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NEWSLETTER

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Cover image:Stockland Cardinal Freeman Village Site Rendered Drawings

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This Edition

- 'Fit for the Future' Policy
- Council Amalgamations
- Council Amalgamations and the Implications for Town Planning
- Project Impact
- Insurance Health Check

'FIT FOR THE FUTURE' POLICY

In late 2011, the NSW government developed its 'Fit for the Future' policy. This policy required the 152 local councils in NSW to review their current financial status and determine whether they are 'fit' to continue operating independently into the future. The Policy encourages neighbouring Councils to amalgamate in order to pool resources and improve performance and efficiency.

The key arguments against amalgamation are that:

(a) local councils should be trusted and capable to make decisions about local issues;

(b) it would diminish councils' abilities to connect with and effectively serve their local communities; and

(c) long-standing communities could be divided if council boundaries are redrawn, leading to loss of local identity and character.

The key arguments for amalgamation are that:

(d) council's role is becoming more complex. Assessing complex developments now requires more specialised staff, more money and greater coordination with neighbouring councils and state and local government. Larger organisations would attract higher calibre staff and remove the need to coordinate across multiple council areas;

(e) it would allow for more even distribution of resources across regions;

(f) having more standardised planning regulations across larger regions would encourage investment by increasing the certainty and efficiency of doing business in NSW;

(g) state planning policy reforms would move more quickly if state government departments could negotiate with a smaller number of councils. These efficiency savings could then free up funds to be spent on health care, education, and social housing; and

(h) amalgamated councils will have a stronger voice in negotiations with state government.

Councils were required to make submissions to the Independent Pricing and Regulatory Tribunal (IPART) in June this year. These submissions either confirm that the Council is financially 'fit for the future' or propose voluntary mergers with other Councils.

IPART will review each submission and report back to the state government in October 2015.

It is difficult to tell at this stage whether the state government will force amalgamations in cases where IPART determines that particular councils are not 'Ft for the Future'. The state government may provide financial incentives to councils who choose to amalgamate, or encourage other cooperative measures such as joint regional organisations, or shared use of service providers by neighbouring councils.

In our opinion, the council amalgamations are likely to have limited impact on the assessment and determination of development applications in NSW. The respective local environmental plans will still be the primary instrument for determining permissibility of a proposed development.

Patrick Holland
Partner

Lawyers | McCullough Robertson

COUNCIL AMALGAMATIONS

A REMINDER OF THE IMPACT OF LEGISLATIVE REQUIREMENTS AND CHANGES IN BUILDING CONTRACTS

The State Government's push for council amalgamation has raised a number of issues which are currently the subject of fierce debate by different stakeholders.

Whatever the outcome of the proposed amalgamations, Councils are an important pillar of government and their actions can have important consequences during a building project. The interface between councils with building projects is significant, administering rules in respect of planning, the Building Code of Australia, noise and pollution, sewerage, and roads and footpaths among others. Council amalgamations would most likely lead to some degree of change to rules and approvals across different areas in greater Sydney as they shift into different Local Government Areas. This is a timely reminder to parties to construction projects to consider the extent of their obligations and level of risk they have assumed for legislative requirements and changes.

Compliance with legislative requirements and changes are a type of risk to be apportioned between the parties to the Contract. The often used saying that the party in the best position to manage the risk will often apply, but because of the diverse nature of legislative requirements that may apply to any project, parties' obligations may differ significantly from project to project.

Construction contracts will make provision for how the parties are required to:

1. Comply with existing legislative requirements; and

2. Apportion the risk/cost arising from changes in legislative requirements.

What amounts to 'legislative requirements' is generally defined very broadly in contracts to include general instruments such as acts, ordinances, regulations, by-laws, orders or proclamations as well as specific approvals including certificates, licences, consents, permits and approvals. The reason for such broad drafting is so that certainty as to whether any requirements that are or may be imposed on the project are dealt with.

It's important that the parties have taken the time to consider precisely what legislative requirements they will need to satisfy prior to commencement and during the life of the project. The Contractor will (in larger projects) often be required to satisfy all legislative requirements unless specifically excepted in the Contract. If a legislative requirement which might be better dealt with by the Principal is not specifically excepted from this, then the Contractor may (unwillingly) end up being responsible for it.

Legislative changes will usually also need to be met by the Contractor, although provision is often made for situations where this leads to unjust costs being placed on them. Where the legislative change causes the contractor to incur more cost than otherwise would have been incurred, then it will usually be priced as a variation provided that the change could not reasonably have been anticipated by the Contractor. What should reasonably be anticipated will depends on the facts in any situation, but factors such as the length of time from the date of contract until the change and the Contractors familiarity with the particular area of regulation will be relevant.

Tamara Helm
Senior Associate

Kennedys
Legal advice in black and white

COUNCIL AMALGAMATIONS AND THE IMPLICATIONS FOR TOWN PLANNING

On 30 June 2015, the Independent Pricing and Regulatory Tribunal (IPART) deadline for Sydney councils to demonstrate that they are "Fit for the Future" resulted in a number of submissions both for and against councils merging (either wholly, or in part) with an adjoining local government area (LGA). IPART will now review submissions and it is anticipated that scale and capacity (amongst other things) will influence whether or not a council is fit for the future.

Government News reports "Parramatta City Council wants to absorb Holroyd, half of Ryde, large chunks of Auburn and parts of the Hills and Hornsby Councils to double its size and create an empire to rival that of the City of Sydney. Randwick and Waverley councillors are engaged in an internecine war over amalgamation and Hills Shire Mayor Andrew Jeffries is on a mission to annex parts of Hornsby, Hawkesbury and Parramatta.

Meanwhile, most other councils appear to be resisting mergers, instead opting to stand alone, and the Save Our Councils Coalition and Facebook pages dedicated to fighting the mergers continue apace." (June 2015)

If amalgamations proceed, 41 Sydney Councils could be reduced to just 12. Below is a synopsis of what to expect from a town planning perspective:

Although there are many historical examples of both successful and unsuccessful council amalgamations, in each case, efforts have been made to streamline the planning process by adopting planning controls that apply to a broader area.

In 1948, Parramatta City Council (first incorporated 1861) amalgamated with Granville Municipal Council (incorporated 1885); Dundas Municipal Council (incorporated 1889); and Ermington and Rydalmere Municipal Council (incorporated 1891) and it is noted that Parramatta City Council is again considering amalgamation. Remnant facades of former council buildings remain in some LGAs which serve as a key reminder of what was once a more suburb-based approach to local planning and governance.

The standard template based Local Environmental Plan (LEP) will assist with minimising conflict and matters associated with demarcation, but ironically, despite different LEPs sharing the same zoning references, permissible land uses within respective zones and their associated definitions are anything but standard.

Accordingly, alignment of land use definitions, zoning references and prescriptive development standards will be a priority for any new council that is formed following any future merger and a transition period of approximately 10 years is likely to be required for various changes in nomenclature associated with LEPs and Development Control Plans (DCPs) that apply to specific LGAs.

Where inconsistencies exist between existing LGAs with respect to development standards such as height, minimum site area and floor space ratio (FSR) controls, it is anticipated that initial amendments to environmental planning instruments and controls may take shape in the form of local area precinct plans or policies under a new LEP or DCP which still recognise the boundaries and unique characteristics within the former LGA, albeit under broader administrative control.

Developments that benefit from State environmental planning policies including, but not limited to, educational establishments, State Significant Development, seniors housing and exempt/complying development are less likely to be affected by council amalgamations which leaves low scale development that requires submission of a development application (DA) most exposed.

Alternative solutions to amalgamation have been proposed by some smaller councils for a single regional plan that could be adopted by various different councils that wish to remain independent without the need

Image: Local Government Review Panel

STATE PLANNING SERVICES

COUNCIL AMALGAMATIONS AND THE IMPLICATIONS FOR TOWN PLANNING

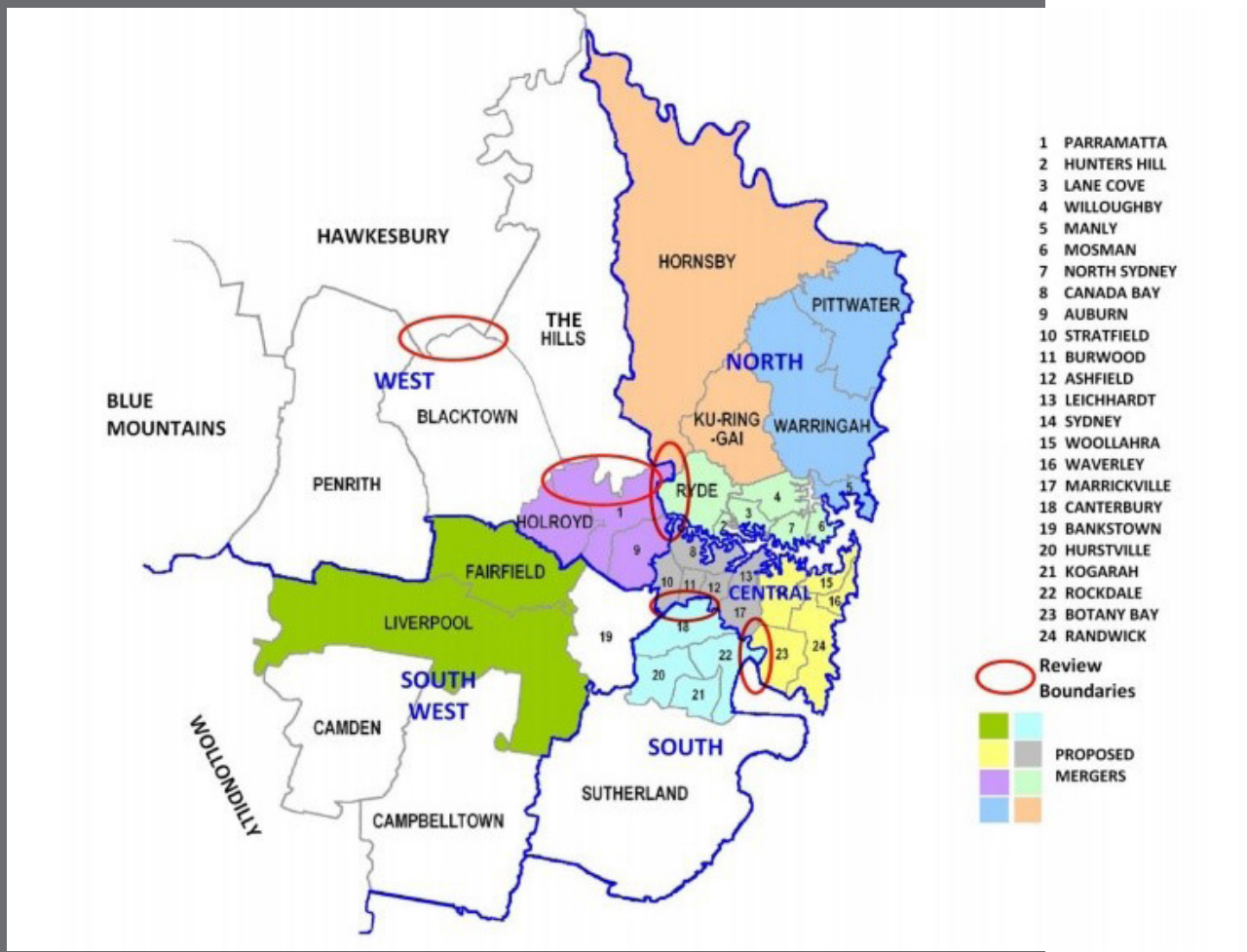
(CONTINUED)

to merge. However, this compromise may create additional unnecessary complexity in the planning process as there has been a high degree of emphasis by the NSW Department of Planning and Environment in the past to have regional environmental plans translated into State environmental planning policies.

A reduction in the number of Sydney councils in NSW may make it easier to implement high level metropolitan strategic plans. However, the current disconnect between the need to look after local environments and communities whilst also needing to address longer term requirements such as infrastructure, amenities and services that are necessary in which to support population growth, must be addressed.

Overall, the impact on the development potential of individual sites as a direct result of any forthcoming council amalgamations in Sydney is likely to be limited, particularly for larger scale developments, many of which benefit from State environmental planning policies which already override local government controls. Notwithstanding, the town planning implications associated with council amalgamations are likely to be significant and will require a period of adjustment that could span many years.

John McFadden
Managing Director



STATE PLANNING SERVICES

PROJECT IMPACT

HOW DO THE DIFFERING APPROACHES OF COUNCILS TO BUILDING WORK AND APPROVALS AFFECT YOUR PROJECT?

EPM's experience on projects in various Local Government Areas tells us that Councils are prone to taking a wide variety of approaches to the administration of development. This is particularly evident in the way that conditions of consent for development are worded and structured. The differing approaches can have varying impacts on the ability of a project to obtain a Construction Certificate and to follow the numerous processes required to commence building work. EPM expects that the pending amalgamation of Councils into new entities will create further 'nuances' in such processes, that will need to be carefully considered in the planning of a project.

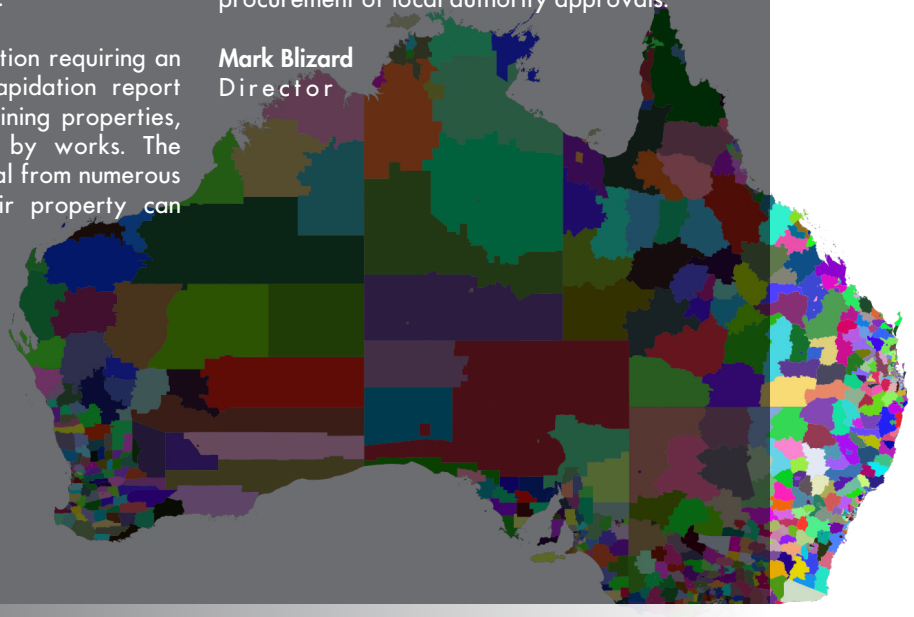
Some Councils can routinely require developers to prepare and submit detailed construction management plans, transport management plans and waste management plans for approval, as a condition of consent that is precedent to the issue of any Construction Certificate. Given the need to iteratively prepare and review such plans until approval is reached, and the timeframes taken by Council for review, such processes can potentially add months of delay to a project in the post-DA period. Preparing items like a construction management plan can also be 'awkward' at a time when a contractor is not appointed.

Councils may set a condition requiring an applicant to obtain a dilapidation report inside and outside of adjoining properties, which could be affected by works. The process of seeking approval from numerous neighbours to access their property can be time consuming enough, but in addition, Council may require the reports to be submitted to them for approval (rather than, say the PCA), creating further possible delay.

Councils take differing approaches to the application processes, design, and contracting of works that affect their infrastructure, including road, driveway, footpath and stormwater works. Apart from differing application forms requiring differing design documentation to be submitted for approval (sometimes detailed design may be required, sometimes none may be required, as Council will provide design to the applicant), some Councils also insist upon carrying out portions of works directly, rather than the developer arranging for the works to be completed.

In considering potential Council amalgamations, EPM has some hope that these varying nuances of local Councils will be made more consistent and streamlined, albeit they may well be relatively new, and untested. However, only time will tell. Regardles of how the matter of amalgamation progresses, careful consideration and management should be applied in the overall planning of a project, particularly regarding procurement of local authority approvals.

Mark Blizard
Director



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INSURANCE HEALTH CHECK

PROTECTING YOUR BUSINESS

Consulting in the construction industry is both difficult and rewarding. Never before has there been so much emphasis on risk transfer through contracts. At Planned Cover we review over 1,500 client drafted consultancy agreements every year and it would be fair to say that not one of those contracts is perfect. All of those agreements contain clauses which potentially enliven exclusion clauses in professional indemnity policies and thereby create uninsured risk for the consultant's corporate entity and also its directors and shareholders.

We recommend a holistic approach to risk management for our clients which we feel is best achieved by protecting professionals and their businesses through a combination of insurance, contract reviews and risk management training.

We have provided below a quick health check of your business protection needs. You should consider the following insurances:

- Professional indemnity insurance

Every professional indemnity insurance policy is different but they all have the same fundamental insurance coverage, that is, they cover you for civil liability arising from breach of your duty of care as a reasonably prudent professional.

That traditional type of policy coverage is no longer sufficient in your industry and insurers have responded to the needs of consultants by providing the following extensions you should consider:

- Cover for contracting out of Proportionate Liability
- Cover for indemnity clauses in contracts
- Cover for limitation of liability clauses which restrict your (your insurer's) ability to seek recovery from other parties
- Cover for Safe Design investigations and prosecutions
- Cover for Fines and Penalties, including Safe Design prosecutions
- Collateral Warranties – are you signing Collateral Warranty Deeds, Side Deeds, or Duty of Care Agreements that create a potential liability to a third party, such as a bank, which you may not otherwise have and thereby trigger an exclusion clause in your policy?

- Directors & Officers/Management Liability Insurance

Practices should have Directors & Officers insurance in place to protect the management decisions and representations of directors and officers.

- Cyber Insurance

Cyber attacks and ransom demands are unfortunately part of doing business today and pose a significant risk for businesses and their directors. The insurance industry has responded to this need with Cyber Insurance.

- Key person policies

Do you have insurance in place to protect your business if a key person dies or is disabled?

- Buy/Sell agreements

Do you have insurance in place if a partner or director dies or becomes disabled and can no longer work?

- Group Salary Continuance

Are you an employer of choice and offering your employees access to a Group Salary policy?

There are of course many other insurances that are required by businesses but the above is a key summary of the important insurances in the professional and asset protection sectors for directors to consider.

Simon Gray
State Manager

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