Enforcement and litigation under the Planning Act 2016 and Planning and Environment Court Act 2016

28 August 2017
6 min. read
Worthwhile read for: Property developer
development / premises / legislation / planning act

On 3 July 2017, the new *Planning Act 2016* (**Planning Act**) and *Planning and Environment Court Act 2016* (**P&E Court Act**) commenced and replaced the *Sustainable Planning Act 2009* (**SPA**).

As is always the case with new legislation, some things change and some things don't. When it comes to enforcement and litigation, there has been one or two big changes, a number of smaller changes, and a lot of re-drafting and refinement of terms and processes that we are already familiar with. Outlined below are some of the notable changes that you need to be aware of.

Maximum penalties

The maximum penalties for most offences against the Act have increased from 1,665 penalty units to 4,500 penalty units. This represents an increase in the maximum penalty for an individual from $210,039.75 to $567,675.00 and an increase in the maximum penalty for a corporation, from $1,050,198.75 to $2,838,375.00.

Development offences

There hasn't been any major changes to the development offence provisions, other than to remove the redundant offences relating to compliance assessment. The existing development offences have been retained in the Planning Act, albeit simplified. What you will see in the Planning Act is a simplified version of the four core development offences:

- Carrying out prohibited development (s162)
- Carrying out assessable development without a permit (s163)
- Contravening a development approval (s164)
- Unlawfully using premises (s165)

Investigation and inspection powers for referral agencies

The Planning Act now prescribes investigation and inspection powers for referral agencies. These are similar to the powers afforded to authorised local government employees under the *Local Government Act 2009* when carrying out compliance and enforcement. The powers of referral agencies for investigating alleged offences against the Planning Act will include; the power to enter land and businesses, the power to search, film, mark or take something, the power to use equipment on the premises, the power to stop and move vehicles, seize evidence and property and the power to require documents and information to be produced.

Circumstances to go straight to an enforcement notice

The concept of issuing an enforcement notice without first giving a show cause notice is not something new. Where an enforcement authority reasonably considers that it is not appropriate in the circumstances to first give a show cause notice, it may issue an enforcement notice. What is different in the Planning Act is that greater flexibility has been given to enforcement authorities to proceed

directly to the enforcement notice step by prescribing circumstances that warrant this type of action. The circumstances relate to:

- a State or local government heritage pace;
- works that are a danger to persons or risk to public health;
- the demolition of works;
- the clearing of vegetation;
- the removal of quarry material and other gravel, rock, sand or soil;
- extracting clay, gravel, sand or soil from waterways; and
- development causing erosion, sedimentation or an environmental nuisance.

Enforcement orders to be recorded on title

The recording of enforcement orders on the title is a new concept brought in through the Planning Act and will be of particular interest to landlords who sometimes become responsible for the actions of their tenants. Where the Planning and Environment Court (**P&E Court**) or the Magistrates Court makes an enforcement order, the order will now attach to land and bind the owner, its successor's in title, and any occupiers of the premises.

There are two exceptions to this rule. The first is where the Court has specifically ordered that the enforcement order should not attach to the premises. The second is where the enforcement order is an order that only requires the respondent to obtain a development permit. In those circumstances, the order will not be recorded on the title.

Once the Court has made the order, the obligation is on the respondent to apply to the titles office to have the order registered on the title. The respondent must do this within ten business days of the order being made. Failure to do so will constitute an offence. The enforcement order will remain on the title and will only be able to be removed if a person is able to obtain another from the Court (called a compliance order) stating that the enforcement order has been complied with. Only once the titles office receives the compliance order will it remove the enforcement order from the title.

Resolution agreements

The alternative dispute resolution processes offered by the P&E Court are prescribed in the new P&E Court Act. The P&E Court Act governs the constitution, composition, jurisdiction and powers of the P&E Court. Quite often planning appeals are resolved through Court facilitated mediations and are typically formalised through mediation agreements. These will now be called resolution agreements, which must be in writing and signed by the parties in the presence of the Court ADR Registrar. While the forum in which these agreements are negotiated is without prejudice, a resolution agreement can be enforced by making an application to the P&E Court.

Costs in litigation

The most notable change that has come about in the litigation space, is the change to the costs rules. We have gone back to the rule that we had prior to 2012, which is that each party bears its own costs in P&E Court proceedings, subject to limited exceptions.

Previously, the P&E Court had a general discretion to award costs. It was not the rule that is applied in the District and Supreme Courts, which is that costs follow the event for the successful party. In the P&E Court it was a discretion to award costs, subject to a number of factors that may influence the Court's decision to award costs. Since that rule was introduced in 2012, the P&E Court has only awarded costs on a number of occasions. Despite this, the decision has been made to move back to

each party bearing its own costs. There are exceptions to this rule, including where litigants commence proceedings without reasonable prospects of success, or conduct litigation for improper purposes. However, it will be very unlikely that any of those exceptions would be triggered in the typical planning cases that go before the P&E Court. Thus, it is likely that in most planning appeals going forward, parties will be able to conduct litigation without fear of adverse costs order.

For more information or discussion, please contact HopgoodGanim Lawyers' Planning and Environment team.

28 August 2017
development / premises / legislation / planning act
Previous article Next article