

Passed by both Houses



New South Wales

# Planning Appeals Legislation Amendment Bill 2010

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*I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.*

*Legislative Council*  
2010

*Clerk of the Parliaments*



New South Wales

## **Planning Appeals Legislation Amendment Bill 2010**

Act No     , 2010

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*An Act to amend the *Environmental Planning and Assessment Act 1979*, the *Land and Environment Court Act 1979* and other legislation with respect to appeals and reviews relating to development applications; and for other purposes.*

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**The Legislature of New South Wales enacts:**

**1    Name of Act**

This Act is the *Planning Appeals Legislation Amendment Act 2010*.

**2    Commencement**

This Act commences on a day or days to be appointed by proclamation.

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## **Schedule 1      Amendment of Environmental Planning and Assessment Act 1979 No 203**

**[1] Section 4 Definitions**

Insert “(or *regional panel*)” before “means” in the definition of *joint regional planning panel* in section 4 (1).

**[2] Sections 23A, 88 (1) and 117C and clause 1 of Schedule 4**

Omit the definition of *regional panel* wherever occurring.

**[3] Section 23N Obligations of councils to assist Commission and regional panels**

Omit “, a regional panel or a planning arbitrator” wherever occurring in section 23N (1) and (2).

Insert instead “or a regional panel”.

**[4] Section 23N (1) (a) and (b) and (3)**

Omit “, panel’s or arbitrator’s” wherever occurring.

Insert instead “or panel’s”.

**[5] Section 23N (2)**

Omit “or to a review by the arbitrator of a matter for which the council is the consent authority”.

**[6] Section 23N (3)**

Omit “, a planning arbitrator”.

**[7] Section 80A Imposition of conditions**

Omit “Division 7A or” from the note to section 80A (10D).

Insert instead “this Division or Division”.

**[8] Section 82A Review of consent determination**

Omit section 82A (2), (3), (5), (7)–(9) and (11). Insert instead:

- (2) A council must, on a request made in accordance with this section, conduct a review.

**[9] Sections 82B–82D**

Insert after section 82A:

**82B Review where development application not accepted**

(1) **Application of section**

This section applies if a council as consent authority determines that a development application is to be rejected and not determined.

(2) **Applications for council review**

The applicant may request a council to review the decision to reject and not determine the application.

(3) **Council must review decision**

A council must, on a request made in accordance with this section, conduct a review.

(4) **Persons who may conduct review**

The review must be conducted:

- (a) if the decision was made by the council—by the council, or
- (b) if the decision was made by a delegate of the council—by the council or another delegate of the council who is not subordinate to the delegate who made the determination.

(5) **Determination of council review**

As a consequence of the review, the council may confirm its decision or proceed to consider the development application.

**82C Review procedures generally**

- (1) This section and section 82D apply to a review held under section 82A, 82B or 96AB by a reviewing body.
- (2) An application for a review must be made, the review must be held and the review must be determined, within the relevant periods (if any) prescribed by the regulations.
- (3) The regulations may provide that a failure to determine an application within a period prescribed by the regulations is taken to be a decision refusing the application.
- (4) The prescribed fee must be paid in connection with an application for a review.
- (5) Before determining an application for a review (other than a review under section 82A), the reviewing body must notify the

request for review (if required to do so by the regulations) and must consider any submissions made concerning the application for review within any period prescribed by the regulations.

- (6) The reviewing body must, in accordance with the regulations, give notice of the result of its determination of an application for a review to the person who applied for the review.
- (7) A decision on an application for a review may not be further reviewed under the same section by the same reviewing body.
- (8) The regulations may make further provision with respect to review applications, the conduct of a review and the notification of review decisions.
- (9) In this Division:  
*reviewing body* means the council or the delegate of the council who conducts the review.

**82D Effect of review decisions**

- (1) For the purposes of determining an application for a review, a reviewing body has the same functions as the consent authority had, in relation to the original application or determination.
- (2) If the reviewing body determines under section 82B that a council should proceed to consider a development application, the development application that is the subject of the review is taken to have been lodged on the day on which that determination is made.
- (3) If the reviewing body changes a determination (other than a determination under section 82B), the changed determination replaces the earlier determination as from the date of review and the date of determination of the application is taken to be the date of the decision on the review.
- (4) If the reviewing body grants development consent, or varies the conditions of a development consent or otherwise modifies a development consent, the reviewing body must endorse on the notice issued under section 82C (6) the date from which the consent, or the consent as varied, operates.
- (5) A decision by a reviewing body in determining an application for a review is taken for all purposes to be the decision of the consent authority.
- (6) This section has effect even if the appointment of a reviewing body or a member of a reviewing body is subsequently found not to have been validly made.

- [10] Section 83 Date from which consent operates**  
Omit “section 82A (7)” from section 83 (1) (a).  
Insert instead “section 82D (4)”.
- [11] Section 83 (2)**  
Omit “section 97”. Insert instead “section 97 (1)”.
- [12] Section 83 (3) (a) and (b)**  
Omit the paragraphs. Insert instead:  
    (a) development consent is refused on a review under section 82A or an appeal under section 97, or  
    (b) the effect of a decision on an appeal under section 98 is that development consent is refused.
- [13] Section 83 (6)**  
Omit the subsection.
- [14] Section 96 Modification of consents—generally**  
Omit “(5), (6) and (7)” from section 96 (1).  
Insert instead “(5) and (6), section 96AB and Division 8”.
- [15] Section 96 (6)**  
Omit section 96 (6) and (7). Insert instead:  
    (6) **Deemed refusals**  
    The regulations may make provision for or with respect to the following:  
    (a) the period after which a consent authority, that has not determined an application under this section, is taken to have determined the application by refusing consent,  
    (b) the effect of any such deemed determination on the power of a consent authority to determine any such application,  
    (c) the effect of a subsequent determination on the power of a consent authority on any appeal sought under this Act.

**[16] Section 96AA Modification by consent authorities of consents granted by Court**

Omit section 96AA (3) and (4). Insert instead:

- (3) The regulations may make provision for or with respect to the following:
  - (a) the period after which a consent authority, that has not determined an application under this section, is taken to have determined the application by refusing consent,
  - (b) the effect of any such deemed determination on the power of a consent authority to determine any such application,
  - (c) the effect of a subsequent determination on the power of a consent authority on any appeal sought under this Act.

**[17] Section 96AB**

Insert after section 96AA:

**96AB Review where modification application refused or conditions imposed**

**(1) Applications for review of modification decisions**

An applicant for the modification of a development consent for which a council is the consent authority may request the council to review a determination by the council under section 96 or 96AA of the application.

**(2) Council must review determination**

A council must, on a request made in accordance with this section, conduct a review.

**(3) Persons who may conduct council review**

The review must be carried out by:

- (a) if the determination was made by the council—the council, or
- (b) if the determination was made by a delegate of the council—by the council or another delegate of the council who is not subordinate to the delegate who made the determination.

**(4) Determination of review**

As a consequence of the review, the council may confirm or change the determination.



**(5) No review if appeal period expired or appeal made**

A determination cannot be reviewed:

- (a) after the time limited for the making of an appeal under section 97AA expires, if no such appeal is made against the determination, or
- (b) after an appeal under section 97AA against the determination is disposed of by the Court, if such an appeal is made against the determination.

**(6) Withdrawal of appeals**

If on a review the council modifies a development consent, the council is entitled, with the consent of the applicant and without prejudice to costs, to have an appeal made under section 97 in respect of its determination withdrawn at any time prior to the determination of that appeal.

**(7) Determinations not subject to review**

This section does not apply to the following determinations:

- (a) a determination of an application to modify a complying development certificate,
- (b) a determination in respect of designated development,
- (c) a determination in respect of integrated development,
- (d) a determination made by the council under section 89A in respect of an application by the Crown,
- (e) a determination that is taken to have been made because the council has failed to determine an application.

**Note.** Sections 82C and 82D apply to a review under this section.

**[18] Section 97 Appeal by an applicant—development applications**

Omit “12 months” wherever occurring in section 97 (1)–(3).

Insert instead “6 months”.

**[19] Section 97 (1) (a)**

Insert “or review” after “application”.

**[20] Section 97 (4) and (5)**

Omit the subsections.

**[21] Sections 97AA and 97A**

Insert after section 97:

**97AA Appeal by applicant—modifications**

An applicant who is dissatisfied with the determination of a consent authority with respect to the applicant's application under section 96 or 96AA (including a determination on a review under section 96AB) may appeal to the Court within 6 months after:

- (a) the date on which the applicant received notice, given in accordance with the regulations, of the determination of that application or, if an application for review under section 96AB has been decided, the date on which the applicant received notice, in accordance with the regulations, of the decision, or
- (b) the date on which the applicant's application is taken to have been determined in accordance with regulations made under section 82C (3), 96 (6) or 96AA (3).

**97A Notice of appeals to be given and right to be heard**

- (1) The consent authority must give notice of an appeal under section 97, 97AA or 98:
  - (a) to an objector, in the case of an appeal concerning a development application in respect of which the objector may appeal under section 98, or
  - (b) to the relevant Minister or public authority, in the case of an appeal concerning a development application in relation to which the concurrence of a Minister or public authority is required under this Act, or
  - (c) to the relevant approval body (within the meaning of Division 5), in the case of a development application to carry out integrated development that involves the approval body.
- (2) A council must give notice to a regional panel of any appeal under section 97, 97AA or 98 in respect of a determination made by the panel or that may be reviewed by the panel under this Act.
- (3) A council must give notice to the Planning Assessment Commission of any appeal under section 97, 97AA or 98 in respect of a determination made by the Commission or that may be reviewed by the Commission under this Act.

- (4) A person or body who is given notice of an appeal under this section is, on application made to the Court in accordance with rules of court within 28 days after the date of the notice, entitled to be heard at the hearing of the appeal as if the person or body were a party to the appeal.

**[22] Section 97B Costs payable if amended development application filed**

Omit section 97B (2). Insert instead:

- (2) In any proceedings to which this section applies, the Court must make an order for the payment by the applicant of those costs of the consent authority that are thrown away as a result of amending the development application.

**[23] Section 98 Appeal by an objector**

Omit section 98 (3).

**[24] Section 109Q Regulations under Part 4A**

Insert after section 109Q (1) (e):

- (f) exempting classes of temporary structures from requirements relating to construction certificates or occupation certificates.

**[25] Section 118 Appointment of planning administrator, planning assessment panel or regional panel**

Omit “, a joint regional planning panel or a planning arbitrator” from paragraph (d) of the definition of *failure to comply with obligations under the planning legislation* in section 118 (12).

Insert instead “or a regional panel”.

**[26] Section 158 Exclusion of personal liability**

Omit section 158 (e).

**[27] Section 158 (f)**

Omit “(a)–(e)”. Insert instead “(a)–(d1)”.

**[28] Section 158**

Omit “, a planning arbitrator”.

**[29] Schedule 6 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

*Planning Appeals Legislation Amendment Act 2010*

**[30] Schedule 6**

Insert at the end of the Schedule with appropriate Part and clause numbering:

**Part Planning Appeals Legislation Amendment Act 2010**

**Review and appeal changes**

The amendments made to Part 4 of the Act by the *Planning Appeals Legislation Amendment Act 2010* do not apply to or in respect of a development application lodged with a consent authority before the commencement of section 82B (as inserted by that amending Act).

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## Schedule 2 Amendment of Land and Environment Court Act 1979 No 204

### [1] Section 34AA

Insert after section 34:

#### **34AA Mandatory conciliation and arbitration**

- (1) This section applies to the following proceedings pending in Class 1 of the Court's jurisdiction relating to appeals, objections and applications under section 97 or 97AA of the *Environmental Planning and Assessment Act 1979*:
  - (a) proceedings concerning development applications, or modifications to development consents, for:
    - (i) development for the purposes of detached single dwellings and dual occupancies (including subdivisions), or alterations or additions to such dwellings or dual occupancies, or
    - (ii) development of a kind prescribed by the regulations,
  - (b) particular proceedings that the Court orders, on the application of a party to the proceedings or of its own motion, to be dealt with under this section.
- (2) Section 34 applies to the proceedings with the following modifications:
  - (a) the Court must arrange a conciliation conference between the parties and their representatives with or without their consent,

**Note.** The Commissioner has the discretion to determine the place (including an on-site hearing) fixed for the conciliation conference.
  - (b) if no agreement of a kind referred to in section 34 (3) is reached, the Commissioner who presides over the conciliation conference must terminate the conciliation conference and, subject to this section, dispose of the proceedings:
    - (i) following a hearing held forthwith, or
    - (ii) if the parties consent, on the basis of what has occurred at the conciliation conference.
- (3) The Court or the Commissioner may at any time, if the Court or Commissioner thinks it appropriate in the circumstances of the case, determine that proceedings are not to be dealt with or are

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not to continue to be dealt with under subsection (2). A determination may be made on the motion of the Court or Commissioner or on application by the parties.

- (4) If the Court or Commissioner determines that proceedings are not to be dealt with or are not to continue to be dealt with under subsection (2), the proceedings are to be dealt with under section 34C.

**[2] Section 34A Proceedings to which on-site hearing procedures apply**

Insert after section 34A (1):

- (1A) This section does not apply to proceedings to which section 34AA applies.

**[3] Schedule 3 Savings, transitional and other provisions**

Insert at the end of clause 1A (1):

*Planning Appeals Legislation Amendment Act 2010*

**[4] Schedule 3, clause 10**

Insert after clause 9:

**10 Provisions consequent on enactment of Planning Appeals Legislation Amendment Act 2010**

Section 34AA as inserted by, and the amendment to section 34A made by, the *Planning Appeals Legislation Amendment Act 2010* do not apply to proceedings commenced in the Court (but not determined) before the commencement of section 34AA.

## **Schedule 3 Amendment of other Acts**

### **3.1 Environmental Planning and Assessment Amendment Act 2008 No 36**

- [1] **Schedule 2.1 Principal amendments to Environmental Planning and Assessment Act 1979**  
Omit items [3], [13], [20], [27] and [32]–[35].
- [2] **Schedule 2.1, items [18], [19] and [38]**  
Omit “section 96E” wherever occurring. Insert instead “section 82BA”.
- [3] **Schedule 2.1, item [36]**  
Omit “Part 4, Division 7A”. Insert instead “Section 82BA”.
- [4] **Schedule 2.1, item [36]**  
Omit “Insert after Division 7 of Part 4”.  
Insert instead “Insert after section 82B”.
- [5] **Schedule 2.1, item [36]**  
Omit all matter relating to proposed Division 7A of Part 4 (including the heading to the proposed Division), other than proposed section 96E.
- [6] **Schedule 2.1, item [36]**  
Renumber proposed section 96E as section 82BA.
- [7] **Schedule 2.1, item [36]**  
Omit “planning arbitrator matters or to” from proposed section 82BA (10) (as renumbered by item [6]).
- [8] **Schedule 2.1, item [36]**  
Insert at the end of proposed section 82BA (as renumbered by item [6]):
- (11) As a consequence of a review, the reviewing body may confirm or change the determination.
  - (12) If an application for a review is made under section 82A and this section, the applications are to be dealt with together and determined by the reviewing body. A council may not determine an application for a review if an application concerning the same matter is made under this section.

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(13) The regulations may make provision with respect to the notification of applications made under this section.

(14) In this section:  
*applicable regional panel* means the regional panel for the part of the State in which the development is proposed to be carried out.

**[9] Schedule 2.1, items [37]–[37C]**

Omit item [37]. Insert instead:

**[37] Section 82C Review procedures generally**

Omit “or 96AB” from section 82C (1).

Insert instead “, 82BA or 96AB”.

**[37A] Section 82C (6)**

Omit the subsection. Insert instead:

- (6) The reviewing body must, in accordance with the regulations, give notice of the result of its determination of an application for a review:
- (a) to the person who applied for the review, and
  - (b) if that person was not the applicant for the determination reviewed, to the applicant and the council.

**[37B] Section 82C (9)**

Omit the definition of *reviewing body*. Insert instead:

*reviewing body* means:

- (a) the council or a delegate of the council who conducts the review, or
- (b) in the case of an application to a regional panel under section 82BA, the regional panel, or
- (c) in the case of an application to the Planning Assessment Commission under section 82BA, the Commission.

**[37C] Section 97A Notice of appeals to be given and right to be heard**

Insert “or make an application for a review under section 82BA” after “section 98” in section 97A (1) (a).



- [10] Schedule 2.2 Consequential amendments to Environmental Planning and Assessment Act 1979**  
Omit items [16], [20]–[25], [31], [32] and [34]–[38].
- [11] Schedule 2.2, items [17], [18], [43] and [44]**  
Omit “section 96E” wherever occurring. Insert instead “section 82BA”.
- [12] Schedule 2.2, items [18] and [28]**  
Omit “Division 7A” wherever occurring. Insert instead “section 82BA”.
- [13] Schedule 2.2, item [30]**  
Omit the item. Insert instead:  
**[30] Section 83 (3) (b)**  
Insert “a review application under section 82BA or” after “a decision on”.
- [14] Schedule 2.2, item [42]**  
Omit “section 96D”. Insert instead “section 82BA”.
- [15] Schedule 2.5 and 2.10**  
Omit the Subschedules.
- [16] Schedule 3.1 [7], proposed clause 2 (1) and (2)**  
Omit “section 96E” wherever occurring. Insert instead “section 82BA”.
- [17] Schedule 3.1 [7], proposed clause 16**  
Omit “Division 7A”. Insert instead “Division 2”.

### **3.2 Independent Commission Against Corruption Act 1988 No 35**

#### **Section 74C Reports relating to local government and planning authorities**

Omit “or a planning arbitrator because of corrupt conduct by the member or  
planning arbitrator” from section 74C (3C).

Insert instead “because of corrupt conduct by the member”.