

# Planning Bill 2013

## PART 1 General

Part 1 of the Bill contains provisions relating to preliminary matters, interpretation and categories of development.

The key changes to Part 1 of the Bill are:

- the objects of the Bill have been amended to include:
  - a separate object for growing the State's economy and increased productivity [*clause 1.3(1)(a)*]
  - a separate object for promoting sustainable development [*clause 1.3(b)*]
  - the promotion of transparent decision-making, as part of the object of providing opportunities for community participation [*clause 1.3(1)(c)*]
  - facilitating and managing growth by co-ordinating, planning and delivering infrastructure and services in strategic planning [*clause 1.3(1)(d)*]
  - the conservation of biodiversity [*clause 1.3(1)(f)(i)*]
  - greater prominence to the protection of heritage and express reference to Aboriginal cultural heritage as part of the object to promote the protection of the environment and heritage [*clause 1.3(1)(f)(ii)*]
  - the effective management of natural hazards, and natural resources including agricultural land, water and minerals [*clause 1.3(1)(g)*]
  - a separate object to promote health and quality in the design and planning of the built environment [*clause 1.3(1)(j)*]
- the definition of 'sustainable development' has been amended and is based on the 1987 United Nations Brundtland Report definition of the term [*clause 1.3(2)*]
- there is a new definition of 'biodiversity offsets' which is defined as measures that benefit biodiversity in or outside the site of the development to offset or compensate for the likely impacts of the development on biodiversity after all practical steps have been taken to avoid or minimise those impacts [*clause 1.12*]

## PART 2 Community Participation

Part 2 of the Bill sets out how the community participation object of the Bill is to be met. It provides for a Community Participation Charter, community participation plans, mandatory community participation requirements and ePlanning.

The key changes to Part 2 of the Bill are:

- the principles which form the basis of the Community Participation Charter have been revised to provide greater guidance for the community on what it can expect from planning authorities when they engage with the community [*clause 2.1(1)*]
- the Bill clarifies that a planning authority is taken to have acted consistently with the Community Participation Charter if its community participation plan has been prepared in accordance with the Bill and it complies with the relevant mandatory community participation requirements [*clause 2.3(2)*]
- the mandatory community participation requirements set out in Schedule 2, and which are legally enforceable, have been expanded to include requirements:
  - for planning authorities to publish reasons for decisions, including how community views have been taken into account during the decision-making process [*clause 2.22 of Schedule 2*]
  - to exhibit an application for a strategic compatibility certificate for a minimum 28 days [*clause 2.8 of Schedule 2*]
  - to exhibit a neighbourhood impact statement with a draft development assessment code [*clause 2.5 and 2.6 of Schedule 2*]
- the Bill provides that that Director General's community participation plan applies to the Minister and that determining authorities are subject to a community participation plan prepared by the Director General [*clause 2.4(2)*]
- the Bill provides for the establishment of a Community Participation Advisory Panel to

provide advice on the preparation and operation of community participation plans and to make recommendations to the Minister on community participation [clause 2.8]

- The Bill has been amended to facilitate online delivery of planning services and information, in particular:
  - changes to give effect to a register of consents published on the NSW planning portal, including the issue of consents and certificates through online services [clause 2.29(1)(f) of Schedule 2 and related clauses 4.12(1); 4.22; 9.5(4) and 9.10]
  - the regulations can prescribe additional standard technical requirements for online planning services to facilitate access to relevant data between planning authorities [clause 2.29(2)(c) of Schedule 2]

## **PART 3**

# **Strategic Planning**

Part 3 of the Bill contains provisions relating to strategic planning, including the preparation of NSW planning policies, regional growth plans, subregional delivery plans and local plans.

The key changes to Part 3 of the Bill are:

- the Bill expressly provides for councils to make their local plans where a council is authorised by a Gateway determination to do so [clauses 3.11 and 3.20]
- the Bill expressly provides that local plans can identify local and State heritage items and heritage conservation areas [clause 3.13]
- the regulations can set out specific procedures and requirements for making development codes including:
  - the application of the Gateway process to the preparation of a development code [clause 3.11(3)]
  - a standard format for development codes (and other development guides) [clause 3.15(9)]
  - a neighbourhood impact statement must be publicly exhibited with a draft development code [clause 3.25]
- regulations can prescribe the form and content of planning proposals and set out the circumstances in which a planning proposal can take the form of draft planning control provisions [clause 3.16]
- the strategic planning principles have been removed where they overlap with other Bill provisions. Only those principles which are not otherwise provided for have been retained, for example planning authorities are to :
  - have regard to evidence as a basis for strategic plans [clause 3.24(1)]
  - co-operate constructively with State agencies when preparing strategic plans [clause 3.24(1)]
  - have regard to the impact of draft provisions of a local plan on the financial feasibility of future development [clause 3.24(2)]
  - have regard to whether the extent and complexity of local plan provisions are proportionate to the likely impacts of future development under the plan [clause 3.24(2)]

- the Bill allows regulations to be made to require strategic assessment statements or other documents to be publicly exhibited with a draft strategic plan [clause 3.25]
- the Minister's powers to amend strategic plans without exhibition are now limited to minor amendments such as correcting errors and misdescriptions. In all other cases, public exhibition is mandatory, and there is a new requirement to publish the reasons why the amendment is being made [clause 3.27]

## PART 4

# Development assessment and consent

Part 4 of the Bill sets out the assessment tracks for development that requires consent and identifies relevant consent authorities and their functions.

The key changes to Part 4 of the Bill are:

- tightened controls for complying development including provision for the regulations to:
  - limit the type and extent of variations allowed by variation certificates [clause 4.7(3)]
  - require notification of residential complying development applications and approvals [clause 4.9(h) of Schedule 4]
- the Bill clarifies that the 'amber light' obligation on consent authorities to provide early advice to applicants on aspects of a development that may lead to refusal would not bind the decision maker and a failure to provide advice does not affect the decision [clause 4.15(4)]
- the code assessment provisions in the Bill have been amended to provide greater certainty in relation to when a code applies and the assessment process to be followed, including:
  - development cannot be subject to both code and merit assessment [clause 4.3]
  - only one code can apply to a development [clause 4.16(3)]
  - the development standards in a code now apply strictly and development must meet all of the standards in the code to be code assessed [clause 4.17(1)]
  - if a development exceeds any development standard in the code, the entire development is merit assessed with mandatory community consultation [clause 4.3(b); clause 4.17(1) and clause 2.9 of Schedule 2]
  - there are protections for heritage, with codes not applying to State heritage items or development that requires an Aboriginal heritage impact permit [clause 4.17(1)(d) and (e)]
  - there is a new test for code development that does not satisfy performance criteria requiring the consent authority to take into consideration all of the local plan in determining the development [clause 4.17(4)]
  - there is an express provision for a consent authority to impose conditions to ensure performance criteria are achieved [clause 4.17(5)]

- the test for merit assessed now includes consideration of:
  - the entire local plan (including part 1 of a plan setting out the strategic context of the local provisions) [*clause 4.18(2)(a)*]
  - submissions [*clause 4.18(2)(b)*]
  - the likely impacts of the development [*clause 4.18(2)(c)*], including broader consideration of economic and social impacts for regional development and State significant development [*clause 4.18(2)(c)(iii) and (iv)*]
  - planning agreements [*clause 4.18(2)(d)*]
  - the public interest (in the context of the objects of the Act) [*clause 4.18(2)(e)*]
- the Bill includes a provision for non-discretionary development standards so that if a local plan identifies non-discretionary development standards and a development complies with those standards, a consent authority cannot refuse consent on those grounds or impose conditions more onerous than the standards [*clause 4.18(6)*]
- the provisions relating to strategic compatibility certificates have been amended to include:
  - mandatory 28 day public exhibition for applications for a certificate [*clause 2.8*]
  - a requirement for councils to be consulted before a certificate is issued [*clause 4.35(3)*]
  - regional panels being responsible for issuing certificates where more than 25 objections have been made following public exhibition or where a council objects to the proposal [*clause 4.33(1)*]
  - new time limits apply, including a 12 month time limit to lodge a DA after a certificate is issued and a 2 year time limit for commencement of works [*clause. 4.36(3) and clause 4.1(3) of Schedule 4*]
- the provisions for modifying development consents have been amended to provide for:
  - modifications to correct minor errors, misdescriptions or miscalculations [*clause 4.41(1)(a)*]
  - modifications where the modified development is substantially the same as the original development [*clause 4.41(1)(b)*]
  - the regulations to set out other provisions for modifications that are substantially the same and have minimal environmental impact, modifications subject to centralised referrals and the mandatory community participation requirements for modifications [*clause 4.41(2) and clause 4.9(n) and (s) of Schedule 4*]
- for State significant development, the Minister's approval is required for all modification applications (this approval function can be delegated) and the Bill clarifies when modification can be made to determinations made in connection with a staged consent [*clauses 4.41(1)(c) and 4.30(4)*]

## **PART 5 Infrastructure and environmental impact assessment**

Part 5 of the Bill contains provisions for development that does not require consent, including environmental impact assessment development, State infrastructure development and public priority infrastructure.

The key changes to Part 5 of the Bill are:

- the Bill clarifies the scope of the duty to consider the environmental impact of development [*clause 5.3(1)*].
- the Bill clarifies that a project definition report must be publicly exhibited and any revised report must be published before development for the purposes of public priority infrastructure may be carried out [*clause 5.26(1)*]

## **PART 6 Concurrence, consultation and other legislative approvals**

Part 6 of the Bill contains provisions relating to the application of concurrences, consultation requirements and approvals under other Acts to development under Part 4 and Part 5 of the Bill.

The key changes to Part 6 of the Bill are:

- environment protection notices can be issued under the *Protection of the Environment Operations Act 1997* (such as clean up notices for pollution incidents) for public priority infrastructure provided that the notice does not prevent the carrying out of the development [*clause 6.4(2)*]
- consultation, concurrence and assessment requirements can be modified where detailed strategic assessments have already been undertaken as part of strategic planning and local plans can be amended to identify more targeted environmental assessment requirements having regard to strategic outcomes [*clause 6.9*]
- there are new requirements for development subject to one stop shop referrals, including a requirement for:
  - the Director General to have regard to State assessment requirements when determining whether an approval under another Act should be given [*clause 6.12(1)*]
  - the Director General to follow the advice and recommendations of the Heritage Council and the NSW Rural Fire Service unless there is unreasonable delay or conflicting advice from another State agency [*clause 6.1 of Schedule 6*]

## PART 7 Infrastructure and other contributions

Part 7 of the Bill provides for local infrastructure contributions, regional infrastructure contributions, biodiversity offset contributions, as well as local infrastructure plans, growth infrastructure plans and planning agreements.

The key changes to Part 7 of the Bill are:

- the principles for infrastructure contributions have been removed where they overlap with other provisions and a NSW planning policy will set out the remaining principles.
- the time limit for councils to spend local infrastructure contributions has been extended from 3 to 5 years, with the ability for councils to request a further extension [clause 7.8(5)]
- biodiversity offset contributions are able to be paid into funds established under both the *Fisheries Management Act 1994* and the *Threatened Species Conservation Act 1995* [clause 7.23(1)(b)]
- the Minister can make an order identifying the provision of infrastructure or any other public purpose which can be included in a planning agreement [clause 7.26(1)(b)]
- if a planning agreement requires the money paid to a public authority to be paid into a statutory fund, the public authority is to pay the money into the fund and apply the money for the purposes of that fund [clause 7.28(2)]
- the Minister is able to issue an order setting out procedures for negotiating planning agreements including requiring consideration of the value of contributions under the planning agreement compared to the contributions that would otherwise be required under the planning legislation [clause 7.35(1)]
- the regulations can provide for deferred payments of contributions so that developers can defer payment of contributions to closer to the point of sale and councils can secure the contributions by statutory charge [clause 7.3 of Schedule 7]

## PART 8 Building and subdivision

Part 8 of the Bill provides for the appointment of building certifiers, the carrying out of building work and subdivision work and the issue of certificates.

The key changes to Part 8 of the Bill are:

- the Director General can issue guidance to building certifiers or subdivision certifiers on the exercise of their functions [clause 8.3(4)]
- completion of work compliance certificates can be issued as an alternative to an occupation certificate in authorised circumstances (such as a swimming pool or where part of a building has been altered) [clause 8.7(2)(a)(ii)]
- the regulations can prescribe requirements for the preparation of a building manual, including who will prepare the manual [clause 8.20(1)]
- the regulations can specify the circumstances when certifiers can issue directions for unauthorised building work [clause 8.24(3)(a)]

## **PART 9**

# **Reviews and appeals**

Part 9 of the Bill sets out the review and appeal rights available to applicants and objectors.

The key changes to Part 9 of the Bill are:

- reviews are now available for decisions made by Departmental staff under delegation from the Minister. The review will be conducted by another delegate (not subordinate to the original decision-maker) or the Planning Assessment Commission [*clause 9.3(7)*]
- mandatory costs orders will not apply when an application is amended during mandatory conciliation and arbitration proceedings in the Land and Environment Court [*clause 9.15(3)*]
- a number of minor amendments have been made to ensure the provisions are consistent with corresponding provisions in the current legislation, including:
  - clarifying the provisions requiring notice of appeals and the right to be heard [*clause 9.12*]
  - confirming the effect of an appeal on the operation of a development consent, including for State significant development [*clause 9.13*]
  - clarifying the types orders the Court can make on hearing an appeal concerning a development control order [*clause 9.18(4)*]

## **PART 10**

# **Enforcement**

Part 10 of the Bill provides for civil and criminal enforcement.

The key changes to Part 10 of the Bill are:

- the Bill clarifies the relevant enforcement authorities who may issue development control orders and expressly provides that this does not include private certifiers [*clause 10.5(1)*]
- exclusions and time limits on proceedings in the Land and Environment Court for judicial review have been amended to be consistent with corresponding provisions in the current legislation [*clauses 10.11 and 10.12*]

## PART 11 Miscellaneous

Part 11 includes miscellaneous provisions.

The key changes to Part 11 of the Bill are:

- building information certificates will be able to be issued by councils for areas adjoining a local government area, such as Sydney Harbour [clause 11.8]
- clarifying that directors of body corporates and related body corporates as defined in the *Corporations Act 2001* (Cth) that are associated with an applicant are captured by the political donations disclosure requirements [clause 11.24(8)(c)-(d)].

## Schedule 12

Schedule 12 sets out the savings and transitional provisions for the commencement of the new planning legislation. More detailed saving and transitional provisions will be included in regulations.

In the following summary of the saving and transitional provisions in Schedule 12, a reference to the 'former Act' is a reference to the *Environmental Planning and Assessment Act 1979*.

Key savings and transitional provisions include:

- councils must prepare a community participation plan by 30 June 2016 and a model community participation plan applies until they have prepared their plan [clause 12.4 of Schedule 12]
- the Minister can make an order to adopt current strategic planning documents as a strategic plans under the new planning legislation [clause 12.5 of Schedule 12]
- all State environmental planning policies will form part of the local plan for each local government area on commencement of the new planning system [clause 12.6 of Schedule 12]
- all local environmental plans and development control plans will form part of the local plan for each area on commencement of the new system [clauses 12.7 and 12.8 of Schedule 12]
- deemed environmental planning instruments (such as a planning scheme ordinance or interim development order) will continue as part of the relevant local plan for a period of 3 years after commencement of the new system [clause 12.7(4) of Schedule 12]
- all heritage items, heritage conservation areas, and archaeological sites in local environmental plans will be part of the relevant local plan [clause 12.7(5) of Schedule 12]
- the provisions of the former Act will apply to existing draft environmental planning instruments, draft development control plans and draft contributions plans for 3 years after the commencement of the new system [clauses 12.9 and 12.15 of Schedule 12]
- existing development consents or approvals (including State significant development consents and State significant infrastructure approvals) will become consents or approvals issued under the new planning legislation and pending applications can continue to be determined under the former Act [clauses 12.10 and 12.12 of Schedule 12];



- determinations under Part 5 of the former Act will be taken to have been made under the new planning legislation and the former Act will continue to apply to pending activities and environmental impacts assessments [*clause 12.11 of Schedule 12*]
- council contribution plans under the former Act and directions or determinations relating to special infrastructure contributions will continue in force and will be taken to be part of the corresponding infrastructure plans in the new planning system until the relevant local plans have been updated [*clause 12.13 and 12.14 of Schedule 12*]
- a Ministerial order may adopt infrastructure documents prepared under the former Act as an infrastructure plan made under the new planning legislation [*clause 12.16 of Schedule 12*]
- planning agreements will be taken to be planning agreements made under the new legislation. Draft planning agreements that have been publicly exhibited before the commencement of the new planning system can be completed under the provisions of the former Act and will be taken to have been made under the new legislation [*clause 12.17 of Schedule 12*]
- conditions imposed under the former Act relating to local infrastructure contributions and special infrastructure contributions will continue to have effect [*clause 12.18(1) of Schedule 12*]
- existing affordable housing schemes will be preserved and any directions that apply to those schemes under the former Act will continue to have effect. Conditions for contributions for affordable housing can continue to be imposed and the contributions can continue to be dealt with in accordance with these plans and schemes [*clauses 12.13, 12.14 and 12.18 of Schedule 12*]
- A Development Fund under the former Act is taken to be a Planning Growth Fund for the relevant development area and the Trust Fund under the former Act is taken to be established under the new legislation [*clauses 12.19 of Schedule 12*]
- the building certification provisions of the former Act will continue to apply to pending applications and the regulations can provide for the continued application of those provisions where a construction certificate or a complying development certificate has been issued for the development on commencement of the new system [*clause 12.20 of Schedule 12*]
- a review or appeal pending on the commencement of the new legislation is to be determined in accordance with the provisions of the former Act [*clauses 12.21 and 12.22 of Schedule 12*].

# Planning Administration Bill 2013

The Planning Administration Bill makes provision relating to the administration of the planning legislation. The key changes to the Planning Administration Bill ('PA Bill') are:

- consistent with the provisions of the current *Environmental Planning and Assessment Act 1979*:
  - regional planning panels will comprise 5 members (including 2 council nominees and 3 State members one of whom is appointed as the Chairperson with the agreement of Local Government NSW) [*clause 5.2(1) of the PA Bill*]
  - the State members and at least one of the councils nominees of a regional planning panel are to have expertise in relevant fields, including planning, heritage, the environment etc. [*clause 5.2(2) and (3) of the PA Bill*]
- councils will be required to appoint independent hearing and assessment panels to exercise any consent authority functions that are required to be exercised by such a panel under the applicable local plan [*clause 7.1 of the PA Bill*]
- an authorised fire officer may exercise the powers of an investigation officer in relation to fire safety issues, including to enter premises with the authorisation of the NSW Fire Commissioner without notice if entry is required urgently [*clause 8.20(5) of the PA Bill*]
- the Bill contains savings and transitional arrangements, including to provide for the continuation of the Planning Assessment Commission and regional planning panels constituted under the former legislation [*Schedule 6 of the PA Bill*]