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NON-COMPLYING DEVELOPMENT

IS011

Responsible Officer: MDS

Issue Date: 25/07/2011

Next Review Date: June 2022

Certain types of development are classed as being non-complying, i.e. they are uses that are not consistent with the general intent of the Zone and are not normally allowed to proceed.

The Development Plan policies list what development is described as non-complying. Generally, such development has been judged as being inappropriate and inconsistent with the character desired for that locality and is therefore, not to be supported.

An obvious example is the establishment of industry within a residential area.

Are you allowed to make an application for a non-complying development?

You may feel that your proposal has substantial merit notwithstanding that it is listed as non-complying. Consequently, you can make a formal application to the relevant authority that must then decide whether or not it wants to process this application.

The Development Act 1993 allows for a development assessment of non-complying proposals, which may result in an approval. There are however, no appeal rights given to an applicant if the decision does not go in their favour.

It is also pointed out that such applications are handled in a different way to normal applications and involve additional cost and time with no guarantee of gaining an approval.

The Act also provides for the relevant authority to **refuse** the proposal right at the outset, without even making an assessment of the development.

The process should not therefore, be taken lightly. Development Plan policy (the source of non-complying uses) is based on rigorous examination and acceptance, after extensive consultation with the community, of desired future character and how this is to be achieved. The concept of prohibiting certain uses to attain these goals is integral to the system and is not to be easily dismissed or set aside.

Who makes the decision?

A number of authorities are involved. No one planning authority has sole discretion to act alone in issuing an approval for a non-complying form of development. If the local Council is the authority (which it will be in most cases), then the **concurrence** of the State Commission Assessment Panel **must** be sought if Council is willing to approve that use and for that approval to then become effective.

Likewise, if the Commission itself is the relevant authority and it decides to approve an application, then it must seek the concurrence from the local Council for that approval to become effective.

In looking at giving its concurrence, the Commission reviews and assesses the proposal from scratch, it doesn't merely 'rubber stamp' what the Council has already done.

Although there are time limits imposed, it should be noted that the whole process might take up to 22 weeks to complete from the time that Council (or the Commission) has decided that it is willing to handle an application.

What do you have to do?

You need to impress upon Council (or the Commission if it is the relevant authority) that your proposal has substantial merit and deserves to be assessed accordingly.

A brief statement setting out persuasive reasons why the development should be supported, notwithstanding its non-complying nature, has to be submitted with the application. Without this statement, the application can go no further.

Council has the sole discretion to process such an application based on the statement's justification.

However, if it declines to proceed with an assessment of the application, then there are no rights of appeal available for you to challenge Council in the exercise of this discretion.

In the event that Council does resolve to proceed with an assessment of the application, you will be asked to supply a detailed **Statement of Effect** before anything else happens.

You must be aware that a decision to process the application does not in any way imply intent to approve the development.

The Statement of Effect must describe and address the following

- the nature of the development and its locality;
- the provisions of the Development Plan relevant to an assessment of the proposal and the extent to which the proposal complies with these provisions;
- an assessment of the expected social, economic, and environmental effects of the proposal on its locality; and,
- any other information or material that may be relevant and helpful to Council in its assessment of the proposal.

The Statement of Effect obviously must reflect some understanding of the importance of the Development Plan as well as the context of the proposal and its setting. It has to be far more than a letter simply stating why the development should proceed.

This Statement is not required in some prescribed, albeit limited, circumstances where the development involved is deemed to be minor only. But, you should normally expect that this requirement would have to be satisfied.

What happens to your application?

Once the above information has been received, Council must give public notification of the proposal as a Category 3 development. It must identify the proposal as being of a non-complying nature.

Third-parties then have an opportunity to lodge a written representation to, and be heard personally by the Council. The applicant also has a right of response to the representations both written and by appearing personally to address Council.

If the Regulations so specify, the application may need to be formally referred to State Agencies for their consideration and report, as per the consultation requirements for any application.

Before making a decision, Council must legally obtain and consider planning advice from a person holding the prescribed qualifications (generally a qualified professional planner).

This report has to provide an assessment of the proposal and comment on the Statement of Effect and whether representations received are consistent with the objectives of the Development Plan.

What if you don't like the decision?

That's It! There are no rights of appeal to the Court available to an applicant in relation to:

- conditions imposed on any approval;
- a decision to decline to even process the application in the first instance;
- a decision to refuse the application following an assessment of the proposal;
- a decision by the Commission (or, in the case where the Commission is the relevant authority, against the Minister's or Council's decision) to refuse to concur with a decision by the Council (or Development Assessment Commission) to approve the non-complying development.

Third-parties do however have appeal rights if they dislike an approval being issued (or conditions attaching to that approval) since the status quo is being disrupted contrary to the underlying intent of the Plan. They are afforded the opportunity to challenge the merit of the decision before the Court.

Further Information

For any queries regarding Non Complying Development please contact Council's Development Services Department on:

Maitland Office (08) 8832 0000
Yorketown Office (08) 8832 0000