Local Government
Association of NSW

Shires Association of NSW

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21 February 2008

The Hon Frank Sartor MP
Minister for Planning
Governor Macquarie Tower
Level 34, 1 Farrer Place
SYDNEY NSW 2000

Dear Mr Sartor

The Local Government and Shires Associations of NSW are pleased to provide you with an alternative model on aspects of the planning reforms that are of particular concern to Local Government.

As you are aware, we commissioned Mr John Mant to prepare alternative solutions to two key problems identified in the current development assessment process – these being the private certification model and decision making processes related to development in NSW. We would like to thank you for the opportunity extended to Mr Mant to present on these issues and are pleased now to provide a written submission outlining the alternative solutions.

The Associations hope that this paper will generate positive debate and discussion and lead to practical solutions and a better development assessment system for NSW.

Yours sincerely

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Planning Reform in NSW – Alternative Solutions
Overview

There are two key problems with the proposals put forward by the Department of Planning discussion paper on reforming the planning system in NSW. These are:

- The proposals for addressing the conflict of interest of private certifiers are not practical and will not resolve the inherent flaws in this model.
- The proposals for additional regulatory bodies and extra steps in the DA process will result in greater complexity and costs for councils and applicants, rather than simplifying the system.

The Local Government and Shires Associations of NSW (LGSA) is keen to see a resolution of the problems relating to certification, as well as transparent and efficient decision making processes that balance the legitimate expectations of key stakeholders in the development process. The LGSA has therefore commissioned Mr John Mant, lawyer and urban planner, to develop alternative solutions to these key problems.

The Mant paper (attached) outlines a number of proposals for addressing these issues. The Associations hope that this paper will generate positive debate and discussion and lead to practical solutions and a better development assessment system for NSW. A summary of the Mant proposals is provided below and in the attached charts.

Private certification

The private certification system is unworkable. It could, however, contribute to a more streamlined and efficient system of development assessment based on a proper redistribution of responsibilities between government and the private sector. The major faults with the current system are:

- The difficulties of regulating private certifiers who have, and are seen to have, irreconcilable conflicts of interests.
- The excessive detail required in the DA process because councils do not have a say in developments from start to finish.
- The confusion in the public's mind as to who is responsible for building work, particularly when things go wrong.

Instead of the current model, it is proposed that private certifiers should provide their certificates to council, which can then issue consents, relying on the quantitative matters that have been certified i.e. compliance with measurable standards and codes. Random audits would be conduced to check the validity of these certificates.

For simple developments that comply in all respects with the codes – and are signed off by the private certifier who takes responsibility for issuing the certificate – the consent can be issued in a matter of days. Where there are qualitative matters to be judged e.g. whether the development impacts on neighbours' views or privacy – council officers, who are not paid by the applicant, can make an assessment on those aspects and issue a consent (or not) as appropriate. This will also ensure that the legitimate concerns of neighbours can be taken into account. For more complex developments, applicants can utilise a staged approach – providing council with a concept plan for approval before going to the time and expense of detailed working drawings.

This model overcomes the inherent conflicts of interest of private certifiers, ensures that applications that comply with standards and codes are dealt with quickly by councils, and provides applicants with a more flexible and efficient DA process that is tailored to their needs.

Decision making

There are a number of problems with existing development decision making processes in NSW. The process involves a range of decision making processes and bodies, it can become unnecessarily politicised and there are an excessive number of development applications that deliberately exceed the controls, causing complexity and delay.

Rather than address these problems, however, the discussion paper on planning reforms proposes to add additional layers and steps, which will be confusing and costly for applicants and councils alike.

The Mant paper proposes simplifying and making more transparent and accountable the DA decision making process by:

- Supporting the establishment of the Planning Assessment Commission but with oversight by a parliamentary committee similar to ICAC.
- Supporting councils who wish to establish advisory Independent Hearing and Assessment Panels (IHAPs) or other panels to promote greater transparency and efficiency in the decision making process.
- No Joint Regional Planning Panels – they are an unnecessary and unworkable model.
- No planning arbitrators as they are an additional decision-making process which will only encourage more ambit claims.
- Abolition of Section 82A reviews as they are an unnecessary decision making step which encourages ambit claims, leads to confusion in the public's mind and adds to the costs of councils.
- Simplification of merit hearings before the Court.

Planning Reform in NSW:

Alternative Solutions

Paper prepared for the
Local Government and
Shires Associations of NSW

by
John Mant

1. Private Certification Can Never Work

The current system of private certification is fundamentally flawed. This is demonstrated by the additional regulation of certifiers' behaviour and the extensions to enforcement and discipline powers that are proposed in the discussion paper on reforming the NSW planning system.

However, no amount of regulation can fix a system that can never work properly.

The failings of the current certification system will be greater if, as proposed in the discussion paper, the role of certifiers is extended by significantly expanding the list of complying developments, including the introduction of a state wide residential code.

- **Conflicts Of Interest**

Not only should there not *be* a conflict of interest, there should no *perception* of a conflict of interest. No matter how much a certifier's role might be regulated, the public will always suspect a certifier who is paid by the person who will benefit from the issuing of the certificate.

- **Discretionary Decisions Cannot be Privatised**

Regulation is not a service that can be privatised. Regulation relies on sanctions and therefore must be operated by government.

Regulation often requires determinations about the respective rights of parties. Only government can properly make discretionary decisions on the respective rights of citizens.

Therefore, while a private certifier can certify to a *quantitative* measurement, he or she is not in a position to make a binding decision on a *qualitative* discretion on a matter of public interest.

- **Sanctions Against Bad Behaviour Are Too Great To Be Effective**

Effective sanctions against certifiers amount to a loss of livelihood. Professional bodies are loath to impose such sanctions, especially for what can be considered minor 'crimes'. This means that they are seldom invoked, as demonstrated by the general lack of sanctions against poor quality work by private certifiers since the system was introduced.

Combined with the Court's reluctance to order demolition, the difficulties of issuing stop work orders and the cost to councils of taking action, there is a widespread belief that one can probably get away with it.

- **The Public Don't Know Who Is Responsible for What**

Responsibility for the management of a development is fragmented. So far as the public is concerned, councils are responsible for all the development that is going on in their respective areas. Yet the current certification system leaves councils out of key steps. Even if the complex issues of who is responsible for what are finally resolved between councils and certifiers, it will not make any difference to the public, who will continue to look to councils for action.

- **Not Being Assured Of Exercising A Judgement Over The Detailed Plans, Consent Authorities Need All The Detail In The DA**

The introduction of private certification of what were once 'building approvals' defeated the policy objective of combining the planning, building and subdivision approval systems and thereby allowing applicants flexibility in how they obtained consents – concept, sketch or detailed, or all together in one application.

Not knowing who will approve the detail, development consent bodies usually require a detailed design up front. It is difficult for councils to leave details for later approval as they may not see that detail if a private certifier is used by the applicant.

This increases costs for everybody, as the detail is likely to be required before the applicant knows if consent for the project will be given at all. Not only does the applicant have to go to the expense of preparing the detailed plans, the staff of the consent authority has to assess the detail of those plans. All this work is wasted if the project is not approved.

The efficiencies sought by combining the three approval processes into one have been lost by the development of a separate process for private certification, which is beyond of the authority of government.

The public has no faith in the system, because it cannot understand how a consultant paid by the developer can become the protector of the public interest.

The current certification system fails because it does not recognise the proper roles of government and the private sector. Any extension of the role of private certifiers under the current system would compound its failures.

The solution is to fix the failings of the present certification system so that government and the private sector can both play their proper roles in the DA process.

Proposed solution to the problems of certification

Private certifiers should provide their certificates to government, which can then issue the 'construction certificates' (really a 'consent' under Part 4 or Part 3A) relying on the quantitative matters certified to in the certificate.

Government can then judge any qualitative matters, such as whether the details substantially conform to the previous consents for the development (e.g. the concept or sketch plans) or, if they do not, whether consent should be granted for the amendments. If the application is for a single stage consent, then the use, urban design and construction matters can be dealt with at the one time.

This reform would solve many of the faults of the current system, which the discussion paper proposals fail to properly address.

- **Resolving Conflicts Of Interest**

The conflicts of interest in the current system would be solved. While the applicant would pay the private certifier, the certificate would be issued to government, which would rely on its correctness. Risk therefore would remain with the certifier, unless government decided to recalculate the compliance.

At the same time the duty of the certifier would be constrained and, with this clarity of potential liability, professional indemnity insurance should be easier to obtain.

- **Clear Roles and Responsibilities for Councils and Certifiers**

The competitive efficiencies of the private certification system would continue to apply to the quantitative measurements, but government would make the discretionary decisions on the qualitative decisions.

Government would make decisions between the respective rights of citizens, as it should.

- **Using the Market not Extra Regulation**

With private certifiers providing their certificates to councils there is an inbuilt mechanism to ensure proper performance by certifiers. Instead of increased but ineffectual *regulation*, *market* mechanisms will sort out the good from the bad.

The current system can encourage applicants to employ certifiers who cut corners. Under the proposed system, where the certificate is provided to government, the market will reward certifiers who have good records and are therefore trusted by government. Certifiers with a good reputation should achieve fast consents from government and will have a market advantage with prospective clients.

- **Public Knows Who Is Responsible**

With the certificate being provided to the government, government remains responsible for managing development in its area. The community can properly expect government to be responsible and accountable.

Not being left out of the picture, government should be able to move quickly to fix problems, rather than being called in too late to prevent illegal development.

- **DA Processes Tailored to Level of Complexity**

The proposed solution effectively restores the situation that used to exist, without losing efficiency gains from an outsourced certification process. Government will again have the ability to accept staged development applications with details being left for later consents.

The full range of staging will be available under the one approval system – concept, sketch and detail, or a combined, single stage, comprehensive application.

For simple house extensions, if decision-making is made simpler, it should be possible to involve neighbours and for government to exercise a discretionary judgment on any merit issues, while providing an efficient system of decision-making.

2. Improving decision-making processes

The Problems

- **Separation of Roles**

Some have argued that the roles of policy making and the application of those policies to individual cases call for different modes of decision-making.

This is sometimes expressed as 'taking the politics out of decisions'.

- **Complexity of Decision-Making Processes**

There are a range of decision-making processes and bodies already involved in making decisions in the NSW system. The aim should be to reduce, rather than add to, that complexity so that the public can understand and have certainty in the processes.

- **Excess Number of Ambit Claims**

Development applications that deliberately exceed the controls cause complexity and delay. They also lead applicants to complain about the performance of councils when the applications are refused.

Ambit claims are more likely if there are numerous decision processes as applicants attempt to obtain something more at every point.

The recent review provisions under section 82A are a case in point. The provision was originally put forward to permit councils fixing an obvious error in a decision rather than being stuck with the error on the grounds that it had exhausted its statutory powers.

The review has now morphed into a full-scale appeal process, which is costly, causes delays and does not stop a further appeal to the Court. The community can be very suspicious when a council approves a development under the section when it 'substantially the same development' was previously refused by a different part of council.

The Minister's proposals

- To impose a separation of roles at the State level

  The Minister's powers to determine applications for Part 3A developments is to be given to a Planning Assessment Commission consisting of people with appropriate qualifications appointed by the Minister.

  The Minister will retain the right to approve directly certain applications such as critical infrastructure.

- To take decisions on major regional developments away from councils and give them to a new Joint Regional Planning Panel (JRPP).

- To appoint planning arbitrators to arbitrate between applicants and neighbours on minor applications i.e. deemed refusals and s82A reviews.

- Provide an approved list of potential panel members for IHAPs and recommended procedures.

Alternative Solution

- **To support the PAC proposal**

The membership and performance of the PAC should be held in high regard. Accordingly, it is proposed that Parliament should appoint a committee to oversee its operations (but not to interfere in individual decisions) and comment on proposed appointments to it (similar to ICAC).

- **To oppose the JRPP**

This is an unnecessary and unworkable model as evidenced by the difficulties in determining where an application for a 'regional' project should be lodged and its pathway through to consent and appeal.

- **To oppose the proposed planning arbitrators**

This is a further decision-making process which will only encourage more ambit claims.

- **To abolish Section 82A reviews**

This is an unnecessary decision making step which encourages ambit claims, leads to confusion in the public's mind and adds to the costs of councils.

A simple appeal mechanism to the Court with its powers of conciliation is all that is needed. The system does not need an additional appeal process.

- **To simplify the merit hearings before the Court**

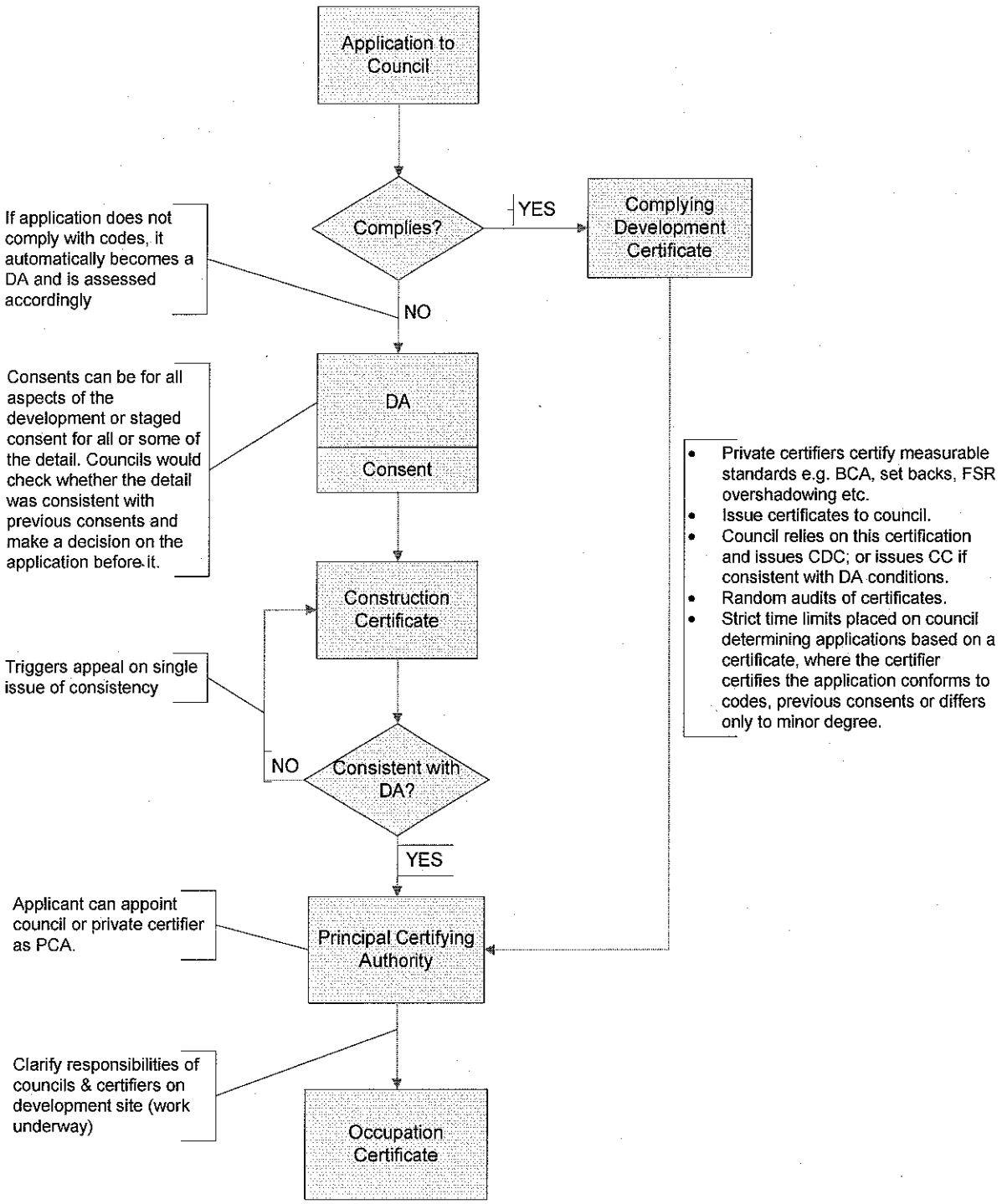
Merit appeals are a rehearing not an appeal against the council's decision, as are part 4 legal challenge. Accordingly the title of the matter and its conduct should be inquisitorial rather than adversarial.

The Court has made moves in this direction in recent times. The formal changes should be made to demonstrate the true nature of the 'appeal'.

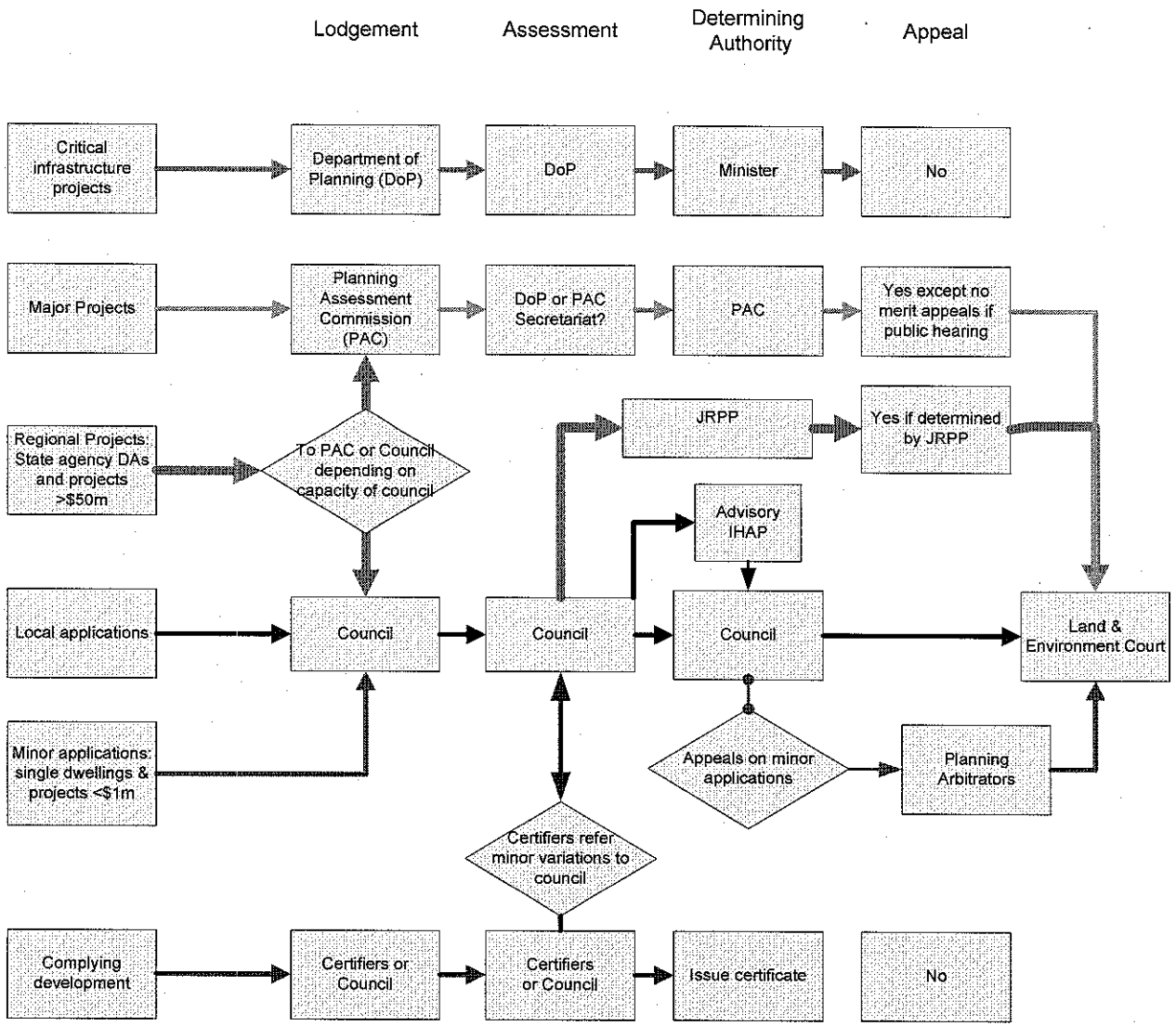
- **To support councils who wish to establish advisory IHAPs or other panels.**

Advisory IHAPs – that conduct hearings on controversial or complex DAs and make recommendations to Council – should be supported. Councils should have discretion whether to use an IHAP, depending on their circumstance e.g. the expense of an IHAP may not be warranted for small rural councils with few DAs. This will promote greater transparency and efficiency in the decision making process. The Minister's proposed assistance to IHAPs is supported provided that councils are free to select panel members who are not on the Minister's approved list.

IMPROVING THE DEVELOPMENT ASSESSMENT PROCESS
AN ALTERNATIVE OPTION



DA Decision Making Process – Government Reform Proposal



DA Decision Making Process – Alternative Option