LOCAL COUNCILS UNDER PRESSURE

Councillors are the arbiters of development, but cracks are appearing in local administrations as the increasinly complex decision-making is challenged and abused. Florence Chong reports.

There is a whiff of corruption at city hall. The amount of money being poured into property development around the country is so vast that some is bound to stick on the way through. There is talk of deals between developers, councillors and local government officials. Developers complain of being bribed by objectors. Objectors complain of being bribed by developers.

There are 836 councils throughout Australia. Although their role spans from running local libraries to maintaining local roads, the area of development and building approvals is their most visible, and sometimes controversial, responsibility. Councillors and local government officials are a powerful influence on how cities and suburbs are shaped and unless there is an appeal, they are the arbiters of our cityscapes.

Their task has become harder as developments have become more expensive and complex in the past few years, raising the question: are councils equal to the task of assessing and analysing these projects? Complex legislation covers planning, local government and environment in the various states.

When Ian Temby took over as head of the Independent Commission Against Corruption in NSW late last year, one of his first actions was to write to local councils and the public sector inviting them to provide details of allegations, or reasonable suspicions, of corrupt conduct. Its first inquiry concerned Waverley Council in Sydney and examined allegations that a developer had purchased an option to buy family property from a town planner with the council. The developer had allowed the option to lapse, forfeiting the fee. Temby has been examining the bona fides of the transaction. He has also examined allegations of corruption at Tweed Shire Council on the NSW north coast.

The importance of these inquiries is that they may have the same impact as the investigations and extensive public scrutiny that sank bottom-of-the-harbour schemes a few years ago. Some people hope that the commission's inquiries will make people more wary.

The Victorian Local Government Minister, Maureen Lyster, last month ordered an inquiry into allegations about breaches of the pecuniary interest rules and improper use of information in relation to councillors of Melbourne City Council. Two inspectors from Lyster's department are examining all minutes kept at the council and have been given the power to call evidence and carry out searches. Melbourne City Council does not have planning power within the central business district; the power was taken away when the Cain Government came into office in 1983.

The inquiry was initiated at the same time as a police inquiry into allegations of extortion by objectors to development projects. Leading Melbourne developers recently spoke publicly of demands, of up to $2 million, in return for dropping objections. Max Beck, joint managing director of Becton, told the Melbourne Herald that he was forced to pay $150,000 to an objector who had originally demanded $2 million to withdraw objections to a big building project.

In general, developers, planners and architects compliment council staff and councillors on the way they carry out their jobs. Although a number told BRW that they have heard of wrong-doings among certain councils, they are unable to substantiate any. They point out that some deals are so subtle that wrong-doing would be difficult to prove. BRW understands that although the mayor of Waverley, Barbara Armitage, spent at least two years gathering evidence, it was only a chance discovery of a transaction that gave her sufficient evidence to report it to the Independent Commission Against Corruption.

A leading town planner who worked in the public and private sectors says that stories of lapsed options have been around for a long time. But it has taken all this time for it to become an issue. A former planner told BRW that compared to Victoria and South Australia, the inference of deals and attempts to influence a planning process is "overwhelming" in NSW "It is not something that you can prove. People on both sides have inbuilt reasons to keep it a secret," he says.

Graeme Frecker, national president of the Australian Local Government Association, says he has not the "faintist" idea why councils are subject to innuendos of impropriety. "People like to throw mud," he says. "Let's remember that in the last 50 years in Victoria there might have been three, or possibly four (out of 210 councils) occasions when, for one reason or another, a council has been found to be incompetent."

Sydney's Lord Mayor, Jeremy Bingham, says the suggestion of corruption arises because the development approval process is like litigation in court - it is a win or lose situation. The person who loses is disgruntled and always thinks that there is something wrong with the system.

Bingham says:

> "The 'I'm-all-right-Jack attitude' is alive and well. You will get people who live in a block of flats objecting to a development that will block out their view, never mind that they themselves have blocked out the views of the people behind them. People are very one-eyed and full of self-interest. If someone is allowed to carry out a development there is an enormous tendency to cry foul."

Until his election this year Bingham specialised in local government and environmental law as a senior partner at Sly & Weigall in Sydney.

The more general complaint with council processes is not corruption, but the slowness of dealing with development applications and the apparent lack of logic in some decisions.

Neil Ingham, who runs Planning Workshop in Sydney, says it is not unusual to have an application approved 18 months after the first submission. He has one proposal for a residential project on the NSW coast that is finally

getting off the ground after 16 years. "I know of one development company that is paying $1 million a week to hold land," he says.

Allan Williams, president of the Victorian chapter of the Building Owners and Managers Association, says losses totalling "hundreds of millions of dollars" can be attributed to delays in obtaining approvals. The cost is eventually transferred to the product, and tenants pay through rents. Referring to the Becton project at 333 Collins Street, Melbourne, Williams says that by the time the developer brought the project to the planning stage it had cost $120 million in land and site preparation. The holding charges amounted to $65,000 a day.

Any developer must look at delays seriously, he says, and if there is a demand for compensation of, say $500,000, the developer will weigh up the payment against the cost of perhaps a 20-week delay in waiting for an appeal.

BRW was told that many disputes stem from the use by a council of its discretion in planning. Discretion is good in that it allows flexibility to suit a particular circumstance, says a planner-turned-lawyer. "But once you get into the business of waiving rules, it offers great scope for developers to want to be certain that the discretion will not be used to their detriment," he says.

It is hardly surprising, he says, that in big developments people may be tempted to pay for no more than an "insurance policy" - to ensure that the discretion is used in their favour. He has seen how discretion can be used "massively", and legally, in favour of applicants. It can also swing the other way, and "the answer for some is to pay for protection".

The scope of this discretion has been the subject of a test case in Sydney. Using powers under the State Environmental Planning Policy No 1, North Sydney Council approved a development application for a 17-storey building on a site that was restricted to a five-storey building. The owner of adjacent properties, Legal & General, joined another development company, Comrealty, to take legal action against the council's decision, so as to protect the value of their investments. The first appeal to the Land and Environment Court resulted in a ruling in favour of the development. An appeal to the Supreme Court was heard last week.

Conrad Fenwick, managing director of Legal & General Property Investment Ltd, told BRW:

> "All we are saying is that the approval is so far and away from current legislation that we consider it outside the range of its (the council's) powers. How far is reasonable discretion? Is the decision to increase the height from five to 17 storeys reasonable?"

He also says that the public was not given the opportunity to express its opinions when the application was made. North Sydney Council had previously maintained strict rules on height restrictions.

John McMullan, who specialises in construction and planning laws at Clayton Utz in Melbourne, says that councils in Victoria have the discretion to advertise development proposals. "In exercising that discretion, councils have got themselves into trouble," he says. The process has brought developments to the attention of people whose objections are, at times, vexatious or frivolous. If a council decides to rule against an application because of objections, McMullan says, if faces an appeal when the developer takes it to the Administrative Appeals Tribunal. If the council grants the approval, the objectors will lodge an appeal at the tribunal.

John Taberner, a partner dealing with planning and environmental laws at Freehill Hollingdale and Page, says anyone has the right to challenge a planning decision under Section 123 of the Environmental Planning and Assessment Act, on the grounds of legal validity rather than planning merit. Such is the case in the Legal & General appeal.

Third-party objection is permitted in development proposals that are considered to have environmental impact. Bingham says the problem of potential impropriety can be handled in two ways: by tightening guidelines to remove ambiguities (reducing the use of discretion) and by maintaining a "real openness" in the discussions of development applications.

Councillors and their administrative staff say their job would be easier if developers submit designs within guidelines in the first instance. John Perrier, chairman of the Queensland chapter of the Building Owners and Managers Association's council liaison committee, says: "If there is a delay, it is because 54% of applications lodged by private enterprises are flawed. You can't blame the council for somebody's stupidity." In addition, he says, possibly one in three applications is seeking rezoning - the most difficult process in all developments - not for genuine development but to increase the resale value.

Neil Barker, chairman of the planning and building committee at Prahran Council in Melbourne, says:

> "Many applications that come before the council are poorly designed. When the council rejects them and after a lot of lobbying, the developers go away and return with good designs that are inside our guidelines. Why can't this happen in the first instance?"

Greg Woodhams, chief town planner at Woollahra Council in Sydney, makes no apologies for its reputation for toughness. "The council has put in train a series of guidelines and policies. I can't speak for other councils, but we aim to have the highest standard of development in this area. It is a trust our ratepayers have placed on us," he says. Woodhams says the council receives about 2000 applications a year, of which 250-300 are large projects. "We have to consider these applications within the requirements of three acts: local government, environmental, planning and assessment, and heritage. Many of them are overlapping and complementary, but we still have to assess them in conjunction with all three acts," he says.

Woodhams says that NSW has one of the most com-

prehensive environmental acts.

"The key to success is to talk to us. There is a cost to the developer, and to the council, in the negotiation process. The time involved reflects the complexity of the projects," he says.

Barker, of Prahran, says: "It seems to me that we are giving away more than we should." He believes that a developer should demonstrate how and why a project should work - on such matters as impact on traffic, the environment and so on. "They should employ consultants to do all that and our job is to evaluate the reports." Barker says he would like to see the further tightening of rules on development and would definitely like to see more conservation.

"We are talking about the development industry. They will try to abuse the system and take as much as they can. If we give them an inch, they will take a mile. They are already getting away with more than they should," Barker says.

There have been various efforts to streamline the planning process in different states. Williams, of the Building Owners and Managers Association, says the three acts in Victoria - the Local Government Act, the Buildings Control Act and the Planning and Environment Act - should be reviewed.

Richard Meldrum, an architect and a Melbourne city councillor, says the Buildings Control Act has been streamlined and hopes that this will eliminate some problems. Objections must now be made within 28 days. Meldrum says one of the most common tactics has been to continually reject drawings. The longest delay he has experienced is six months, but he has heard of delays of a year.

Objectors are not necessarily members of fringe groups. Often they are owners of adjoining properties. Williams has heard of the owner of a city building who was compensated with 12 car spaces in perpetuity in the development. He suggests the problem area of air rights could be solved by establishing a panel of experts to hear objections and disputes to decide if the case should go before the Administrative Appeals Tribunal. If an objector wanted to take it further against the advice of the panel and lost the appeal, the objector should be liable for the costs or face a penalty.

The tribunal in Victoria is becoming increasingly bogged down with appeals. The number has risen from 1500 in 1981 to and expected 4500 this year and possibly 5000 next year. A development approval taskforce of representatives from industry bodies has recommended a two-stage plan to the Victorian Government to speed up the appeal procedure.

McMullan, of Clayton Utz, says the State Government has allocated additional resources to reduce the delay in getting a hearing to 10 or 12 weeks.

The appeals authority in NSW, the Land and Environment Court, is regarded as very efficient. In general, a decision is handed down within three or four months of lodgment.

Some people believe that councils should be made accountable and bear some costs of unreasonable delays. But McMullan, who was an engineer and a planner before taking up law, disagrees with the idea of accountability. It is part of the planning process, he says, and small councils cannot afford to spend thousands of dollars defending their decisions. "It would be a shame if planning decisions are turned into commercial litigations," he says. But he agrees that frivolous objectors who do not even bother to attend hearings should face a penalty.

In South Australia, the Bannon Government has announced that it will upgrade the existing development plan for Adelaide's central business district. Ron Roach, chairman of the planning and environment committee of South Australia's Building Owners and Managers Association, says the planning process in the state is easier than in other states, except for large projects that require environmental impact statements.

In Perth, some projects face delays of up to a year. Mike Fitzhardinge, an architect with Forbes & Fitzhardinge, of Perth, says:

> "My solution to the problem is to place a substantial charge or levy on developers for the service. This will give Perth City Council more resources to employ more staff, consultants and planners, and the council will have the obligation to response to an application within a reasonable time."

North Sydney's mayor, Roslyn Crichton, says there is a national move to introduce a user-pays system and to charge developers a fee more in line with the amount of work involved. Developers now pay a fee for the original application, but the amendments often take just as much time, she says.

Many councils are short of staff. They are losing trained town planners and building staff to the private sector. Councils are constrained by the awards system and are unable to match outside salaries and benefits.

This raises the question of the calibre of people councils are able to employ and retain. Most agree that those in the job today are competent, but Fitzhardinge believes that because they have a vital task to perform, their judgment would be better if they were exposed to the other side in the development industry.

He says that most council staff are trained to examine plans against a set of rules and do not understand the difficulties facing creative people such as architects. A fastidious compliance to the rule book has meant that plans have to be worked and re-worked because designs are looked at sequentially. A plan must go through one committee after another and they each want the best. Invariably there are conflicts.

"Architects look at all aspects of a project simultaneously," Fitzhardinge says. "We are trained to solve problems, but they don't understand the process of trade-off." He says usually it ends up "where we started". For large and complex projects, it is not unusual to modify and redraw plans as many as 20 times. Fitzhardinge believes that young architects are not prepared to fight and as a result are not realising the full potential of the city. He says they are

tending to make projects simpler, treating one block at a time instead of looking at the overall project. "They are taking an easy way out and we are really digging our own graves," he says.

The Gold Coast City Council presided over the fastest developing part of Australia. Lex Bell, mayor of the Gold Coast, says the council has to make the rules as it goes along, and recalls the changing focus of public concerns from high-rise developments to shadowing.

Bell, a lawyer by training, says the council brought in requirements from 1975 to ensure that buildings are set back from the beach to overcome the shadowing problem. The council introduced two planning initiatives that were adopted elsewhere in Australia and overseas.

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NEW ACT ENABLES VICTORIAN COUNCILS TO COMPETE WITH PRIVATE SECTOR

Victorian councils are now able to compete with contractors under the new Victorian Local Government Act which came into force on 1 November 1989.

Unlike the old Local Government Act of 1958, which laid down fairly restrictive requirements on what a council could or could not do, the Local Government Act 1989 gives councils more power to act as they wish.

Basically the old Act prohibited everything not specifically permitted in some 1000-odd sections. Under that Act, a council could only contract to do work on private land if, in the opinion of the council, it "would be uneconomic or impracticable for such owner or occupier to employ a private contractor".

The philosophy of the new Act is to grant general competence powers; a council can do virtually anything, subject to a limited number of restrictions on council powers in the new Act. One of the most important of these is the requirement for councils to provide full disclosure to their communities.

Under the new Act, a council can virtually undertake any activity it wishes to that is in line with its council responsibilities, according to Paul Kenna, legal officer with the Municipal Association of Victoria.

Council responsibilities include roads, bridges, footpaths and traffic control, and the power to open or divert roads. Consequently, a council would probably not have any great difficulty in contracting to build a driveway for a private individual under the new Act. A council might also be able to contract to carry out pool excavations, land clearing, dam construction and similar activities, although Kenna said any council doing so would need to be cautious about involving itself in non-traditional activities. However, any form of road building, drainage works or general sub-division works for private developers, which relate to traditional council activities, would be no problem for a council under the new Act, he said.

Kenna also suggested that a council with excess plant would be free to place equipment and operators with a plant hire agency.

> "It would make very good sense from a council point of view for under-utilised plant to earn extra income, and this could [include] allow[ing] the plant to work outside the council district, because it would be working as directed by clients of the agency.
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> "Using excess capacity in this way is the sort of thing that is encouraged by the philosophy of the Act".

The new Act also allows councils to establish "municipal enterprises", designed to compete in the private sector and to make a profit. A municipal enterprise is defined as something that is outside a council's normal line of activity, such as the operation of amenities for tourists.

- This is an edited version of an article from The Earthmover and Civil Contractor, reprinted with permission.

CAPE YORK SPACE PORT - INTERNATIONAL RESPONSIBILITIES

- Kevin Bartlett, Associate, Henderson Trout, Solicitors, Brisbane.

There are a number of interesting legal issues which will have to be addressed, in the event that the proposals for a launch facility at Cape York go ahead. Kevin Bartlett of Henderson Trout is well placed to comment, as he has concentrated on the legal issues of the proposed Cape York Space Port in a recent Master thesis; he also took part in the preparation of a report on the subject.

The development of a launch facility at Cape York will enliven various international obligations imposed upon the Commonwealth Government as a result of Australia's being party to the major United Nations Space Treaties. At present, there is no domestic legislation in Australia to govern commercial space activity. The Commonwealth Government will therefore need to legislate to ensure compliance with its Treaty obligations.

Parties to the Outer Space Treaty of 1967 are required to retain jurisdiction and control over space objects launched from their territories. Treaty parties must also authorise and continuously supervise their national space activities in accordance with Treaty provisions. It is generally accepted that those obligations extend to the regulation of commercial space activities, e.g. launches, outer space activities and re-entries.

There are serious national implications concerning liability for damage caused by space activities.

The Liability Convention of 1972 sets up two regimes for imputing liability to a launching-State. The first applies where there has been damage or injury to persons or property on the earth's surface or to aircraft or passengers in flight. The second applies where there has been damage or injury to other space objects or to persons or property on board such objects.

For the purposes of the Convention, a launching-State