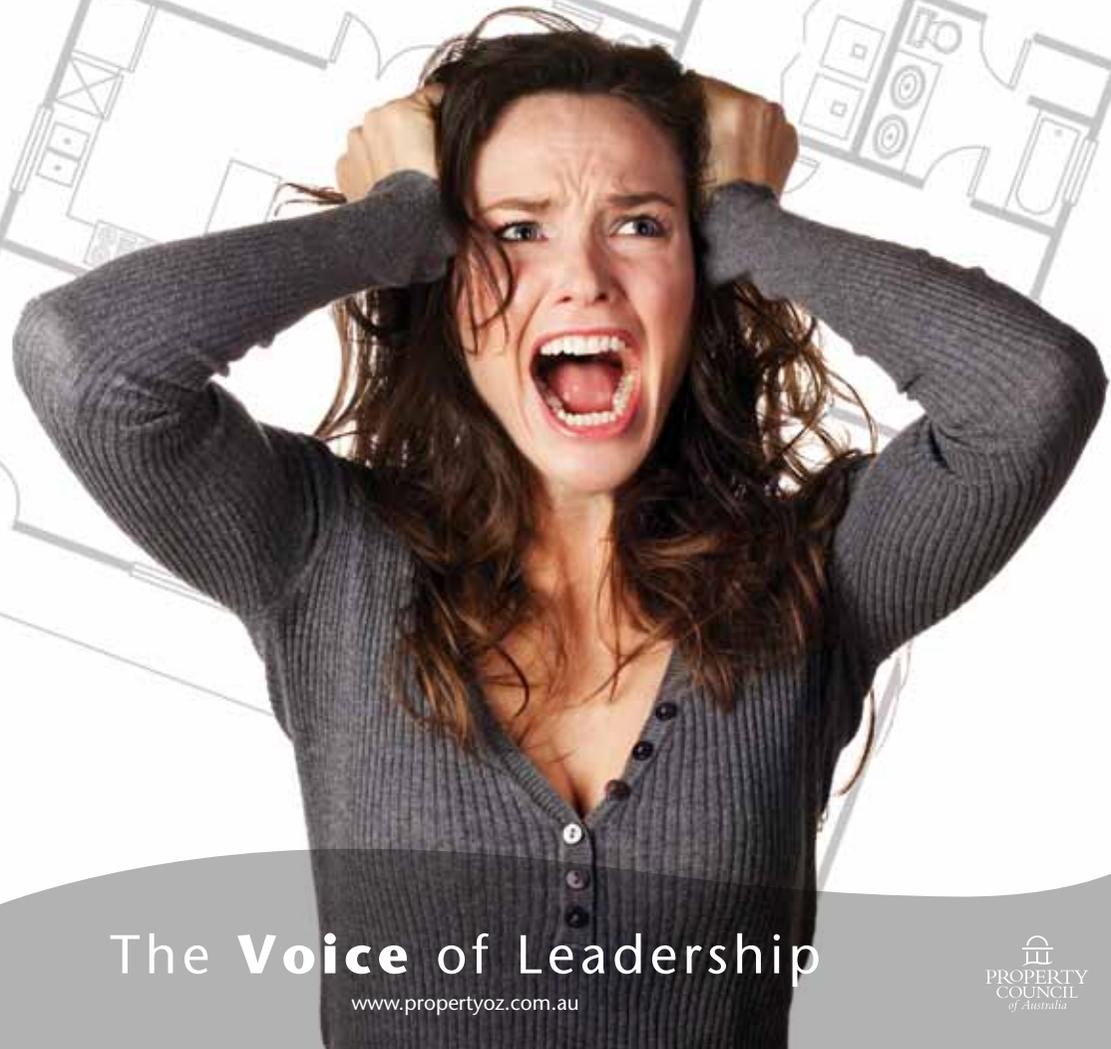


# PLANNING GONE MAD

A STORY ABOUT THE NSW PLANNING SYSTEM...  
AND HOW IT DRIVES APPLICANTS CRAZY



The **Voice** of Leadership

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The Property Council of Australia represents the leading developers, financiers, owners and managers of investment property in Australia. Our membership also includes all major construction, professional and trade services suppliers working within the property sector.

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## PROLOGUE

The Liberal National Coalition came to power in March 2011 with a sweeping mandate to review and reform the State's planning system with a focus on 'returning local planning powers to local communities'.

The following story – **Planning Gone Mad** – is a fictionalised account of the development assessment process as it currently operates in NSW. It is intended as a 'cautionary tale' – a warning from the users of the planning system, both big and small, against progressing reform options which do not address the ingrained culture of poor implementation, lacklustre customer service and absence of accountability at the local government level.

What makes Planning Gone Mad compelling is the fact that it is faithfully informed by the first hand experiences of Property Council members. In every sense of the term, 'this is a story based on true events'.

We want to put on record the dangers of implementing a new planning system without first intervening to address the local government sector's growing 'blind spot' to facilitating innovation and growth, the desire and ability of local government planners to place all development into a straightjacket, and the growing NIMBY movement's capacity to frustrate legitimate development proposals. Without resolving these issues first, the new planning system will do little to improve the attractiveness of NSW as a place to do business.

It is hoped that this story, and the accompanying examples, will confirm to all policy and decision makers that the planning system in NSW has, indeed, gone mad, and encourage them to take the steps needed at the local government level to ensure the new NSW planning system does not suffer a similar fate.

### HAVE YOUR SAY

Tell us your own mad planning stories

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## PLANNING GONE MAD

# SNAP SHOT

### NSW ISN'T OPEN FOR BUSINESS

Proponents are told their proposed development would be better on a site they don't own...

Pre-lodgement meetings come with a thousand dollar price tag...

### LOCAL PLANNING CONTROLS ARE RIDICULOUS

Councils are compiling DCPs which are over 1,000 pages long...

Resources are wasted drafting definitions for 'horses'...

### IT IS A BATTLE TO EVEN LODGE AN APPLICATION

Proponents are turned away as there is no one available to receive and sign off their application...

Applications cost over \$1000 to print and multiple copies are being requested...

# PLANNING GONE MAD

## ACCESS TO VITAL INFORMATION IS CURTAILED

GIPA requests are needed to access submissions to development applications...

Proponents are required to pay \$1 a page to print submissions at Council...

## ASSESSMENTS ARE BOGGED DOWN BY BLIND REQUESTS FOR 'ADDITIONAL INFORMATION'

Sea Level Rise assessments are required in non-coastal locations...

Bushfire Management Plans are required for alterations and additions to existing buildings...

## APPROVALS ARE PLAGUED WITH NONSENSICAL CONDITIONS OF CONSENT

Typical development consents are accompanied by over 200 conditions...

Conditions of consent specify the polyethylene thickness of plastic bags...

PLANNING GONE MAD



# CHAPTER 1

PROJECT INITIATION

# CHAPTER 1 PROJECT INITIATION

The year is 2012 and Mallory, a finance sector professional with a background in property, has inherited a block of land in a prime, middle ring metropolitan location. The site is walking distance to a train station and town centre. She decides to investigate options for a residential development.

After some initial investigations into the development potential of her site, Mallory decides to project manage the development application process and obtain an approval for a residential flat building which mirrors the scale of nearby development and takes advantage of the easily accessible transport options and shops.

Mallory takes out a line of credit against her land to fund the upfront costs of obtaining a planning approval. She is comfortable that the risk she is taking will prove worthwhile once the development is complete.

Mallory sets out to do some due diligence on her site.

PLANNING GONE MAD



# CHAPTER 2

DUE DILIGENCE

## CHAPTER 2 DUE DILIGENCE

Mallory begins by searching the Council website to confirm the zoning and other development constraints on her land. The only thing she could confirm was that the website seemed to be a 'work in progress' and that it was impossible to find the basic information she was after. She decided to go the Council Chambers to look through the hard-copy information that should be available.

At Council, Mallory looked at a map on the wall and found her block of land. Mallory approached the Duty Planner to ask some general questions about her site and Council's lodgement and assessment procedures.

The Duty Planner pointed out two small signs sitting on the counter.

The first read, "Council staff can take no responsibility for any advice given over the counter".<sup>1</sup>

The second was advertising the application fee for a Section 149 Certificate.

The Duty Planner queried her:

*"Why would you want to develop that block of land? I can tell you there are some sites on the other side of the railway line that would be suitable for the sort of thing you're looking at doing. Those sites would be preferable options for both the Council and the community, I think. Have you thought about maybe developing something over that way?"<sup>2</sup>*

Mallory was shocked at the suggestion that she develop somewhere else, on land she didn't even own.

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### REAL LIFE EXAMPLES

1. As part of a due diligence exercise, a planning consultant went to an outer ring metropolitan council to discuss a land use permissibility issue. The consultant was told that they would have to register and pay for a formal pre-lodgement meeting as "trying to circumvent the formal pre-lodgement process" by "asking questions" would be "inappropriate".
2. An applicant sought a pre-lodgement meeting with an inner ring metropolitan council. During the meeting it was suggested by a council planner that the applicant should consider developing on another site several blocks away – land that the applicant didn't own and was neither vacant or for sale.

PLANNING GONE MAD



# CHAPTER 3

INTERPRETING THE CONTROLS

## CHAPTER 3 INTERPRETING THE CONTROLS

Even with a section 149 Certificate in hand, Mallory was no closer to understanding the development potential of her site. Far from giving any guidance about land use permissibility and development potential, all the certificate provided was a general list of planning instruments that applied to her site.

Mallory took the early decision to engage a planning consultant to help her wade through the layers of plans and policies the certificate identified.

\$10,000 later, Mallory received a long report from the consultant setting out the zoning and development controls applying to her land. The fee was high but within Mallory's budget.

She was reassured that the cost had been worth the detailed analysis of the TSCA, EPBCA, HA, NPWA, PEOA, WMA, RFA, FMA and RA; the Sydney Metropolitan Plan and draft sub-regional strategy; SEPPs 14, 19, 26, 44, 55, 60, 64-65 and 70 -71, as well as the ISEPP, Codes SEPP, BASIX, and SEPP for HfSaPwaD that she received in the report.

The report also identified two Council LEPs, a six volume DCP, and Council's policies on TPO, ESD, OSD, APZ, FPL, FBL, RFBs, RCMS, DDA, CLM, CPTED, PoPE, SIA and three section 94 Contributions Plans.<sup>3</sup>

Mallory was told that she was relatively lucky because, even though there had been a '1 DCP per area of land' policy in place since 2004, some councils still had well over 15 separate DCPs that needed to be considered.<sup>4</sup>

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### REAL LIFE EXAMPLES

3. A modest residential development in an inner ring metropolitan council area needed to address an LEP, seven separate DCPs, a master plan that had been amended three times, a resolution of Council that applied certain DCP controls that did not otherwise apply to the land, three SEPPs, a draft LEP and a draft DCP.
4. A regional council has a DCP with a 'table of contents' that is 16 pages long.  
A regional council has 15 LGA wide DCPs in place, plus another 15+ site specific DCPs.  
A middle ring metropolitan council has a DCP that is 1,000 pages long.  
An inner ring metropolitan council has a draft DCP which is over 600 pages long.

# PLANNING GONE MAD

Her consultant told her that Council's housing policy could be found in a resolution it had recently made when considering an application for a residential project. There had been twelve objections from the public so the Council had decided to adopt a policy on the night of their meeting that set out the circumstances in which they would consider significant applications for housing, and what criteria it had to meet.

Mallory couldn't quite follow the process:

*"Are you telling me that a council can change its planning policies at any time in response to somebody's development proposal and without any public consultation? Doesn't that make it very difficult for someone wanting to develop their land to know exactly where they stand?"*

*"Indeed",* was the reply.<sup>5</sup>

Mallory had thought she understood how the various planning provisions, clauses, policies and requirements fit together. She knew that SEPPs were meant to trump LEPs, which in turn were meant to trump DCPs and policies, but nothing seemed to be consistent.<sup>6</sup>

For example, her consultant report outlined the following:

*There are several relevant definitions for different types of residential accommodation.*

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## REAL LIFE EXAMPLES

5. A middle ring metropolitan council has in excess of 50 planning related 'policies' sitting outside of its DCP. Amongst a range of matters, these policies restrict the number of dogs and cats to three per household and ban the erection of signs saying "Caution: Children Playing in the Street".

An inner ring metropolitan council has a policy relating to the design of construction hoardings that is 26 pages long and requires hoardings to display fully coordinated graphics which are either sandstone or ocean green in colour.

An inner ring metropolitan council established a minimum floor plate size for development by council resolution (without public exhibition and outside of its DCP). The minimum floor plate size 'resolution' is applied to all relevant development.

A middle ring metropolitan council resolved at a council meeting (and later argued in the Land and Environment Court) that two conditions of consent that it had placed on a particular DA relating to the use of plastic bags should be seen as 'council policy'.

6. An inner ring metropolitan council has a DCP which applies to a major commercial growth corridor which permits development that is not permissible in the overarching LEP land use zone.  
An inner ring metropolitan council has DCP height and floor space controls that are entirely inconsistent with the height and floor space controls permitted under the overarching LEP.

## CHAPTER 3 INTERPRETING THE CONTROLS

*Under State definitions a 'residential flat building' means 'a building containing three or more dwellings, but does not include an attached dwelling or multi dwelling housing', and 'multi dwelling housing' means 'three or more dwellings (whether attached or detached) on one lot of land, each with access at ground level, but does not include a residential flat building'. However, Council's current LEP defines 'multi-unit housing' to include all 'attached dwellings' except 'dual occupancies' and 'shop top housing' making a 'residential flat building' a form of 'multi-unit housing' unless it was above a shop or office, in which case it wouldn't be.*

Mallory read through some more of the DCP controls and provisions her consultant had identified.

One control specified that residential dwellings had to provide toilets, which seemed a little too obvious to need to be said in a planning document.

Another control outlined the preferred thickness of doormats.

Mallory decided the most ridiculous was a provision detailing design criteria for entries and interiors under the heading 'Environmental Enrichment for Pets'.<sup>7</sup>

The consultant did confirm that her plan was entirely consistent with the State's strategic planning framework. The Metropolitan Plan, sub-regional strategy (which was actually still a draft strategy...) and Council's own housing policy were all calling for more housing to be built in suitable locations close to employment, public transport, community facilities, shops and open space.

Based on her own due diligence and the detailed advice from her planning consultant, Mallory decided to progress with her development application and arrange a pre-lodgement meeting with Council.

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### REAL LIFE EXAMPLES

7. A regional council required 50% of private dwellings to provide for the accommodation of domestic dogs and to ensure that dogs (whether kept indoors or outdoors) are provided with an opportunity to view the public street and have access to direct sunlight and shade at all times (since repealed).

An outer ring metropolitan council defines a 'horse' to include "all animals commonly referred to as a horse" and seeks to regulate "the servicing or teasing of mares for copulation purposes".

Another regional council defines a 'horse' as "one or more animals of the equine family...including those members commonly known as horses" and seeks to ensure that openings in a stable are "of sufficient size to allow horses to enter and exit".

An inner ring metropolitan council has 33 pages of DCP controls relating to residential development. Amongst other matters, these controls prescribe the position of wardrobes in bedrooms, detail how locks on doors should be installed, and provide information on training deciduous vines over pergolas.

PLANNING GONE MAD



# CHAPTER 4

PRE-LODGEMENT

## CHAPTER 4 PRE-LODGE MENT

Council's website advised that a pre-lodgement meeting would reduce processing times, remove the need for any checking of her application when it was formally lodged, and help make sure her DA would be determined as quickly as possible.<sup>8</sup>

The whole process of submitting the pre-lodgement information and request for a meeting could be dealt with over the internet.

The \$3,500 fee required to have this meeting was an irritating additional cost, but Mallory was keen to proceed.<sup>9</sup>

Having lodged her meeting request and paid her fee online, Mallory received this message:

*Pre DA meetings are scheduled on the first available Tuesday dependent on current resourcing and the number of applications before Council and can be expected to occur (where possible) within a two week period from the date the application is forwarded to a relevant assessing officer.*

Four weeks passed.

Mallory was just about to call the Council when she received an email:

*This email has been automatically generated - please do not reply. Your request for a pre-lodgement meeting provides insufficient supporting documentation. If additional information is not received within 24 hours, this request for a meeting will be cancelled.*<sup>10</sup>

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### REAL LIFE EXAMPLES

8. An inner ring metropolitan council advises applicants that it can have "issues resolved before the DA is actually submitted". It subsequently states that council is "not responsible for any of the advice that it provides during the pre-lodgement process and any advice they give is in no way designed to influence the DA assessment process".
9. An inner ring metropolitan council charges a \$4,600 fee (for development over \$10 million) to register for a pre-lodgement meeting irrespective of the nature or complexity of the project.  
An outer ring metropolitan council takes up to four months from a pre-lodgement meeting to issue minutes.
10. A regional council requires requests for a pre-lodgement meeting to be made through an online portal which requires a meeting agenda to be submitted. Having lodged a meeting request and agenda, an applicant received an email stating that the proposed agenda was "inadequate" as a full statement of compliance of the development against all relevant planning controls had not been submitted. The applicant was given 24 hours to rectify the inadequacies, following which the meeting request would be cancelled.

# PLANNING GONE MAD

Mallory went directly to the Council Chambers. The Duty Planner echoed the earlier email:

*"...Did you read our Guide to Pre-lodgement DA Consultation Service? Your site analysis plan was missing the location of the windows on all of the buildings on adjoining land, and your concept development plan didn't seem to cover waste bin storage and collection facilities / areas or surface treatments (inclusive of bunding). It also wasn't clear from your preliminary floor plans which rooms might be studies but capable of being used as a bedroom. We also need the nominated treatment of road intersections..."*

Mallory interjected:

*"But I only want to ask you for feedback on my preliminary sketches and clarify a few issues about Council's development controls before I outlay the money to have all the documents you just mentioned prepared."*

The Duty Planner replied:

*"I really am sorry, but you should have read the instructions more carefully about what you need to do before we can schedule a pre-lodgement meeting and give you any advice."*

They went on:

*"But look, I would really like to help you out here, so I think it's worthwhile telling you (off the record) that I have done a preliminary assessment of your application anyway, and you're going to need to come back with an amended proposal."<sup>11</sup>*

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## REAL LIFE EXAMPLES

11. A regional council has a three page list of required information that an applicant must make available before a pre-lodgement meeting will be scheduled.

A middle ring metropolitan council requires all significant industrial development proposals to go through a Design Assessment Panel before a DA can be lodged. The applicant is required to pay \$1,000 for this process.

A regional council requires an applicant to deliver public art with any major development. The DCP "encourages" applicants to submit a preliminary application (including a concept Masterplan and draft designs) for the public art work before the DA is lodged, for assessment by a Public Art Advisory Group.

A regional council requires submission of a written form and payment of a fee for an applicant to obtain pre-lodgement advice about payable section 94 contributions.

## CHAPTER 4 PRE-LODGE MENT

The Duty Planner pulled out the preliminary sketches and showed Mallory that her apartments were oriented towards the south (which took in the available water view).

They explained that the State had a policy governing the design of residential flat development (SEPP 65) and that, under that policy, there was a set of design 'Rules of Thumb' that illustrated a number of different ways a residential development might achieve good design outcomes.

These 'Rules of Thumb' didn't recommend apartments with south facing living areas, as Mallory had proposed, on the basis of solar access. The Duty Planner said her proposed design would not be acceptable.

Mallory asked:

*"Why do I have to strictly comply with the 'Rules of Thumb'? Aren't they just guidance? What about the water views?"*

The Duty Planner replied:

*"Actually, we only strictly apply 'Rules of Thumb' in some circumstances. When it comes to things like apartment sizes, Council has its own controls and you will have to comply with these. For example, I can see that your two bedroom apartments meet the minimum 70 m<sup>2</sup> apartment size recommended by 'Rules of Thumb' but Council's DCP actually requires them to be at least 100 m<sup>2</sup>."<sup>12</sup>*

Mallory knew that it would be crazy to redesign her proposal to face away from the water view (and instead face out onto the blank façade of the hotel complex on the adjacent block), sunshine or not.

Having done some market research as a part of her due diligence, Mallory also knew that in the adjacent LGA 70 m<sup>2</sup>, two bedroom apartments were permitted and selling well.<sup>13</sup>

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### REAL LIFE EXAMPLES

12. Many councils have DCPs that are inconsistent with the SEPP 65 'Rules of Thumb' and require solar access to apartments well in excess of two hours and apartment sizes well in excess of those in the Residential Flat Design Code.
13. Between suburbs at three consecutive train stops in an inner to middle ring metropolitan area applicable DCPs have minimum required sizes for two bedroom apartments which differ by 35m<sup>2</sup>; one council will not permit two bedroom apartments less than 100m<sup>2</sup>, while the council immediately adjacent permits two bedroom apartments of only 65m<sup>2</sup>.

# PLANNING GONE MAD

Mallory made the decision to put her faith in common sense and the skill of Council's planners to do a thorough merit assessment of her application and appropriately look to the 'Rules of Thumb' as a guideline, as was intended.

She chose not to go ahead with the pre-lodgement meeting, forfeiting her meeting fee at the same time, and decided to progress her application.

Mallory instructed an architect to proceed with more detailed designs and re-engaged the planning consultant to write a SEE.

PLANNING GONE MAD



# CHAPTER 5

DA LODGEMENT

# PLANNING GONE MAD

In an attempt to recoup the cost of the failed pre-lodgement meeting, Mallory decided to print and collate all of the plans and reports for her application herself.

She triple checked that she had everything she would need. Unfortunately, Mallory hadn't realised that she needed to have pre-booked a lodgement interview timeslot. She was surprised to discover the lodgement interview would take an hour.

Mallory filled out the application form and concertina folded 15 sets of 32 A3 plans to fit into the back of her SEEs.<sup>14</sup>

Her SEE was accompanied by 23 supporting studies and reports in Appendices A through W.

The cost just to print out her documents had been \$12,000. The full scale sets of architectural drawings came in 15 rolls, each 2.5 inches thick. To collate them she went down to the local community hall and lay them out in piles on the floor.<sup>15</sup>

Mallory was still dumfounded by the flora and fauna study that had been required to justify the removal of some para grass and a Camphor Laurel which had grown to above just three metres on her site. Her planning consultant had told her that the Council would treat the plants as significant. Despite being noxious weeds, their height rendered them technically subject to the provisions of Council's Tree Preservation Order.<sup>16</sup>

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## REAL LIFE EXAMPLES

14. A middle ring metropolitan council required an applicant to lodge 150 volumes of an SEE. The applicant had to hire a ute to deliver the documentation to the council.
15. The cost of printing a medium to large SEE can easily be between \$1,000 and \$2,000 per copy.  
An inner ring metropolitan council requested 12 sets of A1 plans, of which there were 120 sheets in each set. This equated to 1,440 m<sup>2</sup> of drawings at a weight of 115kg. At the meeting of the Design Review Panel, the panel informed the applicant that they had not been given any plans to review.
16. A middle ring metropolitan council required an applicant to prepare a Social Impact Statement justifying why people that worked for the Department of Defence should be allowed to live in an approved residential development.  
An inner ring metropolitan council required an applicant to prepare a Bandicoot Management Plan to accompany a proposal to rebuild a swimming pool.  
A regional council, far from the coastline, required an applicant to provide additional information on the potential impact Sea Level Rise may have on their proposal.  
A consent authority required shadow diagrams be submitted for an earthworks proposal.  
An inner ring metropolitan council responded to an application for an internal refurbishment by stating that "the application cannot be assessed as the following information, that is essential to proper consideration of the application, has not been submitted...whether the applicant is intending to use an high noise intrusive appliances such as...steam cleaners".

## CHAPTER 5 DA LODGEMENT

Almost 16 weeks after her initial trip to the Council, Mallory presented her development application to Council.<sup>17</sup>

At the lodgement interview Mallory was told:

*“Your bank cheque for the lodgement fee is \$3.97 too much. You will need to re-draw this because Council’s computer system can’t accept the overpayment. One of your SEEs is missing the 8th sheet of the DA drawings. Oh, and the application form you’ve completed is the wrong one. Council updated all of its forms earlier this week – we just haven’t put them on the website yet.”*

The Planner (the third she had now encountered) explained how all this could have been resolved earlier if she had thought to have a pre-lodgement meeting.

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### REAL LIFE EXAMPLES

17. An inner ring council refused to accept a DA over the counter because the Duty Planner was sick and there was nobody else in the council who could sign it off. The applicant was told to try again the following day.

An outer ring metropolitan council repeatedly requested a proponent produce landowners’ consent despite all applications (staged applications under an approved master plan) being lodged under a registered Power of Attorney.

A consent authority required a proponent to submit seven hardcopies and 13 CDs of an application to undertake a Test of Adequacy. To formally lodge the application, the proponent had to provide 18 hard copies and 35 CD copies. These requests were made after the launch of a dedicated electronic lodgement portal.

An inner ring metropolitan council required a proponent to lodge an application for the erection of a sign in order to place a sticker on a piece of furniture in a shop window. The application was rejected at the counter as a ‘section’ of the sticker wasn’t provided.

An inner ring metropolitan council refused to accept a digital model of a project as it did not show the mechanism (eg. the string) which is pulled to adjust the angle of a venetian blind

PLANNING GONE MAD



# CHAPTER 6

PUBLIC NOTIFICATION

## CHAPTER 6 PUBLIC NOTIFICATION

Having rectified the issues with her application, Mallory asked how long it would be before she could expect her application to be notified. She was told that, as the deadline had just been missed for the next newspaper edition, her application would need to wait a week before the notification period could commence.

This meant the notification period for Mallory's application would coincide with the Christmas school holiday period and that her application would need to be notified for eight weeks, instead of the typical 14 days.<sup>18</sup>

When the notification period was over, a Council Planner called to inform her that a large number of submissions had been received in response to her application. Mallory asked what sort of issues had been raised, and whether she could get a copy of the submissions.

She was told that a GIPA application form was required if she wanted access to the submissions, and that this process would take up to ten business days.<sup>19</sup>

Mallory looked past the stupidity of having to lodge a GIPA application to get hold of the submissions that she was required to respond to as part of the assessment process, lodged her application, paid another fee, and waited.<sup>20</sup>

When she received the submissions, the majority of them expressed fear over the potential adverse social impact of having more residential development in the area. All of these submissions had conveniently ignored that residential development was permissible on Mallory's land and that her site was in a town centre, next to the railway station and consistent with the overarching draft sub-regional strategy.

Another submission asked why the community garden on the site had to be removed (the site never had a community garden), and another claimed to have spotted the brush-tailed phascogale on the land back in 1992 and asked to know

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### REAL LIFE EXAMPLES

18. The NSW Government has adopted the policy of extending required exhibition periods for State Significant Development projects by up to three weeks if the exhibition period coincides with a school holiday period (whether this is public or private school holidays – or both – is not clear).
19. Councils are frequently requiring applicants to lodge a GIPA application to access the submissions that they are required to respond to as part of the assessment process.
20. A middle ring metropolitan council required an applicant to pay \$1 per page to print the submissions that they were required to respond to as part of the assessment process.

# PLANNING GONE MAD

what mitigation measures were to be put in place to protect the loss of its habitat.

Council had made it clear to Mallory that she was required to respond, in detail, to each issue raised in the submissions (as Council hadn't gone through a process of determining which issues were legitimate and which were nuisance complaints).<sup>21</sup>

She clarified in her response to submissions that the existence of a top floor penthouse was not evidence of an intention to hold all night dance parties, that there was no backpackers hostel on the ground floor, and that the local horticultural society didn't have an existing right to use the land as a community garden.<sup>22</sup>

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## REAL LIFE EXAMPLES

21. A standard letter from a consent authority requires a detailed written response to be made to all matters raised in submissions, and states that an applicant is not allowed to refer to information already provided – the information must be fully re-stated or provided again.

22. A community action group in a regional council area that was attempting to stop an applicant from modifying the design of an already approved retail project was given coverage on A Current Affair, Today Tonight, SBS Insight, Stateline and various newspapers.

A middle ring metropolitan council requested an applicant to submit shadow diagrams demonstrating that the applicant's own clothes line would receive enough sunlight – this request was on the basis that a neighbour had objected.

PLANNING GONE MAD



# CHAPTER 7

ASSESSMENT

# PLANNING GONE MAD

Mallory called the Council Planner a few weeks later to see how the assessment was proceeding.

She was pleased to hear the Planner generally agreed with her responses to submissions but, before finalising the assessment, the Planner asked Mallory if she could provide some further information to satisfy a DCP provision that required applicants to address how the adjoining sites on either side of her property could be developed in the future if they were amalgamated with hers.

Mallory didn't want to amalgamate the adjoining sites with her own, nor plan out other people's land, but she was willing to spend the additional money to prevent further delay. She went to her planning consultant to get a letter that identified and assessed the urban form outcomes of three different amalgamation options.<sup>23</sup>

She concluded that amalgamation was outside the scope of her application. And her budget.

The council planner had also wanted some further consideration to be given to how the proposal would activate the street front in accordance with Clause 14.7.5(a) of DCP 1, and indicated a preference for a small retail component to be added on the ground floor of her proposal, perhaps a small bar or restaurant, something that would encourage activity on the street and dual purpose trips to the locality.

Mallory had seen many shops and cafés in the area close down because there wasn't enough people traffic during the day when people were at work. The last thing she wanted was for her apartment building to have a pocket of 'dead space' as a foyer.

The Planner wasn't swayed by the rationale and insisted on the additional information.<sup>24</sup>

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## REAL LIFE EXAMPLES

23. A middle ring metropolitan council has DCP provisions that require site amalgamations to occur across existing road corridors (up to 25 lots need to be purchased). An applicant is required to justify why they cannot buy blocks of land on opposite sides of the road and develop them, and give the council written evidence of attempts to buy the land they do not own.

24. An outer ring metropolitan council tried to insist that a proposed residential development must include a component of commercial uses "because it is in the B4 Mixed Use zone and should, therefore, have a mix of uses".

A middle ring metropolitan council required a Rodent Management Plan be prepared for an application for a bakery.

# CHAPTER 7 ASSESSMENT

The Planner also informed her that Council had just recently placed a preliminary draft LEP up on its website for informal public consultation. Mallory asked what status a preliminary draft LEP had and how much weight it would be given during the assessment of her application.

She was told that she would definitely need to take it into account and make sure her proposal was consistent with it. She was then cautioned that, because it was a draft, she couldn't rely on any given outcome.<sup>25</sup>

When she lodged the additional information, the Planner passed Mallory two more public submissions. Although they had been received after the notification deadline for submissions, the Planner needed her to consider and respond to the issues raised.<sup>26</sup>

One submission read *'you're an ugly developer'*, and the other raised the issue of air pollution from the roof top BBQ.

The planner also let Mallory know that she had mistakenly included a number of things in her estimated CIV for the project. The total estimated cost of works was to be dropped from \$20,000,119 to \$19,900,000. This meant that the application wouldn't be determined by a JRPP as Mallory had anticipated, but by the elected Councillors.

Mallory's application had been with Council for 22 weeks.

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## REAL LIFE EXAMPLES

25. An inner ring metropolitan council refused to meet with an applicant to discuss the proposed development of a site for a permissible land use because the land use was proposed to be prohibited under a draft LEP that had not yet been adopted by the council.
26. After lodgement and public exhibition of a DA, a middle ring metropolitan council required a Bushfire Management Plan be submitted for alternations and additions to an existing commercial premises in a highly urbanised town centre with no connectivity or proximity to any areas of bushland. The project was in its 5th stage of alterations and additions and the applicant had not been required to address this issue in the previous four stages.  

A regional council required an application for a modification to an on-site sewerage management system to be publicly exhibited twice and, following the second exhibition, requested additional information from the applicant on four occasions. This information was put through two rounds of peer review. After planning approval was granted, the council refused the Section 68 application under the Local Government Act for the on-site sewerage management system, notwithstanding it was consistent with the planning approval.

PLANNING GONE MAD



# CHAPTER 8

APPROVAL

## CHAPTER 8 APPROVAL

Eight weeks later Mallory's application was on the Council agenda for a meeting in another two weeks time. Her application had been recommended for approval.

Mallory was given a three minute timeslot to speak to her application at the Council meeting.

The Councillors deliberated over her proposal, ignored the council officer's recommendation for approval and resolved to defer the application pending the provision of alternative options for the colour of the paint that Mallory had chosen for the spandrels on the western façade of the building.

The application had now been in Council for a total of 32 weeks.<sup>27</sup>

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### REAL LIFE EXAMPLES

27. A Joint Regional Planning Panel refused to convene for six weeks because its chair was on holidays.

A council refused an application on the basis that a determination hadn't been made within 40 days – no other grounds for refusal were given.

PLANNING GONE MAD



CHAPTER 9  
CONSENT CONDITIONS

## CHAPTER 9 CONSENT CONDITIONS

Mallory's application was finally approved. Fifteen months had passed since Mallory had started the process.

Mallory's approval was accompanied by 167 conditions of consent. This seemed a lot given the amount of information and documentation that she had provided to the Council during the assessment and approval process.<sup>28</sup>

Mallory opted to engage a PCA to assist progress her development. The PCA worked through the conditions of consent and identified six conditions that were contradictory to the BCA and relevant Australian Standards.

The PCA also explained that there were three conditions of consent that were of particular concern. The first was a condition that read:

*A Sea Level Rise risk assessment must be completed prior to the issue of a Construction Certificate for the building to the satisfaction of the Council.*

Considering the development would lie one kilometre from the coast on the top of a ridgeline, Mallory didn't think this was necessary. The PCA noted that because the condition referenced 'the Council', it was likely the Sea Level Rise Risk Assessment would need to go up to a full Council meeting for sign off.

The second and third conditions of concern related to permitted times for construction and fit out.

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### REAL LIFE EXAMPLES

28. A typical development consent can have close to 200 conditions of approval attached.

A middle ring metropolitan council imposed a condition of consent that specified the polyethylene thickness permitted for a plastic bag.

An inner ring metropolitan council placed a condition on the range and size of condoms that had to be made available at a sex services premises.

A regional council adopted a policy that all future DAs submitted by Woolworths and Coles would be subject to a condition requiring the introduction of coin operated shopping trolleys.

An inner ring metropolitan council placed a condition on a fast food restaurant requiring all dine in meals to be served on crockery.

An inner ring metropolitan council imposed a condition requiring installation of ceiling fans in every dwelling of a large residential development even though the project already exceeded both SEPP 65 cross ventilation requirements and BASIX energy efficiency and thermal amenity standards.

A regional council imposed a condition requiring the construction of an on-site sewerage treatment plant and required the applicant to comply with the condition even though, at the time of opening, connection to the mains sewer was both available and granted.

# PLANNING GONE MAD

In order to ensure the amenity of surrounding residents, Council had ruled out any works occurring between 6:00am and 6:00pm. They then ruled out any works occurring between 5:00pm and 7:00am.<sup>29</sup>

Assuming this was an administrative error, Mallory hoped Council would be able to fix them quickly and re-issue her consent.

She was pleased when the Council Planner agreed that they were just standard conditions that had inadvertently placed on her consent. However, Mallory was also told that, even though it was an error of Council, she would have to lodge a s96 modification application to have the error corrected.<sup>30</sup>

This process could take up to another six weeks. The Council Planner also said, although it was council's error, it was likely Mallory would have to pay another application fee.

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## REAL LIFE EXAMPLES

29. A DA was approved by an inner ring metropolitan council with conditions that eliminated all potential hours of construction. The applicant was required to submit and pay for the processing of a s96 modification application in order to rectify this error.
30. A regional council imposed a condition on a dual occupancy development that required it to have a shared driveway, even though the two properties had separate access points divided by a fence. A modification application, and associated fee, was required to fix this condition. The modified condition then included a new requirement for consent under the Roads Act for the driveway. The subsequent Roads Act consent required the submission of a Traffic Management Plan, even though the site was on a quiet country road.

PLANNING GONE MAD



# CHAPTER 10

POST APPROVAL

# PLANNING GONE MAD

Five weeks later, the modified consent arrived.

Although the hours of work issue had been resolved, the condition relating to the sea level risk assessment was still there. Rather than requiring the Sea Level Rise risk assessment being required to the satisfaction of Council, it was now “*to the satisfaction of the certifying authority*”. Council’s planner had misunderstood the irrelevance of this condition, and Mallory could not proceed to get a Construction Certificate until the risk assessment was complete.

Mallory decided to approach the Department of Planning and Infrastructure to detail the hurdles she had been forced to jump and the time delays she had experienced, and hopefully, have them give some advice on how she could move forward.

Having detailed her 18 month story to the Departmental Officer, she was told:

*“The State Government is committed to the goal of delivering new housing in NSW and is absolutely focussed on improving our planning system. We are currently reviewing the planning system and, hopefully, in a year or so these problems will be resolved. Perhaps look to re-lodge your application then...”*<sup>31</sup>

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## REAL LIFE EXAMPLES

31. An applicant approached the Department of Planning and Infrastructure to discuss the assessment of their subdivision proposal and was told that no advice could be provided “at this stage” as the legislation was under review – no timeframe for assistance was provided.

## CHAPTER 10 **POST APPROVAL**

**...THIS IS ONLY  
THE BEGINNING...**



## GLOSSARY OF TERMS

|                      |  |
|----------------------|--|
| <b>APZ</b>           | Asset protection zone  |
| <b>BASIX</b>         | State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004            |
| <b>BCA</b>           | Building Code of Australia   |
| <b>CC</b>            | Construction certificate   |
| <b>CIV</b>           | Capital Investment Value   |
| <b>CPTED</b>         | Crime prevention through environmental design  |
| <b>CLM</b>           | Contaminated land management   |
| <b>Codes SEPP</b>    | State Environmental Planning Policy (Exempt and Complying Development Codes) 2008          |
| <b>DA</b>            | Development application  |
| <b>DCP</b>           | Development Control Plan   |
| <b>DDA</b>           | Disability Discrimination Act  |
| <b>ESD</b>           | Ecologically Sustainable Development   |
| <b>EPBCA</b>         | Environment Protection & Biodiversity Conservation Act                                     |
| <b>FMA</b>           | Fisheries Management Act   |
| <b>FBL</b>           | Foreshore building line  |
| <b>FPL</b>           | Flood planning level   |
| <b>HA</b>            | Heritage Act   |
| <b>HfSoPwaD SEPP</b> | State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 |



## GLOSSARY OF TERMS

|              |   |
|--------------|---|
| <b>ISEPP</b> | State Environmental Planning Policy (Infrastructure) 2007 |
| <b>JRPP</b>  | Joint Regional Planning Panel                             |
| <b>LEP</b>   | Local Environmental Plan                                  |
| <b>LGA</b>   | Local Government Area                                     |
| <b>NPWA</b>  | National Parks & Wildlife Act                             |
| <b>OSD</b>   | On site detention   |
| <b>PEOA</b>  | Protection of the Environment Operations Act              |
| <b>PoPE</b>  | Place of public entertainment                             |
| <b>RA</b>    | Roads Act   |
| <b>RCMS</b>  | Regional catchment management strategy                    |
| <b>RFA</b>   | Rural Fires Act   |
| <b>RFBs</b>  | Residential Flat Buildings                                |
| <b>SEPP</b>  | State Environmental Planning Policy                       |
| <b>SIA</b>   | Social impact assessment                                  |
| <b>SEE</b>   | Statement of Environmental Effects                        |
| <b>S94</b>   | Section 94  |
| <b>TPO</b>   | Tree Preservation Order                                   |
| <b>TSCA</b>  | Threatened Species Conservation Act                       |
| <b>WMA</b>   | Water Management Act                                      |

# PLANNING GONE MAD

## NOTES

# PLANNING GONE MAD

## NOTES



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