

24 May 2011

The Hon. Brad Hazzard MP
Minister for Planning and Infrastructure
Minister Assisting the Premier on Infrastructure NSW
Level 33 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister,

Re: Transitional arrangements for Part 3A projects

We write with reference to the above topic, and the amendments to the Major Development SEPP published on 13 May 2011.

An issue has arisen relating to projects that have been the subject of a concept plan approval, but not a project approval. As you are aware, you have revoked Part 3A declarations for projects where there is an approved concept plan, but no Director-General requirements have been issued in relation to a project application.

We're concerned that the text of the amended SEPP does not accord with either your department's "planning circular" or the government's policy decision.ⁱ

According to the planning circular, local councils will be required to assess development applications for these proposals consistently with the approved concept plan, despite any:

- prohibition, and
- non-compliance with any development standard that would otherwise apply in any relevant environmental planning instrument.ⁱⁱ

However, the equivalent provision in the amended Major Development SEPP does not match this text.ⁱⁱⁱ In particular, the clause does not *require* a consent authority to approve a development application that is in-line with a concept plan approval. It merely *allows* a council to give an approval.

This isn't a problem for those projects that the former minister intended to be finalised under Part 4 when the concept plan was approved. For those projects, a provision in the Act already requires any subsequent Part 4 decision to be "generally consistent with the terms of approval of the concept plan".^{iv} This limits the power of councils or panels to refuse or condition the approval of an application that is covered by a concept plan.

However, the situation is different if the former minister intended, at the time the concept plan was approved, that the subsequent project approval be dealt with under Part 3A. That's because the above statutory provision will not apply. The new provision in the Major Development SEPP only requires that "consent" must not be granted unless the council or panel "is satisfied that the development is generally consistent with the provisions of the [concept plan] approval". This limits the discretion of a panel to re-shape a development via conditions, but **it does not protect a project from outright refusal**.

For example, a project that has received concept plan approval may now be refused final consent by a panel because of something written by council in its development control plan. (Under Part 4, development control plans are considered to be a "fundamental element" in or a "focal point" of the decision-making process.)^v The council's development control plan would not have been a

relevant consideration, had the project been dealt with as Part 3A originally intended, as a project approval. Nor would it have been capable of blocking a project if the former minister had, at the time the concept plan approval was issued, decided that the final project approval would be dealt with under Part 4.

The government's decision to preserve the integrity of approval processes already underway has been undermined by the final legal drafting of the amended SEPP. There can be no sensible public policy reason why the government should preserve a concept plan approval, while simultaneously also requiring panels to give consideration to development control plans in the final development assessment.

We ask that the Major Development SEPP be revised to reflect the text of the Planning Circular issued by the Department. We do not see any legal reason why the government's policy intent cannot be faithfully reflected in the drafting. The *Environmental Planning and Assessment Act 1979* allows the development standards in a concept plan to be incorporated (by reference) into the SEPP as "non-discretionary development standards".^{vi} When this occurs, the consent authority:

- is not entitled to take those standards into further consideration; and
- must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards.^{vii}

Further provisions can be inserted preventing panels from refusing a development application outright when it is generally consistent with the terms of approval of the concept plan.^{viii}

Yours sincerely
Urban Taskforce Australia



Aaron Gadiel
Chief Executive Officer

ⁱ Planning Circular "Part 3A of the EP&A Act and residential, commercial, retail and coastal subdivision development" (13 May 2011) PS 11-015.

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ⁱⁱⁱ Clause 17(7).

^{iv} Section 75(2).

^v *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 386-7 (Spigelman CJ); Meagher and Beazley JJA concurred.

^{vi} s 79C(2)-(3).

^{vii} s 79C(2).

^{viii} For example, see: clause 30A of the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development*; clause 29 of the *State Environmental Planning Policy (Affordable Rental Housing) 2009*; and Part 7 of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*.