CORRUPTION RISKS IN NSW DEVELOPMENT APPROVAL PROCESSES

Submission by

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Introduction

First, may I congratulate the Commission on this paper. It has taken on board some of the fundamental problems of the approval processes. It has generally avoided the previous approaches of the Commission, which placed undue reliance on sanctions against wrongdoers and ever more extensive codes of conduct.

The problems of the approval processes are that both the processes and the institutions that undertake them are not suited for the tasks in hand.

There are problems because there are institutional faults in the system that need fixing. When an ex-Premier of the State behaves in a manner so clearly contrary to public sector ethics, it is difficult to solve institutionalised conflicts of interest by merely calling on councillors and officials, or, for that matter, the Minister, to nonetheless do their best to behave ethically.

The real solutions must lie, not in further exhortation, but in fixing the essential faults in the system that give rise to the conflicts of interests and roles and therefore raise the risks of wrongdoing.

The Essential Problems

To summarise my views on the essential problems:

- There is too much discretion without clear boundaries inherent in most development controls. This is a result of the poor wording of Section 79C of the *Environmental Planning &Assessment Act* and the poor drafting practices of officers of the Parliamentary Counsel and Department of Planning.
- There is insufficient application of the principles of fairness and due process.
- There is insufficient separation of powers in local government.
- The present roles of the Minister for Planning are too greatly in conflict for the Minister to remain the development consent body at the State level.

There are a number of subsidiary issues of concern with the present system. These include:

- the rights of third parties,
- the influences of political donations,
- the training of councillors,

- the role of development agreements,
- the capture of staff and
- issues about the role of managers and staff in the preparation of reports.

Many of these subsidiary issues will disappear or, at least, become less critical, if the fundamental faults with the system are fixed. Fixing these faults will increase substantially the transparency of the system. Letting in the light exposes the consequences of the subsidiary issues, thereby making them less of a concern.

Summary of recommendations made in this submission

- The controls on development should be as clear and concise as possible – therefore no generally applicable list of 'matters for consideration' as presently contained in Section 79C and a number of control documents.
- All development controls therefore to have clear and meaningful objectives and, as far as possible, clear quantitative standards.
- There must be the opportunity for fair hearings before an independent panel before Councils make decisions on DAs or 'spot rezonings'.
- It is essential that Councils retain the right to make the final decision, subject to the availability of applicant and third party appeals on the merits.
- Cost awards for or against appellants if the Court finds substantially in accord with report and recommendation of the hearing body.
- There should be an independent development assessment commission to make decisions on State level Development Applications, apart from those which the Minister has decided should be made by Cabinet following an EIS and review by the commission.

Too much discretion in the planning controls

Section 79C illustrates a fundamental failure to think through the role of development controls. A consent authority should only have regard to the relevant EPI's and DCPs.

In Appendix One there is a detailed argument supporting this point of view.

Because I consider that there should not be a wide discretion to consider DAs beyond what is contained in the controls applying to the land in question, I do not consider that DA decisions by Councillors are '*political*'. They are *arbitral* and should be taken in accordance with the specific controls applying to the land which controls should be worded so as the extent of any discretion is clear.

Consequently, the drafting of development controls should avoid lists of matters for consideration. All controls should be in the form of clear objectives and, where possible, clear quantitative standards.

Insufficient Application of Fairness and Due Process

The Current Meeting Process is Wrong

The Commission's paper asks a number of questions directed at ways to resolve councillor conflicts of roles as representative and administrator and improve the operation of council meetings as decision making bodies on DAs.

I do not believe that the roles can be reconciled. Council meetings, which are essentially parliamentary, cannot be turned into a process that ensures fairness and due process.

Because there is not a separation of powers, or, at least, of processes, the existing situation cannot be made to work, however much exhortation and fiddling there is.

There has to be a hearing process that complies with the principles of fairness and due process. Every council should have the ability to have an IHAP process for disputed, difficult DAs, and all spot rezonings.

Some Issues About the Design of the IHAP Process

IHAPs Recommending Not Deciding

Theoretically, the result of the application of the separation of powers principle would have the IHAP making the decision following the hearing and the giving of reasons.

I agree with the Commission that it is unrealistic for this to occur.

I also think it should not occur.

The IHAP process needs to be owned by councillors. It should be seen as a partner process, not a threat.

If the final decision rests with Council, provided another hearing is not held in the Council meeting, then the IHAP can be seen to be Council's body. It should avoid the danger of councillors mounting political campaigns against the IHAP and its members.

Also if councillors are involved in making the final decision, they will be aware when the controls are not achieving their desired solutions. Council will be directed to its primary purpose, which is the making of policy, rather than getting involved in the detail of administration.

Councils are unlikely to still take *political* decisions and not follow the recommendation of the IHAP. The publication of the report and recommendation will put political pressure on councillors. If my recommendations for costs awards on appeals were implemented then there would be a further constraint on councillors ignoring IHAP recommendations.

Membership of IHAPs

It is not a good idea for one or more of the councillors to be members of the IHAP as is the case in the recently created bodies in South Australia. The SA model should not be followed, for this reason and the decision-making role of the panel.

Apart from the conflict of roles, there are difficult political issues from councillor membership:

- Shall it be one or more councillors?
- If one, presumably it would be the majority group's representative, which would encourage the minority to attack the IHAP.
- Does the Councillor have another vote when the recommendation comes back to Council?

The members of the IHAP should be independent and not conflicted.

Although it is a good idea for the members to have some qualifications, the primary task is to listen to what is said, read what has been written in the staff assessment and make a recommendation based on these matters.

It is not appropriate that the members of the IHAP become *expert witnesses*, in effect. There has been one situation at least where an expert as a member of an IHAP went and did his own surveys of ecological conditions. This is wrong.

IHAPs and SEPP 65 Committees

In this respect the IHAPs play a somewhat different role than the SEPP 65 Committees.

SEPP 65 Committees are meetings of the peers of the architect designing an apartment development. The meetings are held somewhat earlier in the development process, when changes can be made and suggestions taken on board. It is a design review. It is not a hearing of those with an interest in a proposal with a view to ensuring that everyone feels they have been properly heard and that all the issues have been properly aired.

One of the main benefits of the SEPP 65 Committees is that they strengthen the hand of the architect against his or her client.

More Transparency at the State level

The Commission is correct to acknowledge that, if higher standards and more transparent processes are to be adopted at the local government level, the same standards and processes should apply at the State Government level.

There is strong developer influence on the State Government. The Premier at a recent meeting of developer donors to the Labor Party invited those present to get in touch with the Secretary of the Party if they were having problems with his government. Donors expect to have ready access to Ministers.

The Minister for Planning has conflicting roles.

He has responsibility for ensuring there is adequate land available for development but also has a major role in the protection of the environment. The objectives of the *Environmental Planning and Assessment Act* reflect these policy conflicts.

The Minister makes planning controls and he also makes and increasing number of development control decisions on individual applications.

Part 3A of the EP&A Act not only allows the Minister to call in a wide range of development applications for decision, it also permits him to give consent contrary to established controls which may have been relied on by investors in adjoining property and the community. Indeed, there are wide range of transparency concerns with Part 3A.

The Part 3A amendments provide for panels but the decision to appoint a panel is discretionary not mandatory.

Most other States have given the role of making development control decisions to independent bodies or at least provide for panel hearings, reflecting the arbitral nature of development control decisions and reducing the opportunity for the exercise of undue influence.

The same should be instituted in NSW.

There should be an independent development assessment commission to make decisions on State level Development Applications, apart from those which the Minister has decided should be made by Cabinet following an EIS and review by the commission.

Subsidiary Issues

<u>The rights of third parties</u>

There are problems with Third Party appeal rights for domestic and commercial developments but their existence is a useful break on corruption and can encourage councillors to be fairer towards applicants.

At present, the Council is the last hope for neighbours and others with an interest in the outcome of a development application. In some councils there can be a tendency to favour the objectors.

On the other hand if you are an applicant it can be worth going to considerable expense and trouble to unduly influence decisions because there are no third party appeal rights to take the matter further.

The institution of IHAPs will do much to provide third parties with a fair hearing and proper treatment of their issues. IHAPs should make it easier to expose undue influences on the assessment staff.

There is an argument for TP appeal rights provided there are real cost penalties for worthless and time wasting appeals.

If the Court's decision is essentially a confirmation of the IHAP recommendation then costs should be awarded against the Council if it has not followed the IHAP recommendation, or against the applicant or TP if the Council did support the IHAP recommendation.

The influences of political donations

Political donations undoubtedly influence decisions either directly or indirectly.

The solution is not to ban them but to require timely and full disclosure of the donations and to ensure that there are sufficient transparency procedures to expose the decisions that have been the result of undue and improper influence.

The training of councillors

This is a second best solution. Exhortation and training in ethics is a marginal tool compared with fixing the processes that allow conflicts of roles and interests to influence decisions. If there is temptation, then no amount of exhortation will fix the problem, as has been shown from the ICAC's efforts over the last few years.

The codes of conduct have lengthened, but the problems remain because the poor institutional design has not been corrected.

The role of development agreements

Those I have spoken involved with implementing the change to the law to allow development agreements have acknowledged the substantial risk to the transparency of the system.

Effectively the provisions permit the selling of development rights.

The provisions for transparency are inadequate.

All spot rezonings and use of SEPP No 1 must have a compulsory hearing process with the issue of any developer agreement coming under detailed consideration at the hearing, which must occur before any decision is taken on the development.

The capture of staff

Staff can be and have been captured. It is no answer to the problem of councillors' conflict of roles to say that more should be left to staff.

Staff can play too many roles – place manager, development facilitator, advisor to applicants assisting them to get their developments right, advisors to objectors, as well as fair and balanced assessors and then decision-makers. They may also be under pressure to limit appeal costs, as the level of legal costs is a major performance measure placed on councils by the Department of Local Government.

I suspect many of the complaints from the public arise because concern about these multiple roles.

An IHAP provides the opportunity to shine a light on these pressures and can assist staff to be more open about their concerns with an application.

Issues about the role of managers and staff in the preparation of reports

The role of staff and managers in the preparation of reports is confused. Who is responsible – the assessment officer or the manager?

It is important for there to be consistency in reports. You cannot have one officer applying a discretion in one manner and another applying it in a different manner. Accordingly, the manager of the two officers may have to change the reports.

At what point is there the opportunity to make a change. As it is the General Manager's responsibility in the end, can that position redraft reports, even through he or she is not a 'professional planner'?

Again the IHAP process can expose what might be quite legitimate differences of opinion amongst staff, and provide a neutral process for resolving them. There is no reason why a joint view has to be presented to an IHAP.

Recommendations

- The controls on development should be as clear and concise as possible – therefore no generally applicable list of 'matters for consideration' as presently contained in Section 79C and a number of control documents.

- All development controls therefore to have clear and meaningful objectives and, as far as possible, clear quantitative standards.

- There must be the opportunity for fair hearings before an independent panel prior to Councils making decisions on DAs or 'spot rezonings'.

- It is essential that Councils retain the right to make the final decision, subject to the availability of applicant and third party appeals on the merits.

- Cost awards if the Court on appeal finds substantially in accord with report and recommendation of the hearing body.

- There should be an independent development assessment commission to make decisions on State level Development Applications, apart from those which the Minister has decided should be made by Cabinet following an EIS and review by the commission.

Appendix One

The Problems with Section 79C

A short review of the history of the control system in NSW is a useful introduction.

The original planning legislation enabled Interim Development Control to be imposed. IDC required all development (as defined) to be approved.

There was a list of 'matters for consideration' in the IDOs as a guide to the exercise of an otherwise unbounded discretion. Court decisions made some planning principles based on these matters for consideration.

It was expected that Planning Regulations (Schemes) would be introduced progressively and replace the IDOs. These schemes imposed land use tables that identified the lists of uses that were permitted, required consent or were prohibited. Some development standards were imposed on the permitted and to be consented developments, although most of these were to be found in the Building controls or a range of Council codes.

The purpose of the Schemes was to reduce the discretion that was inherent in the list of matters for consideration.

Trouble was that someone thought it would be good to retain matters for consideration even through there were specific and often detailed controls in the Schemes. What is worst, someone in 1979 thought it would be a good idea to include the IDO list in the Act, rather than leave it for the drafters of the individual Schemes to include or not include matters for consideration in each of the Schemes.

Since 1979 the list of matters for consideration grew, as every pressure group pressured the Minister to have their particular concern included.

So no matter how exact and specific the controls applying in an LEP (which took the place of Schemes), Section 90 (the predecessor to S79C) considerations were an invitation to blow open the limited discretion in the controls and have regard to a long list of undefined and often vague issues, including the 'public interest' (which everybody identifies as meaning 'their interest').

In 1997, the Minister, when revamping the Act (yet again) and redrafting S90 as S79C, cut back the number of matters in the list of matters for consideration.

I had argued to the Minister at that time that the Act should only allow the consent authority to apply the terms of the statutory development controls – the EPIs and DCPs – as is the case in South Australia. If a planning authority wanted to have a wide discretion in a particular locality, then the controls could essentially be a list of matters for consideration. But in other areas, where the requirements are well settled and agreed, there would be no such list. Had this been adopted then the whole business of master plans, development plans, etc, would not be needed.

The Minister didn't succeed in achieving this degree of clarity but he did manage to constrain the Upper House to limit S79C to a shorter list than S90. Of course, those in the Department who think that planning is a matter of listing every concern one could ever have and leaving it to the poor overworked development control officers to go through every item and check it off, issued the *Guiding Development* Circular

referred to in the ICAC Paper (p12). This put back into the system the lost list, and then some, of matters for consideration that had been deleted from the Act.

Since then, lists of matters for consideration have further proliferated. It is lazy planning, which results in assessment reports having tens of *matters for consideration* gleamed from the multiple control documents that apply to the land in question. Each must have a comment; even through they may be repetitive.

For example, the *Coastal SEPP*, which has been layered over a raft of existing local and State controls documents, has *twenty eight (28)* complex matters for consideration and aims, all of which need to be considered and assessed by council staff dealing with a DA, no matter how specific and resolved are the controls in the LEP/DCP and how minor is the development.

Drafting Practices

Added to the fondness of long lists of Matters for Consideration, the drafting of LEPs by Parliamentary Counsel is poor. Many controls do not have clear objectives.

Without clear statutory objectives the application of SEPP No 1 is fraught.

Again the SA example is pertinent. There as a general rule every control has a clear and meaningful objective. This is aided by the locality specific nature of the controls.

Castens v Pittwater Council

I do not think that the decision in this case goes as far as the ICAC Paper implies. Essentially it merely applies the old line of decisions that a policy paper of council may assist in the exercise of a discretion, even if it had not become a 'statutory' document.

The objectives of the Act merely provide some idea of the scope of Planning and are not a further list of matters for consideration that can somehow overcome the clear intention of the specific controls.

Generally

The situation of what discretions apply to the exercise of development control is, and always has been, confused in NSW.

This is a product of the failure by the Department to think through these issues in an intellectual manner and then arrive a clear policy position and stick to it.

My position is clear:

- There should be one document with the integrated controls applying to a parcel of land.
- It should be able to be altered by either the council or the State.
- Any amendments should 'specifically amend' the relevant control/s.
- Every mathematical control should have a meaningful objective that provides a clearly bounded discretion if one wants to waive the mathematical control.

- If, for a particular locality, discretions are to be wide then a list of matters for consideration might be appropriate, otherwise such lists should be avoided.

- Consequently, S79C should be limited to the statutorily recognised (single) control document only.

'Political' Decisions

The reason for spending time on the issue of matters for consideration, etc, is that the Commission is suggesting that a development assessment is a *political* decision, because S79, the objectives of the Act and the manner in controls are drafted, imply a wide discretion for councils making decisions on DAs.

This is a dangerous position for the Commission to take.

While not wanting to get rid of discretion completely (good urban design requires clearly defined discretions that are skilfully exercised), I do think the Commission should give the impression that community views expressed at the time an Application is assessed should overturn clearly expressed objectives and controls applying to a particular locality.

A distinction should be drawn between the nature of the decision in making development controls and that that applies them to the particular case.

The former is a *legislative* or *political* decision. The *constituency* is rightly involved in the debate on the formulation of the controls.

The application of the controls to the particular case is an *arbitral* decision. Rather than suggest that the constituency as a whole has an interest in the detail of a particular assessment (as against the general performance of the council in its administration of the system), the Commission should make it clear that the individual members of the constituency affected by the particular application are those that should be involved in the assessment process.

Other bodies with an interest would be community organizations and individuals whose interest is to *uphold* the proper application of the rules in the particular case.

Of course, I recognise that whatever community involvement there may have been when the controls are *made*, there will often be a reaction when the Applications are received. But one should encourage:

- specific place related controls,

- discretions limited to those required to get a good result and

- insistence that clear controls should be consistently applied.

I do not think that the Commission in its paper does this. Indeed it seems to be encouraging Councils' decision-making to have regard to have excessive regard to the excessive discretionary statements in the matters for consideration and the objectives of the Act.

> *That is, it is intended that the merit-based assessment process will necessarily involve a political dimension.* (p12)

I do not think that this is a useful statement. It adopts in a positive fashion some of the serious faults and confusions in the NSW system and it would be better if the Commission addressed itself to correcting these, rather than accepting them.

Labelling the exercise of discretions in controls as '*political* ' is to suggest that a decision-maker can go outside the clear meaning of words and can act inconsistently. It sits uneasily with the paper, which, generally, calls for the greater application of due processes and transparency in the assessment of DAs.