



PLANNING SYSTEM

Act and regulation changes

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Related	

Commencement and implementation of the EP&A Amendment Act 2006

This circular advises of the commencement and implementation of the *Environmental Planning and Assessment Amendment Act 2006*, which deals with planning administrators, assessment panels, development corporations, development control plans and contributions plans. The changes took effect from 30 June 2006.

Introduction

The *Environmental Planning and Assessment Amendment Act 2006* (the Amendment Act), which was assented to on 3 April 2006, commenced on 30 June 2006.

The purpose of the amendment is to:

- reduce delays and costs in the assessment of development applications
- help provide infrastructure and other amenities in new land release areas and other sites identified for strategic growth
- help coordinate local and State planning controls.

The Amendment Act amends the *Environmental Planning and Assessment Act 1979* (the Act), and the *Growth Centres (Development Corporations) Act 1974*. It also includes minor amendments to the *Redfern-Waterloo Authority Act 2004*.

This circular provides advice on the implications of the changes to the EP&A Act and the *Growth Centres (Development Corporations) Act 1974*.

Planning administrators and planning assessment panels

1. What are the new arrangements for planning administrators and planning assessment panels?

Under section 118 of the EP&A Act, the Minister for Planning has been able to appoint a planning administrator to perform all or part of a council's functions.

An administrator may be appointed if:

- a council fails to comply with its obligations under the planning legislation, or
- it is recommended by the Independent Commission Against Corruption (ICAC).

A new subsection 118(3) has been inserted in the EP&A Act by the Amendment Act to also allow the Minister to appoint a planning assessment panel to undertake a council's consent authority role or to prepare environmental planning instruments.

The Minister may appoint a planning administrator or a planning assessment panel, or both, if:

- council has failed to comply with its obligations under the planning legislation, including:
 - enforcement of the EP&A Act, an environmental planning instrument or a Ministerial direction, or
 - preparation of a local environmental plan (LEP) that complies with the Standard LEP, or
- performance of the council in dealing with planning and development matters is unsatisfactory, or
- council agrees to the appointment, or
- ICAC recommends it because of serious corrupt conduct by any of the councillors.

Section 118 provides that the Minister for Planning must obtain the concurrence of the Minister for Local Government before appointing a panel or an administrator. The Minister must also publish reasons for appointing a panel or administrator as soon as practicable after the appointment.

When a panel or administrator is appointed, the Minister may, under the new section 118AB, specify the particular functions that the panel or the administrator will exercise, and their priority. In exercising these functions, panels are subject to the Minister's control and direction except in relation to the determination of a development application (section 118AA).

With the new provisions the Minister has more flexibility to develop a targeted response to systemic issues of unsatisfactory performance. For example, planning administrators or panels could be appointed only to look at a particular class of development such as residential development, or to assess all applications lodged but not determined for extended periods of time. These powers will only be used in exceptional circumstances and where it is reasonable to do so. Such a decision may be informed by performance reporting information that the Minister can require councils to submit (see below).

2. What is unsatisfactory performance?

Unsatisfactory performance could be, for example, if a council consistently takes too long to perform its functions in relation to planning and development matters and without valid reason. For example, there could be persistent delays in the time taken by some councils to assess development applications without a demonstrable reason for such delays.

The Minister will gazette 'heads of consideration' which, under section 118, must be taken into account by the Minister if a panel or administrator is appointed to respond to unsatisfactory performance.

In addition, the Department of Planning, in consultation with stakeholders such as the Local Government and Shires Associations (LGSA), will develop a performance reporting system.

In order to gather the information required for the performance reporting system, sections 117(2)(c) and 117(2A) enable the Minister to direct a council or councils to submit reports containing information on their performance in relation to planning and development matters.

Before the Minister directs councils to submit performance information, section 117(4A) requires the Minister to consult with the LGSA and any other industry organisation he considers relevant.

3. How will panels be established?

Section 118AA provides that planning assessment panels will consist of three to five members, appointed by the Minister, who have the relevant skills and knowledge in planning and development matters. The Minister will appoint a chairperson

for each panel, and the panel members may appoint a deputy chairperson.

To establish a panel, the Minister must list the panel in Schedule 5B of the EP&A Act by Order published in the Gazette.

Under section 118, a panel may not exercise a council's functions continuously for more than five years. A panel's appointment and functions is to be reviewed (in consultation with the Minister for Local Government, the LGSA and other relevant industry organisations) after it has been in place for more than two years.

4. What are the procedures for the operation of panels?

Part 2 of Schedule 5B of the Act contains provisions relating to the procedures for panel meetings. The general procedure for calling meetings of a panel and for the conduct of business at those meetings is to be determined by the panel. The Minister's order of appointment of a panel may specify whether a panel's meetings must be conducted publicly in certain circumstances.

The Amendment Act also allows for the preparation of regulations relating to the term of office of a panel member, the filling of panel vacancies, the procedure for panel meetings, and matters relating to out of session decisions.

5. How are panel members appointed and removed?

Part 2 of Schedule 5B of the Act contains provisions relating to the members of panels. Panel members will be appointed by the Minister on a part-time basis for a term (not exceeding three years) specified in the instrument of appointment. The Minister can remove a member from office. If the office of a member becomes vacant, a person is to be appointed to fill the vacancy.

Deputy members may be appointed to act in the place of an absent member. A deputy has all the functions of the member, except the functions of chair or deputy chair. A deputy may be appointed to act in the place of any panel member or a particular panel member.

6. How must councils assist planning administrators or panels?

The Minister for Planning may direct a council to provide staff and facilities to an administrator or panel under section 118AD. Regulations may be made, under section 118AF, regarding the appointment of staff, or the provision of office accommodation by council, for an administrator or panel.

In addition, section 118AD provides that penalties may be imposed if a councillor or council staff member obstructs an administrator or panel.

7. Who will pay a panel or administrator's costs?

Section 118AC of the Act provides that a council must pay the costs of an administrator or panel exercising that council's functions to the Director-General of the Department of Planning. However, the Minister may exempt the council from such payments and resolve any dispute about the payments.

8. How will a panel or administrators' activities be reported?

Under section 118AE, the Department of Planning's annual report must include details of the financial activities, and the exercise, of council functions by planning administrators and panels.

Special infrastructure contributions

9. What are special infrastructure contributions?

The Amendment Act introduces special infrastructure contributions, which are development contributions that may be levied by the State Government in 'special contributions areas' (see below).

The Minister will determine the level and nature of special infrastructure contributions, which will be imposed as conditions of consent. If the special infrastructure contributions will provide infrastructure worth greater than \$30 million the Minister must consult with the Treasurer in the determination of the nature and level of the contributions.

Special infrastructure contributions expand the existing mechanisms to fund infrastructure. They respond to limitations with the existing arrangements for development contributions.

For instance, special infrastructure contributions can be levied for regional infrastructure outside the locality of the development, such as railway lines, which benefit development across several council areas.

Special infrastructure contributions can also be levied where land ownership is fragmented but where facilities are needed upfront. Currently such infrastructure is provided through environmental planning instruments that require 'satisfactory arrangements' to be met before development can proceed. The arrangements are usually negotiated through planning agreements, but this approach can be cumbersome where land ownership is fragmented.

10. Will there be public consultation on special infrastructure contributions?

Section 94EE of the Act provides that the Minister, in determining the nature and level of special

infrastructure contributions for development within a particular special contributions area (other than a growth centre), must do one or more of the following:

- consult with owners of land in the special contributions area and other relevant stakeholders
- publicly exhibit a proposal in relation to the level of contributions and seek submissions within a reasonable time in relation to that proposal
- establish a panel that, in the Minister's opinion, represents the interests of the various relevant stakeholders and consult with that panel.

In addition, the Minister is required, under section 94EE, to publicly release the determination of the nature and level of special infrastructure contributions (in any special contributions area) including the reasons for the nature and level of contributions.

11. Where are the special contributions areas?

Special contributions areas are listed in Schedule 5A of the EP&A Act. Initially, these areas will consist of land in any growth centre declared under the *Growth Centres (Development Corporations) Act 1974* (such as the North West and South West growth centres).

Under section 94EG, the Minister can, by order published in the Gazette, amend Schedule 5A to create, repeal or change a special contributions area.

Section 94EG provides that the Minister is to consult with the relevant peak industry organisations before declaring a new special contributions area (other than a growth centre).

12. What can special infrastructure contributions be used for?

Section 94ED of the Act provides that special infrastructure contributions must relate to the capital or recurrent costs of public amenities or services, affordable housing, transport or other infrastructure, or environmental conservation.

Under section 94ED(2) and section 94EE(2)(c), special infrastructure contributions may be used to fund infrastructure outside a special contributions area as long as the need for such infrastructure arises as a result of the development in the special area. This means that special infrastructure contributions may be used to fund, for example, regional public transport infrastructure, which extends outside a special contributions area but only if the infrastructure will provide benefits to the development.

13. What are the benefits of special infrastructure contributions?

The ability to collect special infrastructure contributions will enable the Government to:

- ensure the timely delivery of infrastructure needed by communities
- take advantage of economies of scale by pooling of funds to deliver infrastructure
- coordinate local and State levies so the total amount of levies is contained and there is no double-dipping for the same infrastructure
- provide certainty for business and communities that infrastructure will be provided.

14. How much will a special infrastructure contribution be?

Under section 94EE, a special infrastructure contribution may be a reasonable monetary amount based on the cost of providing infrastructure in relation to the development. Alternatively, it may be a reasonable fixed percentage of the proposed cost of a development or class of development.

Under section 94EF(5), a special infrastructure contribution may be provided as works in-kind or through the dedication of land (in addition to being a monetary contribution).

If land is provided to a consent authority (other than the Minister) as a special infrastructure contribution, section 94EH enables the Minister to direct the consent authority to sell all or part of that land, or to transfer any such land to a public authority that is to provide, or has provided, infrastructure.

15. Who can collect special infrastructure contributions?

Section 94EF provides that the Minister may impose a special infrastructure contribution as a condition of development consent. If the Minister is not the consent authority, the Minister may direct the relevant consent authority to impose a condition of consent requiring a special infrastructure contribution.

If a council fails to impose a special infrastructure contribution as a condition of consent, despite a direction to do so, the Minister may impose the condition as though the consent authority imposed it.

16. Can a consent authority change a special infrastructure contribution?

Yes, if the Minister agrees. That is, section 94EF(7) provides that a condition of consent, in relation to a special infrastructure contribution, cannot be modified without the approval of the Minister.

17. What happens with development contributions under section 94 and section 94A?

Section 94EF provides that special infrastructure contributions are in addition to development contributions imposed under section 94 or 94A.

Under section 94EA (2A), a contributions plan can not authorise a condition of consent to collect a section 94 contribution if the public amenities or services to which that condition relates have been or will be provided by special infrastructure contributions. This means that section 94 contributions can not be levied for the same purpose as a special infrastructure contribution. However, a savings and transitional provision provides that this section does not affect a section 94 contribution imposed before the commencement of the section.

Section 94A(2A) provides that a consent authority cannot impose a fixed development consent levy under section 94A on land within a special contributions area unless the Minister or the relevant development corporation agrees.

18. Can planning agreements be made in a special contributions area?

Yes, however, under section 93F(5A), a planning authority, other than the Minister, is not to enter into a planning agreement under section 93F of the EP&A Act that excludes the imposition of a special infrastructure contribution unless the Minister or the relevant development corporation agrees.

19. Can contributions for affordable housing be levied in a special contributions area?

Yes, special infrastructure contributions may be used for affordable housing purposes. However, section 94F(6) provides that affordable housing contributions may not be levied separately, under section 94F of the Act, in a special contributions area.

A transitional provision provides that section 94F(6) does not affect a condition imposed under section 94F before the commencement of that section.

20. Where will special infrastructure contributions be held?

Special infrastructure contributions will be held in a Special Contributions Areas Infrastructure Fund that will be established and administered by the Director-General of the Department of Planning and the Secretary of NSW Treasury. The monies paid into the fund will include:

- monetary special infrastructure contributions
- the proceeds of the sale of any land received as a special infrastructure contribution
- any money appropriated by Parliament for the purposes of the fund
- the proceeds of the investment of money in the fund
- any other money required to be paid into the fund.

The money in the fund may only be used to pay public authorities for the provision of infrastructure; and to meet the fund's administrative expenses.

21. What are the appeal rights for special infrastructure contributions?

There are no rights to appeal against the level and nature of special infrastructure contributions. There are also no rights to appeal a direction of the Minister, or the imposition of a condition of consent at the Minister's direction, to collect a special infrastructure contribution.

22. Will there be any review of the special infrastructure contributions provisions?

The Amendment Act requires a review of the provisions relating to special infrastructure contributions after those provisions have been in operation for three years. The review is to determine whether the policy objectives of those provisions remain valid and whether the terms of the Act remain appropriate for securing those objectives.

Contributions plans

23. What are the Minister's new powers in relation to contributions plans?

Councils must prepare a contributions plan under section 94B of the EP&A Act before they can collect development contributions under section 94 or 94A of the EP&A Act.

Section 94EAA in the Act provides that the Minister may direct a council to make, amend or repeal a contributions plan. The Minister may also act in the council's place to make, amend or repeal a contributions plan if the council fails to act as directed, or if the council agrees. The Minister is not subject to the regulations when making, amending or repealing a contributions plan.

24. Which contributions plans will be made, amended or repealed?

The Minister may choose to intervene in a contributions plan if, for example, the requirements in a plan are considered inappropriate. For example, the Minister may consider the level of development contributions to be too high or too low, or the services to be provided by those contributions to be unsuitable.

The Minister may also intervene to coordinate a contributions plan with the State Government's objectives and priorities for infrastructure. For example, the Minister may wish to ensure that the right mix of infrastructure will be provided using State and local development contributions, and that there is no 'double-dipping' for the same infrastructure.

In order to provide the Minister with sufficient information to determine whether to intervene in a contributions plan, section 94EA(4) requires councils to provide a copy of any contributions plan to the Minister as soon as practicable after it has been approved.

25. What are the appeal rights if the Minister intervenes in a contributions plan?

Section 94EAA of the Act provides that a person can not appeal against the process for making a contributions plan, or the reasonableness of a section 94 contribution determined in accordance with a contributions plan, if that plan is made, amended or repealed by, or at the direction of, the Minister.

Development control plans

26. What are the Minister's new powers relating to development control plans?

Section 74F of the Act provides that the Minister may:

- direct a council to make, amend or revoke a development control plan (DCP), or
- make, amend or revoke a DCP, as if the Minister were the council, if the council fails to act as directed.

This will help ensure that local and State development controls are coordinated. For example, the Minister may intervene in a DCP to ensure that it does not undermine an LEP, prevent appropriate development or increase the cost of development.

27. Should councils submit their DCPs to the Department?

Clause 25AB of the EP&A Regulation already states that a council must provide the Director-General of the Department of Planning with a copy of any DCP within 28 days of it being made. This will assist in decision-making under section 74F.

Arrangements will be put in place to facilitate the submission of DCPs to the Director-General by councils.

28. Does the one-DCP-per-site rule apply to the new powers?

Under section 74C(2) of the EP&A Act only one DCP is permitted per planning authority for the same land. Compliance with this requirement is required once a council has prepared its new principal LEP that adopts the provisions of the Standard Instrument or by 31 March 2011, whichever is sooner. (See Circular PS 06-012 'New transitional arrangements for development control plans' for more information.)

DCPs made or amended by or at the direction of the Minister do not have to comply with the section 74C(2) requirement to have only one DCP for the same land.

This will avoid the need to make unnecessary amendments to any other DCP that applies to the same land as one that is made or amended by the Minister.

Development corporations

29. What are the changes relating to the chief executive of a development corporation?

Schedule 3 of the Amendment Act makes various amendments to the *Growth Centres (Development Corporations) Act 1974* to provide that the Minister may appoint a chief executive of a development corporation that is not the Director-General of the Department of Planning.

30. What are the new requirements for reporting a development corporation's activities?

Section 23 provides that a development corporation must prepare an annual statement of business intent for the Minister and Treasurer. The statement must set out the corporation's business plan for the next year (or any other period requested) and should include:

- the objectives of the corporation
- the intended nature of its activities, including the intended scope of those activities
- the corporation's performance targets
- its accounting and reporting policies and practices
- details of the corporation's activities in connection with special infrastructure contributions
- any other matter requested.

A development corporation may also be required to submit any other reports, statements or plans requested by the Minister, for the approval of the Minister and Treasurer.

These amendments will help coordinate the provision of infrastructure and ensure that the expenditure and business activities of a corporation are transparent and accountable.

Further information

Copies of the relevant legislation, including the Environmental Planning and Assessment Amendment Act 2006 (as made), the *Environmental Planning and Assessment Act 1979* (consolidated), and the *Growth Centres (Development Corporations) Act 1974* (consolidated) are available on the Parliamentary Counsel Office's website at www.legislation.nsw.gov.au (see 'As made' and 'Browse A to Z in force' respectively).

Note: This and other Department of Planning circulars are published on the web at www.planning.nsw.gov.au/planningsystem/practicenotes.asp.

Authorised by:

Sam Haddad
Director General

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