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NEWSLETTER

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Ascham School Kitchen and Dining Refurbishment © Chris Matterson Photography

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This Edition

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THE IMPORTANCE OF THE MASTER PLANNING PROCESS

Land is a finite resource and one of the largest assets of many organisations, and the way in which land is used affects its present and future value. A Master Plan, which provides for careful planning of land use, is a worthwhile investment as it assists your organisation to optimise the use of your property and facilities. A good Master Plan analyses and finds the best fit between the efficient, effective and sustainable use of land.

Ill-informed and poorly timed decisions can affect the extent to which an organisation can achieve its strategic objectives. It is therefore important that a Master Plan underpins an organisation's strategic vision, provides a tool by which to deliver that strategic vision, and is flexible and adaptive enough to move with changes in an organisation's strategic plan. A Master Plan should be reviewed and updated regularly.

What is a Master Plan?

Drawing on our experience in the Master Planning process, EPM have developed the following Master Plan statement:

"A master plan is a tool to guide the way in which land is acquired, developed and used to underpin a strategic plan. It is not a detailed design. It demonstrates the way in which the built and natural environment can be harmonised in an efficient, effective and sustainable way. It responds positively to constraints of all kinds, maximises opportunities and is flexible and adaptable to accommodate changes in other strategies"

A Master Plan offers a host of benefits to an organisation, including:

- Identification of the capacity of the land
- Identify the land & buildings that are required in the short, medium & long term and proposed locations for these.
- Provide an opportunity to engage the users/community and involve these stakeholders in the organisation's strategic vision
- Assists to manage expectations about the timing of new facilities, when to commence planning of these, and also decisions regarding whether to recycle old facilities vs replacement of old facilities with new.
- Enables capital works budgets in line with proposed development, whilst enabling better management of cost of repairs and maintenance
- Enable projects & property acquisition to be prioritised & funded accordingly, and assists in deciding what not to purchase
- Leverage opportunities for project funding
- Enable a statutory planning approvals strategy that increase the prospects for obtaining development approvals in a timely and cost efficient way, by considering all legislation and environmental planning instruments.

How is a Master Plan developed?

The process of developing a reliable and robust master plan involves three phases:

- Phase 1 – Stakeholder consultation and mapping the constraints
- Phase 2 – Developing the master plan brief
- Phase 3 – Developing the master plan

The Master Planning process provides an opportunity to consult with key stakeholders, which should be done

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THE IMPORTANCE OF THE MASTER PLANNING PROCESS

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before preparing a brief setting out the needs and expectations of the organisation and its stakeholders.

It is advisable that a Master Plan is informed by the constraints to development. The extent to which constraints are investigated upfront will affect the cost and time taken to draft the Master Plan. A thorough constraints analysis completed upfront would decrease the risk of implementing an ineffective Master Plan, however this implies a trade-off against cost and time which should be weighed up when approaching a Master Plan. The master plan brief does not propose the solution. Rather, it sets out the challenge for the Master Plan to address.

Various consultants would be required in order to map the constraints and opportunities to development. Depending on the site, the constraints may include the following categories:

- **Physical** - limitations and constraints of existing structures; the shape and size of land; and the location and capacity of existing services infrastructure.
- **Operational** - constraints arising out of the day-to-day operations of the school
- **Legislative** - constraints from applicable environmental planning legislation and instruments.
- **Environmental** - constraints arising out of things such as heritage items, heritage conservation areas, bush fire prone land, ecological features and overland flood paths.
- **Social –** constraints that stem from managing impacts on adjoining property such as noise, traffic, loss of privacy and amenity, overshadowing and construction.
- **Land Tenure** - constraints from restrictions on land title, such as covenants, easements, rights-of-way and underground services controlled by water and energy supply authorities and local councils.

The process of identifying the constraints to development should reveal potential land-use opportunities, including the option of acquisition of adjoining property. It is worthwhile knowing as much as possible about the intentions of neighbouring land owners and their land at the time of preparing a Master Plan, as this could reveal opportunities for more efficient, effective and sustainable development.

Once the brief is developed, the Master Plan is usually prepared by an urban designer or architect, with assistance from other consultants. The lead design consultant can be appointed in a variety of ways, including single-select process, competitive tender, or through a design competition. The benefit of a design competition is that it tends to generate innovative solutions by sourcing different ideas, which could be particularly attractive on a complex or spatially constrained site.A Master Plan is an important tool used to underpin a strategic plan, and to guide the way in which land is acquired and developed. The time and cost to prepare a Master Plan is largely dependent on factors such as the approach taken to investigation of constraints as well as the procurement method for the lead design consultant. EPM have extensive experience in Master Planning and are able to discuss options and associated risks with your organisation in order to determine the best approach.

Danaë Bain
Associate

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DEVELOPMENT CONSENT CONDITIONS AND COMPLIANCE

In recent months we have been called to advise clients about compliance with conditions of development consents and enforcement action taken by consent authorities such as local Councils and the Department of Planning and Environment.

Section 9.58 of the *Environmental Planning & Assessment Act 1979* **(EP&A Act)** provides for the issuing of penalty notices for certain offences under the EP&A Act and the *Environmental Planning & Assessment Regulation 2000* **(Regulation)**. Such notices can be issued by the local council, the Environment Protection Authority or the Department of Planning & Environment. The maximum penalty that can be imposed by a penalty notice on a corporation under the Regulation $15,000.00 and for an individual the maximum penalty is $7,500.00.

In one case a local council issued six separate penalty infringement notices for failing to comply with conditions of a development consent with penalties totalling $36,000.00. The alleged breaches related to conditions of consent which imposed conditions for activities associated with construction such as heavy vehicles entering and leaving a site contrary to an approved route, failure to ensure compliance with a construction management plan, failure to comply with an approved sediment and erosion control plan.

In a separate case the Department of Planning & Environment issued several penalty notices to a construction contractor for failing to comply with conditions of consent relating to on site detention of stormwater.

We are also aware of penalty notices being issued for undertaking construction work outside of approved hours particularly on weekends. Once a penalty notice is issued the recipient has the option of paying the penalty or defending the matter usually in the Local Court. Once issued the recipient is given the opportunity to make written submissions as to why the penalty notice should not have been issued or in the alternative asking for leniency. This process involves making a submission via the Service NSW website and based on our recent experience it is very cumbersome and time consuming. Most importantly it is not clear if and when the submission is forwarded to the agency who issued the penalty notice.

It is also important to note that as an alternative to issuing a penalty notice a consent authority may also commence proceedings against a person or corporation having the benefit of a development consent for alleged breaches of such a consent in the Local Court or the Land and Environment Court. The maximum penalty for a corporation for a breach of the EP&A Act ranges from $1 million to $5 million and for individuals the maximum penalty ranges from $250,000.00 to $1 million.

In view of the recent enforcement activity that we have observed it is important that anyone who is acting on a development consent including contractors must be aware of the implications arising from a breach of the EP&A Act or the Regulation. It is also important to note that failure to comply with various management plans which are required to be prepared before construction commences for example will also constitute a breach of the EP&A Act. Such plans include a construction management plan, a traffic management plan, an erosion and sediment control plan and a vegetation management plans.

Because of the potentially serious penalties which can be imposed for breaches of the EP&A Act and Regulation it is important that those who have the benefit of a development consent and those who are acting on a development consent such as a construction company ensure that they are familiar with all conditions of a development consent and particularly those conditions which regulate construction activities as well as ensuring compliance with approved plans required to be prepared as a condition of consent.

Patrick Holland
Partner

McCullough Robertson Lawyers

Lawyers | McCullough Robertson

AMENDMENTS TO THE NSW PLANNING LEGISLATION

On 1 March 2018 a raft of amendments to the Environmental Planning and Assessment Act 1979 (the Act) came into effect.

The most obvious change has been to the structure of the Act. Many of the old familiar provisions have now been relabelled. For example, Section 79C (the overarching provision governing evaluation of applications) is now known as Section 4.15. Section 96 (modification of consents) is now known as Section 4.55.

That said, for the most part, the amendments amount to an adjustment of the current planning system, not an overhaul. There have not been major changes to the substance of the legislation.

Some of the more important changes are:

- Three new objectives have been introduced into the Act, including one objective that planning assessment take account of design and amenity of the built environment. This elevates the importance of design in both project formulation and assessment.

- Independent Hearing and Assessment Panels (now called Local Planning Panels) are now compulsory in all councils in the Sydney and Wollongong metropolitan areas.

- The Department of Planning will introduce an online standard format for DCPs, in the same way as LEPs now follow a standard format. This will make accessing and interpreting DCPs quicker and cheaper. This is not expected to be rolled out until mid-2020.

- Councils' ability to enforce conditions of complying development certificates (CDCs) will be increased. Councils will be able to stop work for up to seven days on a complying development site to investigate whether the construction is in line with the CDC. The courts will be able to declare a CDC invalid if it does not meet the relevant standards. Councils will also be able to impose a levy on CDCs to fund monitoring and enforcement of CDC conditions.

- The internal review process of consent authorities, formerly contained within Section 82A of the Act, will be expanded to incorporate state significant development and integrated development.

- Enforceable undertakings will be available to consent authorities as a compliance measure in respect to development consents and as an alternative to the traditional options of a council fine or court prosecution.

Please contact EPM Planning if you have any specific questions about the effect of the new legislation.

Mark Bolduan
Manager, Urban Planning Group

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DO THE PRIVACY ACT AND NOTIFIABLE DATA BREACH RULES APPLY TO ME?

On 22 February 2018 the mandatory reporting of Eligible Data Breaches commenced. Holding Redlich outlines the new regime for the Autumn edition due to the potential impact on all types of businesses, whether or not related to projects and construction.

Does the Privacy Act apply to my organisation and am I caught by the Notifiable Data Breach legislation?

The obligation to have a privacy policy arises under Australian Privacy Principle (APP) 1, which forms part of the *Privacy Act* 1988 (Cth) which applies to Australian companies, trusts and other forms of organisations with annual revenue in excess of $3 million per annum.

An organisation which is bound by the Privacy Act must

"take such steps as are reasonable in the circumstances and systems relating to the entity's functions or activities that.... will ensure the entity complies with the Australian Privacy Principles... and will enable the entity to deal with enquiries or complaints from individuals about the entity's compliance with the Australian Privacy Principles."

This is followed by an obligation to have a privacy policy. The requirement is for

"a clearly expressed and up to date policy... about the management of personal information by the entity"

Do I hold Personal Information?

Personal information is defined under the Privacy Act to be information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonable identifiable. This includes business contact information as well as customer and supplier information.

Accordingly, each Australian business, with $3 million annual revenue must have documented procedures to do with the handling of personal information by the business.

Ok, so what about notifiable data breaches?

If a business regulated by the Privacy Act suffers an Eligible Data Breach it is now required to notify both affected individuals and the Office of the Australian Information Commissioner (OAIC). Accordingly it is a prudent time for organisations to review their risk profile in the context of Privacy Act compliance.

How do I know if I have had an Eligible Data Breach?

To determine if there is a notifiable data breach from 22 February 2018 there is an obligation to assess a suspected data breach. If an organisation reasonably suspects it has suffered a data breach then it must take all reasonable steps to complete its assessment of whether that breach is an Eligible Data Breach within a maximum of 30 calendar days of becoming aware of the suspected breach.

An Eligible Data Breach is one where the facts and circumstances of the breach, including the nature of the breached information may give rise to a risk of serious harm for affected individuals. This harm may be financial, reputational, emotional or other types of harm.

For example, an Eligible Data Breach may occur:

1 If a business emails a group in relation to sensitive information and cc's others rather than bcc –ing them, thus disclosing information to the wider group;

2 Holds details on suppliers who are sole traders, including their name, address and bank account details as these are high risk of breach;

DO THE PRIVACY ACT AND NOTIFIABLE DATA BREACH RULES APPLY TO ME?

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3 Maintains that records with personal attributes and preferences of customers, which may be able to be combined with other data to cause harm; or

4 Retains a record of details such as concession identifiers which may allow identity theft.

What happens if I have a reasonable suspicion data has been breached?

The OAIC recommends a risk based approach to the assessment and that a 3 stage process involving the following could be an appropriate process.

1 Initiate – decide if an assessment is necessary and who will be responsible.

2 Investigate

3 Evaluate – make a decision based on the outcome of the investigation as to whether the breach is an eligible breach.

The OAIC recommends that the process be fully documented in the event the decision to notify or not is later challenged.

A key takeaway is to have a nominated person responsible for undertaking and reporting on the assessment process, and providing them with the resources to do this task, within the timeframe, in a way that will withstand scrutiny by the regulator.

Our privacy team can assist you with preparing for this new law, including assisting with template documents to implement these new processes and procedures.

Lyn Nicholson
General Counsel, Corporate Group

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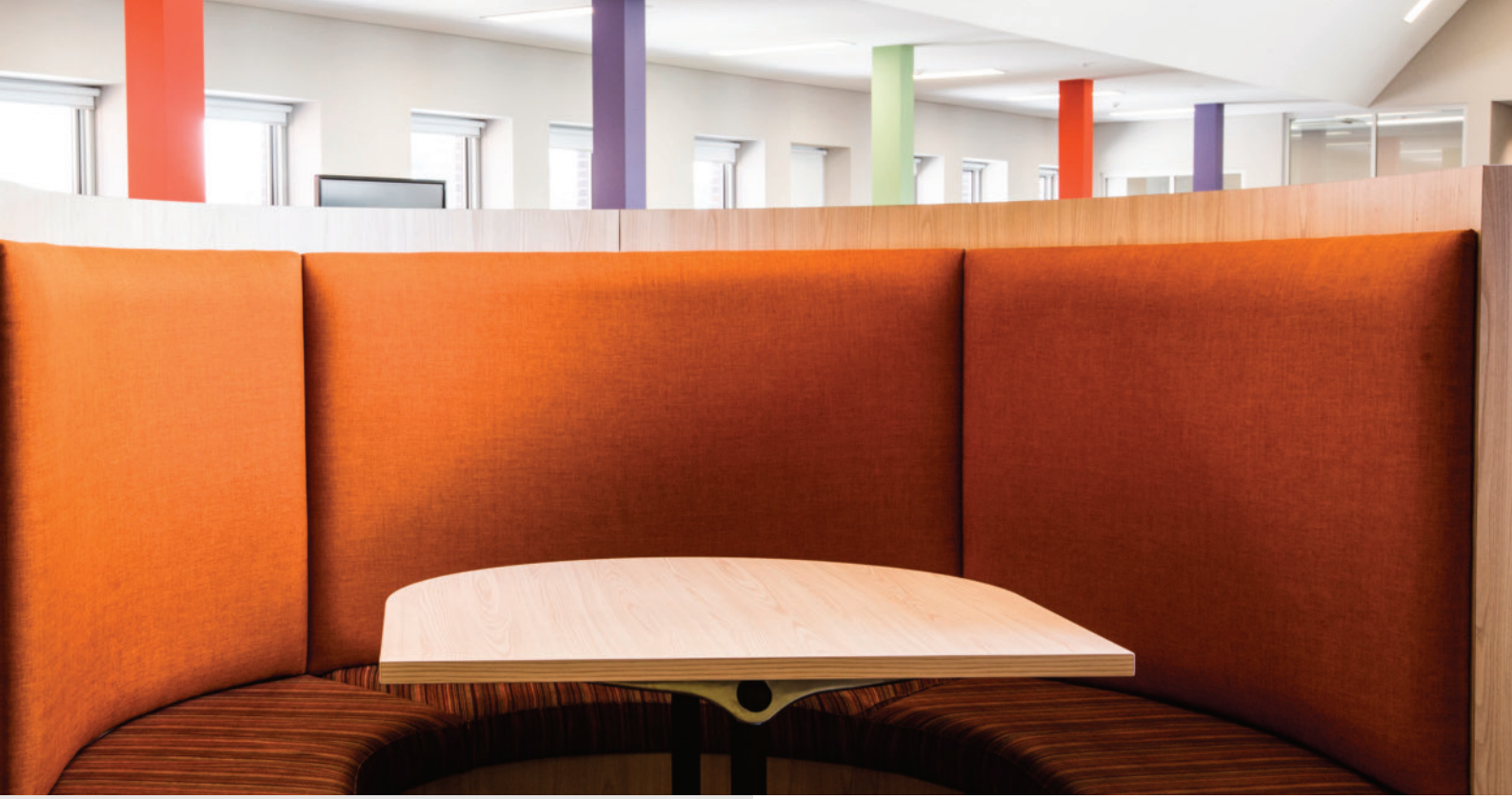

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