

To whom it may concern
Better Regulation Division
Department of Finance, Services and Innovation

RE: Building Stronger Foundations Discussion Paper June 2019

Dear Sir/Madam,

I wish to make this submission to assist State Govt improve the quality of building control in NSW. By way of background, I am now retired but previously worked in Local Government and Consultancy for 44 years. My technical expertise is as a Planner, however as a Chief Planner/Director at Wollondilly Shire, Hastings Municipal and Canada Bay City Councils, I have had very close contact with the building industry including building compliance. In respect of high density /high rise housing, I was intimately involved with the development at Rhodes during the period 2004 to 2018 and dealt closely with the major developers, Mirvac, Multiplex, Billbergia and Meriton.

Introduction

Many people in local government regret the fact that monopoly control of the approval of buildings and management of their construction was removed from Councils in the late 1990s and the system of private certification introduced. I do understand the reasons for the change as it has created competition and introduced efficiencies however it was never intended that quality should suffer as a result. In my view problems have arisen because the private certification system was not implemented correctly and also, state government never understood the positives that local government actually brought to the process. Where there should have been an ongoing process of active cooperation between councils and certifiers over the last 20 odd years in delivering housing to the community, there has been, in fact, a long simmering “cold war” with the local government “old guard” predicting that “one day, this whole system will come crashing down”. Hopefully that is not the case, however recent major failures in relatively new as well as brand new buildings, while being absolute disasters for the home owners, lends credibility to the argument.

Commentary

I shall attempt to answer some of the questions in the Discussion Paper shortly, however firstly I would like to offer some observations that I believe are relevant to the current issues:

1. Fragmented control over building construction has created a situation of nobody being obviously responsible when failures occur. Councils blame certifiers, developers blame subcontractors, engineers blame builders. When a building fails, it should not require a major government inquiry to resolve from basics what went wrong. Especially in new constructions, there needs to be a single point of responsibility to resolve the problems, and pay fines etc.
2. Individuals who are buying a home or are living next to a new development are not interested in litigation. Local communities expect their local council to take action when and where necessary for illegal works, non-complying developments etc. Where councils formerly had a reasonable knowledge of new developments occurring in their area, they now have only partial knowledge and are continually responding to concerns from

residents about constructions which may/may not comply with their approval. Certifiers are not particularly communicative with neighbours because it is not their job to do so and councils are often flying blind in terms of compliance because they do not have any supervisory overview of the project. Certain councils take the attitude that they will not intervene on a site which is under the control of the certifier.

3. Every construction is a “one-off”. Council building inspectors used to take a close interest in every construction site in their district because of their need to know that the works are progressing correctly. Critical stage inspections included footings, slab, frame, plumbing. The building inspector’s job was a quality control for the fundamental elements of the job. This provided an assurance for the owner and also was a point of contact for the neighbours if they were concerned about activities on the site or elements of the project. Using certifiers and certificates from installers can work as a substitute for the old council based approach, but it has also failed on occasion. A major difference is that when a council inspector was concerned about a project he/she would if necessary stop the work and negotiate a resolution. A certifier who identifies a problem issues a notice to comply and then it is up to the council to become involved to rectify the problem. In my experience, certifiers often do not issue a notice until neighbours have complained to the council compliance officer who contacts the certifier who may/may not issue the notice. Once the notice is issued it become the council’s problem. Neighbours are rightly upset by this convoluted process and often hold the council responsible for causing the problem when the site is actually under the control of the certifier.
4. Councils are still responsible for processing the Development Application on non CDC projects. Once approved by the Local Panel, the project is in the control of the PCA. The Discussion Paper discusses the scope for changes under the CC however these should be very limited given the overarching development consent which applies. The Ralan v Burwood case upheld the validity of a CC once approved even where there is considerable change from the Consent, however the principle should be reinforced that the Consent is the principle document which should not be changed to any substantial degree by modifications to the CC. This is fundamental to the notification of Development Applications to the wider community. The Local Panel and council staff are held accountable by the local community for what is approved via DA and when changes occur without re-notification, it is the staff as well as elected councillors who bear the brunt of local outrage.
5. Building projects need a project manager representing the developer, and a project supervisor representing the client. No government or council building project proceeds without a site supervisor/clerk of works whose job is contract management to ensure that what has been contracted is delivered. This can lead to conflicts and disputes but it ensures that the developer delivers what has been paid for. Council building surveyors performed this role to a degree on domestic building projects but it is always better to employ an architect or clerk of works to ensure quality control. The PCA was intended to substitute the role of council, but this has proven to be a failure, with PCAs tending to become certificate curators. From the developer’s perspective, a single competent project manager will be aware of all the complexities of major projects including compliance with conditions of consent which can be extremely complex if they involve site remediation, Voluntary Planning Agreements, relocation of services, negotiations with statutory authorities. Many of these requirements are not building focused and there is no specific certificate as there is with construction activities. I am pleased to be able to compliment the Rhodes developers who are all competent professionals and understand the full suite of

responsibilities associated with major projects. It appears from recent newspaper reports that certain developers do not understand their responsibilities or do not care. In those cases, it is very difficult after the event to rectify problems, and it becomes really difficult when the solution is to serve a rectification notice on an Owners Corporation for matters which were the responsibility of the developer who no longer exists.

Specific Questions;

1. What kinds of plans should be signed off and declared by a statutory declaration?
 - a. None. This system will be abused like most others. Plans need to be prepared by competent professionals eg architects and engineers, and checked and signed off by competent industry professionals.
2. Could plans be statutorily declared at the CC/CDC stages? If not, why not?
 - a. A stat dec means very little. Proper professional/industry qualifications and a proper quality checking process are essential.
3. To what extent should changes to plans be submitted to the regulator?
 - a. Major changes should go to the regulator for eg a modification to the DA whereas minor changes can be managed at the CC/CDC stage. This system works competently now and only fails where there is an intentional breach.
4. Should a stat dec accompany all variations to plans or only major variations?
 - a. See answer 2 above.
5. Are there any obstacles that would prevent a person from submitting a stat dec for variations? If so, what are those obstacles?
 - a. See my previous comments. State Govt is looking for short cuts and assuming the best. In the real world, developers, certifiers are also looking for short cuts and will not as a whole, use a system of stat dec certification with honesty and integrity.
6. What other options could be workable if there are variations to plans?
 - a. The govt needs to appreciate that variations to plans causes delays. Largely this is not due to the technical validity of the changes, but due to the fact that mandatory notifications of DAs creates an expectation that variations will also be notified. Many years ago, a council building surveyor could approve amendments to plans by a notation on the plan in red and signing the plan. This occurred when BAs were issued under the Local Government Act. Those days are gone and the days of full transparency dictate that amendments where significant (usually visible externally) are notified for objection.
7. How could the modifications process be made simpler and more robust?
 - a. For major external variations, this is problematic given the publicity given to DAs and the process of negotiation involved in obtaining an approval.
8. How should plans be provided to, or accessed by the Building Commissioner (BC)?
 - a. The discussion paper does not explain the role of the Building Commissioner but creates the expectation of an Ombudsman/Arbitrator type role. If all building projects are required to be addressed by the BC, the process will fail very rapidly due to overload. Ideally the BC would work in collaboration with councils and PCAs in the administration of its role with the prime aim of protecting consumers by ensuring the quality and integrity of the building process. The real problem with the BC role is the increased fragmentation that will occur with the creation of another position of responsibility and another process. Private certification was not handled well and has resulted in the current mess. Adding another process could potentially make

things more complicated whilst the government is trying to imply strength and control. The Building Commissioner position may be the solution, however it is more important to understand what the real problems are before deciding that more red tape and bureaucracy are the obvious solution.

9. What types of documents should 'building designers' provide to the Building Commissioner?
 - a. See my answer to 8 above.
10. I cannot comment on this question.
11. Ditto
12. Ditto
13. What would the process for declaring that a building complies with its plans look like?
 - a. This question is not about process it is about responsibility. The Project Manager is ultimately responsible for delivering the project and to ensure that it complies.
14. What kind of role should builders play in declaring final building work?
 - a. Declaring final building work is the responsibility of the Project Manager. The Builder should be ultimately responsible to the project manager.
15. Which builders involved in building work should be responsible for signing off on buildings/
 - a. See answer to 14 above.
16. Are there circumstances which would make it difficult for builders to declare that buildings are constructed in accordance with their plans? If so, what are those circumstances?
 - a. This issue goes to the heart of the matter. When a building is in the process of construction and changes become necessary, a solution is required to approve the variations before the work takes place. If the variations are external, the variations need to be notified. This has been mandated by State Govt. Internal variations are not as problematic, although it may cause problems with contracted purchasers. In all cases, it is unacceptable to build first and then seek approval.
17. Are existing licensing regimes appropriate to be accepted as registration for some builders and building designers, such as architects, for the new scheme?
 - a. I believe the existing regime works well. If unlicensed designers continue to design buildings, then I believe they should be required to obtain a certificate of BCA compliance from a registered architect. Councils used to do the BCA compliance checks, but with many buildings proceeding via certification, the process has become problematic.
18. What occupations or specific activities are involved in 'building design' and should be in scope for the registration scheme?
 - a. It is unnecessary to create a new registration scheme. The process works well with registered architects preparing the building designs, specific trades issuing their certificates such as wet area, plumbing, electrical, hydraulic etc and a project manager who is qualified as a clerk of works checking on the competency of the supplier and the adequacy of the works.
19. What should be the minimum requirements for a registration scheme?
 - a. See answer to 18 above.
20. What form of insurance should be mandatory for 'building designers'? Why?
 - a. Professional indemnity is usually adequate. If designers cannot get this insurance they probably shouldn't be doing building designs.
21. What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc)?
 - a. Depends on nature/cost of the project. PI insurance is expensive and prescribing any minimum cover levels is problematic.

22. What skills should be mandatory for 'building designers'?
 - a. They should be qualified architects. All the problems reported in the press recently are major buildings that either have been or should have been designed by architects. There are plenty of second rate building designers in the industry and I would not be encouraging them by issuing registrations which will inevitably be abused.
23. Should specific qualifications be required?
 - a. Yes. See 22 above.
24. Should there be other pre-requisites for registration?
 - a. Preferably an institute or Association qualification to demonstrate recognised competencies in addition to university qualifications.
25. What powers should be provided to the regulator to support and enforce compliance by registered "building designers"?
 - a. The regulator needs to have enforcement powers against developers who fail in their obligations. If the building designer fails in his/her duties, it is more a matter for the developer to sue for damages and seek to have their professional Institute qualifications removed.
26. Which categories of building practitioners should owe a duty of care?
 - a. All building practitioners.
27. What should be the scope of the duty of care? Should it apply to all or certain types of work? If so, which work?
 - a. Duty of care should be wide ranging. Practitioners should not take on work for which they are not competent/qualified. Code of ethics should apply to ensure that work is undertaken with the best interest of the client/consumer at heart.
28. How will the duty of care operate across the contract chain?
 - a. This question really overcomplicates the situation. When you purchase a product you expect to receive a quality product commensurate with the price you have paid. When you buy a home you expect the developer to sell you a quality home with a warranty to fix any faults for a given period. If a developer chooses to use an incompetent builder then the developer must be held responsible. To allow the blame to be shifted up the line to designers, suppliers makes it impossible for the consumer to achieve an acceptable outcome.
29. What types of consumers should be owed a duty of care?
 - a. All end users. Designers also have a duty of care to builders/developers, but it is assumed that these professionals (builders/developers) understand their business well enough to be able to discern who are quality suppliers.
30. On what basis should a particular consumer be afforded the protection?
 - a. Clearly home purchasers should have protection as is normally the case under consumer laws.

Conclusion

The current loss of confidence in the building construction/certification process stems from changes introduced into legislation some twenty years ago, presumably to introduce some competition into the building approval process. Whilst there has been plenty of competition and presumably improved efficiencies in getting building approvals for new projects, there has apparently been a loss of quality in some projects. The original certification system removed councils as serious contenders in the building certification business whilst leaving councils as the last recourse in many cases to

achieve building compliance. Councils are now not a viable career option for building professionals interested in the certification process which means the state government needs to recreate this overview role via the creation of the Building Commissioner role. To be effective this role will need to recreate the function which has been systematically removed from local government. It will of course fail unless it is incredibly well resourced which appears unlikely given the substantial costs involved. In my respectful opinion, there is a real need to avoid the creation of new bureaucracies and rather work very closely with local government, certifiers, developers, builders to better understand what needs to be done to correct the failings of the past. Local government has effectively lost the functions of building certification and much of the more significant DA approvals process has gone to Planning Panels. Despite these facts, local government has a substantial workforce staffed with competent professionals who can work with state government to resolve the current building crisis. Management of the quality of building works has been successful in the past prior to the private certification system with the substantial involvement of local government. The private certification system as it now exists has provided problems with no obvious solutions. Local government can assist in resolving the quality control issues of building projects, while state government needs to focus on consumer protection laws which is clearly its responsibility. The solution does not lie in creating new bureaucracies which sit alongside existing bureaucracies. Neither does it lie in expanding the range of persons who can claim some competency in building design when there is a proven system in existence. As I have stated earlier, the building industry is reinventing the wheel with every project. It is fruitless looking for magic fixes which will self-manage. The solution lies in:

- Clarity of understanding of the planning/building process;
- Establishing clear lines of authority on both the developer side and the approval side of the project;
- Avoiding duplication of systems which allows parties to avoid responsibility;
- Government reintroducing consumer protection for home purchases/warranty periods;
- Reinforcing the role of recognised building professionals and avoid creating a range of associated professionals;
- Working to integrate local government and state government functions with the building certification process.
- Recognising that achieving a better process may upset the building industry.

Thank you for considering this submission. I would be happy to comment further if required as I consider the current investigation vital to achieving acceptable housing for future generations.

Yours Sincerely.

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24 July 2019.