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The Research Director
State Development, Infrastructure and
Industry Committee
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Submission
Sustainable Planning and Other Legislation Amendment Bill 2012

Summary

This submission is limited to the proposed changes to the Planning and Environment Court.

The guiding principle in relation to creating an effective dispute resolution system is that the cost, complexity and duration of that system must bear some relationship to the value and complexity of the development proposed.

Currently, the Planning and Environment Court's dispute resolution system does not conform to this principle.

This is most acute for small to medium sized developments, in respect of which applicants (in particular) find the cost and duration of the dispute resolution system to be prohibitive.

It is not as if there is an absence of financial resources to fix this problem.

Currently, financial resources applied by all parties to a dispute are directed towards bolstering their adversarial positions – employing barristers, solicitors, experts etc. In addition for applicants, holding costs and opportunity costs quickly overwhelm the viability of a proposal, irrespective of its merit.

Yet very few of those resources (the Notice of Appeal filing fee is the only direct contribution to the Court) are given to the decision-maker (i.e. the Court) to decide the dispute.

The dispute resolution system will work much better if:

A. Less financial resources are directed by the parties towards bolstering their adversarial positions

B. More financial resources are directed by the parties to the dispute resolution body decision-maker, allowing the decision-making body to be more effective.

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Warning to the Committee

The Committee will receive many submissions about the Bill.

Care needs to be taken accepting statistics in those submissions.

A boast that the Court receives few appeals is:

A. less likely to be an endorsement of the correctness of local government decision-making

B. more likely to indicate that the current dispute resolution system is costly and not accessible

A boast that the parties settle most disputes in the Court:

A. might be a further indication that the current dispute resolution system is costly and not accessible, because it cannot be pursued through a hearing process

B. fails to take account of:

   i. the motivations for parties settling

   ii. whether the parties are satisfied with the outcome

   iii. whether the development (if it is approved) remains viable and proceeds

An accessible dispute resolution system is likely to produce a higher number of appeals and hearings than is presently the case.

But in respect of each dispute, the overall cost and duration of that system would be expected to be significantly less in order to promote the higher numbers of appeals and hearings.

Individual participants, in those circumstances, are likely to be more satisfied with the dispute resolution system even though there is a higher number of appeals.

Delegation to the Registrar

We applaud a system that allows the Judge to delegate the decision-making function to a non-Judge using a less formal process.

However, we have real doubts:

a) That the Court will ever be properly resourced to employ additional Registrars, who will inevitably be required, if this delegated function is to be reasonably available to the Judges of the Court and the parties to disputes. Until that occurs, disputes will remain before a Judge, with the additional threat of an expanded costs power

b) About the ability of the Court, bearing in mind the limits of salaries that may be offered to Registrars, to attract individuals with sufficient skill and experience to effectively perform such an important role.

Costs

We oppose the changes to the costs provisions.

An expanded opportunity for the Court to award costs necessarily leads to the Court being less accessible than it is now. This is bad for all stakeholders.

What the Bill <u>should</u> do

We support measures that make the dispute resolution process more accessible, meaning that disputes must be resolved more quickly, with less formality, and at less cost to all of the parties.

Our preference would be:

a) There should be a single body for the filing of appeals. This avoids unhelpful disputes about whether one appeal body or another has jurisdiction to hear the dispute. Should the Building and Development Committees continue?

b) The appeal body should decide, on a case by case basis, how each appeal is to be dealt with taking into account the value and complexity of the development proposed. The Planning and Environment Court is best charged to make those decisions.

c) The power to delegate to a less formal decision-maker should be a power to delegate the dispute to QCAT. QCAT already has significant infrastructure and systems to deal with disputes. The Building and Development Committee system should be abandoned.

d) QCAT will need additional Members. For the most part, those Members should be Sessional Members.

e) The Sessional Members should be experienced barristers, solicitors, town planners, architects, engineers, and so on, with significant experience already in Planning and Environment Court matters.

f) Ideally, for each dispute, there should be one legally qualified Sessional Member, who may sit with technically qualified Sessional Members as the circumstances of the case require. Over a period of, say, 5 years, non-legally qualified Sessional Members will amass a body of knowledge and experience in relation to dispute resolution so that it may no longer be necessary for a legally qualified Sessional Member to sit on all disputes.

g) There would be a number of individuals who would consider Sessional appointment on the basis that their remuneration is as close to what they would earn in the private sector. So, for example, there are likely to be a number of barristers who would entertain Sessional work if their brief fees are paid at close to normal commercial rates.

h) The costs of the Sessional Members should be paid, in whole or in part, by the parties. This is how more financial resources are applied to resolving the dispute and less to bolstering adversarial positions. For parties, the overall cost of the dispute

should be less, because the Sessional Member will deal with the dispute in a quicker and less formal way, avoiding the larger outlays that parties presently incur with their barristers, solicitors, expert witnesses and so on.

i) An additional source of funding might be a fee, calculated by reference to development application fees, that is to be directed to the Court and QCAT to fund the dispute resolution system. For example, the development application required to be paid will be the fee, plus 5% of the fee. Most applicants would not quibble about paying higher fees if the dispute resolution system is quicker and cheaper than it is now. It would seem that time, itself, is usually an applicant's greatest cost.

Disclosure

This firm acts exclusively for developers (mums and dads, business, developers proper, and not-for-profit organizations) in disputes before the Planning and Environment Court.

But members of the firm have seen firsthand, time and time again, applicants give up in respect of their meritorious development proposal because of:

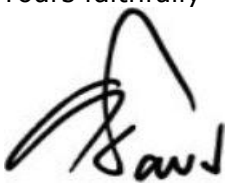
A. the cost of the dispute resolution system; and

B. the gaming of that system by:

    a. local governments, mostly for political purposes

    b. submitters, for NIMBY, for political, or for ideological purposes.

Yours faithfully



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