The New Building and Subdivision Certification Provisions (Part 6) of Environmental Planning and Assessment Act 1979

Introduction

1. The new Building and Subdivision Certification provisions of the Environmental Planning and Assessment Act 1979 ("EP&A Act") and related amendments to the Environmental Planning and Assessment Regulation 2000 ("EP&A Reg") commenced on 1 December 2019. Savings and transitional provisions supporting the new Part 6 are contained in the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 and also commenced on 1 December 2019. The general theme of the changes is tighter control on the powers of accredited certifiers and more onerous standards on the occupation of new buildings.

2. The purpose of this paper is to identify a number of important changes and discuss the impact of those changes on the powers and obligations of accredited certifiers, including an explanation on how the new changes apply to buildings currently under construction.

3. The new provisions are contained in the new Part 6 of the EP&A Act. They deal with the following certificates and other functions of certifiers:
   - construction certificates
   - subdivision works certificates
   - compliance certificates
   - subdivision certificates
   - occupation certificates
   - building information certificates
   - enforcement responsibilities of private certifiers


History of the Amendments

6. The 2017 amending Act introduced a new object into the EP&A Act focusing the importance of controls on building construction. The new object is “to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants”. The new object is more symbolic than substantive, and was somewhat belated given that the EP&A Act has controlled building construction since 2008.

7. The Bill that became the new Part 6 was introduced to the NSW Parliament in October 2017. The purpose of the new Part 6 as recorded in the Second Reading of the 2017 Bill is to simplify and consolidate the former building and certification provisions and to “enhance the effectiveness of the [former] building provisions”. The second purpose mentioned above is, according to the Second Reading speech, aimed at remedying case law that “allows certificates to be used for developments that are out of step with the planning approval” by introducing provisions that allow the Court to declare a construction certificate invalid if it is not consistent with the development consent. The changes are designed to reinforce the “integrity of the planning system” and to give the community “greater confidence in the approvals”.

Summary of Changes

8. The principal changes between the old Part 4A and the new Part 6 can be summarised as follows:

- A change to terminology: “principal certifying authority” now “principal certifier”; “certifying authority” is now “certifier”.
- An interim occupation certificate is no longer a type of certificate that can be issued to authorise the occupation of a new building (s6.9(1)(a)).
- It is now an offence to occupy a new building without an occupation certificate, regardless of how long the new building has been occupied (s6.9).
- A construction certificate and occupation certificate must now be “consistent with” rather than “not inconsistent with” the associated development consent, (for CC see EP&A Regs cl 145(1) and for OC see EP&A Regs cl 154(1B)).
- A principal certifier has a mandatory obligation to issue a notice for specified breaches of the EP&A Act (s 6.31 and cl 161A EP&A Regs)).
- A principal certifier must not issue an occupation certificate until a building manual has been provided to the owner of the building (s 6.27).
- The definition of subdivision of land is now part of the building and subdivision certification part of the Act (s 6.2).
- A subdivision works certificate is a new type of certificate that can be issued by an accredited certifier (s 6.4(b)).

9. There is no change to the following requirements of the former Part 4A, which have been carried forward to the new Part 6:

- The definition of building work (s 6.1).
- The requirement to obtain a construction certificate before commencing any new building work (s 6.3(1)).
- The requirement to obtain an occupation certificate before occupying a new building (s 6.9).

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1 Environmental Planning and Assessment Amendment Bill 2017
2 Hansard, Legislative Council 18 October 2017
• The definition of “subdivision of land” (s 6.2).
• The prohibition on issuing a construction certificate for building work if the work has commenced (s6.8(2)).
• Functions of a certifier (s 6.5).
• Functions of a principal certifier (cl 161B EP&A Regs).
• Exemptions for building work by or on behalf of the Crown (s 6.6(5) and s 6.7(2)(b)).
• Liability for defective building work (s 6.20(2)).

10. The new provisions are explained below.

No Interim Occupation Certificates

11. Under both the old Part 4A and the new Part 6 an occupation certificate (“OC”) is defined as a certificate that authorises the occupation and use of a new building, or a change of building use from an existing building. Under the old Part 4A an OC could be an interim certificate and a final certificate (s109C(2)). Under the new Part 6, there is only one type of occupation certificate that may be issued for “the commencement of the occupation or use of the whole or any part of a new building” (s 6.9(1)).

12. When a partial OC is issued, it is deemed to include a condition that “an occupation certificate must be obtained for the whole of the building within 5 years after the partial occupation certificate is issued” (Cl 156A EP&A Regs). That condition will be enforceable by the same means as the enforcement of a condition of development consent, given that the OC is taken to be part of the development consent to which it relates (s 6.4(c)). In it unclear whether the principal certifier will be responsible for enforcement action if the certifier becomes aware that a building owner has failed to obtain an OC for the entire building within 5 years after the partial occupation certificate is issued (s 6.31 EP&A Act and cl 161A EP&A Regs).

13. Whether a partial OC can be issued in the same circumstances as an interim OC, and whether there is any real difference between these types of OC will remain to be seen. The intention behind the change is not made clear on the face of the Act. If the changes are interpreted in light of the Second Reading speech, the circumstances in which a partial OC can be issued will be limited. Issues that certifiers previously encountered in deciding whether to issue an interim OC where a condition in a development consent required a matter or thing to be done prior to the issue of “an OC”, will equally apply to the issue of partial OC. Whether a partial OC may be issued without all conditions of development consent will depend on the terms of the consent.

14. There may be some development consents where it would be appropriate to read a condition as referring to a full OC rather than a partial OC. The Courts recognise that development consents are not drafted by people with legal expertise and should be construed so as to produce a “harmonious result”, giving meaning to every word so as to “achieve practical results”. It might be appropriate for a principal certifier to issue a partial OC without satisfying a condition ion the consent that requires a matter or thing to be done prior to issue an OC if the context of the condition and the nature of the development allows. This will need to be assessed on a condition by condition basis. There will be limited development consents where it is appropriate for a

3 Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd [2018] NSWCCA 202 and see also summary of cases in Muswellbrook SC v Hunter Valley Energy Coal Pty Ltd [2018] NSWLEC 193.
principal certifier to read a condition in that way, and the safest approach will be to read any such conditions as requiring satisfaction prior to the issue of any OC.

Circumstances in which the Former Provisions (including the ability to issue an Interim Occupation Certificates) Continue to Apply

15. Building work that is carried out under a development consent or complying development certificate issued prior to 1 December 2019 will continue to be inspected and certified under the old Part 4A of the EP&A Act. This is the effect of clause 18A of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017, which provides that:

“the former building and subdivision provisions continue to apply, despite their repeal, to or in respect of the following—

(a) an interim occupation certificate or final occupation certificate in force under those provisions immediately before 1 December 2019,

(b) a development consent granted before [the commencement of Part 6].”

16. The expressions “former building and subdivision provisions” and “amending Act” are defined under the savings Regulation as follows:

former building and subdivision provisions means -

(a) sections 81A(2)–(6) and 86 of the [EP&A Act], as in force immediately before the substitution of those provisions by the amending Act, and

(b) Part 4A of the [EP&A Act], as in force immediately before the repeal of that Part by the amending Act, and the regulations made under that Part as so in force.

amending Act means the Environmental Planning and Assessment Amendment Act 1979

17. The date of repeal of Part 4A by the amending Act, and the date that the amending Act substituting sections 81A(2)-(6) and 86 of the EP&A Act, is 1 March 2018.

18. The terms of clause 18A of the savings Regulation are not as instructive as they could be, and can be better understood if the words “building or subdivision work carried out under” were inserted before the a “development consent” in paragraph (b), so that the paragraph could read (my words in bold):

“the former building and subdivision provisions continue to apply, despite their repeal, to or in respect of building or subdivision work carried out under a development consent granted before [the commencement of Part 6].”

19. The effect of clause 18A of the Savings Regulation is that an interim OC may still be issued, subject to compliance with old Part 4A, if the building was the subject of a development consent or complying development certificate issued before 1 December 2019. All requirements of the old Part 4A can be viewed online at www.legislation.nsw.gov.au through the “historical versions” link on the Environmental Planning and Assessment Act 1979 page and locate the version that applied prior to 1 March 2018.

Clause 4, Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017
Part 4A and the Regulations as they existed prior to 1 December 2019 continue to apply to the issue of an interim and final OC.

20. The Department of Planning, Industry and Environment has issued guidelines on the issue of occupation certificates (November 2019) and a Planning Circular (PS 19-004) on the commencement of Part 6. The Planning Circular recommends that principal certifiers ensure that any OC issued for part of a building clearly identifies the part of the building/development to which the OC applies. Surprisingly, EP&A Regulations does not require a partial OC to identify the part of the building to which it applies, however the Department’s advice is sensible.

21. A partial OC should clearly indicate, preferably by reference to markings on an architectural plan, which part of a building the partial OC applies. This will be necessary in order to enforce the prohibition on occupation of a new building without an OC and to assist purchasers of new buildings to determine whether the whole building may be lawfully occupied.

“Consistent” and “Not Inconsistent” Test

22. Prior to 1 December 2019 clause 145(1)(a) of the EP&A Regulation prohibited the issue of a construction certificate unless “the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent”. After 1 December 2019, clause 145(1)(a) of the EP&A Regulation prohibits the issue of a construction certificate unless “the design and construction of the new building, or any part of the new building that is completed, is consistent with the development consent in force with respect to the new building.”

23. A similar change has occurred to the issue of an occupation certificate. Prior to 1 December 2019 clause 154(1B) of the EP&A Regulation prohibited the issue of an occupation certificate unless “the design and construction of the new building, or any part of the new building that is completed, are not inconsistent with the development consent in force with respect to the new building.” After 1 December 2019, clause 154(1B) of the EP&A Regulation prohibits the issue of a construction certificate unless “the design and construction of the new building, or any part of the new building that is completed, is consistent with the development consent in force with respect to the new building”.

24. The new Regulations only apply to certificates issued in respect of building work approved under a development consent issued after 1 December 2019. The former Regulations continue to apply to the certification of building work approved under a development consent issued before 1 December 2019.

25. I suspect that the Courts will take a similar approach to the new Regulations as they have taken under the old Regulations, which is the approach articulated by the NSW Court of Appeal in Burwood Council v Ralan Burwood Pty Ltd (No.3). In Ralan the Court held that the expression “not inconsistent” in clause 145 of the EP&A Regulation, as it then was, should be given its ordinary

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6 www.planning.nsw.gov.au
7 Clause 18A Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017
English dictionary meaning, being "lacking in harmony between different parts or elements" or "self-contradictory" (Macquarie Dictionary); "discrepancy" or "incongruity" (Shorter Oxford English Dictionary). The Court observed that the question a certifier should ask when applying clause 145 of the Regulation is “whether the two sets of specifications [are] inconsistent, in the sense of lacking harmony between different elements or lacking congruity.”

26. The Court in *Ralan* said at [148] that the answer to this question was “not straight forward” and made the following observations about the flexibility inherent in the controls (excluding citations):

“No every difference between the DA and the plans and specifications furnished to the certifying authority and approved in the CCs amounts to an inconsistency in the relevant sense. As Lloyd J observed in El Cheikh v Hurstville City Council, albeit in another context, a difference does not necessarily constitute an inconsistency. Some adjustment to approved plans and specifications, as the primary Judge suggested, may be inevitable in a large and complex project. (See also the observations of Sperling J (Sully and Simpson JJ agreeing) in *Moy v Warringah Council*.)”

27. More significantly, *Ralan* establishes the principle, which has been followed in subsequent cases, that “the scope and object of the legislation, construed as a whole, does not require a construction certificate issued in breach of s 109F(1)(a) of the EPA Act to be held invalid.” This effectively means that a Court is unlikely to entertain a dispute about whether specifications submitted with a construction certificate are “not inconsistent” with the specifications approved in a development consent. According to the Court of Appeal, the legislation manifests an intention that the appropriate remedy for determining disputes about the validity of a construction certificate is the accreditation and disciplinary regime for certifiers.

28. The principles established in *Ralan* will be reviewed in light of the new Regulations when the appropriate case comes before the Court. Until then, certifiers should assume that similar principles apply to the new Regulations. That is, the word “consistent” has its ordinary English dictionary meaning, namely “agreeing or accordant, compatible; not self-opposed or self-contradictory” (Macquarie Dictionary). The new Part 6 and Regulation do not appear to change the EP&A Act so radically so as to change the scope and object of the EP&A Act, meaning that the Courts comments about the accreditation and disciplinary regime will continue to apply.

29. While ever *Ralan* remains good law, the validity of a construction certificate or occupation certificate is unlikely to be challenged in any legal proceedings, because the Court will not declare the certificate invalid even if it was issued in error. A person who is aggrieved by a decision to issue a CC or OC will need to make a complaint to the Building Professional Board who may then take disciplinary action against the certifier who issued to certificate. The other side effect of *Ralan* is that it is likely the Building Professionals Board will play an increased role in the enforcement of certification laws.

**Disciplinary Decisions (Da Silva v BPB)**

30. There is at least one disciplinary decision where the actions of a certifier were assessed under the former clause 145 of the EP&A Regulation. *Da Silva v Building Professionals Board* [2019] NSWCATOD 177 is a decision of the Occupational Division of the NSW Civil and Administrative Tribunal. The case involved an appeal by an accredited certifier under section 33 of the *Building Professionals Act 2005* (“BP Act”) against a decision of the Building Professionals Board (“BPB”) reprimanding the certifier and ordering him to pay a fine of $25,000.00. The certifier was self-
represented in the appeal. The reprimand was issued after the Board found that the certifier had issued a construction certificate that was inconsistent with the development consent for the development.

31. Although the Tribunal in *Da Silva* applied the “not inconsistent” test in clause 145(1)(a) of the Regulation, as it existed prior to 1 December 2019, the decision indicates the type of analysis that the Tribunal will probably undertake when applying the new test. Details of the decision are set out below. A copy of the judgement in full can be found at austlii.edu.au.

32. The facts in *Da Silva* involved the issue of a construction certificate by the certifier for construction of a four-storey residential flat building at St Peters in Sydney. The certifier held an A1 accreditation under the BP Act. During construction an adjoining resident complained to the BPB about differences between the building as approved under the development consent and as constructed. The BPB investigated and found multiple variations between the plans approved by Council and the CC endorsed plans.

33. The BPB identified the following changes between the development consent plans and the CC plans:

- an increase in the height of the ground floor vehicle entry to the basement, and the first and second floors by 825mm and 815mm respectively;
- new internal stairs added, a terrace divided into two levels with steps instead of the same level and changed access to the terrace as a result of the level change;
- changes to the street elevation and materials (concrete rather than bricks and glazing);
- changes to the south elevation (wall predominantly open not fully enclosed, an approved window deleted and a new window added);
- the floor area of the basement increased by 150m² (20%) by further excavation.

34. The certifier submitted that that the changes in relation to height were not inconsistent with the development consent, when read as a whole, because they were made purely to meet the requirements of Council’s Development Control Plan No 27 relating to waste management, which was a condition of the development consent. The certifier submitted that the changes to the area of the basement were not inconsistent with the development consent because the additional area was required to ensure compliance with various consent conditions including compliance with the BCA and relevant Australian Standards for parking space dimensions, aisle widths, circulation spaces and accessible parking.

35. The Tribunal applied the reasoning in *Ralan* and other relevant decisions including *Moy v Warringah Council* [2004] NSWCCA 77 and *Lesnewski v Mosman MC* [2004] NSWLEC 99, noting in the latter where the Court said:

“It is difficult to precisely qualify the meaning of “inconsistent”. Each case will need to be decided on its own facts. A single minor difference between the construction certificate plans and the development consent plans is likely to be acceptable. Where there are a number of minor differences then the collective impact of these differences will need to be assessed to determine whether they combine to result in unacceptable inconsistency. A major difference is likely to give rise to an inconsistency. Whether a difference is major or minor and whether, in the case of a
number of minor differences, the cumulative effect is a major difference will depend on the circumstances.”

36. The Tribunal held that the conditions of the development consent requiring the design of the building to comply with the BCA and relevant Australian Standards did not permit the changes made to the CC plans. The Tribunal dismissed the certifier’s appeal and upheld the finding and fine imposed by the BPB. In reaching its conclusion the Tribunal said that the role of the developer or certifier to take it upon themselves to ensure the functionality of the building and to decide what method would be employed to address conditions of consent. That was the function of the Council and that the “only appropriate course” to address compliance with the relevant standards was the modification process in section 4.55 of the EP&A Act.

37. The message for certifiers in Da Silva is that there are significant limits to the changes that can be made to an approved plan within the confines of the “not inconsistent test” in order to satisfy condition on the development consent. Changes to CC plans that are necessary to comply with conditions of the development consent will not be consistent with the development consent plans if the changes involve relocating walls, increasing floor area, changes to finished floor levels, elevations or materials. If changes are required in order to satisfy conditions, the appropriate course is a modification application to either amend the approved plans or to alter the condition requiring the plans to be amended.

38. There are several observations to be made about the Tribunal’s decision in Da Silva. The first is that there is an onus on architects and others preparing plans at the DA stage to ensure that the design complies with the BCA, relevant Australian Standards and Council controls. This will avoid the need for changes at a later date after the development consent is granted.

39. The second consequence of the decision in Da Silva is that consent authorities should endeavour to identify, during the course of the assessment of a development application, any areas of the design of a proposed building that fail to comply with the BCA, relevant Australian Standards and Council controls. If issues are identified during the assessment, the applicant may then be given an opportunity to rectify the error prior to issue of the development consent. It is not good practice for consent authorities to defer the assessment of a development application by imposing a condition on a development consent. This creates potential problems and delays for builders and certifiers down the line.

40. Finally, it is apparent that case law in this area will now be developed by the Occupational Division of the Civil and Administrative Tribunal, not the Land and Environment Court. This is a direct result of the Court of Appeal’s decision in Ralan that the appropriate remedy for disputes about the validity of construction certificates is the accreditation and disciplinary regime for certifiers. The Land and Environment Court is better placed to deal with these types of disputes than the Occupational Division of the Civil and Administrative Tribunal.

Rectification Notices

41. Under the old Part 4A, a principal certifying authority had limited power to require a person to rectify unauthorised building work, and the decision whether or not to exercise the power was discretionary.8 Under the new Part 6 a “principal certifier” must issue a notice in writing requiring

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8 Section 109L EP&A Act pre 1 December 2019
a person responsible for carrying out development to “take specified action within a specified time” if the certifier becomes aware of any “non-compliance to which [section 6.31] applies”. The obligation to issue a notice if the circumstances arise is mandatory.

42. The non-compliances to which section 6.31 applies are described in clause 161A(1) of the EP&A Regulation as “the carrying out of works otherwise than in accordance with a development consent or complying development certificate, including any approved plans and development consent conditions” but excluding any “non-compliance identified during a critical stage inspection or during an inspection under this clause”. There are currently no inspections specified under clause 161A.

43. If the action specified in a notice is not taken by the recipient of the notice, the certifier must send a copy of the notice to the consent authority and to notify the consent authority of the failure to comply with the notice. Clauses 161A(3) to (9) of the EP&A Regulation specify the procedure for issuing a notice and the responsibility of the certifiers after the period for compliance with the notice has expired.

44. Section 6.31 is designed to address the current uncertainty about the role of a principal certifier to enforce conditions of development consent. Under the old Part 4A of the EP&A Act, compliance of building work with a development consent was achieved by the default mechanism of an occupation certificate. A certifier could withhold an OC as a way of coercing a new building owner to comply with a development consent, given that compliance with a development consent was a prerequisite to the issue of an OC. There appears to be an intention to continue with that practice by excluding from the types of breaches for which a rectification notice must be issued, breaches “identified during a critical stage inspection”.

45. A certifier might become aware of a non-compliance with a development consent by a complaint. Certifiers will now need to carefully consider how they deal with complaints. Section 6.31 does not say that a certifier must be satisfied there is a breach before issuing a rectification notice. The obligation to issue a notice arises as soon as the certifier becomes aware of the breach, not when the certifier reasonably suspects that a breach has occurred. The terms of section 6.31 will present practical challenges for certifiers – is the certifier required to inspect the site to determine for himself or herself that a breach has occurred? Will there need to be a follow-up inspection after the date for compliance with the notice? Will a certifier be entitled to charge fees for the inspection? If the certifier issues a notice entirely on the basis of complaint, and the complaint is unfounded, is the certifier exposed to potential negligence claim by the building for costs incurred in addressing the notice?

46. It is unclear whether section 6.31 of the new Part 6 will require a principal certifier to issue a rectification notice if the certifier “becomes aware” that a building owner has not obtained an OC for the whole of the building within 5 years of the date of a partial OC. The requirement to obtain an OC for the whole of the building is a condition of a partial OC and an OC forms part of the development consent. However the obligation on a certifier under section 6.31 only applies in respect of “the carrying out of works”, and the occupation of a part of a building without an OC is not a work.

47. It appears that the obligation to issue a rectification notice does not apply to building work carried out under a development consent issued prior to 1 December 2019 by reason of clause 18A of the
Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 discussed above.

Owner’s Building Manual

48. Section 6.27 of the new Part 6 prevents the issue of an OC for a building “of a class prescribed by the regulations” unless a building manual for the building is prepared and provided to the owner of the building “in accordance with the regulations”. The form, content and related procedural matters associated with the preparation of an owners building manual are to be specified in the Regulations, which are yet to be prepared. At the time of preparing this paper there were no regulations prescribing the class of building for which a manual is required or the procedure for preparing such a building manual. In the absence of the Regulations, section 6.27 has no operative effect.

49. The concept of a building owners manual comes from the 2015 Lambert Report into the Building Professionals Act 2005. The purpose of the manual was to address the problem of a lack of accessible information on buildings and building systems. The Lambert Report identified a deficiency in the old Act where insufficient information about BCA compliance was available about the existing buildings and their safety measures to allow later consent and certifying authorities to undertake a proper assessment of applications for building alterations and changes of use. The Lambert Report recommended that a manual be prepared only for all commercial buildings.

Definition of “building work” under the new Part 6?

50. There has been no change to the definition of “building work”, which remains to be defined as “any physical activity involved in the erection of a building (s6.1 EP&A Act). The previous case law that applied to demolition of a building continues to apply, namely that demolition is not “the erection of a building in accordance with a development consent” which requires a construction certificate. 9 Demolition is however “building work” that will prevent a development consent from lapsing.

A new type of certificate – subdivision works certificate

51. A subdivision works certificate is a certificate “to the effect that subdivision work completed in accordance with specified plans and specifications will comply with the requirements of the regulations” (s 6.4(b) EP&A Act). A subdivision works certificate is required “for the carrying out of subdivision work in accordance with a development consent” (s 6.13(1) EP&A Act). “Subdivision work” is defined as (s 6.1 EP&A Act):

“... any physical activity authorised to be carried out in connection with a subdivision under the conditions of a development consent for the subdivision of land. For the purposes of this definition, a development consent includes an approval for State significant infrastructure if the regulations under Part 5 apply this Part to subdivision work under such an approval.”

52. Under the old Part 4 and 4A subdivision work was defined and controlled in much the same way as it is under the new Part 6. The difference is that previously a construction certificate was required before any subdivision work could be commenced (s 81A(4) EP&A Act pre 1/12/2019) and there was no distinction between a construction certificate for subdivision work and a

9 Sharp v Hunters Hill Council (2002) 120 LGERA 155
construction certificate for building work. Now there is a unique type of construction certificate for subdivision work called a subdivision works certificate.

53. A subdivision works certificate may only be issued by a person accredited as a B1 certifier under the Building Professionals Act 2005. When that Act is repealed and the Building and Development Certifiers Act 2020 commences on 1 July 2020, a subdivision works certificate may only be issued by a person accredited as a certifier – subdivision. Transitional provisions apply.

54. There does not appear to be anything in the new provisions that would suggest the existing case law relating to subdivision of land and subdivision works not being development for a purpose will not continue to apply.¹⁰

55. That concludes our explanation on the new Part 6 of the EP&A Act. If you require advice on how these provisions apply to a given set of facts, please contact Planning Law Solutions.

Planning Law Solutions
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