NEW SOUTH WALES

Nicholas Brunton

Further Reforms to Planning Law and Policy

There are no signs that the Planning Minister is slowing down with his agenda to improve the planning system. Some of the key changes that recently have taken place and are proposed include:

Part 3A

- various provisions amending Part 3A of the EP&A Act which were passed in December 2006 have now commenced operation. These include the removal of prohibitions and restrictions in environmental planning instruments (**EPIs**) to projects assessed under Part 3A of the Act. This means that the Minister for Planning can now approve a Part 3A project where that proposal is prohibited by the zoning in the EPI;
- the amendments also allow for the consolidation of existing approvals and consents under Part 3A;
- the EP&A Regulation was amended on 20 July 2007 to identify certain classes of development (other than critical infrastructure projects) for which the Minister for Planning cannot grant an approval or concept plan. These include:
  - projects within environmentally sensitive areas of State significance and sensitive coastal locations and where the particular project is prohibited by LEPs or REPs;
  - provisions setting out the procedures for the surrender of part 3A approvals and entitlements to existing use rights as a condition of a part 3 A approval.

Certification of development

- The *Environmental Planning and Assessment Regulation* 2000 has been amended in an attempt to remove the subject element involved in issuing part 4A certificates. For example, for construction certificates, the wording used to be that a certificate could be issued where the certifier "is satisfied of the following matters" which are then listed in the regulation. The requirement that the certifier "is satisfied" of the applicable matters for each type of certificate have been deleted throughout the regulation.
- Thus a part 4A certificate can only be issued where the relevant circumstances exist. Again, by way of example, clause 145 of the regulation now provides that construction certificates must not be issued unless:
  - the plans and specifications for the building include such matters as each relevant BASIX certificate requires, and
  - the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent, and
  - the proposed building (not being a temporary building) will comply with the relevant requirements of the *Building Code of Australia* (as in force at the time the application for the construction certificate was made).

Heritage Act Review

On 19 July 2007, the Planning Minister announced the government will undertake a review of the Heritage Act as part of its planning reform agenda. The Minister has appointed a panel of experts, chaired by the current Liverpool City Council administrator, Gabrielle Kibble, to review the Act and prepare a draft discussion paper in the next few months to be released for public comment. The terms of reference of the review indicate that it should focus primarily on:

- duplicative and overlapping provisions with other legislation including at the national level;
- strengthening the integration of heritage provisions with the EP&A Act both at plan-making level and development control;
- State heritage provisions and practice in relation to the listing process, public benefit of outcomes for tests for achieving state heritage status, the role of property owners and appeal rights, and resource time and efficiency. In addition, the review is to look at the functions and constitution of the Heritage Council and the consideration of local heritage processes.

Part 4

The Minister has also announced a review of the development assessment process under Part 4. One of the key concerns appears to be the large number of development applications being processed by local government and the manner in which they are processed. Some of the potential reforms that have been mentioned in recent speeches and interviews include:

- significant expansion of the exempt and complying development categories;
- referral of development applications to review panels; and
- removal of councillor involvement in approval applications.

The Minister has stated that he is open to what the reforms will be and has not taken any proposals to Cabinet. The Department is current engaging in the review and is meeting with stakeholders around the State.

The Draft Infrastructure State Environment Planning Policy

By Natalie Day – Solicitor, Henry Davis York

Infrastructure development by statutory authorities is expected to exceed $100 billion over the next decade. However, the planning laws that apply to much of the standard infrastructure is outdated. While the approval process for major projects has been facilitated by Part 3A and the Major Projects SEPP, for regular infrastructure work, agencies are currently forced to deal with the old "model provisions" which were originally developed in the 1930s.

The draft Infrastructure SEPP is intended to streamline the assessment and approval of public infrastructure - especially for smaller scale infrastructure projects which do not have significant environmental or amenity impacts. It is also intended to provide a greater amount of flexibility in relation to where infrastructure can be provided by doing away with the requirement to zone the relevant land as "special use."

To the extent that there is any inconsistency between the draft Infrastructure SEPP and the Major Projects SEPP 2005, the Major Projects SEPP will prevail.

Summary of key features:

- the consolidation of planning regulation relating to project-specific infrastructure under 20 existing SEPP's into one newly created instrument;
- the identification of certain infrastructure development that can be approved by public infrastructure proponents
- the use of "Site Compatibility" statements to govern permissibility, rather than special uses zones;
- the establishment of new guidelines for the characterisation of development which will be "exempt" from the approval; and
- new consolidation requirements which will require State agencies to consult local councils when a new infrastructure development is likely to affect existing local infrastructure or services.

Next steps

Gazettal of the draft Infrastructure SEPP is imminent. Upon gazettal, we anticipate the SEPP will provide a more streamline and expeditious system for the approval of infrastructure development. We also anticipate further regulatory developments in relation to the legal status of Site Compatibility statements.

A new planning principle on bulk, height and scale

By Anneliese Korber - Senior Associate, Henry Davis York

In making its decisions, the Land and Environment Court has been developing planning principles to assist proponents and consent authorities. In a recent case the Court developed a principle dealing with the assessment of bulk, height and scale. In *Veloshin v Randwick City Council* [2007] NSWLEC 428 Commissioner Roseth noted that these terms were probably the most frequently used phrases in a Council's statement of contentions and consequently a planning principle may assist councils and proponents.

Randwick City Council (**Council**) refused consent to a development application that proposed the demolition of an existing building, except for the façade, followed by construction of a three to four storey building at 35-37 St Pauls Road, Randwick near the Ritz Cinema. The proposed new building contained two retail shops, eight one bedroom and two studio apartments and car parking.

The two key issues in the appeal were car parking and whether the bulk, height and scale of the proposal resulted in overdevelopment of the site. In relation to height, bulk and scale, the Commissioner observed that although the terms bulk and scale tended to be used interchangeably, strictly bulk refers to the mass of a building and scale is properly used only when referring to the relative size of two or more things. The new planning principle is set out below.

When applied to the facts, the FSR was unacceptable and that the car parking provided was inadequate. While the visual impact alone was not enough to refuse consent and the reduced height was acceptable, the Commissioner found that the proposal's non-compliance with the FSR control to be unacceptable. The proposal involved an FSR of 2.14:1 and the SEPP 1 provided no justification to vary the development standard of 1.5:1.

This case supplements the decision of Stockland v Manly Council in relation to how proposals should be assessed in terms of the size. The case illustrates that the planning context is critical and an understanding of what is intended by the planning provisions is fundamental.

Planning Principle - Assessment of Bulk, Height and Scale

1. The appropriateness of a proposal's height and bulk is most usefully assessed against planning controls related to these attributes, such as maximum height, floor space ratio, site coverage and setbacks. The questions to be asked are:
   (a) *Are the impacts consistent with impacts that may be reasonably expected under the controls?* (For complying proposals this question relates to whether the massing has been distributed so as to reduce impacts, rather than to increase them. For non-complying proposals the question cannot be answered unless the difference between the impacts of a complying and a non-complying development is quantified.)
   (b) *How does the proposal's height and bulk relate to the height and bulk desired under the relevant controls?*
2. Where the planning controls are aimed at preserving the existing character of an area, additional questions to be asked are:
   (a) Does the area have a predominant existing character and are the planning controls likely to maintain it?
   (b) Does the proposal fit into the existing character of the area?
3. Where the planning controls are aimed at creating a new character, the existing character is of less relevance. The controls then indicate the nature of the new character desired. The question to be asked is:
   (a) Is the proposal consistent with the bulk and character intended by the planning controls?
4. Where there is an absence of planning controls related to bulk and character, the assessment of a proposal should be based on whether the planning intent for the area appears to be the preservation of the existing character or the creation of a new one. In cases where even this question cannot be answered, reliance on subjective opinion cannot be avoided. The question then is:
   (a) Does the proposal look appropriate in its context?

Renewable Energy (New South Wales) Bill 2007

This bill aims to establish a mandatory renewable energy target in relation to all electricity consumed in NSW. The target is to achieve 10% of electricity from renewable sources by 2010 and 15% by 2015.

It operates in a similar manner to the Federal Mandatory Renewable Energy Target (MRET) scheme and closely follows the form and structure of the recently implemented Victorian renewable energy scheme. In the NSW scheme, renewable generators of energy, accredited under the scheme, can create a certificate for each megawatt hour of electricity generated from eligible renewable energy sources.

Certain persons who acquire electricity from the national electricity market for use in NSW or who generate electricity for their own use or for retail supply in NSW will be required to acquire a certain percentage of electricity from renewable energy sources each year. Their targets are set based on their proportion of electricity consumed in NSW.

Retailers will have to acquire and surrender sufficient certificates to meet their target, or pay a civil penalty (which is effectively set at $43 per MWh shortfall)

VICTORIA

Elisa de Wit

Environment Protection (Scheduled Premises and Exemptions) Regulations 2007

The *Environment Protection (Scheduled Premises and Exemptions) Regulations 2007* came into force on 1 July 2007, and have replaced the *Environment Protection (Scheduled Premises and Exemptions) Regulations 1996.*

The Regulations prescribe the premises that are subject to works approval and/or licensing by EPA, and provide for exemptions in certain circumstances. Under the new Regulations, a number of additional categories of sites will be subject to the works approval and licensing requirements. The new Regulations also introduce additional categories of exemptions, and clarify the definitions of existing categories of scheduled premises.

Key changes to the licensing and works approval system under the new Regulations include:

- The introduction of the following new categories of scheduled premises: water desalination plants, facilities that recover energy from waste and premises used for the capture, storage or separation of waste carbon dioxide. Premises falling under the definitions of these categories will require both works approval and licensing;
- The definition of composting facilities has been amended to impose works approval and licensing requirements on those facilities that process more than 100 tonnes of waste a month;
- Poultry farms designed to hold 320,000 or more birds will require works approval;
- Premises used for the washing or cleaning of containers that have held prescribed industrial waste or dangerous goods will require works approval and licensing, and will be required to provide financial assurance;
- The introduction of a new category to deal with premises with an "on-site landfill like cell" used to retain contaminated soils. These premises will require works approval if the total volume of contaminated soil exceeds 1,000 cubic metres (which equates to the clean up of a medium to large service station site).
- Contaminated sites which require long-term management, particularly where there is potential for groundwater contamination, will be required to provide a financial assurance, but will be exempt from works approval and licensing.

Detail on the specific changes to the Regulations can be obtained from the *Regulatory Impact Statement for the Environment Protection (Scheduled Premises and Exemptions) Regulations 2007* and from the EPA website (www.epa.vic.gov.au)

Hazardous waste classification now in force

The *Environment Protection (Prescribed Waste) (Amendment) Regulations 2007* came into effect on 1 July 2007. The Regulations were amended to support the recent changes to the *Environment Protection (Amendment) Act 2006*, under which the landfill levies were increased for the disposal of prescribed industrial waste (PIW).

Under the Regulations, all solid PIW must be classified into hazard category A, B or C prior to being accepted at landfills. All landfill licenses have been updated to reflect the amendment to the Regulations and to specify which categories of waste are acceptable.

The aim of this classification system is to improve treatment standards, and in particular, to improve waste immobilisation processes. It also aims to achieve greater waste separation, which will enable further opportunities for waste avoidance, re-use and recycling to be identified.