16 October 2009

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Mr. J. Young
Principal Council Officer
Parliament House
Macquarie Street
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Dear Mr Young,

Inquiry into the New South Wales planning framework

Thank you for providing the Housing Industry Association (HIA) with the opportunity to respond to the additional questions posed by members of the Parliamentary Standing Committee on State Development.

Please see the attached response to the questions received on 27 August 2009.

If you require any further information in relation to this submission, please do not hesitate to contact Ms Clare Larkin on 9978 3389 or c.larkin@hia.com.au

Yours sincerely
HOUSING INDUSTRY ASSOCIATION

Graham Wolfe
Executive Director

1. **Recommendation 2.2 of your submission is the provision for applicants to appeal to the Land and Environment Court against a decision to refuse a rezoning application.**

   Given that councils must strategically plan for their entire area, what do you imagine would be the grounds or factors that would support an appeal being upheld?

   A large number of the current LEPs in force have not been reviewed for over 5 years in some cases. Unexpected population growth and changes in manufacturing and commercial practices also continue to create a need to alter the residential/industrial/commercial mix. A 5-yearly review of council LEPs is not sufficient to keep pace with the fluidity of investment, nor can it deliver the certainty and efficiency that capital markets require. This signifies the need for an applicant appeal process.

   Under Clause 11 of the Environmental Planning & Environmental Regulation, the relevant planning authority (e.g. council) may recover the costs and expenses incurred in undertaking studies and other matters required in relation to the planning proposal requested by a zoning proponent. The proponent, as the financier of the planning proposal, should be entitled to a fair and judicial appeal process if the application is refused by the consent authority.

2. **You recommend that housing affordability should be incorporated as a distinct object of the legislation. If this was included, what would be the practical outcome be of its inclusion?**

   It must be noted that there is a clear distinction between "housing affordability" and "affordable housing". "Affordable housing" refers to housing for low to moderate income households at a price that they can reasonably afford which is usually provided by government funding through community housing groups.

   "Housing affordability" is the measure of our capacity to enter the housing market, which takes into account the factors of cost and supply of housing. A number of factors impact on housing affordability including - getting land to market faster, streamlining development approvals and simplifying planning requirements.

   One of the objects of the Environmental Planning & Assessment (EP&A) Act is to encourage *"the provision and maintenance of affordable housing".* The Standard Instrument – Principal Local Environmental Plan does compel councils to include housing affordability in clause 1.2 "Aims of the Plan". This compulsory clause of the Standard LEP provides councils with opportunity to insert their preferred "Aims of Plan". In most cases, councils do not refer to housing affordability as an "Aim" in their new pr draft LEPs.

   HIA would like to see housing affordability referenced in all councils LEPs under the clause 1.2 – "Aims of Plan". This way, councils would be required to consider the impact of the provisions of the LEP on housing affordability.

3. **In your submission introduction you note there is a need to involve the community in the development of strategic policy and subsequent planning rules and thereby limit third party intervention for complaints.**

   Involvement of the community is difficult at the strategic planning stage while individuals will always be interested in development occurring next door or nearby. Can you suggest how community involvement could be generated at the current planning controls?

In our submission, we highlighted the importance of involving the community at the strategic planning stage, however, the legislation provides the community with a third party appeal mechanism which is often used as a substitution to providing comments during the consideration of strategic planning outcomes.

The expense incurred by developers during the strategic and consultative process of a proposed development can be quite significant. Allowing a third party objector to step in and appeal a final decision based on a frivolous claim is unreasonable and extremely costly for those involved. The NSW third party appeals process needs to be considered in light of the cost and time delays incurred as a result of unsubstantiated third party appeals.

Even if a frivolous claim is knocked back by the court, the delays incurred by the financier of the proposed development can be financially damaging.

Removing a third party appeal process for development that complies with all of the planning controls and strategies for an area will force potential objectors to involve themselves during the development of the strategic policy and subsequent planning controls. Charging an administrative fee for third party appeals may also deter unsubstantiated objections and thereby force objectors to be involved in the formulation of the planning controls.

4. The following questions relate to the current appeal process through the Land and Environment Court:

Does the appeal process require reform?
As mention in (1) above, HIA urges the Standing Committee to introduce an appeal mechanism for rezoning applicants. Applicants for rezonings should have the right to be heard though the Land & Environment (L&E) Court.

The L&E Court is encouraging a conciliation approach to resolve matters more quickly and at less cost to parties. The conciliation process is working quite well but is being hindered by some councils who refuse to communicate and cooperate through a conciliation process and therefore proceed to a costly and time-delaying court appearance.

One area of concern is that after matters have been heard, some judges are taking a considerable amount of time to deliver judgements. The holding costs incurred by the applicants, whether it is the mum and dad or a large developer is considerable.

Another area of note is where councils are using the court process to gain funds. For instance, where amended plans are sought during the court process leading up to a hearing, the court rule is for the applicant to pay council's costs to assess the plans a second time. The legislation allows the council to decided what those costs will be, it is not prescribed by the legislation. Recently, the Sydney City Council attempted to claim costs in excess of $23,000 for such an assessment. Their claim obviously leads to a new dispute.

Reform is needed to cap the level of costs of assessment through legislation or that the Court be able to nominate the costs at the time that it considers whether the amended plans are reasonable and should be accepted. The Court will usually do this if it can be shown that the plans maintain substantially the same development and that the impact perceived by the original development is reduced.

- **Are L&E Court decisions consistent?**

  Since the McClellan CJ judgment on Stockland v Manly Council in 2004, the Court has been much more consistent, however at the Commissioner level which deals with the majority of the development application appeals, Commissioner's still have a difficulty in interpreting what consistency is required of them. In many cases, the Commissioner has

believed that the facts of a case are similar and therefore their decision must be similar, whilst ignoring that the planning regime may or may not be similar and it is consistence, in dealing with the relevant planning regime, that is required.

- **Does there need to be a mediation step prior to involvement of the L&E Court?**
  There is no need for this as this level of mediation is allowed for by way of section 34 of the Land and Environment Court Act, being conciliation conferences. As stated above, the real problem is council deciding not to participate in such conferences. It would be helpful if the council was forced to participate and that such participation was by way of an independent person representing council, perhaps a representative from planning panels in this regard.

- **Is the cost of appealing to the Court prohibitive? Does the cost dissuade some developers from appealing decisions?**

  The process allows for a range of options in appealing decisions. It can be expensive due to the amount of work required to be put into the appeal by lawyers and experts. Where an issue is raised, the court process inevitably requires an expert to prepare evidence and to present that evidence in Court. This and the lawyer's involvement in running the appeal can lead to quite an expense, however the expense is sometimes insignificant in light of the costs of development involved in these matters.

- **Is the time involved in taking a matter to the Court considered appropriate by the HIA?**

  At the moment, a matter can be commenced and completed within 5 months. Decisions usually take a further 4 to 6 weeks although as indicated above, there are instances where decisions extend to more than 6 months, which is unsatisfactory. Whilst HIA recognises that the majority are dealt with in less time than council takes to assess them, an improvement in the turnaround times would provide a more cost effective approach by reducing the unnecessary delays incurred by applicants.

- **Does there need to be a stronger legislative emphasis placed on mediating development application disputes at the local level?**

  HIA believes that stronger legislative emphasis needs to be placed on mediating development application disputes at the local level, however, applicants should have the right to proceed directly to Court in any case.

  Council's stand in the way most of the time, refusing to participate in mediation. It would be helpful if a council's position was reviewed at the mediation stage and an independent person, as mentioned above, took the place of council as the decision-maker, rather than a council officer who is beholden to councillors or resident activists who make more noise that the voice of reason.