INFORMATION SHEET NO. 32

NON-COMPLYING DEVELOPMENT

What is a Non-Complying Development?

Certain types of development are classed as being non-complying, i.e. they are discouraged in an area or zone specified and are not normally allowed to proceed. The Development Plan lists what development is described as non-complying. Generally, such development has been judged as being inappropriate for that locality, as expressed by the Development Plan, and therefore is unlikely to be supported. An obvious example is the establishment of industry within a residential area.

Are you allowed to make an Application for a Non-Complying Development?

Yes! If a person feels that a proposal has substantial merit, notwithstanding that it is listed as non-complying, then the Development Act allows a formal application to be lodged for assessment with the Light Regional Council. The Council Assessment Panel has discretion whether or not it wants to even process this application at the outset. If it is decided that the application will be processed, the assessment may conclude that the development is acceptable thereby resulting in an approval. It is also pointed out, though, that such applications are handled in a different way to normal applications, involving additional cost and time, with no guarantee of gaining an approval.

The process should not therefore be taken lightly. Development Plan policy (the source of non-complying uses) is based on rigorous examination and acceptance, after extensive consultation with the community, of desired future character and how this is to be achieved. The concept of prohibiting certain uses to attain these goals is integral to the system and is not to be easily dismissed or set aside.

The potential for non-complying development to be judged as satisfactory is generally the remote exception, not the rule.

Who makes the Decision?

A number of authorities are involved. No one planning authority has sole discretion to act alone in issuing an approval for a non-complying form of development. If the Council Assessment Panel (the Panel) is the authority (which it will be in most cases), then the ***concurrence*** of the State Commission Assessment Panel (the Commission) ***must*** be sought if Council is willing to approve that use for that approval to then become effective. If the Commission itself was the initial authority, then it in turn must seek the concurrence from both the local Panel ***and*** from the Commission for that approval to become effective.

This concurrence is decisive and no rights of appeal existing for the applicant with respect to a refusal from either the Council or State Commission Assessment Panel.

Although there are time limits imposed, it should be noted that the whole process may take up to 22 weeks to complete from the time that the Council (or the Commission) has decided that it is willing to handle an application.

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What Do You Have To Do?

Firstly, there is the need to impress upon Council (or the Commission if it is the authority) that the proposal has substantial merit and deserves to be assessed accordingly. A **brief statement** setting out persuasive reasons why the development should be supported, notwithstanding its non-complying nature, has to be submitted with the application. Without this statement, the application cannot be referred to the Panel for its initial consideration.

The Panel has the sole discretion to process such an application based on the statement's justification. However, if it declines to and doesn't wish to handle the application, then the matter goes no further. The Panel is entitled to refuse the application at that point without proceeding to undertake a planning assessment.

However, in the event that the Panel does resolve to proceed with an assessment of the application, the applicant will be asked to supply a detailed **Statement of Effect** before anything else happens.

An applicant must be mindful that a decision to process the application does not in any way imply any intent whatsoever to ultimately approve the development, it merely provides an opportunity for the proposal to be 'tested' against the Development Plan.

The Statement of Effect must describe and address the following:-

- the nature of the development and its locality;
- the provisions of the Development Plan relevant to an assessment of the proposal;
- the extent to which the proposal complies with these provisions;
- an assessment of the expected social, economic, and environmental effects of the proposal on its locality; and
- any other information or material that may be relevant; and helpful to Council in its assessment of the proposal.

The Statement obviously must reflect some understanding of the importance of the Development Plan as well as the context of the proposal and its setting. It has to be far more than a letter simply stating why the development should go ahead!

This Statement is not required in some prescribed, albeit limited, circumstances where the development involved is deemed to be minor only. But, you should normally expect that this requirement will have to be satisfied.

It is suggested that the preparation of the Statement of Effect be discussed with Council (or Commission) planning staff as early as possible. Council planning staff recommends that a planning consultant is engaged to prepare the Statement of Effect on your behalf.

What happens with your Application?

Once the above information has been received, the application is given public notification in the same manner as if it was a Category 3 development, with the notice clearly identifying that the proposal is of a non-complying nature. Again, this notification may be dispensed with in some prescribed but limited circumstances (these are rare however).

As a result of the notification, third-parties therefore have an opportunity to lodge a written representation with and be heard personally by the Council. The applicant also has a right of response to these and to personally address the Panel.

If the Development Regulations so specify, the application may need to be formally referred to State Agencies for their consideration and report as per the consultation requirements for any application for assessment.

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If you don't like the Decision, what then?

That's it! There are ***no*** rights of appeal to the Environment, Resources and Development (ERD) Court available to an applicant in relation to conditions imposed on any approval or in issuing a refusal based on its assessment, or against the Commission's (or, in the case where the Commission is the original authority, against the Minister's or local Panel's) refusal to concur with a decision that seeks to approve the non-complying development. This is premised on the belief that decisions that maintain the status quo of the Development Plan, ie the primary prohibition against such uses in certain areas, ought to be protected from legal challenge.

However, where third-parties are involved, they **do** have appeal rights if they dislike an approval being issued (or the conditions that may be attached that that approval) since the status quo is being disrupted contrary to the underlying intent of the Development Plan. Third-parties therefore have the opportunity to challenge the merit of the decision before the ERD Court. Otherwise, the Court cannot be used to help an applicant overturn a Panel's or the Commission's rejection of a non-complying proposal.

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