Legislation Update: Notification of CDC Applications and Commencement of Work

The Environmental Planning and Assessment Regulation 2000 was amended by the Environmental Planning and Assessment Amendment (Complying Development and Fire Safety) Regulation 2013 on Friday on 22 February 2014. Among other things, the amended Regulation introduces a requirement that an application for a complying development certificate for certain types of development must be notified prior to determination of the application. There is also a minor change to the existing requirement to notify the commencement of work under a complying development certificate.

The amended Regulation commenced last Friday. However it appears that the amended version of the Regulation is yet to be published on the NSW legislation website. A copy of the amended Regulation can be found at:


Following is a summary of the pre-determination and pre-commencement notification requirements of the amended Regulation.

Pre-determination notification

Subject to certain exceptions, the certifying authority for a CDC must notify the complying development application at least 14 days prior to issue of the certificate.

The types of development for which notice is required are:
(a) development specified under any SEPP or LEP that involves construction of a new dwelling or an addition to an existing dwelling,\(^1\)

(b) demolition under the Codes SEPP;\(^2\)

(c) secondary dwellings or group homes under the Affordable Rental Housing SEPP.\(^3\)

Notice is not required for other types of complying development.

The notice must be sent to the occupier of any dwelling on a neighbouring lot that:

(a) has a boundary within 20 metres of the boundary of the complying development lot; and

(b) is within a rural or residential zone.

The way I read the Regulation, both conditions must be met in order to trigger the obligation to notify. For example, notice is not required if a neighbouring lot contains a dwelling and has a boundary within 20 metres of the boundary of the complying development lot, but is not within a rural or residential zone.

If the certifying authority is a private certifier, a notice must also be sent to the local council.\(^4\)

Notification is not required if the complying development lot is with a “residential release area”\(^5\) or if the neighbouring lot is vacant.

The contents of the notice are prescribed by the Regulation.\(^6\) Attached is a copy of a template letter prepared by the Department of Infrastructure and Planning for this purpose.\(^7\)

\(^1\) Clause 130AB(1)(a) EP&A Regulation

\(^2\) Clause 130AB(1)(b) EP&A Regulation

\(^3\) Clause 130AB(1)(c) EP&A Regulation

\(^4\) Clause 130AB(2)(b) EP&A Regulation

\(^5\) Defined in clause 130AB(4) EP&A Regulation as:
(a) an urban release area identified within a local environmental plan that has been prepared under the Standard Instrument (Local Environmental Plans) Order 2006 and made as provided by section 33A (2) of the Act, or
(b) a land release area identified under the Eurobodalla Local Environmental Plan 2012, or
(c) any land subject to State Environmental Planning Policy (Sydney Region Growth Centres) 2006, or
(d) any area included in Parts 6, 26, 27, 28 and 29 of Schedule 3 to State Environmental Planning Policy (Major Development) 2005.

\(^6\) Clause 130AB(3) EP&A Regulation

\(^7\) Planning Law Solutions does not warrant the correctness of this letter.
The amended Regulation provides that a certifying authority must not determine the CDC application until at least 14 days after the certifying authority has “given a notice” in accordance with the Regulation. A notice may be given to the occupier by sending it by pre-paid post addressed to the occupier’s last known place of abode. A notice given in that way is deemed to have been given or served at the time at which the notice would be delivered in the ordinary course of post.

Importantly, if a notice is sent by pre-paid post addressed to the occupier at his or her last known place of abode, there is an “irrebuttable presumption” that the notice was delivered, even if the notice is returned to the sender. In other words, it is not necessary for the notice to be received by the occupier.

There are two observations that I wish to make about the new pre-determination notification requirement. The first is that it increases the risk of third party challenges to the validity of CDCs. There is established case law that failure by a consent authority to properly notify a development application is a breach of procedural fairness, resulting in invalidity of any development consent subsequently issued. It is entirely possible this existing body of law will now spread to CDCs, and in doing so increase the potential liability of accredited certifiers.

My second observation is: what is an occupier in receipt of a notification expected to do? There is no right to object to the proposed development, and there is no obligation on the certifying authority to consider submissions. The Department of Infrastructure and Planning’s circular PS 13-004 states that the purpose of the requirement is for “advice only”. The inference there is that the notification requirement will somehow encourage people to consult their neighbours before lodging a CDC application. But I wonder whether a neighbour in receipt of a notice will have an unrealistic expectation that he or she has a say in the decision.

Pre-commencement notification

The amended Regulation imposes an obligation on a certifying authority to impose a condition on a CDC for specified development requiring the person having the benefit of the CDC to notify occupiers of neighbouring land of the person’s intention to commence work. The condition must require the notice to be given at least:

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8 Section 153(1)(a)(ii) EP&A Act

9 Section 153(2) EP&A Act

10 Sisic v Rockdale City Council [2007] NSWLEC 687

11 See for example Csillag v Woollahra Council [2011] NSWLEC 17 and Tweed Business and Residents Focus Group Inc v Northern Region Joint Regional Planning Panel [2012] NSWLEC 166

12 Clause 136AB EP&A Regulation
• 7 days prior to the commencement of work if the complying development lot is **not** in a residential release area; and

• 2 days prior to the commencement of work if the complying development lot is **in** a residential release area.

Pre-commencement notice is only required if the development to which the CDC relates is:

(a) a new building, or

(b) an addition to an existing building, or

(c) the demolition of a building.

The notice must be sent to the **occupier** of any dwelling on a neighbouring lot that has a boundary within 20 metres of the boundary of the complying development lot.

The same presumption of delivery mentioned above applies in respect of pre-commencement notices.

Attached is a copy of a template letter prepared by the Department of Infrastructure and Planning for the purpose of pre-commencement notification.  

This article is general in nature and it should not be applied to any specific facts or circumstances. If you require advice on the subject matter of this article or any other planning or environmental law matters please contact Michael Mantei at Planning Law Solutions.

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*Michael Mantei*

Lawyer and Accredited Specialist Local Government and Planning Law

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13 Planning Law Solutions does not warrant the correctness of this letter.