State Development Committee – Inquiry into the NSW planning framework

Questions from Members to John Mant following the hearing on 9 March 2009

1. *In evidence you spoke of the ideal of having all the controls applying to a parcel of land being contained within one document. Presumably this would include the controls that currently exist in the DCP level.*

Yes, the single control document contains all the controls applying to the parcel, from whatever source. By adopting a parcel (rather than a land use zone) format for writing the controls, it is possible to integrate in the one document the effect of controls from other development control documents, including those from other legislation.

A parcel/place format also delivers the message to the public that an important focus of planning has to do with places, rather than the objectives, which are implicit in the land use zone format, namely, that the purpose of planning is to separate land uses and increase the need to travel.

- *If it is the case that you are advocating that controls currently imposed by councils within their local DCPs should be given legislative weight.*

The concept of controls with 'legislative weight' and controls that are just 'policy' is an arcane NSW product of the past practices, the multi-level control documentation and the role of Parliamentary Counsel. One does not find it in other development control systems. The wording of controls should imply the degree of discretion, rather than the level in the hierarchy of documents.

Originally planning systems operated with a legislative provision enabling planning authorities to make 'regulations' imposing development controls over land. Each council's set of planning regulations contained the administrative process for making applications for consent, when that was required. (WA's legislation still operates like this).

There is confusion as to the extent to which the control document is 'the law', or merely 'policy'; i.e., whether a landowner is entitled to the permitted use, or whether a consent body is acting illegally in giving consent to a 'prohibited' use. In most States it doesn't matter all that much as there are wide ranging third party *merit* appeal rights. In NSW, the absence of such rights means that the issue of legality is more critical. Instead of having the merits of the original decision reviewed, an objector can only use an *administrative law* challenge to have the decision declared illegal.

The British system differs from most of the Australian systems. Its planning legislation clearly states that all development requires consent, i.e., development rights were 'nationalized' by the legislation. Everything therefore is subject to

consent and there are no 'permitted' or 'prohibited uses'. The purpose of the 'control' document is to provide a guide to government in exercising its discretion whether or not to allocate development rights to an applicant. (This is why it is easier in the UK to collect money from developers using a concept of 'planning gain', or betterment. Australian systems generally have had to rely on 'development impacts' to levy money for facilities.)

The 'Environmental Planning Instruments' in the NSW system are somewhat similar to the original 'Planning Regulations'. They are settled by PC and considered to be subordinate legislation, although, unlike in SA, Parliament plays no role in their review and Regulation Impact Statements are not required.

When Councils had their planning regulations, which were essentially just land use zoning controls, many had policy documents (some in 'bottom drawers') that set out design and siting policies for the different classes of development allowed under the various zones.

One presumes that those designing the NSW system saw these 'non-statutory' policy documents as being made as DCPs.

Because of the distinction between EPIs and DCPs, NSW lawyers have constructed complex scholastic logics around 'weight' and 'permissibility'. It is argued that a control in a DCP, being merely 'policy', can be waived and has little 'weight'; notwithstanding it has been properly prepared and consistently applied. By contrast, a control in a LEP is 'the law'. Of course, a development standard in a LEP can be waived using SEPP No1.

No other State makes this distinction between the relative weight of documents, although, say, in Victoria the simplistic zoning control system is overlaid by policy documents to which the appeal court will have some regard.

By contrast to all this confusion, in SA the legislation clearly states that the *only* document to which regard can be had is the (misnamed) 'development plan' for the parcel in question. Either level of government can initiate amendments to this document.

In the development plan document the controls can be expressed with no discretion – either the development fits or it doesn't; or the controls can leave a wide discretion to the consent authority. The degree of discretion depends on the *wording* of the specific control, rather than which statutory document it is in, or whether of not PC settled it.

The concept of relative weight arises from one of the fundamental faults in the NSW system. This fault arises because the Act has been conceived of as a 'Planning' Act, rather than a 'Development Control' Act. It therefore took a top-down multilayered planning approach instead of starting with the information needs of an efficient development control system. In the latter case, the need is for a clear statement of the controls that apply to each parcel, with the degree of

discretion arising from the words, rather than the level in the hierarchy of 'plans'.

Which level of government wrote the control is irrelevant to the user of the system. What they want to know is what the sum total of the controls mean for their parcel of land, or the land next door. And they would like government to do the integration exercise rather than having to wade, each time, through a raft of sometimes contradictory obscurely worded documents made at different times by different levels of government.

Incidentally, NSW is the only State where PC plays a major role in writing development controls. The costs of his services could be saved, if there was a single simple, plain English, control document.

- *If that is so, do you envisage councils submitting what would be a combined LEP and DCP for approval and gazettal?*

Yes. I believe that the State Government should sign off the development controls for the whole of the State. As the devil can be in the detail, the detail can be important. The endless search for what is 'regional' and what 'local' is a waste of time.

If only words that do development control work are included in a development control document, many can be quite short. Words that do development control work are those that actually affect property values positively or negatively. There are also a number of other mechanisms, which would make the task of checking the consistency with strategic objectives comparatively easy.

Cutting out the unnecessary role of PC and ensuring some consistency of format and definitions can make the task easier.

A single document and central approval of the whole document can also avoid the need for provisions such as the recent amendment to the Act, which said that a DCP could not override the operation of a provision in an EPI (s 74C(5)(c)). This section will provide plenty of work for legal interpretation, quite apart from the on-going expensive disputations about 'relative weight'.

2. *The reform of the planning system that you propose is a huge task. Can you suggest how such a task could and should be undertaken?*

Putting in place a new Act would not be difficult, provided there was a clear understanding of the objectives being sought and agreement on the basic model for the legislation.

For example, the reform of the Local Government Act started with a very clear model. The many chapters of the 1919 legislation, each providing specific powers to nominated statutory officers, plus over 100 Ordinances, were analyzed in relation to the adopted model.

For example, provisions providing a power enabling councils to do something, or requiring an approval from council, were listed in the powers or approvals categories. By doing away with fragmented model of the old Act, we were able to draft legislation containing a general competence power and a single approvals system for councils to operate. Countless detailed grants of power to supply were done away with by a simple power to provide. To a very large extent the whole issue of *ultra vires* disappeared, resulting in savings in legal costs. And one process took the place of some 30 separate approval processes. A considerable simplification of the law was achieved.

In arriving at the model for the new local government legislation a number of workshops were held with stakeholders. The draft was also the subject of a number of genuine workshops. (Unlike the cynical stage-managed presentations that accompanied Minister Sartor's recent amendments.)

The reform of the legislation for local government took a fair time but this was because of the waxing and waning of ministerial and departmental interest, rather than the complexity of the task.

A reform of the planning legislation would take the same approach - first, draft a new development control act and, then, do the work of transferring the existing system to the new.

The draft legislative outline contained in my submission sets out the basis of a new parcel of legislation. Once there was a measure of agreement on the detailed drafting instructions, the task of converting the existing to the new would commence.

Much of the detail in the present Act would disappear. For example, instead of four plan making processes and three separate consent process, there would be one process for amending the single document of controls and one process for applying for consent.

The task of converting the existing multiple layered development control documents into the new parcel formatted single document would be labour intensive, but not difficult once the principles of drafting were settled.

In SA and Victoria, where, in the 1980s, similar exercises were undertaken, approximately 10 administrative staff worked for several months reducing multiple planning documents into one single document per parcel, which was held in a centralized information system. The governments undertook that the *effect* of the new controls would not differ substantially from the existing; i.e., it was not a re-planning exercise. When the job was finished, the newly formatted controls were brought into effect by the enactment of the new planning legislation. Any the future amendments have to 'specifically amend' the single document.

The enactment of a streamlined development control act for NSW is a very doable exercise. It needs but a small dedicated staff and the right collaborative

processes to achieve a reasonable degree of consensus. Given the substantial increases in productivity achieved by a simple system and the integration of controls, which are accessible digitally on a parcel basis, a productivity grant should be available to carry out the work.

3. *In evidence you cited South Australia as a positive approach to effective development controls. The Committee notes that South Australia is now working towards expanding its current spectrum of exempt development and is developing a Residential Design Code to speed planning approvals for alterations and additions and new dwelling.*

   Are you aware of, or can you comment on, the rationale behind South Australia's position that its current system needed improvement in terms of speed?

Firstly, one needs to distinguish between the administrative law system imposing a development control system and the types of policies pursued using that system.

The administrative law system itself is quite simple. It consists of the power to impose controls, the identification of the scope of such controls, a mechanism for detailing them, a process for seeking and obtain the exercise of any discretions, and, possibly, a merit appeal against such an exercise of discretion. The system also needs some enforcement processes to make it effective.

The actual content of the controls and the policy objectives behind them will be a matter for those in charge of the system at any particular time. This will depend on the nature of future development being sought and will be, no doubt, influenced by the relative political power of the various interest groups involved in development issues. While the content may change over time, the basic administrative system need not.

As I understand it, the current SA changes largely reflect a change of *policy* as to the *content* of the controls. It is not intended to change the basic structure of the legislation.

The current controls date back to the early 1980s and reflect the then, post Dunstan, concern to make more new development 'fit into' its particular environment. In the 1980s the then government wanted to move away from the traditional standard land use zoning controls and codes that did not reflect the environments of the many unique towns, villages and landscapes of SA. Of course the problems with 'contextual controls' is that they often require a discretionary judgment on an application.

The present controls have become overly wordy and are in need of simplification. I suspect that the controls have grown too wordy because of a requirement that councils conduct major reviews at regular periods. The tendency has been for consultants employed to do such reviews to add extraneous words rather than advising that no or little change is required.

However, instead of fixing the controls, the present SA Government has adopted the urging of the Australia-wide campaign conducted by the housing and development industries, to revert to the traditional land use zoning controls and standard codes where 'one size fits all'. This represents a clear policy shift from a concern for the quality of different localities to facilitating the efficient production of standard formula urban products such as project homes and fast food outlets. Instead of discretionary contextual decisions there are to be more standard design certifications.

The formatting of controls on a parcel rather than a layered land use zone format is essentially aimed at integrating development controls into a single digital document. Such a system can accommodate standardized controls and codes, or the listing of exempt and certifiable development or, if desired, location specific controls. Unlike a format using land use zones, which implies that the policy purpose of planning is to separate land uses and increase the need to travel, the parcel format is completely *policy neutral*. It can be used to facilitate efficiently and effectively any policy outcome that is sought.

(This submitter personally supports a policy of contextual controls rather than standard land use zoning and standard Statewide codes. This is why he believes that the process for assessing applications should be as efficient, effective and transparent as possible. By way of background, enclosed are some critical comments on the current SA 'reform' proposals, which were made to the SA Minister for Planning.)

4. *In your submission and evidence you noted that if new legislation was created for development assessment then there would be no reason why it could not be used to encourage and allow staged approvals – concept, sketch and detailed.*

   What is the benefit of staged approvals? Are there any negatives such as increased costs to applicants?

There is a staged approval provision (S 83B) already, but it is little used. Unfortunately, when it tried to integrate building control in the Act, the Department did not make the construction process just a further stage in the DA process, because, at the same time, it introduced a private certification system where the certificate was given to the applicant, rather than to government. Instead of a process of staged applications, some of which might be accompanied by certificates, we finished up with the current private certification system, which is fundamentally flawed, increasingly complex and expensive to administer.

The consequences for DAs have been quite contrary to the benefits of a staged process, which is intended to provide applicants with flexibility, economy and certainty. The flawed private certification system means applicants now have to put in almost construction detail drawings before they can find out whether the development can occur at all and what size and height it can be.

The current system is an appalling waste of resources. It is no wonder that both the development industry and government have been devising 'get around' mechanisms such as Part 3A and the latest Stimulus Package legislation.

All the elements of the new system I am advocating are intended to add up to a new paradigm – namely a system designed, not for 'planning', but to produce an efficient and effective development control system:

- By legislating for development control rather than planning, the focus is on the controls rather than strategic plans which need to be implemented using a wide range of mechanisms, only one of which is development control. Of course, the imposition of controls should be justified by a strategic/structure plan, which does not need to be prepared in accordance with legislation.
- By writing controls in a parcel format, rather than using layered documents starting with a land use zone format, one can integrate all the controls applying to a parcel in the one digital document. The wording of these controls can be as fixed (derived from standard land uses and codes) or discretionary (in the form of qualitative contextual objectives) as is desired by policy makers. (As with today's Torrens Title systems, the digital record is the title, not the paper document. If the controls are in a digital cadastral data-base, there is no need to physically print out a copy of all the controls in a council area. An amendment to the controls becomes valid on its inclusion in the digital record, not the Government Gazette.)
- With a parcel-formatted document of controls, any approvals are essentially just more detailed 'controls' applying to a parcel. If the imposed control is a code without any discretion, then a certificate of compliance will amount to an 'approval'. This certificate will be included in the digital record and be evidence to the world of how the development rights have been exercised. If the controls include some discretion and therefore require an application to government to be made, then the application and the detail of the approval become part of the digital cadastral record.
- If the system provides for a certificate of compliance with objective standards to be made to the development control authority, rather than to the applicant, as at present, the authority can accept sketch plan development applications knowing that the detail can be reviewed and approved by it at a later stage.
- In practice, whether the cadastral record is the product of the process of making the development controls, or the application process, is irrelevant. The digital record shows what you can do with your land and the terms on which you can do it.

Obviously, in such a system, applicants should be able to apply for amendments to the digital record in any appropriate sequence.

For example, whether or not an industrial process is permitted may depend on the nature of the emission control. A first stage development might be for a plant of a certain capacity and the detailed design of the air scrubber. The detail of this critical element could be approved or rejected before the applicant went to the expense of designing the building, landscape and roads.

Of course, rather than put in staged applications, an applicant should have the freedom to apply with working drawings accompanied by the appropriate certification on code matters. Essentially it is a matter for the convenience of applicants. The public interest can be protected if government ensures that it has the information necessary to justify the elements of the proposed development for which approval is being sought.

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