A new Planning Act: Planning Panels and Appeal/Review Rights

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Planning Panels – JRPP and PAC is there cause for concern?
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- Radical change in policy from a decentralised planning assessment system to a centralised planning system
Planning Panels – JRPP and PAC is there cause for concern?

- Radical change in policy from a decentralised planning assessment system to a centralised planning system

- Is there a valid basis for their introduction?
“Consent authority” (sect 4 EP&A Act)

- Pre 2008: council, Minister, public authority or s118 panel
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- Pre 2008: council, Minister, public authority or s118 panel
- Post 2008: council, Minister, PAC, JRPP, public authority or s118 panel
Local Government Act Perspective
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• No material change in form post 2008
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- Significant indirect change in policy
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  - Power to delegate, superfluous for significant DAs
Local Government Act Perspective

• No material change in form post 2008
• Significant indirect change in policy
  o Diminution of functions
  o Power to delegate, superfluous for significant DAs
  o Reduced opportunity for elected members to represent the interests of residents and ratepayers
## DA Determinations 2005 - 2010

<table>
<thead>
<tr>
<th>Year</th>
<th>Total DAs/s96/CDC determinations</th>
<th>% of all DAs determined by elected reps</th>
<th>% of all DAs refused by Councils and (elected reps)</th>
<th>JRPP total DAs determined</th>
<th>% of JRPP DAs refused</th>
</tr>
</thead>
<tbody>
<tr>
<td>05/06</td>
<td>117,923</td>
<td>4%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>06/07</td>
<td>111,914</td>
<td>4%</td>
<td>3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>07/08</td>
<td>108,336</td>
<td>3.6%</td>
<td>3%</td>
<td></td>
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<tr>
<td>08/09</td>
<td>95,807</td>
<td>3.8%</td>
<td>3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>09/10</td>
<td>100,868</td>
<td>3%</td>
<td>3% (10%)</td>
<td>102</td>
<td>15.6%</td>
</tr>
</tbody>
</table>

Planning Panels: Purpose
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• Strengthen public confidence

Source: Hansard 4 June 2008
Planning Panels: Purpose

• Strengthen public confidence
• Increase transparency and objectivity

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Planning Panels: Purpose

- Strengthen public confidence
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- Depoliticise the development assessment process

Source: Hansard 4 June 2008
Planning Panels: Purpose

• Strengthen public confidence
• Increase transparency and objectivity
• Depoliticise the development assessment process
• Reduce corruption risks

Source: Hansard 4 June 2008
Planning Panels – the real questions
Planning Panels – the real questions

• Do elected representatives have a legitimate role to play in the determination of DAs?
Planning Panels – the real questions

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- Do planning panels result in better quality decisions?
Other Planning Panels
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- South Australia since 2001, reviewed in 2006
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- Western Australia in 2011, modelled on JRPP
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- Central Sydney Planning Committee since 1988
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- IHAPs operating at various Councils
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- South Australia since 2001, reviewed in 2006
- Western Australia in 2011, modelled on JRPP
- Central Sydney Planning Committee since 1988
- IHAPs operating at various Councils
- S118 Panels (Wagga, Burwood, Cessnock and Ku-ring-gai)
Commentary on Planning Panels

- Development Assessment Forum (2005)
- Allan Report (LGSA 2006)
- ICAC (2007)
- CSPC Review (2010)
- DoP Review (2010)
DAF (2005)

• Professional determination (council planners) for most applications (Leading Practice No. 8)
• All other DAs determined by an expert panel

- 912 households surveyed across metro, regional, rural and remote areas
- Preferred decision maker:
  - 36% favoured independent panel
  - 26% favoured elected representatives on advice from panel
- Final report recommended independent panel with advisory powers only (Rec 18)
Figure 1 (Source: IRIS Research Ltd 2005)
Figure 2 (Source: IRIS Research Ltd 2005)
ICAC (2007)

- Panels not a complete answer to corruption, merely transfers the risk
- Council officials just as susceptible to corruption as councillors
- Existing IHAP arrangements could be used for risky DAs

- IHAP created in 2003, reviewed in 2008
- Review included public consultation on options
- Majority of submissions favoured retention of panel and expansion of functions
- Now “WDAP” has authority to determine DAs
CSPC Review (2010)

- Established in 1988, reviewed in 2010
- 3:4 membership (elected reps:experts)
- Review considered 115 written submissions (incl elected reps, developers, advocacy groups and community groups)
- Majority supported continuation of the Panel
DoP Review of JRPPs (2010)

- Analysed first 9 months of JRPP operations
- Annual operating cost: $2.4M
- 7 of 151 councils refused to nominate reps
- Average assessment time: 105 days (cf 249 council assessment for similar value DAs)
DoP Review of JRPPs (2010)

- 1 of 54 determinations not in accordance with council recommendation
- 16 % (16/102) of all applications refused (DoP Performance Monitor)
The Future of Planning Panels

- Too early to gauge success, but here to stay in the medium term
- Requires further, targeted survey and analysis of panel decisions (focus on the public interest)
- Functions of councillors and councils under the Local Government Act must be considered
- Risks need to be considered
Risk: Discretion and Policy

“But because some important policy issues are not fully resolved at the strategic planning stage, de-facto policy-making occurs during development assessment and rezoning where significant discretion is exercised.”

(Productivity Commission 2011)
Appeal/Review Rights under a New Planning Act

Underlying concepts:

• Public law context: public rights not personal rights
• Appeal rights are a means of protecting public rights and ensuring integrity, certainty and public confidence
Hierarchy of Appeal/Review Rights

1. Merit Appeal and Judicial Review
2. Internal Review
3. Judicial Review

“There should be a correlation between an appeal right and the risk of a decision undermining the integrity, certainty and public confidence in the planning system.”
Merit Appeals by Applicants

• Required for certainty and confidence
• Exclude CDC applications (low risk)
• Allow for spot rezonings (high risk)
Merit Appeals by Applicants

- Required for certainty and confidence
- Exclude CDC applications (low risk)
- Allow for spot rezonings (high risk)
- *Extinguished by public hearing? (proposed s97(7))*
- Procedures for amended plans
- Appeals to be assessed under same policies and rules as DA determination
Merit Appeals by 3rd Parties

Allow where:

- risk of corruption is high
- significant departure from policy
- conditional permissibility category
Merit Appeals by 3rd Parties

Allow where:
• risk of corruption is high
• significant departure from policy
• conditional permissibility category

Exclude where:
• discretion is limited
• public enquiry
• trade competitor objector
Judicial Review

Allow for all decisions (continue current s123 provisions)
Please contribute to the Review

PIA Draft Submission
“The NSW Planning System: A Way Forward”

Submissions to PIA by 4 October 2011 via www.elton.com.au
Thank you!

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