

PLANNING AND ENVIRONMENT COMMITTEE

Outline of submission by Richard Arthur on Planning and Development Bill

I have tried to look at the Bill from the point of view of a practising lawyer seeking to advise a client. I have paid closer attention to where previously there were difficulties. I have not attempted to cover every provision in depth. I have not commented on matters where there is no, or no significant, change except where it might have been useful to make a change.

I apologise that the following is in note form. I intend orally to explain issues at some length in several areas, and touch briefly on others as time permits.

Clause	Comment
5	? significance
7	Important changes to definition of development. Now inclusive definition – ie, open ended. Adds commencement of use and change of use. Use not defined.
31(4)	LDA exercise functions in accordance with “main object” of Plan. Why not in accordance with Plan? Was in accordance with objectives of Plan previously. ?Potential for operating outside plan.
50	Plan looks different, but will not necessarily be much different. ACTPLA paper seems to confirm that re-structure only
82	Policy purpose and framework – potentially significant changes allowed without consultation?
96	(1) No change (2) Ensures Plan does not have to accord with strategy – see 100(4)
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105	Objective determination of track
106	Without seeing development tables it is very difficult to assess the operation of the track system. How that table is drafted will probably make or break the efficiency of the system. Sample development table in ACTPLA paper is not encouraging. ACTPLA’s Guide to proposed laws describes a system which is not reflected in these provisions. Nothing in these provisions permits transfer from one track to another. The sample development table does not mention other forms of development such as lease variation or consolidation – they are surely not consigned to the impact track.
107	Unclear how this relates to 104(2)(a) “the Code” Hierarchy of consistent codes is new. Potentially ground for much dispute as to

	whether the requirement of one overrides the requirement of another. Difficult test to apply. The attempted removal of doubt adds to confusion.
108	No discretion, must approve if meets requirements. ?discretion to approve where fails meet one minor requirement. ?impose conditions to ensure meets requirements - ?workable. Refuse instead of impose conditions – no appeal.
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111	No discretion to approve unless “proposal” consistent with relevant code etc. ?cannot approve inconsistent proposal subject to conditions. (2)New status for entity advice generally. Ignored where subjective satisfaction of person deciding application. ?Guidelines = codes.
115	?relationship with 105/6
123	Picks up uses not mentioned in tables and puts in impact track
125	Continuing use – exempt if originally authorised, but not increase (of area?) of use. But is continuing a use development at all, as defined in Cl 7?
126	New category of prohibited development, previously just not permitted
127	Pre-application advice. Window dressing provision – not obligatory, not binding, no choice to act inconsistently if advice wrong. Subclause (4) is misleading
129	The status of input by other government agencies has been changed significantly.
139	Heritage Council has been arguably downgraded, and others upgraded. None can subsequently act inconsistently with advice/approval, but with a variety of exceptions which probably negate any apparent protection for developers
133	Old provisions allowed amendment of applications but did not give guidance as to occasion for public notification of amendment. AAT established practice whereby amendment allowed if nobody prejudiced. Otherwise new application with public notification required. Now amendment allowed if development “substantially the same” ie, nobody likely to be prejudiced. But public notification still required – waste of resources.
140	The notification provisions have lost cohesion. Notification of adjoining
141	neighbours may be dispensed with where impractical, but then no notice at all?
142	Not clear when 142 is to be activated – called major notification when previously was basic notification. It appears the answers may be in Regulations yet to be drafted.
143	Objectors are now persons who “make representations”. Anyone can do so. Previously only persons whose interests were affected could do so.
150	Conditions – need for rethink of purpose and application. Practice developed of giving approval on condition that construct in accordance with approval.
162	Potentially impossible to determine date of effect – when was last person “given” notice of the approval?
169	These provisions illustrate the inefficiency of maintaining a leasehold system
170	when it has a statutory planning system superimposed upon it. It seems that the approval has to end so that it does not authorise the use beyond the expiry of the lease.
178	The existing Section 247 in relation to amendment of approvals is obscure. The

	new provision simplifies one issue – the criterion for approval – but creates others. Why notifiable, and why refuse if in a lower impact track? Another case where removal of doubt creates doubt.
179	These provisions highlight a conceptual problem in the relationship between an approval and conditions to which it is subject. Usually, the conditions are the sine qua non – refusal is the alternative. Yet failure to develop in accordance with conditions attracts a lesser penalty than failure to develop in accordance with an approval.
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303	The compliance provisions have not been altered. They needed simplification. A complaints procedure has been added. It is in the form of a good office practice manual, which is perhaps what it should be.
383	These provisions appear to approximate the effect of existing Section 12, but have a difference. Most commercial leases have purpose clauses with a range of uses, some of which have never been activated. These dormant uses have nonetheless been paid for and can be activated at any time. The new provisions have the effect that a dormant use can not be activated without development approval. In some circumstances this may not now be attainable. The provisions and Cl 125 and Reg 4 seem to be directed towards this issue, but their relationship is confusing and their outcome is unclear.
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Richard Arthur
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