Legislation Update: Planning Law Response to the recent Bush Fire Disaster in NSW

The recent bush fire disaster experienced in New South Wales has led to changes being introduced on 31 January 2020 to amend the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP). These changes were introduced by amendments to the Codes SEPP effected by:

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Bush Fire Response) 2020; and

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Bush Fire Response) (No2) 2020.

The new provisions include:

1. new categories of exempt development involving:
   a. the demolition of bushfire damaged buildings (cl 2.25);
   b. the repair of any damage to a building caused by certain bushfire related events (cl 2.30AA);
   c. the installation and temporary use of a shipping container for storage on certain bushfire impacted land (cl 2.72A and 2.72B); and
   d. the installation and temporary use of a shipping container for commercial or industrial purposes on specified land within an industrial or business zone impacted by a bushfire.

2. rationalisation of controls applying to complying development on land that is classified as Bushfire Attack Level 40 (BAL-40) or in the Flame Zone (BAL-FZ).

New Categories of Exempt Development

Demolition of Structures Damaged by Bush Fire
Clause 2.25 of the Codes SEPP now provides that a structure that is “significantly damaged by fire” may be demolished without the need to obtain development consent provided the demolition is undertaken in accordance with AS 2601—2001, The demolition of structures and the demolition satisfied the general requirements for exempt development. Previously only a building that could be constructed as exempt development could be demolished with development consent, which excluded for example the demolition of a dwelling house significantly damaged by fire. Clause 2.25 now permits the demolition of a dwelling house significantly damaged by fire. “Significantly” has its ordinary English dictionary meaning.

Repair of Structures Damaged by Bush Fire

On land within an area declared under section 33 of the State Emergency and Rescue Management Act 1989 to be an area where a state of emergency exists, clause 2.30AA of the Codes SEPP permits the repair of “any damage to a building or structure caused by [the] event”. Specified restrictions apply as set out in clause 2.30AB, for example in relation to a fence, gate or other barrier, the repaired or replaced structure must be the same size, in the same location and made with similar materials as the damaged structure.

In relation to any other structure, the work must be necessary to make the building or structure secure and weatherproof and in the case of a dwelling, safe and suitable for habitation but must not include a repair (other than a temporary repair) to a structural element of the building. The time for such repair work to be carried out has been extended from 6 months to 2 years after the declaration of the State of Emergency (Codes SEPP, 2.30AB(a)).

Installation and Use of a Shipping Container on Bushfire Affected Land

The introduction of Subdivision 36A (clause 2.72A and 2.72B) now permits the installation and use of shipping containers for storage purposes for a period of 2 years on land on which a building has been significantly damaged by a bush fire on land declared by an order under section 33 of the State Emergency and Rescue Management Act 1989 to be an area where a state of emergency in respect of bush fires exists.

Additionally, Subdivision 36B (clause 2.72C and 2.72D) provides for the installation and temporary use of a shipping container or portable office on land in a business zone or industrial zone that contains a building significantly damaged by bush fire within an area declared by an order under section 33 of the State Emergency and Rescue Management Act 1989 to be an area where a state of emergency in respect of bush fires exists. Clause 2.72D stipulates further standards. The purpose of this amendment is to allow businesses affected by bushfire to continue operating.

The above new categories of exempt development remain subject to the general requirements for exempt development, including heritage restrictions, in clause 1.16 of the Codes SEPP and remain subject to any agreement, covenant or other similar instrument that restricts the carrying out of that development.

Complying Development on Bushfire Prone Land

The Codes SEPP now includes a new clause 1.19A, which is titled “Land on which complying development may not be carried out—bush fire prone land”. This clause consolidates previous bushfire provisions in clause 3.4 of the Housing Code and clause 3A.37 of the Rural Housing Code. The new clause does not change the previous prohibition on complying development on land that is
Bushfire Attack Level 40 (BAL-40) or in the Flame Zone (BAL-FZ). Under the Rural Housing Code any associated access way to the development must not be on land that is BAL-40 or BAL-FZ. It is important to note that clause 1.19A does not apply to the Housing Alterations Code.

In addition to the above amendments, from 1 March 2020, Planning for Bush Fire Protection 2019 replaced Planning for Bush Fire Protection 2006. This document provides the framework for development located on bushfire prone land in NSW. Any reference to the 2006 document in the Codes SEPP has now been amended to reflect the 2019 document.

This article does not constitute legal advice. If you require legal advice on how the laws mentioned in this article apply in any given situation or if you have any questions regarding the above please contact the team at Planning Law Solutions.

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