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NEWSLETTER

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This Edition

- Identifying the Correct Consent Authority
- Renewing your Heritage
- The Value of a Tax Depreciation Schedule
- Programming from the Get Go
- Certification of Crown Building Projects
- Changes to Security of Payment Act Come Into Effect

green building council australia
MEMBER 2013-2014

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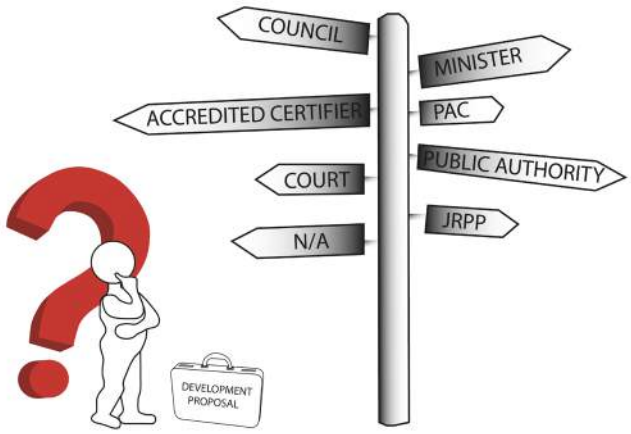
IDENTIFYING THE CORRECT CONSENT AUTHORITY

DFP examines the need to correctly identify the consent authority for a project



Why is it important?

Far too often assumptions are made by individuals, organisations and even statutory authorities during various stages of a project which can result in a development application (DA) being lodged with (and in extreme cases, subsequently determined by) the incorrect consent authority.

Who is the consent authority for the proposal? – is perhaps the simplest, yet most important question of all that is sometimes overlooked by land owners, applicants, consultants, the community and even consent authorities! Yes, whilst it is a rare occurrence, consent authorities have been known to proceed with an assessment and subsequent determination of an application for a project without establishing that they are the relevant consent authority under applicable legislation.

How does the Environmental Planning and Assessment Act 1979 define 'consent authority'?

"consent authority, in relation to a development application or an application for a complying development certificate, means:

(a) the council having the function to determine the application, or

(b) if a provision of this Act, the regulations or an environmental planning instrument specifies a Minister, the Planning Assessment Commission, a joint regional planning panel or public authority (other than a council) as having the function to determine the application - that Minister, Commission, panel or authority, as the case may be.

public authority means:

(a) a public or local authority constituted by or under an Act, or

(b) a government Department, or

(c) a statutory body representing the Crown, or

(d) a chief executive officer within the meaning of the Public Sector Employment and Management Act 2002 (including the Director-General), or

(e) a statutory State owned corporation (and its subsidiaries) within the meaning of the State Owned Corporations Act 1989, or

(f) a chief executive officer of a corporation or subsidiary referred to in paragraph (e), or

(g) a person prescribed by the regulations for the purposes of this definition."

In most cases, the role of a consent authority is to determine a DA by:

"(a) granting consent to the application, either unconditionally or subject to conditions, or

(b) refusing consent to the application."

There is no consent authority for certain types of development such as 'exempt development' and applicants who apply for a complying development certificate (CDC) can choose between a local council, or an accredited certifier. Even after lodging a DA with a local Council, depending on specific criteria, a joint regional planning panel (JRPP) or a planning assessment commission (PAC) may be the consent authority for that project.

dfp planning consultants

Furthermore, in circumstances where an appeal is lodged, the NSW Land and Environment Court assumes the role of the consent authority in determining the relevant proposal.

When to act:

The time to correctly identify the relevant consent authority is at the outset of a project once the various factors that influence this outcome are known. This can include identifying, amongst other things, the type of development (i.e. is it State or Regionally Significant?), or matters such as the Capital Investment Value (CIV). At no stage should it be assumed that the local council will be the relevant consent authority for any project.

What are the consequences of a project being assessed and determined by the wrong consent authority?

Failure to properly investigate the correct consent authority can result in serious consequences for a project particularly if a development consent is obtained, yet due to an incorrect process it becomes the subject of proceedings in the NSW Land and Environment Court and is determined to be lawfully invalid.

However, excess time and cost are the most common consequences of not correctly identifying the consent authority from the outset of a project. In some instances, a project can be stalled pending lodgement with the relevant consent authority, or a DA may be lodged when it is not actually required such as with a project that is an exempt or complying development. It is for these reasons that establishing who is the correct consent authority for a project from the outset is a fundamental issue.

Please contact DFP if you require town planning advice regarding the correct consent authority for your next project.

John McFadden
Partner

RENEWING YOUR HERITAGE

Developing heritage listed items at your school

Lawyers | McCullough Robertson

It is a common misconception that where an existing school contains a building which is heritage listed, a development consent is essential to enable any work to be carried out to that building. Although most schools are familiar with the State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP), many are not aware that in some circumstances, alterations and additions to a heritage item may be carried out as complying development pursuant to this SEPP.

The Infrastructure SEPP provides (at clause 31A(1)) that alterations and additions to certain building types and uses within an existing school can be carried out as complying development. Examples include a library, administration building, hall, or classroom. The only development which is specifically excluded by this clause where a site contains a heritage item, is an outdoor learning or play area with associated awning or canopies.

It is important to note that these provisions of the Infrastructure SEPP which enable complying development in relation to heritage buildings, prevail over those of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP) which otherwise provides that complying development cannot be carried out on land that includes a heritage item.

We note that for development to be carried out as complying development, the requirements set out in clauses 20B and 31A(4) of the Infrastructure SEPP must also be complied with.

If you are unsure as to whether your site or your proposed development is suitable for a complying development certificate, please contact us and we would be happy to assist.

Samantha Daly
Partner

Danielle Le Breton
Senior Associate

THE VALUE OF A TAX DEPRECIATION SCHEDULE

A Tax Depreciation Schedule prepared by a specialist Quantity Surveyor helps ensure the cash return from your investment property is maximised.

mda AUSTRALIA

PRIME COST METHOD		Division 40 Depreciating Assets	Low Pool Value Items	Division 43 Capital Works Deductions	Total Capital Allowance	Written Down Value
Year	Period					
1	2011 - 2012	$75,454	$110,722	$36,031	$221,210	$7,204,074
2	2012 - 2013	$212,459	$179,923	$98,625	$491,008	$6,713,566
3	2013 - 2014	$212,459	$112,452	$98,625	$423,536	$6,290,030
4	2014 - 2015	$212,459	$70,283	$98,625	$381,367	$5,908,663
5	2015 - 2016	$212,459	$43,927	$98,625	$355,011	$5,553,652
6	2016 - 2017	$207,898	$27,454	$98,625	$333,978	$5,219,674
7	2017 - 2018	$199,619	$17,159	$98,625	$315,403	$4,904,272
8	2018 - 2019	$199,619	$10,724	$98,625	$308,968	$4,595,304
9	2019 - 2020	$197,142	$6,703	$98,625	$302,470	$4,292,834
10	2020 - 2021	$192,647	$4,189	$98,625	$295,461	$3,997,373
11	2021 - 2022	$163,451	$2,618	$98,625	$264,694	$3,732,679
12	2022 - 2023	$110,449	$1,636	$98,625	$210,710	$3,521,969
13	2023 - 2024	$109,140	$1,023	$98,625	$208,788	$3,313,181
14	2024 - 2025	$106,765	$639	$98,625	$206,029	$3,107,151
15	2025 - 2026	$106,765	$400	$98,625	$205,789	$2,901,362
16	2026 - 2027	$89,548	$250	$98,625	$188,423	$2,712,940
17	2027 - 2028	$58,292	$156	$98,625	$157,073	$2,555,866
18	2028 - 2029	$58,292	$98	$98,625	$157,015	$2,398,851
19	2029 - 2030	$58,292	$61	$98,625	$156,978	$2,241,873
20	2030 - 2031	$58,292	$38	$98,625	$156,955	$2,084,918
-	Balance	$48,757	$64	$2,036,097	$2,084,918	n/a
	Total	$2,890,267	$590,518	$3,945,006	$7,425,790	n/a

Two main elements are taken into consideration when preparing a depreciation schedule for an investor:

- Capital Works Deduction – this is an allowance applied to the structural element of a building including fixed irremovable assets

- Plant and Equipment – this deduction is applied to removable assets (i.e. assets which depreciate at a faster rate than the structural elements of a building)

Capital Works Deductions for buildings are defined within Division 43 of the ITAA 1997 - Deductions for Capital Works Section 43-10(2) which requires that the capital works have a "construction expenditure area" and that there is a "pool of construction expenditure" and the taxpayer uses the capital works area in a deductible way for the purpose of producing assessable income.

Plant and equipment depreciation deductions as defined in Division 40 of the New Business Tax System (Capital Allowances) Act 2001 allows for either the Diminishing Value or Prime Cost depreciation method of assets based on their 'effective life' with guidelines set down by the Commissioner in TR2013/4.

Construction expenditure is determined on the basis of historical costs incurred and includes on-costs related to the construction of a building such as design fees, preliminary costs, etc. If historical costs are not available then costs can be estimated by a qualified and registered quantity surveyor.

David Noble
Director

PROGRAMMING FROM THE GET GO

Less haste, more speed.

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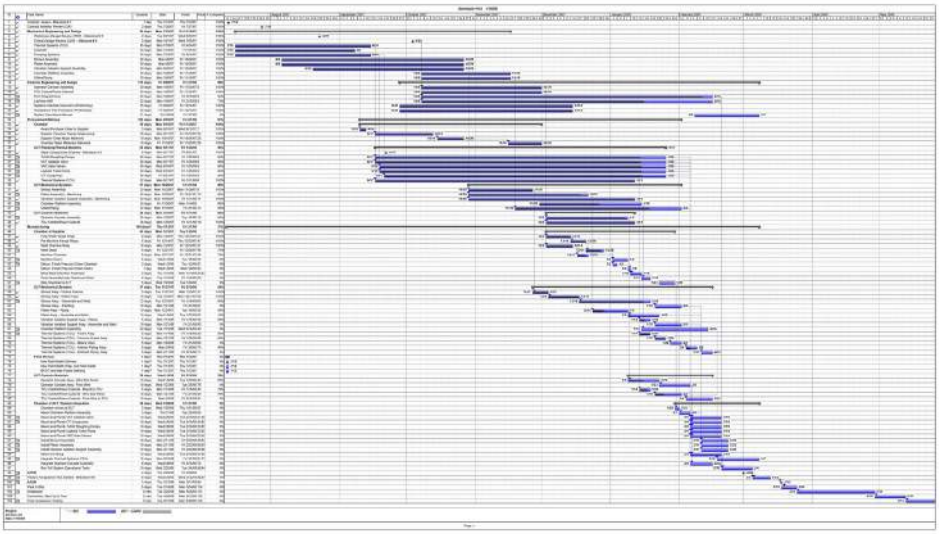

Time is of such importance in the procurement of a project that there is often the temptation to rush in and “get things moving” without proper and considered planning. Focus is typically placed on the construction programme prepared by the Builder for the purpose of planning activities and measuring progress on a construction site. For the very same reasons, attention should be placed on the programming of tasks and activities that commence well before a project reaches the construction phase.

The preparation of a Project Programme will provide all stakeholders with a clear view of the overall process in procuring a project from its inception right through to the handover of the finished product at the end of the construction phase. The programme will detail the required sequential logic of tasks and it will also detail an expected duration of each task. The construction phase of the Project Programme will often be represented by a single line and in many cases, when considered against the overall duration of the project, will appear to be relatively short.

The preparation of a Project Programme will provide a road map for navigating through the project and avoids abortive work being undertaken by embarking on tasks out of sequence. The appropriate allocation of time to each task will provide stakeholders with the ability to measure if the project is running to schedule and if not, the steps that may be taken to remedy delays that may be occurring or forecast in the time to come.

Depending on the stage a project may be at, a Project Programme will capture activities ranging from preparation of a brief, establishing planning permissibility, financial modelling & feasibility, preparation of documentation, gaining authority approvals, right through to tendering and construction. The Project Programme allows the stakeholders to “build” the whole project on paper. This will provide a solid and logical platform from which the project can be procured without launching into expensive out of sequence tasks that may prove to be untimely or at worst, abortive.

Mark Blizard
Director

CERTIFICATION OF CROWN BUILDING PROJECTS

Crown building projects in NSW are subject to vastly different statutory requirements under the EP & A Act 1979 than non-Crown developments, insofar as building certification process and requirements for upgrade of existing building stock.

BLACKETT MAGUIRE+ GOLDSMITH

Blacktown Mt Druitt Hospital Stage 1 Expansion Project

Under the NSW EP & A Act 1979 (and Regulation thereunder), it is generally necessary to obtain building certification from an accredited building certifier for any building works prior to the carrying out of such works. Certification is in the form of a Complying Development Certificate or Construction Certificate.

Similarly, it is generally necessary to obtain certification at the completion of works prior to use or occupation of the building. Certification is in the form of an Occupation Certificate.

Crown Building works is defined under the EP & A Act to include:-

Development (other than exempt development), or an activity within the meaning of Part 5, by the Crown that comprises:

(a) the erection of a building, or

(b) the demolition of a building or work, or

(c) the doing of anything that is incidental to the erection of a building or the demolition of a building or work.

Crown building works generally relates to works carried out by, or on behalf of the Crown. This includes work carried out by:

- Public hospitals
- Public schools
- Universities colleges
- State Govt public infrastructure

The EP & A Act 1979 does not require Crown building works to obtain a prior Construction Certificate or Complying Development Certificate. Instead, it is necessary for the building design to be assessed and certified in accordance with Section 109R of the Act to comply with the technical provisions of the State's building laws (BCA) in force as at:

(a) the date of the invitation for tenders to carry out the Crown building work, or

(b) in the absence of tenders, the date on which the Crown building work commences.

There is no requirement under the Act for the works to be inspected or certified during construction or at completion of the building works.

Unless the relevant Crown authority undertaking the building works implements an appropriate certification process pre and post construction in excess of the minimum requirements of the Act, there is no other statutory triggers for these Crown projects to be assessed and certified commensurate with the statutory process in place for building works other than Crown.

Of similar issue, the EP & A Act prescribes circumstances in which existing buildings are required to be upgraded to comply with current BCA requirements when building works, major or minor, are proposed. Once again, there are no requirements or statutory triggers outlined in the Act to require existing Crown building stock to be upgraded to comply with current BCA. For example, proposed building works to an existing school or hospital, which may include creation of additional floor area to accommodate more patients or students and additional fire load, does not result in any immediate trigger for a building certifier to consider the necessity to upgrade existing parts of the existing building to comply with current Code requirements that have been introduced to satisfy community expectation.

Instead it remains at the discretion and expertise of the accredited certifier which, unfortunately results in an industry practice ranging from zero input on upgrade strategies to unnecessary and onerous enforcement of upgrade requirements. This can result in major public infrastructure building stock remaining significantly deficient in terms of BCA compliance or it can result in major crown projects becoming financially unviable as a result of onerous and unnecessary upgrade expectations of the certifying authority.

To ensure Crown projects are designed, certified and constructed in a manner that is commensurate with community expectation, including the need to implement upgrade strategies to existing building stock to the degree necessary, it is necessary for the Crown authority to ensure the consultant teams, including the certifying authority, have experience with Crown projects and can soundly justify discretion that may be exercised in the certification and upgrade process.

David Blackett
Company Director

CHANGES TO SECURITY OF PAYMENT ACT COME INTO EFFECT

Kennedys

Legal advice in black and white

On 21 April 2014 the amendments to the Building and Construction Industry Security of Payment Act (NSW) 1999 (the Act) passed by parliament in November 2013, came into effect.

On 21 April 2014 the amendments to the Building and Construction Industry Security of Payment Act (NSW) 1999 (the Act) passed by parliament in November 2013, came into effect.

The amended regime applies to construction contracts entered into from 21 April 2014. It does not apply to construction contracts entered into before this date. The changes include:

1. maximum time limits for making progress payments:

a. by a principal to a head contractor – 15 business days from the date the payment claim is made; and

b. to a subcontractor – 30 business days from the date the payment claim is made;

2. the removal of the requirement to endorse a payment claim as being made pursuant to the Act (save for subcontractor claims in respect of certain residential construction); and

3. each payment claim served by a head contractor on a principal must be accompanied by a "Supporting Statement" in the prescribed form. Schedule 1 of the Regulation provides the prescribed form. Essentially it replaces the function of a payment statutory declaration under many of the widely used forms of contract in the industry. The Supporting Statement is separate to the Subcontractors Written Statement concerning pay-roll tax, industrial relations and workers compensation.

In response to concerns that false statutory declarations were routinely provided in the industry, the amendments introduce new statutory offences for refusal to provide, or the provision of false information, with the Department of Finance and Services (DFS) now having the power to investigate and impose fines. The DFS has published a compliance and enforcement policy here: **https://www.procurepoint.nsw.gov.au/sites/default/files/documents/dfs_compliance_and_enforcement_policy_security_of_payment_2014.pdf**

No changes have been made to making or responding to a claim under Part 3 of the Act.

The changes affect the parties to construction industry contracts in different ways. It is therefore important to:

A. review any contracts entered into since 21 April 2014 to ensure compliance as the prohibition against contracting out of the Act will operate to void any terms in such contracts that do not comply with the amended regime; and

B. have regard to how project arrangements straddling the commencement of the amendments may be impacted (for example a head contract entered into pre 21 April 2014 with lengthy payment terms that do not work with subcontracts entered into on and from 21 April 2014).

In addition to the above, provision was made in the amendments for the establishment of a trust regime for the holding of retention monies. The scheme was the subject of public consultation that closed in February 2014 and has not yet been put into effect.

Helena Golovanoff

Partner

Contact Us

WEBSITE www.epmprojects.com.au

supporting clients nationally

PO Box 124
Suite 2, Level 5, 655 Pacific Highway
ST LEONARDS NSW 2065
Phone: (612) 9452 8300
Facsimile: (612) 9452 8388

KEY CONTACTS

Andrew Graham
Managing Director
Mobile: 0419 732 021
Email: agraham@epmprojects.com.au

Stephen Welsh
Director
Mobile: 0417 307 860
Email: swelsh@epmprojects.com.au

Mark Blizard
Director
Mobile: 0438 126 778
Email: mblizard@epmprojects.com.au

Johan O'Brien
Director
Mobile: 0414 917 904
Email: jobrien@epmprojects.com.au

Acknowledgements

The following organisations regularly partner with EPM and contributed to the content of this newsletter.

Lawyers McCullough Robertson

Patrick Holland
Partner

Environmental Planning Law

McCullough Robertson
Level 16, 55 Hunter Street
Sydney NSW 2000
Ph: (02) 9270 8610
Fax: (02) 9270 8699
Email: PHolland@mccullough.com.au
Web: www.mccullough.com.au

dfp planning consultants

John McFadden
Partner

Urban & Town Planning

DFP Planning Consultants
11 Dartford Road
Thornleigh NSW 2120
Ph: (02) 9980 6933
Fax: (02) 9980 6217
Email: jmcfadden@dfpplanning.com.au
Web: www.dfpplanning.com.au

BLACKETT MAGUIRE+ GOLDSMITH

David Blackett
Company Director

BCA & Certification

Blackett Maguire + Goldsmith
Suite 2.01, 22-36 Mountain Street,
Ultimo NSW 2007
Ph: (02) 9211 7777
Fax: (02) 9211 7774
Email: david@bmplusg.com.au
Web: www.bmplusg.com.au

Kennedys
Legal advice in black and white

Helena Golovanoff
Partner

Construction Law

Kennedys
Level 31, 2 Park Street
Sydney NSW 1235
Ph: (02) 8215 5999
Fax: (02) 8215 5988
Email: h.golovanoff@kennedys-law.com.au
Web: www.kennedys-law.com.au

mda AUSTRALIA

David Noble
Director

Cost Management & Control

MDA Australia
Level 3, 160 Pacific Hwy
North Sydney NSW 2060
Ph: (02) 9929 8000
Fax: (02) 9929 8363
Email: david@mda-aust.com.au
Web: www.mda-aust.com.au