An Update on Complying Development in NSW

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Introduction

Sixteen years on from the introduction of private certification of planning and building approvals in NSW, the concept of complying development is beginning to play a significant role in the development assessment system.

Amendments to the NSW Environmental Planning and Assessment Act 1979 made in 1998 introduced the concept of private certification into that Act. The 1998 amendments to the EP&A Act established a system of private certification which enabled suitably qualified and accredited individuals to issue a range of certificates authorising land use and building works. A principal purposes of the 1998 amendments was to “allow the customer to choose” between a council or an accredited certifier when seeking regulatory approvals.¹

One of the certificates able to be issued after the 1998 amendments was a complying development certificate, or “CDC”.² The complying development pathway of project assessment was intended to simplify the assessment process for small scale routine development and building work such as alterations and additions to a single dwelling.³

A CDC is part planning approval and part building approval. Although it sits within Part 4 of the EP&A Act, which deals with planning approvals, conceptually it also sits within Part 4A of the Act, which deals with building approvals. A CDC shares a number of characteristics with certificates under Part 4A, including the ability to be issued by an accredited certifier and the level of detail that must be submitted. A CDC, once issued, in effect serves as a construction certificate.⁴ The relationship between complying development and Parts 4 and 4A of the EP&A act is illustrated in Figure 1 below.

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¹ NSW Parliament Hansard, Legislative Council 5 December 1997
² The other types of certificates are construction certificate, compliance certificate, occupation certificate, subdivision certificate.
³ NSW Parliament Hansard, Legislative Council 5 December 1997
⁴ A construction certificate is not required prior to commencement of a development for which a CDC has been issued (see section EP&A Act 77(b), which exempts complying development from section 81A)
Complying development is formally defined as development or a class of development specified in an environmental planning instrument that may be addressed by specified predetermined development standards. A CDC is a certificate that:

(a) states that particular proposed development is complying development and (if carried out as specified in the certificate) will comply with relevant development standards and prescribed controls; and

(b) identifies the classification of the building in accordance with the Building Code of Australia.

Unlike the other forms of certificates under Part 4A of the EP&A Act, the CDC authorises the use of land as well as the construction of a building. This is significant because the assessment and determination of a land use application often involves the application of subjective criteria, as opposed to an application for building work, which typically involves the application of objective, measurable standards.

A CDC may be issued by a council or an accredited certifier. The latter is “the holder of a certificate of accreditation as an accredited certifier under the Building Professional Act 2005 in relation to those matters.”

The take-up of complying development and the Codes SEPP

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (“Codes SEPP”) commenced in February 2009. It was the first serious attempt by the State Government to advance the take-up of complying development. Although the concept of complying development had existed in the legislation since 2008, its take up relied entirely the making of subordinate legislation in the form of an environmental planning instrument declaring types of development as complying development. Prior to the commencement of the Codes SEPP, the only environmental planning instruments that declared development as complying development were local

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5 Section 76A(5) EP&A Act
6 Section 85 EP&A Act
7 Section 4(1) EP&A Act
environmental plans prepared by individual local government authorities. This was an ad-hoc approach to complying development and stymied its take up.

The Codes SEPP was the first State wide environmental planning instrument dealing solely with exempt and complying development. The Codes SEPP applies to all land within the State of NSW, with only minor exceptions. In doing so, it enabled for the first time since 1998, a co-ordinated and consistent approach to complying development, across all local government areas in NSW.

The Codes SEPP is evolving. When it first commenced the Codes SEPP contained only a single complying development “code” relating to dwelling houses in residential zones. Now, in September 2014, the Codes SEPP contains numerous codes relating to:

- dwellings in rural zones
- alterations and additions to dwellings in residential zones
- bed and breakfast accommodation
- home businesses
- community events
- change of use
- alterations to retail and commercial premises
- signs
- commercial and industrial development
- subdivision
- demolition
- fire safety.

Complying development also features in other State Environmental Planning Policies. For example, *State Environmental Planning Policy (Infrastructure) 2007* (“I SEPP”) identifies as complying development certain types of development undertaken by or on behalf of public authorities and other private development. The construction of, or alterations or additions to an existing school or TAFE and small wind turbines are examples of complying development under I SEPP. *State Environmental Planning Policy (Affordable Rental Housing) 2009* also identifies certain types of secondary dwellings and group homes as complying development.

As it evolves, the Codes SEPP is being taken up by an increasing number of people wishing to carry out development. Statistics collected on an annual basis by the NSW Department of Planning and Environment show a steady increase in the number of CDCs issued since the commencement of the Codes SEPP in 2009. The charts at *Figures 2 and 3* below show, for the period 2005/2006 to 2012/2013, a steady increase in the total number of CDCs issued per year (Figure 2) and a steady decrease in the total number of development applications approved per year (Figure 3).

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8 Clause 1.4 Codes SEPP
Figure 2 shows that the number of CDCs issued in NSW declined between 2005/2006 and 2008/2009, but has progressively risen since then from 9,100 in 2008-2009 to 19,100 in 2012-2013. The turn-around between 2008/2009 and 2009/2010 can probably be attributed to the commencement in the Codes SEPP in February 2009. Amazingly, in 2012/2013 92% of all CDCs were determined under the Codes SEPP, compared with 88% in 2011-12.\(^9\)

An inference can be drawn from the number of development applications approved during the period 2005 to 2013 that the increase in CDCs was \textbf{not} due to a general increase in development activity. Figure 3 above shows that during the same period the number of CDCs increased while the total number of development applications approved fell.

\(^9\) Local Development Performance Monitor 2012/2013.
Figure 3 also illustrates that the Global Financial Crisis in 2007/2008 had only a short term impact (if at all) on the development activity at the lower end of the scale of development.

Figure 4 below shows the number of CDCs as a percentage of total development approvals (CDCs and DAs) in NSW between the period 2005/2006 and 2012/2013. CDCs now account for just over 25% of all approvals issued in NSW. No surprisingly, given the trends evident in Figures 2 and 3, the numbers show a steady increase in the number of CDCs issued as a percentage of all approvals. The above analysis clearly demonstrates that the Codes SEPP is starting to have a real impact on the development assessment and approval regime in NSW.

Figure 4: CDCs as a Percentage of all approvals (NSW DoP, Local Development Performance Monitor)

Appeal Rights and Case Law

There is no right of appeal against the determination of, or a failure or refusal to determine, an application for a CDC. Therefore, there are no reported decisions dealing with the merits of complying development applications.

Any person may commence proceedings in the Land and Environment Court to remedy or restrain a breach of the EP&A Act. These appeals are applications for judicial review heard by the Court in its class 4 jurisdiction. Only a handful of cases dealing with complying development have been decided, and all of them are third party judicial review appeals. The granting of a CDC in circumstances where the proposed development was not a type of complying development is a breach of 85A of the EP&A Act, and the carrying out of that development purportedly pursuant to that certificate is a breach of section 84A of the EP&A Act.

It is clear that the Land and Environment Court is quite readily prepared to make a declaration that a complying development certificate is invalid if the Court is satisfied the development the subject of the certificate did not comply with a requirement of the Codes SEPP.

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10 Section 85A(10) of the EP&A Act
11 Section 123 of the EP&A Act
The only two decisions of which I am aware are *Bankstown CC v Bennet* [2012] NSWLEC 381 and *Blacktown CC v Haddad* [2012] NSWLEC 224. In *Bennet* the Court considered the validity of a complying development certificate issued by a private certifier (Bennet) authorising the construction and use of a new secondary school building. The Council claimed the development the subject of the certificate was not complying development because it was not located on land within the boundaries of an "existing school" as required by clause 31A(1) of ISEPP. The Court accepted the Council's submission that in order for the development to be complying development the existing school must be a lawful use, which, unfortunately for Bennett, was not the case. The Court held that:

“Plainly, on any purposive approach to the construction of cl 31A(1) [of the I SEPP], the power contained in the sub-clause to issue a certificate may only be exercised in respect of development carried out on land in respect of which there is consent to use the land for the purpose of a school, and which is in fact being used, at that time, for that specified purpose.”

In *Haddad* the Land and Environment Court was asked to determine whether a CDC issued for the "construction of a two storey permanent group home comprising of 29 bedrooms and associated facilities" issued pursuant to *State Environmental Planning Policy (Affordable Rental Housing) 2009*, was invalid. The issue for the Court was whether the proposed development satisfied the criteria of a "permanent group home" as required under the SEPP. The Court held that the proper characterisation of the proposed development was a jurisdictional fact, meaning it was a fact reviewable by the Court, and one which was to be determined “regardless of how a proponent may describe the proposed development”.

After considering the meaning of the words “dwelling”, “single household”, “permanent” and “socially disadvantaged” the Court held that the proposed development was not properly characterised as a permanent group home and the certifier had no power to issue the CDC.

The breaches of development standards in Bennet and Haddad were fundamental, both being a failure to properly characterised the proposed development. It is not clear from these decisions whether any breach of a standard applying to complying development, no matter how small, will result in a declaration of invalidity. Whether a minor breach of a development standard, for example a setback requirement, will result in a declaration of invalidity is yet to be determined by the Court. The answer will depend on the application of principles of statutory interpretation and cases such as *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 195 CLR 355.

The paucity of case law on complying development is surprising giving the volume of certificates issued. Perhaps the absence of challenges is due to the cost of commencing proceedings.

**The Future of Complying Development**

Complying development was an element of the NSW Government’s planning law reforms that culminated in the introduction of the Planning Bill 2013 in Parliament in late 2013.12 Under the Bill, an application for a CDC was to be made to a certifier, and standards for complying development were to be contained in a “development code or guide provisions of the local plan”. A notable difference to the current Act was that under the Planning Bill an applicant for a CDC could apply to the Council for a variation certificate that, if granted, would allow a variation to the standards for

12 Planning Bill 2013, Part 4, Division 4.3
complying development in the development guide provisions. The Planning Bill 2013 has stalled in the Upper House of the NSW Parliament, and appears to have died a natural death.

Absent the passing of the Planning Bill we may see the continued evolution of the Codes SEPP, and perhaps also a splitting of the Codes SEPP into individual Policies. We may also see more types of complying development incorporated into local environmental plans and other State Policies such as the State Environmental Planning Policy (Sydney Region Growth Centres) 2006. We are already seeing some councils extend the scope of complying development by amendments to their local environmental plans. The continued evolution of complying development in this way will result in a continuation of the trend toward an increase in the number of CDCs issued in NSW.

Another trend, evidenced by recent amendments to the Environmental Planning and Assessment Regulation 2000, is an increase in public notification, and hence transparency, of CDC applications. Clause 130AB of the Regulation commenced on 22 February 2014 and requires a certifying authority to notify the occupiers of nearby dwellings prior to issuing a complying development certificate for the following types of development:

(a) development specified under any SEPP or LEP that involves construction of a new dwelling or an addition to an existing dwelling,
(b) demolition under the Codes SEPP;
(c) secondary dwellings or group homes under the Affordable Rental Housing SEPP.

The purpose of the notice is not to invite comments on the application, rather it is to encourage the recipients of the notice to discuss their concerns directly with the applicant directly. Prior to the commencement of clause 130AB, the only notification required in respect of complying development was notification post approval.

Further work needs to be done to reduce the complexity of development standards for complying development. The Codes SEPP, as it presently stands, is complex and difficult to navigate even for those involved in the industry. One of the reasons why the standards are so complex is to avoid private certifiers making discretionary decisions on subjective issues such as impact on amenity, streetscape and character. The use of discretion is avoided by the identification of pre-determined by development standards dealing with elements of building design in precise detail. The theory is that adverse impacts can be designed out of new development. The standards might be simplified by either allowing accredited certifiers to make discretionary decisions on a site by site basis, or a precinct based approach to the identification of development standards so that constraints can be sifted out at the policy development stage.

**Industry Support for Complying Development**

There is support for complying development across a range of industry groups. Industry groups such as the planning profession’s Planning Institute of Australia (“PIA”) and the developer advocacy group, the Urban Taskforce, regard complying development as a means to achieve change,
particularly if the Planning Bill is not passed. In its submission to the Minister for Planning dated 13 December 2013\(^{15}\) in response to delays to the Planning Bill 2013, the Urban Task force said:

_Recently the Government expanded the Codes SEPP to include industrial development not exceeding 20,000sqm to be considered as complying development. The Codes SEPP could be expanded to include say residential flat buildings not exceeding 25 metres within appropriate zones and locations to be considered as complying development._

_We strongly supported Code Assessment and this should be clearly in the new Planning Act. However if this is not to eventuate, then the wider use of non-discretionary development standards and/or the expansion of the Codes SEPP within the existing planning system should be pursued._

PIA said in a submission to the Minister for Planning and Environment on 9 July 2014\(^{16}\) that:

_Complying development provides a certain and objective assessment of development types which meet nominated and set rules. Currently, complying development is used for the assessment of lower risk development types such as dwelling houses, shop and office fit outs, development of industrial land and certain public works. The complying development provisions were introduced in 1998 and now represent approximately 25% of all development assessment in NSW. There is no reason as to why further improvements on this 25% level cannot be achieved. The following could be considered and implemented to further increase the use of complying development:_

- ongoing investment in electronic codes and greater public promotion of complying development
- the creation of area or precinct specific codes to allow a greater range of development as complying development following a master planning processes
- draft provisions into complying development rules that would provide for ‘near misses’ with appropriate assessment and consultation regarding those elements.

These submissions show that complying development has support among both developer advocacy groups and planning profession organisations. To the extent that those groups might influence Government policy, complying development is likely to continue to be part of the regulatory regime for development assessment in NSW.

**Conclusion**

Data published by the Department of Planning in the Local Development Performance Monitor over the period from 2005 to 2013 clearly shows the increased popularity of complying development. This appears to be due in large measure to the Codes SEPP, introduced in 2008. It is likely that the Codes SEPP, other State policies and local environmental plans will continue to expand the types of development for which a CDC might be issued. As the number of CDCs issued increases we may also see an increase in the number of judicial review applications to the Land and Environment Court.

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