to use the planning system to keep people in jobs and keep the economy moving during the COVID-19 pandemic*".

In addition to the well-publicised fast-tracking of some projects and the requirement for all councils to adopt the online ePlanning system for lodgement of development applications by 1 July 2021, the Plan appears to be largely concerned with slashing times for rezoning decisions and decisions on applications for larger projects. While much detail is yet to follow in relation to implementation of the Plan, it is also noteworthy that it includes "*boost*[ing] *the role and resourcing of the Land and Environment Court by establishing a new class of appeals for rezonings to help unblock the planning system and appoint an additional two commissioners to enable more cases to be heard each year*".

The introduction of a new class of appeals in the Land and Environment Court for rezoning requests would be a significant change to the planning system. The

government has estimated that the appointment of two additional two commissioners would allow approximately 150 more matters to be considered each year, which on our approximation amounts to about one-sixth of the total number of planning-related appeals registered with the Court in 2019. This may well "*help clear the backlog of appeals*" as referred to in the announcement of the Plan.

PROPOSED HOUSING DIVERSITY SEPP

The State government has recently released an explanation of intended effect (**EIE**) for a proposed Housing Diversity State Environmental Planning Policy (**SEPP**). The EIE is on public exhibition until 9 September 2020.

At this early stage, the EIE warrants a brief mention from a legal perspective due to its proposed consolidation of three housing-related SEPPs that have generated significant litigation in the Land and Environment Court in recent years. By way of background, the State government has stated that:

> *The Seniors SEPP, Affordable Rental Housing SEPP and SEPP 70 have been in place for some time. Some provisions need to be amended or updated to reflect current conditions and community expectations.*

In the field of affordable housing, perhaps of most interest for now is the proposed redefinition of the types of such housing compared with the current Affordable Rental Housing SEPP. The definition of "boarding house" would (for the first time) include an affordability requirement, and the commonly-occurring 'new generation boarding houses' would generally fall within a separate land use definition of "co-living". New definitions of "build-to-rent housing" and "student housing" would also be introduced.

In relation to all such forms of affordable housing, the Government has flagged a move toward local planning controls relating to building height and bulk taking prevalence. That is, apart from new "boarding houses" (which would need to be "affordable" and could then benefit from a floor space ratio bonus "to a maximum 20%"), it seems that all forms of affordable housing regulated by the new SEPP would only benefit from reduced car parking rates and not a relaxation of FSR and height standards (as is currently the case).

A number of changes to the Seniors SEPP provisions have been flagged in the EIE. Three points that regularly arise in planning appeals in the Land and Environment Court relating to seniors housing are worth briefly noting:

- Schedule 1 to the Seniors SEPP lists the types of "environmentally sensitive land" to which the SEPP does not apply. Some terms within that schedule have been noted by the Government as having "*been the subject of significant debate in the Land and Environment Court*". Among other reasons, Schedule 1 is proposed to be updated to resolve such issues.

- Usually, a site compatibility certificate is currently only valid for 24 months. For larger projects where a development application has taken many months to prepare, including where the applicant appeals to the Land and Environment Court against the consent authority's deemed or actual refusal of the application, the 24 months has in some cases not been long enough to facilitate proper

assessment and determination of the application (including on appeal). Accordingly, the Government is proposing to provide that a site compatibility certificate is valid for five years rather than two – provided that the development application is lodged within 12 months of the date on which the certificate was issued.

- Perhaps most significantly, the ability of seniors housing to depart from local development standards is intended to be significantly narrowed by the Government. Instead of the SEPP controls prevailing over any inconsistent controls in a council's local environmental plan (**LEP**), the LEP would prevail to the extent of any inconsistency. Further, relevant development standards in the SEPP itself could only be varied using clause 4.6 of the Standard Instrument LEP, but only to a maximum of 20%.

From all of the above, it can be seen that legal reform of the NSW planning and development certification system continues apace. The reforms that may be of particular interest to clients and consultants will continue to be the subject of future updates as they arise.

For further information regarding this update, please contact 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