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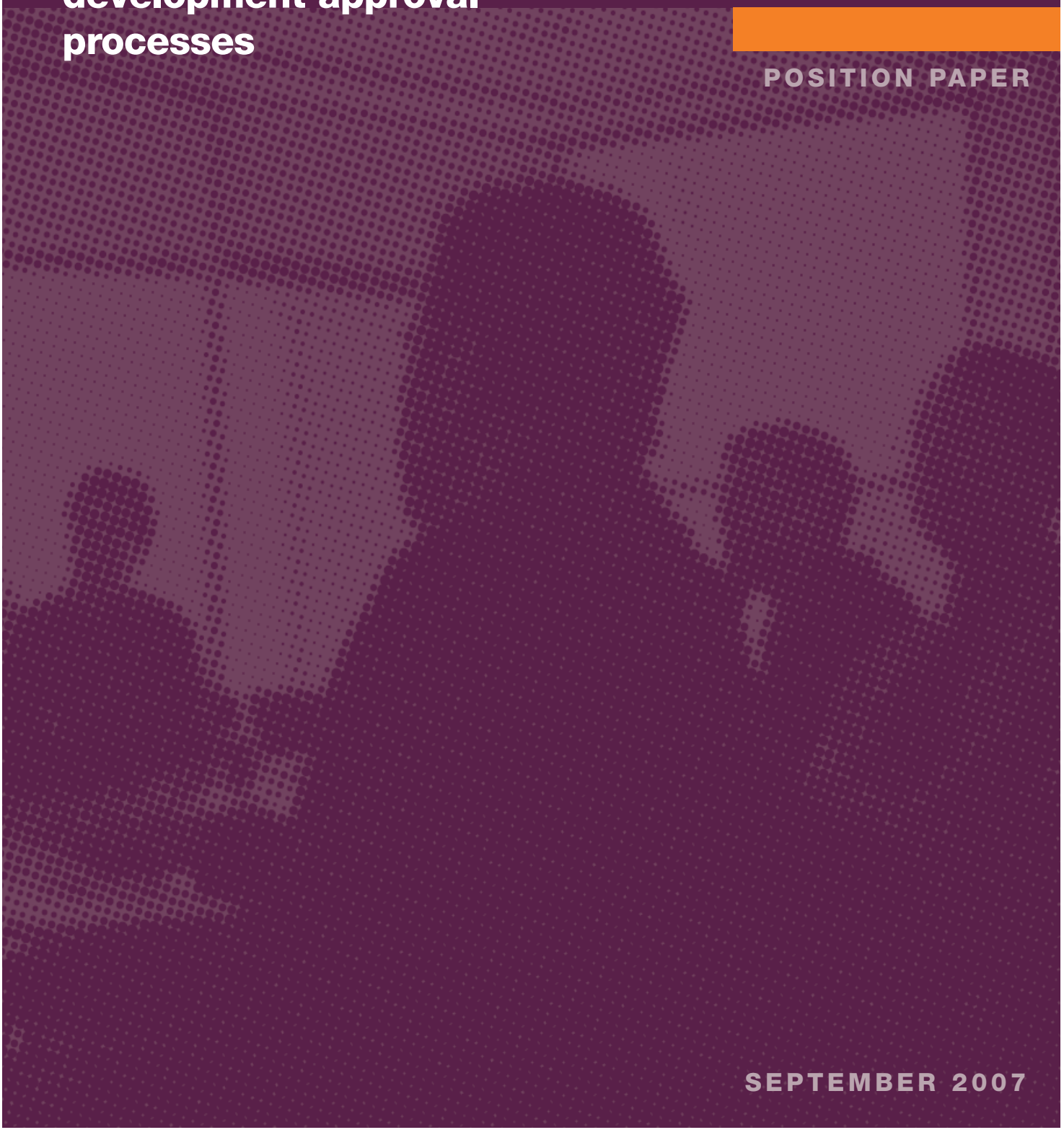
Independent Commission Against Corruption

Corruption risks in NSW development approval processes

POSITION PAPER



SEPTEMBER 2007

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ISBN 1 920726 34 9

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Caveat on use of this publication

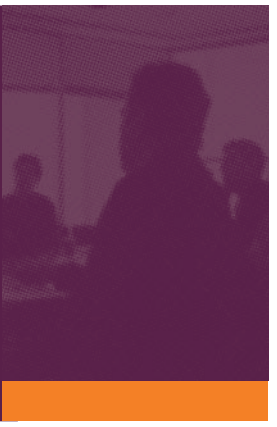
This publication provides readers with advice, guidance and/or recommendations regarding specific governance issues.

The advice contained herein relates to what the Commission considers at the time of publication to be best practice in relation to these issues. It does not constitute legal advice, and failure to implement the advice, guidance and recommendations contained herein does not constitute corrupt conduct, which is defined in the *Independent Commission Against Corruption Act 1988*.

Public sector organisations are welcome to refer to this publication in their own publications. References to and all quotations from this publication must be fully referenced.

Independent Commission Against Corruption

ADDRESS	Level 21, 133 Castlereagh Street, Sydney, New South Wales, Australia 2000
POSTAL ADDRESS	GPO Box 500, Sydney, New South Wales, Australia 2001
TELEPHONE	02 8281 5999 1800 463 909 (toll free, for callers outside metropolitan Sydney)
TTY	02 8281 5773 (for hearing-impaired callers only)
FACSIMILE	02 9264 5364
EMAIL	icac@icac.nsw.gov.au
WEBSITE	www.icac.nsw.gov.au
BUSINESS HOURS	9.00 am – 5.00 pm Monday to Friday



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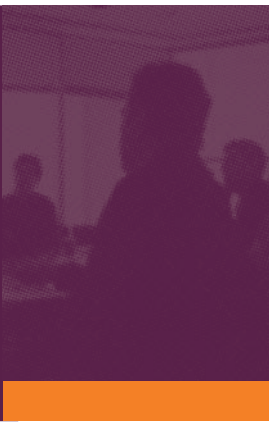


Executive summary

In the 2005–2006 financial year, 34.92% of the complaints received by the Commission from members of the public concerned local government, and a significant number of these related to development approval processes. Two recent investigations by the Commission revealed corrupt conduct aimed at improperly influencing the outcome of development approval processes.

In addition, probity advice is often sought from the Commission by both local councils and state agencies dealing with development matters. Issues associated with the development approval process are commonly raised in the Commission's liaison and training sessions for councillors and council staff.

In the light of this experience, the Commission concluded in 2005 that NSW development approval processes face a number of specific corruption prevention challenges. Accordingly, the Commission decided to consider whether there are unmanaged corruption risks in NSW development approval processes.

In December 2005 the Commission published *Corruption risks in NSW development approval processes — discussion paper*. The discussion paper raised a number of aspects of the NSW development approval process and questioned whether some or all of these aspects of the process might pose a corruption risk which should be addressed by the Commission and relevant bodies.

The Commission invited comment on the discussion paper, and received a total of 187 submissions from a wide range of individuals, agencies and organisations. These are listed in Appendix A.

The Commission considered the issues raised in the light of the submissions made and in the light of its own experience gained from inquiries, complaints and research. As noted in Chapter 1, the Commission focused on identifying identifiable corruption risks, and developing recommendations intended to address those risks. Management issues and governance issues, as distinct from corruption issues, are matters to be addressed by other agencies and by councils.

The different roles of councillors

The different roles performed by councillors are clearly the subject of debate, but this debate centres on management and governance implications. The Commission is not persuaded that the different roles allowed for in the legislation raises issues connected with corruption risk.

The only area in which the Commission believes it needs to make a recommendation concerning the roles of councillors is the absence of a requirement in current legislation

for the giving of reasons for approval; particular concern has been expressed in submissions about councillors giving consents against the recommendations of council officers. The Commission is of the view that the absence of reasons does not necessarily suggest corrupt conduct, however, it considers that reasons should be given for all development decisions.

Councillors and non-pecuniary conflicts of interest

Submissions on the discussion paper revealed a high level of concern about a perceived lack of clarity in this area. It appears that councillors are finding it difficult to identify non-pecuniary interests and to identify the appropriate management option.

The current situation leaves open the possibility that a councillor might determine that he or she has no conflict in circumstances where the Commission, the Department of Local Government and the hypothetical reasonable person might disagree. Conversely, it leaves councillors open to the prospect of making a choice in good faith but nonetheless facing criticism which they have no way of answering in the absence of objective criteria.

The Commission makes a number of recommendations aimed at clarifying the obligations of councillors in the area of non-pecuniary interest and providing for independent sources of advice to assist them to meet their obligations.

Options for reform

A number of options have been put forward to address the issues arising from the different roles of councillors. These options include greater delegation, the recording of how councillors vote on development matters, popular election of mayors, and greater use of design review panels. Another option considered is structural reform to local government, by the creation of larger councils, a smaller number of councillors working on a full-time basis, and the abolition of the ward system. The use of Independent Hearing and Assessment Panels (IHAPs), the broader availability of third-party appeal rights, and training for councillors, have also been considered.

These options for the most part have been put forward as possible ways to address the perceived problems of different councillor roles. The submissions received were divergent in key respects. The Commission has concluded that these different roles are not in themselves a corruption risk, and that its further consideration of most of these options is not warranted. Nonetheless the Commission considers that it would be a positive step in corruption prevention terms to encourage greater transparency about the reasons for revoking existing delegations, and to maintain a record of individual voting. It also considers that IHAPs may be a useful source of advice on particular proposals which raise corruption prevention issues.

The Commission considers that the availability of appeal rights for objectors introduces the possibility that a development approval obtained by corrupt means can be overturned on appeal, and can inhibit corrupt conduct. It therefore favours broader third-party appeal rights for certain categories of significant development.

The availability of training for councillors was strongly supported in submissions and the Commission concludes that better training in planning matters and corruption awareness would be a beneficial reform in terms of corruption prevention.

Council officers and conflicts of interest

The issue of conflicts of interest that can be faced by council officers is discussed in Chapter 5. The two areas considered are regulatory capture, and inappropriate pressure being applied by senior staff or councillors.

Regulatory capture is best thought of as the development of a relationship between the regulator and the regulated which can create a conflict of interest for the regulator. A number of measures can be used to manage the risk of regulatory capture, including the allocation of applications from frequent applicants to different staff members; the introduction of a random auditing system, and peer review or countersigning systems. These measures will be equally applicable to a broad range of corruption risks.

The possibility of inappropriate pressure being applied to council officers by councillors is adequately covered by section 352 of the *Local Government Act 1993* and by the Model Code of Conduct. The Commission concludes that extending prohibitions of the kind applicable to councillors to senior staff could compromise the ability of senior staff to properly fulfil their supervisory responsibilities. It is open to individual councils to adopt a protocol if they believe it appropriate.

Conflicting roles at a consent authority level

Councils are often responsible for the determination of applications affecting their own land, and this is an issue on which the Commission's advice is frequently sought. The dual role is not a corruption issue in itself but, particularly in the case of entrepreneurial proposals, there can be an exposure to corruption risks.

There is a range of approaches councils can take when dealing with their own applications and these are set out in Chapter 6.

Council land disposal

Councils do not have to invite tenders for the sale of land, as noted in Chapter 7. The Commission's recent *Report on investigation into the sale of surplus public housing properties* (2006) demonstrates how a disposal process can be manipulated for corrupt purposes, and the Commission favours measures to minimise the risk councils face in this area. These measures include a tender process in the case of valuable land, the commissioning of at least two valuations in other cases, and the identification of reasons if land is to be sold at below market price for strategic reasons.

The engagement of consultants and conflicts of interest

The engagement of consultants is an area in which councils need to take steps to deal with possible conflicts of interest. Such steps can include using competitive processes to select consultants, rotating consultants regularly, and considering the nature of the work assigned to them. Contracts can include provisions designed to manage conflicts of interest, for example provisions requiring that conflicts of interest are declared, or prohibiting the consultant working on other contracts that would present a conflict during the term of the contract. The issue is explored in Chapter 8.

Departures from development standards

The use of State Environmental Planning Policy No. 1 (SEPP 1) to vary development standards is intended to achieve positive planning results, but the Commission's 2002 *Report into corrupt conduct associated with development proposals at Rockdale City Council* demonstrates that the flexibility of the SEPP 1 combined with inadequate oversight of its use and the potential for substantial financial gain can be conducive to corrupt conduct. Chapter 9 considers some of the measures that could be taken to provide better oversight to ensure that the SEPP 1 is used only for its intended purposes and to reduce the likelihood of its abuse.

Planning agreements

The use of planning agreements as an adjunct or an alternative to section 94 contributions has been authorised by legislation. Considerable disquiet about the use of planning agreements is evident in submissions, on the one hand from those who argue that they operate to the detriment of developers who can be 'held to ransom' and on the other hand from those who argue that they operate to the detriment of local communities who are said to get too little in return.

There are realistic corruption risks attached to the process of negotiating or approving such agreements, and there are concerns that applicants who are able to enter into planning agreements are able to secure preferential treatment compared with applicants who are not able to enter into such agreements. Chapter 10 notes that there is an existing Practice Note issued by the former Department of Infrastructure, Planning and Natural Resources and makes a number of recommendations intended to improve the processes involved in developing planning agreements.

Political donations

Political donations at both local and state level can create conflicts of interest for decision-makers. Donations increase the likelihood that some inappropriate rezonings or development consents will be obtained. In Chapter 11 the risk facing both levels of government and possible measures to address it are considered.

The influence of political donations has arisen in recent inquiries into the Tweed and Gold Coast local councils, and in the Commission's investigation into north coast land development in 1990.

The NSW Upper House has established a broad-ranging Select Committee inquiry into the funding of, and disclosure of donations to, political parties and candidates in state and local government elections. The terms of reference of the Committee are sufficiently broad to cover the suggestion contained in a number of submissions on the discussion paper that particular sources of funding should be banned.

Regardless of whether or not there is any change to permitted sources of donations, the Commission considers that clarification of the Model Code, coupled with action to improve disclosure requirements at the local level, would be of real benefit in corruption prevention terms. The West Australian Local Government (Elections) Regulation 1997 is considered to be a good model for NSW. At state level, a disclosure regime is suggested. It is also suggested that proposals lodged with the minister by political donors should become designated development and thus (unless it is critical infrastructure) subject to a Commission of Inquiry, an expert report, or the possibility of third-party appeal.

List of recommendations

RECOMMENDATION 1

That the Minister for Planning considers making it a requirement that councils give reasons for all decisions on development applications, including decisions to approve applications.

RECOMMENDATION 2

That individual local councils consider adopting a formal system to process complaints and action requests received by councillors from members of the community.

RECOMMENDATION 3

That the Department of Local Government reviews the non-pecuniary conflict of interest provisions in the Model Code with a view to providing clear guidance on the identification and management of non-pecuniary conflicts of interest.

RECOMMENDATION 4

That the Department of Local Government, to the extent possible, include in the Model Code objective tests to assist councillors to determine whether a conflict of interest exists and provide guidance on the appropriate management option for non-pecuniary conflicts of interest.

RECOMMENDATION 5

That individual councils ensure that independent advice (e.g. from an external solicitor or auditor) is available to assist councillors in dealing with conflict of interest issues.

RECOMMENDATION 6

That the Department of Local Government considers establishing an advisory service to assist in the resolution of non-pecuniary conflict of interest issues.

RECOMMENDATION 7

That individual local councils consider requiring councillors to provide reasons for revoking the elected body's delegation in relation to individual development applications.

RECOMMENDATION 8

That individual local councils implement systems that record how councillors vote on development matters.

RECOMMENDATION 9

Where IHAPs have been established, that councils consider referring matters which raise corruption prevention issues to the IHAP for advice, such as:

- entrepreneurial developments where council has a financial interest in the development and is the consent authority
- proposals involving significant departures from development standards.

RECOMMENDATION 10

That the Minister for Planning considers extending third-party merit appeal rights to certain categories of currently non-designated development, including:

- developments relying on significant SEPP 1 objections
- developments where council is both the applicant and the consent authority, or where an application relates to land owned by a council, subject to exceptions for minor operational developments
- major and controversial developments, for example, large residential flat developments
- developments which are the subject of planning agreements.

RECOMMENDATION 11

That the Department of Local Government, in conjunction with other relevant agencies and organisations, provide training for councillors on planning matters and corruption awareness.

RECOMMENDATION 12

That individual councils consider measures to address the risk of inappropriate relationships forming between council officers and frequent applicants.

Depending on the resources available, the following measures could be adopted:

- the allocation of development assessments from frequent applicants to different staff members
- use of a random auditing system for development matters. For example, a supervisor may examine a random sample of development assessments allocated to council staff each year. Staff must justify decisions and discuss and resolve problems that arise
- ensuring adequate mechanisms are in place to consider the outcomes of community consultation processes
- adopting a system of peer review or countersigning for controversial matters
- developing a statement of business ethics to promote awareness among the public of the ethical standards expected of council officers and what is allowable in relation to interactions with applicants.

RECOMMENDATION 13

That individual local councils take steps to manage their conflicting roles in matters where they are the regulator of land and have a financial interest in the outcome of the matter.

RECOMMENDATION 14

That councils disposing of their own land:

(a) consider using a competitive process for the sale of valuable land notwithstanding the absence of a statutory requirement to do so;

(b) in the absence of a competitive process, consider at least two valuations based on the land's "highest and best use";

(c) clearly identify their reasons if they decide to dispose of land at below market price for strategic purposes.

RECOMMENDATION 15

That consent authorities adopt measures to manage potential conflicts of interest when engaging planning consultants, to the extent possible. These include:

- promoting competitive processes for the selection of consultants and regularly rotating the use of consultants
- considering the matters that are allocated to consultants. Local consultants who continue to work in the private sector while being contracted by a council due to a shortage of town planning staff could, for example, be allocated applications for minor development, such as a home extension, rather than applications for significant development.
- preparing contracts for consultants that include:
    - a requirement that consultants declare any personal conflicts of interest that may emerge throughout their engagement, for example, where they are currently engaged in a private capacity by a client with an interest in the work they are performing for the council
    - consequences for failure to comply with contractual requirements such as the declaration of conflicts of interest
    - a prohibition on consultants working for specified clients that would present a conflict during the term of the contract
    - a requirement that consultants make a declaration on their final report that they had no personal pecuniary or non-pecuniary interest in the matter or its outcome
    - a requirement that consultants be bound by a set of guiding principles such as a code of ethics.

RECOMMENDATION 16

That the Department of Planning examine and consider the options for implementing an oversight mechanism in relation to council-approved developments that include SEPP 1 objections. Options include a requirement that:

- the concurrence of the Director-General be obtained for all developments relying on SEPP 1 objections seeking variations to development standards above a certain limit and that this concurrence not be delegated back or assumed
- councils report publicly on development approvals that include SEPP 1 objections through a register, their annual reports or annual reports to the Department of Local Government or Department of Planning
- when an application reliant on a SEPP 1 objection is determined under delegated authority, the determination should be subject to a system of peer review or countersigning.

RECOMMENDATION 17

That individual local councils consider preparing and publicly exhibiting a policy to clarify the processes they will follow in relation to planning agreements; and that in doing so, they adopt the best practice guidelines outlined in the *Development Contributions – Practice Note* issued by the former Department of Infrastructure, Planning and Natural Resources on 19 July 2005.

RECOMMENDATION 18

That individual local councils ensure that negotiations over a planning agreement are not undertaken by the assessing officers responsible for the development to which it relates.

RECOMMENDATION 19

That the Minister for Planning strengthen the guidelines outlined in the *Development Contributions – Practice Note* of 19 July 2005 by incorporating key provisions in the EPA Act itself.

RECOMMENDATION 20

That the Department of Local Government amend the Model Code to:

- include clear instructions to councillors on the circumstances in which political donations will give rise to non-pecuniary conflicts of interest and how to manage such conflicts
- instruct councillors to refrain from discussion and voting on matters affecting campaign donors (in the case of donations above a prescribed limit). If to do so would deprive the meeting of a quorum, councillors may declare the interest and vote, but consideration should be given to making the resulting decision subject to third-party appeal to the Land and Environment Court if approval depended on the vote of a councillor or councillors who had a conflict of interest.

RECOMMENDATION 21

That the Minister for Local Government introduce amendments to the Local Government Act to provide that a failure to declare a non-pecuniary interest relating to a political donation is a matter falling within the jurisdiction of the Pecuniary Interest and Disciplinary Tribunal.

RECOMMENDATION 22

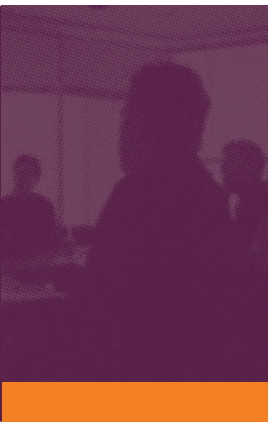
That the Premier consider applying to NSW local government provisions similar to those applicable under the Local Government (Elections) Regulation 1997 (WA).

RECOMMENDATION 23

That the Premier consider amending the *Election Funding Act 1981* to require persons submitting development applications or rezoning proposals to the Minister for Planning to declare any political donations they have made to the minister or to his or her political party.

RECOMMENDATION 24

That the Minister for Planning include, in the list of designated development, development in respect of which a declaration as to the making of a donation has been made.



Chapter 1: Introduction

1.1 Background

A principal function of the Independent Commission Against Corruption (the Commission) is to examine practices, policies and systems of public authorities (which include local councils) that may be "conducive" to corrupt conduct as defined in the *Independent Commission Against Corruption Act 1988* (the ICAC Act).[1] A practice, policy or system is regarded by the Commission as conducive to corrupt conduct if it can lead to or may have the tendency to encourage corrupt conduct – that is, it creates a real opportunity for corrupt conduct to occur.

In the 2005–2006 financial year, 34.92% of the complaints received by the Commission from members of the public concerned local government, and a significant number of these related to development approval processes. Two recent investigations by the Commission revealed corrupt conduct aimed at improperly influencing the outcome of development approval processes.

In addition, probity advice is often sought from the Commission by both local councils and state agencies dealing with development matters. Issues associated with the development approval process are commonly raised in the Commission's liaison and training sessions for councillors and council staff.

In light of this experience, the Commission concluded in 2005 that NSW development approval processes face a number of specific corruption prevention challenges. The Commission decided to consider whether there are unmanaged corruption risks in NSW development approval processes.

In December 2005 the Commission published *Corruption risks in NSW development approval processes – discussion paper* seeking the views of all interested parties on what they thought the corruption risks in NSW development assessment processes were and how these risks could best be managed.

The Commission considered all submissions received and its own experience of matters relating to NSW development approval processes to inform the development of this publication. This publication represents the Commission's views on what the corruption risks are in NSW development approval processes and the appropriate mechanisms for managing those risks.

In considering corruption risk factors, the Commission is not suggesting that participants in the NSW planning system are inherently corrupt or unethical. On the contrary, the Commission has assumed that most participants conduct themselves in an honest and ethical

1 The ICAC Act can be accessed at www.legislation.nsw.gov.au.

manner. However, the complexities of the NSW planning system may create opportunities for corrupt conduct to occur and it is these opportunities, or risk areas, that the Commission seeks to consider in this publication.

1.2 What is a corruption risk?

A corruption risk can exist in relation to almost all functions and activities of an agency. Inadequate corruption risk controls can expose an agency to the possibility of an employee engaging in corrupt conduct. Corrupt conduct is defined in sections 8 and 9 of the ICAC Act but ordinarily speaking it is dishonest or partial behaviour, misuse of information or breach of public trust by a NSW public sector employee which, if proved, could amount to a crime or disciplinary offence. The term also refers to the conduct of any person (whether or not that person is a public official) that adversely affects or could adversely affect the exercise of official functions by public officials and could constitute or involve a criminal or disciplinary offence.

In the local government context, a disciplinary offence includes a substantial breach of an applicable code of conduct.[2] The applicable code of conduct for the purposes of the ICAC Act is the adopted code of the council which must not be inconsistent with the *Model Code of Conduct for Local Councils in NSW* (the Model Code), published by the Department of Local Government in December 2004.[3] The introduction of the Model Code in 2004 has therefore expanded the scope of conduct that could amount to corrupt conduct.[4]

The above definition emphasises the important point that a corruption risk specifically relates to the risk of improper conduct by one or more individuals. It does not include risks which are beyond the influence or action of one or more individuals; for example, the risk of a catastrophic natural event is not a corruption risk. Systems, policies, procedures, and informal work practices that create the opportunity for an individual to engage in corrupt conduct, or are conducive to corrupt conduct, can expose an organisation to significant corruption risks.

1.3 The legislative context

The Commission does not believe it should examine or make recommendations concerning the underlying and fundamental structure of the planning system in New South Wales in this publication. This does not mean that the Commission may not have some comment on the structure of the planning system some time in the future. However, the Commission would make recommendations for a radical change to the fundamental structure of planning only in the context of corruption risks exposed through a major investigation.

The *Environmental Planning and Assessment Act 1979* (the EPA Act) is the central legislation regarding planning in NSW. Section 5 of the EPA Act sets out the objects of the Act:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

2 Section 440(5) of the *Local Government Act 1993*.
3 The Model Code can be accessed at www.dlg.nsw.gov.au.
4 At the time of writing the department was reviewing the Model Code.

(iii) the protection, provision and co-ordination of communication and utility services,

(iv) the provision of land for public purposes,

(v) the provision and co-ordination of community services and facilities, and

(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and

(vii) ecologically sustainable development, and

(viii) the provision and maintenance of affordable housing, and

(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

The EPA Act gives local councils the function to prepare, and recommend to government, the making of local planning instruments, and permits them to make Development Control Plans. Of relevance to this publication is the fact that the legislation gives local councils the function to determine development applications (other than those that are called in by the state government).[5]

There is considerable discretion built into the making of decisions on development applications. The matters to be taken into consideration under section 79C are broadly expressed.

79C Evaluation

(1) Matters for consideration – general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

(a) the provisions of:

(i) any environmental planning instrument, and

(ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the draft instrument has been deferred indefinitely or has not been approved), and

(iii) any development control plan, and

(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

5 Under the EPA Act (Part 3A) any major infrastructure or other development that, in the opinion of the Minister for Planning, is of state or regional environmental planning significance, can be called in and determined by the state government.

Note. See section 75P(2)(a) for circumstances in which determination of development application to be generally consistent with approved concept plan for a project under Part 3A.

Note. If a biobanking statement has been issued in respect of a development under Part 7A of the Threatened Species Conservation Act 1995, the consent authority is not required to take into consideration the likely impact of the development on biodiversity values.

(2) Compliance with non-discretionary development standard – development other than complying development

If an environmental planning instrument or a regulation contains non-discretionary development standards and development, not being complying development, the subject of a development application complies with those standards, the consent authority:

(a) is not entitled to take those standards into further consideration in determining the development application, and

(b) must not refuse the application on the ground that the development does not comply with those standards, and

(c) must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards,

and the discretion of the consent authority under this section and section 80 is limited accordingly.

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards:

(a) subsection (2) does not apply and the discretion of the consent authority under this section and section 80 is not limited as referred to in that subsection, and

(b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

Note. The application of non-discretionary development standards to complying development is dealt with in section 85A(3) and (4).

(4) Consent where an accreditation is in force

A consent authority must not refuse to grant consent to development on the ground that any building product or system relating to the development does not comply with a requirement of the Building Code of Australia if the building product or system is accredited in respect of that requirement in accordance with the regulations.

(5) A consent authority and an employee of a consent authority do not incur any liability as a consequence of acting in accordance with subsection (4).

(6) Definitions

In this section:

(a) reference to development extends to include a reference to the building, work, use or land proposed to be erected, carried out, undertaken or subdivided, respectively, pursuant to the grant of consent to a development application, and

(b) non-discretionary development standards means development standards that are identified in an environmental planning instrument or a regulation as non-discretionary development standards.

In preparing this publication, the Commission has proceeded on the basis that the above legislative context will remain the same.

1.4 What was considered in preparing this report

As outlined below, many different sources of information were considered in preparing this publication.

The Commission was greatly assisted and informed by submissions received in response to the discussion paper *Corruption risks in NSW development approval processes* (2005), hereafter referred to as "the discussion paper". The Commission received 187 submissions from members of the public and public authorities, including those NSW state government departments concerned with regulating development approval and the conduct of local councillors.[6]

The review and consideration of so many submissions was a lengthy exercise. A number of the submissions were directed to aspects of the approval system that could be conducive to corrupt conduct. A number of respondents, however, have made submissions to the effect that the planning system could be made more efficient and/or fairer, and do not identify the corruption risks to which their submissions were directed.

In the last five years, the Commission has conducted two major public investigations where significant corrupt conduct involving the planning system was unearthed.[7] In the preparation of this report the Commission has had regard to corrupt conduct revealed by these two investigations, and by other investigations conducted by the Commission into allegations relating to development approval processes.

Over the years, the Commission has received requests for probity advice from local councils and has discussed aspects of the development approval process with senior council officers. Many of the matters raised during this process have been considered in addressing the topics canvassed in this publication.

The Commission has also had regard to complaints and reports it has received. Although many of these matters have either been referred on to the Department of Planning or the Department of Local Government, or have been referred to the relevant council to deal with, in many instances the issues at the centre of the allegations were of relevance to the topics covered in this publication and so these matters were also considered. It should be noted that the Commission makes such referrals because the ICAC Act obliges the Commission to direct its attention, as far as practicable, to serious and systemic corrupt conduct and to take into account the responsibility and the role of other public authorities (in this case the Departments of Planning and of Local Government) in the prevention of corrupt conduct.

The Commission acknowledges that in considering complaints and reports, many allegations concern what the complainant perceives or believes to be occurring. It is important to recognise that a perception that corrupt conduct is occurring does not establish that such conduct has

6 Appendix A provides a list of the persons and bodies who responded to the discussion paper (excluding any individuals or organisations who requested that their details not be published). Appendix B provides a sample of submissions received, by chapter topic.

7 *Report into corrupt conduct associated with development proposals at Rockdale City Council*, Independent Commission Against Corruption, Sydney, July 2002; *Report on investigation into the relationship between certain Strathfield Councillors and developers*, Independent Commission Against Corruption, Sydney, June 2005.

occurred. Where the Commission has made further enquiries, in some matters the perception was found to be accurate while in others the Commission has found no evidence to support the perception or belief that corrupt conduct was occurring. In any case, the Commission has considered all complaints and reports because the information is relevant in considering corruption risks in the NSW planning process. Indeed, the perception of a reasonably minded, intelligent and informed person does provide some insight into what may be conducive to corruption.

The relevant legislation gives to consent authorities, most often councils, an extremely wide discretion when considering whether to approve development applications (and if so subject to what conditions), or to refuse to consent. Because of the wide discretion given to councils and the self-evident importance of contentious development proposals, be it financial, environmental or otherwise, it is not uncommon for dissatisfied applicants and dissatisfied opponents to claim that a decision unfavourable to their interests may have been corruptly motivated. The Commission, for its part, needs to be persuaded that there is a real and unmanaged corruption risk arising from a particular aspect of the approval system before it makes recommendations with respect to corruption prevention or resistance.

In considering all of the available sources of information and the other factors discussed above, the Commission has done its best to identify the aspects of the development approval process that may be conducive to corrupt conduct and which could be better managed through improvement to corruption risk management processes.

1.5 What this report deals with

The development approval processes considered in this paper are:

- the making of planning instruments (Local Environmental Plans; Regional Environmental Plans; and State Environmental Planning Policies)
- the determination of development applications.

The Commission's interest is primarily in the corruption risks inherent in the development approval process (for example, bribery and misconduct in public office) and how these risks can be best managed to reduce opportunities for corrupt conduct to occur.

Generally, matters to do with the efficiency of the planning system and the quality, as opposed to the probity, of the decisions made under it are not the subject of recommendations by the Commission.

Corruption risks associated with the enforcement of planning instruments, such as the taking of action where there has been a failure to obtain approval or a breach of conditions, are not the subject of this publication. Similarly, the role of private certifiers in the planning system, and any corruption risks that may be associated with that role, are not considered in this publication.

It is important to note that the scale of projects covered by the NSW development approval process varies widely, and does not necessarily involve people normally thought of as "developers". Any use of land, work on land or building on land constitutes "development" and may require development approval from a local council. There are different rules for different kinds of development recognised in the legislation. Hence, when considering corruption risks it is frequently necessary to identify the particular kind of development that is said to generate the risk.

1.6 Structure of this report

This report follows the same structure as the Commission's discussion paper and issues in this report appear in the same order as they appeared in the discussion paper.

For each chapter, a summary of the submissions received in relation to each issue is provided. This is followed by a discussion as to whether there are corruption risks which need to be addressed, and where appropriate, recommendations are made to address the corruption risks identified.

Chapter 2 deals with the different roles of councillors and a series of issues associated with those different roles, focusing on whether there are corruption risks involved.

Chapter 3 deals with councillors and non-pecuniary interests, and considers the difficulties councillors currently encounter both in identifying when such conflicts exist, and in choosing the appropriate management option when they do arise.

Chapter 4 canvasses a number of options for change to deal with the different roles discussed in Chapter 2, and again focuses on whether possible changes could be expected to reduce an identifiable corruption risk.

Chapter 5 deals with two issues faced by council officers rather than by councillors: the prospect of "regulatory capture"; and the issue of inappropriate pressure being applied to officers. The chapter considers measures that can be adopted to ensure that officers retain sufficient distance from applicants to protect the probity of decisions, and considers whether the issue of inappropriate pressure is adequately dealt with in current legislation.

Chapter 6 canvasses the situation in which a council has a role both as the owner/developer of land, and a regulatory role in relation to that land under planning legislation. Whether or not this constitutes a conflict of interest, and measures to improve the process of decision-making in such circumstances, are considered in this chapter.

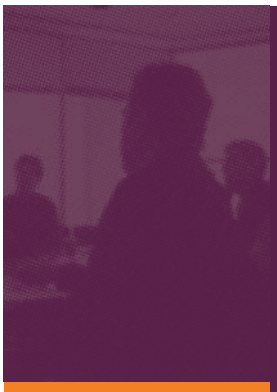
Chapter 7 deals with the disposal of council land, and considers whether additional measures are desirable to guard against the possibility of corrupt practice in this area.

Chapter 8 considers the corruption risks that councils may face when engaging consultants, and outlines a series of measures that can be taken to ensure that conflicts of interest are identified and properly managed.

Chapter 9 considers the corruption risk that can be associated with the ability of councils to depart from development standards, using State Environmental Planning Policy No. 1 (SEPP 1). While the need for flexibility in appropriate circumstances is acknowledged, a number of measures to ensure proper oversight of the discretion available under SEPP 1 are canvassed.

Chapter 10 considers planning agreements, which have come into favour in recent years but which some commentators see as raising the prospect of corrupt behaviour by councils, their staff, or applicants. The chapter notes that there are guidelines in existence at state level, and considers the need for these guidelines to be strengthened.

Chapter 11 considers whether political donations at both state and local level have the capacity to influence decision-making on planning matters and, if so, what can be done to preserve probity at both levels. The chapter notes that there is a broad-ranging review currently being undertaken by a Select Committee of the NSW Legislative Council, but nonetheless canvasses measures which might assist transparency and probity in the planning area.



Chapter 2: The different roles of councillors

2.1 Councillor involvement in preparing Local Environmental Plans and determining development applications

SUMMARY OF DISCUSSION PAPER

The Commission's discussion paper *Corruption risks in NSW development approval processes* (2005) considered the roles of councillors in preparing Local Environmental Plans (LEPs) for ministerial approval, and applying the standards contained in these instruments when assessing and determining individual development applications. Councillors also make Development Control Plans and have regard to the standards they contain in considering development applications.

The paper noted that some have criticised what they perceive as an absence of "separation of powers" as a result of these different roles exercised by councillors. This leads to the suggestion by some that the role of councillors in determining development applications should be reduced or eliminated. Various ways of doing this have been put forward and these are discussed further in Chapter 4.

It is the clear intention of the *Local Government Act 1993* (the Local Government Act) and the Environment Protection Act that local councils perform this dual role. The discussion paper asked:

- *In an environment where local councils both prepare and apply LEPs, what mechanisms are available to enhance accountability?*

SUMMARY OF THE SUBMISSIONS RECEIVED

There were few submissions on the specific question posed in the paper, and those that were made suggested that there is a high degree of accountability built into the existing system.

Despite the discussion paper noting the Commission's acceptance of the dual role in the current legislation, the 'separation of powers' was the subject of a degree of comment, which raised management and governance issues rather than corruption issues. It was a commonly held view that the time of councillors is best spent on broader policy matters, and that their involvement in routine development applications (as opposed to unique and significant applications) is not the best use of their time.

Many respondents, however, challenged the proposition that as a matter of principle councillors should be removed from determining development determinations. Some disputed the relevance of the doctrine of separation powers in this context. Such submissions pointed out that the

executive at state level is drawn from the legislature, and ministers regularly apply to individual cases laws they have participated in enacting.

Other submissions disputed the proposition that councillors set the planning policy that applies in their areas by making the relevant LEPs. Some submissions pointed out that planning instruments are not made by councils but by the Minister for Planning, and their contents are strongly reflective of state planning directives which need not accord with the policy positions of local councils. Others made the point that instruments may have been developed by previous administrations or may not reflect current policy. Such submissions argued that the involvement of councillors in determining development applications enables the input of current community views when LEPs are in the course of, or in need of, review.

Many submissions pointed out that most development applications are determined under delegated authority and on this basis considered that in practice the functions of policy making and policy application have for the most part been separated.

ASSESSMENT OF CORRUPTION RISKS

The Commission's interest is primarily in any corruption risks inherent in local councils both preparing LEPs and determining development applications in the context of those LEPs, and what steps should be taken to minimise or eliminate those risks.

As outlined above, the majority of submissions stated a position on whether these two roles should be performed by the one body. None of the submissions directly addressed the issue of what corruption risks exist with a local council performing both roles. In particular, submissions did not reveal the corruption risk for which the separation of powers would offer a solution.

Based on all the information available to the Commission (e.g. complaints, advice requests, investigations, etc.) and in consideration of the submissions made, the Commission cannot conclude on the evidence available that councillor involvement both in preparing LEPs and determining development applications in itself creates a significant and unmanaged corruption risk. Nor did submissions identify any particular need to enhance accountability within the current system. Consequently, it is neither necessary nor appropriate for the Commission to make recommendations or outline options for reform of the current arrangements.

However, in light of the comments made in the submissions, the Commission does have the following comments on the "separation of powers" doctrine in the context of planning decisions.

The suggestion that has been made is to the effect that the application of the provisions of planning instruments to individual cases is an arbitral function (the term refers to the binding settlement of a dispute between two parties) which should not be made by the body which made the policies. The argument seeks to extend from the Commonwealth sphere to the local government sphere the principle that non-judicial bodies must not exercise judicial functions, and vice versa.

The Commission, however, does not agree that councils determining development applications are making or are intended to make judicial decisions, or even quasi-judicial decisions. Nor are they making arbitral decisions. The Commission considers that it is more accurate to categorise these decisions as administrative, whether made by a council or by the Land and Environment Court when deciding a merit appeal. The judicial functions associated with the EPA Act (enforcement, for example) rest exclusively with the Land and Environment Court. Moreover, planning instruments are not made by the local council – they are made by the Minister for Planning.

A rigid application of the pure separation of powers principle would also call for the separation of the legislative body from subsequent executive decisions. The United States has adopted that approach, with its system of checks and balances; Australia, however, follows the Westminster system of government, under which ministers are drawn from the parliament. Furthermore, strict application would see the parliament making laws, the executive administering them, and the judiciary enforcing them. In fact the executive does make laws, including laws that in effect repeal or override existing legislation. The judiciary of course not only resolves disputes, it also makes law when developing the common law.

Even at Commonwealth level the practicality of rigid adherence to the separation of powers doctrine is not beyond question.[8]

It was assumed in many submissions that the separation of powers doctrine is satisfied by delegation to council officers. Accordingly, many submissions were to the effect that since the majority of development decisions have been delegated to council officers, separation of powers has been achieved. The Commission notes that the separation of powers doctrine would require powers to be vested in an entirely different body independent of the council. Delegation to council officers would not suffice. In any event, officers are as deeply involved in the preparation of planning instruments as councillors.

Given its doubts as to the relevance of the doctrine in this context, and the absence of any evidence of significant and unmanaged corruption risks, the Commission sees no basis on which to recommend a fundamental philosophical shift in the scheme of the legislation enacted by the NSW Parliament. This scheme entails a discretionary system of merit-based assessment for developments, with discretion vested in an elected body rather than a quasi-judicial body.

2.2 Councillors and merit-based development assessment

SUMMARY OF DISCUSSION PAPER

The discussion paper noted that at times councillors have been criticised for making inappropriate political decisions in relation to developments subject to merit-based assessments. It noted that section 79C of the EPA Act sets the statutory criteria for merit-based assessments and provides for subjective merit-based assessments that go beyond development standards provided for in environmental planning instruments.

As a result, caution should be exercised when labelling "politically popular" decisions as inappropriate, provided all relevant considerations are taken into account and decisions are not based on matters outside the scope of section 79C and the objectives of section 5 of the EPA Act.

Despite this, the discussion paper considered that there was still scope for councillors to make inappropriate development decisions based on irrelevant matters. These types of considerations included, for example, the possibility of councillors "horse trading" support for development applications with support for a peer's candidacy for a position such as the mayoralty.

8 See David Bennett QC, "What happens when 'Boilermakers' meets 'Tasmania Breweries'?", speech by Commonwealth Solicitor General to 4th Annual Conference of Council of Australasian Tribunals NSW Chapter Inc., 11 May 2007. See www.coat.gov.au.

The discussion paper asked:

- *What other factors are irrelevant to the merit-based assessment of developments?*
- *Should councillors be provided with clear examples of these?*
- *If so, what is an appropriate way of providing such advice?*
- *How can inappropriate political decision-making involving development consent decisions be detected?*
- *How should the risks associated with inappropriate political decision-making in relation to development consents be managed?*

SUMMARY OF THE SUBMISSIONS RECEIVED

There was a call in some submissions for the redrafting of section 79C of the EPA Act to provide clearer boundaries to the specified criteria, for example by confining consideration to planning instruments. There were two quite distinct lines of argument put forward.

One group of respondents is dissatisfied with the fact that councillors are in a position to make decisions based on factors other than the terms of environmental planning instruments, and argue in essence that if a development meets the relevant numerical standards, it should be approved. Specifically, some do not favour the weight of community opinion leading to decisions they regard as "parochial" or "not the most suitable in a planning sense". Other submissions characterise complaints of this nature as fundamentally anti-democratic.

The other line of argument in submissions is that section 79C as currently drafted allows for an excessive degree of discretion in the planning system, and that of itself may be conducive to corruption, because it is difficult for observers to know what decision might or might not reasonably be expected in particular circumstances. This lack of transparency is seen as facilitating the masking of corrupt motivations.

Some respondents were of the view that there is no need for legislative constraint, but there is a need for clear guidance to councillors about what constitutes inappropriate decision-making in relation to merit-based development consent decisions. One submission casts doubt on the practicality of issuing such guidelines, on the basis that:

> *… assuming that the "public interest" is a merit issue, then nothing can be considered an irrelevant factor.*

The Local Government and Shires Associations (LGSA) suggested that one way to improve decision-making would be to require councillors to give reasons when departing from officers' recommendations, and this suggestion was echoed in a number of submissions. The LGSA also favoured training opportunities for councillors, an issue dealt with in Chapter 4.

ASSESSMENT OF CORRUPTION RISKS

As noted in the discussion paper, there is nothing improper, in the NSW context, in the taking into account of matters other than the technical, particularly numerical, provisions of planning instruments. The legislative framework of section 5 and section 79C of the EPA Act explicitly provides for the taking into account of other matters, including social and economic impacts in the locality, public submissions and the public interest.

Most of the considerations thought to be irrelevant in some submissions (such as the weight of community sentiment) do not raise corruption issues. They may raise the possibility of poor decisions, and these may be vulnerable to successful challenges in the Land and Environment Court (the Court). It does not, however, follow that a poor decision, including one motivated by irrelevant factors, is necessarily a corrupt decision.

The second line of argument in favour of limiting the discretion available under section 79C is, however, that the section allows for the consideration of matters which are not simply irrelevant, but which could be conducive to corruption. The argument appears to be that if councillors have less discretion, applicants are less likely to be either tempted or extorted into corrupt practices to ease their way through the system.

There is evidence from several Commission investigations, and from literature on corruption prevention, that a high level of discretion, particularly coupled with low transparency, is conducive to corruption. The Commission does, therefore, see a need to address the issue of whether section 79C affords excessive discretion which reduces the transparency of the system and can provide a cloak for corrupt decisions, and if so, what should be done to manage the risk.

The less transparent the system, the more likelihood there is of delay, and delay is also a recognised trigger for corruption – individuals needing to access a service in which delays are common may be tempted to bribe the official involved in order to move up the queue or to short-cut the process. The Hong Kong Independent Commission Against Corruption identified a three-year time frame to issue restaurant licences as a cause for corruption and it examined, coordinated and simplified the process for granting restaurant licences in order to shorten the time required, so people would be less tempted to bribe officials or break the rules in some way.[9]

On the other hand, the Commission is conscious that the availability of broad discretion is a deliberate feature of the current system, intended to produce better planning outcomes. It is also seen as allowing for the operation of local democracy.

The Commission also notes that the claimed misuse of section 79C is said to result in refusals of applications which conform with relevant standards, whereas corrupt arrangements are more likely to be directed at securing approvals for developments which do not conform. The ability of the general considerations in section 79C to result in refusal of an application has in any case been moderated since the discussion paper was published. Section 79C(2) now limits the discretion of the consent authority where non-discretionary development standards apply.

The Commission does not consider that the case for a fundamental redrafting of section 79C has been made on corruption prevention grounds. The Commission concludes that there is more to be gained in terms of corruption prevention by other means, for example reviewing the safeguards surrounding the use of State Environmental Planning Policy No. 1 (SEPP 1), which is the subject of separate consideration in Chapter 9.

However, the Commission agrees that transparency would be enhanced if reasons were required for all decisions on development applications, as was suggested in several submissions.

Under current law, reasons must be given if development consent is refused or if conditions are attached to an approval. Reasons are not required if an application is approved unconditionally.[10]

9 *Minimising corruption: some lessons from the literature*, Independent Commission Against Corruption, Sydney, January 1998.

10 Clause 100(1)(c) of the EPA Regulation 2000 only requires reasons to be provided when a development application is refused and when conditions are attached to an approval.

If a decision is made to *refuse* an application contrary to a planner's recommendation, reasons would be required under current law. If, however, a decision is made to *approve* an application contrary to the planner's recommendation, there will not necessarily be any reasons given.

The Commission notes that failure of a council to adopt staff recommendations is not necessarily suggestive of corrupt conduct. Nevertheless, requiring councillors to state their reasons publicly could in some cases act as a disincentive to corrupt conduct.

Rather than confine such a requirement to cases where the decision to approve is contrary to a planner's recommendation that the application be refused, it would be simpler and more consistent with normal practice to require reasons for approval to be given in all cases. If the approval is given in accordance with a planner's recommendation the reasons will be contained in the planner's report. If not, it will be the responsibility of the councillor proposing approval to set out his or her reasons.

RECOMMENDATION 1

That the Minister for Planning considers making it a requirement that councils give reasons for all decisions on development applications, including decisions to approve applications.

There may be a case for the provision of assistance to councils to improve the overall quality of decisions and to reduce the incidence of appeals to the Land and Environment Court. The Commission, however, regards this as a matter for councils and the Department of Planning. As there is no evident corruption prevention issue involved, no recommendation is considered warranted.

2.3 Councillors as constituent representatives and advocates in the development assessment process

SUMMARY OF DISCUSSION PAPER

The discussion paper noted that councillors have a role as democratically elected representatives who can properly be responsive to their constituents' concerns. This is clearly provided for in section 232(2) of the Local Government Act. The discussion paper also examined the role of councillors in exercising statutory power under the EPA Act when determining development applications. The discussion paper noted that there is an inherent conflict between the notion of an impartial decision-maker who is obliged to consider all sides of an issue and that of an advocate for a particular group or individual.

The discussion paper noted that while councillors are expected to represent the broad community, they may have been elected on a platform of opposing particular types of development and may feel they have a mandate to continue to support a particular group when considering development applications. The discussion paper also noted that the concept of representing a broad community interest is difficult where there are competing community interests and there is no clear consensus.

The discussion paper asked:

- *Is it appropriate for councillors to advocate on behalf of individuals or groups on development matters?*
- *Can an advocacy role be easily distinguished from a community representative role? If so, how?*
- *Should section 232 of the Local Government Act be clarified?*
- *Should the Local Government Act make a greater attempt to regulate the representative and administrative roles of elected representatives?*
- *Should there be a greater effort to separate the policy and operational functions of a council? Is this possible?*
- *Are there appropriate reporting mechanisms to council, and is there adequate compliance with council resolutions, to accommodate a clearer separation of a council's policy and operational functions?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Some respondents felt that an advocacy role can easily be distinguished from a community representative role. Others felt that drawing the line between advocacy and representation was not straightforward. In particular, it was unclear to many whether the phrase "to represent the interests of residents and ratepayers" in section 232(2) of the Local Government Act extended to an advocacy role. Some took the view that an advocacy role is broader in nature than community representation, while others did not make a distinction.

Many respondents felt that it was inappropriate for councillors to advocate on behalf of individual constituents or groups when exercising their statutory powers under the EPA Act. Some saw advocacy as involving the partial exercise of a councillor's functions and as potentially constituting corrupt conduct. The argument was in some cases taken further to suggest that advocating for a particular position (as opposed to a particular person or group), similarly involves the partial exercise of a councillor's functions and could constitute corrupt conduct.

Such submissions took the view that the legislation should take a more restrictive position, by providing that councillors are not permitted to advocate on behalf of specific individuals or groups in planning matters, but must make planning decisions having regard to the interests of the residents or ratepayers within the entire local government area to which they are elected. Various options were put forward for addressing this issue.

On the other hand, some submissions took the view that it is not necessary for a councillor's representative role in relation to development decisions to be clarified. The LGSA, for example, did not support any regulation of the advocacy role, on the basis that this would lessen the voice of the community through their elected representatives.

Another submission stated that there may be an inherent conflict between the notion of councillors as impartial decision-makers and advocates for particular groups, but the electorate expects councillors to be no more impartial decision-makers than members of parliament. That submission argued that there would be a problem if a councillor was an advocate for a particular company or individual and this was not disclosed but asked: "However, should there be a concern if a councillor has disclosed their position in their election platform?" Similarly, a submission from a rural council argued that a problem only arises if there is a private conflict of interest.

The Department of Local Government commented:

> *It is reasonable for councillors to bring their own perspective or philosophy into the decision-making process for DAs. It is also reasonable for councillors to take community views into account.*

Similarly a Sydney metropolitan councillor argued:

> *Councillors often have long-held and well-known views on certain issues (e.g. sporting issues). Councillors should be entitled to act in accordance with these beliefs.*

There was no call in submissions for greater separation of policy and operational functions, as canvassed in the last of the discussion points in the discussion paper.

ASSESSMENT OF CORRUPTION RISKS

The discussion paper referred to the "notion of an impartial decision-maker who is obliged to consider all sides of an issue". This notion underlies the belief evident in some submissions that to step over the line of community representative into a role of advocate for a person or group, or for a policy position, constitutes partiality and may be corrupt conduct.

It has already been noted in section 2.2 of this paper that while section 79C of the EPA Act requires councillors to take into account all relevant matters, including submissions received, there is nothing in section 79C to suggest that a quasi-judicial standard of impartiality must be observed by consent authorities. The weight to be given to each matter for consideration is not prescribed, though the resulting decision may be open to merit review if, for example, development consent is refused or, in the case of designated development consent, is given or refused. Its validity may also be open to legal challenge. A councillor is required to bring an open mind to each application. But an open mind is a mind open to persuasion, not an empty mind. A councillor may have a stated position about particular developments (which are in fact permissible under the current zoning) in general, but provided he or she brings an open mind to the resolution of an application, the councillor is not discharging his or her functions contrary to law.

The Commission does not believe it would be appropriate to apply a quasi-judicial standard to the making of decisions on development applications by elected bodies. The notion of a strictly impartial decision-maker (shielded from lobbying, advocating for no-one and no position, and coming to every issue with no opinion on the matter) faces real practical difficulties in the political context.

The pecuniary interest provisions of the Local Government Act already prohibit councillors dealing with matters affecting their own financial interests, and those of close family members. This would include advocating for them in debate. Those provisions also extend to councillors who are office-bearers in clubs, and other organisations and associations. The issue of non-pecuniary conflict of interest will arise if advocacy is motivated by a relationship the nature or depth of which means that the advocate has a personal interest in the outcome. Non-pecuniary interests are dealt with in the Model Code.

These provisions are directed at preventing the kind of partiality which delivers a benefit to a decision-maker, his or her family or associates. In the absence of any benefit of this kind, it is problematic to consider advocacy of a policy position to which a candidate has publicly committed himself as constituting partiality in the relevant sense. Provided there is no pecuniary or non-pecuniary interest, it is to be expected that persons elected on the basis of particular policy positions will engage in advocacy for those policy positions. Again subject to this important proviso, the Commission is not persuaded that there is a corruption argument to restrict councillors advocating for the interests of groups and individuals.

The result, in the context of an elected body, could otherwise be that any councillor with a known policy position would be disqualified from participating in decisions which could either give effect to that position or run counter to it. So, for example, a councillor elected on a platform of expanding sporting facilities could be obliged to take no part in development applications for sporting facilities, or for alternative uses of land otherwise available for that purpose.

Unlike the judicial context, it is also to be expected that councillors will be lobbied, whether directly by applicants or objectors, or by paid lobbyists on their behalf. The Commission's 2006 guide on lobbying of local councillors[11] takes the approach that appropriate lobbying of councillors is normal, but that councillors should take care that their duty to consider issues fairly and properly is not compromised by participating in lobbying practices that are outside the bounds of appropriate or lawful behaviour, such as the acceptance of gifts or benefits (including travel costs and expensive lunches) from a lobbyist. It also notes that councillors who are lobbied by close friends, associates or relatives should consider whether the nature of their relationship with the proponent, and the impact of the matter on the proponent's interests, give rise to a pecuniary or non-pecuniary interest.

It is difficult to see that the fact that councillors may sometimes act as advocates is in itself conducive to corrupt conduct. In any case it is doubtful that the line between community representation and advocacy is capable of legislative definition. Indeed the concept of community representation has difficulties in itself, as frequently development applications throw up conflicting views within the community. The Department of Local Government is reviewing aspects of the Local Government Act affecting the roles of councillors and staff, including the operation of section 232. These issues should be appropriately considered in that review.

On the other matters raised in the position paper, nothing emerged to suggest that the separation of policy and operational functions is not adequately dealt with in legislation and in the Model Code.

Accordingly, the Commission makes no recommendations for change in relation to the role of councillors and merit-based development.

2.4 Councillors dealing with residents' issues

SUMMARY OF DISCUSSION PAPER

The discussion paper considered the role of councillors in pursuing complaints and enquiries they have received from residents about planning issues. The community expects elected representatives to undertake this role, which is clearly envisaged in section 232(2) of the Local Government Act. On the other hand, a councillor's pursuit of a constituent's enquiry has the potential to involve him or her in a council's operational functions. The involvement of councillors in day-to-day administrative council matters is not the intent of the Local Government Act.

At times there is a disparity between community expectations that councillors will and should resolve daily administrative matters, and the objectives of the Local Government Act. This can place councillors in a difficult position.

11 *Lobbying local government councillors*, Independent Commission Against Corruption, Sydney, August 2006.

The discussion paper asked:

- *What is an effective way for council administrators to handle complaints and issues about planning matters raised by councillors on behalf of residents?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Respondents felt it was appropriate for councils to implement some form of councillor action request system. There was also some support for procedures such as online development application tracking systems to reduce the number of enquiries councillors receive. A number of submissions pointed out that section 352 of the Local Government Act and the Model Code already mandate the channels of communication to be followed and the nature of directions that may be given to council staff. Section 352 prohibits councillors from giving directions on the content of any advice or recommendation made by council staff. Section 8.2 of the Model Code places limitations on councillors' ability to contact and direct staff.

While there was support for the use of proper channels of communication, it was strongly argued in many submissions that it is necessary and appropriate for residents to be able to approach councillors to seek action on matters of concern to them, and for councillors to have the ability to respond effectively to such approaches.

ASSESSMENT OF CORRUPTION RISKS

Most submissions on this issue were concerned with making the best use of everyone's time and skills. This is a governance or management issue rather than a corruption issue. There would of course be a clear corruption issue if the enquiry made about the progress of an application was motivated by a corrupt arrangement, and it is for this reason that the establishment of proper procedures is an important corruption prevention measure.

The Commission supports the efforts of the Department of Local Government to encourage such procedures and notes that the Model Code and section 352 of the Local Government Act cover most situations adequately. The Commission also acknowledges that many councils already have successful councillor action request systems in place and considers these should be generally adopted.

While there is general support for the delineation of roles and the use of proper channels, there is also a strong argument that councillors should be able to follow up matters on behalf of residents. It would be untenable to remove the ability of residents to go to their elected representatives to seek redress for legitimate concerns. As a corruption prevention measure, it is also important that improper use of delegated power be detectable and one means of achieving this is proper enquiry about the progress and treatment of applications.

RECOMMENDATION 2

That individual local councils consider adopting a formal system to process complaints and action requests received by councillors from members of the community.

2.5 Council meetings as a forum for consideration of development applications

SUMMARY OF DISCUSSION PAPER

The discussion paper considered the concern that the rules of procedural fairness required by administrative law are not always applied in the context of council meetings.

Where councils have instituted a system of allowing applicants and objectors to be heard, the discussion paper notes that there is the possibility that inaccurate material will be presented without the opportunity for scrutiny by the council's professional staff.

The discussion paper noted that councillors are often lobbied by proponents with an interest in decisions and that others with a relevant interest do not know what is said and cannot respond. The discussion paper also noted that a council is not required to give reasons if it approves an application, and councillors are not obliged to respond to the issues raised by the objectors and applicants when they address the council.

The discussion paper asked:

- *Are there issues of concern associated with council meetings as a forum for the consideration of development applications?*
- *If so, what are they and how can these issues be managed?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Some respondents raised concerns with the general standard of debate and conduct at council meetings and felt that this did little to assist the integrity of development decision-making processes. Others were concerned that there is the potential for an imbalance in the level of ability of people to present their case effectively. In contrast to this, other respondents were satisfied with council meetings as a forum for determining development matters, mostly on the basis that they are an open and transparent forum.

There was not a great deal of comment on the issue of material being introduced to councils without the opportunity for scrutiny by councils' professional staff. One respondent indicated that the code of meeting practice adopted by the relevant local council does not permit council officers to dispute or clarify points raised by objectors, but other councils indicated that they do permit council officers to do this.

Assessment of corruption risks

Procedural fairness

The rules of procedural fairness include the right of affected persons to be heard (an affected person being a person whose legal rights are affected or a person who has a legitimate expectation of being heard), and the obligation of the decision-maker to be impartial.

The concern of some commentators about council meetings as a forum for the consideration of development applications could be addressed either by changing council meeting procedures to enhance procedural fairness, or by moving decisions to some other forum. However, nothing in the submissions suggested how either approach would serve to combat corruption.

The EPA Act already contains provisions directed at procedural fairness. Section 79C of the EPA Act specifies the matters to be taken into account and provides redress if they are not. The Act allows for written submissions, rather than a formal hearing process along court or tribunal lines. Councils have supplemented these requirements with opportunities for applicants and objectors to be heard by the making of verbal submissions, typically at committee stage rather than before the full council meeting at which a decision is made. An applicant must be given reasons if his or her application is refused or is approved subject to conditions.

The Local Government Act and the Model Code made under it contain provisions directed at securing impartiality by ensuring that councillors are not affected by pecuniary interests or personal, non-pecuniary interests.

The Commission does not believe it is necessary as a matter of principle, nor is it desirable, for development applications to be the subject of a formal hearing conducted in a quasi-judicial manner. Determining a development application does not involve the kind of adversarial contest between two or more parties which characterises court proceedings. It is unrealistic and inappropriate to expect an elected body to behave like a legal tribunal, and it is not desirable to give council meeting processes an overly judicial character.

The suggestion that more formal hearing procedures be adopted also has practical difficulties, given that the large majority of development applications are dealt with under delegated authority by council planners. If it is necessary as a matter of principle that applications be the subject of a formal hearing process, there is no reason in principle that this should not apply to applications determined by delegates as well. And is a formal hearing to apply to all development applications no matter how small? If not, the question would be where to draw a line between applications requiring a hearing and those not requiring a hearing. The practical implications of adopting more formal hearing procedures, not only for applications considered by council but also for the overwhelming majority of development applications decided under delegated authority, would need serious consideration.

The concern expressed in some submissions about the atmosphere and behaviour at council meetings is not peculiar to the development approval process and does not have any evident connection with corruption. The Commission regards these as management and performance issues more appropriately dealt with by the Department of Local Government.

The Commission makes no recommendations for change arising from its consideration of this issue.

Introduction of material not subject to review by officers

The second issue raised in the discussion paper and in submissions is distinct from the issue of procedural fairness. It arises from the practice of councils allowing interested parties to address council meetings prior to determination of a development application, or a proposed rezoning.

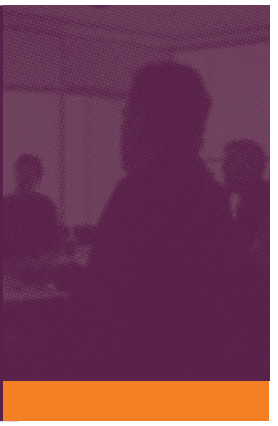
The tenor of some submissions is that this allows inaccurate statements to be introduced into the debate that are not subject to challenge by the council's planning staff, whose report is already completed and before the council. The concern is not that this practice is conducive to corrupt conduct but that it can undermine the integrity of decision-making by leading a council to make a decision based on inaccurate information.

The Commission has already noted in its guide on lobbying local councillors[12] that councils are entitled to develop appropriate codes of practice. It is, however, the law that a body discharging a public function is not entitled to adopt a code or practice which has the effect of precluding

12 *Lobbying local government councillors*, Independent Commission Against Corruption, Sydney, August 2006.

receipt of relevant matters for consideration. Submissions, even those received late, are relevant considerations and can reveal some essential facts.

There may, in some instances, be a basis for administrative law challenges arising from the manner in which material is considered by a council, but as no argument has been advanced to suggest that this issue has any bearing on the issue of corruption, the Commission does not see a need to make any recommendation on the subject.



Chapter 3: Councillors and non-pecuniary conflicts of interest

SUMMARY OF DISCUSSION PAPER

The discussion paper considered the inevitable non-pecuniary conflicts of interest councillors will experience when dealing with development matters, and the impact of the Model Code on how such conflicts are managed.

The discussion paper noted that having a conflict of interest does not in itself amount to corruption. However, corruption risks can occur when conflicts of interest are not managed properly, and they improperly influence decision-making.

The discussion paper asked:

- *Are councillors sufficiently aware of their obligations in relation to non-pecuniary conflicts of interest under the Model Code?*
- *Are there additional mechanisms or guidance that should be in place to assist councillors manage non-pecuniary conflicts of interest? If so, what should these be?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Many respondents felt that the Model Code provisions concerning non-pecuniary conflicts of interest were unclear. A recurring theme was that it is unworkable for councillors to be the arbiter of whether or not a conflict exists, and whether a conflict is important enough to warrant exclusion from discussion and voting on a particular development application. A small minority of respondents were satisfied with the provisions.

ASSESSMENT OF CORRUPTION RISKS

The capacity for development decisions to be influenced by non-pecuniary interests is a recognised corruption risk in NSW development approval processes. Putting a private interest above public duty can constitute the dishonest or partial exercise of official functions and may constitute a disciplinary offence under section 9 of the ICAC Act.

Pecuniary interests carry the same risk and have been dealt with in legislation. Non-pecuniary interests, by contrast, are a matter dealt with in the Model Code. There are two issues to be considered: the identification of non-pecuniary interests, and the choice of the appropriate management option if it is decided that a non-pecuniary interest exists.

Identification of non-pecuniary interests

The Model Code states that "a conflict of interest exists when you could be influenced, or a reasonable person would perceive that you could be influenced by a personal interest when carrying out your public duty" (paragraph 6.1). Paragraph 6.3 of the Model Code requires that:

> *any conflict between your interests and those of council must be resolved to the satisfaction of the council.*

The means by which the council can reach a determination on such matters is not clear.

On the other hand, paragraph 6.5 of the Model Code appears in effect to leave it to councillors (and council officials) to determine whether they have a conflict of interest:

> *The onus is on you to identify a conflict of interests, whether perceived or real, and take the appropriate action to resolve the conflict in favour of your public duty.*[13]

This means that councillors themselves consider and decide whether they have a personal interest and if so, whether they could be influenced by that personal interest or whether a reasonable person would perceive that they could be so influenced.

Making these judgements in the local government context can be particularly challenging. Participation in local and community organisations might be seen as giving rise to a personal interest. On the other hand, an important role of a councillor is to provide local knowledge and input into council decision-making, and councillors are likely to be involved to some degree in a range of local and community associations.

The question of when a relationship is of sufficient depth to give rise to a private interest is not always straightforward. This is particularly so in rural and regional communities, where small populations and relative isolation can lead to the emergence of a number of well-known associations of individuals based on family, business, sporting and social ties.

Dealing with proposals affecting donors is also a difficult area, which is dealt with in more detail in Chapter 11. The Model Code advises councillors that matters before council involving campaign donors may give rise to a non-pecuniary conflict of interest, but warns that they may in certain circumstances create a pecuniary interest (paragraph 6.15). There is no objective monetary threshold, and the decision falls to the individual councillor.

It is possible that reasonable people would have differing views on the application of these rules to any given situation and would draw the line in different places.

The corruption risk is that a councillor might determine that he or she has no conflict of interest in circumstances where the Commission and bodies like the Department of Local Government, and the hypothetical reasonable person, would disagree. The result may be a decision which is partial in the eyes of everyone but the person who made it, but where there is no breach of the Model Code because it is up to the individual councillor to determine whether a conflict exists.

The Commission considers that the Model Code should provide clearer guidance on what is considered a non-pecuniary conflict of interest. Where there is a way to introduce an objective test it should be considered. For example relatives (e.g. cousins) not currently within the pecuniary interest definition can be objectively defined. So can donations reasonably likely to

13 *The model code of conduct for local councils in NSW*, Department of Local Government, NSW, December 2004, p. 11. Accessed at www.dlg.nsw.gov.au.

influence a decision-maker, by a monetary threshold (an issue discussed further in Chapter 11). Where there is no possibility of introducing an objective test, such as for friendship, it should be possible to list in the Model Code or guidelines some delineators of a relationship close enough to suggest a conflict of interest. Advice should similarly be available on the delineators that would suggest enmity.

The guidelines to the Model Code suggest that councils consider nominating a senior officer or engaging a suitably qualified person, such as a solicitor or auditor, to provide objective advice on conflict of interest matters, or use the conduct committee to provide advice.[14] The Commission supports this approach. However, for useful advice to be given the clarification suggested above is still needed.

Management of non-pecuniary conflicts of interest

If a councillor does conclude that he or she has a non-pecuniary conflict of interest, the Model Code leaves it up to that councillor to choose one of the management options in provision 6.12. The Model Code provides limited guidance to councillors about which management option they should choose:

> *The option you choose will depend on an assessment of the circumstances of the matter, the nature of your interest and the significance of the issue being dealt with.*[15]

There is confusion among local councils regarding the Model Code's requirements for managing non-pecuniary conflicts of interest. Submissions have pointed out, with concern, that councillors with the same interest can choose different options – some may feel declaration of the interest is enough, while others may feel it appropriate to remove themselves from the decision-making process.

This situation is unsatisfactory because a conflict of interest that the Commission or the Department of Local Government would regard as serious enough to warrant a particular course of action, such as refraining from participation in voting, may not be seen as such by a councillor. The councillor may genuinely believe that he or she could not be influenced by a personal interest.

As in the case of the initial determination of whether a conflict exists, this can lead to a decision that everyone but the person who made it regards as partial – but there is no breach of the Model Code if the decision about the appropriate course of action is a subjective one. From another perspective, a councillor who genuinely makes an assessment and takes a particular course of action in good faith could be subjected to allegations he or she has no way of putting to rest, because there are no objective criteria.

It is important that once a conflict of interest is identified, councillors are provided with clear guidance about how it should be managed. Consideration could be given to nominating particular circumstances which would warrant a particular approach. These would need to be able to be objectively identified. For example, in the case of an application concerning a significant donor, the Model Code could stipulate a particular course of action rather than leaving it open to individual councillors to adopt different courses in the same circumstances.

14 The Model Code provides for the establishment of a conduct committee in each council, to deal with alleged breaches of the Code.

15 *The model code of conduct for local councils in NSW*, Department of Local Government, NSW, December 2004, p. 13.

Appropriate management options for conflicts of interest can be limited in smaller rural and regional communities, and some allowance would need to be made for this in the guidelines.

An option is for ministerial call-in of applications where there are significant conflicts of interest which are not easily resolved. The ministerial call-in power can be an important safeguard in such circumstances, and in other cases of reasonable and bona fide concerns about the probity of decisions at the local level.

As noted above, the Commission supports the suggestion in the guidelines to the Model Code that councils consider nominating a senior officer or engaging a suitably qualified person, such as a solicitor or auditor, to provide objective advice on conflict of interest matters, or use the conduct committee to provide advice. However, the Commission believes there would be value in a central reference point at state level, able to provide an advice service to councils and to develop a body of precedents to assist in the resolution of conflict of interest issues.

The Department of Local Government has begun a review of the Model Code. The Commission welcomes this review and hopes it will provide an opportunity to clarify the non-pecuniary conflict of interest provisions of the Model Code. Section 9 of the ICAC Act is directed at ensuring that findings of corruption are confined to serious matters, and a "substantial breach" of the Model Code is an indicator that the matter is sufficiently serious to enable a finding of corrupt conduct (although the action must also fall within section 8 of the ICAC Act). The Commission suggests therefore that in the Department's review, consideration be given to separating "aspirational" provisions from those which are firm requirements intended to give rise to the prospect of a "substantial breach" under section 9 of the ICAC Act.

RECOMMENDATION 3

That the Department of Local Government reviews the non-pecuniary conflict of interest provisions in the Model Code with a view to providing clear guidance on the identification and management of non-pecuniary conflicts of interest.

RECOMMENDATION 4

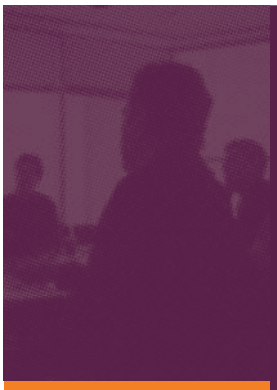
That the Department of Local Government, to the extent possible, includes in the Model Code objective tests to assist councillors to determine whether a conflict of interest exists and provide guidance on the appropriate management option for non-pecuniary conflicts of interest

RECOMMENDATION 5

That individual councils ensure that independent advice (e.g. from an external solicitor or auditor) is available to assist councillors in dealing with conflict of interest issues.

RECOMMENDATION 6

That the Department of Local Government considers establishing an advisory service to assist in the resolution of non-pecuniary conflict of interest issues.



Chapter 4: Options for reform

4.1 Limiting or removing councillor involvement in development approval

SUMMARY OF DISCUSSION PAPER

The discussion paper noted that the Commission did not consider the removal of councillors from the development assessment process as a viable option for reform in the context of its general review of corruption risks associated with that process. As noted earlier in this publication, it is assumed that the underlying and fundamental structure of the existing planning system will remain in place.

However, the discussion paper did consider some measures which would limit councillor involvement in the determination of individual development applications. One measure was standardising delegations to ensure only large and/or controversial developments are dealt with by council itself. It was noted that many councils have already adopted this approach.

The discussion paper asked:

- *Is it desirable to standardise the involvement of councillors in the development approval process? If so, what are the options for doing this?*
- *What are the various options for managing the conflicting roles experienced by councillors within the current planning system?*

SUMMARY OF THE SUBMISSIONS RECEIVED

As noted in Chapter 2, many respondents expressed views on whether councillors should be involved in the determination of development applications. This occurred despite the fact the Commission did not specifically solicit responses on this issue. There was no clear consensus among respondents on this issue, and strong views were expressed on both sides of the argument.

There was general support for the development of guidelines to assist in the standardisation of delegations, although some respondents pointed out practical difficulties with making guidelines that would be appropriate for all councils. There was also general support for the view that the elected body should only deal with significant and/or controversial developments but some concern about how these could be defined.

The approach most often suggested was for developments to be determined by staff under delegation, subject to revocation of the delegation ("call-in") by councillors, and for reasons to be given when this is done.

Some submissions, however, questioned the role of delegation in terms of corruption prevention. For example, one submission stated:

> *Staff can be and have been captured. It is no answer to the problem of councillors' conflict of roles to say that more should be left to staff.*

ASSESSMENT OF CORRUPTION RISKS

The arguments advanced in favour of greater delegation to council officers related to efficiency and to governance and management approaches, rather than to corruption prevention or unmanaged corruption risks.

As noted in Chapter 2, there is no clear corruption risk associated with the fact that councillors have a role both in making planning instruments and in determining development applications, and therefore no corruption prevention argument to support their removal from either role.

In any event, delegation to officers is not necessarily a reliable corruption prevention measure. The discussion paper noted that additional corruption risks could result if the implementation of development instruments was left solely in the hands of the council administration. Council officers are at risk of establishing their own inappropriate relationships with developers, an issue discussed further in Chapter 5.

The public nature of council meetings provides a layer of scrutiny to council determinations that is not present when applications are determined under delegation. Furthermore, the impact of a person corrupting a councillor is diminished by the fact that there are a number of councillors on a council.

On the other hand, where in the normal course of events an application is to be determined under delegation, the revocation of that delegation by one or more individual councillors may call for an explanation. Some councils have a practice of the elected body revoking its delegation of authority in respect of individual development applications at the request of one or more councillors (regardless of the nature or significance of the developments).

The Commission has not seen evidence of any misuse of the call-back power to date, but it could in theory be used by a councillor for corrupt motives, for example, to benefit a close personal friend. This power can, however, work to the opposite effect by moving a decision into an open forum.

The Commission considers that a requirement that councillors provide reasons for revoking the elected body's delegation would assist in promoting transparency in this area.

The need for greater standardisation of delegations in the interests of corruption prevention has not been established, and the Commission makes no recommendations on that issue.

RECOMMENDATION 7

That individual local councils consider requiring councillors to provide reasons for revoking the elected body's delegation in relation to individual development applications.

4.2 Reforms to enhance councillors' accountability to the community

SUMMARY OF DISCUSSION PAPER

The discussion paper canvassed a number of options for improving councillors' accountability to their constituents, including:

- requiring councils to record how councillors vote on planning policy matters and individual development applications
- making minutes of council meetings and council business papers available on council websites (many councils already do this)
- making it mandatory for mayors to be elected only through popular elections (rather than by councillors)
- an extension of design review panels[16] in certain circumstances
- requiring councillors to give reasons for their decision when they approve development applications against the recommendations of staff.

The discussion paper asked:

- *What are your views on the options listed above?*
- *What other mechanisms can be used to improve the accountability of councillors to their constituency?*

Summary of the submissions received

Recording of votes

There was widespread support for recording how councillors voted on development applications. There was, however, a contrary view that recording how each councillor votes on each particular item would be costly and cumbersome to administer.

Making business papers and minutes available on council websites

There was general support for making business papers and minutes available on council websites.

Popular election of mayors

Respondents were strongly divided on the issue of popularly elected mayors.

Those in favour of popular election gave reasons related to what they saw as stronger leadership and greater stability rather than corruption concerns. There was no evidence identified in submissions which pointed to actual instances of "horse trading" of the mayoralty in return for support on development matters, nor any particular concern about the issue.

On the other hand there was concern about the costs involved in funding a popular mayoral campaign, and a perceived greater likelihood that candidates may be compromised by relying on political donations from developers. There was also concern about the possibility of instability should a popularly elected mayor be faced with a hostile council.

16 Design review panels provide independent advice to councils about the design quality of residential flat development proposals, with regard to the design quality principles of SEPP 65.

Design review panels

Few respondents expressed a view about design review panels, although there was a view in one submission that such panels are reluctant to criticise peers and in another that they can be expensive. No corruption issues were raised.

Reasons for decisions approving applications contrary to planning staff recommendations

There was support in many submissions for requiring councillors to give reasons for decisions if they depart from the recommendations of planning staff by approving individual development applications.

ASSESSMENT OF CORRUPTION RISKS

Recording of votes

The Commission appreciates that the recording of individual votes would be beneficial in promoting public accountability and transparency in councillor decision-making, which may help detect or deter corrupt conduct. Other inquiries have also recommended these reforms. The most recent example is the *Independent Inquiry into the Financial Sustainability of NSW Local Government*[17] prepared for the LGSA.

Making business papers and minutes available on council websites

This is acknowledged as good practice and is increasingly common, and is likely over time to become the norm. It can enhance transparency, which may have some tendency to deter corrupt behaviour. It is important, however, to ensure that such information does not become restricted to those with ready access to the internet.

Popular election of mayors

The discussion paper canvassed the idea of popularly elected mayors as a means of preventing "horse trading" among councillors over development decisions and support for a mayoral candidate. Where this practice specifically involves development matters it could fall within the definition of corrupt conduct in the ICAC Act.

No evidence that this is a problem in practice emerged from submissions. Those respondents who supported this proposal tended to give reasons related to non-corruption issues such as avoiding disruption to important council business.

As there is no evidence of a corruption risk, the Commission takes no position on this issue.

Design review panels

As no link to any corruption prevention issue is evident, there appears to be no reason for the Commission to pursue this issue.

Reasons for decisions approving applications contrary to planning staff recommendations

There was strong support in submissions for this idea. It has been canvassed fully in section 2.2 of this paper where the Commission noted that any presumption that failing to accept staff

17 Independent Inquiry into the Financial Sustainability of NSW Local Government, (Chairman P. Allan), Local Government and Shires Associations NSW, May 2006, p. 305. Accessed at www.lgi.org.au.

recommendations is suggestive of corrupt conduct is unwarranted, but nonetheless concluded that requiring councillors to state their reasons publicly when they decide to approve applications contrary to advice could in some cases deter potential corrupt conduct. The most appropriate way to deal with the issue is to consider a requirement that reasons be given for all decisions on development applications, including approvals, as was recommended in Recommendation 1.

RECOMMENDATION 8

That individual local councils implement systems that record how councillors vote on development matters.

4.3 Structural reform to reduce the emphasis on councillors' individual advocacy role

SUMMARY OF DISCUSSION PAPER

The discussion paper examined some of the proposals others have put forward to reduce the emphasis on councillors' individual advocacy role without completely eliminating it. These proposals included the:

- creation of larger councils to increase representation ratios
- introduction of fewer councillors who are paid to work full-time
- abolition of the ward system.

The discussion paper asked:

- *Would larger councils reduce the number of occasions where a councillor or member of staff has a conflict of interest? Are larger councils better able to prevent and detect corrupt conduct?*
- *Would full-time, paid councillors improve overall governance?*
- *Does the ward system affect the way in which councillors discharge their planning responsibilities? Should the ward system be abolished?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Respondents did not reach a clear consensus on any of the issues raised in this section, and on each proposal there were strong views on both sides of the argument.

In relation to larger councils, one view as expressed by a Sydney metropolitan council was that:

> *Although it is accepted that a larger Council may have more resources available for sophisticated audit systems, it might also be the case that inconsistent or inappropriate decisions are far more evident at a smaller Council. Ultimately, it is not considered that size plays a significant role in a Council's vulnerability to corruption.*

The other point of view, as expressed by a private sector town planner, is that:

> *… larger councils would remove many of the opportunities for councillor and staff conflicts of interest and corruption of the system. Larger councils would give a broader perspective to regional issues. The economic feasibility of larger councils both suburban and rural should produce a more efficient system of governance and decision-making in the DA process.*

In relation to the suggestion that councillors could be made full-time and paid accordingly, the comments made did not concern corruption risks. The objection raised by one regional council is that the roles of councillors could become more blurred as they may try to become more and more involved in the day-to-day operations of the councils.

On the other hand a senior planner from a large metropolitan council argues that:

> *… since council meetings are held at night, as they have to be, given that the councillors are all part-time, it is not infrequent to have major decisions being made at 11 pm at night or later. The decision-makers are likely to have been working since 9 am that day, rushed from work to the chamber, may or may not have had time to eat, and five hours later they are still involved in decisions that will affect people's lives and the future of cities and towns. This is just bad practice and after many months of this tempers get frayed and mistakes made. Ideally councillors should be full-time – and paid more.*

In relation to the ward system, comments similarly varied. One view as expressed by a Sydney metropolitan council is that:

> *The ward system has the potential to influence councillors in regard to decision-making. Particular interest groups may be able to exert greater influence on councillors under a ward system than otherwise would be the case.*

Conversely, an inner-city council argued that the ward system has major benefits, largely on the basis of community of interest within each ward boundary. The closeness of constituents to those whom they elect is regarded on this view as "an essential part of democratic representation particularly in an environment that operates with a high degree of participation".

ASSESSMENT OF CORRUPTION RISKS

Opinion is sharply divided on each of the measures canvassed in the discussion paper, and the issues raised concerned effectiveness and efficiency rather than corruption. The reforms considered in this area of the discussion paper have far-reaching implications, and as their effectiveness as corruption prevention measures has not been established the Commission does not take a position on any of them.

4.4 Independent Hearing and Assessment Panels

SUMMARY OF DISCUSSION PAPER

The discussion paper considered the NSW Independent Hearing and Assessment (IHAP) model and the benefits that have been attributed to it. These include:

- a mechanism for the assessment of development applications based on the rules of procedural fairness
- an independent and professional judgement on development applications. This provides councils with an early indication of the likely outcome of a matter should it be appealed to the Land and Environment Court. IHAP recommendations also assist councillors to focus their minds on relevant assessment criteria
- a counterbalance to perceptions of biased decision-making by councillors
- a focus on a non-adversarial process for resolving disputes between objectors and applicants.

The discussion paper asked:

- *Do IHAPs improve development assessment and approval processes?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Respondents were fairly evenly split between supporting and opposing IHAPs. Respondents who opposed IHAPs raised concerns over affordability, the relevance of IHAPs in rural and regional areas, links to the development industry by IHAP members, difficulties associated with finding suitable IHAP members in remote areas, and the lack of accountability of IHAP members to the public.

IHAP supporters argued that IHAPs add a level of impartiality, professionalism and transparency to development decision-making. However, even among those who felt that the use of IHAPs should be encouraged, there was little support for the use of IHAPs to be compulsory.

The Department of Planning in its submission expressed the view that the referral of matters in which the council has a direct interest to an IHAP or some other independent forum would be a useful reform. This is an issue discussed further in Chapter 6.

ASSESSMENT OF CORRUPTION RISKS

As the Commission understands it, IHAPs were conceived as a means of producing better decisions, and reducing the number of appeals to the Land and Environment Court, rather than as a corruption prevention measure. IHAPs allow councillors more time to become involved in strategic issues by reducing their need to become caught up in complex or contentious development applications prior to making a decision. IHAPs also help depoliticise the development approval process and reduce pressure for councillors to vote a certain way.

Indeed, one of the key advantages of the IHAP system is seen as its ability to educate local constituents about the realities of development control, and to make them see that there is nothing to be gained by pressuring councils to make decisions that would inevitably be overturned by the Land and Environment Court.

The submissions suggest that there has been some success in these terms. Those councils with IHAPs are positive about their impact, seeing them as an effective mechanism for dealing with contentious development applications.

The *Independent Inquiry into the Financial Sustainability of NSW Local Government* recently commissioned an IRIS Research survey to determine the public's views about who should determine development applications. The research revealed a high level of community support for the use of IHAPs.[18]

Some submissions, however, raised the issue that there are corruption risks associated with IHAPs themselves. It has been argued that IHAP members can be corruptly influenced in the same manner as a councillor. The possibility of conflicts of interest was of particular concern.

Councils need to put mechanisms in place for managing the potential conflicts of interest that IHAP members may experience. The rotation of panel members should be standard procedure to ensure there is no certainty as to who will be a member of the panel when a particular application is considered. The Department of Local Government suggests that IHAP members should be designated officers under pecuniary interest legislation and should be required to lodge returns of pecuniary interests.

In terms of management of corruption risks, referral to an IHAP for advice may be useful in the case of some classes of applications such as:

- entrepreneurial developments where council has an interest in the development and is the consent authority (further discussed in Chapter 6)
- significant departures from development standards in LEPs (further discussed in Chapter 9).

However the Commission is conscious that corruption prevention is not the purpose of establishing IHAPs, which are normally proposed for other reasons, as noted above.

The Commission is also conscious that there are clearly additional resources required for the IHAP process, and does not believe the process to be warranted for small developments in any area. In addition, some rural councils have legitimate concerns about the applicability of IHAPs to their areas given the relatively low number of larger developments they process. Some of these councils also question their ability to fund IHAPs and find suitably qualified independent members.

The Commission does not therefore consider the compulsory implementation of IHAPs to be a reform necessary to respond to significant and unmanaged corruption risks.

The NSW IHAP model gives councillors the discretion to decide whether or not to accept an IHAP recommendation. The Commission supports maintaining this discretion for councillors. There has been no case made on corruption prevention grounds to constitute IHAPs as final decision-makers.

18 Reported in Independent Inquiry into the Financial Sustainability of NSW Local Government (Chair: P. Allan AM), *Final Report: Findings and Recommendations*, May 2006, p. 183. The survey showed majority support for the involvement of an independent panel with 36 per cent saying that the panel should make the decision and a further 26 per cent saying that it should be councillors who make the final decision based on advice from the panel. This contrasts with only 9 per cent of respondents agreeing that elected councillors should determine developments.

Furthermore, maintaining the role of the elected body acts as a counterbalance to arguments about the perceived lack of democratic accountability of IHAP members and the possibility of improper influence being applied to panel members.

RECOMMENDATION 9

Where IHAPs have been established, that councils consider referring matters which raise corruption prevention issues to the IHAP for advice, such as:

- **entrepreneurial developments where council has a financial interest in the development and is the consent authority**
- **proposals involving significant departures from development standards.**

4.5 Enhanced appeal rights for third parties

SUMMARY OF DISCUSSION PAPER

The discussion paper noted that currently a third-party objector to a development can bring a merit appeal in the Land and Environment Court against a decision to grant development consent only if the development is designated development.[19] For all non-designated development, third-party objectors cannot make merit-based appeals to the Land and Environment Court. This includes most development in urbanised areas, such as residential flat developments and townhouses. On the other hand, merit-based appeals for applicants are available for both designated and non-designated development.

Merit-based reviews can provide a safeguard against corrupt decision-making by consent authorities as well as enhancing their accountability. Consequently, the extension of third-party merit-based appeal rights may act as a disincentive for corrupt decision-making by consent authorities.

The discussion paper asked:

- *Should third-party merit-based appeal rights to the Land and Environment Court be extended?*
- *If so, in what circumstances and how could this be achieved?*

SUMMARY OF THE SUBMISSIONS RECEIVED

A number of councils did not support extending third-party appeal rights. These councils raised concerns such as the costs associated with defending matters in the Land and Environment Court and the potential for delay and uncertainty. There was particular concern about the prospect of the exercise of third-party rights by commercial competitors or by neighbours embroiled in neighbourhood disputes, and high rates of appeal were anticipated by some councils in areas where legal costs may not be a key consideration for potential litigants.

By contrast, a number of respondents, including members of the public and professional planners, were in favour of extending third-party appeal rights. However, the predominant view was that the circumstances in which appeals could be launched would need to be confined to particular

19 Designated development is development listed as such in the EPA Regulation 2000.

circumstances, and that costs should be awarded against litigants bringing frivolous or vexatious appeals. A number of respondents also floated alternative options such as the introduction of third-party review systems that did not involve the Court.

ASSESSMENT OF CORRUPTION RISKS

The absence of an appeal right for objectors means that if an approval can be secured by corrupt means, it can be acted on. Conversely, the availability of appeal rights introduces the possibility that a development approval may be overturned by an independent body.

There is a strong argument that the category of designated development should be enlarged to allow third-party objectors the same rights of appeal as are presently available to developers, at least with regard to significant development. The right of appeal given to an aggrieved applicant and an enlarged right of appeal available to an aggrieved objector should inhibit corrupt conduct by local councillors and/or officers.

The Commission recognises that further consideration would need to be given to appropriately defining development that should be regarded as "significant".

A number of respondents had views on what types of development should carry third-party appeal rights. They included:

- developments relying on State Environmental Planning Policy No. 1 (SEPP 1) objections;
- developments where a council has a financial interest in the development and is the consent authority
- major and controversial developments, for example, large residential flat developments.

These suggestions could be considered in the development of a definition of "significant" development. The Commission, however, notes that not all departures from standards are significant. Similarly, councils are responsible for their own operational developments which can be of limited impact, such as roundabouts, seawalls and bus shelters. Some threshold would need to be considered to avoid an unreasonable financial burden on councils and the Land and Environment Court, and unreasonable time delays for applicants.

Consideration should also be given to allowing third-party appeals in the case of developments associated with planning agreements, and developments approved by a council where significant donations have been made to councillors and where those councillors have participated in voting. This may happen because, for example, they would otherwise deprive the council of a quorum. This is further discussed in Chapter 11.

The current practice of the Land and Environment Court allows for the award of costs in appropriate cases, and this capacity should be a disincentive to objectors who may be inclined to lodge frivolous or vexatious appeals or appeals that otherwise lack merit. Justice Stuart Morris, President of the Victorian Civil and Administrative Tribunal, has also raised further ways in which the impact of third-party appeals can be minimised. His suggestions are:

- reducing the time for appeals
- introducing special procedures to ensure that, in urgent cases, speedy hearings are held
- requiring decision-makers to give prompt decisions and avoid the need to "over service" in relation to reasons in urgent cases.[20]

20 Justice Stuart Morris, "Third Party Participation in the Planning Permit Process", a paper presented at a conference on "Environmental Sustainability, the Community and Legal Advocacy" conducted by Victoria University, Melbourne, 4 March 2005. Accessed at www.vcat.vic.gov.au.

RECOMMENDATION 10

That the Minister for Planning considers extending third-party merit appeal rights to certain categories of currently non-designated development, including:

- **developments relying on significant SEPP 1 objections**
- **developments where council is both the applicant and the consent authority, or where an application relates to land owned by a council, subject to exceptions for minor operational developments**
- **major and controversial developments, for example, large residential flat developments**
- **developments which are the subject of planning agreements.**

4.6 Improved councillor training

SUMMARY OF DISCUSSION PAPER

The discussion paper observed that many individual councils offer some form of training to councillors, although this varies considerably in topics and depth between councils. The discussion paper suggested that training for new councillors could be provided in a more consistent way. In particular, some form of advanced-level training for councillors on planning issues could be appropriate.

The discussion paper asked:

- *Should a more systematic approach be adopted to the provision of training for new councillors?*
- *Should training for new councillors be mandatory?*
- *What options exist for the provision of high-level training to councillors? For example could specialist programs be provided through universities or other institutions?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Respondents overwhelmingly supported the provision of training to councillors, but there was a divergence of views on whether it should be mandatory. The LGSA called for financial assistance from the NSW State Government to enable councils to meet the costs of additional training.

ASSESSMENT OF CORRUPTION RISKS

Recent workshops conducted by the Independent Inquiry into the Financial Sustainability of NSW Local Government found that land use planning and control was the area councillors felt least knowledgeable about.[21] The provision of training to local councillors would help improve knowledge of the specific statutory obligations involved in development matters and improve

21 Independent Inquiry into the Financial Sustainability of NSW Local Government (Chair: P. Allan AM) *Final Report: Findings and Recommendations*, May 2006, p. 313.

professionalism among councillors. Councillor training can also be used to promote corruption awareness in the context of planning issues. Better training in this area should enable councillors to better recognise when the behaviour of a colleague or a staff member is questionable, and may therefore help to expose corruption.

The Minister for Local Government has recently announced compulsory training for councillors. The extent to which planning issues will be covered during this training is unclear; nevertheless, it should be possible to include planning matters and corruption awareness as part of this package.

RECOMMENDATION 11

That the Department of Local Government, in conjunction with other relevant agencies and organisations, provides training for councillors on planning matters and corruption awareness.

Chapter 5: Council officers and conflicts of interest

5.1 Council officers and regulatory capture

SUMMARY OF DISCUSSION PAPER

The discussion paper noted that over-familiarity between planning staff and professional developers and architects can lead to perceptions of conflict of interest and "regulatory capture".

It was noted in the discussion paper that if planning staff do not maintain a professional distance from regular applicants there is a risk that they will not assess applications on their merits.

The discussion paper put forward the following options for managing this risk:

- the allocation of development assessments from frequent applicants to different staff members to help prevent the establishment of inappropriate relationships
- consideration of a random performance auditing system for development matters. For example, a supervisor may examine a random sample of development assessments allocated to council staff each year. Staff must justify decisions and discuss and resolve problems that arise
- ensuring adequate mechanisms are in place to consider the outcomes of community consultation processes
- adopting a system of peer review or countersigning for controversial matters.

The discussion paper noted that a council's available resources would affect its ability to implement these measures.

The discussion paper asked:

- *What mechanisms can be used to deal with the risk of regulatory capture among council staff?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Respondents supported the options put forward in the discussion paper, and one from a trade union considered that the allocation of applications from frequent applicants to different staff members, and auditing by management, are well-established practices already. The Department of Local Government recommends allocation of development applications to different staff, random auditing and peer review.

One submission made by a staff member of a Sydney metropolitan council included this observation on peer review and countersigning arrangements:

One manager stated the strongest belief that this is essential for every application in the interests of consistency, quality control and preventing corruption. No application should be dealt with exclusively by one person from start to finish – this is fertile ground for corruption.

An additional suggestion made by the general manager of a major Sydney metropolitan council was that all regular commercial entities involved in the planning process should be told the standard of behaviour expected of staff and what is allowable in relation to developers. It was suggested that ideally this should be done by way of a statement of business ethics which sets out clearly the standards of behaviour required.

Some respondents agreed with the observation made in the discussion paper that a council's available resources would impact on the ability of a council to implement the suggested measures.

Some respondents also took the opportunity to raise their concerns about the different roles they believe council officers are sometimes required to perform, and the possibility that a council officer's potential role as an adviser to applicants could undermine his or her ability to assess applications impartially. A number of submissions raised pre-lodgement meetings between council officers and applicants as an area of concern. In particular, some felt planning staff assisting applicants with design work during pre-lodgement meetings could create a conflict of interest for the staff member at assessment and approval stage, especially if a planner felt a sense of ownership in relation to an application.

The assignment of a different officer to assess an application in such a case was recognised as one way this perceived conflict of interest could be managed. However, it was pointed out in some submissions that this approach would create a loss of continuity and may lead to an applicant receiving contradictory information from the council.

ASSESSMENT OF CORRUPTION RISKS

The concept of "regulatory capture" involves a loss of impartiality due to an over-identification with the interests of an applicant, brought about through frequent dealings with the applicant. In terms of corruption risks, regulatory capture is best thought of as the development of a relationship between the regulator and the regulated which can create a conflict of interest for the regulator.[22]

A council officer has an obvious conflict of interest in assessing a developer's application where he or she has developed a close friendship with that developer. The nature of the relationship could adversely affect the honest or impartial exercise of the council officer's official functions which, if proved, could amount to a crime or a disciplinary offence and constitute corrupt conduct under the ICAC Act.

The Commission's *Report on investigation into Randwick City Council 1995* concerns a number of development decisions in relation to which findings of corrupt conduct were made against a number of persons, including a former director of planning at the council. The report details the formation of inappropriate relationships between the staff member and those involved in the development industry.

It was noted in the discussion paper that the Model Code to which council officers are already subject defines council officers meeting with developers alone and outside office hours as an inappropriate interaction.[23]

22 The same issue can arise in relation to councillors, and is dealt with in Chapter 3 as a type of non-pecuniary interest.
23 The *model code of conduct for local councils in NSW*, Department of Local Government, NSW, December 2004, p. 20.

The Commission is of the view that there is also merit in councils adopting the additional measures outlined above, to the extent that they have the capacity to do so. The Commission appreciates that many rural and regional councils may not have this capacity.

These measures have been raised in the context of regulatory capture, but they are equally pertinent to other conflicts of interest and to a broad range of corruption risks. They will, for example, counter or at least dilute any benefits to be obtained by the giving of gifts and benefits (or outright bribes), and thus dilute the incentive to offer them.

In the Randwick example noted above, the situation went well beyond regulatory capture and conflict of interest. It was common practice for staff at the council to accept expensive lunches, corporate box tickets to sporting events and discounted products from developers.[24]

This is a particular risk area for councils in cases where council planners operate autonomously, as officers do not face the same level of public scrutiny as councillors. Council officers are responsible for the majority of development approvals and consequently may be a target for persons seeking to use corrupt means to obtain favourable decisions, which can be worth significant amounts of money.

The suggestion in some submissions that the standards of behaviour expected should be made clear to those intending to have dealings with the council is supported by the Commission. A statement of business ethics is a useful tool for explaining to the public the appropriate boundaries in dealing with council officers. A specific guide has been developed by the Commission to assist councils in this regard.[25]

RECOMMENDATION 12

That individual councils consider measures to address the risk of inappropriate relationships forming between council officers and frequent applicants.

Depending on the resources available, the following measures could be adopted:

- **the allocation of development assessments from frequent applicants to different staff members;**
- **use of a random auditing system for development matters. For example, a supervisor may examine a random sample of development assessments allocated to council staff each year. Staff must justify decisions and discuss and resolve problems that arise**
- **ensuring adequate mechanisms are in place to consider the outcomes of community consultation processes**
- **adopting a system of peer review or countersigning for controversial matters**
- **developing a statement of business ethics to promote awareness among the public of the ethical standards expected of council officers and what is allowable in relation to interactions with applicants.**

24 The Model Code now articulates the circumstances in which it is inappropriate to accept gifts and benefits, *ibid*, p. 15.

25 *Developing a statement of business ethics – a guide to building ethical business relationships between NSW public sector organisations and the private sector*, Independent Commission Against Corruption, Sydney, 2004.

The concern expressed in some submissions about the different roles council planners are sometimes required to perform needs to be balanced against the potential benefits of pre-lodgement meetings with applicants. Pre-lodgement meetings can be of assistance to applicants and have the potential to reduce development application processing times.

The Commission does not see this as an area in which it needs to make recommendations. The assignment of officers to provide pre-lodgement advice to an applicant, and to assess the application, is a matter for managers to decide. Relevant factors to consider include a council's available resources and the nature of the advice provided during pre-lodgement meetings.

5.2 Council planning staff being subject to inappropriate pressure by senior council officers

SUMMARY OF DISCUSSION PAPER

The discussion paper considered the potential for council planning staff to be inappropriately pressured over development assessment reports and recommendations. This pressure could originate from senior council staff and/or councillors.

The discussion paper asked:

- *Is it possible to determine when planning staff have been subject to inappropriate pressure in relation to the assessment of development applications? If so, how?*
- *Are there adequate protections for planning staff who are inappropriately pressured by senior staff and councillors to change development assessment reports? What other protections could be put in place?*

SUMMARY OF THE SUBMISSIONS RECEIVED

A number of respondents were concerned about what they perceive as interference with their professional judgements. On the other hand it was recognised in some submissions that different professional opinions can quite legitimately arise. One view is that it is appropriate that senior officers provide advice and directions in relation to assessments, but not to the point of a direction to change a recommendation.

Some respondents supported the development of a professional protocol to deal with the situation, for example requiring senior staff to provide reasons in writing for making any significant changes to a planner's assessment report or recommendations. An alternative view was that if a manager has a different professional view the appropriate course is for the manager to put his or her name to the assessment report instead.

Many respondents also stated that it would be appropriate for this matter to be included in the Model Code.

ASSESSMENT OF CORRUPTION RISKS

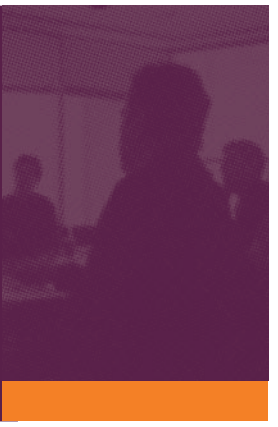
The discussion paper noted that the issue of pressure from councillors has already been dealt with by the outright prohibition in section 352 of the Local Government Act on councillors giving a member of staff directions as to the content of any advice or recommendation. It was noted in

the discussion paper and in section 2.4 of this paper that the Model Code deals extensively with proper channels for contact between councillors and staff members.

In the Commission's view these provisions create an appropriate level of protection against the possibility of inappropriate pressure on staff by councillors, but quite properly leave open avenues for legitimate enquiries by councillors on behalf of their constituents. The Commission does not see a need to make any recommendations for change.

In the case of direction by more senior staff, there is a management issue to be considered. Extending the prohibition and protocols that apply to councillors down the line could compromise the ability of senior staff to do their jobs, which include the supervision of staff in the interests of quality and consistency of approach.

The Commission therefore does not propose to make any recommendations on this matter. It is open to individual councils to adopt a protocol if they believe it appropriate.



Chapter 6: Conflicting roles at a consent authority level

SUMMARY OF DISCUSSION PAPER

The discussion paper noted that the EPA Act allows councils to determine their own development applications. It noted that this can lead to perceptions that a consent authority has a conflict of roles between its different functions as developer and land use regulator.

Consent authorities may have an interest in the outcome of matters such as:

- rezoning of their own land
- sale of their land to developers for development purposes
- development of their land for a community facility or a commercial development
- formation of a partnership with the private sector to develop the consent authority's land.

The discussion paper detailed the South Australian model which involved the establishment of the Development Assessment Commission, which determines applications in which local councils have an interest.

The discussion paper also referred to the Central Parramatta Planning Committee, which deals with any application in the Parramatta Local Government Area in which the council holds a direct pecuniary interest.

The discussion paper noted that the Commission has previously made a number of recommendations to assist councils in dealing with conflicting roles of this nature, including utilising independent parties in the assessment process where possible. The Commission has also recommended the segregation of duties within a council for large projects in which council has an interest.

The discussion paper detailed a number of additional strategies consent authorities could consider. The discussion paper asked:

- *What mechanisms can be used to manage a council's conflicting roles when it is the consent authority for a development it has an interest in?*
- *In what circumstances should these mechanisms be used?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Respondents supported providing additional guidance to consent authorities on how to manage situations where a consent authority has an interest in the development of its own land. Most of these respondents also stressed that any recommended procedure should be commensurate with the scale and type of development. It was pointed out that councils are

responsible for determining their own applications for many minor operational proposals (e.g. seawalls and roundabouts).

Particularly in the case of large-scale entrepreneurial developments, there was a high level of support for measures such as the use of external consultants and referrals to an independent planning commission or some other independent body or person. The Department of Planning was of the view that the referral of matters in which the council has a direct interest to an IHAP or other independent forum would be a useful reform.

Respondents did not support the development of a specific State Environmental Planning Policy (SEPP) to cover instances where a council has an interest in a development and is the consent authority. Many argued that it was not possible to develop a "one size fits all" approach to cover all scenarios.

Some respondents also stressed that council resources needed to be taken into account when considering management options.

ASSESSMENT OF CORRUPTION RISKS

In 2005–2006, approximately one in five requests for written probity advice received by the Commission were from local councils seeking guidance on how to manage their conflicting roles as land regulators involved in entrepreneurial activities. While there was no suggestion that any public officials associated with these councils had engaged in corrupt conduct, there was nevertheless a general concern on the part of these councils about how to manage community perceptions of conflict of interest.

There may be a particular corruption risk associated with entrepreneurial projects, in which an individual or individuals (councillors or staff) must negotiate or approve the terms of engagement with private sector partners. This opens up the opportunity for direct or indirect inducements to be offered.

The Commission believes the best way to deal with the issue is for consideration to be given to the extension of third-party rights of appeal in cases where a council has determined its own application, or the application relates to land owned by the council, for example where a joint venture partner lodges the application with the consent of the council as owner. This option was discussed and recommended in Chapter 4 (Recommendation 10). Small operational developments would need to be exempted.

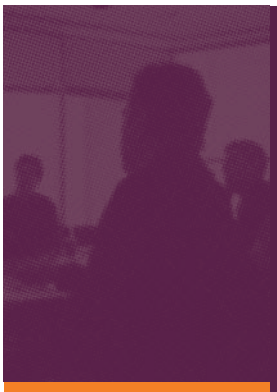
In addition, consent authorities should take steps to manage conflicting development and regulatory roles. The appropriate approach will depend upon the type and scale of development. The options available include the use of external consultants or officers from another council, segregation of duties within council, and referral to an IHAP. Referral to an IHAP was discussed and recommended in appropriate cases in Chapter 4 (Recommendation 9). The following table sets out some of the approaches councils can consider adopting.

Type of development	Method
Category 1 ■ Non-controversial small-scale developments ■ Routine operational developments	■ Assessment by council staff not involved in preparing the application. ■ Determination under delegated authority or by full council
Category 2 ■ Certain entrepreneurial developments valued within a specified range	■ Use of appropriate external consultants or officers from another council to undertake development assessment. ■ Consider referral to an IHAP (if established) ■ Determination by full council
Category 3 ■ Certain entrepreneurial developments with a value above that specified in Category 2 (above)	■ Same as for Category 2 above ■ Segregation of duties within council ■ Provision of independent financial advice where appropriate ■ Key project decisions not made unilaterally. Consider establishment of a project steering committee ■ Consider whether notifications process should be expanded ■ Determination by full council

RECOMMENDATION 13

That individual local councils take steps to manage their conflicting roles in matters where they are the regulator of land and have a financial interest in the outcome of the matter.

Where entities such as the Central Sydney Planning Committee and the Central Parramatta Planning Committee are established it would be appropriate that they be given responsibility for determining significant applications in which councils have a direct interest. However, such entities are uncommon and no recommendation is considered necessary.



Chapter 7: Council land disposal

SUMMARY OF DISCUSSION PAPER

The discussion paper referred to section 55(3) of the Local Government Act, which provides that councils do not have to invite tenders for the sale of land. The disposal of council-owned land can involve development proposals, for example, when a developer purchases council-owned land and then lodges a development application for the site.

In some circumstances direct negotiation over the sale of council-owned land can be justified.[26] The discussion paper proposed that where a council decides to sell a parcel of land to a proponent without inviting other expressions of interest, it should commission at least one independent valuer to provide an assessment of the fair price. It was also noted that in addition to obtaining at least one independent valuation, it may be reasonable to seek to examine the methodology that a proponent has used to arrive at its own proposed estimate of price.

The discussion paper asked:

- *Should councils be required to consider obtaining more than one demonstrably independent valuation on any land it plans to sell to a potential developer?*
- *If so, in what circumstances?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Most respondents were not overly concerned with the issue of council land disposal, although a few respondents expressed reservations about the ability of valuations to ensure a council received best value for money. There was a general consensus that land valuations should be based on its "highest and best use".

One Sydney metropolitan council argued that for valuable land, councils should go through a tender process (even though it is not a legal requirement), having established a reserve price through independent valuation. Another suggested that two valuations should be obtained before a council disposes of land.

Some respondents were concerned about the practice of proponents purchasing land from a council based on the prevailing development standards and then relying on a State Environmental Planning Policy No. 1 (SEPP 1) objection to significantly increase development

26 For more information on the Commission's view on direct negotiations see the *Direct negotiations – guidelines for managing risks in direct negotiations*, Independent Commission Against Corruption, Sydney, May 2006.

yields. It was argued that it can be difficult for a valuer to take this into account, especially in cases where approval is granted by the Land and Environment Court.

Some respondents supported councils selling land at less than market value for identified strategic purposes.

ASSESSMENT OF CORRUPTION RISKS

The Commission's recent *Report on investigation into the sale of surplus public housing properties* (October 2006) involved a Department of Housing official selling government properties by private treaty to companies in which he had an interest, at prices below market value. This investigation provides an example of how a disposal process can be manipulated by a public official acting corruptly. The implementation of appropriate procedures for the disposal of council-owned land reduces the risk that a council official could similarly manipulate a disposal process for corrupt purposes.

The Commission supports the proposition that councils consider using a competitive process for the sale of valuable land notwithstanding the absence of a statutory requirement to do so.[27] The Commission also supports the proposition that two valuations should be obtained, as a corruption prevention measure. In most cases where a council disposes of its own land, the selling price should be based on the land's "highest and best use". Where a council chooses to sell land at less than market value for identified strategic purposes, it should clearly and publicly articulate its reasons for doing so.

The issue of councils being denied the best price when the purchaser of council-owned land uses a SEPP 1 objection to vary the controls and obtain a significant windfall profit is a difficult one.

The Commission is unaware of the extent of this problem; it was raised by only a small number of respondents and suggested solutions to the problem were not forthcoming. While the potential for councils to be denied the best return on the sale of land is clear, it is not evident that this is properly thought of as a corruption issue, unless there is some collusion between a council officer and the applicant. Accordingly the Commission does not propose to make any recommendation on this second issue.

RECOMMENDATION 14

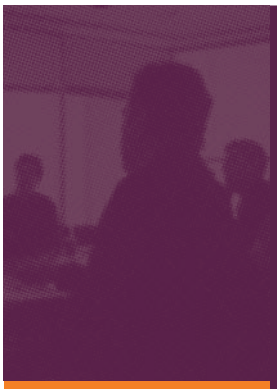
That councils disposing of their own land:

(a) consider using a competitive process for the sale of valuable land notwithstanding the absence of a statutory requirement to do so;

(b) in the absence of a competitive process, consider at least two valuations based on the land's "highest and best use";

(c) clearly identify their reasons if they decide to dispose of land at below market price for strategic purposes.

27 Section 716 of the *Local Government Act 1993* provides that sale of land for unpaid rates and charges must be by public auction.



Chapter 8: The engagement of consultants and conflicts of interest

SUMMARY OF DISCUSSION PAPER

The discussion paper noted that consent authorities often use consultants in the planning area, to assist with the preparation of planning instruments, and in some cases to assess development applications. At times this practice is motivated by resource considerations and at other times a consent authority seeks to obtain an impartial and objective assessment of a matter, for example where it is the applicant. The discussion paper considered the different types of conflicts of interest that can be experienced by consultants. It was noted that conflicts of interest have the potential to undermine a consultant's objectivity.

The discussion paper noted that consent authorities can adopt different strategies for managing consultants and conflicts of interest. These include:

- promoting competitive processes for the selection of consultants and regularly rotating consultants (the discussion paper recognised that a shortage of planning experts may limit the practicality of this approach in rural and regional areas)
- considering the matters that are allocated to consultants. Local consultants who continue to work in the private sector while being contracted by a council due to a shortage of town planning staff could ideally be allocated "one-off" applications to assess. An example is matters involving "mum and dad" applicants as opposed to developments involving local developers
- preparing contracts for consultants that include:
  - a requirement that consultants declare any personal conflicts of interest as they emerge throughout their engagement, for example, where they are currently engaged in a private capacity by a client with an interest in the work they are performing for council
  - consequences for failure to comply with contractual requirements such as the declaration of conflicts of interest
  - a prohibition on consultants working for specified clients that would present a conflict of interest during the term of the contract
  - a requirement that consultants make a declaration on their final report that they had no personal pecuniary or non-pecuniary interest in the matter or its outcome.

The discussion paper asked:

- *What other measures can be undertaken to manage consultants' potential conflicts of interest when working for consent authorities?*
- *When would it be appropriate to use these measures?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Most respondents supported the suggestions made in the discussion paper for managing a consultant's conflicts of interest. The Department of Planning considered that:

> *When appointing consultants to do planning work, consent authorities should require the consultant to warrant that at the date of entering into the agreement to undertake the work, the consultant has no conflict of interest in performing the relevant services. The consultant should also be required to advise the party that appointed them immediately upon becoming aware of the existence or the possibility of a conflict of interest affecting the consultant.*

Another area of concern was that consultants' integrity can often depend on their perceived independence from council, which can be undermined by their involvement in other facets of a council's operations, for example, where a council contracts people to sit as IHAP members or as independents on planning committees.

Some respondents supported requiring consultants to be bound by a specific set of guiding principles that could be set out in a document such as a code.

ASSESSMENT OF CORRUPTION RISKS

The use of external consultants to supplement available resources is a common practice, and their engagement to provide independent oversight or advice in relation to a project can be a useful corruption prevention tool.

There is, however, a risk that decisions or recommendations of consultants may be influenced by conflicts of interest. As in the case of councillors and council staff, a failure to manage conflicts of interest by consultants may be conducive to corruption.

A consent authority can implement a number of measures to help minimise this risk when engaging consultants. These measures are outlined above. However, the Commission is aware that the use of competitive processes to select consultants, and the rotation of consultants, has practical limitations in rural and regional areas where there is a shortage of planners.

The Commission also considers that consent authorities should require consultants to be bound by a set of guiding principles such as a code of ethics. Such a requirement should be included in contracts of engagement. While some consultants are bound by existing professional codes of conduct or a council's code of conduct, many would not fall into this category. Documents such as codes of ethics provide opportunities for communicating core values and expectations at the beginning of business relationships, when establishing mutual expectations is critical. The United Nations Convention Against Corruption (which Australia signed in 2003) specifically recommends the development of codes of conduct and the like to regulate private sector business dealings and contractual relations with the public sector.

There are a number of documents that can be used to assist local councils with this task, including some of the provisions of the Planning Institute of Australia's Code of Professional Conduct, which applies to all members of the Institute.[28] The Commission's *Developing a Statement of Business Ethics*[29] would also assist councils in this regard.

28 Accessed at www.planning.org.au.

29 *Developing a statement of business ethics – a guide to building ethical business relationships between NSW public sector organisations and the private sector*, Independent Commission Against Corruption, Sydney, May 2004.

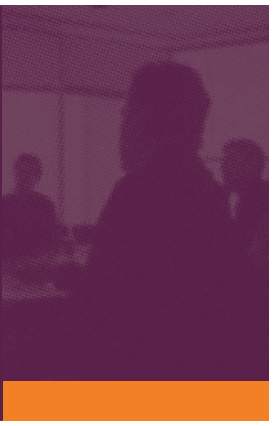
The Department of Planning has also advised the Commission that a planned review by the Department of the Environmental Planning and Assessment Regulation 2000 (the EPA Regulation 2000) will consider whether there is merit in the central regulation of the outsourcing of development assessment, and make appropriate recommendations to the NSW State Government.

It may be the case that consultants engaged in different capacities by the council will come to be seen as lacking complete independence from the council, and their advice may then hold less weight in the eyes of some parties. The Commission does not feel, however, that this amounts to an identified corruption risk, and no recommendations are made in relation to the issue of consultants being used to fill different roles for councils.

RECOMMENDATION 15

That consent authorities adopt measures to manage potential conflicts of interest when engaging planning consultants, to the extent possible. These include:

- **promoting competitive processes for the selection of consultants and regularly rotating the use of consultants**
- **considering the matters that are allocated to consultants. Local consultants who continue to work in the private sector while being contracted by a council due to a shortage of town planning staff could, for example, be allocated applications for minor development, such as a home extension, rather than applications for significant development.**
- **preparing contracts for consultants that include:**
  - ⇨ **a requirement that consultants declare any personal conflicts of interest that may emerge throughout their engagement, for example, where they are currently engaged in a private capacity by a client with an interest in the work they are performing for the council**
  - ⇨ **consequences for failure to comply with contractual requirements such as the declaration of conflicts of interest**
  - ⇨ **a prohibition on consultants working for specified clients that would present a conflict during the term of the contract**
  - ⇨ **a requirement that consultants make a declaration on their final report that they had no personal pecuniary or non-pecuniary interest in the matter or its outcome**
  - ⇨ **a requirement that consultants be bound by a set of guiding principles such as a code of ethics.**



Chapter 9: Departures from development standards

SUMMARY OF DISCUSSION PAPER

State Environmental Planning Policy No. 1 (SEPP 1) allows an applicant to lodge an objection to development standards. Development standards that are often subject to SEPP 1 objections include building heights, floor-space ratios, car-parking provisions and subdivision size. The variation of these standards provides an opportunity for applicants to achieve a higher level of development on a particular site than would otherwise be permitted.

The discussion paper acknowledged that SEPP 1 objections can be used to create positive planning outcomes. It also recognised that SEPP 1 has the potential to create significant windfall profits and that there is a risk that SEPP 1 can be used inappropriately to circumvent established development standards.

The discussion paper asked:

- *Should councils be subject to an oversight mechanism for the approval of developments seeking to rely on SEPP 1 objections?*
- *If so, in what circumstances and in what form?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Many respondents supported the introduction of an oversight mechanism in relation to developments relying on SEPP 1 objections. Some suggested that the existing concurrence role of the Director-General of the Department of Planning was appropriate, although it was suggested that it could be more actively used (at present it is generally the case that councils can simply assume this concurrence).

The LGSA felt that applications reliant on SEPP 1 should not be able to be appealed to the Land and Environment Court, on the basis that the standards contained in the planning instruments have been devised by the council in consultation with the community. The LGSA regards the existing concurrence role of the Director General of Planning as appropriate, and does not favour another layer being introduced into the planning system.

The LGSA and other respondents saw merit in requiring councils to keep a register of development approvals that rely on SEPP 1 objections. There was also a suggestion by staff from a Sydney metropolitan council that the use of SEPP 1 should be reported monthly to the council, and that individual councillors who support a SEPP 1 objection should be listed.

ASSESSMENT OF CORRUPTION RISKS

The use of SEPP 1 creates a wide discretion in the planning system that can be open to abuse. The development standards in planning instruments influence the price paid for land, and variations to those standards can greatly increase the profits to be made.

The Commission's 2002 *Report into corrupt conduct associated with development proposals at Rockdale City Council* examined the conduct of two councillors and their dealings with developers and intermediaries in respect of development proposals. One proposal involved an application for an eight-storey mixed commercial and residential development on a site which only allowed for four storeys. The proposed development sought to rely on a SEPP 1 objection to exceed the floor-space ratio (FSR) development standard.[30]

The Commission found that there was a sham agreement to disguise a corrupt agreement between a councillor and the developer, involving the councillor giving support to the application and organising support from other councillors. The agreement involved $40,000 for approval for a four-storey building and an additional $70,000 per floor for each additional floor.

The Commission acknowledges that positive planning outcomes can be achieved by adopting a flexible approach to development standards. SEPP 1 requires the consent authority to be satisfied that compliance with the relevant standard is in the particular case "unreasonable" or "unnecessary", and properly used serves desirable ends. The investigation into Rockdale City Council demonstrates, however, that the flexibility inherent in SEPP 1, combined with a lack of oversight and the potential for substantial financial gain, can be conducive to corrupt conduct.

The Department of Planning has advised the Commission that it is currently undertaking an overall review of SEPP 1. The review will examine the operation of the policy in urban, rural and regional contexts and the use of assumed concurrence generally. The review will also examine a number of options including whether quantified limits need to be included in SEPP 1 and whether councils should be required to keep a register of development approvals that include SEPP 1 objections.

The Commission supports the Department of Planning conducting such a review. One option to be considered is more active use of the concurrence role by the Director-General of the Department of Planning. For example, the assumption of concurrence could be removed for SEPP 1 objections seeking variations to development standards above a specified limit.

The Commission notes that the effectiveness of reporting requirements, such as councils reporting publicly on development approvals that include SEPP 1 objections through a register, their annual reports or annual reports to the Department of Local Government or the Department of Planning, would depend upon some form of periodic and purposeful review of the contents of these reports.

Also worth consideration in the review is whether it is appropriate for a single officer to make decisions involving SEPP 1 under delegated authority. A system of peer review or countersigning could be considered. The discussion in Chapter 5 of the risk of regulatory capture of council officers is relevant to this issue.

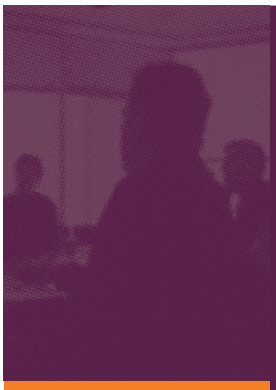
30 There were also some concerns regarding drainage and traffic on the site.

RECOMMENDATION 16

That the Department of Planning examine and consider the options for implementing an oversight mechanism in relation to council-approved developments that include SEPP 1 objections. Options include a requirement that:

- **the concurrence of the Director-General be obtained for all developments relying on SEPP 1 objections seeking variations to development standards above a certain limit and that this concurrence not be delegated back or assumed**
- **councils report publicly on development approvals that include SEPP 1 objections through a register, their annual reports or annual reports to the Department of Local Government or Department of Planning**
- **when an application reliant on a SEPP 1 objection is determined under delegated authority, the determination should be subject to a system of peer review or countersigning.**

The possibility of introducing greater oversight of applications involving significant variations, by referral to IHAPs (in areas where they have been established), or the introduction of third-party appeal rights, was discussed in Chapter 4. Both measures were seen to be worthy of consideration as corruption prevention measures (Recommendations 9 and 10).



Chapter 10: Planning agreements

SUMMARY OF DISCUSSION PAPER

The discussion paper considered section 93F(4) of the EPA Act, which provides for a statutory system of planning agreements. Planning agreements are voluntary agreements between one or more planning authorities and a developer, under which the developer agrees to make development contributions towards a public purpose.

The discussion paper considered that the absence of a strict nexus between a development and a contribution provided for in a planning agreement could be perceived as a potential threat to the integrity of the development approval process. There is a risk that a perception could arise that a developer has improperly used a planning agreement to buy a development consent.

The discussion paper discussed safeguards for planning agreements and asked:

- *What other types of safeguards should a consent authority introduce to prevent the misuse of planning agreements?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Some respondents opposed the use of planning agreements entirely. Others did not oppose the concept but were concerned about a perceived lack of clarity over the scope and use of planning agreements. Such submissions argued that there should be a more definitive rationale on how and when such agreements should be applied.

One submission from an industry association argued that:

> *Although there may be a perception that an applicant may have "bought" a development consent by entering into a planning agreement, there is equal level of concern – from applicants – that councils may "hold them to ransom" if an agreement isn't signed.*

A submission from a large metropolitan council also saw two sides to the issue:

> *The key issue with planning agreements is their value. If they are "overvalued" then there could be allegations that the developer has bought the consent, albeit that revenue or public benefit is substantially increased. If they are "undervalued" then there could be allegations of corrupt influence which has saved the developer substantial money and therefore given them a windfall gain on their development.*

There was considerable support for the introduction of safeguards in the use of planning agreements by consent authorities. Suggestions included the negotiation of planning agreements independently of the development application assessment process; an independent assessment of their value against some objective criteria (which might be done by an IHAP); and the implementation of policies and practices which are public and transparent.

A number of respondents suggested a planning authority should prepare and publicly exhibit a policy to clarify the processes it will follow in relation to planning agreements.

ASSESSMENT OF CORRUPTION RISKS

There was a high level of dissatisfaction with the use of planning agreements evident in some submissions. On the one hand they are seen to operate to the disadvantage of applicants who are said to be "held to ransom", and on the other hand they are seen to operate to the disadvantage of communities who are said to be getting too little public benefit when major development occurs in their areas. These arguments centre on whether some such agreements are unwise, or unfair. If, however, a perception that a developer has improperly used a planning agreement to buy a rezoning or a development consent is a correct perception, the developer and council may have engaged in corrupt conduct.

Planning agreements are legal and clearly provided for in the EPA Act. They may be negotiated either in the context of proposals to rezone land, or in the context of development applications relating to land which is already appropriately zoned. Nonetheless, the Commission considers there is a realistic corruption risk attaching to the process of negotiating or approving such agreements. Applicants who are able to participate in the process may be able to secure improper preferential treatment. There is also the possibility of improper inducements being offered during the negotiation process.

There are a number of protections already in place. For example, section 93F(9)of the Act provides that a planning agreement cannot impose an obligation on a planning authority:

> *(a) to grant development consent, or*
>
> *(b) to exercise any function under this Act in relation to an environmental planning instrument.*

Councils are also already required to:

- report on their use of planning agreements in their annual reports. This is a requirement under the EPA Act;[31] and
- keep a publicly available planning agreement register.[32]

These requirements are supplemented by the *Development Contributions – Practice Note* (the Practice Note) issued by the former Department of Infrastructure, Planning and Natural

31 Section 93G(5) of the EPA Act requires a planning authority that has entered into a planning agreement, while the agreement is in force, to include in its annual report certain particulars relating to the planning agreement during the year to which the report relates.

32 Clauses 25F and 25G of the EPA Regulation 2000 make provision for the keeping and public inspection of planning agreement registers. A council must keep a planning agreement register of any planning agreements that apply to the area of the council. The Director-General of the Department of Planning must keep a planning agreement register of any planning agreements entered into by the Minister. Clause 25H of the EPA Regulation 2000 makes provision for planning authorities other than the Minister for Planning or a council to make planning agreements to which those authorities are a party available for public inspection.

Resources on 19 July 2005. The Practice Note discusses the safeguards that should apply to the use of planning agreements. They include the following principles:

- *planning agreements must be governed by the fundamental principle that planning decisions may not be bought or sold;*
- *planning authorities should never allow planning agreements to improperly fetter the exercise of statutory functions with which they are charged;*
- *planning authorities should not use planning agreements as a means to overcome revenue raising or spending limitations to which they are subject or for other improper purposes;*
- *planning authorities should not be party to planning agreements in order to seek public benefits that are unrelated to particular development;*
- *planning authorities should not, when considering applications to change environmental planning instruments or development applicants, take into consideration planning agreements that are wholly unrelated to the subject-matter of the application, nor should they attribute disproportionate weight to a planning agreement;*
- *planning authorities should not allow the interests of individuals or interest groups to outweigh the public interest when considering planning agreements;*
- *planning authorities should not improperly rely on their peculiar statutory position in order to extract unreasonable public benefits from developers under planning agreements;*
- *planning authorities should ensure that their bargaining power is not compromised or their decision-making freedom is not fettered through a planning agreement;*
- *planning authorities should avoid, wherever possible, being party to planning agreements where they also have a stake in the development the subject of the agreements.*[33]

The Practice Note also advises that benefits provided under planning agreements should never be used to justify a dispensation with applicable development standards under State Environmental Planning Policy No. 1 (SEPP 1).[34] It further recommends that "planning authorities, particularly councils, should publish policies and procedures concerning their use of planning agreements"[35] and that "the value of planning agreements should always be restricted to a reasonable share of development profit".

The Commission believes it is in the public interest that planning authorities adopt an open and transparent approach to planning agreements that allow their use to be subject to discussion by the community. This should include the development and publication of policies and procedures concerning their use. The Commission also believes that consideration should be given to an explicit cap on the benefits able to be required under a planning agreement.

The Commission believes the Practice Note should be given more weight by incorporation of key provisions in the EPA Act itself.

33 *Development Contributions – Practice Note*, Department of Infrastructure, Planning and Natural Resources, 19 July 2005, p. 8.
34 *ibid*, p. 9.
35 *ibid*, p. 8.

The Commission regards the suggestion that planning agreements should be negotiated or agreed independently of the development application assessment process as sound, particularly in situations where the planning agreement concerns a planning authority which has entered into a joint venture with an applicant to develop land.[36]

Where a development application is refused by a council which has refused to enter into a planning agreement, the developer has a right to appeal to the Land and Environment Court, thus reducing the risk of corruption at least where the cost of appeal is less than the cost to the owner of entering into a planning agreement. Where an agreement is entered into and a development (which is not designated development) is approved, the risk of a developer "buying" a consent would be resolved by allowing third-party appeals to the Land and Environment Court. This was considered and recommended in Chapter 4 (Recommendation 10).

RECOMMENDATION 17

That individual local councils consider preparing and publicly exhibiting a policy to clarify the processes they will follow in relation to planning agreements; and that in doing so, they adopt the best practice guidelines outlined in the *Development Contributions – Practice Note* issued by the former Department of Infrastructure, Planning and Natural Resources on 19 July 2005.

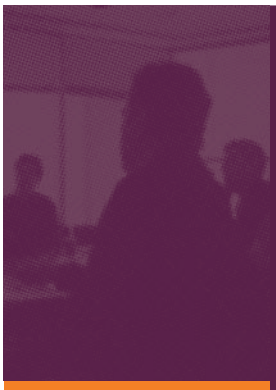
RECOMMENDATION 18

That individual local councils ensure that negotiations over a planning agreement are not undertaken by the assessing officers responsible for the development to which it relates.

RECOMMENDATION 19

That the Minister for Planning strengthen the guidelines outlined in the *Development Contributions – Practice Note* of 19 July 2005 by incorporating key provisions in the EPA Act itself.

36 The *Development Contributions – Practice Note*, Department of Infrastructure, Planning and Natural Resources, 19 July 2005, specifically advises planning authorities to "avoid, wherever possible, being party to planning agreements where they also have a stake in the development the subject of the agreements".



Chapter 11: Political donations

11.1 Councillors and political donations

SUMMARY OF DISCUSSION PAPER

The discussion paper observed that political donations can be a particular category of non-pecuniary conflict of interest. It noted that political donations have come to the Commission's attention in some of its investigations.

The corruption issue identified in the discussion paper is that political donations can be used to attempt to influence public officials in their decision-making. They can also create or reinforce perceptions that influence can be bought.

The discussion paper noted that the Model Code suggests that councillors may be required to declare political donations as a non-pecuniary conflict of interest; however, more precise guidance is left to the optional guidelines.

The discussion paper also referred to the political donation disclosure requirements for local government candidates in Western Australia. These include a requirement that donations made during election campaigns be disclosed by a candidate within three days of being received. The recommendations made in the Daly Inquiry into Tweed Shire,[37] that donations be disclosed prior to elections, were also noted.

It was noted that overseas jurisdictions have attempted to regulate political donations through other means including contribution limits, bans on certain types and sources of donations, and campaign spending limits.

The discussion paper asked:

- *Should the Model Code specify clearer guidance for the management of political donations as a category of non-pecuniary conflicts of interest? If so, should the Model Code specify a monetary limit for political donations at which councillors are required to abstain from voting on a matter? If so, what should the limit be?*
- *What options exist for reducing the dependence on private sector donations as the primary source of funding for local government campaigns? Is public funding of local council campaigns a viable option?*

37 Tweed Shire Council Public Inquiry (Commissioner: Professor M. Daly), *First Report*, May 2005. Accessed at www.dlg.nsw.gov.au/Tweed/.

- *What options exist for improving the political donation disclosure requirements of local government candidates?*

SUMMARY OF THE SUBMISSIONS RECEIVED

Respondents generally supported improving the clarity of the Model Code provisions relating to political donations. Many submissions, including a number from local councils, put forward the view that councillors should be obliged to declare an interest and refrain from voting on applications made by their political donors. Some suggested a dollar limit above which this requirement should apply. The Department of Local Government felt, however, that the amount donated is not a definitive test of whether a conflict of interest exists. Several submissions noted the disparity between the reporting requirements of the Model Code and those applying to members of the NSW Parliament, and there was general support for the same standards to be applied at all levels of government.

There were a number of calls to ban developer funding. Respondents were generally unsupportive of the public funding of local government campaigns, although there were a few exceptions to this.

There was considerable interest in the introduction of reforms requiring local government candidates to disclose political donations prior to election day, along the lines of the Western Australian requirements.

ASSESSMENT OF CORRUPTION RISKS

It was noted in the discussion paper and in Chapter 3 that political donations are a potential source of conflict of interest. Donations increase the likelihood that some inappropriate rezonings or development consents will be obtained.

In the Model Code (p. 25) the Department of Local Government treats donations as normally creating a non-pecuniary interest, but the associated guidelines warn that they can give rise to a pecuniary interest and potentially to a crime, if there is some agreed action in exchange for the donation.

The issue has arisen in a number of recent inquiries into local councils including Tweed Shire Council[38] and Gold Coast City Council.[39]

The public inquiry into Tweed Shire Council dealt with concerns over the relationship between certain councillors and developers, which were evidenced by substantial donations provided by certain developers to assist the election campaigns of councillors who favoured those developers. The inquiry found that, by accepting substantial electoral funds obtained by developers, certain councillors placed themselves in a position of repeatedly having to face conflicts of interest when making decisions on developments. The inquiry also found that since the developments which might cause a conflict of interest for certain councillors were likely to be large and contentious, this was a recipe for a dysfunctional council.[40] On 25 May 2005, the then NSW Minister for Local Government, the Honourable Tony Kelly MP, dismissed the Tweed Shire Council.

38 *ibid*.
39 *Independence, influence and integrity in local government – a CMC inquiry into the 2004 Gold Coast City Council election*, Queensland. Crime and Misconduct Commission, Brisbane, 2006. Accessed at www.cmc.qld.gov.au.
40 Tweed Shire Council Public Inquiry (Commissioner: Professor M. Daly), *First Report*, May 2005, p. 270.

The Commission believes that councillors should be provided with clear instructions on how to manage the conflicts of interest created by political donations. The lack of clarity in the Model Code was the subject of many submissions and the current situation is unacceptable given the corruption risk involved.

On 27 June 2007 the NSW Legislative Council established a Select Committee to enquire into and report on the funding of, and disclosure of donations to, political parties, and candidates in state and local government elections. Its terms of reference are as follows:

1. *That a select committee be appointed to inquire into and report on the funding of, and disclosure of donations to, political parties, and candidates in state and local government elections, and in particular:*
    a) *all matters associated with electoral funding and disclosure*
    b) *the advantages and disadvantages of banning all donations from corporations, unions and organisations to parties and candidates*
    c) *the advantages and disadvantages of introducing limits on expenditure in election campaigns*
    d) *the impact of political donations on the democratic process, and*
    e) *any related matters.*
2. *That notwithstanding anything contained in the standing orders, the committee consist of six members of the Legislative Council of whom:*
    a) *two must be government members*
    b) *two must be opposition members, and*
    c) *two must be cross bench members*
3. *That, notwithstanding anything contained in the standing orders, at any meeting of the committee, any four members of the committee will constitute a quorum.*
4. *That the committee report by the first sitting day in March 2008.*

The proposal made in some submissions in response to the Commission's discussion paper and by other commentators that donations from developers (or more generally from corporations and foundations) be banned, falls within the terms of reference of the Select Committee, and it is appropriate that it be dealt with by the Select Committee. There are some problems in defining "developers" which would need to be resolved if banning of donations from that source is to be explored. One possibility would be to ban donations from entities whose regular course of business involves submitting rezoning proposals or development applications, whether directly or through agents (such as builders and architects).

Whether or not there is any change relating to permitted sources of donations, the Commission believes that clarification of the Model Code coupled with action to improve disclosure requirements at the local level would be of real benefit in corruption prevention terms.

There is a strong argument for informing electors in advance of local government elections about the source of financial support to particular candidates. The current system makes it compulsory to report long after the election, so the public cannot know in advance who gave donations. If a successful candidate makes a decision after the election but before returns are in and published, there is no scope for scrutiny of the councillor's obligation (if any) to declare a conflict of interest and to take the appropriate action. Earlier disclosure would be in candidates' interests as well.

If it subsequently is reported that a donation was made and a councillor pleads ignorance until then, he or she may be disbelieved.

The Commission supports procedures that would require candidates to disclose donations prior to election day, along the lines already in place in Western Australia. The Local Government (Elections) Regulation 1997 (WA) requires candidates to disclose to the CEO of the relevant council area all gifts received within the period starting six months before the election and ending three days afterwards in the case of unsuccessful candidates, and on the start day for financial interest returns for successful candidates.[41] The CEO in turn is required to establish and maintain an electoral gifts register, which is to be available to the public at the appropriate local government offices.[42]

There is also a strong argument for requiring councillors to abstain from discussion and voting on matters affecting campaign donors. Small donors (identified by a monetary threshold aligned with that applicable under current disclosure laws) could be exempted. At present councillors in the same group who have received the benefit of a particular donation may choose variously not to declare donations at all, to declare but still participate in discussions and vote, to participate in discussion but not to vote, or to absent themselves from both discussion and voting.

It is anomalous that under the pecuniary interest provisions of the Local Government Act a councillor must absent himself from a decision affecting a golf club of which he is the unpaid secretary, but can stay and vote on an application submitted by a major donor. It seems reasonable that councillors refrain from participation in matters affecting major donors.

There is a prospect, however, that sufficient councillors will be affected as to deprive the meeting of a quorum. In that case, it may be necessary for councillors to declare the interest but not refrain from participation and voting. In such a case, however, it would then be appropriate to consider granting third-party appeal rights to ensure there is some possibility of review of the decision.

The appropriate body to deal with alleged failures to disclose a non-pecuniary interest involving a political donation would be the Pecuniary Interest and Disciplinary Tribunal.

There may also be a need to enable councillors to return donations given maliciously by donors seeking to remove the voting rights of political opponents, and to thereby reinstate their voting rights.

RECOMMENDATION 20

That the Department of Local Government amend the Model Code to:

- **include clear instructions to councillors on the circumstances in which political donations will give rise to non-pecuniary conflicts of interest and how to manage such conflicts**
- **instruct councillors to refrain from discussion and voting on matters affecting campaign donors (in the case of donations above a prescribed limit). If to do so would deprive the meeting of a quorum, councillors may declare the interest and vote, but consideration should be given to making the resulting decision subject to third-party appeal to the Land and Environment Court if approval depended on the vote of a councillor or councillors who had a conflict of interest.**

41 Local Government (Elections) Regulation 1997, clauses 30B, 30C, inserted November 1998.
42 *ibid*, clauses 30G and 30H.

RECOMMENDATION 21

That the Minister for Local Government introduce amendments to the Local Government Act to provide that a failure to declare a non-pecuniary interest relating to a political donation is a matter falling within the jurisdiction of the Pecuniary Interest and Disciplinary Tribunal.

RECOMMENDATION 22

That the Premier consider applying to NSW local government provisions similar to those applicable under the Local Government (Elections) Regulation 1997 (WA).

11.2 Political donations at a state level

SUMMARY OF DISCUSSION PAPER

The discussion paper noted that political donations at a state level also have the capacity to create perceptions of undue influence in relation to planning decisions. It was noted that the Minister for Planning has considerable power to approve developments, for example, under Part 3A of the EPA Act. There is, however, no obligation equivalent to that placed on councillors to at least consider declaring political donations as non-pecuniary conflicts of interest when dealing with applicants who are donors.

The discussion paper asked:

- *Should the disclosure requirements governing political donations at a state level be reviewed?*
- *If so, what should be the focus of the review?*

SUMMARY OF THE SUBMISSIONS RECEIVED

A number of respondents to the Commission's discussion paper were concerned that donations at state level raise the prospect of conflict of interest for the minister in dealing with development proposals for which he or she is the determining authority. Many of these respondents supported the notion that there should be parity between political donation disclosure requirements at state and local government levels. A typical view was that:

> *Ministers should be required to declare donations to their political party when exercising their ministerial discretion to determine a development matter or take any action, which would confer benefits on any political donor.*

One submission suggested that at state government level, development applications should be decided by an independent development assessment commission, or by the whole Cabinet, rather than by the minister alone.

ASSESSMENT OF CORRUPTION RISKS

The NSW State Government considered the issue of political donations at the local level as worthy of inclusion in the Model Code, where they are treated as potentially giving rise to a conflict of interest.

It may be that the significance of electoral donations at council elections is greater than at state government elections, because the range of policy areas in the domain of councillors is smaller and the capacity of councillors to take actions that can provide immediate and substantial benefits to donors is significant. A donation made at local level may be more readily identifiable with a particular development matter in contemplation when the donation is made, than a donation made at the state government level.

It may also be the case that there are other areas in which donations have the potential to influence the decisions of state government ministers in various portfolios. Like the development industry, the gaming, racing and liquor industries have a high level of reliance on various forms of permits and approvals.

These broader issues relating to the potential for conflicts of interest arising out of political donations are within the terms of reference of the Parliamentary Select Committee which, as noted above, is considering election funding and donations at both the local government and state government levels.

Given the submissions it has received in response to its discussion paper, the Commission nonetheless feels it appropriate to make some observations in relation to the particular corruption risks in the planning area at state government level. The Minister for Planning has considerable discretion to determine development matters under Part 3A of the EPA Act. The Commission does not suggest that ministerial planning power is inherently conducive to corruption, and indeed, as noted in Chapter 3, the ministerial power can in certain circumstances be a safeguard against potential corrupt conduct at local level. The appropriate management of conflicts of interest arising out of donations is, however, relevant at the state government level as well as at the local government level.

The influence of political donations at state government level arose in the Commission's investigation into north coast land development. In its public report on this investigation, published in July 1990,[43] the Commission recommended that consideration be given to the prosecution of several persons for the common law offence of bribery, arising out of the payment and receipt of political donations.

There is scope within Part 3A of the EPA Act for projects that are to be determined by the Minister for Planning to be subject to independent scrutiny either before or after a decision is made. The project may be the subject of a Commission of Inquiry, a report by a panel of experts, or if the development is a designated development which has not been declared to be critical infrastructure, a third-party appeal to the Land and Environment Court. The level of scrutiny applied is largely at the discretion of the minister. The Commission believes that if the minister is dealing with an application made by a political donor, higher levels of transparency and accountability are warranted. At the minimum, there should be disclosure if an application concerns a political donor.

It may be that a register of donors along the lines applicable to local government in Western Australia would be more difficult at state government level due to the larger number of donors,

43 *Investigation into North Coast land development*, Independent Commission Against Corruption, July 1990.

which would make it hard for successful candidates to know who is a donor. An alternative approach would be to require applicants whose application is to be determined at ministerial level to declare whether they or their principal has given a donation to the relevant minister, directly or through the political party to which he or she belongs. This declaration should form part of the material exhibited with the application.

The Minister for Planning, as the sole decision-maker, could not reasonably be expected to stand aside from the decision. The Commission therefore suggests that an appropriate and workable procedure may be to add development lodged by an applicant who is a donor to a minister or to his or her party to the list of designated development. The provisions of section 75L of the EPA Act would then operate to ensure that (except in the case of a critical infrastructure project) some independent assessment of the application is available. Third-party objectors would have a right of appeal, unless the development has been the subject of a commission of inquiry under section 119, or a report of a panel of experts under section 75G of the Act.

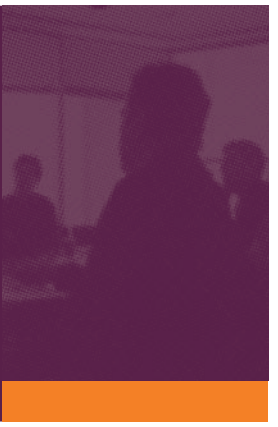
This suggestion still leaves open the prospect that the minister could decide that a critical infrastructure project proposed by a donor will not be subject to outside scrutiny. The Commission sees no obvious way around this without increasing the complexity of the system, but some proposals may emerge from the Select Committee's inquiry. Such projects are, however, likely to be large-scale and technical and the Commission expects that these factors, combined with the fact of disclosure of the donation, will increase the likelihood that the minister will refer the proposal to either a Commission of Inquiry or a panel of experts.

RECOMMENDATION 23

That the Premier consider amending the *Election Funding Act 1981* to require persons submitting development applications or rezoning proposals to the Minister for Planning to declare any political donations they have made to the minister or to his or her political party.

RECOMMENDATION 24

That the Minister for Planning include, in the list of designated development, development in respect of which a declaration as to the making of a donation has been made.



Appendix A: List of respondents

The following people and organisations responded to the discussion paper and did not request the suppression of their details:

Individuals

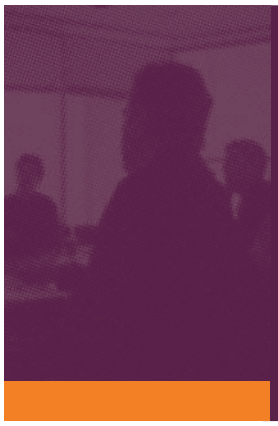
Bev Atkinson
M. Bentley
Stephen Blackadder
T. Brill
John Brunton
John Buchanan
Alex Caras
Ray Carr
Councillor Brian Chetwynd
Bob Cole
Geoff Coleman
Vincent De Luca OAM
Barry Donnelly
Alan Do Rozario
Chris Elliott
Joan and Pat Etheridge
Helen and Les Gapps
Neil Garbutt
Ian Garrard
Michael Gillian
Wladimir Golowenko
Illana Halliday
Graeme Heine
Councillor Nan Horne
Alan Hyam
Saul Isbister
Councillor David James
Lyn Jones
Councillor Rae Jones
Elaine Kaldy
Helen Kaminski
Councillor Rod Kendall
Ronald Knowles
Barry & Joy Laing
Councillor Ian Latham
Margaret Lund
Councillor Steve McMahon
Stuart McPherson
Patricia Mann
John Mant
Anthony Meaney
David Moncur
Stephen Moore
R. Moore
Joe Nagy

The Hon Sandra Nori MP
Brian O'Dowd
The Hon Barry O'Farrell MP
Alana Parkins
Ron Patton
The Hon Paul Pearce MP
Dalba Primmer
A.T. and C.M. Purcell
Chris Ramos
J Rayner
Julie Rea
Councillor Alan Rich
Olive Rodwell
Romaine Rutnam
Councillor James Ryan
R.D. Ryan
Graham Sansom
John Searl
Ann Sharp
Angela Smith
Bea Sochan
Robin Strachan
Graham Taylor
William Taylor
Genelle Thomson
Peter Thyer
Ronald Tindall
Irene Tognetti
Phil Tolhurst
Chris Tuckfield
John Turner MP
Steven and Pranee Villiers
Anne Wagstaff
Peter Waite
Jill Walker
R. Walker
Nigel Waters
Peter Wells
Penelope and Charles Wynne

Organisations

Armidale Dumaresq Council
Association of Concerned Mid-Mountains Residents
Bankstown City Council
Bathurst Regional Council
Baulkham Hills Shire Council
Cabonne Council
Campbelltown City Council
Carrathool Shire Council
Central Coast Community Environment Network Inc.
Centroc (Central NSW Councils)
Cessnock City Council (staff)
City of Canada Bay Council
Coastal & Wetlands Society Incorporated
Coastwatchers Association Inc.
Cobar Shire Council
Community Expressions
Council of Camden
Cranky Rock Road Action Group
Deniliquin Council
Development and Environmental Professionals' Association
Fairfield City Council
Gilgandra Shire Council
Gloucester Shire Council
Gosford City Council
Goulburn Mulwaree Council

Greater Taree City Council
The Greens NSW
Griffith City Council
Guyra Shire Council
Hay Shire Council
Hornsby Shire Council
Housing Industry Association
Hunters Hill Council
Hurstville City Council (staff)
Illawarra Escarpment Coalition
Jerilderie Shire Council
Kempsey Shire Council (staff)
Kiama ALP Local Government Committee
Kogarah Council
Ku-ring-gai Council
Land and Environment Court
Leichhardt Council
Lismore City Council
Local Government and Shires Association of NSW
Local Government Pecuniary Interest and Disciplinary Tribunal
Manly Precinct Community Forums
Marrickville Council (staff)
Murray Shire Council
Nambucca Shire Council
North Sydney Council
NSW Department of Local Government
NSW Department of Planning
Orange City Council
Pacific Palms Community Association
Palerang Council
Peninsula Residents Association
Penrith City Council
Pittwater Council
Planning Institute Australia (NSW)
Property Council of Australia
Randwick City Council
Rose Bay Gardens Estate
Royal Australian Institute of Architects
Shire Watch Independents
Shoalhaven City Council
Singleton Council
Stanwell Tops Residents Awareness Association
Strathfield Council
Sutherland Shire Council (staff)
Sutherland Shire Council (Office of the Internal Ombudsman)
Telstra
Total Environment Centre
Upper Lachlan Shire Council
Uralla Shire Council
Urban Development Institute of Australia
Vaucluse Progress Association
Village Building Co.
Wagga Wagga City Council (staff)
Walcha Council
Warringah Council
Wentworth Shire Council (staff)
Wollongong City Council
Woollahra Municipal Council
Wyong Shire Council



Appendix B: Samples of submissions made in respect of each chapter

CHAPTER 2: THE DIFFERENT ROLES OF COUNCILLORS

2.1 Councillor involvement in preparing Local Environmental Plans and determining development applications

What this forgets is that the making of LEPs is subject to strict statutory guidelines and must also conform to State Government guidance and direction. The process is reviewed by Parliamentary Counsel and requires Ministerial approval. It is considered that the LEP-making process is very accountable, along with the process of applying LEPs.

A Sydney metropolitan council

It is Council's contention that, although an imperfect solution in terms of separation of powers, the fact that elected councillors are responsible for both "making" and applying local planning law does not in itself unreasonably impact the validity of local planning decisions.

The involvement of Councillors in some development assessment (bearing in mind the discussion paper's own assertion that only 4% of DAs in NSW are in fact determined by the elected Council) can in fact act as an ongoing check and balance that development assessment is being undertaken appropriately and in keeping with (at times changing) community interests. Given also that at any time elected Councillors may be asked to apply environmental planning instruments approved by previous Councils, continued involvement in the assessment process enables Councillors to keep abreast of local planning law and any amendments that changing circumstances might reasonably dictate.

A Sydney metropolitan council

… if the views of the community have changed and are no longer reflected in the LEP, changing the LEP is a lengthy, cumbersome process with, given the interference by the State Government, no guarantee of success, as the State Government wishes to ensure state-wide planning policies are reflected in the LEP regardless of the local level of support these policies may or may not have.

Staff from a Sydney metropolitan council

Councillors are subject to a variety of pressures and considerations when preparing and applying LEPs. Alternatives may also be subject to pressures from larger, more powerful stakeholders. Rigid application of the doctrine of "separation of powers" could become unwieldy, and may not necessarily solve the problem.

A mayor from a Sydney metropolitan council

2.2 Councillors and merit-based development assessment

Councillors are elected as individuals to Council, and must vote independently on matters before Council. The strength of the democratic process lies in Councillors exercising their independence in decision-making. Political decision-making on developments can be detected if Councillors obviously vote in a block, and there is no particular link to the merits of the matter before Council. To mitigate the risk of inappropriate decision-making, how Councillors vote must be recorded and made public. In addition, the reasons for voting against an officer's recommendations must also be given and made public.

A Sydney metropolitan council

What could be provided is a sample of irrelevant considerations, drawn from experience and supported with specific examples from Councils.

This advice could be very simply provided as a guideline either by Councils, or the Department of Planning.

A Sydney metropolitan council

Whilst it is agreed that the community play an important role in planning decisions there is potential for councillors to be unduly influenced by emotional factors as opposed to the strict planning considerations. If the weight of the pressure on individual councillors from the community is strong enough it can produce a result that was not the most suitable in a planning sense.

Staff from a regional council

The Associations believe that the Act clearly indicates which matters are of relevance in determining whether an application is of merit. Consideration might be given to promoting further transparency and accountability by:

- *requiring councillors to provide reasons for their approval or refusal of development applications against the recommendations of their staff; and*
- *providing further guidance and/or training on what constitutes the "public interest" and what matters are irrelevant.*

Local Government and Shires Associations of NSW

Any guidelines that could be made available to assist councillors to deal in an appropriate manner with merit-based assessments would be beneficial.

A rural council

Assuming that the "public interest" is a merit issue, then nothing can be considered an irrelevant factor.

A Sydney metropolitan council

2.3 Councillors as constituent representatives and advocates in the development assessment process

The Act clearly compels Councillors to avoid being placed in a position where a private conflict of interest can arise. Any narrowing of s. 232 would have the effect of reducing the community advocacy role that Councillors currently undertake. Before conflict of interest can exist there has to be conflict between a decision and the duty of the official.

A rural council

An important role of a Councillor is to advocate on behalf of residents, however, this needs to be undertaken in an appropriate manner in assessing development applications and be in accordance with the requirements of the EPA Act, i.e. a matter for consideration under section 79C of that Act along with all other matters in that section.

Senior staff from a Sydney metropolitan council

There is a collision of roles – between the governing body role requiring merit assessment and the advocacy role in representing constituents. Councillors cannot perform the governing role effectively, and objectively assess the merit of a DA under s. 79C when their advocacy role means that issues extraneous to s. 79C come into play.

… A Councillor may still use the statutory power under s. 232 to assess the DA on an advocacy basis. Section 232 could be amended by the addition of a new subsection (3).

Section 232(3) – it is not the role of a Councillor as an elected person or as a member of the governing body of the Council to advocate on behalf of any person or entity while carrying out any functions under the Environmental Planning and Assessment Act 1979.

A general manager from a Sydney metropolitan council

The Associations are strongly of the view that there should not be any regulation of the advocacy role of elected representatives as this would clearly lessen the voice of the community through their elected representatives.

Local Government and Shires Associations of NSW

It is inappropriate for Councillors to be advocates for individuals or groups during the assessment process. This is not an easy issue, however, there is a fine line between ensuring an individual's concerns are heard, but at the same time, not becoming an advocate for that person's point of view.

The Local Government Act should clearly address the role of a Councillor in relation to advocating on behalf of individual residents/ratepayers. The legislation should take a more restrictive position that Councillors are not permitted to advocate on behalf of specific individuals groups in planning matters, but must take all planning decisions having regard to the interests of the residents/ratepayers within the entire local government area to which they are elected.

The alternative approach of permitting advocacy in planning matters should require the Councillor to withdraw from the decision-making role as it is likely they would have formed a partial view on the proposal as a result of their advocacy. The more desirable alternative of prohibiting advocacy in planning matters altogether, would enable the Councillor to properly separate their decision-making role and remove their potential conflict – similar to how the judicial process operates in a court of law.

Staff from a Sydney metropolitan council

Distinguishing between advocacy and representative roles can be difficult. Any changes to the Local Government Act that clarified this situation would be supported.

It would also assist if the Department of Local Government and/or ICAC could issue practice notes to assist councillors in understanding the need to consider the interests of all stakeholders, and to be seen to be so-doing, rather than act as an advocate for a particular individual or group.

A rural council

Section 232 of the LG Act should be clarified to specify that Councillors represent the community on broad policy issues only and not as representatives of particular lobby groups in relation to individual DAs. It is not necessary for Councillors to act as conduits for the views of certain sections of the community, or individuals, in relation to DA determination as there are already adequate avenues for such views to be included in the assessment due to the requirements for notification, advertising and public exhibition of DAs.

A regional council

It is considered that there is little if no distinction between a Councillor advocating on behalf of residents and ratepayers or representing their interests. In practical terms the two are considered to be identical. Further it is considered that this role is consistent with the role of a Councillor as set out in section 232 of the Local Government Act.

A Sydney metropolitan council

The word "represent" can imply a blind advocacy role.

Staff from a Sydney metropolitan council

There may be an inherent conflict between the notion of councillors as impartial decision-makers and advocates for particular groups, but the electorate expects councillors to be no more impartial decision-makers than MPs. Obviously there would be a problem if a councillor was an advocate for a particular company or individual and this was not disclosed. However, should there be a concern if a councillor has disclosed their position in their election platform?

A conservation group

2.4 Councillors dealing with residents' issues

I agree that Councillors should not be able to interfere in the day-to- [sic] *handling of DAs, but a system must be put in place that enables Councillors to get quick reliable answers to the legitimate concerns and questions of both objectors and applicants.*

A councillor from a Sydney metropolitan council

Councillors do not need to be involved in day to day administrative council matters, unless it involves procedural issues, or is an urgent matter. It is not the best use of councillors' time to be involved in the nitty gritty detail – however, in some instances, these minor matters affect the lives of individuals, who appeal to councillors for help. A section of council assigned to follow up minor matters and complaints could be helpful.

A member of the public

A successful system adopted by at least one major council was to issue councillors with "request" books, which contained duplicated pages on which councillors could specify their complaints or requests and direct them to the appropriate or specified staff member for action or advice as may be necessary.

A system similar to that applied in relation to representations or requests made by members of parliament to ministers of the Crown could be implemented.

A former Sydney metropolitan councillor

The Model Code of Conduct already addresses the issue of councillor interaction with staff. Many councils have supplemented their Codes of Conduct with detailed protocols for dealing with councillor requests for action or information. The department monitors these processes as part of its Promoting Better Practice review program.

The department encourages councils to develop comprehensive complaints handling systems, and is presently reviewing Practice Note No. 9 – Complaints Management in Councils. *As part of this review, the department will consider whether specific guidance should be given on resident complaints regarding development matters directed to or received by councillors.*

Again, the department notes the provisions of clauses 5.7 and 5.8 of the Model Code in relation to this issue. The department also supports moves to provide more information to the public through systems such as online DA tracking.

NSW Department of Local Government

It would be a prudent policy for councillors to direct enquiries and complaints about planning matters to the General Manager or senior council staff and to have publicly available complaint recording and response mechanisms.

NSW Department of Planning

2.5 Council meetings as a forum for consideration of development applications

Council meetings do provide an open and transparent forum for decision-making on complex and contentious development applications. The practice at … Council of allowing applicants and objectors to address the Council means that the issues of concern can be brought out into the open and all Councillors have an equal opportunity to hear the arguments for and against. This is far preferable to the situation where individual Councillors may be lobbied and not all Councillors have the same information.

Where applicants or objectors make inaccurate statements, staff should have and do have the chance of providing correct information to Councillors.

A Sydney metropolitan council

Council meetings are probably not the appropriate forum for consideration of objections to a development application as there is no opportunity to refute allegations made or assumptions that have been made as staff are not entitled to address Council without the approval of the Mayor or Chairman at the time.

This becomes a major issue where you have inaccurate statements made either by the developer or by the objectors.

A rural council

Both proponents and objectors are given the opportunity to address the Council on planning matters. It is observed in the discussion paper that "the practice of receiving submissions in this form also allows proponents to make inaccurate statements that are not subject to challenge by council staff". It would be fairer if (a) the report writers were always in attendance at meetings, and (b) once both the proponent and the objector have had the opportunity to address the council, the report writer be permitted to provide the assessor's perspective and the reasons for the recommendation.

A regional council

Issues of concern relate to potential inaccurate statements being made by objectors/applicants that are not subject to challenge or response by council staff. The current system of objector/applicant address to Council does not provide for a set procedure for the recording of issues raised, and appropriate response by staff or councillors.

Staff from a regional council

Meetings can be hijacked by one side leading to unequal debate.
A member of the public

The time limit (3 minutes + 3 minutes extension if so voted by Council), may not be fully conducive to drawing out all the issues under discussion in complex cases. As well, successful argument of the issues depends heavily on one's oratorical ability (or lack of it).
A councillor from a Sydney metropolitan council

While it would add to the processing time, perhaps issues on which constituents make verbal representations ought to be deferred to a future meeting for discussion to enable council staff time to review the submission and include relevant comments in their report to Council.

… further to the last point another issue is the oft-times adversarial and even confrontational attitude at the meetings. Community members should be encouraged to make submissions on matters of concern without fear of denigration or abuse from Councillors.
A regional conservation association

CHAPTER 3: COUNCILLORS AND NON-PECUNIARY CONFLICTS OF INTEREST

With regard to non-pecuniary conflicts of interest, it is recommended that clear guidelines be issued, supported by examples of non-pecuniary interests/conflicts and the recommended action that councillors should take. Councillors must not be the arbiter of whether they believe a conflict is important enough to warrant exclusion from discussion and voting on a particular development application.
A local residents' association

Clearer guidelines would assist greatly in defining the conflicts that councillors may face.
A rural council

Chapter 3 asks the question as to whether councillors are sufficiently aware of their obligations in relation to non-pecuniary conflicts. The answer in my view is no. This is not only because of a lack of training of councillors; it is also because many of the issues are not easy to resolve.
A councillor from a Sydney metropolitan council

Understanding the range of options that they (councillors) have available following the declaration of the non-pecuniary interest seems to still be a cause of confusion here.

The Conduct Committee formed under the Code of Conduct will be called upon to adjudicate on these matters of non-pecuniary interest. It seems to me that, despite the apparent role of the Conduct Committee under the Code, the findings of the Committee on a matter where the non-declaration of a non-pecuniary interest (pecuniary interest matters must all be referred to the Department of Local Government) is alleged are quite limited. Because it clearly remains the province of the individual with the non-pecuniary interest, to determine what action needs to be taken as a consequence of declaring the conflict, all that the Committee can find is that there was a conflict of interests of a non-pecuniary nature that should have been declared and was not. It seems to me to be quite a limited outcome in the context of the potential for the operations of the Conduct Committee to be a politically and administratively destabilising influence on the organisation.
A general manager from a rural council

Councillors must not be the arbiter of whether they believe a conflict is important enough to warrant exclusion from discussion and voting on a particular development application.
A member of the public

While councillors are generally aware of their obligations there are circumstances that arise where councillors require clarification of their obligations. This advice is generally difficult, if not impossible, to obtain. There needs to be a mechanism where a councillor can contact someone, provide details and get a ruling. This could be via a telephone referral service from the Department of Local Government.
Councillors from a regional council

It is considered that there is a high level of awareness among councillors concerning their obligations in relation to non-pecuniary conflicts of interest. Whilst the Model Code specifies a range of options for managing non-pecuniary conflicts of interest this at times results in confusion both to Councillors and particular residents in relation to how non-pecuniary conflicts of interest should be dealt with. This confusion arises due to the fact that a Councillor may disclose a conflict of interest and decide to continue to take part in the decision-making process. One option which may be worthy of consideration is to remove the discretion of the Councillor in determining what action is necessary as a result of the disclosure of a conflict of interest.
A Sydney metropolitan council

CHAPTER 4: OPTIONS FOR REFORM

4.1 Limiting or removing councillor involvement in development approval

It is agreed that Council should really only be responsible for dealing with 'big ticket' items at a Council meeting. If "smaller", more day-to-day items are managed with a good community consultation policy, Council do not need to fear that they are excluded from community input or any expressions of concern.
Staff from a Sydney metropolitan council

Standardisation of councillor involvement across the state would not work. Metropolitan and coastal councils are greatly different to small inland rural councils.
A rural council

If delegations were standardised to ensure only "large and/or controversial developments" are dealt with by council, then the latter must be clearly defined to be workable. Nevertheless it is probably necessary to broaden this criteria to include those developments where say three or more councillors request that certain DAs be dealt with in a full meeting of Council.
A planner from a regional council

Council does not believe that it is desirable to standardise the involvement of Councillors in the development approval process. Each Council is very different.
A rural council

Councillors in calling a development application to Council should provide reasons as to why they are calling the application …
Staff from a Sydney metropolitan council

The department supports councillors having a continuing role in determining certain development applications. As indicated above, it is generally a matter for individual councils to determine their own delegations having regard to local conditions and the expectations of their communities. These will vary from council to council and as such, it would be inappropriate to be too prescriptive or to seek to impose a uniform standard that applies to all councils regardless of their individual circumstances.

Nevertheless, the department considers there is merit in developing a model policy for calling up development applications and, should one be in place, for determining what matters will be referred to an Independent Hearing and Assessment Panel. This is in order to encourage some degree of consistency in approach, and to help prevent call-up practices that are overly intrusive and inefficient.

NSW Department of Local Government

4.2 Reforms to enhance councillors' accountability to the community

Councils should record and make public how councillors vote. Minutes should be available on council websites. Mayors should be elected by popular election, not by councillors.

A local residents' association

For smaller rural Councils with minimal resources the best options would be for Council to record how Councillors vote and to give reasons for their decisions if overturning a staff recommendation.

A rural council

To record how each Councillor votes on each particular item in the development approval process would be costly and cumbersome to administer. At the end of the day it is the Council as a whole which is held accountable for its decisions. Very few members of the public would be interested in how each individual Councillor votes on general matters. In respect of a controversial development those involved would know how each Councillor voted. However, the end result is that the decision of a council is a decision of the Council as a whole and how an individual Councillor voted is irrelevant.

A regional council

Mayoral election by the councillors will I believe lead to a more coherent council and allow for non-performers to be removed. A mayor should reflect the mood of the council. Election by councillors will tend to achieve this more often. Consideration should be given to two-year terms.

A councillor from a regional council

While the notion of a popularly elected mayor sounds democratic, problems lie in the ability for heavy financial support and backing by development interests (including often the local media) being able to promote one person over many others and that person then having an extra vote where needed.

An environmental group

The Mayor should be elected by popular vote. The … practice of yearly mayoral elections within the Councillors is completely disruptive to important Council business and adds to vicious lobbying and the confrontational style of Council meetings.

A member of the public

4.3 Structural reform to reduce the emphasis on councillors' individual advocacy role

[In relation to full-time, paid councillors] *The roles of councillors could become more blurred as they may try to become more and more involved in the day-to-day operations of the councils.*

A rural council

Although it is accepted that a larger Council may have more resources available for sophisticated audit systems, it might also be the case that inconsistent or inappropriate decisions are far more evident at a smaller Council. Ultimately, it is not considered that size plays a significant role in a Council's vulnerability to corruption.

A Sydney metropolitan council

Larger Councils would, in my view, remove many of the opportunities for councillor and staff conflicts of interest and corruption of the system. Larger councils would give a broader perspective to regional issues. The economic feasibility of larger councils both suburban and rural should produce a more efficient system of governance and decision-making in the DA process.

A private sector town planner and urban designer

… since council meetings are held at night, as they have to be, given that the councillors are all part-time, it is not infrequent to have major decisions being made at 11 pm at night or later. The decision-makers are likely to have been working since 9 am that day, rushed from work to the chamber, may or may not have had time to eat, and five hours later they are still involved in decisions that will affect people's lives and the future of cities and towns. This is just bad practice and after many months of this tempers get frayed and mistakes made. Ideally councillors should be full-time – and paid more.

A planner from a Sydney metropolitan council

The ward system has the potential to influence Councillors in regard to decision-making. Particular interest groups may be able to exert greater influence on Councillors under a ward system than otherwise would be the case. The abolition of the ward system would need to be considered in the context of a range of issues not just decision-making with respect to development applications. Issues such as the ability of Councillors not aligned with major political parties to be elected and the equal representation of residents in Councils where there are diverse population centres need to be taken into account.

A Sydney metropolitan council

Throughout the discussions of the ward system over the years, the community recognises the major benefits to the ward-based system of representation including:

- *the closeness of constituents to those whom they elect is an essential part of democratic representation particularly in an environment that operates with a high degree of participation*
- *the essential community of interests within each ward boundary would be eroded under a single ward system*
- *candidates for election to council incur less cost under a ward system thus encouraging people to nominate*
- *equal representation across the municipality*

- *throughout the history of the area the electors have voted for Councillors (aldermen) to represent their suburb – reflecting the obvious communities of interest.*

A Sydney metropolitan council

4.4 Independent Hearing and Assessment Panels

[The Association]… *questions the introduction of IHAPs since it wouldn't guarantee fairness, independence and professionalism. For example professional individuals who are accountable to no-one but their own industries or state members may dominate these committees.*

While the current system is also unsatisfactory at least voters get a say and if other reforms took place things might improve.

A local residents' association

The fact is that while councillors come from a wide range of backgrounds and possess varied skills, few, if any, have formal qualifications in town planning or spheres relevant to the specialist review and consideration of DAs and complex strategic planning studies. For this reason alone, the incorporation of IHAPs (for both DA and strategic studies) into the system should be an imperative to not only prevent corruption, but ensure sound and consistent planning along the NSW coast.

A planner from a regional council

The question of IHAPs is similarly complex. It is based on a model whereby an impartial expert committee determines compliance with planning laws. That model exists only in rare circumstances. Any member of an IHAP has their own prejudices. If they are drawn from the ranks of local experts in law, planning and architecture, it seems difficult to see how they could not reflect their own economic interest in further development. To some extent, IHAPs represent an outsourcing of development control to the development industry.

The further question is the presumption that planning laws can be applied fairly by such a body. Many councils have planning instruments that are inadequate or incomplete. In those circumstances, the requirement to deal with a particular DA that falls within such planning lacunae requires a series of subjective merit-based assessments. At least within a democratic model, those value judgements should be exercised by those who are politically accountable.

A councillor from a Sydney metropolitan council

While IHAPs may provide increased impartiality, having access to skilled participants outside non-metropolitan or large regional areas is likely to be limited and therefore IHAPs should be encouraged but not be mandatory. Due to limited access to people skilled in development assessment systems in rural areas, conflicts of interest are likely to arise for IHAP members in non-metropolitan centres. Otherwise, engaging members of IHAPs from outside a local or regional area may increase costs and time associated with development assessment for rural councils. Adding time to development runs counter to the Minister of Planning's intention (Sydney Morning Herald, *24 February 2006) that councils will be stripped of planning powers for delayed development application determinations.*

A regional council

As Council receives such a small number of development applications an IHAP is unwarranted. The resources to run an IHAP could not be justified in remote rural areas.

A rural council

Might I suggest that the use of IHAPs be made compulsory for all Councils when any development application is at variance with any major element of a DCP (e.g. height, and FSRs

in particular) by say an arbitrary 10%. The determination of the IHAP would still only be by way of recommendation to the Council. The Council in turn would need stated cogent reasons for overriding an IHAP recommendation and thus place Council under greater scrutiny. Hopefully this would lead to planning decisions being made on planning grounds rather than political or more sinister reasons.

A member of the public

An IHAP system provides an opportunity for independent and expert evaluation for greater credibility of decisions and transparent technical evaluation of complex and/or controversial matters. This impartial review process is implemented to prevent any perceived conflict of interest in controversial planning matters, including spot rezonings.

An industry association

4.5 Enhanced appeal rights for third parties

We think the real disparity is between the intent that the (planning) system should be transparent, fair and accessible but relies on an appeals system that fundamentally excludes a range of matters being put before it (because of time, cost and the functions of the court to hear certain matters).

Suggestion

Whilst fairly radical, we believe the Planning List of the Administrative Appeals Tribunal in Victoria offers a more inclusive and accessible approach to planning. Again, this is not to say that the system is faultless. Some argue this system allows too much scope for third-party appeals, leading to a greater workload, and does not prevent legal professionals becoming involved. On the other hand, however, the tribunal is a less formal and less expensive method, of allowing matters to be "tested" by a range of "interested parties".

Depending on the spirit in which this system is "embraced" by Councils, it can be an effective method of keeping all of councillors, staff and the public more "honest" and appropriate in their dealings with planning matters.

A Sydney metropolitan council

Third-party merit appeal rights to the Land and Environment Court should certainly be extended to include major and controversial development as well as designated development. The EPA Act should be changed to do this.

An environmental group

[The Group] *… would support a new mechanism for appealing of development application decisions. This would involve a "desk top" review of the application, which is less financially burdensome and time-consuming for applicants and objectors. The assessment is carried out by a person appointed by the Chief Judge of the Land and Environment Court.*

Any appeal lodged under this process must occur within 28 days of the development application being notified, and the decision must be delivered within 90 days. Appeals may progress to the Land and Environment Court if either party feels there has been an error made in the judgement.

An industry group

On the issue of third-party appeals discussed at 4.5 in the discussion paper, there is merit in extending current provisions for major proposals and developments involving SEPP 1 objections. Consideration could also be given to broadening third-party appeals in the case of Council developments.

A peak professional body

The experiences of this group have led us to believe that third-party merit appeal rights to the Courts would be a worthwhile means of ensuring only the highest quality developments were approved. We also believe that such appeal rights would allow review of decisions that may have been influenced by factors that may not be strictly relevant to the development application processes. The provision of costs against parties bringing frivolous or vexatious appeals would discourage unnecessary appeals to the Courts.

A local residents' association

Third-party appeals already exist for "Designated Development" which are often abused by competitors rather than valid planning grounds.

Third-party appeals on DAs would significantly delay developments and add substantially to community costs, as the delays and costs caused to applicants would be passed onto the purchaser. Refer to the experience in Canada.

There should also be no third-party appeal rights against spot rezonings. It is Council's role to determine the vision for its area whether in City Wide LEPs or spot rezonings not the Courts'.

A Sydney metropolitan council

Alternatives to court should also be considered such as:

- *regionally based Tribunals/Panels*
- *non-legal forums*
- *panel members with broad skills/experiences from outside the Region*
- *Tribunal/Panel recommendations back to Council for consideration.*

A regional council

While it is acknowledged that increased capacity for third-party appeals may improve focus on planning merits and outcomes instead of concentrating on processes under the threat of section 123 appeals, the introduction of such appeals is of concern unless limited and carefully managed.

For example, the potential exists for appeals to be used by commercial competitors and neighbours in dispute for the principal purpose of delay.

In order that third-party appeals retain (or provide) a reasonable balance between property rights of applicants and materially affected neighbours, any consideration of third-party appeals should be only provided where:

- *the development subject to third-party appeal is "advertised development" or otherwise specifically identified as being potentially subject to third-party appeal in environmental planning instruments or regulations*
- *the third-party appeal is available to people who have made a submission in accordance with the advertised development for people who can demonstrate that they are likely to be materially affected by the development*
- *an appeal is time limited to avoid unreasonable delays in proceeding with development*
- *awarding of costs are available to manage vexatious or frivolous appeals for the purpose of delaying development.*

A regional council

4.6 Improved councillor training

Yes, all new councillors should be required to undertake training outlining their different roles and in particular the training should provide an overview of the planning system, i.e. the hierarchy of planning instruments and the different types of applications that can be assessed by Councils.
A rural council

… councillors themselves have recommended specialised training courses be established. Mayors have proposed the establishment of a training institute and planning professionals have repeatedly called for mandatory training of councillors.

As discussed earlier, a mandatory program of regular training programs are recommended for all councillors. This training could be carried out by professional institutions, universities and the Local Government and Shires Associations.
An industry lobby group

While the Associations believe a more systemic approach to training for new councillors needs further consideration, we do not believe training for new councillors should be mandatory.

… the Associations believe that the State Government needs to have a greater involvement in the training of councillors and staff by providing assistance to:

- *remote area councils for travel and expenses when attending training*
- *provide further training incentives to attend training.*

Local Government and Shires Associations of NSW

CHAPTER 5: COUNCIL OFFICERS AND CONFLICTS OF INTEREST

5.1 Council officers and regulatory capture

While we reject the concept and phenomenon "regulatory capture" we agree with the proper allocation of applications from frequent applicants amongst different staff levels and the auditing of frequent applicants by management. These are well-established practices already.
A trade union

Regulatory capture among council staff could be an issue for small councils. It is not possible to provide those options in a small council as detailed in the discussion paper.
A rural council

All regular commercial entities involved in the planning process need to be told the standards of behaviour expected of Council staff and what is allowable in relation to developers. Ideally they should be provided with a statement of business ethics which sets out clearly the standards of behaviour required.
A general manager from a Sydney metropolitan council

Some agree with one officer for the pre-DA and then a separate officer for the DA assessment. Some believe this loses continuity with the overall project.
Staff from a Sydney metropolitan council

All of the paper's suggested options for avoiding regulatory capture have merit, particularly the proposed measures to ensure there are strong peer review mechanisms.
NSW Department of Planning

… there was general support for peer review and a countersigning arrangement for controversial matters.

One Manager stated the strongest belief that "this is essential for every application in the interest of consistency, quality control and preventing corruption. No application should be dealt with exclusively by one person from start to finish – this is fertile ground for corruption".
Staff from a Sydney metropolitan council

5.2 Council planning staff being subject to inappropriate pressure by senior council officers

It is appropriate that senior officers provide advice and directions in relation to assessments, however, this should never include a direction to change the assessment officer's determination. If there is a contrary view, the senior officer should provide written comments on the assessment and the matter determined by a third party at a more senior level.

The Code of Conduct could be more specific in this regard.
Senior staff from a Sydney metropolitan council

Staff should be able to step away from a DA should they be asked to change a report if it does not accord with their professional opinion. Obviously, a manager may have a different professional view to the reporting officer and if this is the case the manager should put their name to the report.
A general manager from a Sydney metropolitan council

Any action required by senior staff must be recorded, with reasons and signatures, and placed on the file and recorded electronically. Further, any follow-up discussion must also be recorded. A standard "proforma" could be used to indicate whether or not councillor involvement has occurred at any stage and if so, who. If Councillor involvement is "driving" decisions at this stage, they should be required to sign the form, stating their reasons for involvement.
Staff from a Sydney metropolitan council

Perhaps there may be merit in including in any planning report details of any councillor or officer who has discussed the subject matter with the report author.
A rural council

CHAPTER 6: CONFLICTING ROLES AT A CONSENT AUTHORITY LEVEL

It is recommended that the Commission consider requiring Councils to seek appropriate outside advice where Council owns, or has recently owned land, and that this be properly resourced. The level of outside advice should be commensurate with the type and size of development, with minor matters being appropriate to be reported to and decided by Council. Major matters should be assessed by and decided by a body outside Council.
A peak professional body

The Associations would agree that there is a need to provide further guidance to councils where council is the consent authority for a development in which it has an interest. Many councils are very conscious of the community's perception of conflict of interest in these situations and have adopted strategies to manage conflicting roles such as those identified in the discussion paper.

In the Associations' view, an overriding consideration for councils where they may be considering strategies to manage conflicting roles will be the resources available to the council.
Local Government and Shires Associations of NSW

A clear distinction should be made in dealing with Council's own development applications between DAs that relate to "operational" matters and "entrepreneurial" matters. Applications for operational forms of development (e.g. seawalls or roundabouts) are different to a development application to develop a restaurant in a park or an entertainment venue. Differentiation should also be made on strict criteria as to what constitutes a minor development and a major development.

The use of external consultants to assist in the assessment and to audit the process is appropriate on some forms of development. The use of "white knights" to overview the assessment is appropriate.
Staff from a Sydney metropolitan council

Agree with the South Australia example, in that any application in which a council has an interest is determined by the Development Assessment Commission, whose members are appointed by the Governor.

Problem is with selecting suitably qualified and independent committee members. This panel can be just as involved with conflicts of interest.
Staff from a Sydney metropolitan council

It is considered that the concept of establishing a statutory body similar to the South Australian Development Assessment Commission has merit. Advantages of such an approach would be more consistent-decision making across councils together with a greater transparency resulting in less likelihood of a community having concerns regarding the actions of councils in such circumstances.
Staff from a Sydney metropolitan council

Referring matters in which the council has a direct interest to an IHAP or another independent forum would be a useful reform.
NSW Department of Planning

CHAPTER 7: COUNCIL LAND DISPOSAL

When councils sell land or a proprietary interest in its land for development, councils must be obliged to ensure that best value for the land is achieved. There should be at least one independent valuation undertaken, and council should certainly understand how a prospective purchaser arrived at a bid. Often the land value is a direct function of the development potential of the land. It is important that the value a council gets for its land is based on its highest and best use development potential. This may not necessarily be the basis of the developer's offer.

For valuable land, councils should sell land through a tender process, having established a reserve price through independent valuation. If it is not possible to sell the land through a tender process, then councils must be obliged to resolve to adopt a process by which it will establish the value of the land. An independent auditor's comment on the sale of the land and valuation process should be included in the statutory reports.
A Sydney metropolitan council

… the mere commissioning of a valuation is not in itself a magic panacea for avoiding corruption for the following reasons.

As consultants to Councils, valuers unfortunately are subject to the same pressures as any other consultant or council officer. Even if the valuer is beyond reproach, considerable danger exists that the valuation has not been made on the correct basis.

…

A prudent valuer would strongly qualify his valuation to the effect that he relied on the DCP and council planning staff's recommendation as a basis for his assessment and that any departure from that Code would require a review.

A member of the public (former registered valuer)

There is no such thing as an independent land valuation. The preferred method is to have the Institute of Valuers appoint a valuer that is acceptable to all parties and accept their valuation.

Staff from a regional council

Sometimes land is sold as part of a comprehensive package to attract development. This especially applies in regional areas and is important to attracting new development.

A regional council

CHAPTER 8: THE ENGAGEMENT OF CONSULTANTS AND CONFLICTS OF INTEREST

… Councils need specific guidelines to adhere to when engaging consultants. These guidelines should include that any consultant engaged by a council should not have had commercial dealings with any of the parties that they are to deal with in their role for council for at least two years.

A councillor from a regional council

It is agreed that the contract inclusions outlined above would be advisable.

A Sydney metropolitan council

Planners in local government are already bound by their Council's Codes of Conduct, and where they are members, the ethical requirements of the Planning Institute of Australia. Not all planners are, however, so bound. The paper raises the issues of consultants, who, unless a Member of the Institute, are not bound in the same way as Council planners or Institute Members.

A peak professional body

The engagement of consultants should be undertaken following a public expression of interest process to establish a panel of consultants who meet certain criteria. A selection of the consultants should be at random through this panel … Clear guidelines need to be met in relation to establishing any conflict or pecuniary interest that the consultant may be perceived to have. Whilst Council's Code of Conduct will be difficult to apply, a separate Code of Ethics that consultants should sign off on would be appropriate.

Staff from a Sydney metropolitan council

A consultant should only have one role at a time within Council.

A member of the public

When appointing consultants to do planning work, consent authorities should require the consultant to warrant that at the date of entering into the agreement to undertake the work, the consultant has no conflict of interest in performing the relevant services. The consultant should also be required to advise the party that appointed them immediately upon becoming aware of the existence or the possibility of a conflict of interest affecting the consultant.

NSW Department of Planning

CHAPTER 9: DEPARTURES FROM DEVELOPMENT STANDARDS

Some oversight mechanism is appropriate along with the adoption of the draft SEPP (Application of Development Standards) 2004.

The oversight mechanism may be a concurrence role by the Director-General of the Department of Planning for a review period (say two years) to ensure appropriate use by Council, particularly in relation to the following requirements of the draft SEPP:

- *That the proposed departure from the development standard will result in a better environmental planning outcome than that which could have been achieved on the site had the standard been complied with*
- *That the proposed development will be in the public interest by being consistent with any aims and objectives expressed in, or implied from:*

  (i) the zone in which the development is proposed to be carried out;

  (ii) the development standard, or

  in any relevant environmental planning instrument.

Senior staff from a Sydney metropolitan council

The Associations recognise that State Environmental Planning Policy No. 1 – Development Standards *(SEPP 1) plays an important role in the planning system as it provides an appropriate level of flexibility necessary in the assessment of development applications. However, like the ICAC, Local Government continues to be concerned about the potential for the Policy to be misused to circumvent established development standards, in particular its application by the Land and Environment Court (LEC).*

The Associations have long held the view that applications which rely on SEPP 1 objections should not be appealable to the LEC. It is our view that if a variation to a development standard has not been supported by the council, then the Court should not have the power to overturn the standard contained in a council's planning instrument, which has been devised by council in consultation with the community.

… The Associations would therefore argue to the ICAC that an oversight mechanism already exists for the approval of developments relying on SEPP 1 objections in the form of the Director-General's delegation of this concurrence function to councils as appropriate. We would generally not be supportive of another layer being introduced into the planning system, with the potential for loss of council planning powers, community participation and significant delays to the development assessment process. Notwithstanding, we consider there may be some merit in requiring councils to keep a register of development approvals that rely upon SEPP 1 objections.

Local Government and Shires Associations of NSW

Councils should be subject to oversight mechanisms for the approval of developments seeking to rely on SEPP 1 objections. A register should be kept and all councils required to include this as a measure in the Annual Report. Further, it should be reported monthly to Council, and councillors who support a SEPP 1 objection should be listed.

Staff from a Sydney metropolitan council

SEPP 1 is widely abused in the planning profession.

If an application requires a departure significantly beyond a statutory control, then the statutory control itself should be changed. Varying the control only undermines the control and provides limited certainty in the development process for the community.

SEPP 1 can be a useful tool if used in moderation however current legislation in relation to SEPP 1 must be tightened. This may be achieved by attaching a maximum variation of 10%. If a further variation is necessary, then the consent authority should change the actual controls …

An anonymous council planner

CHAPTER 10: PLANNING AGREEMENTS

It is considered that guidance on the use of the planning agreements to date has been fairly limited and that there is a need for a more definitive rationale on how and when such agreements should be applied.

A Sydney metropolitan council

Although there may be a perception that an applicant may have "bought" a development consent by entering into a planning agreement, there is equal level of concern – from applicants – that councils may "hold them to ransom" if an agreement isn't signed.

Potential safeguards to prevent the misuse of planning agreements by all parties include:

- *ensure a mechanism is available that permits alternatives to planning agreements e.g. section 94 contributions or the 1% levy*
- *provide clearer guidance as to the types of facilities and infrastructure that may be included in a planning agreement*
- *consider tightening "no nexus" provisions for planning agreements to assist applicants and councils.*

An industry lobby group

The planning agreement should be negotiated or agreed independently of the development application assessment process, by persons other than the assessing officers.

A Sydney metropolitan council

The Department's Practice Note, issued last year is not part of the previously issued section 94 Manual, but a stand-alone document, the status of which remains unclear.

A peak professional body

The key issue with planning agreements is their value. If they are "overvalued" then there could be allegations that the developer has bought the consent, albeit that revenue or public benefit is substantially increased. If they are "undervalued" then there could be allegations of corrupt influence which has saved the developer substantial money and therefore given them a windfall gain on their development.

Where substantial planning agreements are entered into there must be an independent assessment of their value against some objective criteria. This could be done as part of the IHAP process.

A general manager from a Sydney metropolitan council

The Associations consider that the absence of a strict nexus between a development and a contribution provided for in a voluntary planning agreement provides an appropriate level of flexibility necessary for Local Government in administering the development contributions system.
Local Government and Shires Associations of NSW

The provisions for transparency are inadequate.
A member of the public

The major safeguard available to Councils is to implement a policy and practice in relation to s. 93F agreements which is public and transparent and avoids complaints, particularly from developers of unfair or partial treatment.
A Sydney metropolitan council

[The Association] *considers that planning agreements, as currently drafted in the legislation, are not an appropriate mechanism for state and local governments to use to obtain the provision of public goods. The scope of a public purpose must be reduced and there must be a relationship (nexus) between the rezoning or development and the public purpose being served. The lack of clarity and consistency regarding the scope of purpose of planning agreements contributes to the potential for corruption within the development approval process.*
An industry association

In my opinion, planning agreements are a legalised form of graft, and should be stopped.
A member of the public

I have seen applications approved purely on the basis that a contribution was paid to a Council through a planning agreement. The applicants are given approval far in excess of the applicable development standards and walk away with a huge profit …

Section 93F of the EPA Act should be amended to state that a SEPP 1 must not be used with planning agreements. If that was the case, only legitimate planning agreements would be entered into.
An annonymous town planner

CHAPTER 11: POLITICAL DONATIONS

11.1 Councillors and political donations

There should be a clear limit placed on the size of donations, that if exceeded would constitute an automatic conflict of interest preventing that councillor or group of councillors from voting on any development involving that donor coming before council. The limit should be set at $1000.
A member of the public

In the interests of enhanced accountability and transparency, improved reporting of political donations is supported on the basis that equal standards are applied in federal, state and local jurisdictions.
A Sydney metropolitan council

There is no case for considering public funding of local council election campaigns.
A Sydney metropolitan council

In relation to local government and state elections, it (council) suggests that a list of political donations should be publicised a week prior to elections and no donations should be accepted during that last week.

A rural council

If a councillor receives donations from a developer or any other business, that councillor should be required to disclose this when matters pertaining to the donors are brought before Council and he/she should not be allowed to vote on those particular issues.

A member of the public

There exists some confusion, which I am aware of, of the differentiation between financial (cash) donations to political campaigns, and the investment of time and effort to campaigns. I believe there is a view that the investment of time and effort into a campaign is tantamount to a political donation that needs to be declared. The Code should clarify that political donations are restricted to cash support, or alternatively, clarify what is intended.

A general manager from a rural council

The department intends to review the Model Code of Conduct in the second half of 2006. However, the department does not agree with the suggestion that the Model Code prescribe a monetary limit for political donations at which councillors would be required to abstain from voting.

The question of whether a political donation or any other form of campaign support gives rise to a non-pecuniary conflict of interest will depend on a range of considerations. The size of a donation will not necessarily be definitive. A donation under the specified amount may in certain circumstances still give rise to a conflict of interests. The specification of a monetary limit may serve to encourage councillors to believe that they are relieved of their obligation to appropriately manage a conflict of interests arising from a political donation where it falls below that amount. Conversely a donation that exceeds the specified amount may not necessarily give rise to a conflict of interests in certain circumstances.

NSW Department of Local Government

11.2 Political donations at a state level

Council agrees that the disclosure requirements governing political donations at a state level should be reviewed.

A rural council

Consistent with the requirements for disclosure of interests at the local government level, the disclosure requirements governing political donations at a state level should be reviewed. Ministers should be required to declare donations to their political party when exercising their ministerial discretion to determine a development matter or take any action, which would confer benefits on any political donor.

A Sydney metropolitan council

… [Council] *is particularly concerned with the application of Part 3A and the perceptions of conflicts of interest and political donations when most of the review mechanisms that apply to other planning processes have been removed.*

A Sydney metropolitan council