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NEWSLETTER
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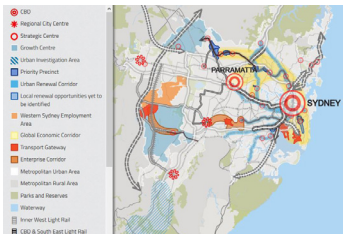
SITE-SPECIFIC AMENDMENTS TO LOCAL ENVIRONMENTAL PLANS



The dynamic nature of town planning and the ongoing need for environmental planning instruments to reflect community values and objectives is such that a Local Environmental Plan (LEP) should not necessarily be regarded as a static, or rigid form of development control.

Sites that have either high development potential (consistent with a broader strategic policy or strategy), unique characteristics, or other environmental attributes, often require preparation of a planning proposal to address an amendment to an LEP. Where there is sufficient strategic planning merit, an LEP can be amended to allow for greater flexibility by allowing development that may previously have been prohibited, or non-compliant with development standards.

However, it is not always appropriate to rezone a site when the consequences of such actions may lead to inappropriate development outcomes elsewhere within a Local Government Area (LGA). In situations where a broad rezoning cannot be supported, but the site warrants unique consideration of a land use (or development standard) that would otherwise prohibit (or restrict) development that is suitable for the site, it may be appropriate to consider inclusion of the site and/or any relevant proposal within Schedule 1 of an LEP as an 'Additional Permitted Use'.

Schedule 1 of an LEP has the ability to recognise specific land uses and development standards that prevail (to the extent of any inconsistency) over the permissible and prohibited land use table contained within a conventional LEP. Furthermore, a site may require unique application of development standards such as height, or floor space ratio (FSR), which can also be recognised in this manner.

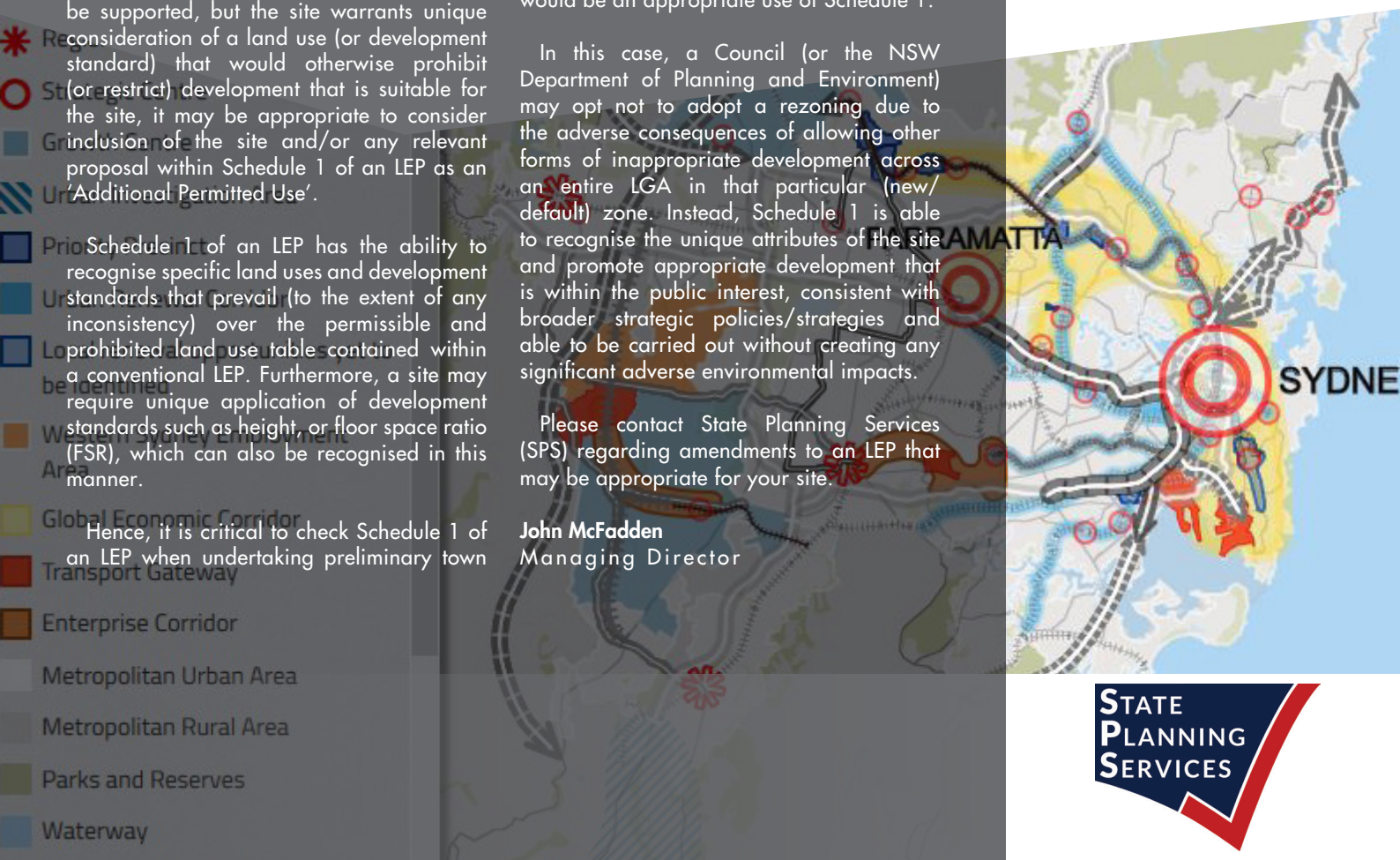
Hence, it is critical to check Schedule 1 of an LEP when undertaking preliminary town planning site investigations as exclusive review of the land use table and conventional LEP development standards may fail to identify the actual development potential of the land. Vice-versa, when the actual development potential of the land is not recognised by the land use table and conventional development standards, it may be appropriate to consider a planning proposal, either to rezone the land, amend development standards, or to include an additional permitted use within Schedule 1 of an LEP.

If a new LEP does not translate each and every land use definition from a previous LEP, this may result in an existing approved permissible use becoming a prohibited use. Consequently, the existing development may not comply with applicable development standards, but warrants the flexibility to continue operating and to undergo enlargement or intensification without having to rely upon existing use rights for the purposes of any subsequent development application (DA). This type of LEP amendment would be an appropriate use of Schedule 1.

In this case, a Council (or the NSW Department of Planning and Environment) may opt not to adopt a rezoning due to the adverse consequences of allowing other forms of inappropriate development across an entire LGA in that particular (new/default) zone. Instead, Schedule 1 is able to recognise the unique attributes of the site and promote appropriate development that is within the public interest, consistent with broader strategic policies/strategies and able to be carried out without creating any significant adverse environmental impacts.

Please contact State Planning Services (SPS) regarding amendments to an LEP that may be appropriate for your site.

John McFadden
Managing Director



STATE PLANNING SERVICES

AMENDMENT TO THE *ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000 (NSW)*

Amendments to the *Environmental Planning and Assessment Regulation 2000* (NSW) (EP&A Regulation) came into force on 28 October 2015. The amendments are designed to improve the notification of neighbours to land subject to a complying development certificate.

Changes

The requirement that certifying authorities must give occupiers of neighbouring land 14 days written notice of an application for a complying development certificate for development on land (other than on land within a residential release area) that is to be carried out on a lot that has a boundary within 20 metres of the boundary of another lot on which a dwelling is located that involves:

- development specified under any environmental planning instrument that involves any of the following:
  - a new dwelling;
  - an addition to an existing dwelling;
- development specified in Part 7 of *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (the Demolition Code, or*
- development specified in Division 2 or 7 of Part 2 of *State Environmental Planning Policy (Affordable Rental Housing) 2009,*

will now only apply to land in applicable local government areas (see list below).

Applicable local government area means Ashfield, City of Auburn, City of Bankstown, City of Blacktown, City of Blue Mountains, City of Botany Bay, Burwood, Camden, City of Campbelltown, Canada Bay, City of Canterbury, City of Fairfield, City of Hawkesbury, City of Holroyd, Hornsby, Hunter's Hill, City of Hurstville, City of Kogarah, Ku-ring-gai, Lane Cove, Leichhardt, City of Liverpool, Manly, Marrickville, Mosman, North Sydney, City of Parramatta, City of Penrith, Pittwater, City of Randwick, City of Rockdale, City of Ryde, Strathfield, Sutherland Shire, City of Sydney, The Hills Shire, Warringah, Waverley, City of Willoughby, Wingecarribee, Wollondilly or Woollahra

The requirement that certifying authorities must give occupiers of neighbouring land which is within 20 metres of the boundary of land that is the subject of the complying development certificate seven days written notice of the person's intention to commence work for development on land that is not in a residential release area and that involves:

- a new building, or
- an addition to an existing building, or
- the demolition of a building

will now only apply to land in category 1 local government areas (see list below).

All other land is a 'catergory 2 local government area'. Land that is a catergory 2 local government area only needs to give two days' written notice.

Category 1 local government areas means Ashfield, City of Auburn, City of Bankstown, City of Blacktown, City of Blue Mountains, City of Botany Bay, Burwood, Camden, City of Campbelltown, Canada Bay, City of Canterbury, City of Fairfield, City of Hawkesbury, City of Holroyd, Hornsby, Hunter's Hill, City of Hurstville, City of Kogarah, Ku-ring-gai, Lane Cove, Leichhardt, City of Liverpool, Manly, Marrickville, Mosman, North Sydney, City of Parramatta, City of Penrith, Pittwater, City of Randwick, City of Rockdale, City of Ryde, Strathfield, Sutherland Shire, City of Sydney, The Hills Shire, Warringah, Waverley, City of Willoughby, Wingecarribee, Wollondilly or Woollahra.

Patrick Holland
Partner

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HOW MANY TENDERS DO I NEED?

The process of tendering has many factors to consider such as which firms to select for submitting a tender, how long should the tender period be, and how many Tenderers should be included in the tender panel.

The decision about the number of Tenderers to seek submissions from will be informed by a number of factors:

1. Current market conditions
2. The number of experienced firms for the project
3. Responses to an Expression of Interest campaign
4. Scale of project
5. Existing sample of pre qualified firms for tendering
6. Time constraints

The primary intention of any competitive tender process will be to receive comprehensive, well considered, and price competitive submissions. Receiving such submissions can be achieved from a panel of two Tenderers as well as from a panel of six Tenderers. However there are some fundamental considerations to be explored before making a decision on the number of Tenderers to select.

Tenderers will make their decision to compete based on at least the following factors:

A. Current tender workload
B. Current and future project workload
C. Suitability of its firm to the type of project
D. Size of project
E. Competing Tenderers
F. Assessment of risk in the project

Of these factors, only item E is initially the most unknown factor. During the tender process it ultimately becomes apparent to all Tenderers who their competition is and how many firms will be submitting tenders. This will invariably cause the Tenderers to approach the tender in a manner particular to its circumstances at that time. For this reason, in order to avoid the decisions of Tenderers to withdraw from tendering due to the competition, or take a less considered approach due to the perception that there are too many Tenderers, it is best to be transparent at the commencement of the tender process.

Advising each Tenderer of the proposed tender panel size and the competing firms allows the Tenderer to more fully consider its commitment to the tender process and in turn provide the same commitment to the Client that it will submit a comprehensive, well considered, and price competitive submission. This in turn allows the Client to make its decision on whether, for example, a small panel of 3 or a large panel of 6 Tenderers will provide the best outcome for the project.

Mark Blizard
Director

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THE IMPORTANCE OF BUILDING LIFE CYCLE & MAINTENANCE COSTING

The calculation of the estimated future lifecycle and replacement as well as maintenance costs of building fabrics and assets is important to establish a budget of the future costs to be incurred by the client to maintain a building that will be suitable to perform its desired function and retain its aesthetics.

The approach of viewing the initial capital costs as well as maintenance and replacement costs when making decisions on the building asset, material and installation method during the design stage of a project is known as the Life Cycle Costing approach. It considers the use of alternatives and the determination of the overall costs to be incurred for each alternative to enable the client to make informed decisions on which option would offer more value and meet their specific requirements.

An estimate of the lifecycle and maintenance costs is usually broken down into various building elements and components as well as assets which have different lifecycle periods. A client could also determine these costs over a certain duration; for example over the contract duration with a Facilities Management Service provider.

The collation of the actual costs for replacement and maintenance early during the lifecycle of a building is important to not only serve as historical cost data for future estimates but also to be used as a benchmark to compare against estimated costs and to help the client to develop a strategy for ensuring the actual costs don't exceed the budget.

Innovations in technology of the building materials and methods of installation as well as assets purchased could offer significant cost savings to clients provided the costs are viewed holistically. The minimization of future lifecycle and maintenance costs is also interrelated with the concept of sustainable construction.

Quantity Surveyors that have experience in this field offer the client added value besides the usual cost planning and control services over the design and construction phases of a building. They could also develop a budgetary estimate of future lifecycle replacement and ongoing maintenance costs as well as assist in the choice of the alternative building assets, materials and installation methods which would offer greater value to the client from a lifecycle costing perspective.

Ran de Fonseka
Quantity Surveyor

mda AUSTRALIA

KEEPING THE FAITH:

CONTRACTUAL GOOD FAITH OBLIGATIONS

It is important to keep in mind the obligation to act in good faith in commercial and building contracts. The obligation is sometimes specifically written into many contracts, but may otherwise be implied by a Court if there is a dispute about the contract.

In a competitive market, with tight time frames and competing demands, it might be easy to lose focus on good faith obligations, but NSW and Australian case law highlight the importance of keeping the faith.

What is 'good faith'?

The meaning of term 'good faith' is somewhat broad and perhaps a little bit unclear, but Australian Courts have indicated that acting in good faith can generally be said to involve:

1. Parties to a contract acting cooperatively and reasonably in respect of their rights and obligations, particularly when exercising an express right to terminate;

2. Not acting capriciously, and exercising a degree of restraint on self-interest when exercising rights and meeting obligations under the contract; and

3. Not acting in 'bad faith'.

When does good faith apply?

Although Courts in Australia have been somewhat circumspect and in some cases reluctant to imply good faith obligations into contracts, it is now fair to say that a general obligation to act in good faith applies to all contracts to some extent. This is particularly the case in the exercise of discretionary rights such as rights to terminate or to withhold approval.

A good example is the seminal case of *Renard Constructions (ME) Pty Ltd v Minister for Public Works.*[1] Here the Principal had the right to cancel a building contract if:

1. The Contractor defaulted; and

2. The Contractor was unable to show cause as to why the contract should not be terminated.

The Contractor defaulted, and the right to terminate was exercised even though the Contractor had responded that it was willing and able to complete the contract. The Court held that the power to terminate had to be exercised reasonably, and upheld an award for damages in favour of the Contractor.

This case dealt with a specific contract and set of circumstances, and each case will be treated differently based on its facts. Nevertheless the key lesson from cases like this is to always keep in mind whether good faith obligations might apply to the exercise of any particular right under a contract.

Things to remember

The extent to which an obligation of good faith is included in a contract will depend on the particular contract, however keep in mind the following two points:

1. In order to *limit* obligations of good faith with any certainty, there should be explicit terms contained within the contract, whether by blanket limitation, or by confirming a party's right to *'sole'* or *'absolute'* discretion in the exercise of a specific power; and

2. In order to *impose* obligations of good faith with certainty, a contract should contain a blanket duty, or specific constraints on a parties exercise of a right by reference to good faith and reasonableness, e.g. *'… must not unreasonably withhold'.*

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[1] (1992) 26 NSWLR 234.

Kennedys
Legal advice in black and white

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