

Our Ref:

31 March 2017

Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001



PLANNING
PROJECT MANAGEMENT
ENGINEERING
CERTIFICATION

Dear Sir,

Submission on Planning Legislation Update – Subdivision Certification

Barker Ryan Stewart is pleased to provide a submission on the proposed update to the planning legislation. We fully support the NSW Government's initiative to update the legislation, but have some specific concerns relating to some aspects of the proposed Bill, which are outlined below.

Appointment of Principal Certifier

It is unclear as to whether the intent of the definition in the Draft Bill and Cl. 6.12(1) are to allow a private accredited certifier to be appointed as the Principal Certifier for subdivision works. S109E(2) of the current Environmental Planning and Assessment Act 1979 prevents the appointment of a private accredited certifier as a Principal Certifying Authority unless an environmental planning instrument allows such an appointment. At present, only two SEPP's and no Council LEP's allow such an appointment, which is making the current system unworkable for private accredited certifiers at present.

If the intent of the proposed legislation update is to allow a private accredited certifier to be appointed as the Principal Certifier, then we fully support this outcome, as it will create a level playing field between Council and private accredited certifiers and allow Developers to make a defined choice in choosing a certifier, which currently does not exist.

If the intent of the proposed legislation update is not to allow a private accredited certifier to be appointed as the Principal Certifier for a subdivision, then based on the current wording of the Draft Bill, this will have terminal consequences for the ability of private accredited certifiers to provide certification services to the development industry for subdivision developments. This issue is further detailed in the following sections.

Subdivision Works Certificate

It is apparent that the Subdivision Works Certificate is proposed to replace the Construction Certificate as the means by which approval is provided to undertake subdivision works. However, Cl. 6.5(2)(a) of the draft bill states that the Subdivision Works Certificate can only be issued by the Principal Certifier. Assuming the Principal Certifier is equivalent to the PCA under the current legislation, this restriction does not currently apply to the issue of a Construction Certificate for subdivision works. Further, Cl. 6.12(2) of the draft bill only requires the Principal Certifier to be appointed two (2) days before subdivision works are commenced, therefore conflicting with the requirements of Cl. 6.5(2)(a), as the Principal Certifier will generally not be appointed at the time of issue of the Subdivision Works Certificate.

As described in the previous section, the definition in the draft bill and Cl. 6.12(1) are not specific about whether the Principal Certifier for subdivision works can be a private accredited certifier or is restricted to Council. However, if the latter is the case and the appointment of the Principal Certifier is restricted to Council for subdivision works and the current wording of Cl. 6.5(2)(a) remains, this will prevent the issue of

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a Subdivision Works Certificate by a private accredited certifier. This scenario would have a significant impact on the approval of development works in NSW, with most Councils being unable to cope at present, without the added workload of construction certificate approvals currently provided by private accredited certifiers.

Inspection and Certification of Subdivision Works

The inspection and certification of subdivision works under the current legislation has been a grey area for some time, with many Councils refusing to allow a private accredited certifier to undertake an inspection of works and subsequently certify such works (as the Council claims that they as the PCA have to undertake inspections, even though there are no critical stage inspections for subdivision works).

The proposed legislation updates contained within the draft bill appear to do little to resolve this issue. Cl. 6.5(2)(b) of the Draft Bill states a certifier can carry out inspections of subdivision works "(but only if the certifier is the principal certifier or the inspection is carried out with the approval of the principal certifier)". If the intent of the provisions of the Draft Bill are to only permit Council to be appointed as the Principal Certifier for subdivision works, as is presently the case, then a private accredited certifier will not be able to inspect any subdivision works, because Council as the principal certifier, would never provide approval for another certifier to inspect works on their behalf.

For this reason alone, it is imperative that private accredited certifiers are permitted by the legislation updates to be appointed as the principal certifier for subdivision works.

Subdivision Certificates

Under the current legislation, the issue of subdivision certificates is restricted to Councils, unless an environmental planning instrument permits a private accredited certifier to issue the certificate. At this stage, only two SEPP's and no Council LEP's allow a private accredited certifier to issue a subdivision certificate. This requirement is delaying the release of new lots to the market, as the developer, regardless of whether their construction certificate and works were privately certified, have to queue up at Council to have their subdivision certificate application assessed. This process at some Councils is taking months, where the majority of private accredited certifiers would issue the certificate inside of two weeks.

Apart from delaying the release of lots to the market, the current restriction on the issue of subdivision certificates is also gradually killing off the private certification of subdivisions. Many developers are advising that they would prefer to use a private accredited certifier for their subdivision, however, because they have no choice but to go to Council for their subdivision certificate, they use Council for the entire process because they don't want to "rock the boat" and jeopardise the issue of their subdivision certificate by Council.

The Draft Bill under Cl. 6.5(2)(c) contains an identical restriction to that which presently restricts the issue of a subdivision certificate to Council. Therefore, under the proposed legislation updates, Council will still have a monopoly on issuing subdivision certificates, the release of lots to market will continue to be delayed and developers will continue to have no choice in their appointment of a certifier for their subdivision.

The present and proposed restrictions in the legislation regarding the issue of subdivision certificates by Council only is in direct contradiction to the recommendations of the Lambert review, which stated "*the requirement for councils' local environment plan to approve of private subdivision certifiers being able to be appointed as PCAs or issue subdivision certificates be removed and accredited private certifiers allowed to act as PCAs for subdivisions and issue subdivision certificates.*".

A further complication exists in that if a private accredited certifier is permitted to be appointed as the principal certifier for a subdivision, but only Council can issue the subdivision certificate, the Council cannot issue this certificate as the principal certifier, as this role is already taken by the private accredited certifier.

Roads Act

An inconsistency has existed since the inception of the private certification system in 1998, between the Environmental Planning and Assessment Act and the Roads Act. Section 138 of the Roads Act states that only the Road Authority (generally Council or RMS on main roads) can approve works on roads. The majority of NSW Councils are using this section of the Roads Act to prevent certifiers from issuing construction certificates for subdivision works on existing roads. This practice is both duplicitous and time consuming, meaning that developers have to obtain a construction certificate for internal works and then apply to Council for a Roads Act approval for something as minor as a few metres of kerb and gutter or a drainage pipe connecting a new road to an existing road.

This issue does not appear to have been addressed in the Draft Bill, but could be resolved by the insertion of a clause stating that the requirements of this legislation take precedence over all other legislation. If the Government is serious about streamlining the release of lots to the market, then this duplicitous approval regime must be addressed and removed.

Conclusion

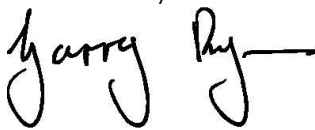
Barker Ryan Stewart appreciates the opportunity to provide this submission to the Planning Legislation Update process. However, we strongly request that the Department reviews the clauses in the Draft Bill relating to subdivision certification to enable private accredited certifiers to be appointed as the principal certifier and issue subdivision certificates in accordance with the recommendations of the Lambert review. It makes no sense that a building certifier can issue an occupation certificate for a 40-storey apartment block, for which the consequences of failure would be catastrophic, but a subdivision certifier cannot issue a subdivision certificate for a 6 lot subdivision with a new road and some drainage infrastructure.

If the role of the subdivision certifier is not addressed in the proposed legislation updates and given the legal position to provide the full range of subdivision certification services, then Councils will continue to prevent private accredited certifiers from operating effectively, ultimately resulting in the demise of subdivision certifiers, the continuation of delays in both the subdivision certification process and the release of new lots to the market and the resulting unnecessary increase in costs for housing.

If the recommendations in this submission are adopted, this would enable the subdivision certification system to operate to its full potential by removing unnecessary bottlenecks and allowing the delivery of subdivided lots in NSW by certifiers that are appropriately experienced, skilled and legally accredited to do so.

We would welcome the opportunity to further discuss these concerns with Department representatives or other Government staff as part of any further consultation undertaken in the update process.

Yours faithfully



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