

Use and abuse of Development Control Plans ("DCPs")

Richard Smyth, Director Smyth Planning

When the original Act was put together I always envisaged the DCP as a guideline document to further expand any controls in the Local Environmental Plan ("LEP") rather than frustrate them. However the Courts have not shared my view and have given the DCP much greater status than it was intended to have.

Sutherland Shire Council, in its submission to the NSW Standing Committee on State Development in April 2009 formally described how many Councils use their Development Control Plan to overcome Local Environmental Plan provisions they do not like. Their submission said:

"If the Council does not support a particular provision within a local environmental plan because that provision was imposed upon it (or was acceptable in the past but is not acceptable now, my addition), there are several common responses. These would not be universal and not be used unless the Council strongly opposed the control. However, if those circumstances existed the Council would find it necessary to divert resources to ensuring that this form of development did not receive approval.

At a policy level the Council will attempt to introduce into its development control plan other provisions that will counter the LEP provision. For example, the LEP may permit a form of development that the Council opposes (eg brothels) so the Council will make development control plan provisions that are so restrictive that no proposal could satisfy the requirements. Should an applicant choose to submit an application obstacles would be created to frustrate the applicant.

Should the proposal then come before the Council it would be refused so that the applicant was forced to appeal to the Land & Environment Court.

Forcing brothels into industrial zones is contrary to good Health & Safety

standards as the isolation of the premises after normal working hours puts workers and their Clients at risk.

From the Council perspective directing resources towards defeating the first proposal would be justified because it would indicate to any other potential applicant that gaining approval would require the investment of significant time and money".

[Source: Sutherland Shire Council - 29 April 2009, in its Submission to: the Standing Committee on State Development, Legislative Council, NSW Parliament House.

RE: Inquiry into the NSW Planning Framework (Submission 46)

This sort of frustration of LEP provisions through the DCP has been going on for

many years. I can recall a Court case in Willoughby some 15 years or more ago, where although the height limit the Local Environmental Plan was for 7 storeys and Council had previously allowed a building of that height, 7 storeys became unacceptable when Politicians or Officers came along. As the Council did not agree with the LE height limit they used the DCP to limit the height to just 2-3 storeys through imposition of building envelopes.

More recently, in the case of an Islam Prayer Hall in the Hills Shire, where Shire President is quoted as telling a strong meeting of Objectors that "If let these people come here our wives and daughters will not be safe". Such response could be expected in the "c north" of Sydney as was also illustrated by the objections received by Council



DCP Controls are often used to defeat LEP provisions, for example in where LEP building height standards are deemed as unacceptable

some 5000 from about 500 hundred families in the area. In spite of all this the officers fairly assessed the application and recommended approval. Councillors did not accept the recommendation and the project was approved by the Court. A subsequent Section 96 also had to be approved by the Court.

However given the location and Councillor attitudes it was not long after the first Court approval that a provision to prevent such facilities being built in a rural zone appeared in Council's DCP. The provision limited 'hard surfaces' to 2500 sq m on a 2 hectare allotment and to make sure included the effluent disposal area as a "hard surface". The Annangrove facility had a hard surface, building and parking area of approximately 3000 sq m and by putting the effluent disposal area into that brings the figure to approximately 5000 sq m. The way the system works the Annangrove Prayer Hall could not now get a recommendation for approval under Council's current controls, and perhaps not even an approval in the Court.

The "hard surface" provision effectively discriminates against the non-Christian religions in the Shire, because apart from Hill Song it is unlikely that any other Christian type group would get the attendance numbers to require a hard surface area in excess of the 2500 sq m. The large hall with car parking and effluent disposal area that would be required by an Islamic Prayer Hall or Hindu Temple could not meet the hard surface criteria on a site in a rural-residential zone that would otherwise be ideal.

Some Councils who want to make things really difficult make a new DCP or new Chapter in the DCP for a single use such as a brothel or prayer hall.

It is hoped that the new Act will see provisions to prevent the unfortunate practices that many Councils use in their DCP to prevent uses they do not like where the LEP permits them. ■

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