INFORMATION SHEET No 6

DEVELOPMENT ACT 1993

NON-COMPLYING DEVELOPMENT

What is a non-complying development ?
Certain types of development are classed as being non-complying, ie they are prohibited outright in an area or zone specified and are not normally allowed to proceed. The Development Plan policies list what development is prescribed as non-complying. Generally, such development has been judged as being inappropriate and inconsistent with the character desired for that locality, as expressed by the Plan, and therefore not 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! You may feel that your proposal has substantial merit notwithstanding that it is listed as non-complying. Consequently, you can make a formal application to the relevant authority who must then decide whether or not it wants to process the application. The Act allows for a development assessment of non-complying proposals, which may result in an approval, but there are no appeal rights given to applicants if decisions do not go in their favour. It is also pointed out that such applications are handled in a different way to normal applications and involve additional cost and time with no guarantee of gaining an approval.

The Act also provides for the relevant authority to *refuse* the proposal right at the outset if it so desires, without even making an assessment of the application. 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 can 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.

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 local Council is the authority (which it will be in most cases), then the 'concurrence' of the Development Assessment Commission - must be sought if Council is willing to approve that use and 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 Council and the Minister for that approval to become effective.

This concurrence is decisive; it must be given or the whole thing fails and you cannot take this for granted. In looking at giving its concurrence, the Commission reviews and assesses the proposal from scratch; it doesn't merely 'rubber stamp' what the Council has already done.

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

What do you have to do ?
Firstly, you need to impress upon Council (or the Commission if it is the authority) that your 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 can go no further!

Council has the sole discretion to process such an application based on the statement's justification. However, if it declines and doesn't wish to handle the application, then end of story! That's it - and there are no rights of appeal available to you to challenge Council in the exercise of this discretion.
In the event that Council does resolve to proceed with an assessment of the application, you will be asked to supply a detailed '*Statement of Effect'* before anything else happens.

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You must be aware that a decision to process the application does not in any way imply any intent whatsoever to ultimately approve the development.

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
- 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* (and *the planning report, see below) be discussed with Council as early as possible.*

What happens with your application ?

Once the above information has been received, Council must give public notification of the proposal in the same manner as if it were a Category 3 development (see **HELP GUIDE N°.5**) and which must identify the proposal as being of a non-complying nature. Again, this notification may be dispensed with in some prescribed but limited circumstances (these are rare however!).

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 address Council also.

If the 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.

Before making a decision, Council must legally obtain and consider a planning officer's report. This report has to provide an assessment of the proposal and comment on the Statement of Effect, and whether representations received are consistent with the objectives of the Development Plan. As with the above, this requirement may be dispensed with in certain, but rare, instances.

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

That's it! As previously mentioned there are no rights of appeal to the Court available to an applicant in relation to conditions imposed on any approval, against Council initially declining to even process the application, 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 Council's) refusal to concur with a decision seeking to approve the non-complying development. Because of the primary prohibition against such uses, decisions which maintain the status quo of the Development Plan, ought to be protected from legal challenge.

However, where third-parties (representors) are involved, they do have appeal rights if they dislike an approval being issued (or conditions attaching to that approval) since the status quo is being disrupted contrary to the underlying intent of the Plan. Hence, they are afforded the opportunity to challenge the merit of the decision before the court.