

November 2020

Natural Disasters Local Environmental Plan Clause

Introduction

Clause 5.9 of the Standard Instrument Order (the clause) was introduced to support homeowners whose homes have been damaged or destroyed by natural disasters. The clause applies to development applications (DAs) where development consent is sought to repair or replace a dwelling house or secondary dwelling that was damaged or destroyed by a natural disaster.

The clause was prepared in response to regulatory challenges faced by homeowners seeking to rebuild homes following natural disasters where planning controls in Local Environmental Plans (LEP) have changed over time.

The clause will ensure that development consent can be granted for the repair or replacement of a dwelling that was damaged or destroyed by a natural disaster despite any provisions in the relevant LEP which would otherwise prevent the consent authority from doing so.

The clause intends to eliminate the need for applicants to:

- Prepare formal requests to vary a development standard; or
- Demonstrate the continuance of an existing use in circumstances where dwelling houses or secondary dwellings are no longer permitted with consent in the relevant zone (applicants will need to demonstrate that the existing dwelling was lawfully erected).

Natural Disasters

Natural disasters are naturally occurring, rapid onset events that cause serious disruption to life or property in a community or region, such as floods, bushfires, earthquakes, storms, cyclones, storm surges, landslides and tsunamis. A natural disaster can include a state of emergency declared under section 33 of the *State Emergency and Rescue Management Act 1989*.

The rebuilding or repair of damage or destruction caused by or because of any of these events is development to which the clause applies.

Varying Development Standards

The clause states that consent can be granted to the specified development in a zone where the clause applies despite any other provision of the relevant LEP. For this reason, it is not necessary for applicants to submit a request to vary a development standard where a development standard is contravened. DAs will still undergo a merit assessment to ensure that dwelling houses and secondary dwellings are of an appropriate size, location and design in the context of the site.

In situations where key planning controls or development standards have changed over time, removing the need to formally request a variation under clause 4.6 of the relevant LEP will save time and resources for applicants and consent authorities.

Merit Assessment

For DAs where the clause applies, the consent authority cannot refuse a DA on the basis it does not comply with a development standard or other provision in the applicable LEP.

The proposed development will be assessed on its merits against the relevant considerations under section 4.15 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and any other applicable legislation.

Any standards or provisions outlined in a State Environmental Planning Policy (SEPP) that are relevant to the DA continue to apply (including any concurrence or referral requirements). Development Control Plan (DCP) provisions also continue to apply.

Evaluation under section 4.15 of the *Environmental Planning and Assessment Act 1979* where the clause applies

For DAs where the clause applies, LEP provisions themselves must not be used as a reason for refusal. However, if the consent authority considers that the risk, or other environmental impact associated with the proposed development is inconsistent with the relevant considerations of section 4.15, the consent authority can refuse the application on that basis.

Example

Due to a period of local severe rains, a river floods and destroys two homes. Although this natural event is not subject to an emergency declaration under section 33 of the *State Emergency and Rescue Management Act 1989*, it is still considered to be a natural disaster and accordingly, the natural disasters clause could potentially be applied to rebuild the destroyed dwelling houses.

Council is unable to refuse the DA to rebuild the destroyed dwelling on the basis that it does not comply with a development standard in the applicable LEP – however, council will be able to undertake a merit assessment under section 4.15 of the EP&A Act. If council considers the site is unsuitable for redevelopment under section 4.15(1)(c) due to flooding concerns, then the DA may be rejected on this basis.

Other Applicable Legislation

The requirements of other applicable legislation referred to in a SEPP, or in the EP&A Act continue to apply to DAs where the clause applies. For example, section 4.14 of the EP&A Act continues to apply for development of bushfire prone land and all relevant requirements of *Planning for Bushfire Protection 2019* must be satisfied.

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 and the *Biodiversity Conservation Act 2016* will also continue to apply to development involving clearing of vegetation and development of land with high biodiversity values. Any relevant assessment and offsetting requirements under that Act must also be met.

Replace and Repair

The clause refers to the *repair* or *replacement* of a lawfully erected dwelling house or secondary dwelling that was damaged in a natural disaster. There is no requirement for the *replacement* or *repair* subject of a DA to be identical to the original dwelling which was destroyed or damaged.

Development consent can be granted for dwelling houses and secondary dwellings that are of a different size, location or design to the original dwelling under the clause. Changes to the design and location of a proposed dwelling may be required to meet the relevant provisions of a DCP, other environmental planning instruments, associated legislation or the requirements of the National Construction Code.

Lawfully Erected

To be a lawfully erected dwelling house or secondary dwelling, it must have been constructed under a valid development consent, building approval or another lawful planning pathway under the EP&A Act or equivalent historical planning legislation.

Further Information

For more information:

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