



24 June 2021

Principal Council Officer – Committees
Legislative Council, Regulation Committee
Parliament House
6 Macquarie St
Sydney NSW 2000

SENT BY E-MAIL TO Regulation.Committee@parliament.nsw.gov.au

Dear Regulation Committee:

Re: Inquiry into Environmental Planning Instruments (SEPPs)

We would like to thank you for the opportunity to give evidence during the hearing held on 7 June 2021 in relation to your inquiry into the making of environmental planning instruments (SEPPs) under section 3.29 of the *Environmental Planning and Assessment Act 1979*.

During the hearing, we took two questions on notice. We have written our responses to these questions below.

Question 1: What are the origins of the Henry VIII provision in the *Environmental Planning and Assessment Act 1979* (s 3.16)?

Section 3.16 of the *Environmental Planning and Assessment Act 1979* was previously numbered as section 28 in earlier versions of the Act. The language used in this section has remained unchanged since the time it was first enacted in 1979 with the exception that subsection 6 was added in 2009.¹ Notably, the *Environmental Planning and Assessment Act 1979* was subject to extensive debate before its enactment. Concerns were repeatedly raised about the broad scope of executive power in the bill.²

¹ The subsection clarifies that the section has effect “despite anything contained in section 42 of the *Real Property Act 1900*”: amended by schedule 3, s 3.7 of the *Real Property and Conveyancing Legislation Amendment Act 2009*.

² See, e.g., Hansard of first reading in the Legislative Assembly on 17 April 1979 from 4277-4289, 13 November 1979 from 2878-2894; Hansard of second reading in the Legislative Assembly on 14 November 1979 from 3045-3051, 15 November 1979 from 3115-3146, 20 November 1979 from 3254-3274, 21 November 1979 from 3345-3417; Hansard of Legislative Assembly in committee on 22 November 1979 from 3592-3593.

Since its enactment, section 3.16 (and its predecessor section 28) has been used by the Executive on many occasions to allow SEPPs to override other instruments and laws. Over the past ten years, the *Government Gazette* notes that the Governor has approved the use of this section in relation to SEPPs on more than 20 occasions:

1. State Environmental Planning Policy (Western Sydney Employment Area) Amendment 2020
2. State Environmental Planning Policy (Gosford City Centre) 2018
3. State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (North Wilton Precinct) 2018
4. State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (South East Wilton Precinct) 2018
5. State Environmental Planning Policy (Penrith Lakes Scheme) Amendment 2017
6. State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (Hawkesbury Growth Centres Precinct Plan) 2017
7. State Environmental Planning Policy Amendment (Heathcote Ridge West Menai) 2015
8. State Environmental Planning Policy Amendment (South Wallarah Peninsula) 2014
9. State Environmental Planning Policy Amendment (West Byron Bay) 2014
10. State Environmental Planning Policy Amendment (Minmi–Newcastle Link Road) 2013
11. State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Commercial and Industrial Development and Other Matters) 2013
12. State Environmental Planning Policy (Port Botany) 2013
13. State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (Blacktown Growth Centres Precinct Plan) 2013
14. State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (Camden and Liverpool Growth Centres Precinct Plans) 2013
15. State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (East Leppington Precinct) 2013
16. State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (The Hills Growth Centre Precincts) 2013
17. State Environmental Planning Policy Amendment (Gwandalan) 2012
18. State Environmental Planning Policy Amendment (Middle Camp) 2012
19. State Environmental Planning Policy Amendment (Nords Wharf) 2012
20. State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (Schofields Precinct) 2012
21. State Environmental Planning Policy Amendment (North Penrith) 2011
22. State Environmental Planning Policy (Major Development) Amendment (Edmondson Park South) 2011

It should be noted that in addition to SEPPs, this section is frequently invoked by the Executive when it prescribes local environment plans. There are dozens of such examples.

The use of this section by the Executive has sparked considerable litigation, mostly in relation to its interpretation and its application to the facts of various planning scenarios. Court judgments that have considered this section include:

1. *Wenli Wang v North Sydney Council* [2018] NSWLEC 122
2. *Bankstown Trotting Recreational Club Ltd v Chisholm* [2016] NSWCA 274
3. *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2011] HCA 27
4. *Barry Edward and Thelma June Harrington v Greenwood Grove Estate Pty Ltd* [2011] NSWSC 833
5. *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2010] NSWCA 214
6. *Street v Luna Park Sydney Pty Ltd* [2009] NSWSC 1
7. *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2009] NSWSC 717
8. *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2009] NSWSC 1157
9. *Lennard v Jessica Estates Pty Ltd* [2008] NSWCA 121
10. *Jessica Estates v Lennard* [2007] NSWSC 1175
11. *Cracknell and Lonergan Pty Ltd v Council of the City of Sydney* [2007] NSWLEC 392
12. *Natva Developments Pty Ltd v McDonald Bros Pty Ltd* [2004] NSWSC 777
13. *Yu v Ku-Ring-Gai Council* [2004] NSWLEC 569
14. *Maule v Liporoni* [2002] NSWLEC 25
15. *Chehab v City of Canada Bay Council* [2002] NSWLEC 220
16. *Horizons Corporations Law Pty Ltd v Rizons Pty Ltd* [1999] NSWSC 691
17. *Alfredo Giusti v Kathleen Grant* [1998] NSWLEC 68
18. *Edwina Doe v Cogente Pty Ltd* [1997] NSWLEC 115
19. *Doyle v Phillips (No 2)* [1997] NSWSC 238
20. *Marjen Pty Ltd v Coles Myer Ltd* [1996] NSWLEC 134
21. *Coles Supermarkets Australia Pty Ltd v K-Mart Australia Ltd* [1996] NSWLEC 135
22. *Marjen Pty Ltd v Coles Myer Ltd* [1993] NSWLEC 52
23. *Marjen Pty Ltd v Coles Myer Ltd* [1993] NSWLEC 53
24. *GH Wainwright v Canterbury Municipal Council* [1992] NSWLEC 96
25. *Alfredo Giusti v Kathleen Grant* [1988] NSWLEC 68
26. *Donald Crone & Associates Pty Ltd v Council of the City of Bathurst* [1988] NSWLEC 73

Question 2: What are the benefits to how SEPP-equivalents are scrutinised by Parliament in South Australia? Are there examples where the instrument has been improved or strengthened as a result of this process?

(a) Environment Protection Policies

As noted in our first submission, the *Environment Protection Act 1993* allows for the parliamentary scrutiny and disallowance of Environment Protection Policies (EPPs). The only formal disallowance motion under the Act in recent years was moved on 2 November 2016 in relation to the Environment Protection (Air Quality) Policy 2016. The motion lapsed due to the prorogation of Parliament.³

³ Note that there has been more activity in relation to the disallowance of regulations made under South Australia's *Development Act 1993* (ceased), *Native Vegetation Act 1991* and *Planning*,

Despite the lack of formal motions for disallowance, we suggest that the availability of scrutiny by the Environment, Resources and Development Committee (ERD Committee) and the potential for disallowance by either House of Parliament creates a strong incentive for the Environment Protection Authority (EPA) to carry out an effective consultation process before an EPP is finalised to avoid the risk of parliamentary rejection.

The Act also imposes consultation requirements. Before EPPs are made, extensive public consultation is carried out by the EPA with both the general public and all industry groups likely to be affected by the proposed policy provisions. Consultation is designed to ensure that all groups who may be affected by the new policies have the policies fully explained to them together with their rationale and justification. Because of this extensive consultation, some policies have taken a long time to be finalised. The EPA prefers to have a position where there is no opposition to new policies. With no opposition there is unlikely to be pressure on Parliament to reject or otherwise hold up the implementation of the policies.

(b) Planning and Design Code

The Planning and Design Code developed under the *Planning Development and Infrastructure Act 2016* came into effect in 2021. Before it was made, the Code was subject to extensive consultation and scrutiny by industry groups, local government and the community sector. This consultation and scrutiny occurred at two main points: (i) through the State Planning Commission; and (ii) through the ERD Committee after the Code was referred to it.⁴ Both stages produced changes to the Code that strengthened and improved it. We would again suggest that the Act's consultation requirements, along with the availability of parliamentary scrutiny and the potential for disallowance by either House of Parliament, creates a strong incentive for the government to ensure that stakeholders are consulted and have their views considered. We believe this results in a higher quality legislative product.

Pursuant to the Act, the minister referred parts of the Code to the ERD Committee in three phases over several years. The referrals were accompanied by reports of the State Planning Commission that detailed the consultative process carried out with stakeholders. The Commission's reports indicate that consultation resulted in changes that improved the Code. For example, the Commission's report in connection with phase two (rural areas) noted that it provided "recommendations as to how ... policy content can be improved prior to finalisation and potentially being given effect".⁵ It then

Development and Infrastructure Act 2016: in the past ten years, 20 disallowance motions for regulations made under these Acts have been introduced, with eight of those motions agreed to by the House, resulting in their disallowance. In general, regulations are made in South Australia according to the process set out in the *Subordinate Legislation Act 1978*, which does not impose any consultation requirements and permits regulations to come into force immediately. We would suggest that the lack of a legal requirement for meaningful consultation in relation to the development and making of regulations can create political controversy and a higher risk of disallowance (to the extent this mechanism is available for those regulations).

⁴ Note that the ERD Committee is essentially a policy committee as opposed to a scrutiny committee that is focused on technical considerations.

⁵ State Planning Commission of South Australia, *Planning and Design Code Phase Two (Rural Areas) Amendment Validation Process Advice Report Prepared under Section 73(10)(a) of the Planning and Infrastructure Act 2016* at 3.

recommended more than a dozen changes. The Minister later noted that the “outcomes of consultation informed the Amendment ultimately adopted”.⁶

During the course of its review in each phase, the ERD Committee received written submissions and heard evidence from a variety of stakeholders. For instance, in phase two (rural areas), the ERD Committee heard from 15 individuals and groups. It then made a series of recommendations to the minister based on the submissions received. A number of these recommendations were later accepted by the minister, resulting in further changes to the Code.⁷

Despite these consultation and scrutiny processes, a petition was referred to the Legislative Review Committee that was in part related to the adequacy of public participation in the process of developing and implementing the Code. That Committee’s inquiry remains ongoing.

We would be happy to clarify or expand upon any aspect of this written submission.

Thank you again for the opportunity to contribute to this important inquiry.

Yours sincerely,

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⁶ Letter from the Hon Vickie Chapman MP, Deputy Premier and Minister for Planning and Local Government to the Environment, Resources and Development Committee dated 25 August 2020.

⁷ Letter from the Hon Vickie Chapman MP, Deputy Premier and Minister for Planning and Local Government to the Environment, Resources and Development Committee dated 19 January 2021.