

DISCUSSION PAPER

MAJOR CONCERNS ABOUT NEW PRIVATE CERTIFICATION PROCESSES

Introduction

Changes came into effect on 11th April 2013 allowing private certifiers to issue development plan consent for developments covered by the SA residential code.

Previously, private certification processes in South Australia only applied to building rules consent and not to development plan consent. The development plan consent component of the development approval process was only undertaken by the local council or Development Assessment Commission.

The amendments are described in the *Development (Private Certification) Amendment Bill 2012* and draft *Development (Private Certification) Variation Regulations 2012* to amend the *Development Regulations 2008 (SA)*. These came into force on 11th April and allow private certification for developments that fall under the residential code.

The new rules have been brought in by the SA Government, seemingly as a result of pressures being exerted by the development industry, and provide yet another example of the government fast tracking development irrespective of the outcomes. The way they have been introduced again highlights the poor public consultation processes in the planning system. The changes also add to the growing reality that, no matter where you live, you could be subject to new planning measures which diminish your rights to have a say in development which may adversely affect you or your property.

This discussion paper outlines the changes and why they are likely to be detrimental to good development.

Shoddy consultation process

Information on the changes was posted on the sa.gov.au website 'Consultation on private certification and related changes to planning and building processes'.¹ Comments were sought from the public from 21st December to 1st February, with this process doing little more than satisfy some very basic requirements for 'consultation':

- the public would not have known any changes were being proposed unless they had somehow stumbled across the website, or if they had been alerted to it by someone else;
- releasing draft changes during the Christmas period meant that members of the public were less likely to be aware of them and also less able to provide an informed response;
- the information provided was 'legalistic', making it very difficult for most people to understand the implications of what was being proposed; and
- it seems that many elected members of local councils were not even aware of the changes prior to them being brought into force.

Overview of the development approval processes

Before obtaining final development approval, a development requiring 'consent' goes through the following processes:

- Application to the local council (or Development Assessment Commission, DAC, in the case of major development proposals and other certain types of development applications);
- Development plan assessment by council staff under delegated authority, the local council's Development Assessment Panel (DAP) or the DAC. The application is assessed to see whether the development fits with the development plan for the area, and a determination is made as to whether it is an appropriate development for its location. The new rules mean that private certifiers can now carry out this assessment in the case of residential code developments, and can issue development plan consent;
- Building rules consent, which is assessed by council or by a private certifier employed by the applicant (generally the owner, developer or builder); and
- Final development approval

The new rules mean that private certifiers, engaged by an owner, developer or builder, can now carry out the assessments (for residential code developments only), with the 'final signing off' of approval given by the local council.

Why have the changes been introduced?

The SA Government says "it is common knowledge that planning approvals in some parts of the State can take months" and claims these changes will make things easier for the home owners seeking planning approvals who "are forced to wait months by some councils".² The Government says "the Premier conducted a round table with the building industry and private certification was one of the proposals suggested" and the new laws will "streamline planning approvals for code-compliant new housing" and will "reduce waiting times to less than two weeks, with potential for turnaround in just days".

However, the rules for residential code development applications already state that development plan consent must be issued by the relevant authority within 10 business days of the application being lodged, and delays should only occur if the application is lacking the required information.³ The need for these changes is therefore highly questionable.

SA's residential code comes with its own problems

South Australia's one-size-fits-all 'residential code' allows development to be fast-tracked through the planning system if it meets certain criteria relating to its location, height, boundary set-backs and site coverage.⁴ The code applies in all areas except heritage sites, Hills Face Zone, bushfire protection and flood protection areas.

The residential code currently applies to certain forms of residential development such as sheds, carports, single-storey additions, new single-storey and two-storey detached and semi-detached homes.

The main problems identified with such codes are that they:

- over-ride local context and are often 'out of step' with local planning objectives and standards;
- are 'broad brush' and lower planning performance standards by overriding physical, environmental, planning and heritage constraints or opportunities;
- discourage diversity and innovation in design;
- eliminate input from council planners to applicants on better or more appropriate design options;
- reduce opportunities for local residents to have a say; and
- have failed to hit the mark for developers, many of which say they prefer the normal council approval process, according to Kym McHugh, President of the Local Government Association.⁵

Changes to private certification regulations bypass councils' decision-making powers

The new rules mean local councils are now effectively bypassed from the decision-making process when a private certifier gives development plan consent for residential code developments.

The fact that "after a certifier has signed off, the council will still need to issue the final authorisation",⁶ does little to alter this fact. For a council to carry out its role responsibly in this process it would have to duplicate assessment. In reality, councils will have to accept private certifier recommendations at face value or undertake superficial checks of a certifier's report. This means the council is effectively bypassed from the decision-making process.

Potential 'dumbing down' of planning standards

The reason given for introducing the new rules is to speed up the process, which is already set at '10 business days' for development plan consent to be issued.³ Private certifiers have told some councils they can guarantee a development plan consent within 24 hours! This may lead to a further 'dumbing down' of planning standards that occurred with the introduction of the residential code, with the assessment not being as stringent, particularly in regard to checking that all required information is provided. Unfortunately, the Government seems more concerned with fast tracking development than ensuring the quality of development.

Other issues:

There are likely to be issues with:

- accountability, with local councils having to issue the final development approval, and therefore assuming ultimate responsibility;
- 'conflicts of interest' with private certifiers assessing applications for development plan consent when they are actually employed by the applicant (generally the owner, developer or builder);

- private certifiers potentially ignoring the true intent of a development plan as many aspects of development plans are subjective, and not black-and-white. This could be an invitation to interpret the wording of development plans to suit the applicant;
- the new rules representing a further weakening of the powers of our 3rd tier of government. Local councils are most likely to represent the interests of the community and to interpret development plans as they were intended;
- the process potentially being later opened up to allow private certifiers to give approval for other, more complex and significant, forms of development; and
- the public not being able to access development applications. Currently, councils are not required to make development applications publicly available. Private certifiers may be even less likely to do so. Surely all development applications, whether being assessed by councils or by private certifiers, should be publicly available, on the website of the appropriate council.

The standard of private certification processes is already questionable.

Private certifiers have been able to issue building rules consent in SA for some time. However, it is only recently that an auditing system for monitoring these certification processes has been set up by the State Government, and is now in the process of being implemented.⁷

This is a major concern as "in NSW, one private certifier in six has been the subject of an adverse disciplinary finding, and the ACT has similar problems although rarely is formal action ever taken".⁸ It is therefore irresponsible of the SA Government to extend private certification processes until its audit has been completed.

The SA Government is also proposing changes to the requirements for private certifiers assessing applications for building rules consent.

The SA Government has released the *Development Regulations 2008: Improving building rules assessment processes in South Australia Discussion Paper December 2012*⁷ proposing to:

- reduce the requirement for private certifiers to have 8 years experience (in building surveying) to 3 years;
- introduce further streams of private certification and to amend the required qualifications for private certifiers;
- permit registered structural engineers to self-certify in certain circumstances; and
- recommend the government establish an independent body to handle registration, accreditation, complaints and an auditing system for all private certifiers/building surveyors.

The discussion paper says these changes will bring SA closer in line with other parts of Australia. However, relaxing the requirements for private certification could lead to an increase in shoddy and dangerous building practices as in other parts of the country.⁸

¹ sa.gov.au website:

<http://www.sa.gov.au/subject/Housing,+property+and+land/Building+and+development/South+Australia's+land+supply+and+planning+system/Public+consultation+on+planning+matters/Consultation+on+private+certification+and+related+changes+to+planning+and+building+processes>

² Media release by Deputy Premier John Rau: http://www.premier.sa.gov.au/images/news_releases/13_04Apr/privatecert.pdf

³ 'Streamlining Planning Assessment: Guide to complying development, (Residential Code), exempt development and development requiring building consent only', *Version – Gazetted Regulations 31 May 2012*, Government of South Australia, Department of Planning, Transport and Infrastructure.

⁴ sa.gov.au website:

<http://www.sa.gov.au/subject/Housing,%20property%20and%20land/Customer%20entry%20points%20and%20contacts/Industry%20professional%20entry%20point/Local%20government%20and%20planning%20professionals/Residential%20development%20code%20updates>

⁵ 'Public must be involved in planning', Kym McHugh, Local Government Association President, *The Advertiser*, p24, 15 March 2013.

⁶ Letter to the Editor, Terry Walsh, Executive Director, Urban Development Institute of Australia (SA), *The Advertiser*, 7 December 2012.

⁷ 'Development Regulations 2008: Improving building rules assessment processes in South Australia Discussion Paper December 2012', Government of South Australia, Department of Planning, Transport and Infrastructure.

⁸ 'Problems with private certification of buildings', *Riotact 6 November 2008*.