2 April 2020

Legislation Update: Planning law response to COVID19

The recent outbreak of the coronavirus (COVID19) is having an unprecedented impact on all sectors of the economy. In a bid to soften the impact and allow for an appropriate legislative response, the NSW Government has introduced the following changes to planning law in NSW.

COVID-19 Legislation Amendment (Emergency Measures) Act 2020

COVID-19 Legislation Amendment (Emergency Measures) Act 2020 was introduced by parliament on 25 March 2020 and commenced on the same day. The amending Act makes the following changes to the Environmental Planning and Assessment Act 1979 (“EP&A Act”):

a) A new section 10.17 of the EP&A Act has been introduced that permits the Minister for Planning and Public Spaces to make an order that authorises development to be carried out on land “without the need for any approval under the Act or consent from any person”. An order that is made under section 10.17 is taken to be the granting of development consent. The Minister may make the order only if the Minister has:

- consulted the Minister for Health and Medical Research; and
- is reasonably satisfied that the making of the order is necessary to protect the health, safety and welfare of members of the public.

b) A new section 10.18 of the EP&A Act has been introduced that enables a document that is required by the Act to be available at a physical location, such as an office, to instead be made available on the NSW planning portal, or any other website approved by the Planning Secretary.

The new sections 10.17 and 10.18 of the EP&A Act apply for a minimum period of 6 months and may apply for a total of 12 months if the regulations prescribe a longer period.

The purpose of these provisions is to give the Minister for Planning and Public Spaces power to make changes to the normal development approval purpose in a bid to protect the health, safety and welfare of the general population during the COVID19 crisis.

Ministerial Orders

State Environmental Planning Policy Amendment (COVID-19 Response) 2020

The Minister for Planning and Public Places, through his section 10.17 powers, has amended State Environmental Planning Policy (Exempt and Complying Codes) 2008 by creating a new category of
exempt development titled “Trading Hours for retail supply chain premises”. The new category is contained in a new Division 4 - Special Provisions—COVID-19 (at clauses 2.133 to 2.135). This new Division provides for the 24-hour operation of retail supply chain premises.

Retail supply chain premises are defined as port facilities, warehouse or distribution centres, and retail premises. These terms are defined in the Standard Instrument.

In other words, premises including but not limited to supermarkets, pharmacies and convenience stores may now operate for 24 hours per day, including receiving deliveries. The purpose of this change is to ensure that sufficient food supplies, household supplies and medical supplies are accessible to the general population during this time of crisis.

All other conditions of a development consent remain in place and require compliance. Additionally, the new change requires that noise outside of the approved hours of operation be managed.

Environmental Planning and Assessment (COVID-19 Development – Extended Operation) Order 2020

On 25 March 2020 the Minister made Environmental Planning and Assessment (Covid-19 Development - Extended Operation) Order 2020 pursuant to section 10.17 of the EP&A Act. The effect of the order is that the types of development specified in the order may be carried out without approval, subject to compliance with the standards specified in the order. The development specified in the order is:

- retail premises trading and operating hours (including the removal of waste from those premises); and
- home businesses and home industries operating hours

The standards for the specified development include:

- there must be a development consent in force for the use, and all conditions must be complied with, other than operation hours and number of employees.
- home businesses and home industries may employ more than 2 persons other than the permanent resident of the dwelling, but no more than 5 persons;
- the operation of a home business or home industry outside of hours must not adversely impact on the neighbourhood by reason of the emission of noise, smell, fumes or waste products.

Environmental Planning and Assessment (COVID-19 Development – Construction Work Days) Order 2020

On 31 March 2020 the Minister made Environmental Planning and Assessment (COVID-19 Development - Construction Work Days) Order 2020 pursuant to section 10.17 of the EP&A Act. The Order permits development specified in the order to be carried out “without the need for any approval under the [EP&A] Act” if it complies with the conditions specified in the order. The development specified in the Order is “the carrying out of any [approved] building work or work, or the demolition of a building or work on a Saturday, Sunday or public holiday.” The conditions include no rock breaking, rock hammering, sheet piling, pile driving or similar activities.
The works must still be the subject of a development consent and comply with all conditions of the consent other than any condition that restricts the hours of work or operation on a Saturday, Sunday or public holiday.

*Environmental Planning and Assessment (COVID Development - Takeaway food and beverages) Order 2020*

On 31 March 2020 the Minister made *Environmental Planning and Assessment (COVID Development - Takeaway Food and Beverages) Order 2020* pursuant to section 10.17 of the EP&A Act. The Order permits development specified in the order, namely “use of certain existing premises to prepare and sell food, beverages or other goods to be consumed off the premises”, to be carried out “without the need for any approval under the [EP&A] Act”, if it complies with the conditions specified in the order.

The premises at which the preparation and sale of food or beverages (or both) for persons to consume off the premises are:

- a community facility;
- an education establishment, business premises or office premises that was operating as a cooking school immediately before the commencement of this Order;
- food and drink premises; or
- a function centre.

The conditions of the Order include that all other conditions of development consent relating to the premises remain in place and must be adhered too other than those relating to:

- hours of trading and operation;
- the use of the premises for food and beverage preparation
- the use of the premises for food and beverage delivery purposes;
- the sale of prepared or packaged food or beverages (or both) for consumption off the premises; and
- the location of retail sales and food preparation within the premises.

In relation to premises, the use of which is authorised without the need for development consent, they must comply with the provision of any environmental planning instrument applying to the development other than any provision which restricts:

- hours of trading and operation;
- the use of the premises for food and beverage preparation
- the use of the premises for food and beverage delivery purposes;
- the sale of prepared or packaged food or beverages (or both) for consumption off the premises; and
- the location of retail sales and food preparation within the premises.

Furthermore, the order permits mobile food and drink outlets to operate on any land at any time for the purpose of preparing and selling food or beverages (or both) for consumption off the premises.

The operator of the mobile food and drink outlet must have the permission of the land owner and must not: obstruct access to any utility service on the land or adjacent land; not cause damage to any
tree on the land or on adjacent land; not cause damage to any public property on the land or adjacent land; and must abide by current social distancing rules.

Environmental Planning and Assessment (COVID-19 Development – Temporary Workers’ Accommodation) Order 2020

On 31 March 2020 the Minister made Environmental Planning and Assessment (COVID-19 Development - Temporary Workers' Accommodation) Order 2020 pursuant to section 10.17 of the EP&A Act. The Order permits, without the need for “any approval” under the EP&A Act, the construction of two temporary workers’ accommodation sites on land adjacent to Bayswater and Liddell power stations (subject sites) and a change of use of an existing building or place on those sites to temporary works accommodation.

The purpose of this Order is to secure the State’s power supply by providing accommodation that will be used as a refuge from COVID-19 for workers of the two power stations named in the order during the pandemic.

Specifically, the Order permits the following on the subject sites:

- the construction or installation of a temporary structure, and a temporary alteration or addition to a building or work;
- earthworks and hardstand area; and
- drainage work.

The conditions specified for the development are that the development must:

- not accommodate more than 100 people at each site;
- not involve the accommodation of more than 5 people in a dwelling;
- not involve any shared dining facilities;
- implement measures to ensure compliance with government social distancing rules and regulations;
- be fitted with smoke alarms;
- have appropriate foundations and structural support to ensure safety and suitability for habitation; and
- not affect the means of egress from any building in an emergency.

The Order requires the sites to be returned to the previous use within 2 months after the expiry of the prescribed period.

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.

Planning Law Solutions
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