Standing Committee on State Development

INQUIRY INTO THE NSW PLANNING FRAMEWORK

Discussion paper

November 2008

Published according to Legislative Council standing order 226(4)

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Council. Standing Committee on State Development.
The New South Wales planning framework : discussion paper, November 2008. / Standing Committee on State Development. [Sydney, N.S.W.] : the Committee, 2008. – 17 p. ; 30 cm

At head of title: Legislative Council.
At foot of title: Parliament NSW.
Running-title: Discussion paper, November 2008.
"Published according to Legislative Council standing order 226(4)".
Chair: Tony Catanzariti, MLC.

ISBN 9781920788216

1. Regional planning—New South Wales.
II. Title
III. Catanzariti, Tony.

307.12 (DDC22)

How to contact the committee

Members of the State Development Committee can be contacted through the Committee Secretariat. Written correspondence and enquiries should be directed to:

The Director

Standing Committee on State Development

Legislative Council

Parliament House, Macquarie Street

Sydney New South Wales 2000

Internet www.parliament.nsw.gov.au/committees

Email state.development@parliament.nsw.gov.au

Telephone 02 9230 3504

Facsimile 02 9230 2981

Committee membership

Hon Tony Catanzariti MLC	Australian Labor Party	*Chair*
Hon Melinda Pavey MLC	The Nationals	*Deputy Chair*
Hon Matthew Mason-Cox MLC	Liberal Party	
Rev the Hon Fred Nile MLC	Christian Democratic Party	
Hon Christine Robertson MLC	Australian Labor Party	
Hon Michael Veitch MLC	Australian Labor Party	

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Background to the Committee

The Standing Committee on State Development is a current standing committee of the New South Wales Parliament's Legislative Council.

The functions of the State Development Committee are to inquire into and report on matters concerned with policy directions to ensure that opportunities for sound growth and wise development are pursued for the benefit of people in all areas of New South Wales.

Further information about the Committee can be viewed on the Committees website at: www.parliament.nsw.gov.au/statedevelopment.

The Inquiry into the NSW planning framework

Terms of reference for the Inquiry into the NSW planning framework were referred to the Committee by the then Minister for Planning, the Hon Frank Sartor MP, on 24 June 2008. The Committee adopted the terms of reference on 26 June 2008.

The terms of reference are:

1. That the Standing Committee on State Development inquire into and report on national and international trends in planning, and in particular:

    (a) the need, if any, for further development of the NSW planning legislation over the next five years, and the principles that should guide such development,

    (b) the implications of the Council of Australian Governments reform agenda for planning in NSW,

    (c) duplication of processes under the *Commonwealth Environment Protection and Biodiversity Act 1999* and NSW planning, environmental and heritage legislation,

    (d) climate change and natural resources issues in planning and development controls,

    (e) appropriateness of considering competition policy issues in land use planning and development approval processes in NSW,

    (f) regulation of land use on or adjacent to airports,

    (g) inter-relationship of planning and building controls, and

    (h) implications of the planning system on housing affordability.

2. That the committee report by 14 December 2009.

SUBMISSIONS

The Committee is currently seeking written submissions from stakeholders and interested parties in relation to the inquiry. Submissions should be provided by **13 February 2009,** and addressed to:

The Director
Standing Committee on State Development
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Submissions can also be lodged via the Committee's website at www.parliament.nsw.gov.au or by email: state.development@parliament.nsw.gov.au.

This discussion paper aims to encourage the provision of submissions by providing:

- an outline of the context for this Inquiry
- background information on each of the terms of reference.

The paper outlines some of the issues covered by the terms of reference, with questions intended to stimulate consideration of the issues raised. It is not an exhaustive list of all issues.

The Committee welcomes submissions addressing any of the issues referred to in the paper or any other issues relevant to the Inquiry.

Acknowledgement

The Committee acknowledges the work of Mr Stewart Smith of the New South Wales Parliamentary Library Research Service and the assistance of Ms Yolande Stone of the NSW Department of Planning in the preparation of this discussion paper.

Term of reference 1(a): The need, if any, for further development of NSW planning legislation over the next five years, and the principles that should guide such development

1.1 The *Environmental Planning and Assessment Act 1979* (EPA Act) is the main vehicle for planning in NSW. The EPA Act provides a comprehensive planning scheme, as well as stipulating the development assessment process. Whilst the EPA Act attracted considerable support upon its introduction, nearly thirty years of amendments, case law and the proliferation of other natural resource management legislation has meant that the planning regime in NSW is complex.

1.2 Under the planning framework, some $30 billion worth of development applications are determined in NSW every year. Local government is responsible for assessing development worth $20 billion. Approximately 70 percent of this total value is for residential work, and up to 90 percent is lodged by non-developers.

1.3 Since its inception in 1979, the EPA Act has undergone significant revision and reform. Significant reforms have been made in the area of development assessment, both for major projects and for local development. The latest reform was the passage, in June this year, of the *Environment Planning and Assessment Amendment Act 2008*, much of which has yet to commence. Major reforms to the EPA Act over the last 15 years are shown in **Table 1.1**.

Table 1.1 Major reforms to the Environmental Planning and Assessment Act 1979

Date	Reform
1993	• Minister for Planning independent approval authority for major infrastructure projects (now Part 3A).
1994	• Introduction of State Environmental Planning Policy (SEPP) 34 – Employment Generating Development, with the Minister for Planning the consent authority for all major industrial development.
1995	• Threatened species conservation provisions added to the EPA Act.
1997	• Introduction of integrated development assessment provisions with agencies involved in assessing development applications. • Introduction of State Significant Development determined by the Minister for Planning. • Exempt or complying development categories introduced. • Integration of the building controls from the *Local Government Act 1993* into the EPA Act. • Construction certificates or complying development certificates can be issued by council or private certifiers – with system of regulation of private certifiers.
2002	• Anti-corruption provisions added to the EPA Act. • Rural fires provisions added to the EPA Act.
2005	• A Standard Local Environment Plan template introduced.

	• Review of local development infrastructure levies. • Introduction of Part 3A with integrated approval provisions for major development, including critical infrastructure. • Gazettal of Major Project SEPP with State Significant Site provisions.
2006	• Minister may appoint a planning administrator or a panel to exercise the planning functions of a council. • Introduction of Regional Infrastructure levies provisions.
2008	• Planning Assessment Commission to be established to provide advice and determine major projects delegated to it by the Minister. • Joint Regional Planning Panels composed of two council representatives and three state government appointees to determine regionally significant development. • A new system of planning arbitrators will consider applicant appeals against council decisions on small scale development proposals. • Tighter rules for private certification introduced, including new limits on the annual income that can be earned from, and the number of certificates that certifiers can issue to any one client. • New rules to support a major expansion in the use of exempt and complying development.

Questions

Is there a need for further development of planning legislation in NSW?

What further changes to the planning legislation are needed?

What principles should guide any future development of planning legislation in NSW?

Term of reference 1(b): The implications of the Council of Australian Governments reform agenda for planning in NSW

1.4 The Council of Australian Governments (COAG) and the Local Government and Planning Ministers Council have been increasingly active participants in the land use planning policy sphere. Many of the recent reforms to the EPA Act, particularly in regards to development assessment, reflect discussions at the federal level.

1.5 In 1998 the Development Assessment Forum was formed, with membership from the development industry, planning professions and the three tiers of government.[1] The Forum's

[1] The Forum is an independently chaired group comprising the development industry, professions and the three spheres of government to harmonise and improve planning and development assessment systems. The Forum provides independent advice and recommendations to the Local Government and Planning Ministers Council: COAG, *Commonwealth-State Ministerial Councils: A Compendium*, Sept 2007, p 51

mission is to encourage the harmonisation of Australian development assessment systems through the promotion of leading practice regulatory reform. In 2005 the Forum developed the Leading Practice Model for Development Assessment, which provides a blueprint for jurisdictions for a simpler approach to development assessment. It achieves this by defining ten leading practices that a development assessment system should exhibit, and then by applying the ten leading practices to six development assessment pathways/tracks. According to this model, development applications should be assessed by one of the following six pathways:

1) Exempt Development. This has a low impact beyond the site.

2) Prohibited Development. Development that is not appropriate in specific locations should be clearly identified as prohibited in the ordinance or regulatory instrument so that both proponents and consent authorities do not waste time or effort on proposals that will not be approved.

3) Self Assess. Where a proposed development can be assessed against clearly articulated quantitative criteria and it is always true that consent will be given if the criteria are met, self assessment by the applicant can provide an efficient assessment method. Little judgement will be required as to whether the criteria are met and there would be no need for public notification. A standard consent would issue.

4) Code Assess. Development assessed in this track would be considered against objective criteria and performance standards. Assessment would be by an expert assessor and judgement would be required, for instance, as to whether or not a design solution meets a performance standard. Private sector certification is possible. Provided the application meets the criteria, a standard consent would be given.

5) Merit Assess. This track provides for the assessment of applications against complex criteria relating to the quality, performance, on-site and off-site effects of a proposed development, or where an application varies from stated policy. Expert assessment would be carried out by professional assessors.

6) Impact Assess. This track provides for the assessment of proposals against complex technical criteria that may have a significant impact on neighbouring residents or the local environment. This type of application would generally be of such a scale or significance that it should appropriately be determined by elected representatives (local government or the Minister) based on the advice of the expert assessment panel.

1.6 On 4 August 2005, the Local Government and Planning Ministers Council acknowledged the Model in their communiqué as 'an important reference for individual jurisdictions in advancing reform of development assessment.'[2] Indeed, elements of the Model can be seen in the NSW development assessment process.

1.7 COAG took up the issue of development assessment at its 10 February 2006 meeting, which led to the following outcome:

> COAG will request the Local Government and Planning Ministers' Council to:
> (a) recommend and implement strategies to encourage each jurisdiction to:-

2 Local Government and Planning Ministers Council, *Communiqué* 4 August 2005 www.daf.gov.au/reports/LGPMC-Communique-4_August_2005.doc (accessed October 2006)

(i) systematically review its local government development assessment legislation, policies and objectives to ensure that they remain relevant, effective, efficiently administered, and consistent across the jurisdiction, and

(ii) ensure that referrals are limited only to agencies with a statutory role relevant to the application and that referral agencies specify their requirements in advance and comply with clear response times;

(b) facilitate trials of electronic processing of development applications and adoption through Electronic Development Assessment.[3]

1.8 The topic of development assessment arose again at the December 2007 COAG meeting. The meetings' *Communiqué* made reference to a $500 million Housing Affordability Fund, with the goal of:

> Streamlining development approval processes and reducing infrastructure charges and developer costs.[4]

1.9 The 13 August 2008 COAG meeting agreed to the Development Assessment Forum (DAF) developed protocol to support the electronic processing of planning and development applications.

1.10 The Australian Government committed $30 million from the Housing Affordability Fund to develop the IT infrastructure and software needed to implement electronic development assessment (eDA) systems nationally. It is hoped that improvements in eDA processes will reduce delays in planning approvals, producing savings for home buyers. NSW will receive almost $6 million to assist the implementation of an eDA system.

1.11 The work of COAG and its support of the DAF is reflected in NSW in the recent amendments to the EPA Act, and the workings of the Department of Planning.

Questions

Are the reforms and discussions at the Council of Australian Governments level important for the future development of the New South Wales planning framework?

What are the specific implications of the work of the Council of Australian Governments on planning in New South Wales?

3 Council of Australian Governments, *Meeting Outcomes, Attachment B*, 10 February 2006

4 Council of Australian Governments, *Meeting Outcomes*, 20 December 2007

Term of reference 1(c): Duplication of processes under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and NSW planning, environmental and heritage legislation

1.12 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) is the Australian Government's key piece of environmental legislation. The EPBC Act focuses Australian Government interests on the protection of matters of national environmental significance, with the States and Territories having responsibility for matters of state and local significance. This Act replaced the *Environment Protection (Impact of Proposals) Act 1974* (Cth), which was among the earliest environmental assessment legislation in the world.

1.13 Developments which are likely to affect matters of national environmental significance are called 'controlled actions' and must be assessed and approved under the EPBC Act as well as under NSW legislative provisions. There are typically between 10-15 controlled actions each year in NSW.

1.14 An important provision in the EPBC Act is bilateral agreements with the States/Territories. The main function of bilateral agreements is to reduce duplication of environmental assessment of controlled actions under Commonwealth and States/Territories legislation. Bilateral agreements allow the Commonwealth to 'accredit' particular State/Territory assessment processes and, in some cases, State/Territory approval decisions.

1.15 In effect, bilateral agreements allow the Commonwealth to delegate to the States/Territories the responsibility for conducting environmental assessments and, in certain circumstances, the responsibility for granting environmental approvals. Bilateral agreements may also deal with various other matters, such as management plans for World Heritage properties and cooperation on monitoring and enforcement.

1.16 In December 2005, the NSW Government and the Federal Minister for Environment and Heritage entered into an Approvals Bilateral Agreement in relation to actions undertaken in accordance with an accredited Management Plan for the Sydney Opera House, a World Heritage site. The Federal Minister can rely on the State processes in relation to actions undertaken in accordance with the management plan. A similar Approvals Bilateral Agreement is currently being developed for the Sydney Harbour Bridge.

1.17 In January 2007 an Assessments Bilateral Agreement was entered into with the NSW Government. The agreement will allow the Federal Minister for the Environment to rely on environmental impact assessment processes specified by New South Wales in assessing controlled actions under the EPBC Act.

1.18 The Commonwealth have also provided for controlled actions which comply with a strategic assessment approved under the EPBC Act to be exempted from the need for further assessment or approvals.

Questions

What are your experiences involving assessment processes under New South Wales and Commonwealth environment legislation for controlled actions?

Did the bilateral agreements reduce duplication of approval procedures for the controlled action?

Are there areas of duplication that need to be addressed?

Term of reference 1(d): Climate change and natural resources issues in planning and development controls

1.17 Our understanding of the relevance of climate change to the development assessment process is in an evolutionary phase. Increasingly, the concept of whether determining authorities should have regard to climate change and natural resource issues in determining development applications is being tested in the courts, both in NSW and interstate jurisdictions.

1.18 For instance, recently the Victorian Civil and Administrative Tribunal considered the impact of climate change on a development application on coastal farmland. The Tribunal found that potential sea level rise and coastal inundation due to the effects of climate change are a relevant matter to consider in appropriate circumstances. In this case, increases in the severity of storm events coupled with rising sea levels created a reasonably foreseeable risk of inundation of the subject land, and the Tribunal refused the application.

1.19 In NSW, the Land and Environment Court held, in 2007, that a concept plan approval for residential development on flood prone land was invalid on the grounds that the Minister had failed to consider whether the flood risk would be aggravated by climate change.[5] This decision was appealed, and the NSW Court of Appeal held that any failure to consider ecologically sustainable development principles does not void the Minister's approval under s 75O (Major Projects) of the EPA Act. However, in the lead judgement of the decision, Hodgson JA noted that failure to take into account the principles of ecologically sustainable development could be considered evidence of failure to take into account the public interest.[6] Hence climate change, ecologically sustainable development and considering the public interest are all interlinked factors.

1.20 One topical area of interest in relation to climate change and planning is that of access to the sun. In response to climate change and in an effort to reduce greenhouse gas emissions, householders are installing solar photovoltaic panels on their roofs, as well as solar hot water systems. These installations may be at risk of being overshadowed by new neighbouring developments, effectively diminishing their potential.

1.21 Increasingly additional approvals are being required for natural resource aspects of developments which duplicate or overlap the responsibilities for consideration of

5 *Walker v Minister for Planning and Ors* [2007] NSWLEC 741

6 *Minister for Planning v Walker* [2008] NSWCA 224

environmental and sustainability issues under the EPA Act. For example, provisions of the *Threatened Species Conservation Act 1995,* the *Native Vegetation Act 2003,* the *Water Management Act 2000,* and the *Fisheries Management Act 1994* often duplicate obligations under planning instruments including requirements for referral to relevant agencies. Regional strategies such as the North Coast and South Coast Regional Strategies now provide a strategic context for the consideration of natural resource issues in planning across the region.

Questions

How should climate change be addressed in the planning framework?

Is the current framework adequate to consider the potential effects of climate change?

How should natural resources issues be taken into account in the planning and development approval framework?

Term of reference 1(e): Appropriateness of considering competition policy issues in land use planning and development approval processes in NSW

1.21 The application of the EPA Act can influence or restrict competition. For example, one issue is whether consent authorities should consider competition policy issues when planning land use or determining development applications.

1.22 The Australian Competition and Consumer Commission (ACCC) reviewed some of these arguments in its recent inquiry into the competitiveness of retail prices for standard groceries.[7] The ACCC received evidence of incumbent supermarkets using planning objection processes to deter entry of new supermarkets in circumstances where the incumbent supermarket had no legitimate planning concerns.

1.23 The ACCC noted that whilst zoning and planning policies, including existing centres' policies, are designed to preserve public amenity, they can also act as an artificial barrier to new supermarkets being established. The ACCC noted that, broadly speaking, little regard is had to competition issues in considering zoning or planning proposals. Further, the complexities of planning applications, and in particular the public consultation and objections processes, provide the opportunity for incumbent supermarkets to 'game' the planning system to delay or prevent potential competitors entering local areas. The ACCC concluded that new ways of incorporating competition analysis into planning decisions should be considered.

1.24 Whilst the ACCC made its findings in relation to supermarkets, similar observations and conclusions could be made across a broad spectrum of industries.

7 Australian Competition and Consumer Commission, Inquiry into the Competitiveness of Retail Prices for Standard Groceries, July 2008

Questions

Should competition analysis be a part of local planning decisions?

How should competition be factored into the planning system, if at all?

Term of reference 1(f): Regulation of land use on or adjacent to airports

1.25 State and local governments have a clear role to regulate land use near an airport, however they have no role regulating land use and buildings within an airport on Commonwealth land. The *Airports Act 1996* (Cth) regulates, among other things, land use planning, building and the environment within an airport site. Section 112 of the Act states that land use planning and the regulation of building works on an airport operates to the exclusion of State and Territory legislation. The Commonwealth Minister for Infrastructure, Transport Regional Development and Local Government is the Minister responsible for the *Airports Act 1996*, and hence is the final determining authority for airport development and works.

1.26 The *Airports Act 1996* requires an airport lease holder to have:

- an airport master plan
- major development plans.

1.27 The master plan is a 20 year forward-looking document and must be renewed at least every five years. Among other things, it is intended to include the lessee's proposals for land use and related development, and assess environmental issues associated with the implementation of the plan. Prior to submission and approval from the Commonwealth Minister, the draft plan must go through a public consultation process.

1.28 Major development under the Act includes runways, new passenger terminals and other buildings and works over $20 million in value. Major development must not be carried out except in accordance with a Major Development Plan. These plans must be consistent with the approved master plan for the airport, and be exhibited for public comment before final approval by the Minister.

1.29 Hence the regulatory environment for land use planning and building works within an airport site is different to that immediately outside it.

1.30 State and local governments have no role in setting the noise contours (Australian Noise Exposure Forecast - ANEF) which are used as the basis for prohibiting noise sensitive types of land uses in areas likely to be affected by noise in the future. These contours are often set by the airport operator (using predictions based on the maximum aircraft movements) and approved by the Commonwealth. In addition, the Commonwealth sets height restrictions on development near airports. An airport operator can therefore influence the regulatory environment for land use planning and building works around an airport site.

Questions

Is the current arrangement for regulating land use on or near airports appropriate?

Is there sufficient involvement of the community within which the airport is located under the current system?

Term of reference 1(g): Inter-relationship of planning and building controls

1.31 In 1997 legislative changes to the development assessment system brought together development, building and land subdivision into one process under the EPA Act. Instead of obtaining separate development consent under the EPA Act and building approval under the *Local Government Act 1993*, the building approval (called a 'construction certificate') was moved into the EPA Act and became a subset of the planning approval.

1.32 These amendments also introduced 'private certifiers' into the system. Applicants then had the option to choose a council officer or a private certifier to issue the construction certificate and be responsible for monitoring the construction phase of a development. This meant that once a development application was approved, council may not see the building details of the development as the applicant could chose to appoint a private certifier to approve these aspects. As a result, councils have tended to require more details of the design and construction phase at the development application stage than previously. This has led to added costs and delays as well as duplication in the provisions of the development consent and construction certificate.

1.33 In 1997 two new development types, 'exempt development' and 'complying development', were introduced to help streamline the assessment process. These new development categories enable small scale, minor or routine development proposals to be carried out without an approval (exempt development) or with a complying development certificate from a council or private certifier (complying development). The complying development certificate integrated the planning and building approval into a single certificate.

1.34 The 1997 and subsequent amendments were designed to make the relationship between planning and building controls less complicated, more streamlined and efficient. However there has been an increased overlap in the matters prescribed in planning controls under the EPA Act and in building controls under the Building Code of Australia.

Questions

Is the current inter-relationship between the planning system and the regulation of building works appropriate?

Term of reference 1(h): Implications of the planning system on housing affordability

1.35 There are numerous factors which impact on housing affordability, many of which have no basis in the planning and land use system. However, the importance of efficient and effective planning processes and the influence they can have on housing affordability is widely recognised. For instance, inefficient and complex planning processes can result in long delays in granting development approval, contributing to high development costs.

1.36 The planning system has ramifications for a wide range of issues that affect housing affordability, including:

- The zoning of appropriate land.
- The provision of infrastructure such as transport.
- The supply and timing of new land release areas and the level of 'infill' development in existing suburbs.
- Who pays for the provision of infrastructure in newly created suburbs?
- The shortage of skilled planning professionals, contributing to development approval delays.

Questions

What is the impact of the planning system on housing affordability?

What changes, if any, need to be made to the planning system to improve housing affordability?