Delphi

June 2014

"Simplifications" in the Planning and Building Act (PBL) - a political rush job?

On 2 July 2014, the new regulations regarding further building permit exemption measures will come into effect. Among the news is the opportunity to construct 25 m² ancillary residential dwelling without requiring a building permit. However, the amendments are not entirely without controversy and have been met by strong criticism from several respondents.

In Bill *2013/14:127 New measures that can be implemented without requiring a building permit*, the government proposed, a number of additional measures to the Planning and Building Act, which in future can be implemented without requiring a building permit. According to the Government, the purpose of the amendments is to simplify the framework so that the requirements for building permits are not imposed to an extent that is greater than what is justified on the basis of the public need to ensure the buildings are developed in a timely and sustainable manner. The new legislative amendments come into effect on 2 July 2014.

What actions do the new rules apply to?

The new regulations mean that the following measures, if they meet certain criteria, may be imple-mented without requiring building permission:

- that the erection of ancillary dwellings and ancillary buildings will be to a maximum of 25 m² in connection to one and two family residential dwellings
- that the erection of ancillary building will be up to a maximum of 15 m² on one and two family residential dwellings
- that in one and two family residential dwellings there will be a maximum of two dormer windows, and
- that in a single residential family dwelling an additional dwelling will be furnished

All actions, with the exception of the dormer windows, must now be reported to the Board of the Planning and Building Act instead.

Ancillary dwelling

Under the new provisions a new form of housing has emerged - the ancillary dwelling (or the sup-plementary residential unit as it has become known) - which may be erected adjacent to one or two family dwellings. The ancillary dwelling will also be

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able to constitute an ordinary ancillary building. The area is a maximum of 25 m^2 and can be divided into several different forms of usage and buildings, e.g. residences and storage. The difference compared to today's sheds, is that the ancillary dwellings may be used as permanent residences and also as a garage, storehouse or guesthouse.

The ancillary dwellings may be erected to a maximum roof ridge height of 4 m. If the buildings are to be placed closer than 4.5 m to the boundary, any affected neighbours are required to approve it. With regards to railway lines, the buildings may not be erected closer than 30.0 m to the tracks the railways infrastructure administration approves it. Normally an ancillary dwelling may be erected even if it conflicts with existing zoning.

Extensions

In future, planning permission will not be required in order for a one or two family residential dwell-ing that is being extended by a gross area of a maximum of 15 m^2. The height of the extension must not exceed the roof ridge height on the existing dwelling. The extension may not be placed closer than 4.5 m to the boundary unless any affected neighbours have approved it. Normally an extension may be erected even if it is in conflict with existing zoning.

Maximum of two dormer windows

For one or two family dwellings, the waiving of the requirement for a building permit will apply to the building of a maximum of two dormer window, even if it is in conflict with existing zoning. . If there is already one dormer window, the exemption from the requirement for a building permit will apply to only one dormer window. The exemption does not apply to residential dwellings that are already furnished with two or more dormer windows. The dormer windows may cover a maximum of half the roof and must not involve intervention with weight-bearing structures.

Furnishing an additional dwelling

A building permit will not be required in order for a single family dwelling to furnish an additional dwelling, e.g. at cellar level. Normally a new dwelling may be furnished even if it is in conflict with existing zoning.

Requirements for building permits in certain cases

The municipality has the possibility of regulate measures for certain building permits in the zoning and development plan, despite the requirement for planning permission. This will apply also to the new measures. Furthermore, the building permits will also be required in future if the actions are to be taken on, in or at buildings from historical, cultural, environmental or an artistic point of view is particularly valuable or is included in such a settlement area.

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Processing the new measures

Deviation from the zoning and development plan

The new building permit exemption measures may all be implemented even if they are in conflict with the existing zoning and development plan. This means that the buildings or the extensions e.g. will be erected on so called point dotted land, i.e. land that according to zoning and development plan must not be built on.

Obligation to report

As mentioned above the obligation to report as a principal rule will apply to the construction of ancillary dwellings, extensions and furnishing of additional residential dwellings. The obligation to report means that the suitability of the building will be assessed by the Board of the building committee in a starting clearance, where a control plan is required to ensure that the proposed building meets the technical property requirements. Construction must not be started prior to receiving the starting clearance, and neither may the building be put into service until the Board of the Building Committee has granted final clearance. The starting clearance enables, the Board of the building committee to approve the measures to be taken if they can be assumed to meet the requirements stipulated by PBL or the regulations announced in accordance with the PBL. The requirement for a technical consultation will not apply to the new measures unless otherwise determined by the Board of the building committee. According to the Government the new procedure with the obligation to report instead of a building permit will not, involve any substantial simplification of the building process for the building contractor that would facilitate the construction of the buildings in question. Rather, the simplification for the building contractor lies in the possibility of being able to deviate from the existing zoning and development plan.

Influence of neighbours and the right to a judicial review

The decision of the Board of the building committee to grant a starting clearance, as opposed to a decision on planning permission, may not be appealed against by neighbours and others affected. Concerning this, the Government has written the following.

Today, so-called sheds may be built if they are conflict with the existing zoning and development plan, without either a building permit or report to the Board of the building committee and without any special recourse for the neighbours to judicial review prior to the commencement of construc-tion. The Government considers it to be significantly important to create better conditions for housing supply by simplifying the procedure. The proposals in question will facilitate the construction of residential buildings by property owners and the taking of other measures to create more dwellings. It will also increase the opportunity for property owners to control how their own property will be developed. However, it must also be considered that neighbours and others who are affected have an interest in preventing measures that would result in nuisance to them. Therefore the Government proposes that the current buildings and

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extensions should not be allowed to be built closer than 4.5 m to the boundaries without the prior consent of the neighbours concerned. Moreover the Government proposes a restriction of the height of the buildings in such a way that they may only be increased by 1 m against that which is applicable to the sheds mentioned.

A major difference in comparison to the sheds is that construction of the current buildings will be preceded by a report. This same procedure applies to extensions. That a measure is subject to an obligation to report, means the Board of the building committee will make a decision regarding a starting clearance. The assessment of the Board of the building committee will include deciding whether the measure in question can be assumed to meet the requirements of the PBL. These could be, among other things, whether or not the location and design are appropriate in view of protection against fire as well traffic accidents and other incidents. Furthermore, it will also look at whether the placement itself can be assumed to involve any impact that might be detrimental to human health or safety, or may involve significant inconveniences in any other way. Therefore, in processing this, the Board of the building committee will consider both private and public interests. Should any inconvenience occur due to PBL regulations not being observed, the neighbours or people living in the vicinity have the opportunity to initiate a supervisory matter with the building committee. From the view o the Government, the leading line of reasoning and the proposed scheme mean a suitable balance between the different interests that may be held by property owners, neighbours and the community. However, the Government also intends that a broad analysis should be done with respect to judicial review of the new measures.

Criticism of the new provisions

Strong criticism has been directed at the proposal for the new provisions, both with regards to the preparation itself and the content. Some respondents, Nacka District Court (Land and Environmental Court), KTH Royal Institute of Technology and The Government Advisory Council, amongst others have explained that they cannot submit any responses due to the short referral period. The Svea Court of Appeal (Land and Environmental Court) criticises the forced procedure and considers the conditions make it impossible for interested parties and respondents to consider the proposal in a desirable manner.

In its opinion on the proposal, the Council on Legislation writes, inter alia, the following.

The referral is based on three investigative suggestions / ... /. The report of the National Housing Board, which was prompted by a Government commission in mid-November 2013, was referred on 13 December 2013, with a final response time of 10 January 2014. A consultation referral meeting on the report was held at the Ministry of Health on 19 December 2013. / ... /. The proposals in the report were far from straightforward. The consultation and referral groups found that despite this, there less than one month in which to express an opinion and meanwhile all the weekends were during the Christmas and New Year holiday period. The consultation referral meeting that was held on 19

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December, i.e., only a couple of days after the report was provided to the referral groups, cannot be considered to have compensated for the unreasonably short response time. The Svea Court of Appeal has noted that the consequences of the National Housing Board proposal had not been adequately reported in the report. The Council on Legislation agrees with the criticisms raised by the Court of Appeal. For example, the report does not analyse how the proposed legislative changes will affect the regulatory system in general. The absence of such an analysis must have made it difficult for interested and referral parties to assess the consequences of the proposal, which would naturally have been particularly problematic given the short referral period.

The Council on Legislation further notes that at the Government meeting on 6 February 2014, the Council on Legislation decided this, i.e. less than a month after the expiry of the referral period. This short turnaround time gives the impression that the Government has not taken the preparation requirements of this form of government seriously. The fact that the referral viewpoints are barely treated the same adds to this impression, even although in several places, the referral indicates that many respondents produced negative opinions on the proposals. From the foregoing, it follows that the preparation of the National Housing Board report is not acceptable and indeed neither can it be said that the preparation requirements for this form of government have been met. Due to this, the Council on Legislation has already, in the parts that are based on the report of the National Housing Board, not provided a basis for legislation. In addition, this means that there are serious shortcomings in some parts of the legislative proposals of the referral.

Regarding the relationship of the proposal to the rules on zoning, the Council on Legislation leads including inter alia, the following. The Council on Legislation considers that the introduction of an opportunity to take the extensive measures in question that are in conflict with the zoning and development plan in such cases, risks undermining the zoning and development system. In any case, such an intervention change should not be implemented without a thorough assessment of the impact.

With regards to the right to judicial review, the Council on Legislation leads with inter alia, the following. The Council on Legislation finds that the proposal means that the neighbours are presented with the opportunity to appeal against and therefore prevent the work from being undertaken, causing the inconveniences to be removed completely. This also applies if the work would be inappropriate localised and likely to lead to a reduction in the value of adjacent properties. At the same time, this crops the possibility for the Board of the building committee to conduct an unbiased review of such projects, including inter alia, with respect to public and private interests. In this context, the Council on Legislation, reminds us of the fact that the right of the neighbours to appeal decisions that may affect the value or disposition of their own property has a long tradition in Sweden. That these rights are also considered as covered by the European Convention requirement for the right to judicial review to be confirmed by the complaints of neighbours in planning matters accepted for testing by the Supreme Administrative Court in judicial review cases.

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It is certainly the case that not all building measures have the scope and importance that they can be argued as constituting a violation of the Convention rights. However, according to the opinion of the Council on Legislation, such an advanced framework must now be proposed for the ancillary dwelling, which in addition may be able to be placed in a location in conflict with the applicable zoning and development plan, could cause harm to neighbouring property owners, such that they may be regarded as having a right to judicial review of the admissibility of this action. / ... / In addition, the Council on Legislation questions whether there are sufficient grounds for the assumption that the decision of the Board of the building committee in a supervisory matter can always be appealed in court. In the court case, HFD 2010 ref.29, the Supreme Administrative Court held that the decision of a supervisory authority to not take any action in response to a complaint does not constitute an appealable decision. Therefore, the Council on Legislation therefore finds that it had not investigated that the proposal meets the requirements under the Convention regarding the possibility of judicial review for neighbours regarding a future ancillary dwelling. The same applies to the other building measures for which it is proposed that they are carried out without building permits. However, these differ significantly with respect to the degree of impact on the surroundings. It may thus be assumed that for example, an extension to the proposed scope could often form the basis of an alleged breach of the protection of property. A careful analysis of the legal situation must therefore precede the possible removal of the requirement for a building permit for the current actions so that access to judicial review is respected.

Analysis

The new rules aim to simplify the regulatory framework so that requirements for building permits are not imposed to a greater extent than is justified by the needs of society to ensure that the buildings are developed in a timely and sustainable manner. However, the Government states that the largest simplification lies in the possibility to build in conflict with the existing zoning and development plan, unless specific provisions against such construction-have not been entered in the zoning and development plan. The municipal planning monopoly is one of the linchpins in the planning and building legislation. The zoning and development plan gives municipalities the opportunity to control urban development, while at the same time providing the citizens with an opportunity to predict what will happen and what may happen in a certain area. The newly proposed changes will make it difficult for municipalities to regulate the design of buildings in a certain area through the zoning and development plan. Therefore, the municipalities' "right of veto" disappears in some sense.

In the same way, the right of the neighbours to appeal under the PBA has a long tradition in Sweden. With the new procedure using the report instead of the building permit application, creates an entirely new and foreign system for Swedish planning and building legislation, to manage such extensive measures, which, in any case, an ancillary dwelling is. Through this, the right of the neighbours to appeal against measures that could have a major impact on their properties and the basis of the existing zoning

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and development plan cannot be foreseen. In the proposal for the new provisions, the Government has not taken sufficient account of the right to judicial review that neighbours and local residents may have with building measures that may include a violation of property protection in accordance with the European Convention. In general, these questions will not be affected, which will probably make application of the law difficult.

The Government believes that problems that may arise from legislative changes may instead be solved through municipal oversight. However, in the first instance, the regulations regarding supervision of course do not primarily establish an open dialogue between different stakeholders, but that rather that from a social intervention perspective when someone has violated the regulations of the PBL. It is common for building permits granted, i.e., that the Board has determined that the building is appropriate, to be appealed by local residents. In this situation provincial Government may review the decision. With the newly proposed system such a matter, where a person has made a report and been given starting clearance, will instead be treated as a municipal supervisory matter if reported by a neighbour. How this situation will be handled is not addressed in the Bill. After all, the Board of the Building Committee may not revoke the starting clearance in principle if it is then judged as having done wrong, even although it constitutes a positive decision by the authorities.

In summary, it can be concluded that the newly proposed legislative changes have been severely criticised, which can be considered as justified. The changes are most likely to mean a lot of extra work for both local government and for the testing authorities who must interpret and attempt the practical application of the changes. Therefore, the future will tell if the changes will in fact mean "simplification" or not.

Christian Härdgård,
Associate

Christina Hellström,
Associate