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Proposed Amendments to the Environmental Planning & Assessment Act 1979 (NSW)

As part of the on-going review of the NSW planning systems, the Government has released a draft Amendment Bill for public comment. Madison Marcus review the proposed draft amendments that will bring both good and bad news to developers.

In this paper, Paul Jayne, Partner for Planning, Environment and Government at Madison Marcus discusses the key proposed changes that are most relevant to developers including:

- Community consultation
- Strategic planning
- Development control plans
- Section 96 modification applications
- Complying development
- Subdivision Works Certificate
- Voluntary Planning Agreements

Community Consultation

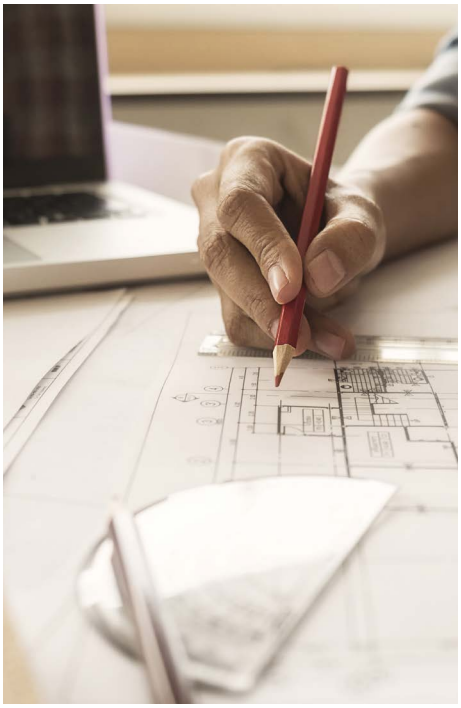
The proposed amendments require planning authorities to prepare and implement a 'community participation plan'. These plans will provide information on how the community can be consulted and how to access materials related to planning proposals and development applications. For a greater degree of consistency between different Council's, the plan will include state-wide mandatory exhibition periods.

Developers will also be encouraged to engage in early consultation with neighbours through the introduction of an incentive scheme. This consultation must, however, take place prior to 'development or modification application'. The Department of Planning and Environment (**the Department**) is currently in talks with Councils in order to establish the exact parameters of these incentives.

Strategic Planning

Planning authorities will be required to provide a 'statement of reasons' for planning and development decisions that are proportionate to the scale and impact of the decision (ie large and complex developments will require a more comprehensive statement of reasons as opposed to a smaller development with less impact).

Local planning statements will be developed and published by Council that address the context and desired future development of the locality. Once the form and content of the statements is finalised, the statement will be implemented to 'inform rezoning decisions and guide development'. Planning statements will aim to provide some clarity about how 'strategic priorities' are 'given effect' at a local level and will be situated 'above' LEPs and DCPs in the strategic planning 'line of sight', thus influencing the ways in which those LEPs and DCPs are implemented. We believe the objective is to provide a narrative to better inform how the controls in LEPs and DCPs are applied. This may make the controls more subjective rather than objective.



It is difficult to predict how this will interact with the considerable degree of planning law in relation to variation of development standards.

The proposed amendments to the EP&A Act also require regular revision of LEPs by Councils in order to ensure compliance with the strategic planning objective of the locality. LEPs in NSW are, on average, revised every seven years under the standard instrument LEP. The amendments will see Councils undertaking a 'check-up' of its LEPs every five years. The reviews aim to ensure consistency with, and observation of regional and district plans, demographic booms, infrastructure investments and community input as to the effectiveness of the LEP.

This may result in more frequent changes in zoning to allow for an intensification or re-classification of development in areas. Arguably, this may reduce the need for spot re-zoning.

Development Control Plans

Currently, there are over 400 DCPs across NSW varying in content and format. The proposed amendments seek to standardise the format, much like the standard instrument LEP. It is hoped that the standarisation of DCPs will result in a more expeditions process for both Councils and Developers.

However, it is noted that the new standardised DCP will only address the format issue for now, with the decision on content remaining with individual Councils.

A working group will be established for the purpose of creating a database of optional model provisions (accessible through the NSW Planning Portal) that Councils may choose to adopt in the drafting of the content of their DCPs.

Modification Applications

The summary Amendments states modification applications will "no longer" be able to retrospectively regularise works already carried out on land.

This statement is troubling as it demonstrates a misunderstanding of the law that has evolved around the application of section 96.

The Courts have long maintained that modification applications cannot apply to a development retrospectively. In its Summary, the Department relies on Justice Talbot's decision in *Windy Dropdown Pty Ltd v Warringah Council [2000] NSWLEC 240,* made almost two decades ago, to illustrate instances where the retrospective application of section 96 may be suitable. However, it has long been held that modifications regarding already completed developments will not be looked upon favourably by Councils or the Courts.

Whether policy evolves to allow modification applications utilised to rectify discrepancies described in section 96 (1) of the Act remains to be seen. Presently, there exists very little to justify the existence of section 96 (3A) which provides:

If, after the grant of development consent, any part of the development is carried out in contravention of the consent, the consent may not be modified (except under subsection (1) - modifications involving *minor error, misdescription or miscalculation*) in order to authorise that part of the development.

It may be that the Department is simply seeking to codify that position, but that hardly seems necessary. The accepted law for structures already built is that a section 96 modification approval can authorise the prospective use of a building, and a 'building certificate' can regularise the built structure through compliance with relevant standards, etc.

The Department further observes that under the current system, conditions central to a development consent can be removed without due consideration towards their initial inclusion. Under the proposed amendments, section 96 will include, at section 96 (3), the requirement that planning authorities need to consider the reasons and conditions of the original consent when determining modification applications.

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Complying Developments

The proposed amendments seek to 'open' up complying development proposals to scrutiny as well as create a more efficient system.

The Department recognises the need to create an expeditious system that can meet the demand for quick approval of complying developments. The proposed amendments are the next step in the progression towards accommodating the Medium Density Design Guide (the Guide) and Medium Density Housing Code (the Code), which were exhibited in October 2016. The Guide and Code were developed with the intention of classifying medium density housing developments as complying developments.

The Guide and Code have necessitated the introduction of a pathway system that would allow for a fast-tracked assessment process for complying developments, which could reduce the assessment period from ten to three weeks. Further, the NSW Planning Portal will adopt an online lodgement process for applications and certificates for complying developments.

The proposed amendments will ensure that complying developments will be open to scrutiny, and can be challenged and declared invalid if a development does not comply with the applicable standards. The Department have relied upon the decision in *Trives v Hornsby Shire Council* [2015] NSWCA 158 to illustrate that currently 'little can be done to challenge a complying development that does not meet the standards unless the certifier acted unreasonably'.

The Department believes that the proposed amendments allow for a 'person or a Council to bring proceedings to challenge the validity of a complying development certificate and allowing the Court to objectively determine whether the certificate is in accordance with relevant standards'. These amendments could spell trouble for developers seeking to take advantage of the new complying development scheme. It could be argued, that the proposed amendments could open the doors for vexatious cases against developers for problems with complying developments where there are none.

Further, Councils will be granted powers to issue 'temporary stop work' orders on complying developments in order to ascertain whether the development is compliant with the SEPP (it is noted that this power has not yet been completely framed, and will be framed in due course when the regulations are drafted). During these stop work periods, Councils will be able to conduct investigations into the complying development's adherence to the relevant codes. These investigations will be funded by a new levy system through which fees will be collected from payment for complying development certificates. Whilst the system itself

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may be improved through these amendments, this power, if implemented, may lead to an adverse result of complying developments being unreasonably prolonged due to investigations and the developer may incur substantial costs as a result.

The new amendments may also 'reshape' complying development certificates to resemble something more akin to development consents, namely that developers will be required to pay special infrastructure contributions and the possibility of deferred commencement conditions being imposed by way of the proposed section 85A (9). This section states 'a complying development certificate may be granted subject to a condition that the certificate is not to operate until the applicant satisfies the Council or Certifier who issued the certificate, in accordance with the regulations, as to any matter specified in the condition'.

In an effort to increase transparency, the new regulations will require 'certifiers…intending to issue a complying development certificate' to provide copies of the development certificate to the Council and the neighbours of the development site. The online NSW Planning Portal will also exhibit complying development certificates and their attached plans.

Subdivision Works Certificate

The Bill proposes the implementation of a subdivision works certificate to further regulate developments. Under the proposed amendments, development consents will not authorise subdivisions unless a certificate has been issues allowing for said subdivision (separate from a construction certificate). This will require the inspection of the site and the proposed plans by an authorised certifier.

Voluntary Planning Agreements

The current Voluntary Planning Agreement (VPA) framework is approximately a decade old. Despite VPA's being a popular and viable option for Developers and Councils, there exists the ability for one party (Councils) to unreasonable dictate terms over the other party.

To combat this, the proposed amendments will introduce a 'clearer policy framework', developed to guide planning authorities through VPA implementation. The Department has drafted a number of documents such as a proposed ministerial direction aimed at clear VPA policy and framework enabling Councils to clearly identify the core principles of the new framework, which will require VPA's to demonstrate:

1. a clear public benefit;
2. that they have been informed by 'an assessment of the needs of the local community';
3. a fair and reasonable platform for both parties to negotiate terms; and
4. transparency in the community.

Under the policy and framework, Councils will be required to adhere to the above principles and work with developers to attain a result that best realises those principles.

The Amendment Bill is open for public comment until **31 March 2017**. If you have any questions regarding any of the proposed amendments to the EP&A Act please contact:

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