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HAVE LEGISLATIVE REFORMS EXPEDITED PROPERTY DEVELOPMENT APPROVALS IN NEW SOUTH WALES?

*A commentary on recent changes to the
Environmental Planning and Assessment Act 1979.*

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ABSTRACT

The Environmental Planning and Assessment Act 1979 was recently amended to expedite the approval process for development in New South Wales. The amendments came into force on 1 July 1998 and considerably changed the procedural process for the lodgement of development applications, and the procedures to be applied to assessment. The new integrated development assessment process introduced a single application for development, building and sub-division, giving developers the opportunity to either seek an integrated approval from the consent authority for all envisaged development and construction works or to defer building issues to the "Construction Certificate." This paper profiles the essential elements of the reform programme and examines the success of the new amendments through the opinions of local government planners, private certifiers and developers.

AN EXPRESS LANE THROUGH THE MAZE?

Developers often experience a sense of frustration as they guide their development applications through the approval process in New South Wales. At best, development outcomes are generally achieved through the urgent need to compromise. In the worst situations every aspect of the proposal is bitterly contested through the New South Wales Land and Environment Court or appellate courts¹.

By 1990 there was a strong need to deal with the systemic dissatisfaction experienced by the development construction industry and local consent authorities. In 1993 the NSW State Government appointed a Commission of Inquiry into Red Tape chaired by Garry Sturgess. The Sturgess Report entitled "Thirty Different governments" highlighted the complexities of the process for gaining State and Local Government development approvals.

Two green papers followed the recommendations of the Sturgess Report: "Towards an Integrated Land Use, Planning and Natural Resource Approvals Policy for NSW" and "Regulatory Innovation - Regulation for Results" which heralded the real beginning for reform of Planning and Building laws in New South Wales². From the ensuing public and industry discussion there emerged a White Paper released on 12 February 1997 entitled "Integrated Development Assessment - White Paper and Exposure Draft Bill³". The proposed reforms included:

1. Integration of Development Approvals - integration of development, building and subdivision applications into one development consent.
2. New Categories of Development - State significant, Local, Complying and Exempt development to streamline the process for minor/routine development.
3. Accreditation Certification - giving consent authorities and applicants greater opportunity and choice of using the expertise of accredited professionals.

In December 1997 Parliament passed the *Environmental Planning and Assessment Amendment Act 1997* (the "Amendment Act") which amended the *Environmental Planning and Assessment Act 1979* in relation to environmental planning control and made consequential amendments to the *Conveyancing Act 1919* and the *Local Government Act 1993*. On 25 May 1998 the Regulations were passed allowing the *Amendment Act* to be commenced on 1 July 1998.

According to the Department of Urban Affairs and Planning (DUAP) the "reforms in the Act are the most fundamental change to the land use planning and development assessment system since the introduction of the *Environmental Planning and Assessment Act 1979*⁴.

KEY POINTS OF THE AMENDMENT ACT

Reforms introduced by the *Amendment Act* were designed to facilitate a more efficient and simplified development assessment process by establishing an integrated development consent process; by providing simpler but appropriate assessment procedures and by increasing the role of the private sector in the assessment system. The Department of urban Affairs and Planning ("DUAP") expressed the three principal areas of reform in these terms⁵

Integrating development consents

A clearer, simpler and more certain process is established for obtaining approvals for a project such as construction of a building or a new business. Integration is achieved by:

- * providing a single system for the development, building and subdivision aspects of a project under the EP&A Act;
- * removing the need for subsequent Local Government Act approvals, where relevant;
- * linking associated licences, permits and approvals required under other environmental legislation with the development consent.

Providing appropriate assessment

A more streamlined decision-making system is established to ensure that the level of assessment reflects the complexity and likely environmental impact of a development. This is to be achieved by:

- * improving the process for local development and State significant development
- * introducing new categories of exempt development and complying development
- * improving assessment of applications.

Increasing the role of the private sector in the assessment system

The Act provides for increased choice and competition in the assessment process. This will be achieved by:

- * enabling private-sector professionals to perform compliance functions currently conducted by consent authorities;
- * enabling professional associations to act in partnership with government in the implementation of an accreditation scheme;
- * ensuring that private-sector professionals are subject to stringent conflict of interest provisions and regular auditing.

HOW DOES THE NEW PROCESS WORK?

The Amendment Act's changes to the EP & A Act are aimed at cutting through the red tape at the assessment and approval stages. Where the development proposal requires one or more State agency permits or licences (e.g. approvals under the *Heritage Act 1977* or *National Parks and Wildlife Act 1974*)⁶ the consent authority (usually the local council) will co-ordinate the requests for additional permits or licences at the preliminary stage of assessing the development application. In the formal sense, S.91 of the EP & A Act defines this new category of development application (DA) as "integrated development". Ideally, the process is designed to expedite development approvals by removing the necessity of obtaining the requisite permits or licences after the consent authority has approved the DA⁷. The new process is also designed to provide for the integration or consolidation of other essential approvals enabling a single application to be made for development, building and subdivision where previously separate applications were required. A developer may still elect to defer the building application until development consent is granted and will then be required to apply for a 'Construction Certificate' before commencing building work⁸.

FOUR CATEGORIES OF DEVELOPMENT

The Amendment Act introduced four distinct categories of development : 'State significant Development' for development which has major economic consequences for the State of New South Wales. Steel mills, coal mines and major harbour foreshore developments are typical examples of 'State Significant Development'.

Unless classified as 'Complying Development' a great deal of the development spectrum will be categorised as 'Local Development'. Residential unit development, commercial development, industrial development and new shopping centres are typical examples of 'Local Development' (unless the DA is lodged as complying Development). If the DA is submitted as 'Complying Development' the proposal must comply with all relevant development standards (generally referenced against the Local Environmental Plan and Development Control Plan). Either the local council or an accredited certifier can issue a complying development certificate containing conditions of approval which must be met by the developer. With Complying Development neither Council nor an accredited certifier are able to grant variation concessions under the provisions of State Environmental Planning Policy No.1 (SEPP1) ⁹. Compliance with the Building Code of Australia is also a strict requirement for building work. Detailed plans and specifications should demonstrate that BCA provisions are being complied with.

The fourth category of development with the new system is 'Exempt Development'. Minor development or building which is listed under Exempt Development in Councils local environmental plan (LEP) will require no formal approval from Council before proceeding to the building stage. Councils had until 31 December 1999 to nominate the list of Exempt Developments in their LEP's or a NSW Government schedule of Exempt Developments would be imposed through an SEPP.

DEVELOPMENT ASSESSMENT CRITERIA

"A clear statement of assessment criteria is a key feature of any approval system"¹⁰. The changes introduced by the Amendment Act in relation to development assessment are contained in S.79C and supplemented by the Environmental Planning and Assessment Regulation 1994 [EPAR]. The previous lengthy S.90 (thirty one items) is replaced with a much shortened S.79C (1) which addresses the assessment criteria in broader terms:

Assessing Development applications

- (1) "in determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
 - (a) the provisions:
 - (i) any environmental planning instrument, and
 - (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority; and
 - (iii) any development control plan, and
 - (iv) any matters prescribed by the regulations, that apply to the land to which the development application relates,
 - (a) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts on the locality,
 - (b) the suitability of the site for the development,
 - (c) any submissions made in accordance with this Act or the regulations,
 - (d) the public interest".

The DUAP Practice Notes¹¹ conclude with the following warning: "The matters listed in Section 79C act as a safety net, ensuring that site specific matters and broader environmental, social, economic and public interest matters, not necessarily covered by planning controls, are considered. In this light, it is possible that a proposal which complies with LEP and DCP standards may not be approved".

INCREASED ROLE FOR PRIVATE SECTOR

The Amendment Act introduced a scheme designed to expedite the approval process for Complying Development and provided an alternative consent mechanism (to local council) through the engagement of private accredited certifiers for construction certificates (certifying compliance with the Building Code of Australia), subdivision certificates (excluding strata subdivision), compliance certificates (certifying that work has been completed in accordance with plans, specifications, council conditions or Regulations) and occupation certificates (i.e. the subject premises are suitable for occupation and any issues of fire safety have been appropriately addressed as an essential element). Under a scheme approved by the Minister for Urban Affairs and Planning, individual certifiers are accredited through those professional associations which have been approved as an accreditation body. Schemes by the Institution of Engineers Australia and the Building Surveyors and Allied Professions Board have been approved by the Minister. Other associations including the Royal Australian Planning Institute and the Professional Surveyors Occupational Association of NSW have applied for approval¹². Developers and Councils are both able to engage private certifiers. For example, the developer may have council undertake the advertising and neighbour notification for a development application, while engaging the private accredited certifier to certify the proposal's compliance with building standards and regulations. Naturally the accredited certifier will need to be covered by adequate professional indemnity insurance. Section 109P of the EP & A Act limits liability when a certificate of compliance is relied upon. In the case of the accredited certifier the Act provides that liability finishes ten years after an accredited certifier (or consent authority) issues an occupation certificate for a building or a subdivision certificate. The EPAR (Regulation) allows insurers to restrict their cover to a ten year period from the date of the last inspection, if an occupation certificate is not issued, or ten years from the date the building is occupied if an occupation certificate is not issued and if no inspections have been carried out¹³.

SO HOW EFFECTIVE IS THE NEW SYSTEM?

With a specific brief from the writer, researchers interviewed town planners from eight local councils in the Sydney basin between August and October 1999¹⁴. Almost an equal number of developers, engineers, architects and private certifiers were invited to share their considered opinions on the implementation of the integrated development assessment scheme some twelve months after its commencement on 1 July 1998.

LOCAL COUNCILS –Town Planners’ comments

The first but nevertheless notable change in the new process originated with the development application form itself.

The new application form is known as the “Development Consent; Construction Certificate and/or Other Applications” form and can be found in the Schedules which appear at the back of the Regulations (EPAR). The application is in a “fill in the blanks” format. It successfully combines all applications for different certificates in the one form. The new application form replaces a range of separate applications and is straightforward and succinct in its language. Whilst developers (or their representatives) needed some re-education in the completion of the new form, there was little criticism of its utility from councils’ town planners.

The cornerstone of the new system is the “integrated development assessment process”, which was intended to streamline the development approval process by combining at the earliest assessment stage the development, subdivision and building aspects of a project with associated licences, permits and approvals required under other environmental legislation. There was a consensus of opinion from council planners (who generally welcomed the amendments) that the changes have not streamlined the DA process in the way intended, but in fact the new system is causing delays (at present) because the workload has shifted from the developer to council planning departments. With short staffing levels, efficiency has generally decreased. The extra burden experienced by planners has come about as a result of the requirement to refer DA’s for assessment to other State agencies within two days of being received, and the extra time is currently being spent by council planners in re-organising their own systems to cope with the changes.

Amendments to LEP’s and other environmental planning instruments (EPI’s) are also taxing resources. Councils have been forced by the State Government to amend their LEP’s to include a provision for Exempt and Complying Development or accept the model provisions promulgated through a SEPP by the NSW Government in the December quarter of 1999. Further amendments to council LEP’s will be required by 1 July 2000 when the procedures dealing with advertising and notification of developments are due to be updated in council EPI’s.

With respect to private certification, most planners reported that the level of participation in the approval process by accredited certifiers was minimal at this stage. There was a consensus among planners which recognised councils had not yet had the time or resources to deal with private certifiers on a broader basis. However, council planners generally welcomed the advent of private certification in the planning approval process and expected that private certification will lower the monotonous workload generated by the

range of smaller scale development and free-up planners to work on local policy issues and documents.

DEVELOPERS' Comments – First Reactions

Developers were experiencing increased time delays as a result of the additional work required from architects and consultants in the preparation of the DA for the integrated development assessment system. They were also being subjected to increased cost outlays at the preliminary stage of the process as a result of the need for further information to be provided to council planners (both technical and supportive) at the earliest submission dates. By comparison, the old system spread the DA costs through a series of applications and reports which may have been required over 6 – 12 month period.

The consensus among developers indicated that processing time for DA's by council planning departments had not improved and currently was slower as planners dealt with a backlog of applications caught up in the change process. The Government's motive for introducing Complying Development was clearly aimed at expediting approvals where developers agreed to comply rigidly with all council EPI's and regulations. The new system placed a mandate on Councils to approve 'Complying Development' within seven days but provided no penalty where councils chose to ignore this direction from the Amendment Act. As a result of non-compliance by many councils, developers are not being encouraged to pursue 'Complying Development' applications through local councils and will continue to seek out accredited certifiers for this category of development, as developers recognise their ability to enter into contracts with private certifiers on terms which offer certainty in approval times for both complying development applications and construction certificates. Developers who specialise in subdivisions claim to have suffered a considerable loss of utility under the new process. The opportunity to register a plan of subdivision and seek a Deferred Commencement is no longer an option under the new system and has added a considerable period to the processing time of applications.

Overall, developers saw the introduction of private certifiers as a positive step in speeding up the approval process. They recognised the role private certifiers may play in creating a self-regulating industry and hoped that the advent of private certifiers would assist in moving the professional aspects of the assessment process away from the constraints of the political process.

CONCLUSIONS

The broad consensus stemming from the development construction industry and council planners considered that the changes introduced by the Amendment Act were justified and should eventually produce benefits for councils, developers and the economic well-being of New South Wales. There is little doubt that the integrated development assessment process will, over the long term, produce a more streamlined decision making process. There is a level of current disillusionment with the new process from all sides of the development spectrum which may well be a by-product of the change process. Ultimately the new system should produce a clearer, simpler and more certain decision making process with greater accountability for the likely environmental impact of development projects.

Dealing with the political influence at the local council level will undoubtedly be the next target of the government's policy advisors.

ENDNOTES

¹ For example in *Parramatta City Council v Hale (1982)* 47 LGRA 319 (the Parramatta park case which generated high emotions and public controversy), Friends of Parramatta park and the NSW Branch of the National Trust were successful in overturning the decision of Parramatta City Council (itself a proponent of the development) to allow a sports stadium to be built on Cumberland Oval (part of the Park). The development opponents were successful in the NSW Court of Appeal (*supra*) in defending the Land and Environment Courts' decision nullifying the development consent. Council was shown to have misconstrued its powers, had failed to consider certain factors and its decision was shown to be manifestly unreasonable in the circumstances.

² NSW State Government publication, May 1996.

³ NSW State Government (Parliamentary Counsel's Office).

⁴ NSW Department of Urban Affairs and Planning (DUAP) publication "Integrated Development Assessment, 97/103, December 1997.

⁵ *Ibid.*

⁶ See the list of relevant State Agency approvals in S.91 of the EP & A Act.

⁷ See DUAP Practice Note September 1999 "What are integrated development applications and how are they handled?"

⁸ The construction Certificate is required to certify compliance with the Building Code of Australia in respect of the plans and specifications (among other matters).

⁹ SEPP.1 is a State Government policy initiative designed to allow some relaxation of development controls by Councils in discretionary areas of planning. For example a developer may lodge a SEPP.1 objection with the development application seeking a variation from Council's policy on setbacks or height restrictions.

¹⁰ DUAP Practice Note September 1999 "Assessing development applications".

¹¹ *Ibid.*

¹² DUAP Practice Note September 1999 "Who is an accredited certifier".

¹³ See also DUAP Practice Note September 1999 "Who is responsible? Liability Issues."

¹⁴ The researchers were assisted by the following Councils: Baulkham Hills, Botany, Hawkesbury, Ku-Ring-Gai, Liverpool, Parramatta, Penrith, Woollahra.