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Planning & Environment Newsletter

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Timely caution on political donations

In the lead up to the NSW State election and the inevitable increase in requests for political donations expected during this period, property developers involved in major projects will need to remain vigilant about their reporting obligations under section 147 of the Environmental Planning & Assessment Act 1979 regarding any gifts or donations made.

The disclosure obligations extend to all persons with a "financial interest" in a planning application made to the Minister or the Director-General of Planning, including Part 3A applications. This includes applicants, companies on whose behalf applications are made, owners of land, companies who have entered into agreements to buy land the subject of an application and others who are likely to obtain a financial benefit from the application.

The political donations required to be disclosed include one-off political donations exceeding $1,000 to anyone in the last 2 years, or a number of political donations that, when added together, total $1,000 or more during a financial year.

Although failure to disclose is not relevant to the determination of a planning application and does not provide grounds for challenging a determination, significant penalties apply for non-compliance, including fines of up to $22,000 or imprisonment for 12 months or both.

Maysaa Parrino
Partner

New fast track appeal regime for planning disputes

The NSW State Government has recently introduced a new fast track appeals process for class 1 applications to the Land & Environment Court, to be known as section 34AA hearings.

The new appeal regime, introduced as part of the Planning Appeals Legislation Amendment Act 2010 (Amendment Act), will involve a "mandatory" conciliation and arbitration process for all development application appeals involving single dwellings, dual occupancies and associated subdivision applications. Higher density development projects

will generally be unaffected by the changes and will continue to be managed via the usual appeal processes.

The new regime has been introduced in consultation with the Land & Environment Court which has, in turn, released a new practice note detailing the procedures and timeframes that will apply to the new appeal process. The Court has set a target of finalising 95% of all fast track appeals within three months of filing the initiating application.

The final hearing will be conducted, in the first instance, as a conciliation conference where the parties will, in good faith, endeavour to reach agreement, under the auspices of the presiding Commissioner. In the event that the parties are unable to reach agreement the same Commissioner will, without further adjournment, immediately terminate the conciliation conference and enter into the arbitration phase of the process. The Commissioner will then make a determination on such further evidence and submissions presented by the parties or, if the parties consent, on the basis of what has occurred at the conciliation conference. That determination will be binding on the parties.

Appeal rights under the new fast track regime will, as per the former regime, be strictly limited to errors of law.

Given the time constraints of the new appeal process, applicants will need to be thoroughly prepared prior to the commencement of the appeal process. In most instances, that should not present a problem. However, when dealing with so-called "deemed refusals" (where a council has failed to make a determination within the prescribed period and failed to disclose its objections), applicants should seek to identify and address – so far as possible – the key planning issues likely to arise, prior to commencing proceedings.

Applicants and respondent councils may also need to be more circumspect about what evidence is presented in the conciliation phase of the process, mindful that – irrespective of whether the parties elect not to have that evidence admissible in any further hearing – the prospect of that evidence inadvertently flavouring the ultimate determination remains. This concern, of course, is a feature of any dispute resolution system involving adjudicators wearing two hats.

The new fast track appeal process is apt to be well received within the planning community, and is anticipated to see a marked increase in challenges against the decisions of local councils, albeit limited – for the time being at least – to relatively modest development applications. Should the process prove successful, the Parliament has indicated that it will consider expanding the types and scale of disputed development applications that will be arbitrated under the new fast track process.

Claire Parsons
Solicitor

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Changes to existing use rights for commercial and light industrial sites

Existing use rights have been under close scrutiny in recent years, resulting in a number of amendments to the Environmental Planning & Assessment Act 1979, most of which have worked to restrain the type and extent of development that may be carried out where existing rights can be established.

In something of a reversal to the current trend, the NSW Parliament has recently introduced amendments to the Environmental Planning & Assessment Regulation 2000 to eliminate the floor space "cap" applying to commercial and light industrial spaces. Under the current regime, owners of commercial or light industrial spaces greater than 1000sq/m are prohibited from applying – under existing use rights – to change a commercial use to another commercial use or change a light industrial use to another light industrial use (including commercial or light industrial uses, as the case may be, that would otherwise be prohibited under the Act).

The Government has recognised this unduly restrictive limitation on existing use rights, which has particularly impacted on spatially larger business operations, such as bulky goods outlets, warehouses, distribution centres and the like.

Other existing limitations on "change of existing use" applications, however, will continue to apply to commercial and light industrial sites, including allowing only "minor alterations and additions", limiting floor space increases to a maximum of 10 per cent, and not permitting the rebuilding of premises or the intensification of those existing uses.

The amendments came into effect on 25 February 2011.

Anthony Perkins
Partner

VPAs and Part 4A certificates

Voluntary Planning Agreements are essentially agreements struck between developers and consent authorities - subsequently ratified under the Environmental Planning & Assessment Act 1979 - in which the developer agrees to pay a financial contribution or provide some material benefit to the consent authority, often in lieu of section 94 monetary contributions.

Under most VPAs the developer is required to meet its obligations under the VPA as a precondition of the certifying authority issuing a construction, subdivision or occupation certificate (known as Part 4A certificates).

On larger projects involving staged delivery, however, the nexus between the timing of a developer's obligations under a VPA and the issuing of

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Part 4A certificates is less certain (where, for example, the VPA may sit outside the terms of the consent for a particular stage in the development), potentially resulting in occupation certificates and other certificates being issued by certifying authorities prior to - and in contravention of - the contributions under the VPA being made by the developer.

To remedy the situation, the NSW Parliament has enacted amending legislation to prevent accredited certifiers and councils from being able to issue construction, subdivision or occupation certificates for development if requirements in a VPA have not been performed, where they are required to be done before those certificates are issued.

The changes will be particularly significant for those involved in large scale "staged development" projects, which typically have longer project delivery time frames. For such projects, VPAs will need to clearly indicate whether they are linked to Part 4A certificates. Similarly, explanatory notes (required under the Environmental Planning & Assessment Act) will need to specify whether a VPA's particular requirements must be complied with before any such certificates are issued.

The amendments came into effect on 25 February 2011.

Lucinda Baldwin
Solicitor

The future of Part 3A

The NSW Independent Commission Against Corruption has recently released its long awaited report into the controversial Part 3A of the Environmental Planning & Assessment Act 1979.

Introduced in 2005, Part 3A overhauled the way in which major development projects were assessed in NSW, substantially increasing the types of development that were to be determined by the Minister, including - for the first time in any systematic fashion - major private sector projects.

The essential finding of the ICAC report was that the Part 3A system was "characterised by a lack of published, objective criteria". The report noted that "there are also various elements of Part 3A that are discretionary, particularly as regards residential and commercial development, which are prohibited or exceed existing development standards. The existence of a wide discretion to approve projects that are contrary to local plans and [which] do not necessarily conform to state strategic plans has the potential to deliver sizable windfall gains to particular applicants. This creates a corruption risk and a community perception of a lack of appropriate boundaries."

The report emphasised that despite the "corruption risk" associated with Part 3A, no established examples of corrupt use or manipulation of

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discretion under Part 3A or SEPP (Major Development) 2005 had been established.

ICAC recommendations

The report went on to make a series of recommendations, most of which revolved around reducing the discretion available under Part 3A and limiting the Minister's direct involvement in the approval process. Some of the key recommendations:

- Part 3A should be limited to projects that are permissible under existing planning instruments (including local environmental plans).
- Joint Regional Planning Panels should determine rezoning proposals for prohibited aspects of Part 3A projects instead of the Planning Minister.
- The Planning and Assessment Commission should determine all Part 3A applications which exceed development standards by more than 25%.
- The appeal rights of third party objectors should be expanded to permit appeals against private sector projects approved under Part 3A where those projects constitute a major departure from existing development standards.

Political responses

The State Government has welcomed the findings of the ICAC report, with the Minister for Planning, Mr Tony Kelly, saying that the Department of Planning would investigate the recommendations made by ICAC. Mr Kelly said his Department would also consider ICAC's recommended amendments to the EP&A Act and the types of projects able to be assessed under Part 3A.

For the Coalition, it is a case of too little too late for Part 3A, with the Shadow Minister for Planning, Mr Brad Hazzard, pledging that a Coalition Government would remove Part 3A from the statute books and, in due course, re-write the Environmental Planning & Assessment Act. Invariably, that agenda would also see a radical overhaul, if not repeal, of SEPP (Major Development) 2005.

There is no clear indication from the Coalition at this stage as to what statutory mechanism will be put in place of Part 3A, if any, to deal with major projects (which, rightly or wrongly, have often been considered too large and complex for local government authorities to assess), other than oblique references to reliance upon the historic "call-in" powers available to the Minister under other provisions of the Environment Planning & Assessment Act and reliance upon a range of environmental planning instruments specifically nominating the Minister as the consent authority, such as relate to mining and large scale manufacturing projects.

It is also uncertain as to what savings provisions will be in place, should the Coalition win government, to address those Part 3A applications currently lodged but yet to be determined by the incumbent Minister.

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About the only thing that can be said with any degree of certainty at this point is that major private sector projects will be determined under a very different assessment regime in the near future.

Anthony Perkins
Partner

If you have any questions in relation to any of the matters discussed in these articles, please contact the **Planning & Environment Team** -

Anthony Perkins
Partner
D: +61 2 8281 4606
E: afp@cbp.com.au

Maysaa Parrino
Partner
D: +61 2 8281 4486
E: msp@cbp.com.au

Claire Parsons
Solicitor
D: +61 2 8281 4610
E: cfp@cbp.com.au

Lucinda Baldwin
Solicitor
D: +61 2 8281 4693
E: lxb@cbp.com.au

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