



PLANNING SYSTEM

Act and Regulation changes

Circular	PS 06-004
Issued	13 February 2006
Related	

Prohibition of retrospective construction certificates and changes concerning compliance certificates

This circular is to notify councils, private certifiers, developers and the community that the *Environmental Planning and Assessment Act 1979* (EP&A Act) has been amended to make clear that construction certificates for building or subdivision work cannot be issued after work has commenced, and that the obtaining of compliance certificates cannot be made a condition of development consent. The changes take effect from 3 March 2006.

Construction certificates

In January 2005 Justice Talbot of the Land and Environment Court decided, in *Marvan Properties Pty Ltd and Anor v Randwick City Council* [2005] NSW LEC9, that a construction certificate could be validly issued for building work that had commenced (that is, the construction certificate operated retrospectively) provided the certifying authority was satisfied that the plans and specifications meet the requirements of the EP&A Act and EP&A Regulation 2000.

Justice Talbot stated that his decision does not prevent a civil or criminal sanction being sought for the breach of section 81A(2) of the EP&A Act. Section 81A(2) prohibits the commencement of the erection of a building until a construction certificate has been issued.

Amendment to the EP&A Act

The Department is of the view that it is preferable that construction certificates be issued before building work commences.

If a construction certificate could be issued after building or subdivision work has started, the likelihood of the work not being designed and constructed in accordance with the relevant consent and required standards would increase. In many cases it is far more difficult to assess the compliance of building or subdivision work after work has commenced.

To ensure the proper functioning of the certification system, section 109F of the EP&A Act has been amended to provide that construction certificates, issued by either private certifiers or councils after the building or subdivision work to which the certificate relates is physically commenced, have no effect. The amendment has been made through the *Building Professionals Act 2005* (Schedule 3), assented to on 7 December 2005.

When the amendment comes into effect

The amendment to section 109F will come into effect on 3 March 2006.

Developments that are affected

The amendment (section 109F(1A)) applies to all construction certificates for building or subdivision work, except to:

- construction certificates issued before 3 March 2006, or
- building or subdivision work that was physically commenced on the land (to which a relevant development consent applies) before 3 March 2006.

These transitional and savings provisions mean that retrospective construction certificates issued before 3 March 2006 in respect of work which had already commenced are valid. They also mean that a construction certificate may be issued after building or subdivision work has commenced,

provided that the work was physically commenced before 3 March 2006.

For construction certificates to be valid in either of these circumstances the certifying authority needs to be satisfied that the plans and specifications meet the requirements of the EP&A Act and EP&A Regulation. It is important to note that even under these limited circumstances where construction certificates have been or may be issued, the erection of a building or the commencement of subdivision work before a construction certificate has been issued are still offences under sections 81A(2) and (4) of the EP&A Act.

Compliance certificates

Amendment to the EP&A Act

The EP&A Act has also been amended to make it clear that obtaining compliance certificates cannot be required by councils through conditions of development consent or by councils or private certifiers through conditions on complying development certificates. (Compliance certificates may certify, amongst other things, that certain requirements for building or subdivision work have been complied with, or they may specify the classification of a building under the Building Code of Australia.)

Compliance certificates were not intended to be mandatory. Reliance on them is at the discretion of the relevant certifying authority or principal certifying authority (PCA).

The amendments to section 80A and section 85 of the EP&A Act make it clear that applicants or the certifying authority or principal certifying authority can choose whether to obtain a compliance certificate.

Applicants may obtain compliance certificates to demonstrate that detailed designs comply with conditions of approval or that works have been properly executed in accordance with an approval.

The PCA (council/consent authority or a private certifier) may specify in a council policy or service contract with the applicant that before the issue of an occupation certificate the applicant would need to obtain a number of compliance certificates on aspects of the development. These decisions cannot be made by conditioning development consents or complying development certificates.

The amendment will prevent duplication and unnecessary regulation – for instance where a council requires a compliance certificate through a development consent condition when the certifying authority for the development (which may be a private certifier) does not consider such a certificate is necessary or where it is impractical to obtain a compliance certificate.

The amendment has been made through the *Building Professionals Act 2005* (Schedule 3), assented to on 7 December 2005.

When the amendment comes into effect

The amendment to sections 80A and 85 of the EP&A Act will come into effect on 3 March 2006.

Developments that are affected

The amendments do **not** apply to a development consent or complying development certificate issued before 3 March 2006, but apply to each development consent and complying development certificate issued on or after that date.

Further information

Legislation

The EP&A Act and EP&A Regulation may be accessed on the Parliamentary Counsel Office's website at www.legislation.nsw.gov.au. Note: the amendments to sections 80A, 85 and 109F of the Act will not appear as 'In Force' until 3 March 2006.

The legislation amending the EP&A Act — the *Building Professionals Act 2005* (assented to 7 December 2005 but yet to commence) is also available from Parliamentary Counsel Office's website at www.legislation.nsw.gov.au.

Related information

Department of Urban Affairs and Planning *Guiding Development: Better Outcomes* practice notes:

- 'The use of compliance certificates', September 1999
- 'Construction certificates for building work', September 1999.

Note: This circular and others issued by the Department of Planning are available on the Department's website:

[www.planning.nsw.gov.au/planningsystem/practice notes.asp](http://www.planning.nsw.gov.au/planningsystem/practice%20notes.asp).

Authorised by:

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Important note

This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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