

Guiding Development — Practice Notes

Exercising discretion

The purpose of this practice note is to advise public officials, public authorities (both of which include accredited certifiers) and elected representatives on the proper use of the discretionary powers available under the *Environmental Planning & Assessment Act (the Act)*. It outlines strategies to help officers avoid corruption and unethical practices and to promote good decision making.

What is discretion?

The Macquarie Dictionary defines discretion as the "power or right of deciding, or of acting according to one's own judgement; freedom of judgement or choice". The Concise Oxford adds "...absolutely or within limits".

The limits of discretion are established by the governing legislation, the powers of delegation within organisations and, in general, the principles of administrative law.

Improper exercise of discretion affects us all as it weakens the integrity of the system, and involves the loss of public trust and faith. Improper use of discretion arises when the extent of discretion available in reaching a decision is not known, or where conflicts of interest affect the decision-maker's judgement.

Circumstances where discretion is exercised under the Act

Council officers and elected representatives exercise discretion in a range of circumstances during the development assessment and construction process:

(a) Giving advice to potential applicants on procedures or interpretation of council plans and policies

For example, on whether a development application (DA) is required or if an application to modify a consent (under section 96 of the Act) is necessary.

(b) Assessing and determining DAs

Deciding whether or not to approve a development proposal usually involves subjective judgement by the assessment officer and the decision-maker, eg. is the extent of overshadowing reasonable? Will the streetscape be adversely affected? A number of key provisions and examples are presented below:

- Assessment of applications under section 79C of the Act

This entails using discretion in two ways. Firstly, the assessing officer (and decision-maker) must determine the matters in the section which are of relevance. This means making judgements on broader environmental impacts, site suitability and the interests of the various publics. Secondly, the officer must make some qualitative judgements on whether the proposal deserves consent, judged against the provisions of Environmental Planning Instruments, matters in the Environmental Planning and Assessment Regulation 2000 and any relevant Development Control Plans.

- Using performance-based controls to manage development

It is common practice for planning standards to be presented in a performance-based format – specifying outcomes without fixing the means of achieving them, permitting flexibility in design and innovation (see Practice Note: *Performance based conditions*).

In 1996 the Building Code of Australia (BCA) adopted a performance-based approach, providing for alternative solutions to satisfy the intent of the building and fire-safety standards.

Performance based controls enable flexibility in design, materials and construction outcomes, however their performance is measured against pre-determined criteria and standards. Performance based controls do not specify numeric standards on, for example, height limits, setbacks or wall thickness. An assessment officer or decision maker must exercise their judgement on whether the proposal meets the outcome required.

- Development Control Plans (DCPs) and other guideline documents

These provide more detailed advice than contained in the statutory Local or Regional Environmental Plan (LEP, REP). Councils have the discretion whether to permit departures from the standards contained within DCPs. An exception is Exempt and Complying Development DCPs, where the standards are fixed and variation is not permitted (see Practice Note: *Complying development*).

- State Environmental Planning Policy No.1 – Development Standards (SEPP 1)

While departures from DCPs and other guideline documents are at the council's discretion, varying development standards within an LEP (or REP) requires a formal application under SEPP 1. SEPP 1 gives councils the discretion (with delegation from the Director-General of Planning in some cases) to vary standards where they are unreasonable and unnecessary in the circumstances of the case.

Variation of a standard using SEPP 1 is only allowed where the variation meets the aims and objectives of the standard. SEPP 1 therefore allows fixed standards to become performance standards. The assessment officer or decision-maker must exercise their judgement on whether the proposal meets the objectives of the standard and zone. Regional objectives (in a regional plan) can also help inform the decision-maker's judgement on the outcome to be met by the development.

(c) Monitoring building and subdivision work

The legislation requires a Principal Certifying Authority (PCA) – a council or an accredited certifier (specifically authorised to be a PCA) – to supervise building and subdivision work (see Practice Note: *The Role of the PCA*). Inspections at particular stages may be undertaken by the PCA or an accredited certifier (or council officer) to ensure compliance. This role requires discretion to be exercised, for example in making decisions on whether the building work complies with the BCA, whether departures from the approved DA plans are acceptable or whether a condition of consent has been met.

(d) Responding to complaints and enforcement actions

Complaints and enforcement action can occur during construction or following completion of work (during the ongoing operation of the

development). In the first circumstance, responsibility rests with the PCA – council or appropriately accredited private certifier – to investigate and act accordingly. This involves the exercise of discretion, for example repeated but minor breaches may only need a warning, while a serious breach that may cause injury will need more an immediate response.

For ongoing operation, acting on complaints and the enforcement of operational consent conditions is council's responsibility, for example, in deciding whether action (and what kind of action) should be taken on complaints about hours of operation or the use of car parking spaces (see Practice Note: *Enforcement of development consents and complying development certificates*).

Where a State agency or Minister is the consent authority for the development the same issues arise.

Accredited certifiers exercise discretion when issuing certificates. For example:

- construction certificates, including certifying compliance with performance standards under the BCA; deciding whether the detailed plans are consistent with the approved DA plans and/or whether a modification of the development consent (under section 96 of the Act) is required. Discretion is also exercised when deciding whether relevant conditions of consent have been met.
- compliance certificates, certifying satisfaction of nominated standards in detailed designs or completion of certain works.
- occupation certificates, determining whether buildings are fit to occupy.

In acting as a PCA, appropriately qualified accredited certifiers (and councils) exercise discretion in their supervisory role, leading to the issue of an occupation certificate or a subdivision certificate (see Practice Note: *Enforcement of development consents and complying development certificates*). The same principles apply to accredited certifiers as apply to council officers (see above).

Accredited certifiers fall within the definitions of 'public official' (in the *Independent Commission Against Corruption Act 1988*) and 'public authority' (in the *Ombudsman Act 1974*) and are subject to the same level of scrutiny as council officers. The safeguards and best practice suggestions listed later in this practice note also apply to accredited certifiers (see Practice Notes: *Who is an accredited*

certifier? and *When is there a conflict of interest for an accredited certifier?*)

State agencies are also involved in development assessment where an environmental planning instrument (State Environmental Planning Policy, REP or LEP) requires their concurrence or involvement in particular DAs. For example, developments that create high traffic volumes on main roads, or that have heritage significance. Integrated development goes a step further by integrating nominated State agency approvals into the consent process. In all of these cases, parameters are set in the instruments (and the legislation in the case of integrated development) on the scope of agency comments. These often involve qualitative judgements requiring the exercise of discretion.

Issues with the exercise of discretion

(a) Corruption and unethical behaviour

The *Independent Commission Against Corruption Act* (ICAC) states:

"It is in the exercise of discretion that most problems exist. The more discretion built into the system, the more chance there is for disagreement as to how it is exercised, and the more opportunity there is for favouritism and corruption to occur. On the other hand ...the ability to exercise discretion is often important for achieving good design outcomes" (ICAC 1995:104)

Where subjective judgement occurs, opportunity exists for abuse of that power.

The ICAC has investigated the use of discretion in a number of councils and discussed the corruption measures covered below (ICAC 1995)

(b) Poor administrative practice

Failing to consider the principles of good administrative practice (NSW Ombudsman 1997) in the exercise of discretion, while not necessarily corrupt or unethical behaviour, can lead to poor administrative practice. For example, some problems are:

- acting beyond power or exercising powers unreasonably – requiring the applicant to pay for facilities beyond the scope of the proposal
- basing decisions on irrelevant grounds – the development may allow other development to occur
- failing to consider relevant matters – putting economics over environmental impacts

- bias (actual or apprehended) – may include the nationality or political interests of an applicant
- acting under a direction or inflexibly applying a policy – refusing all developments of a specific type because the council dislikes them.

Such practices can lead to a failure to act with integrity, competence and tolerance. Such behaviour is not in the public interest.

(c) Inconsistent decision making

The exercise of discretion by a range of people can lead to inconsistent decisions – outcomes on similar proposals can vary depending on who makes the decision or recommendation. Inconsistency can allow some people a development right, while preventing others in similar circumstances. Where this occurs the community loses faith that the planning process will deliver the type of future they want for their area.

(d) Piecemeal variation to standards and the cumulative effect

Where discretion relates to variation of planning standards the cumulative effect, over time, can lead to "standard creep" or a defacto change in the standard. This is effectively policy change on the run, an outcome contrary to the procedures in the legislation and the practice of environmental planning generally. Like inconsistency in decision-making, "standard creep" can cause the community to lose faith that the planning process will deliver an appropriate outcome.

Best practice use of discretion

The proper exercise of discretion is an important part of good administrative conduct. The NSW Ombudsman's publication, "Good conduct and administrative practice", provides detailed advice on the relevant principles of administrative law and of administrative good conduct. These principles include:

- exercising powers lawfully and reasonably
- considering relevant material and basing decisions on material that can be logically demonstrated
- not considering irrelevant factors
- not acting under a dictation or inflexibly applying a policy
- only using powers for their proper purpose
- giving reasons for decisions
- avoiding actual or apprehended bias

- giving affected parties the right to be heard
- acting with integrity, competence, tolerance and in the public interest.

In more specific terms, problems with the exercise of discretion can be addressed by the following actions:

(a) Be aware of the legal limits of discretion

Elected representatives, council officers and accredited certifiers need to be aware of the legal limits of their discretion.

The legislation sets limits on discretion by:

- establishing a systematic approach to decision making
- specifying procedures to be followed in policy preparation and implementation. For example, requirements for public involvement and State government scrutiny
- specifying matters for consideration when making decisions. For example, the matters listed in section 79C(1) of the Act for DAs or the BCA for construction details
- limiting (in the planning controls) matters that can be considered by State agencies where concurrence or consultation is required. This also applies to Integrated DAs, where nominated State agencies are limited by the Act, to matters within the scope of their legislation (and not to broader planning matters, which are the responsibility of the consent authority).

As indicated above, accredited certifiers need to be aware of the limits of their discretion and to operate accordingly. Acting outside of the legal powers provided by the legislation (and the terms of individual accreditation) could have implications for legal liability. For example, in failing to consider required matters when issuing certificates, or acting as a PCA without accreditation. Certifiers must carefully scrutinise application forms and requirements (containing details of certificate requirements) and have a working knowledge of the legislation to ensure they act within their accreditation.

Delegation is the process of transferring administrative and decision-making authority – and the discretion that goes with it – within and between organisations. Delegation usually proceeds "down the line", for example from elected representatives to the administration.

At the local government level, delegation powers are vested in the elected council and the General Manager (GM). Authority, in the first instance, rests with the elected council (and for some matters the GM) which can delegate authority to the GM who, in turn, can delegate to staff.

The same scenario applies where State agencies delegate to local government. Delegation is to the elected council and then down the line.

Delegation powers for local councils are specified in sections 377-381 of the *Local Government Act 1993*.

(b) Identify and avoid conflicts of interest

Increased awareness of corruption and conflict of interest issues can be promoted by education, by supervision of staff and by monitoring delegation performance. One outcome of such actions is greater care with the exercise of discretion (see Practice Notes: *Avoiding corruption* and *When is there a conflict of interest for accredited certifiers?*).

DUAP best practice guideline, *LEPs and Council Land*, provides important guidance for councils using delegated powers when preparing LEPs involving land that is or was previously owned or controlled by council.

(c) Use clear, unambiguous controls

The status and nature of planning, building and subdivision controls determines the discretion permitted to applicants. For instance:

- development standards in LEPs are statutory controls. Variation requires a formal SEPP 1 request. Standards in DCPs or in guidelines are non-statutory, providing more discretion to the applicant.
- prescriptive standards (especially statutory controls) provide less discretion than performance-based controls.

In drafting controls, councils (and State agencies) need to consider this range of options and provide a mix of statutory/non statutory and performance/prescriptive controls appropriate to their circumstances. The following questions and criteria will assist in deciding on an appropriate package of controls:

- Where should there be prohibitions? Why?
- Which standards are important enough to require statutory weight, that is, inclusion in delegated legislation (such as an LEP)? Why?

- The nature of applicants in the area?
- Staff resources. Merit assessment based on performance criteria (rather than prescriptive controls) may mean closer attention and more staff time.
- Community expectations

Ensuring that controls, even those that are performance-based, are clear and unambiguous will help to limit inconsistent performance. It is important to remember that controls can be strengthened or weakened depending on the consistency of how they are applied. A standard in a DCP is likely to be more effective when it is varied only in exceptional circumstances, or when the variation is clearly identifiable if compared with other decisions. The same principles apply to performance standards.

(d) Careful use of SEPP 1 and performance based controls

While subjective judgement is implicit in the use of SEPP 1 and performance-based controls, regular monitoring and staff supervision can foster consistency in judgements on applications. Monitoring can also prompt amendment to planning controls, where repeated variation demonstrates a problem with the plan/policy framework.

The SEPP 1 monitor

DUAP Circular B1 requires councils to maintain a SEPP 1 monitor - documenting variations from development standards and prompting policy/plan review.

A similar monitor can apply to variations or departures from other controls such as DCPs or council policies.

(e) Separate assessment from decision-making functions

The ICAC (1995) recommends that there be a clear separation of assessment and decision-making. A report on a development proposal or intended action, with a recommendation, proceeds up the line for a decision. A clear distinction needs to be drawn between the two tasks and action taken to ensure that those determining applications are not able to direct or influence those carrying out the assessment. The decision-maker(s) needs to be presented with all relevant information, views and opinions. This can be achieved by clear allocation of functions and duties in council delegation instruments.

For contentious proposals or where councils have a dual role (as proponent and regulator) an independent assessment can be used. The Department of Local Government's practice note on community land classification (1998) provides useful advice on such circumstances.

EXAMPLE: Liverpool Council's Independent Hearing and Assessment Panel

The council has established a panel (made up of three specialists and one community representative) to receive submissions and make recommendations, following a report from a council officer, to the council on

- DAs with unresolved objections
- Variations to council policy (eg rezonings)
- Council's own applications.

Where do I find more information?

The following publications provide further discussion and case study material on this topic:

Independent Commission Against Corruption 1991
'Report on investigation relating to Stait, Dainford and Waverley Council', January

Independent Commission Against Corruption, 1995
'Report on Investigation into Randwick City Council', February

Independent Commission Against Corruption, 1998.
'Accountable Health & Building Inspections: Recommendations for Local Government'
A Corruption Prevention Project, June

Independent Commission Against Corruption, 1998,
'Ethics: The Key to Good Management', December

Independent Commission Against Corruption, 1999,
'Strategies for Preventing Corruption in Government Regulatory Functions', March

Independent Commission Against Corruption 1999
'Gifts, benefits or just plain bribes: guidelines for public sector agencies and officials', June

Independent Commission Against Corruption, 2000,
'What is an ethical culture? Key issues to consider in building an ethical organisation – summary report', September

Independent Commission Against Corruption 2001,
'Unravelling Corruption II – Summary – Corruption...who wants to know?', April

Independent Commission Against Corruption 2001,
'Corruption Resistance Strategies – Researching risks in local government', Research findings summary, June

Independent Commission Against Corruption 2001,
'Corruption trouble-shooting. Lessons learnt from ICAC research about identifying and dealing with corruption hot spots', June

Independent Commission Against Corruption,
'Model of Public Duty', http://www.icac.nsw.gov.au/pub/public/pub2_20q.cfm#P38_1735

Independent Commission Against Corruption,
'The first four steps', http://www.icac.nsw.gov.au/pub/public/pub2_41cp.cfm

Ombudsman (NSW) 1997 'Principles of Administrative Good Conduct', January

Ombudsman (NSW) 1995 'Good Conduct & Administrative Practice Guidelines for Councils' (also available for public authorities and officials)

For more information see also the websites for the ICAC and the NSW Ombudsman:

<http://www.icac.nsw.gov.au>

<http://www.nswombudsman.nsw.gov.au>

Additional references cited:

Allars M. 1990 Introduction to Australian administrative law, Butterworths

NSW Department of Local Government and Co-operatives, 1993 Public Land Management. Practice Note No.1, September, Revised May 2000

DUAP 1997 Best Practice Guideline, 'LEPs and Council Land'

Note: This practice note has been prepared with input from ICAC and the NSW Ombudsman.

For further information please contact:

Policy and Reform

PlanningNSW

GPO Box 3927 Sydney NSW 2001

Phone 02 9762 8253

Fax 02 9762 8720

Email reform@planning.nsw.gov.au

Update Note

Since this practice note was issued in September 1999, the department has changed its name to PlanningNSW.

This practice note has been updated to reflect this, along with changes to contact details.