DEPARTMENT OF PLANNING

Remington Centre, 175 Liverpool Street, Sydney 2000.
Box 3927 GPO Sydney 2001. DX 15 Sydney.
Telephone: (02) 391 2000 Fax: (02) 391 2111.

CIRCULAR NO. A21

Issued
30 June 1993

All City, Municipal and Shire Councils

# CHANGES TO THE *ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979* UNDER THE *LOCAL GOVERNMENT (CONSEQUENTIAL PROVISIONS) ACT 1993.*

**THIS CIRCULAR INCLUDES DETERMINATION OF DEVELOPMENT APPLICATIONS, LAPSING OF CONSENT AND AMENDMENT TO S94 TO REMOVE LEVYING FOR WATER SUPPLY AND SEWERAGE FACILITIES.**

## BACKGROUND

This circular advise of changes to the *Environmental Planning and Assessment Act 1979* which will be effected through the Local Government (Consequential Provisions) Act 1993. The following sections are to be amended:

- section 77 (making of development applications)
- section 91 (determination of development applications)
- section 92 (notice to applicant of determination of development application)
- section 93 (date from which consent operates)
- section 94 (payment towards provision or improvement of amenities or services)
- section 97 (appeal by an applicant)
- section 99 (lapsing of consent)
- section 101 (determination of development applications by the Minister)
- schedule 3 — current development consents under the *Environmental Planning and Assessment Act 1979.*

Contact: Planning Systems Management Branch
Telephone: (02) 391 2370 or (02) 391 2080
Our reference: S93/00650/001 S90/02473/018

The Environmental Planning and Assessment Regulation 1980, clause 41F (structure and subject matter of plan), will also be amended.

The legislation is expected to be available from the Government Information Office shortly. It is proposed to commence on 1st July 1993.

Subdivision controls will continue to be covered by part XII of the *Local Government Act 1919* for an interim period. Further refinements are to be made to the relevant provisions previously contained in the Local Government Consequential Provisions Bill. These are expected to be introduced as a separate Bill in the next session of Parliament.

### CHANGES TO THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

The approval process is an important aspect of the planning system. Ideas for improving it were put forward in the discussion paper *Modernising the Planning System* published in November 1991.

A key reform is to facilitate joint applications and approvals for development, especially planning and building approvals.

## DETERMINATION OF DEVELOPMENT APPLICATIONS

Several amendments to the *Environmental Planning and Assessment Act 1979* are designed to make the approvals process more flexible and compatible with the *Local Government Act 1993*.

An objective of the change is to provide greater flexibility in the forms of determination of applications to assist both consent authorities and applicants.

The new forms of determination are briefly explained and examples given. The examples are indicative rather than comprehensive.

### 1. Operational Consent with an Ancillary Matter to be Finalised (s91(3A))

This amendment clearly authorises a development to be approved and to commence even though an ancillary matter has not been finalised. A condition of consent can be made which requires that a specified aspect which is ancillary to the core purpose of the development is to be carried out to the satisfaction of the consent authority or a person specified by the consent authority. These forms of consent are common but may previously have been seen as potentially uncertain.

**Example**

**An indicative plan of landscaping has been submitted at the development application stage.**

**Further information is required by the consent authority relating to species and quantity of planting. Consent is granted, with this matter being deferred and a period nominated by which this information is to be lodged. Works can commence for other aspects of the development.**

## 2. 'In Principle' Consent (s91AA)

This provision should not be confused with a concept plan to be dealt with under staged approvals (section 91AB).

An 'in principle' consent involves granting approval on condition that a specified matter be resolved before the consent can operate. The consent must clearly distinguish the conditions concerning matters which remain to be addressed to the satisfaction of the consent authority. A clear procedure is established in the legislation for this form of consent to ensure that the process operates fairly.

This form of consent will remove the need for a development application to be resubmitted where an issue (or issues) have not been fully addressed in the submitted application and the consent authority is clear on the performance standards which the development must meet.

**Example**

**A development application is submitted for a proposed industrial development which would involve the discharge of waste water into a neighbouring stream.**

**The consent authority in assessing the application decides that provided it can be satisfied that the industrial waste water being discharged can meet a specific standard, the development can proceed.**

**An 'in principle' consent is granted which includes a condition that further information must be submitted to demonstrate that the specified standard can be satisfied. The consent authority nominates a three month period in which the additional information must be submitted. The consent can not operate until the condition is satisfied.**

## 3. Staged Development (s91AB)

Under s91AB a consent authority is able to grant development consent for staged development or to stage aspects of a development. It will be possible to grant a development consent subject to a condition that the development or some specified part or aspect of it will require another development consent. Below are listed two examples of development which may be undertaken through staged approvals.

If this new version of determination is to be of value to applicants it is important that once an issue is determined it is not repeated in a later approval. This will require the consent authority to be sure that all relevant considerations have been addressed when making its determination.

The granting of an approval subject to some part of the development requiring a further development consent should be in response to an application for such an approval. Segmentation of approvals, where this is not sought by the applicant, is undesirable because this unnecessarily draws out the regulatory process. A refusal rather than a highly-qualified consent may be more appropriate.

Example 1

**A greenfields site is to be investigated for potential urban development.**

**An initial application is to be submitted as a concept plan or master plan for the proposal. Approval of the master plan may serve to secure funding for the project. Subsequent applications would further detail the masterplan on a precinct basis.**

Example 2

**A multi-storey development is proposed. The developer needs to know with some certainty that the proposal is acceptable to the consent authority.**

**A concept plan is prepared which may outline issues which are considered of major consequence such as the building envelope. However, other issues which do not appear to be of equal significance may be dealt with in a subsequent application.**

## FEES FOR STAGED DEVELOPMENT

No provisions have yet been made for a variation in the fees. This is under consideration and councils will be advised once the matter is determined.

## CONSENTS

### LAPSING OF CONSENT (S99)

Section 99 of the Environmental Planning and Assessment Act has been amended to change the time period for lapsing of consent. This period has been changed from two years (with the possibility of a one year extension) to five years. This recognises that projects, especially large or complex ones, may take some time to get started. It would be unreasonable to require developers to repeat the approval process if they are unable to commence in three years. At present buildings are frequently demolished and minimum works undertaken in order to have commenced a development sufficiently for the consent not to lapse, with the site then remaining vacant for some time.

Councils will have the capacity to reduce or extend the period a consent lasts before it lapses. There will be a two year minimum period applying to building, demolition and subdivision. Master planned developments which take some time to build will be the most likely candidates for longer consent periods.

In the case of a subsequent development consent for staged developments referred to in section 91AB(2), the consent lapses two years after the date the last consent, approval or permission required operates. This subsequent development consent can be extended by the consent authority.

**EXISTING CONSENT**

A savings provision in schedule 3 of the *Local Government (Consequential Provisions) Act 1993* automatically extends all existing consents that have not lapsed by 1 July 1993 so that they will lapse five years from the date the development consent operated.

This extension has been created to assist development in the recovery from the recession.

## MAKING OF DEVELOPMENT APPLICATIONS (S77)

A new provision (3B) will be inserted to enable consent authorities to reject a development application within seven days after its receipt, if it is not clear as to the development consent sought or if it is not easily legible. An application so rejected is taken not to have been made and the application fee is to be refunded.

This provision is equivalent to one in the new Local Government Act (section 85).

## SECTION 92 (NOTICE TO APPLICANT OF DETERMINATION OF DEVELOPMENT APPLICATION)

Section 92 has been amended to include a requirement that where consent is granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority as to any matter specified in the condition:

(a) the date from which the consent operates must not be endorsed on the notice; and

(b) if the applicant satisfied the consent authority as to the matter, the consent authority must give notice to the applicant, in the prescribed form and manner, of the date from which the consent operates.

## SECTION 93 (DATE FROM WHICH CONSENT OPERATES)

Section 93 has been amended to omit references to section 91 as there are now a number of provisions available for setting the form of determination of an application. References to 'as prescribed' are also omitted as the regulations are no longer relevant to stipulating how endorsements of the date of consent are given; only the Act applies. Section 93 was also recently amended by the *Environmental Planning and Assessment (Miscellaneous Amendments) Act 1992 No. 90.*

## SECTION 97 (APPEAL BY AN APPLICANT)

Section 97 has been amended to insert a provision (1A) which provides a right of appeal for the applicant for section 91AA ('in principle' consents) where the matter (or matters) to be satisfied is in dispute. Appeal to the court may be made within 12 months after the consent authority notifies the applicant of its decision.

## SECTION 101 (DETERMINATION OF A DEVELOPMENT APPLICATION BY THE MINISTER)

Section 101 has been amended to insert in section 101(8), after '91', 'and sections 91AA and 91AB'. This clearly authorises the Minister to determine development applications in the forms authorised by section 91AA and 91AB.

## AMENDMENT TO S.94 TO REMOVE LEVYING FOR WATER SUPPLY AND SEWERAGE FACILITIES

### DECISION OF THE COURT OF APPEAL: *ALLSANDS PTY LTD V. SHOALHAVEN CITY COUNCIL*

In March 1993, the Court of Appeal handed down the decision of *Allsands Pty Ltd v. Shoalhaven City Council*. This case is an important interpretation of s94 of the *Environmental Planning and Assessment Act 1979* and council's ability to recoup costs under s94(2A).

The findings of the case with regard to s94 are:

**Meaning of 'Recoupment of the Cost'**
The Court held that the word 'cost' in the phrase 'recoupment of cost' must mean the actual cost incurred by council in providing that service, including interest on monies borrowed. The Court determined that the words of s94(2A) do not justify estimating cost either by taking present day cost and discounting it, or by applying an index to historical cost.

**Calculation of Cost**
In determining 'cost' under s94(2A), the Court held that it does not include the cost of maintaining the physical asset once it has been provided.

**Government Subsidies**
With regard to subsidies, the Court found that where council receives a subsidy from the State, the formula for calculating the s94 contribution should deduct this amount since it is not a cost incurred by council.

Due to a concern that the Allsands judgment reveals s94(2A) to be too narrow for levying for complex long-life facilities like water and sewerage, a number of legislative changes have been made.

Through the *Local Government (Consequential Provisions) Act 1993* changes have been made to the *Environmental Planning and Assessment Act 1979* and the *Water Supply Authorities Act 1987*.

Section 94 was amended by inserting s94(9) to remove levying for water and sewerage facilities. However, for all other facilities levied under s94, the findings of the Court of Appeal in the Allsands case must be applied when calculating contributions.

**THE WATER SUPPLY AUTHORITIES ACT 1987**

Under s64 of the *Local Government Act 1993*, division 2 of part 3 of the *Water Supply Authorities Act 1987* will apply to a council in the same way as it applies to a Water Supply Authority under that Act.

Division 2 of part 3 of the *Water Supply Authorities Act 1987* allows for water and sewerage required in connection with the development of land to be provided without ultimate cost to the water supply authority (in this case the council).

**ISSUE OF COMPLIANCE CERTIFICATE**

The provisions of s27 of the *Water Supply Authorities Act 1987*, require a developer to obtain a certificate of compliance from the council before a plan of subdivision can be registered or where a development or building approval has been given. In deciding whether to grant the certificate, the council can do the following:

(a) require the developer to contribute to the cost of existing works which benefit the developer's land; or

(b) require the developer to pay the whole or part of the cost of constructing specified works;

or require the developer to do both of these things; or

(c) pay the council a specified amount towards existing works or projected works, or both; and

(d) require the developer to construct works to serve the development.

**CALCULATION OF AMOUNTS**

When calculating the amount to be paid towards specified existing or projected works, the council must take into account the following:

(a) the value of existing works and the estimated costs of projected works; and

(b) the amount of any government subsidy or similar payment is not to be deducted from the relevant value or the costs of the works; and

(c) consideration is to be given to the guidelines issued by the Minister for Public Works.

**TRANSITIONAL ARRANGEMENTS**

The *Local Government (Water and Sewerage) Savings and Transitional Regulation 1993* states that any contributions received under the EP&A Act for water and sewerage works can be applied by a council, without restrictions, to its water or sewerage supply schemes respectively, consistent with the present proposals.

Further, a transitional arrangement is to be included in the regulation to the *Local Government Act 1993* providing that from July 1 1993, water supply and sewerage contributions relating to development applications held by councils but not determined by them, may be determined on the basis of the provisions in the new Act. The date of lodgement of an application is not relevant.

#### CROWN DEVELOPMENTS

Where the council requires the Crown to pay an amount or enter into an additional works agreement or both under s27 of the Water Supply Authorities Act, and the Crown disputes the requirement, the Crown may seek a determination from the Minister for Planning as to whether such a requirement should be made and, if so, in what terms. The determination of the Minister for Planning is final and is taken to be the determination of the authority.

#### ACCOUNTABILITY

The Minister for Public Works will issue guidelines on contributions assessment to councils and will monitor the assessment of contributions by councils to ensure that the amounts levied are reasonable.

#### SECTION 94 CONTRIBUTIONS PLANS

Although s94 contributions plans for water supply and sewerage facilities are no longer required, the work that has been undertaken to date will remain valuable for councils as they will still be required to be accountable for their levies.

#### MINISTER FOR PUBLIC WORKS ADVICE TO COUNCILS

On 10 June 1993, the Minister for Public Works wrote to all country councils in NSW, to advise of the action taken by the Government to ensure that appropriate powers would be available to councils under the *Local Government Act 1993*, in regard to water supply and sewerage developer contributions.

### ADMINISTRATIVE GUIDELINES ON THE APPROVALS SYSTEM

Administrative guidelines are being prepared jointly by the Department of Planning and the Department of Local Government and Cooperatives. The aim of the guidelines is to encourage councils to review their approvals system and to initiate reforms where necessary. The guidelines have been prepared for council officers but should be of interest to all people involved in the approvals process. It is intended to publish them in August 1993.

The guidelines are intended:

- to encourage more effective use of the approvals system
- to reinforce the Local Approvals Review Program (LARP)
- to be user friendly

- to provide a summary guide to the administration of approvals under the Local Government Act and the amendments to the Environmental Planning and Assessment Act and Regulations.

The guidelines complement other source material detailed in the references. Particular attention is drawn to the LARP documents, the Development Assessment Manual prepared for the Local Government and Shires Association(1990) and the 'Good Practice Database' established by the Royal Australian Planning Institute (RAPI 1993).

In addition to the information contained in the guidelines, seminars are being held to demonstrate the concepts contained within the guidelines and to discuss the best practices for approvals at the local level.

E. Smith
Secretary