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NEWSLETTER

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CHALLENGES AHEAD FOR NSW BUILDING CERTIFIERS

VIC LILLI & PARTNERS

The obligations of building certifiers in NSW have steadily increased over recent years in a range of areas. The latest amendments introduced by the EPA Regulation in July 2014 will have a dramatic increase to the obligations in relation to the reporting of 'significant fire safety issues' encountered in 'existing developments'.

The amendments apply to construction certificates (CC), complying development certificates (CDC) and occupation certificates (OC) with the aim being to use the private certification process to upgrade old and substandard buildings having regard to fire safety

Under the previous requirements building certifiers were required as part of a CDC application process to obtain a report, prepared by a separate independent certifier, addressing, amongst other things, an assessment of whether it was appropriate to require the existing development to be brought into total or partial compliance with the current version of the BCA. The legislation required any fire safety upgrading works to be undertaken prior to the issue of the occupation certificate.

The EPA Regulation requires a building certifier to notify the relevant consent authority when carrying out an inspection prior to the issue of CC, CDC or OC of a significant fire safety issue with any part of the building.

However the regulation does not define a 'significant fire safety issue' but relies on a Technical Guideline published by the NSW Department of Planning and Environment for some guidance as to what, in the Department's perspective, constitutes a reportable 'significant fire safety issue'. The Technical Guideline provides that:

- issues considered to be 'minor' do not need to be reported.
- issues that would warrant a fire safety order (order No.6 under s.121B of the EPA Act) are 'significant fire safety issues'.

The reality of this change has it as the burden of the certifier in determining what may constitute a significant fire safety issue in any particular set of circumstances.

The EPA Regulation stipulates which parts of an existing building are to be inspected for the purposes of satisfying the inspection obligations. It is not entirely clear from the regulations whether, and to what extent, other parts of an existing building might also need to be inspected for the purposes of satisfying the duty to inspect, including those parts of a building not directly 'affected by the development' or which do not form part of an 'egress route'.

Once notified by the building certifier the challenge of local council will then be to assess each and every notification received and then decide to do one of the following:

- Decide that no action should be taken.
- Issue a fire safety order that specifies how the significant issue must be addressed.
- Issue a fire safety order that directs the owner to determine and specify how the significant issue will be addressed. This will result in a further fire safety order requiring that the agreed remedy be completed within a specified period of time.

The new amendments are founded on the grounds of public policy as there have always been limited options and resources within local councils and the NSW Fire Brigade to identify, inspect and remedy significant fire safety defects in existing developments. At the coal face of development, building certifiers, are well placed to identify fire safety issues. However the major concerns within the certification community is the associated and potentially onerous liability that will potentially flow from a failure to correctly identify significant fire safety issues. There has been an outcry from the NSW Association of Accredited Certifiers to repeal or amend these reforms to the EPA Regulation but as usual it appears it has again fallen on deaf ears regarding whether the reforms will be revisited.

Vic Lilli

Director

THE IMPORTANCE OF DOCUMENT CONTROL

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Attention to detail in the naming, numbering, and revision of drawings and specifications is critical to ensure consistency and mitigate problems with discrepancies during the various project phases.

Design documentation is subject of review and adjustment as required to reflect the flow of knowledge that is progressively applied from the early phases of design development all the way through to the point in time that it reflects the as built environment.

For this reason, diligence with the adjustment of alpha and/or numeric revisions of documentation, along with succinct descriptions of the changes made to the documentation will serve well to provide a forensic trail should the need arise.

By way of example:

- A consultant produces a structural steel drawing, Roof Framing Plan, S11 Rev A for a tender.
- On the eve of going to tender, it is realised that a number of steel trusses are not shown on the drawing. The consultant expeditiously amends the drawing and issues this drawing to the Project Manager, as S11 Rev A.
- As the drawing is of the same title and revision previously issued, the drawing is presumed to be the same as that already on file issued for tender.
- Subsequent to the tender process, the contract is formed around the drawing S11 Rev A that is missing the trusses.
- During construction, the consultant arrives on site and observes that the trusses have not been installed. Thereafter, a significant cost variation arises on the project.
- The stakeholders are then required to resolve the matter with the least time and cost impact on the Client.

Poor document control can have significant time and cost consequences. Good document control, including unique revision numbers, clouding all changes, and adding short notes to the revision history box will all serve to avoid unsavoury time and cost impacts on the project.

Mark Blizard
Director

SEPP 65 REVIEW TO INTRODUCE GREATER FLEXIBILITY FOR RESIDENTIAL FLAT DEVELOPMENT

On 23 September 2014, the NSW Government indicated its intention to review State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development (SEPP 65) in order to introduce greater flexibility. DFP outlines the proposed changes as follows:

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The draft SEPP is known as "Amendment No. 3" and includes a draft "Apartment Design Guide" which is set to replace the current Residential Flat Design Code that is now 12 years old. Both the draft SEPP and draft Apartment Design Guide were publicly exhibited until 31 October 2014 and included provision for the following amendments:

Policy to Apply to Broader Categories of Development:

At present, SEPP 65 only applies to development for the purposes of a "residential flat building", but not to other forms of residential development. The Draft SEPP introduces provisions to ensure that SEPP 65 will also apply to development for the purpose of "Residential Flat Development" which will include the residential component of other types of development such as shop top housing and mixed use development. In particular, the Draft SEPP 65 will apply to:

(a) *to the erection of a new building, substantial redevelopment or refurbishment of an existing building or the conversion of an existing building for the purpose of Residential Flat Development; and*

(b) *where the proposed building or existing building concerned has at least 3 storeys and will contain at least 4 dwellings.*

Consent Authority Must Not Refuse Development on Certain Grounds

Where a Residential Flat Development provides ceiling heights, apartment floor areas or car parking provision to a standard which is equal to, or greater than the recommended minimum amount specified in the draft Apartment Design Guide, a Consent Authority must not refuse consent on these grounds.

Apartment Design Guide to prevail over Development Control Plans

For both existing and proposed Development Control Plans (DCPs), the draft Apartment Design Guide will prevail over inconsistent controls adopted within DCPs such as visual privacy, solar access, common circulation spaces, natural ventilation, apartment layout, ceiling heights, dimensions of balconies and private open space and storage.

Flexible Car Parking Provisions

In order to improve housing affordability, the draft SEPP sets no minimum requirement for the provision of parking for Residential Flat Development located in inner and middle metropolitan Sydney, so long as the development is located within 400 metres of a railway station or light rail. Whilst development in these areas may still be approved with parking, an applicant may need to demonstrate why parking should be provided.

This flexibility is considered to promote a reduction in car dependency and encourage walking, cycling and use of public transport as well as housing affordability. Sites that are greater than 400 metres from a railway station or light rail and/or beyond the inner and middle metropolitan Sydney will need to comply with the Roads and Maritime Services (RMS) Guide to Traffic Generating Development, or the relevant Council requirement (whichever is the lesser).

Revised Residential Flat Development Design

The draft Apartment Design Guide also includes the following design changes for Residential Flat Development:

- all apartments are to have access to a balcony with a minimum depth of 2m and private open space;

- specified criteria now exists to manage external noise and limit the transfer of noise between apartments; and
- studio apartments are to be a minimum size of 35 m².

Alternative Design Solutions

The draft Apartment Design Guide includes provision for acceptable design solutions to be pursued as an alternative to the relevant performance criteria. This introduces greater flexibility where a "one size fits all" approach to design is not appropriate. An example of this would be a reduction in the size of balconies where high wind speeds at 9 storeys or above exist, or where balconies are within close proximity to noise sources such as airports, or busy roads and railway lines.

The Department of Planning and Environment is expected to consider all submissions received following the public exhibition of the draft SEPP 65 and draft Apartment Design Guide with formal amendments expected to be finalised in 2015.

Please contact DFP if you require town planning advice regarding the implications of SEPP 65 on your next apartment project.

John McFadden

Partner

BUT IT'S A LUMP SUM CONTRACT!

Kennedys

Legal advice in black and white

Just because you have a lump sum contract, it does not mean that there will be no increase or decrease in your contract sum.

Under a lump sum contract, the Principal agrees to pay a fixed price for the work described in the scope documents, subject to the contingencies provided for in the contract. A lump sum contract is not an agreement that the Contractor will perform everything the Principal requires for a fixed fee. Nor is it a contract that promises that the Contractor will receive the contract sum, no matter what. The contract price under a lump sum contract is an agreement that the Contractor will build:

1. a particular thing;
2. over a particular period;
3. on the basis of certain assumptions.

Changes to scope, timing, physical environment or circumstances will likely lead to changes to a contract sum. Most contracts will make provision for these contingencies in some manner.

The most common variables include:

1. variations: a variation is a change to the work done. It can have the effect of increasing or decreasing the contract sum;
2. latent conditions: a latent condition will undermine the assumptions upon which the contract sum is based. The likely effect of a latent condition will be an increase in the contract sum; and
3. delays: depending on the cause, delays can lead to increases in costs through delay claims and directions to accelerate.

In practice, this means that every project should have a contingency reserve. The contingency reserve should, as far as is possible, make provision for unforeseen circumstances

A lump sum contract doesn't mean that the contract will be "fixed fee". Certain events will change how the contract sum is calculated. A contingency reserve will help to offset the effects of fluctuations in the contract sum to keep the project on track.

Tamara Helm

Senior Associate

KEEP IT, DON'T THROW IT!

The importance of storing, filing and recording information from completed construction projects is often not acknowledged and in most instances can prove to be costly.

It is surprising the number of times that a Client who is endeavouring to commence a new building project on an existing site has no record of previous building works or infrastructure on the site. Information that may seem irrelevant to some parties is often destroyed causing delays and additional costs when new building projects are being considered.

Advancements in technology have certainly improved the situation in recent years where information can be stored electronically by many relevant parties compared to when bundles of hard copy "As Built" documentation needed to be stored. However, in both instances it is a concern about the amount of important information that is misplaced or lost. This information can be of great assistance to the design team during the initial design phases whether it is an extension or renovation to an existing building or a new building on an existing site. With existing buildings the provision of existing structural and services documentation can be critical in a new design and the cost effectiveness of the design whilst the positioning of existing infrastructure can have a significant effect on the design and cost of a new building.

From experience we have found that information is more likely to be "lost" in larger organisations and corporations where there is a greater movement in personnel and the structure of the organisation can change. Unfortunately relevant information is often misplaced or destroyed, where smaller organisations appear to be more diligent in retaining the information.

It is important to note that historical information not only assists in new building works but can also assist when insurance valuations are required, sinking funds need to be established or tax depreciation schedules need to be developed. Additionally, it is equally important that historical information is continually updated as maintenance and minor alterations are undertaken to both the existing buildings and infrastructure.

In summary, the importance of retaining relevant historical information should not be underestimated and building owners and Clients should remain diligent with this process.

David Noble
Director

NOTIFICATION REQUIREMENTS FOR COMPLYING DEVELOPMENT

Lawyers | McCullough Robertson

The amendments to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP) and Environmental Planning and Assessment Regulation 2000 (Regulation) that came into effect on 22 February 2014 have expanded the requirements for advising neighbours about building works that are proposed to be carried out as complying development under the Code.

The amendments to the Codes SEPP and Regulation require that neighbours within a 20 metre radius of the proposed complying development be given notice of a complying development application 14 days before the complying development certificate (CDC) is granted. Notice must also be provided to Council if the application is being determined by a private certifier and the CDC cannot be issued until after the 14 day notification period has expired.

There are certain circumstances in which notification is not required, for example proposals that involve ancillary development such as garages, sheds or swimming pools, if the complying development is within a residential release area or if the neighbouring lot is vacant. Where notification is required, the contents of the notice must include the information prescribed by the Regulation for the notification to be valid. Under the Regulation the notice should be given to neighbours either in person, through a letter box drop or via post. If the notice is delivered in person, the day after the delivery is counted as the first day of the notification period. If the notice is dropped in a mail box or sent by pre-paid post then it is deemed to be received on the next business day and the notification period commences from the day after the next business day. It should be noted that the requirements for advising neighbours about building works carried out under State Enviromental Planning Policy (Infastructure) is somewhat different to the requirements of the Codes SEPP and will be dealth with in a future article.

The other change to neighbour notification is that 7 days (increased from 2 days) notice of the commencement of works pursuant to a complying development certificate is required for complying development that is not in a residential release area. This notice is only required if the development to which the CDC relates is a new building, an addition to an existing building or the demolition of a building.

It is important to keep a record of the addresses where the notices have been delivered, as the Regulation requires the certifying authority to be satisfied that the notice has been given before permitting works to commence.

It has been held by the Courts that failure to properly notify a development application is a breach of procedural fairness, resulting in invalidity of a development consent subsequently issued. It is therefore important that neighbours within a 20 metre radius are notified properly and according to the Regulation to avoid third party challenges to the validity of a CDC.

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