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The Research Director
State Development, Infrastructure & Industry Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: sdiic@parliament.qld.gov.au

Sustainable Planning and Other Legislation Amendment Bill 2012

Dear Director

This is a supplementary submission which expands upon my submission that was lodged on 12 October 2012 and is made after considering the other submissions.

"Thin Cases"

Many of the submissions that have been lodged with the Committee refer to appeals by interested community members.

A greater impact of the existing costs rules is on small and medium developers who are faced with "thin cases", or cases with little merit, brought by third parties, and also "thin cases" maintained by local government.

It is true that local governments refuse development applications that on their merits should be approved. In some cases this is for political reasons. Generally, if in any doubt, a local government will refuse, or not decide an application, and wait and see if the applicant proceeds with an appeal. Under the current costs rules, the developer faces a local government with deep pockets and a significant cost to proceed to a hearing.

Many developers choose not to appeal due to the cost involved, or to make the commercial decision not to challenge the Council's decision, even though that decision is wrong and in some cases oppressive.

Fortunately many local governments act with integrity and resolve cases in the ADR process. However, from time to time, local governments proceed with defending cases on grounds that are without merit.

If the costs rules are reversed, then these problems will increase as small and medium sized developers will not want to take the risk of a costs order against them. However, the "bolting on" of case appraisal to the existing mediation and joint expert reporting process would:

(a) result in appeals relating to small and medium developments being resolved faster and at less cost to all parties and at less cost to the Court;

(b) better access to justice for small and medium developers;

(c) improved independent oversight of the decision making of local government, which would mean that development applications would be assessed more fairly prior to the appeal stage;

(d) allow for interested third parties to understand the applicable facts and the law and to put their case to an independent arbiter, and for all parties to obtain a fair and fast resolution of the matter.

Commercial Competitor cases

In my opinion the proposed changes would not stop commercially motivated appeals, but instead would escalate these appeals to wars of attrition.

A better outcome would be for the Act to specifically state that costs must be awarded against a commercial competitor if it loses an appeal. Costs should not be awarded against the developer or the Council in appeals of this nature (regardless of the outcome) for the reasons discussed below.

In some cases, a costs order against a commercial competitor would still leave the competitor with a commercially beneficial outcome. Consideration should be given to costs being on a penalty basis to reflect the commercial benefit obtained by the commercial competitor in pursuing the appeal, for example, the benefit in trade obtained by delaying the construction of a competing shopping centre.

The proposed amendments as they are would be likely to lead to small and medium developers being severely disadvantaged.

For example, a small or medium developer wishes to build a retail development within the catchment of an existing large shopping centre. The owner of the existing shopping centre may object to the development and file an appeal, or pursue an originating application if the development application is code assessable.

The developer will be faced with a well resourced opponent, and the Council will be faced with the choice of whether to side with the well resourced objector, or side with the small or medium developer.

Inevitably, Councils will side with the objector because the risk of a costs order will be lower and if a costs order is made it will be split with the objector. Consequently, the small or medium developer will face the prospect of paying the costs of the well resourced objector who is likely to run a thorough case, and also pay the Council's costs.

Most small and medium developers would walk away from the development.

In addition, over time, the decision making of local government would become tainted in favour of well resourced existing owners and against competing new development. The local government would know at the decision stage of the assessment process that the matter was heading for an appeal, and accordingly the local government would be more likely to refuse the application to minimise its exposure to a costs order and avoid the embarrassment of changing its position in the appeal process from an approval to a refusal, to align its position with the competitor.

A specific provision to require a commercial competitor to pay costs, on a penalty basis, but with the developer and the Council not being exposed to a costs order, would stop commercially motivated appeals and at the same time encourage small and medium developers and maintain the integrity of the Council's decision making.

Practical Consequences

Mediations are likely to be more efficient if the ADR Registrar is given the power to make case appraisal decisions and is encouraged to do so. For example, it is a common problem that submitters do not appreciate that the Court is not the planning authority.

Currently, the ADR Registrar (and in many cases the legally represented parties) explain the settled principles in the practice of the Court to the submitter parties, but the submitters proceed with the case nevertheless and the Court decides the case against them squarely on the principles discussed at the mediation.

If the ADR Registrar made a case appraisal decision as part of the ADR process, then this would not occur. The submitters would retain the right to proceed to a hearing, but would face a costs penalty for not accepting the case appraisal decision. In addition, mediations would be shortened and more focussed as the ADR Registrar could make an interim ruling that a particular issue will be determined in a certain way and therefore further time would not be wasted on seeking to persuade submitters that they should concede that point.

It may be the case that there is an increased demand for use of the ADR process if case appraisal was bolted onto it. However, the existing *Uniform Civil Procedure Rules 1999* ("the UCPR") provide for the costs of ADR to be set and apportioned between the parties. Accordingly, the framework for resourcing the ADR process already exists and would not add any costs to the existing Court budget.

Currently, there is, in practice, a presumption in favour of appeals being referred to mediation and in favour of the use of the joint experts' reporting process. A similar presumption should apply in favour of a case appraisal decision being made once the mediation and joint expert reporting process has run its course. In most cases, this would leave only a few issues to be resolved by the case appraiser who would in most cases be the ADR Registrar.

Without case appraisal, third party appeals will continue, with impecunious litigants and organisations created to run appeals. The Court will be required to determine whether or not appeals on important issues will be heard with or without security being given for costs. With case appraisal, third parties could have their say and obtain a determination by an independent entity. It would be rare for such cases to proceed to a hearing, regardless of the case appraisal decision.

The existing UCPRs allow the ADR Registrar as a case appraiser to order costs. This would safeguard against frivolous appeals and abuse of the ADR system.

Summary

In summary:

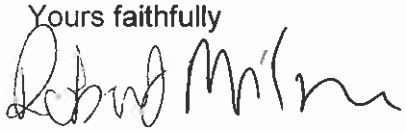
(a) if the existing case appraisal system under the UCPRs is adopted in the ADR process in the Court, there is no need to reverse the costs rule, as the existing UCPRs would impose the same effect;

(b) the proposed amendments willnot stop commercial competitor appeals, and are likely to cause other problems, but a specifically worded amendment would have this effect.

Even if the costs rule is reversed, case appraisal should be embraced as part of the ADR process as it will level the playing field between those with deep pockets, and those without (including small and medium developers). It will also be a fair, fast and independent system which will be likely to increase access to justice and reduce the number of appeals proceeding to a hearing, thereby saving costs across the board.

Please contact Robert Milne on 3229 8226 if you have any queries.

Yours faithfully



Robert Milne
Principal