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Proposed Changes to the NSW Planning System

"For almost 30 years the three-tiered planning process of State planning policies and Regional and Local Environmental Plans has been in operation in NSW. Stakeholders complain that the current system is too slow and concentrates on the process rather than the outcome.

The NSW State Government has proposed a series of new legislation containing fundamental changes with the aim of improving and speeding up the planning process. The new system reduces the level of public participation, increases the power of the Minister, reduces appeal rights and creates new planning amendment bodies. Time will tell if the Government has struck the right balance between process and outcomes in the planning system."

On 18 June 2008, the NSW Parliament passed three planning reform Bills::

- Environmental Planning & Assessment Amendment Bill 2008 (**EP&AA Bill**);
- Building Professionals Amendment Bill 2008 (**BPA Bill**); and
- Strata Management Legislation Amendment Bill 2008 (**SMLA Bill**).

A summary of these changes is set out below.

Environmental Planning Instruments (EPI) and Streamlined Processes

A new procedure for the preparation of Local Environmental Plans (**LEP**s) is proposed. The planning reforms support early, upfront feedback by the Planning Minister to local councils on whether a new LEP is justified, along with tailoring the plan-making process based on the complexity of the proposed LEP.

The EP&AA Bill provides that the Planning Minister may make an LEP. Before an LEP is made, the relevant planning authority is required to prepare a planning proposal that explains the proposed LEP. The planning proposal is then submitted to the Planning Minister for a 'gateway determination'. The Minister is to review the planning proposal and make decisions about how the matter is to proceed and make provisions for community consultation. The EP&AA Bill also allows for an expedited process for making EPIs where the amending EPI does not have any significant adverse impact on the environment or adjoining land.

As a result, the new regime gives the Planning Minister the power to substantially control the process for making LEPs and determine the extent of community consultation, while at the same time lowering the threshold amount of information that must be provided to the community. The ability of the Planning Minister to dispense with detailed community consultation when making a gateway determination represents a significant departure from the detailed statutory requirements for public participation that currently exist.

The EP&AA Bill also provides the NSW Governor with a very broad power to make EPIs for the purpose of environmental planning by the State or State Environmental Planning Policies (**SEPP**s), and proposes that SEPPs replace Regional Environmental Plans (**REP**s). Significantly, the EP&AA Bill removes the requirement that a SEPP relate to matters that are, in the opinion of the Planning Minister, of significance for environmental planning in NSW and that the Governor make a SEPP only in accordance with the Planning Minister's recommendation. The power of the Governor to make a SEPP can therefore be exercised unchecked and is not subject to the statutory requirements that currently exist in relation to environmental planning significance and ministerial direction.

Thomson Playford

New Development Assessment Bodies

To reduce delays, the EP&AA Bill establishes the following new planning bodies for determining development applications:

- Planning Assessment Commission (**PAC**);
- Joint Regional Planning Panels (**JRPP**);
- Independent Hearing & Assessment Panels (**IHAP**); and
- Planning Arbitrators.

The PAC is comprised of independent experts and is intended to consider about 80% of NSW' significant projects currently determined by the Minister. Critical infrastructure and major strategic projects will continue to be dealt with by the Planning Minister. The PAC will be able to conduct public hearings and provide advice to the Planning Minister.

However, there will be no right of appeal against a PAC decision if it is made following a public hearing.

The JRPP is comprised of NSW Government and local council representatives and experts and is intended to consider regionally significant developments. JRPPs will be identified in a SEPP as the consent authority for regional development that is a:

- designated development;
- nominated development over $5 million;
- residential, commercial or retail development of $50 million; and
- nominated subdivisions.

As is currently the case, an IHAP may be established by a council to assess any aspect of a development application or any planning matter. The members of an IHAP are to be selected from a list of experts approved by the Director-General of the Department of Planning. It is intended that IHAPs will be funded from DA fees. However, the cost of an IHAP is reported to be negligible in comparison with the potential cost of defending an appeal to the Land & Environment Court.

Planning Arbitrators will have responsibilities in relation to determining development applications and review applications. The Director-General of the Department of Planning will keep a list of planning arbitrators who have expertise in one or more of planning, architecture, heritage, urban design, law or engineering.

Councils will still continue to determine local development applications.

Review of Development Application (DA) Determinations

The EP&AA Bill proposes to repeal and replace the existing review of determination provisions with new provisions for reviews of DA determinations by bodies other than the Land & Environment Court. The intention of this change is to limit appeals to the Court and reduce costs for smaller developments.

An applicant in relation to a development application determined by a council may apply to the council for a review of the determination and may also apply for a review by a planning arbitrator in relation to a minor development (e.g. certain classes of residential development under $1 million). An applicant's right of appeal to the Land & Environment Court is reduced from 12 months to three months from the date of determination. In relation to a development application determined by a planning arbitrator, an applicant, but not a Council, may appeal to the Court within three months.

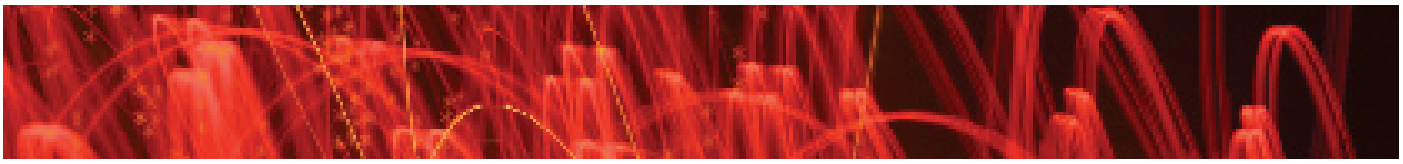
The EP&AA Bill proposes to require the Court to order an applicant to pay the costs of any other party to proceedings, if the Court approves a DA that is significantly different from the application which is the subject of the appeal, where an appeal involves changes made at the request of the applicant.

The EP&AA Bill proposes to expand the range of developments against which local community objectors can lodge applications for merit reviews. An objector to a DA determined by a council may apply to the JRPP for a review of the determination. An objector to a DA determined by a JRPP may apply to the PAC for a review of the determination. An application for review must be made within 28 days of notice of the determination of the DA. There is no change to existing objector appeal provisions in the *Environment Planning and Assessment Act* 1979 (**the Act**) relating to designated development.

Changes to Development Contributions

The EP&AA Bill proposes to continue to allow local councils to require development contributions for "key community infrastructure" and affordable housing. However, local councils must have a contributions plan in order to impose conditions of consent requiring development contributions from developers. Local councils may only seek contributions for additional infrastructure if approved by the Planning Minister.

The State may require development contributions for the provision of public infrastructure. Planning authorities may



enter into voluntary planning agreements with developers for the provision of public infrastructure and other public benefits.

The EP&AA Bill requires that issues such as timely spending, affordability and reasonable costs be considered when a contributions plan is prepared.

Changes to Development Certifications

Changes to development certifications will increase accountability and create a system with more integrity and certainty over responsibilities, because checks and balances in the relationship between the certifier and applicant will be improved.

The EP&AA Bill proposes to enable a consent authority to require payment of security as a condition of consent, or by agreement with an applicant, for the purposes of ensuring compliance with the development consent during the construction phase of development.

The EP&AA Bill increases the maximum penalty for commencing building or subdivision work in breach of the Act from $33,000 to $110,000.

If a certifying authority becomes aware of any non-compliance in respect of a development, the certifying authority must notify the person responsible for carrying out the development of the non-compliance and direct that specified action be taken to remedy the non-compliance. If the direction is not complied with, the certifying authority must notify the consent authority.

The amendments provide that a compliance, construction, subdivision or occupation certificate may only be issued by a person holding accreditation under the *Building Professionals Act* 2005. The BPA Bill proposes to enable the Building Professionals Board to accredit certain building professionals in addition to its current role of accrediting certifiers. It proposes to impose sanctions against an accredited certifier or building professional found guilty of unsatisfactory professional conduct or professional misconduct, increase penalties for breaches of the *Building Professionals Act* 2005 and creates new limits on the amount of income that an accredited certifier can obtain from one developer.

The EP&AA Bill creates a new type of order which may be given under the Act to require a person to stop carrying out specified building work or subdivision work. Proposed Order No.19 may be given where the work is being carried out in breach of the Act or where the work affects the support of adjoining premises. A proposed new section enables an authority who issues an order to serve a compliance cost notice on the person to whom the order was issued requiring that person to pay the costs and expenses of the authority in connection with the order.

The EP&AA Bill provides that a complying development certificate and a construction certificate must not be issued unless an inspection of the site has been carried out and the certifying authority is satisfied that the development is consistent with development consent.

Changes to Strata Management

In addition to the planning amendments proposed in the EP&AA Bill, the SMLA Bill proposes to make changes to the management of strata buildings. The SMLA Bill proposes to address the situation where a developer retains control of the development until the seven year warranty period provided for under the *Home Building Act* 1989 has expired, thereby limiting the rights that strata owners have against the builder or developer under the *Strata Schemes Management Act* 1996.

The SMLA Bill proposes to:

- remove the ability of an owner's corporation to make by-laws authorising parking on common property during the initial period;
- place certain restrictions on the casting of votes by original owners/ developers, and certain persons connected with them, by using proxies and powers of attorney; and
- require members of executive committees of strata schemes and candidates for membership of such committees to disclose connections with original owners/ developers and caretakers of those schemes.

The amendments propose to increase the rights of strata owners against a developer and limit the developer's role in the management of strata buildings.

NSW Housing Code and Commerical Building Code for exempt and Complying Development

As part of the planning reform package, on 8 May 2008 the NSW Government released two Codes for public comment until July 2008. The purpose of these Codes is to simplify and speed up approvals for small scale, low impact proposals. This will also assist the assessment process by reducing the processing time for small scale residential development applications.

The Codes provide rules for certain types of residential and commercial

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developments that can be approved in 10 days and apply to:

- exempt development on residential and rural zones;
- new single-storey homes and additions on lots of 600 square metres or more;
- internal alterations for two-storey houses; and
- commercial and industrial exempt and complying development.

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