

# Subdivision Certification

## Purpose

In the draft report of the Review of the Building Professionals Act, section 14.8 addressed subdivision and strata certification. There have been a number of submissions made raising concerns about the recommendations contained in the report on subdivision certification. This paper seeks to identify and address these concerns.

## Role and Accreditation of Private Subdivision Certifiers

The category B1 in the BPB Accreditation Scheme is an accredited certifier for subdivision certification. Persons accredited under this category can undertake the full range of activities associated with subdivision certification including the assessment and issue of a construction certificate for a subdivision, undertaking the role of Principal Certifying Authority (PCA) including undertaking of any necessary inspections during the construction process, the issue of a compliance certificate and the issue of the subdivision certificate. B1 certifiers can also issue CDCs for strata developments. It should be noted that a B1 certifier can both issue a construction certificate and a compliance certificate even if the B1 certifier is not the PCA.

The BPB accreditation statement for B1 certifiers, setting out both the qualifications and experience required, is set out in the table below.

## Accreditation statement - Category B1

### Accredited certifier – subdivision certification

<b>Authorities conferred</b>	<p>Issue of complying development certificates for proposed subdivision developments, construction certificates for subdivision work and subdivision certificates.</p> <p>Carrying out of inspections under Clause 129B of the EP&amp;A Regulation.</p>
<b>Specialty knowledge (know and understand...)</b>	<ul style="list-style-type: none"><li>• Relevant aspects of development control</li><li>• The design, planning and construction concepts for subdivision works, relevant to the category of accreditation</li><li>• Impact of related legislation such as utilities legislation and property encumbrances</li><li>• The design, planning and construction requirements relevant to the category of accreditation and appropriate techniques for their construction</li><li>• General knowledge of technical/professional skills related to subdivision works</li><li>• Project control arrangements and site organisation for subdivision works relevant to the category of accreditation</li></ul>
<b>Specialty skills (ability to ...)</b>	<ul style="list-style-type: none"><li>• Identify, interpret and determine compliance with all provisions of the EP&amp;A Act and EP&amp;A Regulation relevant to the processing of applications for complying development certificates, construction certificates and subdivision certificates</li><li>• Interpret and review relevant reports, certificates and other documents</li></ul>

	<p>used as evidence to demonstrate compliance</p> <ul style="list-style-type: none"> <li>• Carry out the role and responsibilities of a certifying authority, including of the principal certifying authority</li> </ul>
<b>Specialty underpinning knowledge</b>	<p>Relevant provisions of:</p> <ul style="list-style-type: none"> <li>• <i>Protection of the Environment Operations Act 1997</i></li> <li>• <i>Contaminated Land Management Act 1997</i></li> <li>• strata legislation</li> <li>• <i>Roads Act 1993</i></li> <li>• <i>Conveyancing Act 1919</i></li> <li>• relevant standards and codes related to design and construction of subdivision works, including requirements and/or guidelines on sedimentation and erosion control, as required by development consent conditions and the relevant provisions of regulations made under those Acts.</li> </ul>
<b>Specialty qualifications requirement</b>	<p>For category of accreditation B1, the Board recognises the following:</p> <ul style="list-style-type: none"> <li>• a degree in civil engineering from a university within the meaning of the <i>Higher Education Act 2001</i>, or</li> <li>• a degree in land surveying from a university within the meaning of the <i>Higher Education Act 2001</i>, or</li> <li>• registration as a Land Surveyor under the <i>Surveying Act 2002</i> by the Board of Surveying and Spatial Information (BOSSI).</li> </ul>
<b>Experience requirement</b>	<p>A minimum of five years recent practical experience relevant to the category of accreditation, to the satisfaction of the Board. This can include assessing designs, plans and specifications of an appropriate range of proposed subdivisions, and assessing and inspecting an appropriate range of subdivision works both during construction and upon completion of the works for compliance with relevant provisions of the EP&amp;A Act and the EP&amp;A Regulation, relevant development standards, relevant council guidelines, specifications and Australian Standards.</p>

*Source: Building Professionals Board, Accreditation Scheme*

There are at present 21 accredited B1 certifiers in NSW. A number of these have limited accreditation to issue CDCs for strata developments. The two major employers of subdivision certifiers for subdivision work are Barker Ryan Stewart and Land Development Certificates Pty Ltd. Information on both firms, including current and past work can be found at [www.barkerryanstewart.com.au](http://www.barkerryanstewart.com.au) and [www.ldcerts.com.au](http://www.ldcerts.com.au).

## **Subdivision Certification in NSW**

The role and responsibilities of subdivision certification is covered by the Environmental Planning and Assessment Act and Regulations. The process for undertaking subdivision work and certification is summarised as follows:

- Plans and a development application for a proposed subdivision development are submitted to the relevant consent authority, which is either the relevant council or the state government. The plans are required to identify any public assets associated with the development including roads and storm water management infrastructure.
- Individual councils maintain standards for any public assets constructed in their area and assess the plans against the required standards and issue a development approval with any associated conditions. In general complying developments are not applicable to subdivision developments apart from strata subdivision.
- Not less than two days after the issue of a construction certificate by the subdivision certifier, the construction certificate has to be notified to the council. Two days before the commencement of work, the applicant has to inform the council of the appointment of the PCA and of the date for the commencement of work.
- If there is any intersection between the new road works for the subdivision and other existing roads, such as RMS roads or roads of the local council, then, depending on the conditions of consent, there may be a requirement to liaise with the road owner prior to the issue of a construction certificate and to have a section 138 certificate issued.
- Once construction starts, inspections are undertaken during the construction period by the council or an accredited certifier. At completion a compliance certificate is issued by an accredited certifier or the council and then a subdivision certificate is issued by the PCA, the latter being the requirement before the subdivision can be registered with the NSW Land Titles Office.
- The council can impose conditions on any subdivision including the requirement for security to be provided to meet any costs incurred by a council in rectifying any defects in assets provide to the council. This is addressed in section 80A of the EP&A Act.

At present a private subdivision certifier can undertake both the role of a Certifying Authority and PCA, but there are restrictions on a private certifier acting as the PCA where a council is the consent authority. Under the EP&A Act private certifiers can act as the PCA only if the council's local environment plan allows this to occur. At present only one council, Orange allows for this in its LEP.

This means at present that private subdivision certifiers can only act as CAs or as PCAs for subdivisions where councils are not the consent authority.

## **Draft Report Recommendations**

The draft report identified what it assessed as anomalies in the approach to subdivision certification which can be summarised as follows:

- Effective exclusion of private accredited subdivision certifiers for acting as PCAs where councils are the consent authority, despite having the experience and qualifications and the accreditation under the Building Professionals Act to undertake such work and despite private building certifiers being able to act as PCAs
- Reported action by a number of councils in seeking to exclude private subdivision certifiers from acting as the CA or issuing compliance certificates
- Council subdivision officers not being required to be accredited as certifiers with the BPB, unlike the situation with council building certifiers.

As a consequence the Draft Report made the following recommendations:

- remove the requirement for councils' local environment plan to approve of private subdivision certifiers being able to be appointed as PCAs or issue subdivision certificates and simply allow accredited private certifiers to act as PCAs for subdivisions and issue subdivision certificates
- recognise in the partnership agreement with councils that private subdivision certifiers are fully entitled to issue construction and compliance certificates and councils are not to represent to the contrary
- councils be directed that their only role in respect to a Section 88 instruments (Conveyancing Act) is to confirm the wording of the condition or restriction
- council subdivision officers be required to be accredited as certifiers with BPB on the same basis as council building certifiers are accredited
- NSW work with the ABCB on developing a standard for engineering design requirements for subdivisions

## **Issues Raised in Submissions**

There were a number of issues raised by councils, bodies related to councils such as the Local Government Engineers Association and the Institute of Public Works Engineers Australia as well as private certifiers. This paper is directed at creating a dialogue on these matters with a view to seeking to address the issues.

### **A. Council issues**

#### **1. Accreditation requirements for private subdivision certifiers**

A number of submissions sought information on what were the "proposed" accreditation requirements for subdivision certification and commented that these must include civil engineering and/or land surveying qualifications and extensive experience with subdivision work. As can be seen from earlier in this paper there are strong experience and expertise requirements for subdivision certifiers. The great majority of private certifiers involved with subdivision works also are former local government employees.

## **2. Concern about potential conflict of interest by private certifiers**

A concern raised in a number of submissions was that private subdivision certifiers have a potential conflict of interest in that they would be employed by the developer but would have a responsibility to assess the standards of the public assets constructed as part of the development.

While there is a potential for conflict of interest this is equally true for all categories of private certifiers and has been addressed in the regulatory and accreditation framework developed by the BPB which is the subject of further proposed enhancements contained in the draft report.

Current mechanisms to ensure accountability of private certifiers to act in the public interest include the following:

- accreditation by the BPB
- complaints and disciplining processes operated by the BPB
- application of code of conduct to all certifiers
- requirement for all certifiers to maintain professional indemnity insurance
- requirement for certifiers to undertake Continuing Professional Development
- subject to the provisions of ICAC

In addition the draft report proposes further measures to enhance professional responsibility and accountability, namely:

- establishing and maintaining a practice guide to both guide and assess the performance of certifiers
- undertaking proactive audits and investigations of certifiers
- re-engineering the complaints mechanism to make it more effective and timely

Accordingly, accredited private certifiers are personally and professionally responsible and accountable for their actions.

## **3. Protection of the interests of councils in respect to public assets**

This was the key issue of concern raised in council submissions. There are in fact a range of mechanisms in place to address this matter. This includes the mechanisms set out under the previous issue to ensure proper accountability of certifiers. In addition the process for undertaking subdivision approvals and certifications included mechanisms to provide councils with input at the design, construction and completion stages, namely:

- Ability of councils to establish in the DA the necessary requirements for any public assets developed as part of the subdivision process, including adherence to council standards for such public assets. While most councils have in place such standards, the draft report considered that it would be desirable to develop a more consistent set of standards that would apply across councils.

- Ability of councils to review the construction certificate at the time of notification to the council and raise and seek to have addressed any issues of concern before construction commenced.
- The appointment of the PCA is an appropriate time to review the CC and plans prior to construction. Where the council is not the PCA it should be mandatory for its involvement in pre-commencement meeting where works covered by the CC are discussed. Where the council is the PCA it can arrange for pre-commencement meetings to go over plans and review works program.
- Reliance on the professional experience and training of the PCA in ensuring that the assets being constructed are in conformity with the DA and ability.
- Ability to establish security to cover any deficiency in the assets passed across to councils.

#### **4. Lack of mandatory inspections for subdivision developments**

While it is true that there are not mandatory critical inspections analogous to those set out for the building and construction process, nevertheless there are well established inspections that are undertaken as a matter of good practice. In addition councils often have these as part of their standard DA conditions. For example Blacktown Council has as a standard DA condition the issue of inspection compliance certificates issues by a Registered Engineer at the completion of the following inspection stages:

- i. Soil erosion and sediment control
- ii. Traffic control
- iii. Construction of drainage works
- iv. Construction of road pavement
- v. Footpath works
- vi. Stormwater quality control

Consideration will be given to greater standardisation of these or including these in a practice guide.

#### **5. Road safety**

A number of the submissions made the valid point that there is a difference between road standards and road safety and that councils needed to have regard to both. Road safety should be addressed in the DA assessment and it is normal practice for line marking and signage to be subject to council approval once they are endorsed by the Council Traffic Committee.

#### **6. Council officer certification**

There was general support for the proposal for council subdivision officers to be required to be accredited by the BPB but the point was raised that there needed to be a transitional arrangement for existing council officers. This is accepted and has in fact being implemented for council building certifiers, where existing council building certifiers were accredited and given grandfathered rights and only new building certifiers were subject to the accreditation requirements.

## **B. Other issues raised**

### **1. Accreditation of sub division certifiers**

A number of submissions suggested that designers of sub divisions should be subject to BPB accreditation, consistent with the proposed approach for accreditation of building designers. This proposal has merit and will be considered for inclusion in the final report. It is understood that the RMS is considering implementing such a scheme for designers for its roads.

### **2. Accreditation or pre-qualification of sub division subcontractors**

A submission noted that at present there is no accreditation or pre-qualifications established for sub division contractors, though the RMS does have such a scheme in place for sub-contractors who work on RMS roads. In addition some councils, such as Warringah Council, require subcontractors who work on the council's roads to be pre-qualified under the RMS scheme. Further consideration will be given to this issue for possible inclusion in the final report.

### **Next steps**

As set out in the covering note to this document, your response to this paper is invited. If there are still concerns about the proposals a workshop will be arranged involving all relevant parties.

Michael Lambert

Independent reviewer of the Building Professionals Act

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