Changes to consultation requirements – Bushfire Prone Land

Introduction

If you prepare or assess development applications involving development on bushfire prone land, you might be interested in changes to the assessment and consultation procedures for such applications, due to commence on 25 February 2011.

Assessment requirements for development on bushfire prone land are currently set out in section 79BA of the Environmental Planning and Assessment Act 1979 (EP&A Act). Under that section development consent cannot be granted for development on bush fire prone land, other than specified development, unless the consent authority for the development:

- is satisfied that the development conforms to Planning for Bushfire Protection (PBP); or
- has consulted with the NSW Rural Fire Service (RFS), before the application is determined.

Section 79BA(1) of the EP&A Act, as it currently stands, allows a consent authority to determine a development application without referral to the RFS. This power exists if the consent authority is satisfied that the development conforms to PBP. However, my understanding is that the practice of many councils is to refer development applications to the RFS, as a matter of course, even if the application is accompanied by a bushfire assessment report that states the development complies with PBP.

New section 79BA

On 25 February 2011 section 79BA(1) will be repealed and replaced by new sections 79BA(1) and 79BA(1A). New sections 79BA(1) and (1A) will provide as follows:

(1) Development consent cannot be granted for the carrying out of development for any purpose (other than a subdivision of land that could lawfully be used for residential or rural residential purposes or development for a special fire protection purpose) on bush fire prone land unless the consent authority:
(a) is satisfied that the development conforms to the specifications and requirements of the document entitled Planning for Bush Fire Protection, ISBN 0 9751033 2 6, prepared by the NSW Rural Fire Service in co-operation with the Department of Planning (or, if another document is prescribed by the regulations for the purposes of this paragraph, that document) that are relevant to the development (the relevant specifications and requirements), or

(b) has been provided with a certificate by a person who is recognised by the NSW Rural Fire Service as a qualified consultant in bush fire risk assessment stating that the development conforms to the relevant specifications and requirements.

(1A) If the consent authority is satisfied that the development does not conform to the relevant specifications and requirements, the consent authority may, despite subsection (1), grant consent to the carrying out of the development but only if it has consulted with the Commissioner of the NSW Rural Fire Service concerning measures to be taken with respect to the development to protect persons, property and the environment from danger that may arise from a bush fire.

In effect the new section 79BA introduces a 3rd alternative to the “be satisfied” or “consult” alternatives that currently exist. The 3rd alternative (section 79BA(1)(b)) is “certified compliance”.

The certified compliance alternative relieves the consent authority from assessing development applications against PBP. If the development is certified as conforming to PBP by a “recognised” consultant, then the consent authority may (but need not) consult with RFS or assess the application itself against PBP.

On first blush the new section 79BA is a significant improvement on the current situation. However, on closer analysis the consent authority still has discretion to consult with RFS even if the development is certified as conforming by a recognised consultant. That is because the new section does not prevent council’s consulting with RFS if the certified compliance option is elected. The consent authority may choose to consult despite a certificate from a recognised consultant stating that the proposal conforms to PBP. The new subsection does not rule out consultation in cases where the development is certified as complying by a recognised consultant.

The possibility therefore remains under the new section 79BA that a consent authority might disagree with a bushfire report submitted with a development application and decide to consult with the RFS. The new section appears to be designed to protect consent authorities rather than stream-line the consultation process.

A consent authority can (but need not) rely on the new section, at its discretion. A failure to act on a certificate by a recognised consultant would not be a breach of the Act in my view.
How do consultants get “recognised” by the RFS?

The NSW RFS has published a practice note on its web site setting our requirements for “recognised/qualified consultants”.

The practice note indicates that consultants can be certified directly by the RFS or by an accreditation body administering an accreditation scheme approved by the RFS. There does not appear to be any accreditation schemes in place to date.

The requirements for certification include, among other things, public liability insurance to a minimum of $10 million, professional indemnity insurance to a minimum of $2 million, “appropriate” qualifications and interview with a peer review panel.

Additional requirements apply to consultants who wish to certify alternative solutions.

Related amendments

There are a number of related amendments to the Environmental Planning and Assessment Regulation 2000 and the Local Government Act 1993, designed to support the new section 79BA.

The amendment to the Regulation inserts a savings and transitional provision (Schedule 7, cl 21B). This provision applies to development applications lodged prior to 25 February 2012. The clause provides that a “consent authority may grant development consent to development referred to in section 79BA (1) of the Act if it has consulted with” the RFS.

The amendment to the LG Act gives councils immunity from liability for: (a) advice furnished in good faith and (b) anything done or omitted to be done in relation to the likelihood of land being subject to the risk of bushfire.

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