



A Community Legal Centre specialising
in public interest environmental law

22 December 2011

Office of David Ridgway
Legislative Council
Parliament House
North Terrace
ADELAIDE SA 5000
Via email Cecilia.schutz@parliament.sa.gov.au

Dear Ms Schutz

Re: Developing a Better South Australia: A Discussion Paper

The Environmental Defenders Office of South Australia (EDO) is a community legal centre with over 15 years' experience specialising in public interest environmental and planning law. Engaging in law reform processes, including reviewing and proposing changes to environmental bills and legislation, forms an important part of our work and so we welcome the opportunity to make a submission with respect to this discussion paper.

In our view there are significant shortcomings with the planning system which include restrictions on public participation, limited environmental impact assessment and a flawed development plan amendment process. Reform is urgently needed.

The planning system should be based on the principle of achieving ecologically sustainable development with comprehensive public participation in the planning process. Public participation, transparent decision-making and rigorous environmental assessment are essential elements of a good planning system. Good process leads to good outcomes, whereas a rushed and discretionary process does not guarantee good outcomes for the environment and thus the community's interests are also compromised.

The creation of an independent Planning Commission will not necessarily assist with these difficulties but if it were to be implemented it should be;

- Accountable for its decision making;
- Required to engage in extensive and meaningful public consultation when developing policy and engaging in decision-making in general and;
- Properly resourced to carry out its functions.

In the rest of this submission we examine some of the areas where the present system is deficient and provide some suggestions for reform.

The following issues are covered:

- public participation-access to information, rights to make representations, appeal rights;
- major projects;
- environmental impact assessment; and
- development plans.

Public access to Information

Under the South Australian Development Act 1993 (the Act) planning authorities, mostly local councils, are obliged to make certain information about development applications available for inspection by members of the public. Some authorities take the view that in most cases, members of the public should have access to all relevant information on their files including detailed plans and also the reports prepared by Council planning staff. Photocopies of this material will often be provided on request. Other authorities have a somewhat restricted view of their obligations in that they only provide the bare minimum amount of information required to satisfy the legal requirements and never provide (or even sell) photocopies.

The result of this type of approach is often that representors appearing before planning authorities have only a fraction of the information held by either the proponent or the decision maker. When clients approach the EDO with this scenario, we encourage them to lodge an appeal, as that is the only way they can be assured of getting access to all the necessary paper work to help them form their views on the proposed development. In South Australia, for the \$198 appeal fee, members of the public can obtain a complete set of all the relevant paper work concerning a development and are also able to attend the pre-trial conference where important negotiations can take place. In effect, many members of the public have been effectively encouraged to commence legal proceedings in order to obtain full details about a development in relation to which they have legal rights of participation. This is not an efficient system.

The Development Assessment Commission (DAC) has a policy of making all information available to the public at least 5 days before its meetings and to provide photocopies on payment of a small fee. Unfortunately, there are still many local Councils which refuse this level of access, therefore potentially unnecessary appeals will still be lodged, simply to level the information playing field.

Recommendation

We recommend that the Act be amended to require all decision-making bodies to provide complete details of all development applications, including photocopies free of charge upon request from a member of the public.

Rights to make representations

Public participation in planning decision-making often involves members of the public being entitled to make submissions or representations to the decision making body. Ideally, this right should be exercisable in writing and/or in person. Under the Act however, only a small proportion of non-complying or other more controversial types of development attract this right. Whilst there is no limit on the amount of detail which can be included in written representations, it is common practice in most councils to allow only five minutes per representor for verbal submissions.

If citizens are to have confidence in planning decisions, then they need to know that these decisions are based on sound information, have canvassed all the relevant issues and have been subjected to a methodical, transparent and accountable decision making process. One of the best ways of instilling this confidence in the community is for decision makers to be required to give reasons for their decisions.

However administrators are usually reluctant to give reasons for their decisions and they rarely do so unless required to by law. Even then, they will often do the minimum they think they can legally get away with. The reasons for this reluctance are cultural and personal. At a cultural level within planning bureaucracies, "courage" is rarely appreciated by superior officers and a more certain path to career advancement would seem to be "head down, tail up and hide your mistakes". This approach is further supported by the legal secrecy and confidentiality obligations of public servants. Whilst 'whistle-blowers' protection laws already exist in many jurisdictions, these are generally regarded as ineffective and provide no incentive to public servants disclosing bad or improper decision-making practices.

From the perspective of the individual decision-maker, no-one likes to see their decisions pulled apart, analysed and perhaps over-turned. It is human nature to be defensive about our work and our reputations.

Planning officers often see their jobs as largely technical exercises which are beyond the understanding of the average citizen and therefore citizen participation is not to be overly encouraged. The prevalent view is that being obliged to give reasons for decisions would simply be a time-wasting exercise and would add nothing to the quality of decision-making. Even worse, having to give reasons for decisions would simply encourage appeals and other legal challenges.

Regarding decision-makers as the efficient and impartial enforcers of government policy is problematic in that it ignores issues concerning the criteria or principles used in making decisions.

We recommend that the Development Act be amended to provide for mandatory statements of reasons in planning decisions. Giving reasons for decisions would be an excellent way for citizens to better understand the role of planning decision makers. If the technical rationales for a planning decision were better understood, then communities would be more capable of assessing whether the relevant guidelines, principles and planning schemes actually do the job the community expects. If they aren't meeting their objectives, then law reform can be promoted to improve the outcomes of future decisions.

From the point of view of many of individuals and conservation groups, the key question for the relevant authority should be; "Is it a good idea to have this development in the local area?" From the decision-maker's point of view however, the only question is: "Is this proposed development seriously at variance with the relevant planning scheme [Development Plan]?"

Most people don't understand how the development assessment system works and many would assume that decision-makers have virtually unfettered discretion to make "good" decisions or "the right" decision. If a matter is challenged in the Environment, Resources and Development Court where reasons for decisions must be given, the real problem becomes clear, namely the provisions of a local Development Plan and accordingly scrutiny by the court could lead to changes to a Development Plan to better reflect the type of outcomes expected by the community.

Therefore there is a strong link between knowledge of the reasons for a decision and the ability of communities to better engage in planning law and policy formulation and reform.

Another reason for concluding that decision-making quality would improve if reasons were required to be given is the additional discipline on decision-makers that flows from such accountability. In our view decisions that are justified or supported in writing are more likely to be made with greater care and consideration. At worst, a requirement to give reasons probably makes it harder to make bad decisions and therefore more likely that good decisions will be made.

Recommendation

We recommend that the Act be amended to provide that reasons only have to be given in certain circumstances and not for every decision. This could be a two tiered process. First, it could be a requirement that all decisions of a certain kind (eg. major project approvals) must include published reasons. Secondly, there could be a general right to request reasons in certain circumstances. These proposals would require more resources than are currently applied to decision-making, however the cost could be justified in terms of more open and accountable government and also in improved quality of decision-making. For some agencies a new requirement to give reasons would be a difficult imposition onto existing structures. However, this is not an argument against these reforms, it is an argument for more independent resourcing of these bodies.

Some administrators, especially those exercising quasi-judicial functions, routinely provide reasons for their decisions because it is part of the culture of the organisation, not because the legislation requires them to. In most cases however, legislation is needed. However,

even when an Act or Regulations require reasons, administrators will usually do as little as possible to comply with this requirement.

For example, if a planning authority (such as the DAC) grants development approval and attaches conditions, it must give reasons. The relevant provision of the Act says (at s.42):

"notice of a decision on an application must be accompanied by details of any condition to which the decision is subject, and of the reason for the imposition of the condition"

The usual method of interpreting this provision makes it next to useless. The usual practice is to simply 'parrot' some words from the Act to show that a decision has been made according to law and to insert those words into every "reason" for a decision.

Case Study: Louth Bay tuna feedlots

Below are the "reasons" given by the DAC in approving 42 tuna feedlots in Louth Bay in 1999;

Reasons for Decision:

The proposed development is not seriously at variance with the relevant provisions of the Development Plan.

Reasons for Conditions

To ensure the development is of a high standard and to maintain the objectives of the Development Plan

That decision was subsequently successfully appealed to the Environment Resources and Development Court in what became the State's longest environment case in which 20 witnesses (mostly scientists and government officials) gave evidence over 3 weeks. If the original decision maker had been obliged to give proper reasons perhaps the DAC would have considered the issue more carefully and made a different decision. At the very least the DAC would have had to explain up front why they did not follow the advice of their own planner, the Coast Protection Board, the EPA and all public representations.

As for what constitutes "proper" reasons, this should include at least the following:

- *Findings on material questions of fact*
- *Evidence on which those findings were based*
- *Reasons for the decision.*

In addition, legislation could require a decision maker to address some of the grounds of judicial review in its reasons. The list in s.5 of *the Commonwealth Administrative Decisions (Judicial Review) Act 1977* would be a good starting point.

Case Study: Rezoning of Mount Barker

In 2010 a controversial rezoning of Mount Barker was approved by the Minister. The process for public consultation was managed by the Development Policy Advisory Committee (DPAC). This committee is an independent statutory body, established under the Act. The role of the Committee is to make sure that the Minister receives independent advice on the issues raised in the consultation phase and to make sure submissions are appropriately addressed.

The Ministerial decision was simply that the development plan amendment be approved. The DPAC's advice contained the critical information influencing the Minister's decision but the Act does not require this to be publicly disclosed. This caused a great deal of disquiet in the local community. When public pressure led to release of the report it was not released in full. The part that analyses the public submissions and also the final advisory map showing what areas DPAC recommended for rezoning was missing.

Recommendation

We recommend that the Act be amended to require disclosure of all DPAC advices.

Appeal rights

The right to appeal "on the merits" against decisions is limited to a small proportion of developments under the Act, namely those applications designated category 3. The policy basis behind this limitation seems to be a combination of the "floodgates argument" (if 3rd party appeals are allowed for all development approvals they will overwhelm the Court system) and a deeper philosophical view that disputes should only be recognised when they exist between the regulator and the regulated, (with no role for 'meddlesome' community groups or individuals).

On the evidence, the floodgates argument does not have much weight especially given the experience of many years of open standing provisions in NSW. An alternative and more positive view of third party appeal rights is that such rights promote better decision-making. If every decision was made in the knowledge that it could be reviewed by a higher Court or Tribunal, then this would impose considerable discipline on the decision maker to properly consider both the decision making criteria and the best available evidence.

Whilst the ability to appeal more planning decisions would add to the amount of litigation in the Courts, there is no evidence that this would constitute an unmanageable flood. In any event, there are a number of limiting mechanisms which exist. Clearly, the effort and expense of bringing legal challenges would provide one disincentive, whilst Courts themselves could be given the power to filter out unmeritorious appeals at an early stage.

Recommendation

We recommend that the Act be amended to allow merits appeals for category 2 matters.

Major Projects

A further issue raised in the paper is the major project or development process. There are in our view two major difficulties with this process.

Firstly, the Minister has a broad discretion as to the circumstances in which major project status is granted. There has been questionable decision making in this regard. For example a proposal for a pulp mill at Penola was not declared a major project but a supermarket at Victor Harbor was. In our view there needs to be a more transparent decision-making process combined with a requirement that the Minister provide a Statement of Reasons as to why a decision was made.

A second issue is the absence of rights of review in relation to major projects. Section 48E of the Act provides that:

No proceedings for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question-

(a) a decision or determination of the Governor, the Minister or the Major Developments Panel under this Division; or

(b) proceedings or procedures under this Division; or

(c) an act, omission, matter or thing incidental or relating to the operation of this Division.

This provision was inserted into the Act in 1996 despite the fact that such rights had very rarely (if ever) been used to delay or frustrate major projects. The stated rationale for removing these rights involved "perceptions" and "sending the right signals to prospective investors that South Australia is open for business".

Recommendations

We recommend that the Act be amended to:

- Provide further criteria describing the circumstances in which a proposal can be declared a major project;
- Require the Minister to provide a Statement of Reasons for declaring a proposal to be a major project; and
- Repeal section 48E.

Environmental Impact Assessment

The Act does not provide for mandatory environmental impact assessment in respect of all developments. Rather, the DAC determines the level of environmental impact assessment to be undertaken for any major project¹. Crown development and electricity infrastructure

¹ *Development Act*, section 46 (7),(8).

development are not required to undergo environmental assessment unless directed by the Minister². Where the Minister makes such a direction, the development cannot go ahead without the Governor's approval.³ As noted above decisions regarding major development are protected from review⁴. Such a privative clause is arguably unconstitutional in part⁵. Further, the Minister's decision regarding Crown development or electricity infrastructure development cannot be reviewed.

We are of the view that environmental impact assessment needs to occur more broadly and in particular where a proposal is likely to have significant impacts on a state listed threatened species and/or its critical habitat. Where there is an assessment this should be referred to an independent body such as the National Parks and Wildlife Council which has the power to direct consent authorities regarding the approval of the proposal.

Finally, the EDO has a long standing concern regarding the present practice of developers undertaking environmental impact assessment. In our view these should be carried out by independent assessors.

Recommendations

We recommend that the Act be amended:

- To require a statement of environmental effects to accompany a development application where:
 - the proposed development is likely to cause significant adverse impacts on listed threatened species and/ or their habitat;
 - native vegetation is likely to be cleared in contravention of the principles of clearance under the *Native Vegetation Act*.
- To require a Statement of environmental effects to identify the likely environmental impacts of the proposal and measures taken to reduce or eliminate these impacts.
- To specify how 'significance' is to be judged. The 7-Part test used in NSW could serve as a model.
- To require consent authorities to refer for direction all development applications accompanied by a statement of environmental effects or environmental impact statement to the National Parks and Wildlife Council or Native Vegetation Council, as the case may be.
- To require statements of environmental effects and environmental impact statements to be prepared by independent assessors funded via government and developer contributions.

² Development Act, section 49 and section 49A .

³ Development Act, section 49 (16a), section 49A (20). The Governor may issue his or her approval under section 48.

⁴ *Development Act*, section 48E.

⁵ *Kirk v WorkCover NSW (and Ors)* [2010] HCA 1.

- To require statements of environmental effects and environmental impact statements to be prepared in accordance with appropriate guidelines and address all types of impacts, including cumulative impacts.

Development Plans

Development Plans vary considerably in the extent to which they address environmental concerns. Plans should be written in a way which shows a comprehensive and consistent approach to these issues. In addition biodiversity mapping should be a requirement in all development plans

A further issue is environmental assessment of amendments to Development Plans. This is necessary to ensure that these instruments do not place undue weight on social and economic factors at the expense of environmental concerns including the clearance of native vegetation. More specifically, once the land is zoned, a landholder has a right to develop in accordance with the objectives and principles of development control set out in the development Plan for that zone⁶. Therefore, it is important that the placement of zones is undertaken with appropriate consideration for the protection of the environment particularly biodiversity conservation.

For environmental assessment of planning schemes and their zones to be meaningful, it must be performed by appropriately qualified individuals within specialist agencies⁷.

A final issue is that the Act requires that Development Plan amendments approved by the Minister must then be scrutinized by a Parliamentary Committee and if the Committee votes against it must be referred to the whole Parliament. However, even if the amendment is voted down eventually by Parliament developers have a window of opportunity to have applications processed under the Ministerial approved amendment as such applications must be assessed against the Development Plan (as amended) that was in force on the day an application is lodged. This makes a mockery of the process of scrutiny by Parliament.

Recommendations

We recommend that:

- That all Development Plans have a consistent and comprehensive approach to environmental issues.
- That all Development Plans are accompanied by comprehensive biodiversity mapping.
- That the Act be amended to provide that any proposed amendments to Development Plans be referred for direction to the:

⁶ Bates, Gerry, *Environmental Law in Australia*, 7th edition, LexisNexis Butterworths, Australia, 2010, p 252.

⁷ See Connolly, Isabelle and Fallding, Martin, *Biocertification of local environmental plans – promise and reality*, EPLJ, 26 (2009) who note at 130 that councils often lack staff with the training and experience to make decisions with respect to biodiversity conservation matters.

- National Parks and Wildlife Council which must then refer the matter to the scientific working group for appropriate scientific assessment of significant adverse impacts on listed threatened species and /or their habitat.;
 - Native Vegetation Council where as a consequence of rezoning it is likely that there will be clearance of native vegetation in contravention of the principles of clearance under the *Native Vegetation Act*.
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- That the Act be amended to provide that when considering any proposed amendments to Development Plans the Minister must ensure that they include adequate conservation measures.
 - That the Act be amended to provide that the Minister can refuse to approve proposed amendments to a Development Plan if it is likely to impact biodiversity and remnant vegetation to an unacceptable degree and is incapable of being made environmentally-acceptable.
 - That the Act be amended to provide that no amendment to a Development Plan may come into effect until after it has been through the Parliamentary scrutiny process.

Please contact Melissa Ballantyne should you have any queries in relation to this submission.

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