Holistic Considerations Concerning Performance Based Building Codes

In this paper KIM LOVEGROVE concentrates on holistic considerations that should be taken into account when one enters into the performance code debate. It is concerned with the regulatory culture within which performance based codes fit and the notion of what is required to facilitate that fit.

The writer's interest concerns holistic and broader regulatory issues. The interest emanates from a background in Australian and Victorian legislative reform initiatives (in this context the writer worked closely with Mr, Lyall Dix, the Executive Director of the Australian Building Codes Board). Mr Dix and the writer had carriage of a National Model Building Act reform initiative in Australia and assisted with its legislative introduction in 2 Australian jurisdictions, the State of Victoria and the Northern Territory.

The particular issues that the writer will canvass in this paper are as follows:

- Philosophical considerations
- Comparative models
- Holistic factors
- Regulatory systems
- Risk and accountability
- Education
- False assumptions

Preliminary Issues

The most critical stage of any major reform initiative is at the beginning, the formative stage. The ground rules will shape the destiny of the initiative. It is at this stage that serious consideration to the underlying philosophical tenets or foundations that will underpin the reform initiative should occur. Equally important is the development of a project management strategy, designed to maximise its success.

A reform initiative of this magnitude must be based upon solid philosophical foundations. These foundations have to be readily identifiable and explicable. As long as they are based upon a logical framework, if challenged the system will be capable of being defended within a public policy and legal context.

These initial remarks may seem trite but reform antagonists who challenge the very need for reform will always accost the reformer and unless the reformer has sound and clear reasons to justify the initiative the reform will have little chance of reaching any potential.

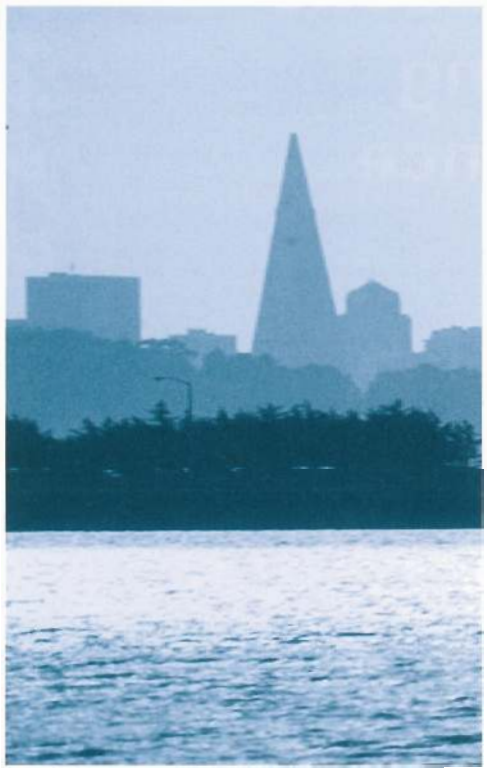
The philosophical tenets also have to survive the rigours of legal scrutiny. The Courts are the ultimate arbiters of semantics and the judiciary will always look for the logic where regulation fails to generate coherent meaning. The question that will be asked is "What was the intention of the legislature?". Sometimes those who have had carriage of the reform initiative (such as public officials, politicians and associated consultants) do not know the answer to this question. This is because the reform may have been driven for reform's sake, political whim, or as is more often the case, it just wasn't well thought through. Whatever the reason, failure to establish clear intention can be regarded as tantamount to an abdication of public responsibility.

Therefore those charged with a performance reform agenda such as that under consideration in the USA should tackle the issue of establishing sound philosophical foundations first. Energy should be devoted to the identification of the underlying logic and principles for a performance based approach. Hence when the public asks "Why are you doing this?", the reformer will, with confidence, be able to present a number of well considered answers.

Philosophical Considerations

Firstly some of the major and soul searching questions may include the following:

- What are we trying to achieve?
- Why are we embarking on this path?
- Is the USA being caught up in a popular international current?
- If so, why are the other countries going down this path?
- Is this the right approach for the USA?
- Is the performance approach compatible with US regulation and culture?



(Culture within this context means the legal, commercial and public policy framework and ethos).

My research has revealed that the most common universal motivators for a performance based approach appears to revolve around a desire for:

- more flexibility
- more innovation
- cheaper construction costs

There are nevertheless a plethora of related questions that need to be asked when one enters into the performance foray, namely:

- How will performance change the industry?
- What will be the real as distinct from the imagined economic benefits?
- How will it impact upon the law?
- Will the real beneficiaries in the USA be the legal profession?
- How will it impact upon construction standards?
- How will it fit with notion of liability, risk transfer?
- What level of expertise will be required?
- What consequential amendments will be required to Acts of Parliament to accommodate the necessary subjective elements associated with the greater use of discretion?

I fear that some jurisdictions have not addressed these fundamental questions. My investigations with regards to New Zealand and some European jurisdictions reveal some strong performance similarities within the technical sphere, but the regulatory and legal culture within which those technical regulations are slotted are not in the least bit similar when viewed inter-jurisdictionally. These differences will become apparent in due course.

Holistic Considerations

At the last meeting of the Task Group of the International Construction Industry Bureau, which was held in Wellington, New Zealand in November 1995, there was much discussion about the notion of a performance culture.

There is a developing awareness that the performance approach is not just about the development of technical codes which contain objectives, functional statements, deemed to satisfy provisions and acceptable solutions. Rather it is about a holistic system, a legislative, regulatory package

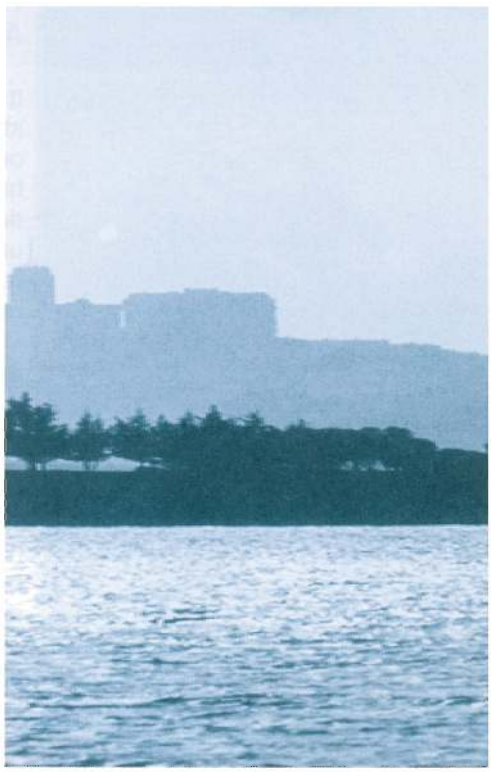
that is complemented by expertise, accountability and responsible allocation of risk. Yet some jurisdictions have approached performance solely on a technical basis.

Unless these complements exist, a performance system may not reap the imagined benefits. In support of this contention I refer to findings from an investigative mission to New Zealand in 1995, where we interviewed prominent council officers and legal authorities. From these interviews certain themes emerged.

One prominent local government representative, Mr. David Fitzpatrick (of the law firm Simpson Grierson), explained that he actively discouraged councils from sanctioning performance based applications. In his view, when a council has to sanction a performance application the council has to exercise a discretion. This discretion involves the exercise of a judgement, which although it may be well considered, nevertheless involves a degree of subjectivity. The exercise of this discretion is highly susceptible to contrary views and litigious challenge. He added that prescriptive solutions on the other hand provide statutory decision makers with very strong legal defences.

If an application is approved on the basis that it complies with a prescriptive provision, then the officer can fall back upon a solid regulatory prescriptive defence. We were able to confirm that councils, which were indeed highly sceptical about so called performance solutions for the reasons articulated by Mr. Fitzpatrick, had adopted Mr. Fitzpatrick's advice.

In March of this year we conducted an in depth fact finding mission in Europe. Mr. Lyall Dix, the CEO of the ABCB, one of our Board members, and I elected to visit Sweden, Holland, England and Scotland, because the performance approach has existed in these countries for the better part of a decade. During this mission we did not encounter the same degree of disquiet with regards to the performance approach that was evident in New Zealand. In England, Holland and Sweden the system was well received. It was only in



Holland that a prominent industry person stated that the performance approach could lead to more legal activity.

Why the difference between New Zealand and the European countries? There are some major distinguishing legislative and common law characteristics when one compares these countries with each other and with New Zealand and Australian jurisdictions. In addition there are different models of central and local government. (As a cautionary note however, performance regulation is new to the international community, it has had insufficient time to be truly tested, consequently its impacts upon construction standards are still largely unknown.

The English for instance have had performance regulation in place since 1985, yet at a forum organised by the Institute of Building Control those we interviewed stated that to date there had been no litigation relating to performance provisions.

Pending judicial findings and analyses of building collapses, the community can only speculate as to whether performance will survive the tests of time as a regulatory philosophy. Nevertheless the anecdotal evidence suggests much promise.)

In England an important legal case, Murphy vs. Brentwood, gives rise to the notion that councils cannot be sued for economic loss that may be a by product of tardy inspection. Furthermore English performance regulations provide that a building surveyor merely has to establish that a performance proposal reasonably complies with functional requirements.

The English building surveyors are therefore in a low risk performance culture, as they cannot be held liable for economic loss that is occasioned by less than vigilant inspection practises, and they only have to satisfy a

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