epm projects pty ltd

NEWSLETTER

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This Edition

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A NEW PLANNING SYSTEM FOR NSW IS NEARLY HERE

Lawyers | McCullough Robertson

On 16 April 2013 the NSW Government released the White Paper, 'A New Planning System for NSW'. This White Paper outlines in detail the proposed new planning scheme and is accompanied by draft legislation, the *Planning Bill 2013* and the *Planning Administration Bill 2013*. This is your final opportunity to comment on the proposed new planning regime. Submissions are due by 28 June 2013.

Key Areas of Reform

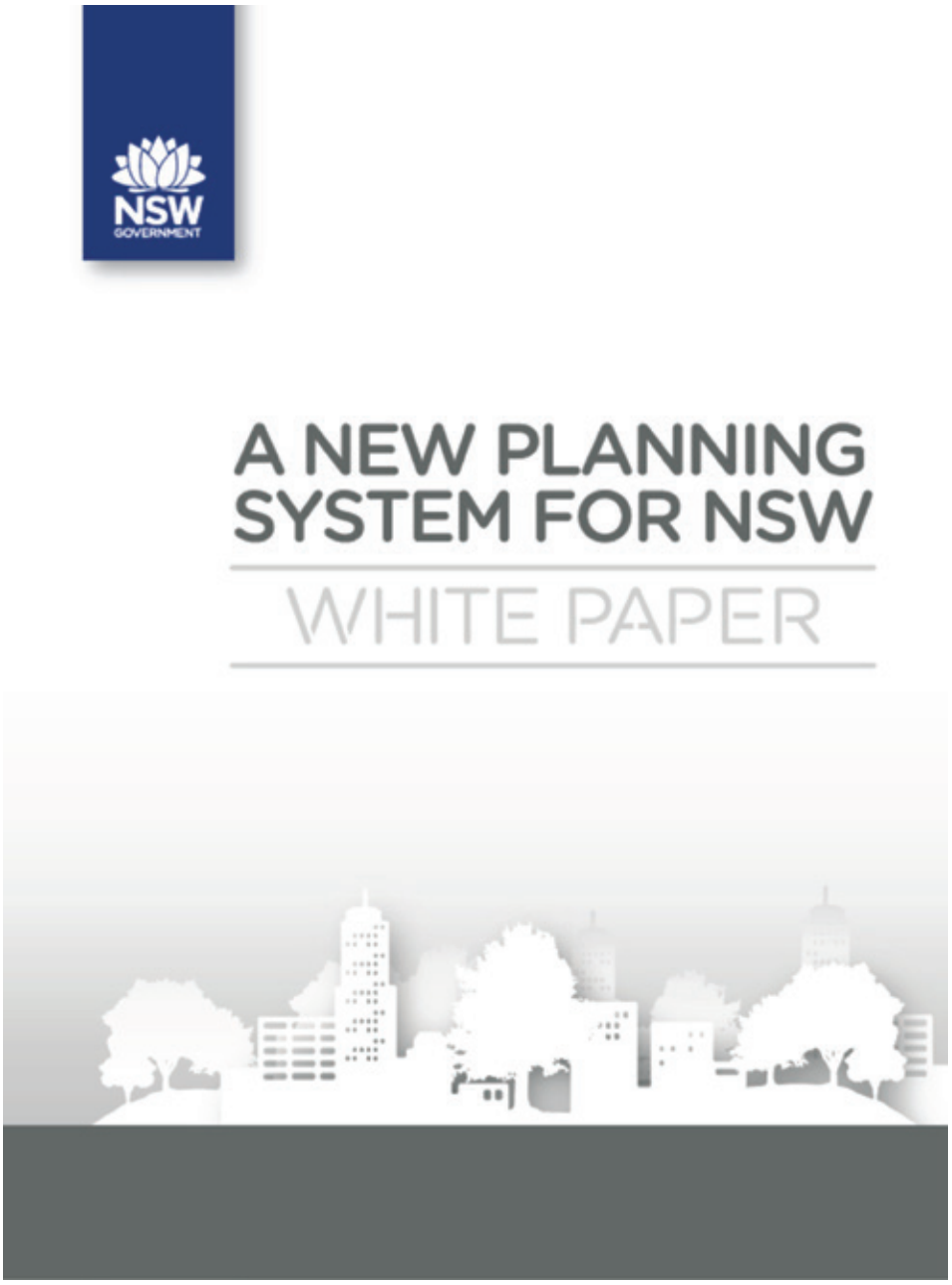
The White Paper focuses on the key areas of reform which were outlined in the 2012 Green Paper. These are: delivery culture, community participation, strategic planning, development assessment and the provision of infrastructure.

The delivery culture reform is aimed at changing the culture of all of the people and bodies involved in planning in NSW so that a 'can do' attitude becomes the norm. A 'one-stop-shop' will be established within the Department of Planning and Infrastructure which will provide a single point of contact and project managers for each development assessment.

The White Paper emphasises the importance of community involvement, particularly up-front community involvement at the strategic planning level. Planning authorities will need to prepare Community Participation Plans which are consistent with a legislative Community Participation Charter.

Planning policies and plans as we know them will change under the new regime with a new hierarchy of strategic plans ranging from state-wide Planning Policies, to Regional Growth Plans, Subregional Delivery Plans and new Local Plans. Local Plans will be a single point of reference and will incorporate the laws currently outlined in a range of plans. Zoning will change significantly with fewer, broader zones and a new 'Enterprise zone'. Floor space ratios will be replaced with building envelopes and development contributions will be specified to provide certainty for developers.

There will be one development approval system with consistent applications and processes but multiple tracks of assessment. The major change is a new form of development called code assessable development which will be used for development which complies with the subregional and local plans for an area. The community will not be able to comment on code assessable development assessments and they will be processed within 25 days. The aim is for 80% of development to be code assessable.



Appeal rights will be expanded and conciliation and arbitration will be used more widely as these are cheaper and more accessible ways of resolving disputes.

When will the changes take place?

The Government has released draft legislation and it is anticipated that the new regime will be made into law late this year. The proposed planning regime involves significant changes to the current regime, which will take time to implement. The White Paper states that the Planning Policies will be released when the legislation commences then Regional and Subregional Plans will be progressively rolled out within two years from this date, followed by Local Plans.

In the meantime, the Government has committed to review all referrals, concurrences and planning related approvals by August 2013 with a view to removing unnecessary referrals and improving the timeliness of the planning system.

Clare Collett,
Senior Associate

PLAYING BY THE RULES

Contractors who abide by their legislative and moral requirements are at a disadvantage when competing against contractors who do not "play by the rules".

In today's aggressive construction market compliant head contractors and sub-contractors are finding it increasingly difficult to submit winning tenders or deliver projects with a profitable outcome if their opposition does not allow for, or does not provide, the same level of on-site requirements.

In addition to contractors being responsible for off-site requirements such as insurances, superannuation payments, long service leave etc there are many on-site requirements that need to be provided that can be quite costly. Subject to the size and type of project the following list of items indicate what may be required to be provided by a head or sub-contractor to satisfy relevant legislation and workplace requirements:-

- Workers and visitors clothing and safety equipment
- Complying with and providing the correct number of amenity and ablution sheds
- First aid equipment and shed
- Quality Assurance systems
- Compliant hoardings and public protection
- Site safety equipment
- Site communication systems
- Training programmes for safety and first aid
- Adequate materials handling and personnel transport equipment
- Traffic and pedestrian control
- Authorised Construction & Loading Zones
- Provision of compliant temporary power and lighting
- Adequate site security
- Provision of site induction training and general house keeping
- Site evacuation procedures
- Checking the safety of site plant & equipment
- Adequate and suitably qualified supervision and administration resources to meet each project's specific requirements

All the above items come at a cost and if a contractor elects, or is allowed not to provide some of these items at an adequate level they will have a distinct advantage over contractors who do. This is not only a concern if the safety of site workers and the public are compromised, and the specified level of quality is not achieved, but if the value of a completed project does not differ between the " compliant" contractor and the "non-compliant" contractor, the "compliant" contractor is placed at additional financial risk.

To ensure that the wellbeing and credibility of the construction industry is maintained to the highest possible standard it is most important that all Consultants ensure that all tender submissions and engaged contractors are offering, and continue to provide, a quality service and product that in turn provides value to all Clients, purchasers and end users.

David Noble
Director

WHEN TO COMMENCE WORK ONCE DEVELOPMENT CONSENT HAS BEEN OBTAINED

DFP is often asked about the timing of commencement following issue of development consent and what is required to activate an approval so that development consent does not lapse.

Demolition:

If development consent includes demolition, an efficient approach to proceed with your development is to commence demolition prior to obtaining a Construction Certificate (CC). This is because demolition works do not require a CC, so long as the demolition works are carried out in accordance with the development consent.

Commencing Construction Work:

It is well known that construction work should not commence without first obtaining a CC, but a good way to avoid time delays and increased costs is to ensure that your CC documentation is consistent with the DA approved plans and conditions and to promptly identify the need for any required modifications under Section 96 of the Environmental Planning and Assessment Act 1979 (EP&A Act 1979).

However, obtaining a CC does not automatically mean that your development consent will not lapse because it is also important to ensure that the relevant works are commenced on the site.

Avoiding Lapse of Development Consent:

To avoid lapse of a development consent, it is important that any works be 'physically' commenced. Previously under the Local Government Act 1919 works could be 'substantially' commenced, but since 1999 the EP&A Act 1979 requires that 'physical' commencement be achieved in order to avoid a lapse in development consent.

The type of works that constitute physical commencement may include any building, construction or engineering works and it is noted that in some cases, engineering works can include survey works. In each case however, it must be demonstrated that the physical commencement work relates to the approval and occurs on site. The actual physical works that qualify as evidence of physical commencement will differ according to individual circumstances and will also be influenced by the relevant conditions of consent.

Importantly, unlawful works do not count towards physical commencement. It is also important to note that if a DA consent lapses after 5 years, so too does any associated CC where physical commencement has not occurred. Ensuring that your development consent does not lapse will avoid the need to lodge a new DA because it is not possible to extend a 5 year consent once this period has expired.

Please contact DFP for town planning assistance with your next project.

John McFadden
Partner

dfp
planning consultants

INSOLVENCY QUICK TIPS PART 3

What are the problems that insolvency of a project participant can bring you? In part three we look at the risks that the insolvency of a project participant presents.

Kennedys

Legal advice in black and white

There are few if any winners when a project participant becomes insolvent.

Contractor, supplier or services provider: If you are a party seeking payment, apart from the obvious risk of not getting paid, you will need to be mindful that liquidators have a power under statute to claw back what are called "preference payments". Essentially, preference payments are payments made to a creditor (like a supplier or contractor) made within the six months prior to the date of insolvency (called a "relation-back date") that gives the creditor more than that creditor would have received if they had queued up in the liquidation with all of the other creditors.

So if you think the entity you are dealing with is going under, you should bear in mind that just because you receive all of the money you are owed, it doesn't mean you will be able to keep it.

Letters from liquidators demanding repayment of preferences can happen long after a company has gone under. The limitation period for these claims is 3 years from the relation back date. You could have long ago written off the insolvent entity, or be dealing with the same players for a couple of years under a new entity, and get a knock on the door from the liquidator.

Principals: For principals dealing with the insolvency of a head contractor, navigating the fallout can be a minefield. Apart from the obvious delays to a job, it can be difficult to get subcontractors back on site. Some subcontractors may refuse to continue until money owing to them in relation to the project is paid. This can result in the Principal paying twice. While most contracts provide some safe guards against this, sometimes this will be the Principal's only option to ensure that work does not stop.

Even having a contractor become insolvent during the defects liability period can present a significant problem. Once the company is in the hands of a liquidator it can be very difficult to have defects attended to, and calling on the security can be made vastly harder by a liquidator mandated to return the highest amount possible to the creditors.

Finally, if you are unsure about your rights in an insolvency matter, seek the advice of your lawyer or accountant. Insolvency matters are time critical so if you do receive correspondence from a liquidator, don't delay. The sooner you act and the more prepared you are, the better your outcome will be.

Helena Golovanoff
Partner

WINDOWS IN RESIDENTIAL BUILDINGS

BCA 2013 was introduced on 1 May 2013. Amongst various changes, updates and clarifications in the new BCA revision, the ABCB has introduced a requirement to enhance occupant safety and restrict the openable area of windows in bedrooms in Class 1, 2, 3 & 4 residential buildings and early childhood centres.

The issue of child falls from openable windows, particularly in Class 2 apartment buildings, is unfortunately a common and tragic problem and is likely to see increased risk to life with the significant expansion in apartment living throughout NSW.

The Children's Hospital at Westmead has reported that an average of one child a week is taken to hospital in Australia after falling from a window. According to figures from Westmead Children's Hospital, 80 per cent of children who have fallen from a window have significant injuries, and four out of five children who fall from windows are aged under five.

As a result of such incidence, the ABCB has imposed a national requirement for new building works to incorporate specific design requirements for windows to bedrooms in residential buildings. These requirements include mandatory provision for a device to restrict windows to maximum 125mm opening area or a structural screen to window openings to prevent children from falling. The new requirements will apply to:-

- all bedroom windows located in a Class 1, 2, 3 & 4 residential building, and
- windows that have a sill height less than 1.7m and the room is located more than 2m above the surface below

The device to the windows can be removable or able to be disengaged, however it must be a child-resistant device so only an adult or a person with a key (or the like) can remove or disengage the device.

Whilst these new provisions are a positive move forward to mitigate injury to young children, there are a number of notable deficiencies in the legislation, namely:-

1. The legislation is not retrospective and hence will only apply to new building works.
2. The legislation, applying only to window sills less than 1.7m, does not cater for situations of child access to the higher window openings from furniture such as beds and chairs.
3. The provision for a device to restrict the window opening area (maximum 125mm) does not require a permanent fixture, and hence the engagement or use of the device is subject to human intervention.
4. The new legislation only applies to bedrooms in apartments and other residential buildings greater than 2m above the surface below – the new provisions do not apply to any other windows in apartments or dwellings such as study rooms, play rooms and the like. These rooms may often be used as temporary bedrooms and or accommodate unsupervised children.

David Blackett
Company Director

DO DILIGENCE

Anyone who has purchased property only to find a nasty surprise appreciates the importance of undertaking a thorough pre-purchase investigation. Unfortunately, a realisation at that point doesn't avert their disaster. I have been finding that property is purchased without careful and methodical investigation. This is often in circumstances where haste to purchase has been the "driver" tempered by the hope that everything will be fine.

Buyer beware – remember, the cost of "due diligence" will pale into insignificance in comparison to the cost to overcome physical conditions and legal constraints - in the worst case, land that was valued for a higher use than it was purchased. EPM manages a three-stage property investigation process:

- **Stage 1 Preliminary Planning Investigation** - can the land be developed and used for the intended purpose in consideration of the current and draft Environmental Planning Instruments, and what are the key issues to be further investigated?
- **Stage 2 Detailed Planning Investigation and Capacity** – can all the constraints that have been identified in Stage 1 be overcome at an acceptable cost and within an acceptable time, and will the property yield the required area of built space?
- **Stage 3 Physical Condition Investigation** – are the ground conditions acceptable, is the land contaminated, are there hazardous materials, are the services to the site sufficient and in acceptable condition, what is the condition of repair of existing buildings, and can all the problems be overcome at an acceptable price in an acceptable time.

The cost for due diligence can be high, so the tactful approach is to adopt a process that enables the study to be aborted at the lowest cost when the first immovable obstacle is encountered. While the cost of due diligence may be high, the cost of remediating contaminated land (as an example) will be a lot higher. So make sure you **do due diligence** before purchasing property.

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