Planning circular

PLANNING SYSTEM

Development assessment; matters for consideration

Circular	PS 24-007
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Related	Replaces PS 07-001 (dated 11 January 2007) and PS 08-013 (dated 13 November 2008)

Consideration of proposed EPIs under section 4.15(1)(a)(ii) of the EP&A Act

This circular is to advise consent authorities about considering proposed environmental planning instruments (EPIs) when determining a development application (DA). It updates previous circulars to address recommendations of the Independent Commission Against Corruption in Operation Galley.

Introduction

Consent authorities are required by section 4.15(1)(a)(ii) of the *Environmental Planning and Assessment Act 1979* (the EP&A Act) to take into consideration relevant proposed EPIs when determining a DA. Proposed EPIs include proposed State environmental planning policies (SEPPs) and proposed local environmental plans (LEPs).

Proposed EPIs that should not be considered

For the purposes of section 4.15(1)(a)(ii), the Planning Secretary through this circular notifies consent authorities that any proposed EPI (other than a comprehensive LEP), that has not been made within 3 years of public consultation has been deferred indefinitely or has not been approved and does not need to be taken into consideration by consent authorities when determining DAs.

Proposed EPIs that should be considered

Unless exempted by notification of the Planning Secretary, a proposed EPI that is or has been the subject of public consultation and has been notified to the consent authority is a relevant matter for consideration under section 4.15(1)(a)(ii).

Weight to be given to a proposed EPI

Judgments of the NSW Land and Environment Court (LEC) and Court of Appeal provide a stream of case law regarding the weight that should be given to a proposed EPI when assessing a DA.

Case law tends to emphasise that the weight that should be given to a proposed EPI will depend on the likely or unlikely **certainty** and **imminence** of the relevant provisions of a proposed EPI coming into force.

Certainty relates to how confident the consent authority is that the provisions of the proposed EPI that relate to the development site are settled, while imminence relates to how soon the proposed EPI is likely to be made. This is considered in connection with the facts and circumstances of the case.

As the facts and circumstances can vary considerably from case to case, there is no definitive list of considerations or factors that can establish the certainty and imminence of a proposed EPI and the weight to be given to the proposed EPI in determining a DA.

However, the examples below provide guidance on the kinds of matters that the Court has considered in determining whether a proposed EPI is certain and imminent.

The Courts have found that significant weight should be given to a proposed EPI where:

- it has been exhibited (particularly more than once),
- there is a clear and proximate date for the likely gazettal of the proposed EPI,
- any changes to the proposed LEP as a result of submissions or amendments required by the Minister are likely to be more of detail than substance, and/or
- it is a provision inserted into a draft LEP following public submissions.

Where a proposed EPI has been notified prior to determination

Many cases relate to circumstances where a DA was lodged when the EPI was a draft, but the proposed EPI has since been gazetted or notified prior to determination. The weight to be given to the EPI once in force will largely depend on the terms of any savings provisions.

Typically, the Court has found that an instrument that has been gazetted or notified should be considered as both certain and imminent unless there is clear language in the savings provisions that the instrument does not apply.

Where a proposed EPI has been notified prior to determination of a DA, consent authorities should obtain legal advice on the application of the EPI to undetermined applications, especially if the savings and transitional provisions are ambiguous and/or many DAs may be affected.

Considering a proposed EPI in development assessment

Where a proposed EPI is a relevant matter for consideration, the consent authority must then consider what new matters should be taken into account from the proposed EPI in determining the DA. The Court has approached this in different ways, including:

- considering whether the proposed development will be consistent with any new standards in the proposed EPI.
- considering whether the proposed development might undermine the character of the neighbourhood if the proposed EPI proposes to preserve it.
- considering whether the development is antipathetic to or will undermine the aims and objectives or planning approach of the proposed EPI.

Giving significant weight to a proposed EPI does not mean requiring strict compliance with the development standards in the proposed EPI or dwelling too heavily on the detailed controls. This is because variation of the standards or controls may be justified under clause 4.6 of the Standard Instrument LEP (or equivalent provisions), if the proposed EPI were in effect.

Other considerations

Where a proposed EPI is a relevant matter for consideration, it does not mean that existing EPIs that have been made and have effect should not be considered under section 4.15(1)(a)(i) of the EP&A Act.

Where there is some uncertainty whether a proposed EPI or a gazetted EPI is a relevant consideration under 4.15(1)(a)(ii), it may still be relevant as an aspect of the public interest under 4.15(1)(e) of the EP&A Act.

Relevant caselaw

The application of section 4.15(1)(a)(i) of the EP&A Act and repealed equivalent provisions have been considered many times by Judges and Commissioners of the LEC and the NSW Court of Appeal.

New cases may change how the requirement is applied in practice. Consent authorities must ensure they update their knowledge of the caselaw as it can change the application of the provision.

Cases that may assist a consent authority in further understanding the provisions are listed below:

NSW Court of Appeal

Terrace Tower Holdings Pty Limited v Sutherland Shire Council [2003] NSWCA 289

Land and Environment Court (Judges)

- *Architects Haywood and Bakker Pty Ltd v North Sydney Council* [2000] NSWLEC 138
- *Edward Listin Properties Pty Ltd v North Sydney Council* [No. 2] [2000] NSWLEC 181
- *Blackmore Design Group Pty Ltd v North Sydney Council* [2001] NSWLEC 279

- *Maygood Australia Pty Ltd v Willoughby City Council* [2013] NSWLEC 142
- *Omid Mohebati-Arani v Ku-ring-gai Council* [2017] NSWLEC 143

Decisions by Commissioners of the LEC may also assist in providing examples of the different ways the principles set out above have been applied to individual facts and circumstances.

Impact of developments in case law

The approach to considering proposed EPIs in development assessment is nuanced and may continue to evolve.

This planning circular is intended to be used as a high-level guide based on the law at the time of issue, but legal or planning advice is always recommended to account for individual facts and circumstances and any developments in case law.

Further information

For further information please contact Service NSW on 13 77 88.

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Authorised by:

Monica Gibson
Deputy Secretary

Planning, Land Use, Strategic, Housing and Infrastructure
Department of Planning, Housing and Infrastructure

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