Legislation Update: Modification of a development consent under the Planning Bill 2013

In this article I review a potentially significant change to the power to modify a development consent proposed under the Planning Bill 2013.

The Planning Bill 2013 was passed, with amendments, by the NSW Parliament Upper House on 27 November 2013. The Bill has been referred back to the Lower House for concurrence. The Minister for Planning says that the amendments by the Upper House have “bastardised” the Bill, and that the Government will reconsider the Bill in early 2014, after further consultation with business and the community.¹

Given the time and resources spent on planning reforms in NSW over the last 2 years, I suspect that a new Planning Act, in some form, will be made in 2014.

A full copy of the Bill as passed by the NSW Lower House can be found at the following link:


Modifications under the Planning Bill 2013

The power to modify a development consent granted under the Planning Bill is contained in proposed Division 4.8 of Part 4.

Clause 4.39 of Part 4 describes a modification to a development consent as a "change to the terms of the consent", and may include the imposition of additional conditions. As is the case with the current Environmental Planning and Assessment Act 1979, under the Planning Bill a development consent may only be modified if the consent as modified is "substantially the same" as the consent as originally

¹ Hansard 21 November 2013
granted. However, under the *Planning Bill*, this limitation does not apply to a modification to correct a minor error, misdescription or miscalculation, or any modification to State significant development.

Of particular significance is clause 4.41(3) of Part 4, which is expressed in the following terms (my emphasis added):

“A development consent may be modified only if the development as proposed to be modified is development for which the consent authority may grant development consent in accordance with this Part. Accordingly, the obligations of a consent authority under this Part in relation to the determination of an application for development consent extend to applications for the modification of development consents (other than modifications of the kind referred to in subsection (1)(a)).”

This new provision reverses the principle under the EP&A Act that the power to modify a development consent is not diminished by a change in an environmental planning instrument.²

Proposed clause 4.41(3) will have a number of consequences. One is that a person seeking to modify a development consent for development that is prohibited by a change in the local plan subsequent to the granting of the original consent, must rely on existing use rights in order to enliven the modification power. Another consequence is that modification applications must be accompanied by an objection under *State Environmental Planning Policy No. 1*, or a submission under clause 4.6 of the relevant local environmental plan, if the proposed modification would result in breach of a development standard.

Perhaps the most significant consequence of proposed clause 4.41(3) is that a development consent can no longer be modified if the modification would result in breach of a development standard the kind of which may not be varied (for example the minimum allotment size for subdivision of land within zone RU1 under standard instrument plans). In other words, modification applications will be placed in the same position as applications for development consent. This reverses the current approach.

The limitation in section 4.41(3) of the *Planning Bill* will apply to existing development consents granted under the current EP&A Act by reason of the savings and transitional provisions accompanying the *Planning Bill* (see *Planning Bill* Schedule 12, cl 12.10). This means that modification of those consents will be more difficult, and in some cases prohibited, under the *Planning Bill*. Consent holders contemplating a modification would be well advised to lodge the application as soon as possible to avoid the more onerous requirements likely to be introduced when the *Planning Bill 2013* commences.

This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact the writer.

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