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**The NSW Planning System:
Proposed Reforms**

by

Stewart Smith

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Stewart Smith

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EXECUTIVE SUMMARY

Under the planning framework, some \$30 billion worth of development applications are determined in NSW every year. Local government is responsible for assessing development worth \$20 billion. Approximately 70 percent of this total value is for residential work, and up to 90 percent is lodged by non-developers.

The NSW Government believes that the time taken to assess development applications is too long, and that the *Environmental Planning and Assessment Act 1979* is focussed on process rather than outcome. This Paper looks at reforms proposed by the NSW Department of Planning in its discussion paper *Improving the NSW Planning System*, November 2007.

Changes to the NSW planning regime must be considered within the context of regulatory reform at the Federal level. The Council of Australian Governments has been active in the area of streamlining development approval processes.

The NSW *Environmental Planning and Assessment Act 1979* has undergone significant revision and reform. The NSW Government believes that further reform is warranted, and has proposed changes in the areas of:

- Plan Making. Introducing a new gateway system which will provide an upfront assessment of the suitability of a Local Environment Plan against established criteria.
- Development Assessment and Review. Establishing: a Planning Assessment Commission to determine applications of State significance; Joint Regional Planning Panels to determine applications exceeding \$50 million in value, or projects by State Government agencies greater than \$5 million.
- Complying Development. Significantly expand the level of complying development so that the number of exempt and complying developments increases from its current 11% to 50% within four years. This is to be achieved by the implementation of a statewide complying development code.
- Electronic Planning. Implement e-planning initiatives.
- Building and Subdivision Certification. To address perceived conflicts of interest in the certification system, the number of complying development certificates that can be issued to any one client by a certifier will be limited. For larger projects, the Building Professionals Board will allocate certifiers.
- Other Reforms. Including changes to strata management and paper subdivisions.

Stakeholder responses to these proposed reforms are discussed. In general, the development industry has supported the thrust of the reforms. In contrast, the Local Government and Shires Associations, whilst supportive of some of the proposals, strongly disagrees with the Government in the areas of complying development and the establishment of Joint Regional Planning Panels.

1.0 INTRODUCTION

The *Environmental Planning and Assessment Act 1979* (EPAA) is the main vehicle for planning in NSW. The EPAA provides a comprehensive three tier planning scheme, allowing for state, regional and local plans, as well as outlining the development assessment process. Whilst the EPAA attracted considerable support upon its introduction, nearly twenty years of amendments, case law and the proliferation of other natural resource management legislation has meant that the planning regime in NSW is, to say the least, complex.

Under the planning framework, some \$30 billion worth of development applications are determined in NSW every year. Local government is responsible for assessing development worth \$20 billion. Approximately 70 percent of this total value is for residential work, and up to 90 percent is lodged by non-developers.¹ Clearly, the development industry makes a significant contribution to the NSW economy.

The NSW Government believes that the time taken to assess development applications is too long, and that the *Environmental Planning and Assessment Act 1979* is focussed on process rather than outcome.

This Paper looks at reforms proposed by the NSW Department of Planning in its discussion paper *Improving the NSW Planning System*, November 2007.

2.0 THE FEDERAL CONTEXT

It is important to note that many of the proposed reforms, particularly in regards to development assessment, have arisen out of discussions at the Federal level, which have been on-going for at least ten years. For instance, in 1998 the Development Assessment Forum was formed, with membership from the development industry, planning professions and the three tiers of government. Notably, there appears to be no inclusion of any environment or conservation groups in the Forum.

The Forum's mission is to encourage the harmonisation of Australian development assessment systems through the promotion of leading practice regulatory reform. In 2005 the Forum developed the *Leading Practice Model for Development Assessment*, which provides a blueprint for jurisdictions for a simpler approach to development assessment. It achieves this by defining ten leading practices that a development assessment system should exhibit, and then by applying the ten leading practices to six development assessment pathways/tracks. According to this model, development applications should be assessed by one of the following six pathways:

1. **Exempt Development.** This has a low impact beyond the site
2. **Prohibited Development.** Development that is not appropriate in specific locations should be clearly identified as prohibited in the ordinance or regulatory instrument so that both proponents and consent authorities do not waste time or effort on

¹ Hon Frank Sartor, MP, Minister for Planning, Speech at 'New Ideas for Planning Forum', August 2007. See: <https://admin.acrobat.com/a37046705/p35064215/>, accessed February 2008.

- proposals that will not be approved.
3. **Self Assess.** Where a proposed development can be assessed against clearly articulated quantitative criteria and it is always true that consent will be given if the criteria are met, self assessment by the applicant can provide an efficient assessment method. Assessment in this track is against the criteria only, so this type of application will generally be suitable for certification by a qualified person. Little judgement will be required as to whether the criteria are met and there would be no need for public notification. A standard consent would issue.
 4. **Code Assess.** Development assessed in this track would be considered against objective criteria and performance standards. Such applications would be of a more complex nature than for the self assess track, but still essentially quantitative. Assessment would be by an expert assessor and judgement would be required, for instance, as to whether or not a design solution meets a performance standard. Private sector certification is possible. Provided the application meets the criteria, a standard consent would be given. There should still be an opportunity for an applicant to seek review of an assessor's decision not to give consent, but no other parties would be involved.
 5. **Merit Assess.** This track provides for the assessment of applications against complex criteria relating to the quality, performance, on-site and off-site effects of a proposed development, or where an application varies from stated policy. Expert assessment would be carried out by professional assessors. In specified circumstances, the views of other parties or agencies may need to be sought before making a decision. Where assessment involves evaluating a proposal against competing policy objectives and where objective rules and tests are not available, or do not cover the application, opportunities for notifying the community may be provided. Generally, an applicant will be provided with the opportunity to seek a review of conditions or of a refusal to consent. In specified circumstances, an opportunity for third-parties to seek a review of the decision may be appropriate.
 6. **Impact Assess.** This track provides for the assessment of proposals against complex technical criteria that may have a significant impact on neighbouring residents or the local environment. This track expects that the proponent would prepare an impact assessment as part of the application. Assessment of these proposals is likely to benefit from the views of a range of parties and agencies and a decision about the need for and extent of public notice would usually be required. Generally, assessment would require the evaluation of the applicant's documentation and the views of other parties by an expert assessment panel. This type of application would generally be of such a scale or significance that it should appropriately be determined by elected representatives (local government or the Minister) based on the advice of the expert assessment panel. As the views of all parties would have been considered during the expert panel process, a further opportunity for review is not necessary.

On 4 August 2005, the Ministerial Council of Australian Local Government Ministers and Planning Ministers acknowledged the Model in their communiqué as "an important reference for individual jurisdictions in advancing reform of development assessment".²

² Local Government and Planning Ministers Council, *Communique* 4 August 2005. See: http://www.daf.gov.au/reports/LGPMC-Communique-4_August_2005.doc, accessed

The Council of Australian Governments took up the issue of development assessment at its 10 February 2006 meeting, which led to the following outcome:

COAG will request the Local Government and Planning Ministers' Council to:

- (a) recommend and implement strategies to encourage each jurisdiction to:-
 - (i) systematically review its local government development assessment legislation, policies and objectives to ensure that they remain relevant, effective, efficiently administered, and consistent across the jurisdiction, and
 - (ii) ensure that referrals are limited only to agencies with a statutory role relevant to the application and that referral agencies specify their requirements in advance and comply with clear response times;
- (b) facilitate trials of electronic processing of development applications and adoption through Electronic Development Assessment.³

Again the topic of development assessment arose at the December 2007 COAG meeting, which divided into 7 working groups. For the Housing Working Group, the COAG Communique made reference to a \$500 million Housing Affordability Fund, with the goal of:

- Streamlining development approval processes and reducing infrastructure charges and developer costs.⁴

It is within this context of reform at the Federal level that proposed reforms to the NSW planning system must be considered.

3.0 NSW PLANNING REFORMS

Since its inception in 1979, the *Environmental Planning and Assessment Act* has undergone significant revision and reform. Significant reforms have been made in the area of development assessment, both for major projects and for local development. Major reforms in these areas are shown in Table 1.

October 2006.

³ Council of Australian Governments, *Meeting Outcomes, Attachment B*, 10 February 2006.

⁴ Council of Australian Governments, *Meeting Outcomes*, 20 December 2007.

Table 1: Reforms to Development Assessment of the NSW Planning System.

Date	Reform
1997	<ul style="list-style-type: none"> • exempt or complying development categories introduced; • simplified criteria for councils to use in assessing development applications; • private certification introduced.
2005	<ul style="list-style-type: none"> • Minister may appoint a planning administrator or a panel to exercise the planning functions of a council; • A standard Local Environment Plan template introduced; • Minister to assess major infrastructure, including critical infrastructure.

The Government has made it clear that it sees a need for further reform to the planning system. It noted that in 2005-2006:

- Local councils determined 105,000 development applications, plus 12,698 complying development certificates (which can be determined by an accredited certifier). This is double the number dealt with in Victoria, and comparably far in excess of the expected numbers of applications per head of population.
- Complying development accounted for only 11 per cent of all development decisions;
- Across all councils, the average time taken to assess development applications was 68 days, with 12 councils taking an average of over 100 days.

The key areas for reform were identified as:

- Planning should not involve a 'one size fits all' approach;
- Delays in development assessment;
- Delays in preparation of local environment plans;
- Community input can be ineffective;
- Process often seems more important than the outcome;
- The planning system is complex and difficult to comprehend;
- The system is not consistent across the State;
- Planning resources are not used effectively.

In August 2007 the Government held the 'New Ideas for Planning' forum, attended by more than 600 people. It subsequently published the *Improving the NSW Planning System Discussion Paper* in November 2007.⁵ Proposed changes to the planning system, and comments by interested stakeholders, are presented below.

3.1 Changing Land Use and Plan Making

The EPAA introduced a three tier system of environmental planning instruments, State environmental planning policies (SEPPs), regional environmental plans (REPs) and local environmental plans (LEPs). The control of development through zoning is

⁵ NSW Government, Department of Planning, *Improving the NSW planning system. Discussion Paper*. November 2007.

applied through LEPs, which are produced by local government, whilst SEPPs and REPs are made by the State government for matters that have either state or regional significance.

Despite recent reforms, the Discussion Paper noted the following key concerns in relation to plan making:

- Lengthy timeframes to complete a Local Environmental Plan;
- The large number of Local Environmental Plans implemented to achieve a site specific land rezoning – often developer driven;
- The procedural nature of plan making, which is inefficient, cumbersome and the level of assessment is not tailored to the scale and nature of the plan;
- The overlapping levels of control, involving the relationship of State Environmental Planning Policies and Regional Environmental Plans which are State Government led, and the local government led Local Environmental Plan;
- Clearer accountability for plan making.

The cumbersome nature of plan making has meant that many councils forsake longer term strategic planning for spot rezoning. In 2006-07, some 54% of local environment plans involved spot rezonings. Comprehensive local environment plans have taken on average up to five years to complete, whilst even the most simple of amendments have taken an average of 196 days.

Proposed Reforms

The Government's proposed solution is to introduce a gateway system. This will provide an upfront assessment of the suitability of a local environment plan against established criteria. The upfront assessment would determine whether a local environment plan should proceed or not. It would also stream local environment plans into different categories, such as local or State significance, to determine the level of assessment, consultation and approval authority required.

The gateway test is described as a justification report, and it is proposed that what is included and the level of detail required depend on the local environment plan proposal. For example, for major rezonings intended for land release, there are two categories: strategy consistent land and strategy inconsistent land. The former is land already on a future development program, ie, already included in a regional or local growth strategy, but not yet zoned for that purpose. In contrast, strategy inconsistent land is that not identified for future development. The suggested tests that the proposals must pass in the justification report for these plans, as well as major and minor plan changes, are shown in table 2.

Table 2: Gateway tests for Local Environment Plans

Major rezonings – land release		Major plan changes, eg, comprehensive LEP, major spot rezonings.	Minor plan changes, eg reclassification of land, minor changes in zone boundaries.
Strategy inconsistent land release	Strategy consistent land release		
Justification report required to address the following issues:	Justification report required to address the following criteria:	Justification report required to address the following criteria:	Justification report required to address the relevant criteria – depending on scale and nature of LEP.
<ul style="list-style-type: none"> • Strategic planning validity; • Infrastructure and servicing; • Environmental constraints and benefits; • Public benefit including contribution to stocks of affordable residential land; • Investment certainty; • Statement of community involvement. 	<ul style="list-style-type: none"> • Infrastructure and servicing; • Environmental constraints and benefits; • Statement of community involvement. 	<ul style="list-style-type: none"> • Strategic validity and justification; • Environmental constraints and benefits; • Public benefits; • Urban design implications; • Infrastructure/servicing implications, if any; • Consistency with State planning policies; • Statement of community involvement. 	<ul style="list-style-type: none"> • The justification for the LEP as a stand-alone amendment; • Consistency with State planning policy; • Statement of community involvement.

Hence any proposal to rezone land would not proceed to the Local Environment Plan stage if it did not meet the specified criteria at the gateway stage. Gateway evaluations for large scale proposals would require a whole of government approach, while smaller proposals or existing plan amendments would be delegated to local councils.

Stakeholder Responses

The Local Government Association of NSW and the Shires Association of NSW support the model of a gateway system and streaming of Local Environment Plans. They strongly support the rationalisation of planning instruments, and recommend that State Environmental Planning Policies and Regional Environmental Plans should be incorporated into Local Environment Plans, thus producing one Environmental Planning Instrument.⁶

The Urban Development Institute of Australia (NSW) (UDIA) notes that there is an acute need for plan making to be responsive to demand. UDIA argues that the Local Environment

⁶ Local Government Association of NSW, Shires Association of NSW, *Discussion Paper: Improving the NSW Planning System. Submission to Hon Frank Sartor MP*, 10 January 2008.

Plan process has proved unnecessarily constraining and consent authorities have endeavoured to thwart proposed land use changes on the basis of their own often misguided assessment of demand. The UDIA considers that the proposed gateway system has the potential to be more efficient in the plan making process. In particular, UDIA recommends that:

- NSW government agencies prepare and publish a suite of standard Local Environment Plan Conditions to provide greater certainty, consistency and transparency in the plan making process;
- Mandatory timeframes be prescribed for different stages in the plan making process and reinforced by ‘deemed to concur’ provisions in the case of government agency consultation;
- Where councils fail to meet their response milestones, ‘call in’ powers for the Joint Regional Planning Panels and the Planning Assessment Commission should be available (see later discussion about these bodies);
- Parliamentary Counsel be involved earlier in the plan making process, with legal drafting the responsibility of the NSW Government.⁷

The NSW Chapter of the Royal Australian Institute of Architects (RAIA) accepts the proposed reforms to plan making, but considers the process for minor changes is still too complex and bureaucratic. It also argued that there is a bias in the discussion paper against spot rezonings. The RAIA argued that these may result from unexpected opportunities not foreseen at the time of comprehensive plan making. Instead, in the RAIA’s opinion, spot rezonings should be considered a vital and necessary part of community development, which justifies their facilitation.⁸

3.2 Development Assessment and Review

In this area, the aim of the review is to achieve the following outcomes:

- Reduce the local government development application time frame from the current average of 68 days to 48 days;
- Reduce the number of applications to modify a consent to a development application by a third;
- Reduce legal appeals to the Land and Environment Court by 20%.

It hopes to achieve these outcomes by establishing a hierarchy of decision making bodies known as Planning Assessment Commissions.

It is proposed to establish a Planning Assessment Commission (PAC) to determine applications of State significance. The Minister would remain the consent authority for critical infrastructure projects and projects deemed to be of critical significance. The PAC would be appointed by the NSW Government and comprise a permanent Chair, and a panel

⁷ Urban Development Institute of Australia, *NSW Planning Reform. Submission to the NSW Department of Planning by the Urban Development Institute of Australia NSW*. January 2008.

⁸ The Royal Australian Institute of Architects, *Improving the NSW Planning System. Submission to the NSW Department of Planning*, February 2008.

of up to eight part time members. The PAC itself would sit in panels of three. The PAC would have the powers to hold public meetings. It is proposed that in the case of State significant projects (not critical infrastructure projects), merit appeals would not be allowed for either the applicant or third parties if public hearings had been conducted.

For regionally significant development applications, defined as developments exceeding \$50 million in value or projects by State Government agencies in excess of \$5 million, these would be determined by a Joint Regional Planning Panel. This is only the case where the Panel can be resourced by the relevant Council, otherwise the Planning Assessment Commission becomes the consent authority.

Regional panels would be established in those areas of the State where there are significant development pressures. It is proposed that they be modelled on the current Central Sydney Planning Committee, which operates in the City of Sydney. Under this model, the Panels would be comprised of three independent State appointees and two Council appointees. State appointees would be appointed by the Chair of the PAC from a register approved by the Minister. State appointees would remain the same for a particular region but Council appointees would rotate in line with the particular council area within which the development or issue occurs. Assessment reports to be considered by the Panel would be prepared by Council staff.

Under the proposed reforms, local applications would continue to be determined by councils. Local applications are those that are neither: of State or regional significance; classed as a minor application; or complying development. Independent Hearing and Assessment Panels could be appointed, in an advisory role only.

Minor applications would include all single dwellings, alterations to single dwellings and all other development with a capital investment value of less than \$1 million. Appeals, reviews and deemed refusals of minor applications could be dealt with by planning arbitrators. These would be non legal informal reviews and conducted within 21 days, and a determination made within 14 days. Appeals would still be allowed to the Land and Environment Court, but only after a review by the planning arbitrator has been undertaken. Planning arbitrators would be appointed by councils from a register agreed by the Department of Planning.

Currently consent authorities have 40 days to determine a proposal. If the authority has not made a determination within this time, it can be classed as a 'deemed refusal', and the applicant may appeal to the Land and Environment Court. The Government proposes to turn the 'deemed refusal' into a 'deemed to comply', with new time periods, as follows:

- 10 days for complying development;
- 20 days for development applications not requiring exhibition;
- 40 days for small scale development;
- 60 days for medium scale development;
- 90 days for development equivalent to designated development

Stakeholder Responses

The Local Government and Shires Associations supported the establishment of a Planning Assessment Commission, supported by a separately resourced secretariat. The PAC should publish criteria and provide reasonable justification for declaring a development or site to be a project to which Part 3A (Major Projects) of the Act applies.

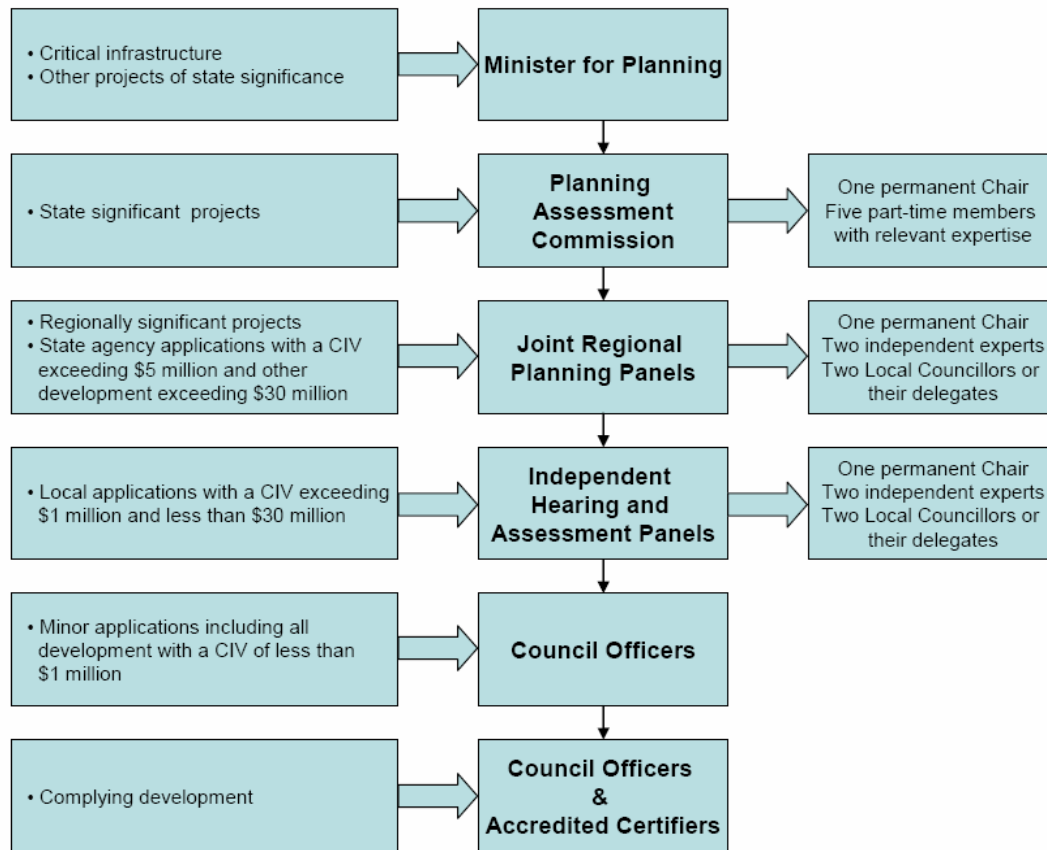
However, the Associations strongly opposed the establishment of Joint Regional Planning Panels. It was considered that these would undermine local decision making and local accountability. They asked who the regional panels would be accountable to. It was considered that they would add another layer of bureaucracy and complexity to the development application process. Under the proposed reforms only 31 applications in 2005/06 would have been considered regional and assessed by a regional panel, the Associations considered that this small number does not warrant the creation of a separate assessment and determination system.

The UDIA also did not fully agree with the proposed reforms in this area, but for different reasons. UDIA strongly argued that there should be a separation of powers at both State and Local Government level, with a clear role for elected representatives and another for professionals responsible for development assessment. This is in line with the Development Assessment Model as developed at the national level and discussed earlier. UDIA argued that the proposed structure for development assessment and review would increase the complexity of the system, and presented an alternative, as shown in Figure 1. Under this alternative, the number of consent authorities is reduced to six, and the hierarchy between different levels of assessment is demarcated.

UDIA supported the concept of the Planning Assessment Commission and the Joint Regional Planning Panels. However, in regard to the latter it argued that the proposed threshold to make a project of regional significance (\$50 million) is too high, and recommended the threshold be reduced to \$30 million. Under the UDIA proposal, Independent Hearing and Assessment Panels would determine all local development applications between \$1 million and \$30 million. Development applications less than \$1 million, and not complying development, would be determined by council officers.

The RAIA supported proposals to establish independent panels to assess state significant projects and regionally significant projects. The Institute would also like to see local government delegating its development assessment powers to Independent Hearing and Assessment Panels, similar to the UDIA's position.

In direct contrast to the UDIA and the RAIA, the Local Government and Shires Associations did not support the recommendations in respect to the use of Independent Hearing and Assessment Panels. The Associations have in the past, and again in response to these proposed reforms, strongly argued that elected councils should be responsible for development application decision making, not independent panels. The Associations surveyed their members on the use of planning panels by councils, and found that whilst they can be a useful option, often the resources and time taken using the panel far outweighed their benefits.

Figure 1: UDIA NSW Proposal – Development Assessment Hierarchy

In terms of planning arbitrators, the Associations considered that they may have some merit. However, they were concerned about: potential duplication of services given existing mediation services provided by the Land and Environment Court; the potential costs to councils and applicants; and the availability and quality of arbitrators and consistency in their decision making. The RAIA supported the use of arbitrators but not the removal of appeal rights unless the arbitration process had first been tried.

3.3 Exempt and Complying Development

In 1997 legislative changes to the development assessment system brought together development, building and land subdivision into one process under the *Environmental Planning and Assessment Act*. At the same time, two new development types, ‘exempt development’ and ‘complying development’ were introduced to help streamline the assessment process. These new development categories enable small scale, minor or routine development proposals to be carried out without an approval (exempt development) or with a complying development certificate from a private certifier (complying development).

Introducing the reforms in 1997, the Minister for Urban Affairs and Planning Craig Knowles told Parliament:

The most often stated problems with the system are that it is over-regulated; it is full

of duplication; separate approval processes sometimes conflict with one another; there is a lack of certainty; there is a lack of transparency; no-one is accountable; there is little co-ordination; the process and scale of assessment is often out of proportion to the environmental impact; and it all takes too long.

...This bill is important for the people of New South Wales because it will encourage business activity and increase job opportunities; reform a development approval system that is overregulated and needlessly complicated; and put commonsense back into the approval system by tailoring the level of environmental assessment to the scale of the proposal.

...The solutions contained in the bill focus on reducing necessary delays and duplication, simplifying the assessment process as much as possible and achieving consistency and certainty across multiple environmental approvals.⁹

The intent of the reforms was that developments that previously needed a building application would become complying developments. However, the reality is very different. Post -1997, across the State the average number of development applications processed by councils increased by 171 percent. Currently, the Department of Planning reports that only one council in 15 has managed to have more than 40 percent of its applications dealt with as complying. A third of all NSW councils have very low rates of complying development, and some none at all.

The aim of the current reforms is to increase the number of exempt and complying development certificates from the current 11 percent to:

- 30 percent within two years;
- 50 percent within four years.

The Department of Planning proposes to establish a Complying Development Experts Panel. With the assistance of the Panel, the Department proposes to develop a series of Statewide complying development codes for common development categories such as single dwellings, alterations and additions, industrial sheds and commercial fitouts. These codes would become mandatory default codes, to apply to all relevant development categories unless an alternative local code has been accredited. Councils would be permitted to develop alternative complying development codes, but these must be generally consistent with the State code and be accredited by the Department on the advice of the Experts Panel.

The following procedures would then be adopted for determining development where a complying code applies:

- where a development proposal is fully compliant with an applicable code, a certifier (private or council) may approve the development and lodge the complying development certificate with the council;
- where a development proposal has minor non compliances that in the opinion of the certifier would not generate an impact on neighbours or set a planning precedent in

⁹ NSWPD, 15 October 1997. Hon Craig Knowles MP, at 822. *Environmental Planning and Assessment Amendment Bill 1997*, Second Reading Speech.

the neighbourhood, the certifier would be required to lodge a provisional complying development certificate with the council. This would become effective after seven days unless challenged by council. If the council did not consider the non compliances to be minor then a development application would need to be formally lodged and processed in the normal manner;

- where a development proposal has minor non compliances, which require a performance assessment by the council, only that aspect of the proposal will require council approval;
- the certifier would have an obligation to provide a courtesy notice to immediate neighbours advising the request for a complying development certificate, noting works found to be complying would be automatically approved.

The Department aims to implement the first mandatory complying code on 1 July 2008.

Stakeholder Responses

Whilst the Local Government and Shires Associations stated that they support measures to widen exempt and complying development, they noted that developments that would be suitable for this include: residential developments in greenfield sites, commercial fitouts, and certain light industrial. Clearly, this is not as expansive as wanted by the State Government. The Associations argued that developing a state wide complying development code to apply to residential developments in areas as diverse as Bourke, Blacktown and Bondi will be challenging. For inner city areas, it is likely to result in negative impacts on residential amenity, urban character and increased neighbour conflicts. Instead, the Associations argued that codes should be developed for councils to use and adapt to their local circumstances. The Associations recommended that state wide codes be dropped in favour of best practice guidelines on exempt and complying development, and a fast track assessment process be developed to enable councils to process building applications that are low impact and small scale but require merit assessment. The Associations also did not agree with the proposals for managing minor amendments, particularly the requirement that councils should respond within seven days

In contrast, the UDIA supported the expansion of exempt and complying development provisions, including the introduction of a mandatory code.

The RAIA supported the introduction of a mandatory code designed to make 50 percent of all development applications 'exempt' or 'complying'. However, it recognized the danger that a mandatory code could lead to the 'lowest common denominator' homogenous dwelling being supported, and innovation quashed. It argued that any mandatory code must make provision for context sensitive design. The RAIA noted that Victorian planning legislation provides for a statewide standard for subdivision and housing three storeys and under, but also allows some variation in the application of those standards to different contexts. This is the Victorian 'ResCode' as outlined in Box 1.

Box 1: The Victorian ‘ResCode’

In Victoria ‘ResCode’ covers the standards for all housing development and subdivision in residential zones. It is a set of statewide standards contained in clauses 54-56 of the planning scheme for each Municipality. These clauses provide:

- objectives that must be met;
- standards that should be met as long as the application of the standard meets the objective; and
- decision guidelines.

ResCode’s key focus is on respecting neighbourhood character, protecting amenity and promoting more sustainable development. 14 residential development standards apply to all dwellings across all planning schemes in Victoria. The standards are for street setback, building height, site coverage, permeability, parking, side and rear setbacks, walls on boundaries, daylight to existing windows and to new windows, north-facing windows, overshadowing open space, overlooking, private open space and front fences. ResCode recognises that a one-size-fits-all mandatory approach doesn’t work. Standards can be varied by:

- a statewide strategy for, say, coastal development or wildfire areas;
- a particular local requirement of the residential zone, or
- local requirements related to special issues such as heritage or neighbourhood character.

Variations to a standard must still meet prescribed objectives, and all variations must go through a public consultation process and be approved by the Minister. Rescode allows about 70% of all new homes in Victoria to be built without the need for a planning permit, but gives municipalities the flexibility to introduce neighbourhood character controls to trigger permits in areas identified for special protection.¹⁰

3.4 Electronic Planning

Electronic planning (ePlanning) makes use of computers and specialized software to provide new ways to deliver information about the planning controls on a site and prepare a development application. ePlanning tools typically include:

- Development application tracking. Applicants can view the status of their proposal as it moves through council’s internal assessment system;
- Smart forms for electronic submission. Applicants are guided through a checklist specific to their proposed development;
- Certified planning information. Users can obtain a copy of the relevant planning information for their site from a website instantly;
- Filtered planning controls. Planning controls are drawn out of documents and packaged for the specific proposal;
- Online maps. Users can search for their site and view layers of information, eg, zoning, heritage items;
- Electronic development activity gathering. Data on development activity is collated for internal review and can be sent to higher levels of government for review across

¹⁰ The Royal Australian Institute of Architects, NSW Branch. *Improving the NSW Planning System. Submission to the NSW Department of Planning*. February 2008.

multiple councils.

The NSW Department of Lands has developed a spatial information website (www.maps.nsw.gov.au) which brings together the ability to search on location, council area, property and title details and other features. It then enables the user to integrate this information with aerial photographs and other imagery. It is called the Spatial Information Exchange (SiX). The Department of Lands is also developing a planning theme for the site, so that planning data and planning instruments can be accessed. The Discussion Paper states that the SiX project provides a strong platform on which to build an ePlanning initiative.

However, whilst councils acknowledge the benefits of ePlanning, and some have successfully introduced initiatives in this area, the uptake of ePlanning is not widespread. Council feedback to the Department of Planning suggests that this is due to:

- The cost of improving data accuracy to a level where it can be provided online without council staff checking it first;
- The cost and time to implement and maintain ePlanning services.

The Department's proposed reforms include establishing an ePlanning experts panel. Part of the panel's responsibility would be to develop an implementation plan over the next three years with targets for State and local government achievements. The plan would also include potential funding to reach these targets and funding an ePlanning training and communications strategy. The Department recommends the following outcomes:

- Implementation plan with targets adopted by State and local government within three years;
- Adoption of ePlanning platforms in local councils:
 - Within two years 80 percent of councils are to provide online development application tracking;
 - Within two years 100 percent of exempt and complying codes will be available on line (State provided) and 50 percent of Council codes;
 - Within three years 50 percent to provide online Section 149 planning certificates;
 - Within three years 50 percent to have Local Environment Plan tracking systems.

Stakeholder Responses

The Local Government and Shires Associations support the improved coordination, standardization and resourcing of ePlanning, but consider the targets arbitrary. They noted that the adoption of ePlanning initiatives will be highly dependent on resources and funding being made available to local government.

3.5 Building and Subdivision Certification

Under the current planning system there are two roles for certifiers:

- To assess building plans and issue a certificate (construction or complying development) that indicate that the plans comply with key standards such as the Building Code of Australia;
- To inspect buildings as they are constructed to ensure that the building is built to

the approved plans and the conditions of the development approval. This role is performed by the Principal Certifying Authority, and may be by either a council or a private accredited certifier.

The introduction of private certification in 1998 was strongly contested by local councils, and still is. Initially, professional organizations were responsible for the development and administration of accreditation schemes for private certifiers. By 2002 this model of accreditation was labeled a failure, with many of the Local Government and Shires Associations' concerns found to be justified. Following a Joint Parliamentary Inquiry into the Quality of Buildings in 2002, the Government introduced a new scheme whereby certifiers are accredited by the Building Professionals Board under the *Building Professionals Act 2005*.

However, the Government has noted the need for further reform in the area of certification. This is particularly so as the broader proposals seek to increase the rate of complying development and associated certification. Three issues with certification that need attention have been identified as:

- The perceived close relationships between developers and accredited certifiers. There is a lack of faith that an accredited certifier will provide an independent assessment when they are being paid by the developer;
- The management of the enforcement of consents and the uncertainty as to the respective roles of councils and certifiers. The role and responsibilities of councils and certifiers are not specifically defined in legislation, particularly in relation to enforcement, making it difficult for parties to take appropriate action and for the community to know what to do when problems arise.
- Application and management of the accreditation process.

To address perceived conflicts of interest, for small developments (any building not requiring a fire isolated exit), the following reforms were proposed:

- The number of construction or complying development certificates that can be issued to any one client or any one builder / developer by an accredited certifier to be limited in any one calendar year;
- Only the landowner would be allowed to appoint a certifier to issue a construction certificate or complying development certificate.

For large or complex projects (any building requiring a fire isolated exit) it is proposed that the Building Professionals Board would allocate certifiers, subject to the right of developers to reject the first two certifiers allocated. The Board will develop a model set of contractual arrangements that will clearly specify the responsibilities of the certifier and the builder/developer. It is also proposed that the Board will undertake targeted audits focusing on those certifiers whose income from any client exceeds a significant proportion of their total income, and those who work on larger projects.

In terms of clarifying enforcement provisions, it is proposed that a Council's responsibility to enforce development consents would be mandated. Penalties could be imposed against Councils where they are made aware of an issue but do not act. In addition, the Building Professional Board's powers to fine or suspend an accredited certifier or attach conditions

on their accreditation would be expanded and streamlined.

Stakeholder Responses

The Local Government and Shires Associations supported the proposals in regard to private certifiers to reduce conflicts of interest and client capture. They would also like councils to be given the power to issue compliance cost notices to recover the costs associated with enforcement actions against accredited certifiers. The Associations also argued that legislation should be amended to enable consents and certificates to be voided where the applicant has provided false or misleading information on which the consent authority or certifier has relied.

UDIA acknowledged that there are some adverse perceptions about certification within the community and that the Government needs to generate faith and trust in the system. As an alternative to the proposals, it suggested that the number of certifications issued to one particular client be limited to 75% of the total certifications issued by the certifier over a two year period. UDIA argued that this two year time frame acknowledges the nature of staged development and the importance of continuity in process when a developer is utilizing the services of a certifier.

3.6 Other Proposed Reforms

The Discussion Paper also included reforms in the following areas:

- Strata management – decreasing the influence developers can have on the strata management of buildings that they have developed. It has been suggested that developers are deliberately retaining ongoing control of strata schemes until the seven year warranty period for building work under the *Home Building Act 1989* has expired, thus making it difficult for owners to take action against the builder / developer.
- Resolving paper subdivisions – these are subdivisions (on paper, with no earth works or development) originating from the late 1800s and early 1900s in rural zonings located in the Blacktown, Port Stephens and Shoalhaven local government areas. Lot sizes range in size from 270m² to 1,000m². Landcom has developed a voluntary land trading model in some of the areas. Under this scheme, land owners would trade a part of their land for the construction of the infrastructure required to service the land. A development entity would then recover its costs by developing and selling the land transferred to it. Legislation is required to facilitate this. The model would be implemented where supported by the majority of landowners (defined as 60% of owners and 60% of land holdings by area).

4.0 CONCLUSION

The Council of Australian Governments has been pushing the planning and development assessment reform agenda. This is in response to concerns across the country to streamline the regulatory environment. Reforms to the planning system proposed by the NSW Government are moving closer to the Development Assessment Forum model. Under this regime, the majority of development assessment is carried out by independent panels, and elected representatives provide strategic direction and policy. Whilst the development lobby and architects support this approach, it is strongly contested by local government and

environment groups.

The Royal Australian Institute of Architects has argued that much of the complexity and all of the delays of the NSW planning system arise from the application of a single development assessment process to all projects, regardless of size, impact or importance. Whilst in the pursuit of efficiency the *Environmental Planning and Assessment Act* has been amended many times, the Government's aim is that the proposed reforms go some way to alleviating the Institute's and others concerns.

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