Much ado for NOTHING

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South Australia's Planning Review promised a new era – eight months in, very little has changed.

An extensive review of the entire development control system in South Australia which commenced in April 1990 with the establishment of a Planning Review, resulted in a repeal of the State's *Planning* and *Building Acts* and the passing of the *Development Act 1993* which came into operation on 15 January 1994. The Planning Review was loudly proclaimed as the means to develop an innovative and dynamic planning and development control system which while implementing ecologically sustainable principles, would also facilitate and expedite the development approval process thereby satisfying the needs of the various interest groups.

The new Act has not dramatically changed the previous system. It seeks to consolidate and amend various pieces of legislation while still maintaining the essential elements of the previous system and various regulatory bodies (albeit in a number of instances with new names).

As such the new legislation is disappointing. The challenge and opportunity to make fundamental changes was available but not taken up by the process. Many would argue that the shortcomings of the old system under the *Planning Act 1982* and the *Building Act 1971* could have been rectified without the complete legislative change which was in fact wrought.

Local Government still plays a pivotal role in the new system. Indeed, it is arguable that increased responsibility has been placed on the shoulders of local government. Certainly the combining of both planning and building controls into one piece of legislation requires many Councils to reassess their approach to the development control issue.

Background to the changes

The Planning Review had undertaken extensive public consultation before delivering its Final Report on 5 July 1992.[1] It found that planning for the State had become confused with and subordinate to the regulation and control of private development, a trend reinforced by the separation of the *Planning Act* from other regulatory areas at both State and local levels. The Review recommended that the Government adopt an integrated system of planning and development control based on a long-term vision for metropolitan Adelaide, which vision would be set out in a planning strategy. It was considered that there were too many pieces of legislation controlling various aspects of development in South Australia. For example the construction, establishment and commencement of a delicatessen required anything up to 18 licences, permissions and approvals prior to legal operation. With these criticisms in mind, Parliament enacted three pieces of legislation, the *Development Act 1993*, the *Statutes Repeal and Amendment (Development) Act 1993* and the *Environment, Resources and Development Court Act 1993*. The *Statutes Repeal and Amendment Act* repealed the *Planning Act 1982*, the *City of Adelaide Development Control Act 1982*, the *Building Act 1971* and amended a number of others including the *Strata Titles Act 1988* and the *Real Property Act 1886*.[2] It also included a large number of transitional provisions designed to ensure the transition from one system to another proceeded smoothly.

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From a development control perspective the principal feature of the *Development Act* is the integration of planning and building controls. 'Development' as defined by the Act cannot be undertaken unless approved in accordance with the Act (s.32). To become an approved development, a proponent of an activity or proposal may need to seek and obtain a number of 'provisional' consents. Thus, a development requiring assessment against the relevant provisions of the appropriate Development Plan will require a 'provisional development plan consent', a 'provisional building rules consent' if building work is involved and to satisfy various prescribed requirements in respect of land divisions whether by strata title or otherwise (s.33(1)).

'Development' is more broadly defined than in the *Planning Act*. It now expressly includes development on or under water. Development involving the division of land includes the division by strata plan. It includes extensive controls over State and local heritage places and building work. The term 'building' in the act is expressed to include a boat or pontoon permanently moored or fixed to land or a caravan permanently fixed to land. The Second Schedule to the Regulations under the Act sets out a number of additional acts and activities which constitute development. Schedule 3 to the Regulations sets out a number of acts and activities which are not development.

The consents do not have to be obtained in a block. Applications for them can be made one at a time. To suggest as the Government did at the time of introducing the draft legislation to Parliament that the new system is less complex and therefore easier to understand and use is nonsense. If anything the new system creates greater confusion. How do you explain to a person unfamiliar with the system that, although they have obtained a provisional development plan consent, they cannot commence work until the development is approved and that the approved status will not occur until they also obtain provisional building rules consent? Surely, the old system whereby two separate consents were obtained under two separate pieces of legislation was less confusing.

Authorities established under the new system

Development Assessment Commission

This body is the successor to the South Australian Planning Commission. It is the relevant planning authority for applications by Councils, applications outside of Council areas and applications for those matters listed in Schedule 10 to the Regulations which include developments in the Hills Face Zone, the Mount Lofty Ranges Water Protection Area, the River Murray Flood Zone and particular coastal areas where development requires more that just local input and control. In addition to its development assessment function the DAC may report to the Minister on matters relevant to the development of land and on regulations that should be made under the Act.

Development Policy Advisory Committee

This body is the successor to two bodies, the Advisory Committee on Planning and the Building Advisory Committee. Its membership reflects the areas to be covered by the Act that is, both planning and building. It is essentially an advisory body principally at a policy level.

Staff for both bodies will come from the Office of Housing and Urban Development. There is the option for either body to make use of the services of officers or employees of a Council (with the Council's approval).

Environment Resources And Development Court

The *Development Act* does not establish its own court. Rather, a separate Act the *Environment, Resources and Development Court Act 1993 (ERDCA Act)* has been passed establishing a new court at District Court level. The court has both a civil and criminal jurisdiction and at present two judges and one magistrate are appointed to the court.

The court may sit with lay commissioners where so provided by legislation. Four full time commissioners from the Planning Appeal Tribunal have been appointed to handle planning matters with a number of part-timers who will deal with both planning issues and, in a number of cases, building referee matters. A Full Bench will comprise a judge and not less than two commissioners. The court may also comprise a judge or commissioner sitting alone or two or more commissioners. Prosecutions under the *Development Act* must take place before either a judge or a magistrate.

The legislation provides for compulsory conferences, the purpose of which is to enable the court to assist the parties to explore any possible resolution of the matters in dispute without resorting to a formal hearing. In practice, conferences under the *Planning Act* often dealt with the question of whether a compromise was achievable without, once it was apparent that a compromise was not possible, proceeding to examine the practical aspects of the hearing. It is to be hoped that the conference will be used more often as a convenient forum in which to discuss various pre-hearing matters such as, the number of witnesses, the view of the subject land, whether any preliminary legal points will be raised, and whether various facts can be agreed. Some comfort for practitioners has been afforded by the recently issued rules for the new court. They indicate that the Rules are to be construed and applied so as to best ensure the simplification of practice and procedure, the identification of the real issues between the parties prior to the hearing of the proceedings, the saving of expense, and the fair and expeditious disposal of the business of the court.

The court's powers to award costs are limited although it may order a representative to pay costs in certain circumstances where proceedings are delayed through the neglect or incompetence of the representative, or disallow the whole or part of the costs between the representative and his or her client (s.24(3) *ERDCA Act).*

Planning schemes under the Development Act

It is within the area of planning schemes under the legislation that some changes of possible long-term significance have occurred.

The Planning Review acknowledged that the most obvious difference between the new system which it proposed and the old was in the explicit requirement for strategic planning for development. In January 1994, Planning Strategies for Metropolitan Adelaide and Country South Australia were released. These Planning Strategies are intended to be translated into development control policy through amendments to the existing Development Plan. The Planning Strategies will also stimulate corresponding local strategic planning.

The Planning Strategy

The *Development Act* is particularly brief in its outline of the nature of the Planning Strategy and the procedures which are to govern its preparation and amendment. Section 22(2) of the Act simply provides that the appropriate Minister (being the Minister responsible for the *Development Act)* will prepare and maintain a Planning Strategy for development within the State and that the strategy 'may incorporate documents, plans, policy statements, proposals and other material designed to facilitate strategic planning and co-ordinated action on a statewide, regional or local level' (s.22(3)).

No detail is provided by the Act with respect to the procedures for future amendment of the Planning Strategy and, in particular, no role is guaranteed for local government in this process despite the fact that local government plays a significant role in the overall development control and local planning policy area. However the Final Report of the Planning Review proposed that the Planning Strategy should be reviewed on a five-yearly basis with extensive public consultation occurring. This task is to be co-ordinated through the Department of Premier and Cabinet.

The absence of any statutory requirement for a review of the Planning Strategy and limited public consultation in association with such review, is deliberate. After considerable debate within the Planning Review, the view was taken that the Planning Strategy is essentially a political document which should not be subject to such statutory constraints.

The other side of this coin, however, is that there is a risk that the Planning Strategy could be made subject to significant amendments without proper consultation and at the whim of a Government. The significance of this risk is enhanced considerably by the fact that the *Development Act* envisages that the Planning Strategy must be reflected in the Development Plans which are to be produced and regularly revised by Councils (s.23(3)).

Section 22(10) of the *Development Act* provides that no action can be brought on the basis that a Development Plan or an amendment to a Development Plan is inconsistent with the Planning Strategy or that an assessment or decision under the Act is inconsistent with the Planning Strategy. Apart from ensuring that no legal challenge might be brought with respect to the validity or substance of the Planning Strategy, this provision appears to be designed to ensure that the Planning Strategy cannot have any direct relevance or application to decisions made under the legislation with respect to development proposals. Rather, the intention is that such decisions will be made by reference to the appropriate Development Plan, Building Rules and other specified policy material.

It is tempting to speculate that a court faced with a clear and significant conflict between the terms of the Planning Strategy and the relevant Development Plan may nevertheless be inclined to give some cognisance to the Planning Strategy by one means or another, despite this statutory prohibition. This may become particularly tempting where a Council clearly has not yet brought its own Development Plan into line with the Planning Strategy and is possibly in the throes of doing so.

Development Plans

The existing Development Plan had become an unwieldy and at times confusing document for planning authorities to rely upon when making decisions on development applications. Frequently regional and local elements of that Development Plan were not always consistent in their terms leading to uncertainty in development decisions over which provisions took precedence.

Accordingly the single, Statewide Development Plan has been replaced by separate Development Plans for geographical parts of the State, provided that no more than one plan may relate to a particular part of the State. While the relevant geographic parts will generally comprise the areas of each Council, they might also comprise a part of the State outside Council areas, or a single plan might be produced covering the area of a regional grouping of Councils. The *Development Act* does not explain in any detail how a Plan covering several Council areas would be prepared, other than to provide in s.24(1)(b) that such plans must be prepared by the Minister.

Section 23(3) sets out the various matters which may be addressed in a Development Plan. These include: planning or development objectives or principles (which in turn may relate to a variety of subjects including the natural or constructed environment, ecologically sustainable development, social or socio-economic issues, urban or regional planning, conservation of land or buildings, etc.) and provisions enabling the transfer of development potential between sites.

The initial form of Development Plans for each Council area other than the City of Adelaide comprise the Council portion of the Development Plan under the *Planning Act* together with the relevant regional part of the Development Plan under that Act. For any part of the State outside an area of a Council, the appropriate Development Plan will comprise the relevant 'out of Council' part of the Development Plan under that Act together with the relevant regional part of the Development Plan under the *Planning Act*. Finally, for the City of Adelaide, the Development Plan will comprise the principles established under Part 2 of the City of Adelaide *Development Control Act 1976*.

Building and other codes

The incorporation of building controls within the *Development Act* means that additional matters must be taken into account by the relevant planning authority in relation to the assessment of a development proposal. In particular s.33(1)(b) provides that the authority must assess a development against the provisions of the Building Rules.

The term 'Building Rules' is broadly defined, to include 'any codes or regulations under this Act that regulate the performance, standard or form of building work and includes any standard or document adopted by or under those codes or regulations or referred to in those Codes or regulations' (s.4). It is clear therefore that the range of codes or technical standards which may be required to be considered by a planning authority can extend beyond the Building Code of Australia. That particular Code is specifically adopted by the Regulations under the *Development Act*.

While the Building Rules are clearly regarded by the *Development Act* as distinct from Development Plans, the possibility of some overlap in this area is raised by the fact that s.23(5) of the *Development Act* provides that a Development Plan may adopt 'any plan, policy, *standard, document or code* prepared or published under or pursuant to this or any other Act or by a body prescribed by the regulations'. It seems curious that codes or standards may in some instances be incorporated in the Building Rules and in others in the Development Plan, and it is difficult to ascertain from either the *Development Act* or the Final Report of the Planning Review how such types of instruments are to be divided between these two possible repositories.

The practice of issuing Planning Advisory Circulars which was adopted by the Minister under the old system may be relevant in this context. Circulars such as that relating to contaminated land (No. 17) may continue to be issued on an informal basis, or, alternatively, may be incorporated as 'policy' within Development Plans in the future.

The status of codes, standards and similar instruments is further complicated by s.29(1) of the *Development Act* which enables the Minister to amend a Development Plan by including in the Plan any plan, policy, standard document or code of a prescribed kind without going through the routine procedures for Plan amendments. The parts prescribed to date include coastal management plans; waste management plans; parks or reserves management plans and Heritage items lists.

Review of Development Plans

Section 30 of the *Development Act* requires Councils to carry out periodic reviews for the purpose of determining the appropriateness of any Development Plan that applies in relation to its area and the consistency of any such Development Plan with the Planning Strategy. The first such review is to be carried out within three years of the commencement of the Act and subsequent reviews must be completed within five years of the completion of the previous review. Such reviews are to be subject to public consultation. The outcome of a review is a report by the Council to the Minister (presumably as to why no amendment to the existing Development Plan is considered necessary) or, alternatively, the preparation of a Statement of Intent for the purpose of effecting an amendment to the Development Plan.

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The clear intention of these provisions is to ensure that Development Plans are regularly brought into conformity with the provisions of the Planning Strategy. However a number of practical difficulties may arise in this context. First, a considerable amount of time and energy may have to be devoted on an ongoing basis by Councils to this review procedure if it is to be undertaken every five years. This may place a strain on the resources of some Councils.

Perhaps a more serious difficulty could be to determine just how Development Plans will be revised to reflect the extremely broad provisions of the Planning Strategy. Given that it appears the Minister will be able to reject proposed amendments to the Development Plan on the basis that they do not conform sufficiently with the Strategy (s.25(9)(c)), it is possible that there will be a considerable amount of negotiation required between Councils and the Minister's Department on the question of such conformity. In this regard, Councils will inherit a new and quite significant burden under the proposed planning system. It will be highly desirable for the Minister to issue guidelines in order to assist Councils with the task of plan amendment and in particular to provide more detailed guidance on the specific question of conformity with the Strategy.

The Planning Review anguished considerably over the status and role of the Planning Strategy and concluded that it should have no direct legal force or effect in relation to development applications, but rather should be implemented through Development Plans. It is most likely that in practice this will prove to be an extremely difficult system to implement, and indeed the viability of the entire new planning system proposed by the Planning Review will hinge on the effectiveness of the amendment process for Development Plans.

Development control aspects

Planning authority

The primary responsibility for the development control functions of the *Development Act* will rest with local government. However, in a number of circumstances the Development Assessment Commission will be the relevant planning authority. For example, if development is to be undertaken by a Council, or if the development falls into a class prescribed by regulation, the Development Assessment Commission has the responsibility for undertaking a planning assessment and making a planning decision on the proposed development.

Characterisation of development

On receipt of an application for a proposed development which requires the relevant authority to assess the proposal against the Development Plan, the planning authority must determine the nature of the development and proceed to determine the application on that basis. To assist in that process, Schedule 1 to the Regulations defines a range of words and terms including various types of development.

The Development Plan can describe development as being either 'complying' or 'non-complying'. If a proposed development falls into neither category then it becomes what is known as 'consent development'. The Act provides that complying development must be granted a provisional development plan consent subject to any conditions prescribed in the Regulations or the Development Plan (s.35(1)). Where development is classified as non-complying, then the developer has a number of additional hurdles. A Council cannot make a decision granting approval to a non-complying development without the concurrence of the Development Assessment Commission. The developer has no right of appeal against a refusal of a non-complying development. Apart from name changes this system does not differ from the previous system.[3]

The *Development Act* provides that a development that is assessed by a relevant authority as being seriously at variance with the relevant Development Plan must not be granted a provisional development plan consent (s.36(2)). This provision varies from the more objective provisions found in the old *Planning Act*. The provision is drafted in such a way as to try and prevent judicial review of the decision. It remains to be seen whether such review will be prevented.

With respect to building work, certain types of building work are classified as complying building work in which case the planning authority must grant a provisional building rules consent. The planning authority cannot grant consent to a development which is at variance with the building rules, unless certain defined criteria are satisfied (s.36(2)).

Referrals and concurrence

There are a range of developments which require consultation with various bodies and authorities. In some cases the planning authority will be required to comply with any direction given by

the body to whom the application was referred, or even more importantly obtain the concurrence of the referral body prior to granting a consent or approval. The determination of which particular category a development falls into for the purposes of the referral provisions, requires one to consider Schedule 8 of the Regulations under the Act.

There have been two new categories included in the legislation, namely 'Activities of environmental significance' and 'Activities of major environmental significance'. When proposed development falls into either category the planning authority is required to refer those applications to the Minister for Environment and Natural Resources who, in the case of activities of major environmental significance, has the power of direct refusal, or the attachment of certain conditions. This function will be taken over by the Environment Protection Authority when the *Environment Protection Act 1993* eventually comes into operation. The intention is that the two statutes will be closely linked and the approval processes integrated through the referral procedures to try and minimise delays and excessive bureaucracy for applicants. One consequence of this process is that councils will require more detailed information on development proposals which may be environmentally significant before they can proceed to consider the application because such details will be necessary to determine the appropriate procedures under the *Development Act*.

Public notification procedures

Since 1982 when the *Planning Act* came into force, there has been a gradual reduction in the range of development proposals requiring public notification. While the *Development Act* includes the right to make representations and pursue any third party appeals in some situations, there is a definitely not a general right of public notification nor third party appeal. Where public notification does occur, then the representations which are to be made can relate only to the issue of whether or not a provisional development plan consent should be granted. They do not apply to the assessment of a proposal against the relevant building rules. There are three categories of public notification. Category 1 requires no notification. Category 2 requires notification to any owner or occupier of adjacent land, any other person of a prescribed class and Category 3 provides that notice must be given to all owners and occupiers of adjacent land and any other owner or occupier of land which the Council determines would be directly affected to a significant degree by the development if it were to proceed, and the public generally.

Where a third party is dissatisfied with the decision of the Council, the third party has 15 business days from the date of the decision within which to lodge an appeal.

Conditions

Under the *Development Act* planning authorities have a broad condition-making power (s.42(1)). The Act goes so far as to outline the nature of some of the conditions which can be attached to any approval. They include conditions regulating or restricting the use of any land or building subject to development, providing for the management, preservation, or conservation of any land or building subject to development, regulating the maintenance of any land or building, or imposing restrictions on the temporary use of buildings on land. The specific categorisation of certain types of conditions is simply a reflection of the fact that the *Development Act* now incorporates both the old *Planning* and *Building Acts*.

Private certification

Private certification of building work which is a concept new to South Australia has been provided for in the legislation (Part XII). Private certifiers can only grant provisional building rules consents and their power does not extend to the grant of provisional development plan consents although there is no reason why in theory that could not occur in the future.

It remains to be seen how successful the concept of private certification will be. People eligible for appointment as private certifiers must be suitably qualified and also have a valid policy of insurance covering them for a period of at least ten years after the completion of building work (Development Regulations, reg 93).

One of the purposes of such a scheme is to reduce the burden on councils which have traditionally had to carry a number of qualified building inspectors on their staff.

Linked with the private certifiers scheme is the exemption of councils and private certifiers from any liability for any acts or omissions made by them in good faith after a development has been approved (s.99). This would appear on the face of the statute to exempt a council from liability for negligent inspections of building work. However, to simply ignore the question of building work inspections and fail to implement a policy on the same may not mean there has been 'good faith' on the part of the council concerned. Councils should at least turn their mind to the question of inspections and formulate a policy on the same bearing in mind their resources, community expectations and known problem areas.

Conclusion

The Planning Review promised us a new era – a bang rather than a whimper. Unfortunately, eight months into the term of the legislation it appears that very little has changed. The development control system is, in essence, unchanged. The planning policy area also continues in a manner similar to the previous legislative system with the addition of the concept of a planning strategy. Whether the changes will be significant remains to be seen.

Perhaps the area where there has been the most change is in relation to the court structure and enforcement of the legislation. A much wider array of enforcement remedies are now available to planning authorities for use in situations where there has been a breach of the legislation. Those remedies combined with a court whose members are cognisant of urban planning and environmental issues could result in renewed vigour in the area of enforcement of planning breaches.

References

1. Planning Review '2020 Vision – Final Report – A Planning System', Department of Environment and Planning (SA), June 1992.

2. Other Acts amended were *Coast Protection Act 1972, Courts Administration Act 1993, Local Government Act 1934, Mining Act 1971, National Parks and Wildlife Act 1972, Swimming Pool (Safety) Act 1972.*

3. Under the *Planning Act* 'complying development' was called 'permitted development' and 'non-complying' was called 'prohibited development'.