

**Submission
No 51**

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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Date received: 16/02/2009



Manly Council Submission to the draft Standing Committee on State Development 2008 Inquiry into the NSW Planning Framework

Manly Council thanks you for the opportunity to provide a submission as part of the NSW Legislative Committee's Standing Committee on State Development's Inquiry into the NSW Planning Framework ("SCSD Inquiry").

Manly Council's submission considers a range of planning concerns and difficulties that arise in NSW from the legislative inconsistencies, the inability to raise revenue for infrastructure, increased cost burdens on local government, as well as a number of planning, environment, heritage and biodiversity issues as relevant to the Manly Local Government Area.

Therefore, this submission provides comments in the paragraphs below on the SCSD Inquiry's terms of reference:

- ***The need for further development of the NSW planning legislation over the next five year period and principles that should guide such development:***

As stated in the SCSD Inquiry's November 2008 Discussion Paper, the Environmental Planning and Assessment Act (EP&A Act) is the main vehicle for planning in NSW and provides a comprehensive planning scheme that stipulates and guides the planning and development assessment process. This paper effectively summarises in a table many of the recent reforms that include major infrastructure projects (Part 3A) provisions, new State Environmental Planning Policies (SEPPs), such as SEPP (Major Projects) 2005 provisions determined by Minister for Planning and a new planning and development standard local environmental plan template,

As the SCSD Inquiry recognises the EP&A Act has undergone significant revision and reform since its commencement in 1979 with the most recent changes been legislated in June 2008 as part of the EP&A Amendment 2008. Much of this has yet to commence. For instance, the NSW Government's SEPP (Exempt and Complying Development Codes) 2008 have introduced significant changes to development procedures via a new NSW Housing Code that will eventually override Council's local development and planning controls and may also create substantial new administrative, interpretative and planning workloads in the lodgement and determination of complying development certificates.

The implications of the recent reforms have yet to be properly identified and tested at local government level. The new level of controls may contribute additional complexity to the planning system. Council's existing controls have been tried and tested over many years through its development assessment in a manner which ensures protection of Manly's environmental sensitivity including its relationship to Sydney Harbour.

As well, a number of amendments to the EP&A Act during 2008 appear to have resulted in an increasing concentration of decision-making power and control in the NSW Minister for Planning.

Principles that should guide the further development of the NSW planning legislation over the next 5 year period should include:

- Consistency of legislation – between Commonwealth and State, and within the NSW agencies that have input to planning and development matters;
- Reduction in State and Federal Government layers of development control and increased understanding and streamlining, including simplification of planning and development local and state controls; reducing complexity so it becomes clear to the 'user' what and how the variety of planning legislation applies at the individual property level;
- Reduce the level of cost and policy shifting from state government to local government. This especially concerns Manly Council and other established metropolitan LGA's facing significant infrastructure maintenance costs and limited by rate pegging, reduced Financial Assistance Grants, and increased State charges;
- Any shift in policy which increases the roles and responsibilities of local government should be accompanied by a corresponding funding, resources and/or grant provision;
- Local government should be supported by appropriate state funds to develop appropriate records and data management systems encompassing IT computer, Geographical information systems and data management that accurately provide data, statistics and manage and track planning in a local government area. These should also be compatible with other government authorities and across the various levels of government to assist in information sharing on the broad range of environmental matters;
- Continued progression with the NSW planning reforms in relation to the standard LEP template is hindered by the issue of ongoing versions of this template. As a result local government is constrained in its ability to plan for local variations and future development preferences; however, greater ability to 'share' LEP and DCP resources between Councils and state funding for improved LEP/DCP and GIS capabilities; and
- Less reliance on state control of planning and development control powers, and more emphasis on local character and the strengthening and development of local development controls; and
- Greater emphasis be given to environmental sustainability with each level of government being required to identify the proposed actions through the Community Strategic planning and subsidiary action plans; and
- Agreement from State and Commonwealth governments to provide adequate funding to Local government give effect to agreed sustainability actions to address global warming and climate change imperatives in each local government area.

- ***Duplication of processes under the Commonwealth Environment Protection and Biodiversity Act 1999 and the NSW Environmental Planning and Assessment Act 1979 and the NSW Heritage Act 1976:***

There is existing confusion and duplication between the environmental and heritage provisions of the Commonwealth Environment Protection and Biodiversity Act 1999 and the NSW Environmental Planning and Assessment Act, 1979, the NSW Heritage Act, 1976 and other relevant State legislation.

This is most apparent on lands that are near, adjoining or located on Commonwealth land, or within National Parks (such as Sydney Harbour National Park), and confusion regarding the layering of separate heritage controls (National Heritage List, Register of the National Estate, and Commonwealth Heritage List, State Heritage register and local Listings under LEPs). Development on these lands becomes even more complicated if the developments become state significant or subject to approval by the Minister for Planning under its recently strengthened state planning powers.

In NSW the planning and heritage controls are given effect variously through the EP&A Act as well as SEPPs (previously identified); Regional Environmental Planning Policies (such as Sydney Harbour REP 2005), the NSW Heritage Act and Local Environmental Plans. A simplified system of heritage listings and strengthened controls over development is required to protect the State's environmental heritage. There is real concern here that the array of legislative layers has, and will continue to result in complexities that ultimately threaten the heritage significance that the legislation set out to protect (as evidenced in the recent removal of St Patricks Estate listing as stage significant development under amendments to Sydney Harbour REP 2005.)

- ***Climate change and natural resources issues in planning and development controls:***

The SCSC Inquiry's discussion paper considers the relevance of climate change to the development assessment process as an 'evolutionary phase', as well that these issues are being tested in the courts, in NSW and interstate jurisdictions. For example, the NSW 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 (*Walker v Minister for Planning and Ors* [2007]NSWLEC741. In the NSW Court of Appeal, the lead judgement of the decision found that failure to take into account ecological sustainable development could be considered evidence of failure to take into account the public interest. However, the judgement determined that the issue of climate change could be deferred from the Strategic planning phase to the development approval. The logic of this decision is unfathomable.

It is difficult to accurately estimate the potential impacts of climate change at a local government level, and how this should be reflected in planning and development controls. However, research as developed by groups such as the Sydney Coastal Councils group indicates that metropolitan coastal councils will suffer effects of possible sea level rise, increased incidence of local flooding, and one-off storm events (with various impacts from falling trees, hail, lightning, flooding of roads). There is also expected to be greater numbers of bush fire and increased temperatures. Further, the health and social effects are also likely to demand resources from local government to address needs within the local communities.

While, there has been some program funding support from Commonwealth and State departments and authorities towards research, and some programs to produce better data and management, they remain separate from the State planning and development controls. The State Environmental planning legislation does not specifically address global warming and climate change.

Existing planning and development controls do not sufficiently control development related to possible climate change impacts in existing LEPs and DCPs, and the various planning and development controls of the Environmental Planning and Assessment Act (EP&A Act). For instance, the information that is available is related to flood studies as required by planning and development controls as well as various section 117 directions under the EP&A Act, as well as likelihood of acid sulfate soils, bushfire controls, threatened species legislation (vegetation and plant).

As well, existing bushfire controls are produced in accordance with the EP&A Act requirements as well as NSW Rural Fire Service and map vegetation into categories with sufficient buffer zones to protect property. Development proposals are required to take into account these controls, and the impact of the development on the bush fire propensity.

However, the increased incidence of extreme temperature events, or runoff/hail/snow from severe storms are difficult to predict or accurately plan for. The likelihood of property damage, loss of life, etc. are known as 'insurance risks' that insurance assessors firms struggle to predict.

There are problems at the local government with undertaking such studies, examination of possible impacts and having sufficient resources to accurately plan for future climate change impacts.

There could be greater consideration at a State level (through a State Environmental Planning Policy development on climate change) to reject residential, commercial and industrial development proposals that are likely to increase climate change risk levels (e.g loss of vegetation, lack of soft landscaping, increased use of concrete and hard surfaces, badly designed properties without consideration of solar/wind or alternative energy sources).

State leadership and directions on environmental/ climate change actions that can be undertaken at a local level to provide research, funding and development of local planning and development controls for climate change should be encouraged. These might provide the basis for councils to specifically assess future development proposals and risks to property in respect of impacts arising from climate change (flooding, sea level rises, bush fires, and storm damage).

In the current circumstances new State legislation may be required to override other legislation in order to respond to the broad range of issues.

- ***The implications for the Council of Australian Government's (COAG) reform agenda for planning in NSW:***

Manly Council acknowledges and welcomes that the Council of Australian Governments (COAG) and the Local Government and Planning Minister's Council have been increasingly active participants in the land use planning policy sphere.

It is noted that many of the recent reforms to the EP& A Act in regard to development assessment have reflected discussions and consideration at a Federal level. For instance, the 1998 Development Assessment Forum was formed with membership from the development industry, planning professions and three tiers of government. Its mission has been to encourage the harmonization of Australian development assessment systems through the promotion of leading practice regulatory reform, a blue print for jurisdictions for a simpler approach to development assessment, and defining leading practices that the system should exhibit. These measures are considered important for reform of planning and "harmonizing" the planning and development control systems throughout Australia.

However, there are other impacts of reform that the COAG system does not recognize as important. Namely, the need for greater community involvement in strategic planning and development matters. As well, the costs of reform are significant on local government and often legislation for simpler processes is imposed without corresponding financial support or cost/benefit analysis for the local level. The NSW reforms to improve LEP plan making and monitor approvals, and increase timeliness at Local and State approvals has generally been accepted, many NSW Councils, including Manly Council, find the pressure to produce new corporate, environmental, social and integrated strategic plans, statutory plans and reporting and monitoring development within the imposed 5 year timeframe a resource and funding burden. In addition there has been insufficient consultation on the specific impacts of many of the State imposed planning reforms. As well, there appears to have been a considerable lack of resources at the NSW Department of Planning level to assist the reform processes that benefit local councils apart from planning reform fund grant applications that are project based and not commensurate with the funds actually provided for these purposes from local developments (i.e. Council grant funds received do not match Council collected planning funds).

- **Appropriateness of considering competition policy issues in land use planning and development approval processes in NSW:**

The application of the EPA Act can influence or restrict competition, and consent authorities consider competition policy issues when undertaking strategic planning, changes in landuse and determining development applications. For instance the SCSD Inquiry's discussion paper refers to the Australian Competition and Consumer Commission's (ACCC) recent review of competition issues in its recent inquiry into the competitiveness of retail prices for standard groceries. The ACCC received evidence from supermarkets and planning objection processes and their effect on deterring entry of new supermarkets and the legitimacy of the various planning concerns. 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. Whilst the ACCC made its findings in relation to supermarkets, similar observations and conclusions could be made across a broad spectrum of industries.

It is questionable to what extent 'competition policy' and its economic analytical tools are appropriate in assessing the effectiveness of planning and development

legislative controls. Competition policies have commonly been used to assess government or industry operations and their performance, or transition from government ownership to private enterprise. Such policies have been used to assess the performance of NSW and Commonwealth owned corporate organizations such as Sydney Water, Sydney Airport and Telstra (and many other government structures) to consider the best options for their transition to private enterprise and associated capital and fund raisings. However, such policies are not necessarily appropriate to provide a framework for analysis of the planning and development environment.

As well, some local planning and development codes (such as the Manly LEP and DCP) and controls specifically require particular market assessments to enable development to occur. For instance, bulky goods industries are permitted in industrial zones in accordance with the Manly LEP 1988 (clause 28) providing certain tests about land availability, and detriment to local businesses and centres are required to be satisfied in order for the development application to proceed. As well, as part of the rezoning process and future business, industry and employment development, the NSW Department of Planning considers the effect of applications in terms of centres hierarchies, as well as existing uses established in industrial areas and employment centres. Assessment of new proposals also considers these in the context of definitions in the 2005 NSW Metropolitan Strategy and draft 2007 North East Subregional Strategy.

However, the competition framework may be useful to measure the costs and benefits of planning and development regulations, and the numerous taxes and charges that apply to both the residential and property development within NSW and the extent to which this impedes or enhances market behavior. Previously, this competition framework was used for economic evaluation of the industry structures, such as the competitiveness of monopolies, oligopolies and private competition models as they might benefit public organizational structures (such as the feasibility of a previously government owned organization such Telstra and selling public /government government ownership and raising capital via share ownership).

- ***Inter-relationship of planning and building controls:***

As the SCSD Inquiry's discussion paper recognizes there have been a number of legislative changes to the development assessment system in the last 10 years that have brought together development, building and land subdivision processes into consideration under the EP& A Act. Building approvals, or construction certificates have become a subset of the planning approval system. As well, private certifiers have been brought into the planning system as applicants have a choice in choosing a council officer or private certifier to issue construction certificates and be responsible for monitoring the construction phase of the development.

As well, there is considerable overlap between planning and building controls in the EP& A Act and building controls under the Building Code of Australia. As well, there is community confusion and lack of inconsistency with the various planning and building controls at local government (planning and development LEP and DCP controls) and Building Code of Australia controls at State level and this is further complicated through private certification for complying development. This may potentially be further exacerbated by the new SEPP 2008 Housing Codes policies and provisions.

- ***Implications of the planning system on housing affordability:***

There are few mechanisms available for local government control on housing affordability. Local Councils remain unable to control local market behaviour, and apart from well intended Local Environmental Plan objectives, and there remains little that Manly Council can legally do to ensure the provision of affordable housing in the Manly area. For instance, while Council can approve a variety of dwelling types, the economic market determines the price at which dwellings are ultimately sold. There are only a few Councils in NSW that can require affordable housing contributions from developers through section 94 of the EP& A Act, and through State Environmental Planning Policies.

Conclusion:

The implications of the NSW planning reforms are far reaching and there is a concern that the reforms have not been fully consulted with local government and the community. As a result they do not adequately address local issues and variations in topography and environmental and heritage values. These aspects are critical to the long-term protection of the environmental and cultural heritage and warrant equal weight with economic concerns.