

Local Councils Proposed updates to Development Control Plan (DCP) 2012

The DCP outlines what types of development and land uses are permitted in the various zoning within Council's area. Some Councils propose to categorise DOGS NSW members as either Hobby Breeders or Professional Breeders, placing limits on dog numbers. Further, members would be required to lodge a Development Application to keep dogs.

DOGS NSW has sought legal advice on the validity of the Local Council's proposed changes.

Ultimately, the following is a brief summary of a huge amount of law. Effectively, we are just scratching the surface with this advice.

Planning law

1. In great summary format, town planning law provides for the ability to carry out development, which is defined as meaning any of the following:
 - (a) the use of land,
 - (b) the subdivision of land,
 - (c) the erection of a building,
 - (d) the carrying out of a work,
 - (e) the demolition of a building or work,
2. The primary piece of legislation for planning law is the Environmental Planning and Assessment Act 1979. Essentially, it provides for environmental planning instruments (the main ones are called Local Environmental Plans, LEPs), which, through maps, place land in various zones, and then provide a zoning table to indicate what sort of development may be carried out on land in that zone, and what sort of development might be prohibited.
3. A relevant type of development referred to in many planning instruments is ***animal boarding or training establishment***, which is defined as "a building or place used for the breeding, boarding, training, keeping or caring of animals for commercial purposes (other than for the agistment of horses), and includes any associated riding school or ancillary veterinary hospital." That definition already contains a commercial aspect, and by definition a building or place [used for animals] for non-commercial purposes falls outside the definition of *animal boarding or training establishment*. There is caselaw about this *Acers v Wollondilly Shire Council* [2014] NSWLEC 1169, in which relevantly the Land and Environment Court found that commercial purposes can be established even if no profit is made, and it is all a question of fact and degree.

Development control plan

4. A **development control plan** is a subsidiary document. The purpose of a DCP is "to provide guidance on the following matters to the person proposing to carry out development and to the consent authority (council) for any such development –
 - (a) giving effect to the aims of any environmental planning instrument that applies to the development,
 - (b) facilitating development that is permissible under any such instrument,
 - (c) achieving the objectives of land zones under any such instrument."

5. Importantly, a DCP is relevant only when and development application is lodged. Then, one must comply with requirements set out in an LEP, but strict compliance with requirements in a DCP is not required, so long as one achieves the objectives for that particular requirement.

Ancillary Development

6. It may well be that the use of land for the keeping of cats or dogs for non-commercial purposes is an *ancillary use* to residential development, and not a type of development in its own right. So long as the predominant use is lawful (e.g. development consent was obtained for the residential development if required), then consent is not required for uses ancillary to that residential development.
7. However, because it is not always clear whether certain development is or is not ancillary development, there is a planning instrument called the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 which provides that the carrying out of certain development is "exempt development" and therefore does not require an approval. This includes animal shelters, so long as they comply with the "development standards" referred to in the Policy (the subdivision 3A Animal Shelters in the Policy).

Local Government Act Orders

8. It is possible for a council to issue an order pursuant to section 124 (order 18) of the *Local Government Act 1993* "not to keep birds or animals on premises, other than of such kinds, in such numbers or in such manner as specified in the order". Such an order can be given in circumstances where birds or animals "of an inappropriate kind or number or are kept inappropriately" or, if the premises are in a catchment district, "birds or animals are suffering from a disease which is communicable to man or to other birds or animals), or pigs".
9. Further, a Council can adopt a Local Policy for Orders, which would specify the criteria which (if the policy were to be adopted) the Council must take into consideration in determining whether or not to give an order under section 124.
10. A development control plan is NOT such a policy. Even so, we would not be surprised if the Council officers were to use the controls set out in section 8.5 as the basis for them issuing an Order under section 124 (order 18) of the *Local Government Act 1993* to a person with respect to keeping of animals. In order to issue such an order, the Council first needs to issue a notice of its intention to so issue an order, at which stage the recipients (landowner) needs to contact you urgently.

Steven Berweling

Barrister