

PLANNING SYSTEM

Act and regulation changes

Circular	PS 11 – 009
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Related	PS 11 - 003

Commencement of the Planning Appeals Legislation Amendment Act 2010

The purpose of this circular is to provide advice on amendments to the *Environmental Planning and Assessment Act 1979* and Environmental Planning and Assessment Regulation 2000 following the commencement of the *Planning Appeals Legislation Amendment Act 2010* and the Environmental Planning and Assessment Amendment (Planning Appeals) Regulation 2011.

Introduction

The *Planning Appeals Legislation Amendment Act 2010* (PALA Act) amends the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the *Environmental Planning and Assessment Amendment Act 2008* (EP&A Amendment Act) in relation to reviews and appeals.

The Environmental Planning and Assessment Amendment (Planning Appeals) Regulation 2011 (Planning Appeals Regulation) amends the Environmental Planning and Assessment Regulation 2000 (the Regulation) to support the changes introduced by the PALA Act.

The PALA Act also amends the *Land and Environment Court Act 1974*. These amendments which introduce a scheme of conciliation-arbitration in the Land and Environment Court, have already commenced and are the subject of Circular [PS 11-003](#).

This circular provides information on the amendments in the PALA Act and the Planning Appeals Regulation that commence on **28 February 2011**.

Overview of changes

The PALA Act:

1. Introduces new rights to internal reviews in respect of modification applications and decisions of councils to reject development applications (DAs).

2. Makes changes to appeal provisions by:
 - amending the statutory limitation period for merit appeals from 12 to six months (instead of three months as proposed in 2008)
 - amending the application of cost order provisions where applicants amend plans during the course of proceedings
 - providing for Joint Regional Planning Panels (JRPPs) and the Planning Assessment Commission (PAC) to be notified of and to be heard in appeals if they were involved in the related determinations.
3. Repeals uncommenced planning arbitrator provisions in the *Environmental Planning and Assessment Amendment Act 2008* and makes other consequential amendments.

The Planning Appeals Regulation provides procedures for the operation of the new internal reviews, including timeframes, fees, and notification procedures; and makes consequential amendments that are necessary upon the commencement of the PALA Act.

1. Reviews of decisions

Three classes of reviews

The PALA Act will add to the existing right for an applicant to seek a review of a council determination of a development application under section 82A.

The EP&A Act will now provide for three classes of internal reviews in the development application process:

1. reviews of development applications rejected due to inadequate information when lodged (section 82B of the EP&A Act);
2. reviews of development application determinations (section 82A of the EP&A Act), and
3. reviews of modification determinations (section 96AB of the EP&A Act).

Reviews of decisions to reject development applications are not available where a DA was lodged before **28 February 2011**.

Reviews of modification determinations are not available where the modification was determined before **28 February 2011**.

General procedural requirements for reviews

The attached table details the key provisions in the EP&A Act and EP&A Regulation relating to the three reviews.

Review of rejected development applications under Section 82B

The introduction of a review of rejected DAs is supported by the following amendments to the EP&A Regulation 2000:

- councils have 14 days to decide to reject a DA
- councils are required to provide written reasons for rejecting the DA
- an applicant may seek an internal review of that decision within 14 days
- councils will have 14 days to review its decision to reject the DA
- if the Council fails to determine the review within 14 days the DA is taken to be rejected

In addition, the EP&A Regulation 2000 has been amended to give consent authorities 14 days to forward DAs to relevant State agencies (formerly 2 days). This ensures a council does not have to forward a DA which might otherwise be rejected.

This new review provision applies to all DAs lodged with a council from 28 February 2011 (irrespective of whether the DA is to be determined by the council or a JRPP).

Review of council determination under Section 82A

Internal reviews of council determinations of DAs remain available under section 82A. This type of review will continue to operate as it currently does.

Review where modification application refused or conditions imposed under Section 96AB

An applicant may seek a review of a determination by council in respect of a modification application under sections 96 and 96AA where council is the consent authority.

This type of review is not available for modifications involving minor error, misdescription or miscalculation (i.e. those lodged under section 96(1)).

This type of review is also not available for modification determinations in respect of:

- complying development certificates
- designated development
- integrated development
- Crown DAs
- determinations taken to have been made because the council has failed to determine the application (deemed refusals), and
- determinations made by a Joint Regional Planning Panel.

Applicants have 28 days after being notified of a modification determination to request a review.

Review procedures for modification determinations generally mirror the current section 82A review procedures.

2. Appeals

Statutory timeframe for appeals

The PALA Act reduces the period within which a merit appeal must be lodged with the Court from 12 months to six months.

Uncommenced provisions in the EP&A Amendment Act 2008 proposed to reduce this period from 12 to three months. However, the period is now prescribed as six months in order to strike an appropriate balance between the need to speed up the time taken to resolve disputes, offering certainty to those affected by an application, and where appropriate, allowing applicants ample time to pursue negotiations with council and amend plans during the internal review process.

The six month time limit for appeals will not apply to **development applications** lodged with a consent authority before the commencement of the PALA Act provisions on **28 February 2011**.

The six month time limit for appeals to the Court in respect of **modification applications** under sections 96 and 96AA will not apply to determinations made before **28 February 2011**.

Appeals in relation to review determinations

Where a development application has been amended during the section 82A or 96AB review process, any appeal made to the Court will be in respect of the amended application that was the subject of the section 82A or 96AB review determination.

Cost orders for amended DAs

Cost order provisions in section 97B of the EP&A Act have been amended to clarify that if an amended application is filed during appeal proceedings, the Court is only required to make an order for the costs of the consent authority that are thrown away as a result of amending the application.

The amendment means that applicants will only have to pay costs related to the part of the original application that has been amended, and not the full cost of the assessment.

PAC and JRPP involved in hearings

The Joint Regional Planning Panels and the Planning Assessment Commission are now required to be notified where there is an appeal in respect of a matter the JRPP or PAC has determined. This means the PAC and JRPPs will now be entitled to be heard at these appeals as if they were a party to the appeal.

3. Other amendments

Removal of planning arbitrators scheme

With the implementation of the mandatory conciliation-arbitration scheme in the Land and Environment Court, and the introduction of an expanded internal reviews regime under the EP&A Act, all uncommenced provisions of the EP&A Amendment Act 2008 relating to planning arbitrators have been repealed.

Exemptions for temporary structures

The EP&A Regulation has been amended to make permanent the current exemption from meeting all certification requirements for temporary structures that are not entertainment venues. The amendment also makes permanent the current exemption for temporary structures that are entertainment venues from the requirements for construction and occupation certificates. Temporary structures that are entertainment venues must continue to comply with other certification requirements.

4. Savings and transitional provisions

All amendments to Part 4 of the EP&A Act by the PALA Act do not apply to development applications lodged before 28 February 2011 or modification applications determined before 28 February 2011 as the case may be.

Further information

NSW Acts and Regulations can be accessed on the Parliamentary Counsel Office's website at www.legislation.nsw.gov.au.

Department of Planning circulars are available from: <http://www.planning.nsw.gov.au/circulars>

Authorised by:

Sam Haddad
Director General

Important note: This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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Summary of Review Provisions

Review Provision <i>Note about references:</i> 'Section' refers provisions in the EP&A Act 'Clause' refers provisions in the EP&A Regulation.	Review of rejected DA Section 82B	Review of DA determination Section 82A	Review of modification determination Section 96AB
Time limit for an applicant to request a review	Applicants need to request a review within 14 days of being notified of council's decision <i>Reference: Clause 123H</i>	Applicants may request a review at any time before expiry of making an appeal under section 97: <ul style="list-style-type: none"> – 12 months for DAs lodged <u>before</u> 28 February 2011 – 6 months for DA's lodged <u>on or after</u> 28 February 2011 <i>Reference: Section 82A and Schedule 6 savings & transitional provision in the EP&A Act</i>	Applicants need to request a review within 28 days of being notified of council's decision <i>Reference: Clause 123I</i>
Time limit for council to make a determination	Council has 14 days to determine the review application. Council is taken to have refused the review application if it fails to determine it within 14 days. <i>Reference: Clause 123H</i>	Council may not determine a review: <ul style="list-style-type: none"> – after the time limited for the making of an appeal under section 97 expires, if no such appeal is made against the determination; or – after an appeal under section 97 against the determination is disposed of by the Court, if such an appeal is made against the determination <i>Reference: Section 82A</i>	Council may not determine a review: <ul style="list-style-type: none"> – after the time limited for the making of an appeal under section 97AA expires, if no such appeal is made against the determination; or – after an appeal under section 97AA against the determination is disposed of by the Court, if such an appeal is made against the determination <i>Reference: Section 96AB</i>
Fees	Determined by reference to a sliding scale in the Regulation. <i>Reference: Clause 257A</i>	Determined by reference to a sliding scale in the Regulation. <i>Reference: Clause 257</i>	50% of the modification application fee <i>Reference: Clause 258A</i>
Public Notification of the request to review	No requirement.	Maximum 14 day notification period but otherwise in the same manner as the original development application was notified or advertised, or as provided for in a DCP. <i>Reference: Clause 113A</i>	Maximum 14 day notification period but otherwise in the same manner as the original development application was notified or advertised, or as provided for in a DCP. <i>Reference: Clause 123I</i>
Public participation and submissions	No provisions	Submissions may be made during the notification period. <i>Reference: Clause 113A</i>	Submissions may be made during the notification period. <i>Reference: Clause 123I</i>
Notification of the council's determination of the review	Council must give written notice to the applicant as soon as practicable after the review is determined. <i>Reference: Clause 123H</i>	Council must give written notice to the applicant as soon as practicable after the review is determined. <i>Reference: Clause 123G</i>	Council must give written notice to the applicant as soon as practicable after the review is determined. <i>Reference: Clause 123I</i>

Review Provision <i>Note about references:</i> 'Section' refers provisions in the EP&A Act 'Clause' refers provisions in the EP&A Regulation.	Review of rejected DA Section 82B	Review of DA determination Section 82A	Review of modification determination Section 96AB
Effect of the review determination	If a review reverses the decision to reject the application, council must proceed to consider and determine the application and the date of the review determination is taken to be the day the development application is lodged. If the decision to reject the application is confirmed, the application is taken to have never been made. <i>Reference: Section 82D and Clause 51</i>	If the review changes a determination, the changed determination replaces the earlier determination from the date of the determination of the review. <i>Reference: Section 82D</i>	If the review changes a determination, the changed determination replaces the earlier determination from the date of the determination of the review. <i>Reference: Section 82D</i>
Further reviews and appeals	A decision on an application for a review may not be further reviewed under the same section by the same reviewing body. <i>Reference: Section 82C</i>	A decision on an application for a review may not be further reviewed under the same section by the same reviewing body. The decision may be appealed under section 97. <i>Reference: Section 82C</i>	A decision on an application for a review may not be further reviewed under the same section by the same reviewing body. The decision may be appealed under section 97AA. <i>Reference: Section 82C</i>