Submission No 50

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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Our Ref: JCC:SRC:EPD2009

12 February 2009

Ms Rachel Simpson
Director
Standing Committee on State Development
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Simpson

Inquiry in New South Wales Planning Framework

In responding to the Standing Committee's call for submissions on issues relevant to trends in planning and the principles that should guide further developments in planning legislation, the Law Society's Environmental Planning and Development Committee is pleased to provide you with copies of submissions made by the Law Society committees last year in relation to improving the New South Wales planning system.

The Environmental Planning and Development Committee believes that there is a continuing need for systematic review of the New South Wales planning regime and, as recognised by the Council of Australian Governments reform agenda, there are imperatives for national compatibility. The desirability of providing efficient and environmentally sound planning and development control was a particular focus of the attached submissions and I commend them to you.

Yours sincerely

Joe Catanzariti
President

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13 February 2008

Planning Reforms
Department of Planning
GPO Box 39
SYDNEY NSW 2001

Via Email: planningreform@planning.nsw.gov.au

Dear Sir

Improving the NSW Planning System – Discussion Paper (Discussion Paper)

The Law Society thanks you for the opportunity to comment on the reform proposals contained in the Discussion Paper. The Paper proposes some of the most far-reaching changes to the State's planning system in thirty years.

The Discussion Paper has been considered by each of the Society's Environmental, Planning and Development Committee (EP&D Committee), which is comprised of senior practitioners who are experts in environmental, planning and development law and the Property Law Committee, which is comprised of senior property law practitioners.

Due to time constraints, the Council of the Law Society has not reviewed the Discussion Paper and the comments that follow are the Committees' comments alone.

The Committees have each prepared separate comments on the recommendations in the Discussion Paper. These comments reflect the different orientations of these Committees.

The Committees agree, however, that the following issues reflect their major concerns with the proposed reforms:

Further consultation

In its Discussion Paper, the NSW Government has given a very broad outline of its proposed reforms. More comprehensive details of the proposed changes are required to enable commentators to properly evaluate their efficacy.

It is noted that an Exposure Draft Bill will be prepared early in 2008 with the intention that final legislation will be enacted by mid 2008. It is proposed that procedural changes not requiring legislative change will also be commenced during this period. Both Committees stress that it will be of great benefit to the integrity of the reform process if an appropriate period of consultation is allowed before the final version of the Bill is introduced into Parliament.

Need for democratic accountability and participation of the community in the process

The Committees consider that a number of the changes proposed in the Discussion Paper restrict rights of public participation in respect of many aspects of planning and environmental assessment.

One example of this is the Committees' concerns with the expansion of the proportion of development that is to be dealt with as exempt and complying development. The proposed process does not appear to place sufficient value on the right of the community to participate in the planning process. The Paper's references to "minor" residential development fails to recognise that for the average landowner, their property represents their major asset. The amenity impact of changes to neighbouring properties is of enormous significance to the property owner.

The potential for conflict of interest, lack of accountability and lack of transparency are evident in a number of areas, some of which are highlighted below.

Planning Assessment Commission

The Committees are concerned that the proposed Planning Assessment Commission (PAC) will be given powers to make decisions of enormous significance, but will not be subject to Parliamentary or community scrutiny. The proposal to limit rights of appeal where the PAC has determined a project is not supported.

State significant projects are better served by the existing system where the Minister is the consent authority. Any Panel or Commissioner should be advisory only.

Joint Regional Planning Panels

The proposed new hierarchy of additional decision making bodies introduces levels of complexity and the potential for a conflict of interest, a lack of accountability and a lack of transparency.

The proposal that the Chairperson of the PAC will appoint State members is not supported. State appointees of panels should be appointed by the Minister, consulting with Cabinet. In that manner, accountability and the democratic process are better safeguarded.

Local Environmental Plans: Approval and Exhibition

Again, the Committees are of the view that accountability is safeguarded if the Minister continues to be responsible for the sign off of local environmental plans.

It is fundamental that the local environmental plan continues to be publicly exhibited as a draft.

Reduction in Rights of Appeal

A number of proposals foreshadow a limitation of the rights to seek relief, for example, in relation to appeals from determination of PACs and complying developments. Any restriction to rights of appeal is opposed.

Exempt & Complying Development and the Certification Process

One of the Committees' main concern with the expansion of the kinds of development which can be dealt with as exempt or complying is the combined effect of this expansion with the proposal to further expand the private certification regime. The problems with the current system are well known. These problems will only be exacerbated by the proposed expansion of development that is to be dealt as exempt and complying development. A default mandatory compliance code must be backed up by a robust certification regime.

There is a pressing need for the certification system to be revised to address concerns in relation to conflicts of interest and to clarify responsibilities and sanctions.

Planning Arbitrators

The EP&D Committee opposes the establishment of planning arbitrators referred to in A7 and A18.6 as the Committee considers that it would add an unnecessary level of bureaucracy and that there is real potential for conflict of interest.

The Property Law Committee is also concerned about the potential for conflict of interest, but considers that this could be addressed if planning arbitrators operated under the umbrella of the existing Land and Environment Court system - that is, if the process is managed by the Land and Environment Court and a right of appeal is retained.

Strata Management Reform

The EP&D Committee supports proposed recommendation S5 that legislation be amended to prevent a building developer, original owner or related party from exercising voting rights (greater than what they presently own) through contractual rights with subsequent purchasers.

The Property Law Committee agrees generally that it is more appropriate for proxies to be restricted to owners of lots (rather than purchasers under a contract to purchase) as owners can be presumed to have the means of obtaining the knowledge necessary to make an informed decision.

While the Property Law Committee agrees that a general unlimited proxy is not acceptable in these circumstances, proxies "for purpose" could be, i.e. proxies that are limited to exercising a vote only in relation to a matter and in the manner described in the proxy form itself.

The Property Law Committee, however, has outlined an alternative proposal which aims to provide a developer with the flexibility to complete a complex development, while at the same time allowing a purchaser of a strata lot to be fully informed of any future steps that the developer is authorised to make after registration of the strata plan.

Submissions

A more detailed consideration and commentary by each of the Law Society's relevant Committees is annexed as follows:

1. A submission from the Law Society's EP&D Committee.
2. A submission from the Law Society's Property Law Committee

Conclusion

Once again, the Law Society urges a reconsideration of the timetable for implementation of the planned reforms. The Society requests, in particular, that an appropriate consultation period is provided for comment on the Exposure Bill, once released. This is imperative given the major impact that the proposed changes are likely to have on the planning system.

If you have any questions in relation to this letter, kindly contact Ms Liza Booth in the first instance on telephone 9926 0202; email: ljb@lawsocnsw.asn.au.

Yours faithfully

Hugh Macken
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Environment Planning and Development Committee

SUBMISSION

February 2008

Improving the NSW planning system

Department of Planning

Discussion Paper
November 2007

CONTENTS

About the Law Society of New South Wales and its Environmental Planning and Development Committee

The Law Society of New South Wales *is the professional association representing the* solicitors of New South Wales. The Law Society has two primary responsibilities: it acts as the licensing and regulatory and also represents the interests of its members. The role of the Society is summarised by the objectives set out in the Memorandum and Articles of Association, which include:

- To consider, originate and promote reform and improvements in the law;
- To remedy defects in the administration of justice;
- To effect improvements in administration or practice;
- To represent generally the views of the profession;
- To preserve its integrity and status;
- To suppress dishonourable conduct or practices;
- To consider and deal with all matters affecting professional interests of members of the Society.

The role of the committees of the Law Society is to review new legislation, both State and Federal; monitor law reform proposals and other developments in law and practice; and provide a practice support function by responding to practitioners' enquiries on matters of law and practice.

The Environmental Planning and Development Committee is charged with the responsibility to consider and deal with any matters relating to or associated with environmental planning and development law, and to advise the Council of the Law Society on all issues relevant to that area of practice. Membership of the Committee is drawn widely from experienced professionals whose expertise has been developed variously in representing the interests of local government, government instrumentality, corporate and private clients.

This submission contains the considered views of the Environmental Planning and Development Committee.

EXECUTIVE SUMMARY

Detail giving effect to the proposals is required

In its discussion paper, the NSW Government has given a broad outline of its proposed reforms to the ways plans are developed and implemented. However, commentators are constrained in providing the necessary feedback sought by the paucity of supporting detail for many of the proposed recommendations. It is noted that an exposure draft bill will be prepared early in 2008 and it would be of great benefit for the integrity of the reform process were an appropriate period of consultation allowed before the final version of the bill is introduced into parliament.

Similarly, many of the procedural reforms outlined in the discussion paper are scant on detail and it is again requested that further information be released for public consideration before any procedural changes are implemented.

Removal of rights to public participation

Part 3A to the Act has severely restricted the rights of public participation in respect of many aspects of planning and environmental assessment and a number of the changes proposed in the discussion paper continue this theme.

The Environmental Planning and Development Committee, whilst supportive in theory of measures that will simplify the planning process, is opposed to changes to this system that concentrate more power in the hands of the Minister for Planning and erode the rights of members of the public to participate in the process.

"One size fits all" approach

While creating consistent criteria for assessing re-zoning proposals and discouraging non-strategic spot rezoning would be beneficial and improve public confidence, sufficient flexibility will need to be retained to accommodate special controls relating to special circumstances

Similarly, regard must be given to the significant impact of development with appropriate regard being given to the demographic, regional and natural resource implications, together with assessment of the effect on sensitive environments.

Certification Process

Particular concerns arise in relation to the conflicts of interest issue and proposals aimed at clarifying responsibilities and sanctions. There is pressing need for the certification system to be revised to provide an independent body with responsibility to issue certificates.

Reduction in Rights of Appeal

A number of proposals foreshadow a limitation of the right to seek relief, for example in relation to appeals from determinations of PACs and complying developments. Any restriction to rights of appeal is opposed.

COMMENTARY

CHAPTER 3 CHANGING LAND USE AND PLAN MAKING

Summary

- **Lack of detail in proposals.**
- **Good planning is essential. All else flows from this.**
- **Undermines objects of EP&A Act which has as one of its objects public participation and any attempts to move away from this are opposed.**
- **Paper focuses on processes rather than outcomes.**
- **Demographic pressures/regional dispersal/natural resources planning must be a focus.**

3.1 Introduction

It is perhaps self evident that the process of strategic planning and plan making must ultimately be rendered into a document, the local environmental plan, that is robust and relevant to the local area planned for. In the process of creation of such an instrument, it is also apparent that lawyers are called on to provide the legal framework that is called for in the Environmental Planning and Assessment Act 1979 (as amended). However, inevitably, lawyers are constrained to provide legislation that springs from the planning work that is prepared by planners and, therefore, they are not in a position to achieve appropriate and relevant plans, unless the material they work with is capable of achieving such a result.

From a legal perspective, inadequate and poorly researched environmental studies and strategic plans can only lead to less than useful statutory plans that no amount of careful legal drafting can rescue. The creation of well thought out and relevant local environmental plans constitutes the crucial initial step in producing a local environment which satisfies the aspirations of the local population. Moreover, without such an approach, it can be anticipated that a poorly constructed plan can only become a source of constant disputation relating to implementation and development control. Indeed, efforts to improve the administrative functions in the State of New South Wales can be expected to founder unless the underlying planning work has been properly and relevantly undertaken.

Accordingly, it is maintained that much of the thrust of the reform proposals constitutes "putting the cart before the horse" and far greater attention needs to be focussed on the initial work of planning that has so often in the past been omitted, or undertaken on a minimal basis in local areas. If major reforms are to be applied to the legislation of the late 1970s, then a particular area of concern is the undertaking of the preparatory work required to achieve robust and generally acceptable statutory plans that will be accepted by the public in a particular locality.

3.2 Public Participation and Plan Creation

As a counterpoint to these observations, it is contended that a fundamental aspiration of the Environmental Planning and Assessment Act 1979 was to ensure that the public to be affected by the intended statutory plan would be adequately informed and involved in the process of plan making. Again, although necessitating a significant expenditure of effort and funds, achieving valid public participation is seen as an essential component of a plan that relates to the needs and aspirations of communities affected by the ultimate statutory framework.

In responding to this latter concern, it is apparent that adequate resources and staff are an essential component. Expecting local government to rise to such a challenge when financially constrained by capped local rates can only lead to the poor planning referred to above. Evidently

this situation could be met in a number of ways and the reform proposals appear to embrace at least one such way. The most clearly articulated is the proposal that mobile expert groups of experts should be set up to assist specific local government authorities to undertake the high level of plan making that is fundamental to achieving a satisfactory environment.

However, in using external consultants or a "flying squad" of professionals appointed by the Minster and "parachuted" into a local authority to take over the responsibility for creating a modern plan, there are inherent dangers. Perhaps the most critical danger is that such an external expert group does not become fully aware of the local characteristics of a locality in deriving the basic strategy to apply.

The proposal to create consistent criteria for assessing re-zoning proposals and discouraging non-strategic spot rezoning would be beneficial and improve public confidence in the system.

The proposal to exempt 'minor' amendments to LEPs (other than those already covered by s 73A) from exhibition is not supported. This requires a value judgment as to what is a minor alteration in advance of the public participation process which should inform such a judgment. Something which seems minor in theory (examples which are given in the discussion paper are addition of a permissible use to a land use table and an adjustment to zone boundaries) may have a significant impact on the character and amenity of a neighbourhood. Moreover, a change which seems minor on its face may have unintended consequences. An LEP is a foundational planning document which affects people's rights to develop their land, land values and amenity. Even minor changes warrant public exhibition to ensure that people who are affected and who are concerned about the character of the neighbourhood can have their say. Notification of adjacent landowners only is considered inadequate.

Introducing an earlier stage of public participation based on the intent of a proposed LEP is supported. However, this should be in addition to rather than a substitute for exhibition of the document as drafted. Exhibition of a draft LEP provides a valuable opportunity for the community to comment on the detail of the proposed changes, in particular the wording of provisions which may have unintended consequences. This provides a valuable input into the process of fine-tuning the LEP and reduces the need for minor amendments down the track.

3.3 Standardised Land Use Definitions

The danger of creating a plan in the absence of a full appreciation of the particular characteristics of a locality has the potential to be aggravated by the proposal to standardise the fundamental tools of zoning control - through the structure and definition of uses that may apply in particular zones. The imprecision of some of the land use definitions contained in the template proposed by the Minister is seen as providing an intrinsically inadequate framework to allow local authorities to respond to the special circumstances to be found in the urban, rural and coastal areas of the State of New South Wales. In this, the notion explicitly criticised in the reform proposals as involving a "one size fits all" approach, is surely just as relevant to land use definitions and, ignoring the need for special controls to relate to special circumstances, constitutes the flouting of a basic precept in city and regional planning. This is that the circumstances should dictate the form of planning control that should apply in a particular locality.

In regard to this latter proposition, examples of special circumstances that spring to mind immediately are locations exhibiting high conservation value, both in terms of historic building and the natural environment. Equally, the developing problems of sea shore recession to be found all along the coastline of New South Wales can only become worse with rising sea levels predicted by scientific assessment of climate change factors. Such inherent instability of littoral areas of the State must surely be met by the creation of special purpose zones in which recession control can be related to exclusion of unsuitable uses.

3.4 Demographic Pressure and Regional Dispersal

As is apparent from the discussion paper, the principal thrust is to improve and expedite the undertaking of development assessment and to simplify the associated administrative process and the range of uses that may be subject to development control.

However, as a strategic issue that could be seen underlying much of the pressure to be relieved by the reforms is the reality of population growth in Sydney, mirrored by the need to support and expand rural regional locations in the State of New South Wales.

Evidently this is an issue that logically one would expect to see developed in the State Plan that now applies but, at the same time, specific elements of the reform proposals could and should be directed to the implications of enhanced population away from the Sydney Region.

Of relevance are access to infrastructure and telecommunications facilities and the location of air services on the one hand and special purpose business zones to accommodate regional Information and Communications Technological, ICT, facilities. This issue deserves special consideration in the reforms foreshadowed.

Given the self-evident changes to business and commerce in the last ten years and the changing operations in the workplace, moderated by ICT, regional dispersal is an issue that needs consideration, not only in the local planning process and administration, but also at the State level in regard to strategic planning considerations. Again, the assessment of the infrastructure of services, roads, air services and the broadband Internet are issues that need careful consideration and integration in any local planning endeavour as a counterpoint to the exercise of development control.

In this general context, it is apparent that since 1979 and the advent of the new planning approach in New South Wales, socio-economic processes have had only indirect concern in the development of local plans. The start of the 21st Century may represent a time in which it has become opportune to elevate such issues to a more prominent part of the strategic plan making process, not simply as a reflection of local volition alone but by specific legislative requirement.

3.5 Natural Resource Planning

As referred to above, planning for natural resource issues is seen to spring naturally from a concern for sensitive and endangered environments and associated fauna. Again such concerns may be seen as logically supporting special purpose zones and definitions. However, more importantly, such concerns are seen as better satisfied as part of the prelude to the exercise of strategic planning.

Leaving environmental assessment of sensitive areas to post-hoc definition and associated disputation, often in the Land and Environment Court, is not seen as a rational expression of strategic planning. Consequently, appropriate studies and research are suggested as part of the necessary foundation for a robust and publicly acceptable statutory plan.

With the appreciation that a new process of land development, associated with the concept of Carbon Trading, is in the process of development, careful assessment and relevant controls represent a new and problematic issue in planning for particularly the arable parts of the State where farming inevitably comes into conflict with the desire to conserve natural environment.

Moreover, land capability and arability constitute critical issues in the control of rural land, as do pressures for urban fringe growth, that may become ever more obvious as the forces of natural population dispersal expand in future years. In this, planned dispersal on a selective basis, in the past referred to as "decentralisation", is seen as a critical responsibility of the State Government and adequate tools to achieve acceptable environments are a basic requirement of the Environmental Planning and Assessment Act 1979 as amended to allow such developments to occur in regional locations under the management of local government.

3.6 Development Control Plans

While Development Control Plans do not have the same mandatory power of a statutory plan, nevertheless, they tend to play a significant part in colouring the form of development in a particular area.

Consistent with the notion of administrative uniformity, some degree of guidance as to content and structure in such documents would seem to be rational and useful. Inclusion of such provisions in the Minister's proposals would seem to be relevant, particularly given the extent to which the public interest tends to be intertwined with physical form and bulk of development proposals and associated disputes, particularly in the type of sensitive areas referred to above.

CHAPTER 4 DEVELOPMENT ASSESSMENT AND REVIEW

Summary

- **"One size fits all" not appropriate.**
- **Public participation being eroded.**
- **Extension of powers to private certifiers not supported.**

4.1 Objectives

An effective development assessment system for New South Wales, achieved in accordance with the objectives outlined – in particular that the community would be engaged - would be supported, provided that proper environmental assessment is not compromised just because a particular development application is of a small size or scale. Even a small development application can have significant impact in terms of amenity or ecological effect, depending upon the particular site characteristics.

4.2 The current situation and need for reform

The New South Wales development assessment system is complex and sophisticated. Where possible, this ought to be simplified in order to provide an effective and efficient system. Again, however, it is important to recognise that local controls respond to local conditions and ought not to be discarded purely because of perceived initial efficiency and cost effectiveness. Costs saved at one stage may merely be deferred causing greater expenditure at another. For instance, the failure to carry out a proper environmental assessment of an application might have costly implications for rectification of environmental damage.

4.3 Options to improve the system

It is agreed that the assessment and review system must manage the expectations of applicants, neighbours, councillors and the broader community. In this regard, transparency, accountability, efficiency, objectivity, consistency, equity and effectiveness are vital to any such system.

State significant projects or concept approvals, including all current Part 3A applications

The major concern in relation to the proposal for state significant projects is the suggestion that in the case of state significant projects (other than critical infrastructure), merit appeals on applications would not be allowed for either the applicant or third parties if public hearings had been conducted by the PAC. It is considered that public participation at all levels is vital for managing the expectations of applications, neighbours, councillors and the broader community. If the PAC makes a determination that may not be appealed on its merits to the Court, this removes an important right for people to have an administrative decision reviewed by the Courts.

Regionally significant projects

It is noted that the proposal in relation to regionally significant projects include projects of regional significance which are not dealt with as state significant including applications by state agencies exceeding $5 million in capital investment value and other developments exceeding $50 million in value. These would be determined not by a Council but by a joint regional planning panel "where they can be resourced by the host council" and by the PAC, where the host council does not have the capability to undertake assessment. The JRPP would comprise three independent state appointees and two council appointees. The paper is not specific about how a determination is made as to whether the JRPP can be resourced by the host council. This would need to be clarified.

Again, it is an issue of concern that appeals to the Court may be dispensed with if projects are determined by the PAC involving a public hearing. Oversight by the Courts is an integral part of

the planning system in New South Wales and ought not to be dispensed with for regionally significant projects.

The paper is also unclear as to who the appointees might be. It is noted that the state appointees would be appointed by the chair of the PAC from a register approved by the Minister. There is some question as to whether this is a transparent process in the sense that the register approved by the Minister is presumably made up of people selected by the Minister or the Department. At present, the ultimate decision maker in relation to development applications is either the elected representatives of the local council area (ie. the local council) or the Court. This is proposed to be replaced by a panel made up of three representatives nominated by the state and two representatives nominated by the local councils' elected representatives. In cases where the project is determined by the PAC and public hearings are conducted, there is no oversight by the Courts.

Local applications

The assessment of local applications in the discussion paper contemplates compulsory independent hearing and assessment panels in certain circumstances, for example, for major SEPP1 variations. While there is some merit in independent hearing and assessment panels as contemplated (and they have been particularly useful in councils' own applications and for controversial development applications) it is considered that compulsory panels would add to the cost of the assessment process and contribute to delays. It is noted that the IHAP would be acting in an advisory capacity only, which is supported. It is further noted that appeals to the Court would be maintained as per the status quo, which is also supported.

Minor applications (other than complying development)

The proposal that appeals in the first instance, s.82A reviews and deemed refusals for minor applications, would be dealt with by planning arbitrators is not supported. This proposal would impose another level of bureaucracy and is likely to add to the cost of the process. Issues of conflict of interest would also arise. This appears to be a reversion to a model similar to the Local Government Administrative Tribunal which was ultimately unsuccessful, and which comprised three tribunal members. An arbitration by a single person under a similar scheme would be unlikely to result in acceptable outcomes.

Commissioners of the Land and Environment Court have, by and large, shown themselves to be successful arbiters of Class 1 Appeals. They are appointed for seven year terms and are independent. Their income is derived entirely form their position as Commissioners of the Land and Environment Court. Presumably, planning arbitrators would be drawn from the industry and it would therefore be expected that they would be earning an income in the industry. Accordingly, there can be no assurance that there would be no conflict of interest and public confidence in their independence and impartiality may be jeopardised.

It is unclear whether appeals against the arbitrator's decision would be allowed by Councils. This would be necessary if the system were to be fair.

The proposal that there would be no appeal rights for complying development is not supported. (Comments in relation to exempt and complying development are given below in relation to Chapter 5 of the discussion paper). Proposals for development which comply with specific standards can, nevertheless, have significant negative impacts on amenity or the character of a locality, depending on the particular circumstances and the constraints of the particular site. Just because a locality or particular property has not been attributed heritage value does not mean the locality does not have a character worth preserving. Accordingly, appeal rights ought to be retained, even for development that complies with all the relevant standards. The merits of applications need to be considered.

It is submitted that the discussion paper contemplates stricter accountability "for example, penalties for errors in the preparation of plans or the certification of applications". The paper does not specify what these penalties might comprise. This notion is not supported.

The development assessment process, simplifying requirements to lodge a development application and streamlining integrated development and concurrences.

There is no disagreement with the paper's discussion of simplifying requirements for the lodgement of the development application and streamlining integrated development and concurrences, and the recommendations made are welcomed.

Improving development consents, modifications and deemed refusals

Development consents

While supporting a system of standard development conditions of consent, it is submitted that flexibility would need to be retained so that specific conditions can be imposed in addition to the standard conditions to cater for specific proposals and the particular constraints of particular sites.

Section 96 modifications

There is a valid concern that some applicants view s.96 modifications as a means of getting a development approved by way of incremental changes that, if considered in its totality, would not have been supported. Frequent modifications adversely affect council resources.

However, the imposition of an arbitrary number of s.96 modifications would be in inappropriate. Instead, the imposition of significant fees for multiple s.96 applications might be a better was to control multiple applications. The Committee agrees that mandating criteria to reduce multiple modifications is advisable and increased flexibility ought to be given for councils to reissue consents under s.96 if an error is made. The s.96 modifications ought to be subject to SEPP1 where relevant.

It is suggested that consideration should be given to imposing a time limit within which s. 96 modifications may be sought, bearing in mind that a "one size fits all" policy may not be appropriate for large staged developments.

Deemed refusals

The Committee agrees that complex applications, which often need to be renotified during assessment, require more than the current 40 day assessment period. This creates unnecessary appeals to the Land and Environment Court. Accordingly, the Committee agrees that an assessment period of 60 days for medium scale development and 90 days for development equivalent to designated development is more reasonable and realistic.

Having said that, however, the Committee believes that an assessment period of 10 days for even a complying development is too short, as is 20 days for a development application not requiring exhibition. 40 days for small scale development is considered reasonable.

The discussion paper does not make it clear whether applications for complying development or development applications not requiring exhibition would be deemed to be approved after the expiration of the proposed statutory assessment period of 10 days and 20 days respectively. If that is what is contemplated, then the Committee would not consider that to be acceptable. If they were deemed to be approved, then questions arise as to what the conditions would be and where the public participation would be in that process. Although standard conditions of consent might apply, such a system would not allow for the specific conditions that might be required for particular proposals. The Committee also considers that public participation at every stage is important for the proper administration of planning in New South Wales.

Matching fees for service

The discussion paper's proposal in relation to the review of fees is supported. In particular, councils ought to be able to charge a fee for substantial modifications during assessment. This would effectively provide a disincentive for multiple modifications being made during the course of the assessment process.

4.4 Opportunities Provided by ePlanning

Subject to the submissions in relation to Chapter 6 of the discussion paper, it is agreed that online submission of DAs as proposed in the discussion paper would be a useful addition. The availability online of pre-DA lodgement resources is a useful tool and may result in better development applications being submitted.

(See the response to Chapter 6 for discussion of the portal/DA tracking system proposals).

4.5 Meaningful community involvement

As already highlighted in this submission, meaningful community consultation is vital. Transparency is required and the public needs to have an adequate say in the assessment of development proposals, commensurate with the level of impact and significance of the development. On page 61 the discussion paper suggests that, where developments comply with adopted standards and have minimal impact, then expectations of objectors would need to be tempered. However, sometimes compliant proposals can have poor amenity impacts. In order to consider whether the impact will be minimal, then public submissions would need to be considered as they are now.

At present, councils notify nearby neighbours directly affected. It is noted that the proposal requires applicants to make the appropriate notifications. Provided that there is certainty that all appropriate neighbours have been notified, then there is no objection to the onus of notification being reversed. As a minimum requirement, all DAs ought to be notified to adjoining and opposite neighbours.

4.6 Proposed Recommendations

For comments and responses to the specific recommendations proposed in Chapter 4, please see pages 23-24 of this submission.

CHAPTER 5 EXEMPT AND COMPLYING DEVELOPMENT

Summary

- **Private certifiers not independent – extensions to powers opposed.**
- **"One size" does not fit all.**
- **Principles of ecologically sound development require proposals to be subject to assessment, not merely certified.**
- **Council should have opportunity to inspect proposed exempt development and notify criteria for the particular site.**

5.1 Introduction

The discussion paper states the need for "a faster and less complex process" for applications for residential alterations and additions and for new houses noting that these applications represent more than 60 per cent of all development in the State. The paper also points out that before the last "reform" process, which was legislated in 1997, small residential developments, apparently also 60 per cent of all developments in the State, only required building approvals under the Local Government Act 1993. The amendments came into force on 1 July 1998.

As Richard Smyth, a former head of the NSW Department of Environment and Planning and now a planning consultant, wrote in a feature article published in the Sydney Morning Herald (21 June 2007) in relation to the planning of the 1998 changes:

> *"[T]he then planning Minister, Craig Knowles, announced the most significant changes to the state's planning system since the 1979 Act. He was going to reform and simplify the system. But to those working at the coalface, all the system needed was tidying up at the edges. By combining previously separate development and building applications Knowles trebled, roughly, upfront costs for applicants and processing times for councils."*

Before 1 July 1998 in dealing with building applications under the Local Government Act 1993 Councils were required by s 89(1)(c) to "take into consideration the principles of ecologically sustainable development. However, the State Government has steadfastly refused to include a similar head of consideration in relation to development applications. It was left to the judiciary in cases such as *Carstens v Pittwater Council* (1999) 111 LGERA 1, *BGP Properties v Lake Macquarie City Council* (2004) 138 LGERA 237 and *Telstra Corp v Hornsby Council* (2006) 146 LGERA 10 to partially remedy the Government's failure to provide a legislative requirement to take account of ESD principles.

5.2 Complying Development

Complying development, legislated as part of 1997 reforms, can be addressed against predetermined development standards prescribed by environmental instruments. Discretion does not play any part in the issue by a council or accredited certifier of a complying development certificate.

If a proposed development complies with the predetermined standards, the certificate is issued, if not, it is refused. However, councils (supported by their communities) have been understandably reluctant to surrender development control in relation to single dwellings, alterations and additions in favour of the complying development process where discretion is involved.

The City of Sydney strongly opposed the accredited certifier concept on account of the inevitable conflict of interest. In the case of *Burns Philp Trustee Co v Wollongong City Council* (1983) 49

LGRA 420 McClelland CJ detected the conflict which existed when a consultant preparing a planning study for a planning instrument was accountable to the developer. His Honour said "If ..... the practice has been developing whereby consultants regularly carry out studies on behalf of developers, it is fairly obvious that they will, even unconsciously bear in mind the necessity to produce "positive" results (from the developer's point of view) if they wish to obtain future commissions." His Honour's opinion is very pertinent to the issue of accredited certifiers.

In a paper by Paul Stein AM QC entitled 21st Century Challenges for Urban planning - The Demise of Environmental Planning in NSW presented in 1998 he decried the concept of complying development which can be certified privately without any resort to the council which was "part of a move to privatise planning decisions, premised on the argument that there is a need to introduce competition into planning decisions."

Mr Stein also expressed concern about exempt developments "which can proceed without any oversight".

Having the majority of single dwelling applications assessed as complying development is considered impractical in established and densely-populated suburbs where any new dwelling invariably has an impact on neighbours. In such cases consent authorities have to strike an appropriate balance between the proponent's entitlement to build a dwelling and the neighbours' rights to privacy, views, solar access and so on. While development controls (for example minimum solar access) can assist in resolving these disputes, they seldom do so automatically, but require some discretion to be exercised in applying the controls to the circumstances of the case. This discretion cannot be credibly exercised by a private certifier engaged by the proponent.

In local government areas where there is a lot of environmentally sensitive land, a substantial increase in the number of proposals treated as complying development would also be undesirable. In such a setting even minor developments such as house extensions or carports may have a significant environmental impact. The principles of ecologically sound development would indicate that such proposals should be subject to assessment, not merely certification.

The proposal to allow private certifiers to approve 'minor' variations from development standards as complying development is not supported. Complying development certificates should only be issued where a proposal can be 'ticked off' against fixed and objective standards. Any decision as to whether or not a departure from a development standard is 'minor' and 'acceptable' involves a value judgment. Not only impacts on neighbours need to be considered, but also environmental impacts and streetscape impacts. It is not appropriate for building professionals employed by developers to be making these value judgments. They have no mandate from the community to do so.

5.3 Exempt Development

The concept of exempt development works well when the community understands the pre-determined requirements. However suppliers are not familiar with the requirements in relation to *dimensions or locations and are keen to make a sale. This can lead to major* problems when the owner decides to sell and seeks a building certificate and is told by the council that a shed, cubby house or other item is either too big or is in the wrong location. Exempt development, being a different use of a building can also be a problem if the proponent does not understand the permissible circumstances. In communities where there are a high proportion of residents with a poor command of English the predetermined standards would not be *likely to be complied with.* The Committee recommends that the legislation be amended to require proponents to lodge a simple notification with their council of their intention to undertake a particular exempt development after 21 days. This which would allow the council the opportunity to carry out an inspection, and inform the proponent of any criteria for exempt development for the particular site.

CHAPTER 6 ePLANNING INITIATIVES

Summary

- **Accuracy of underlying data is paramount; users and legal representatives relying on information must be indemnified.**
- **Independent verification of data.**
- **Consistency in hardware/software.**
- **Compatibility with data base systems in other States/Territories.**
- **Utilise technology and information systems to facilitate public participation.**
- **Commitment to facilitating council's ability to adequately fund and resource creation and maintenance of data systems.**

6.1 Introduction

The notion that consolidating all relevant controls and processes to be applied by local government into a single electronic, digital repository for instant access, must have immediate but perhaps superficial appeal. Clearly, to be able to discover all of the potential controls that may apply to a parcel of land, and then be able to both lodge and follow the progress of an application to develop that land, must be extremely appealing. However, in terms of the legal constraints that may apply and the responsibilities of solicitors to discover what may or may not be done with land, particularly in the process of conveyancing, ePlanning is seen as a potential "minefield" which, until it has become widely adopted, will not reveal all the associated problems that are likely to be engendered by its existence.

At the outset, it is to be noted that, as with all digital databases and associated programmed administrative aids, a fundamental law of computing applies with utter remorselessness. This is described by the acronym, GIGO, which stands for "garbage in, garbage out". Thus, in a system that purports to describe all the relevant constraints to the use of a particular parcel of land or allotment, if the input data is wrong then the output information will also be wrong. The repercussions can be very serious. Such problems may start at the most fundamental level of lot description in terms of the basic cadastre.

Given that in a conveyance, some solicitor will become responsible for the accuracy of the material that is supplied to a client to underlie a purchase and intended land use, this makes for a very problematic situation because the responsibility for the accuracy of what is available, lies in the hands of persons having no direct connection to the lawyer concerned.

6.2 Verifying and Establishing the Database

As noted above, accurate lot description in cadastral terms, lies at the heart of a useful and trustworthy ePlanning system. Given the potential repercussions of erroneous lot description, where information derived from an electronic/digital data base is found to be defective, there must be some method of indemnifying the user against losses derived from actions which depend on the faulty information. This is also particularly relevant to the solicitor called in to advise on matters that will impact on the transfer of a property between owners or for a complete conveyance service.

Apart from this, mere interaction between the State Government and local authorities can be no guarantee that the relevant land descriptors and applicable planning and other controls will be accurately included in the database or that verification of the data will be accurately undertaken. If ePlanning as a system is progressively to be imposed on local government as the relevant administrative arm of the planning system, then a system of independent data checking and

verification is required and clearly this implies considerable financial resources, beyond the capacity of many councils to respond. This is particularly the case in rural areas away from Sydney.

However, including the comprehensive and accurate data in a planning database is only the first stage in an ongoing process which will involve updating the data as local changes occur. Again this process has to be undertaken quite meticulously and given the serious potential adverse ramifications if errors arise, an independent system of verification would need to be instituted by the State Government. In addition, some system of indemnification would also need to be introduced, perhaps based on a State Government sponsored insurance scheme.

6.3 The Digital System and its Creation

This submission is generally critical of the "one size fits all" philosophy proposed in the discussion paper. However, in creating a comprehensive and universal system of ePlanning and development tracking, this is an instance where "one size fits all" is clearly appropriate. If local authorities are to be encouraged to adopt this form of land description and development process tracking system, then there needs to be consistency in all the elements of the software and hardware so that public confusion does not follow inevitably.

There have already been examples of satisfactory ePlanning systems introduced by certain adventurous, if not brave, local councils. However, if a general system of digital land use description and development process tracking is to be introduced, then application of a particular proprietary system is not likely to produce satisfactory results. The State Government has a major responsibility to provide a specification of how such a system should be developed to satisfy the majority of local authorities. Moreover, such a system should be compatible with State Government databases already developed and in operation, such as I-Plan and the Lands Department database.

However, beyond even this State and local level concern, the opportunity should be taken to integrate such a land based data system with what is happening in neighbouring States so that an abrupt transition in planning and administrative processes does not occur across an arbitrary line on the map, the State border.

In this general context, it is appropriate to note that experience with other digital conversion processes has demonstrated that where the original paper based system is faulty, conversion to a digital system will only amplify the faults. On this basis, it is urged that the State Government proceed cautiously and only when a satisfactory system of land description and development control is in place in each local authority, should the task of digital conversion be implemented.

In this issue, again, the problem of GIGO is likely to surface as a major concern which has the power to render the attraction of a digital based planning administrative system completely illusory. It has to be emphasised that digital databases and administrative systems are only as good as the humans that write the software and then administer the data that underlies the digital product. Humans have been known to be fallible. Ten years would seem to be a much more rational goal for the introduction of such a complex and potentially fallible system, if success is to be anticipated.

6.4 Public Participation in the Planning Process

As discussed in **Section 2**, the Environmental Planning and Assessment Act, 1979, has as an overt intention, that the public should be involved in the process of plan preparation and implementation. It is observed that, over a thirty year period, much local plan creation has occurred without the requisite level of public participation, while much plan implementation has suffered from a surfeit of public exposure with a concomitant level of public angst and opposition.

In many respects, it is this unbalanced situation that has produced the current unsatisfactory and tardy mode of development control. Moreover, it is not a situation that is likely to repaired without major surgery to the initial phases of plan making if it is intended to create a public which understands what is proposed, and accepts the changes implied, even if grudgingly.

In relation to the plan making stage, opportunities now exist, using modern technology and the information system implicit in the Internet, to make for a much more meaningful dialogue with those affected by an intended planning change. This is an area that should be investigated in detail, and it is suggested that significant resources need to be applied to this task.

It has been noted that in places like California and even in certain part of Australia, flourishing citizen advisory systems, forums and Blogs have been established on the Internet to allow information and feedback to occur. Moreover, the current generation of electronic communicators have adopted the power of the Internet and mobile telephones to maintain a level of interconnectedness. This is unlikely to be a short term fad but provides an indication of where the public consciousness is likely to be found in the future.

Linking such facilities and social networks into the digital planning system as it has developed so far, is seen as a matter that deserves considerable attention. In the world of politics, of which planning and its administration represent a part, communication of opinions and attitudes represents the inexorable basis of success or failure. For the benefit of the community both local and national, involvement in creation of a satisfactory environment seems likely to be promoted by access to the social network that is in the process of creation using digital means. Tying such capabilities into the method of land use control and development processing is seen as something that should be included now rather than being "tacked on" belatedly, when public pressure demands that it be available.

6.5 Funding

Although the cost of digital hardware has progressively reduced over time, and the power of the apparatus to speed through complex calculations has gone up according to Moore's Law, nevertheless, implementing a land based planning description and development data base is likely to be a very expensive operation for any local authority. Likewise the staff resources required to set up and maintain the system and in particular put in place and then verify the data are likely to be very substantial and for many councils, anticipating that this can be achieved under the present regime of rates and charges is expecting too much.

Quite apart from assistance in the form of trained personnel to provide on site support and training, many, if not all, local authorities are likely to require substantial financial aid to undertake that hardware and data acquisition that ePlanning implies. Accordingly, the State Government should investigate a method of funding ePlanning conversion, perhaps with long term loans as a relevant mechanism. In principle, an ePlanning system, once in operation and maintained on the basis of infrequent local plan amendments, should result in operational savings to local government which should enable the repayment of such loans to occur without local financial embarrassment.

6.6 Proposed Recommendations

A number of the proposed recommendations would improve the present system. However, in the Committee's view, a number of the proposals are problematic. For comments and responses to recommendations B1.1, B1.2, B2.1, B9 and B13 as proposed in Chapter 6, please see pages 25-26 of this submission.

CHAPTER 7 BUILDING AND SUBDIVISION CERTIFICATION

Summary

- **Independence of certifiers must be assured.**

7.1 Introduction

A number of the recommendations in Chapter 7 will constitute improvement to the present system. However, particular concerns arise in relation to the conflicts of interest issue and proposals aimed at clarifying responsibilities and sanctions.

7.2 Addressing Conflicts of Interest – Committee proposal

The essential conflict of interest which exists in the current provisions for building and subdivision certification leads to the conclusion that the current process is intrinsically flawed. There is no easy way to resolve this conflict. Engagement of certifiers by the owner rather than the developer or builder will do very little to change the situation. It will be a simple contractual matter for the developer or builder to require, as part of the contract, the owner of the land to authorise the nominated certifier. Similarly, attempts to limit the amount of work a certifier does for any one particular developer and builder will not overcome this essential conflict of interest.

Therefore, this submission calls for the complete re-writing of the certification system. It is proposed that certificates should be provided by an independent body rather than individuals who are paid by the developer and/or builder.

7.3 Alternative Committee Proposal

If the State Government is intent on keeping the existing system in place, then the following general recommendations are made:

1. There be a specific legislative provision that the certifier must act at all times in the public interest.

2. The appointment of the certifier should in all cases be made by the Building Professional Board ("BPB") or by the owner of the property from a list of three certifiers to be provided by the Board. This could be provided on a rotating basis.

3. There needs to be substantial work done on the disciplining of certifiers. At the moment there are a number of "known" certifiers who have continually certified plans they should not have and been the subject of numerous complaints. Nevertheless these certifiers continue to practice.

7.4 Clarifying responsibilities and sanctions

It is understandable that there is confusion about the respective roles of Councils and private certifiers.

When the legislation was first introduced, the Department of Urban Affairs and Planning (DUAP) produced a publication entitled "Guiding Development – Practice Notes" (September 1999) and in the chapter headed "Who was responsible? Liability issues" the following statement was made:

> *"The Government intends that the Principal Certifying Authority (PCA) be involved through the construction stage, with an overarching responsibility to supervise the work of others including other certifiers. The requirement to appoint a PCA before construction, the continuity provisions – maintaining the*

same PCA throughout – and the power of PCAs to issue notices in relation to orders are evidence of the breadth of the PCAs role. In this light, the PCA may also have a responsibility to ensure that buildings are constructed in accordance with the development consent."

The integrated development reforms were sold to both the public and private sector not only by the Minister of the day but also by DUAP staff on the basis of the PCA assuming the role of Council and that as a result Councils would have no role in checking construction certificates issued by the private sector nor would it be the Council's responsibility to be the primary point of contact and action in the event of an issue arising concerning construction works.

This is plainly not the case and there is concern now that it is proposed to "mandate" Council's responsibility to enforce development consents. [The note at page 106 of the discussion paper is: "Providing penalties against Councils where they are made aware of an issue and do not act"].

This is opposed.

Councils retain a discretion to enforce development consents (*Ryde City Council v Echt 107 LGERA 317*).

What would be more suitable would be provision for Councils to be given an additional fee in recognition of the enforcement role in respect of construction works which was said to be vested in the PCA but is in reality vested in the Council so that Council may be properly resourced to undertake this enforcement role.

CHAPTER 8 STRATA MANAGEMENT REFORM

Summary

- **Voting rights should be limited through contractual rights with subsequent purchasers**

The Committee has considered the recommendations in the discussion paper.

The Committee particularly supports proposed recommendation S5 that legislation be amended to prevent a building developer, original owner or related party from exercising voting rights (greater than what they presently own) through contractual rights with subsequent purchasers.

CHAPTER 9 RESOLVING PAPER SUBDIVISIONS

Summary

- **Lot owners should not be disenfranchised.**
- **Voluntary land trading model proposed.**
- **Enhancement or increase in existing powers of acquisition opposed.**

9.1 Objectives

The issue of "paper subdivisions" has been an ongoing problem for the owners of these properties for many years. While it would be preferable for development to occur on these subdivisions, the current legislative schemes for development do not have the scope to be able to deal with many of them.

The proposed implementation of a system of either voluntary or legislative change that allows for the development to occur that will not disenfranchise lot owners is supported.

9.2 Current situation

Paper subdivisions are a small part of the planning scheme of NSW. As a result of the Growth Centres criteria applying to urban paper subdivisions, urban and non-urban paper subdivisions may need to be treated independently. This has the potential to make the development of these subdivisions more complex in some areas.

9.3 Committee proposal

Accordingly, it is submitted that a voluntary land trading model may have some benefit. The development of "gateway criteria" would be crucial in ascertaining the development potential for a paper subdivision. The gateway criteria would need to address many issues including how the burdens for the implementation of the infrastructure required for development would be met.

The Committee does not support the enhancement of existing powers of acquisition or additional powers of acquisition being given to any government agency, state owned corporations or other government body. Rather, it is preferred that reliance be placed, if there is need, upon the existing powers of acquisition that the Department of Planning or Department of Housing may have in support of the functions of those agencies under their constituting legalisation.

9.4 Proposed Recommendations

For comments and responses to the specific recommendations proposed in Chapter 9, please see page 27 of this submission.

CHAPTER 10 MISCELLANEOUS REFORMS

Summary

- **Councils must have ability to adequately fund their operations.**
- **Public participation must be preserved.**
- **Compulsory mediation is opposed.**

Comment

In the view of the Environmental Planning and Development Committee, a number of the proposed Miscellaneous Reforms are problematic. For the Committee's comments and responses to the Miscellaneous Reforms proposed at M2, M3, M4, M5, M9, M10 and M11 of Chapter 10, please see pages 28-29 of this submission.

RESPONSES TO PARTICULAR PROPOSALS AND RECOMMENDATIONS

The Environmental Planning and Development Committee has highlighted the following recommendations as particularly necessary of comment. The comments below should be read in conjunction with the comments made in the body of this submission. As already noted, more detail is required before informed commentary can be provided about many of the proposals and recommendations in the discussion paper.

Chapter 4 DEVELOPMENT ASSESSMENT AND REVIEW – Proposed Recommendations

The Committee's responses to the proposed recommendations in Chapter 4 are as follows:

A1. Hierarchy of decision making bodies

Subject to concerns expressed above in relation to the likely cost of adding new levels of bureaucracy, the need to retain rights of appeal to the Land and Environment Court even after hearings by the PAC, this recommendation is not opposed.

A2. Ministerial delegation to new PAC

Agreed.

A3. Powers of new PAC

Provided there is a right to appeal even after a public hearing to the Land and Environment Court, it is not opposed.

A4. Determination of certain regionally significant projects by new PAC

Subject to the comments above in relation to transparency and the retention of the right to appeal to the Land and Environment Court, this proposal is not opposed.

A5. JRPPs to determine applications of regional significance.

As above.

A6. Councils to establish IHAPS to deal with certain local developments

As above.

A7. Council appointed planning arbitrators to deal with small applications

This recommendation is opposed. It would add an unnecessary level of bureaucracy and there is *real potential for conflicts of interest. Please see our comments above.*

A8. Role of IHAPS, design review panels and independent advisory panels to be rationalised

Agreed.

A9. Mandated guidelines for plans, reports and studies

Agreed. However, it is suggested that it would be more appropriate for the Department to publish standard guidelines and allow a certain level of council adaptation to accommodate local requirements, for example the number of copies of documents required to be lodged.

A10. ePlanning for DA lodgement and tracking

Agreed.

A11. Review of entitlement to appeal after PAC public hearing

The Committee opposes any notion that the right to appeal to the Land and Environment Court be curtailed. In relation to complying development, appeals ought to be allowed on the merits, as even complying development can have adverse amenity impacts.

A12. Review of agency referral requirements

Flexibility is required. Care needs to be taken, as particular development applications may still need to be referred. It is not possible to contemplate every proposal and how it might affect particular sites with particular constraints.

A13. Standardise conditions of development approval

Agreed, subject to allowance for special conditions being imposed to take into account the particular development and the particular site.

A14. Changes to current system of development modifications

A14.1 An arbitrary maximum number of s.96 applications is opposed. The Committee considers that it would be better to impose higher fees for multiple s.96 applications to discourage their use or abuse.

A14.2 Agreed.

A14.3 Agreed.

A15. Statutory assessment periods

As to the proposed statutory assessment periods, the Committee agrees that some review may be warranted, especially for medium scale and complex developments. The Committee is of the view that:

A15.1 A statutory assessment period of 10 days for complying development would not appear to be a lengthy enough period;

A15.2 A period of 20 days for development applications not requiring exhibition would also appear to be too short;

A15.3 40 days for the assessment of small scale development is reasonable;

A15.4 60 days for medium scale is reasonable; and

A15.5 90 days for development equivalent to designated development is reasonable.

If it is proposed that applications for complying development or development applications not requiring exhibition would be deemed to be approved after the expiration of the proposed statutory assessment period of 10 days and 20 days respectively, the Committee does not agree with this proposal. This will pose difficulties in that there would be a deemed approval without conditions tailored to the specific site. It would also mean no public participation where public participation might be required.

A16. Review of DA fee regime

Agreed.

A17. *Department to issue consultation guidelines*

Agreed.

A18. Changes to the development assessment process

The suggested targets are not unreasonable, however, they ought not to be inflexible. Sometimes obtaining a just and acceptable outcome in relation to a particular proposal will take a longer time than anticipated and may require flexibility in terms of allowing modification to plans and the like. Targets should therefore be guidelines but not mandatory.

The Committee opposes the establishment of planning arbitrators proposed in A18.6, for the reasons articulated above.

Chapter 6 ePLANNING INITIATIVES – Proposed Recommendations

Whilst a number of the proposed changes are improvements to the present system, the Environmental Planning and Development Committee has concerns about the following proposed recommendations:

Building and Subdivision Certification

B1.1 *Limit number of construction or complying development certificates*

Please see the Committee's comments in the body of the submission. This will not, of itself, be sufficient to resolve the concerns about conflict of interest.

B1.2 Landowner to appoint a certifier to issue a construction certificate or complying development certificate

Please see the Committee's comments in the body of the submission. It will be likely that the builders/developers will require the landowners to sign over their rights to choose the certifier.

B2.1 For small developments, limit number of projects to which an accredited certifier could be appointed

Please see the Committee's comments in the body of the submission. This needs to go further, namely requiring the BPB to appoint the certifier or requiring the owner to appoint the certifier based on a list of three names provided by the BPB.

B9 Councils' responsibility to enforce development consents to be mandated - penalties could be imposed where councils are made aware of an issue and do not act

B13 Clarify roles and responsibilities of certifiers, Councils and landowners

It is understandable that there is confusion about the respective roles of Councils and private certifiers.

When the legislation was first introduced, the Department of Urban Affairs and Planning (DUAP) produced a publication entitled "Guiding Development – Practice Notes" (September 1999). In the chapter headed "Who was responsible? Liability issues" the following statement was made:

> *"The Government intends that the Principal Certifying Authority (PCA) be involved through the construction stage, with an overarching responsibility to supervise the work of others including other certifiers. The requirement to appoint a PCA before construction, the continuity provisions – maintaining the same PCA throughout – and the power of PCAs to issue notices in relation to orders are evidence of the breadth of the PCAs role. In this light, the PCA may also have a responsibility to ensure that buildings are constructed in accordance with the development consent."*

The integrated development reforms were sold to both the public and private sector not only by the Minister of the day but also by DUAP staff on the basis of the PCA assuming the role of Council and that as a result Councils would have no role in checking construction certificates issued by the private sector nor would it be the Council's responsibility to be the primary point of contact and action in the event of an issue arising concerning construction works.

This is plainly not the case and there is concern now that it is proposed to "mandate" Council's responsibility to enforce development consents, and penalise councils where they are made aware of an issue and do not act.

This is opposed.

Councils retain a discretion to enforce development consents (*Ryde City Council v Echt 107 LGERA 317*).

It is submitted that it would be more suitable for councils to be given an additional fee in recognition of their enforcement role in respect of construction works (which was said to be vested in the PCA but is in reality vested in the council) so that councils may be properly resourced to undertake this enforcement role.

Chapter 9 RESOLVING PAPER SUBDIVISIONS – Proposed Recommendations

The Environmental Planning and Development Committee's responses to the proposed recommendations in Chapter 9 are as follows:

PA1. New power to mandate scheme of arrangement

While the Committee agrees that a scheme that would allow the development of paper subdivision is preferable, it would seem that there will be winners and losers under the schemes that are being proposed. Figure 9 on page 120 shows 5 lots becoming 3 lots with no clear indication of how the owners of the 2 lots that have been subsumed will be compensated. It is difficult to see how a voluntary system could work where there are so many individual land owners.

PA2. Addressing circumstances where unanimous agreement cannot be achieved

There could be considerable costs involved in implementing and administering any land trading scheme and it is unclear from the proposal which authority would implement the scheme. This scheme may not be practical where a lot owner has only 1 or 2 lots and may need to have other mechanism provided to assist these people. Alternative will need to be developed for a precinct that does not comply with any preconditions to be declared a suitable area for the land trading model.

PA3. Protecting owners' interests

The committee is concerned that it would appear that this proposal is only protecting the interests of 60% of the subdivision owners and could possibly disenfranchise the other 40%. To remove the interests of 40% of the land owners has the potential undermine the principles that have been developed to protect land owners under the Torrens title land system.

Chapter 10 MISCELLANEOUS REFORMS

The Environmental Planning and Development Committee of the Law Society has concerns about the following proposed recommendations:

M2. Public authorities responsible for providing services usually provided by Local Government – share of Council rates

Along with the concentration of powers in the Planning Minister over the last few years, there has also been a decrease in the ability of Councils to fund their operations, largely as a result of rate pegging.

This proposal will see a further erosion of the ability of Council's to fund their operations which will then have a further "chicken and egg" result of less resources for Councils, less ability to carry out their functions (in particular their planning functions) and an increased cry for more concentration of such functions to be in the hands of the Minister and Department of Planning.

This goes against the object in section 5 of the Act:

> *"To promote the sharing of the responsibility for environmental planning between the different levels of government in the State."*

M3. Standard instruments

Whilst the Planning and Development Committee supports the concept of a simplified standard instrument, some of the proposals will strip away the rights of the community to participate in the process and are therefore opposed.

M4. Exhibition and amendment of planning agreements

The Committee has a fundamental opposition to the use of planning agreements where there is no nexus with the development. It is considered this results in bad planning and at the extreme, is a recipe for corruption.

Leaving that aside, one of the few safeguards in relation to planning agreements is the requirement for public exhibition.

Therefore, the Committee considers that where a planning agreement is amended, whether in response to a submission received during the public notice period or otherwise, it should be publicly notified before the parties enter into the agreement.

M5. Compulsory mediation in the Land and Environment Court

The Committee believes that mediation is a desirable aim and under the current Chief Judge section 34 conciliation conferences have been greatly increased.

However, the typical class 1 appeal involving a Council as the respondent and an individual or company as the applicant is quite different to a normal commercial dispute where there are two individual parties which will generally have authority to enter into an agreement at the mediation.

Whether the Council legal representative or officer attending the mediation is able to enter into an agreement will depend on whether authority has been delegated by the Council as a corporate body.

This will vary from Council to Council and case to case.

Accordingly, the Committee opposes a "one size fits all" approach of compulsory mediation.

The Committee suggests that instead there should be an extensive education process involving all relevant parties and bodies and a presumption in favour of mediation but stopping short of compulsory mediation.

M9. Planning panels

The Committee considers these proposals to undermine the public participation process and concentrate more power in the hands of the Minister contrary to the objects contained in section 5(b) and (c) of the Act.

M10. Ensure planning outcomes are achieved

The Committee considers that compulsory acquisition by Councils should only relate to the proper functions of the Council under the legislation relating to Councils and therefore the Committee opposes these amendments.

M11. Ensure appropriate tailored assessment in Part 3A

The Committee is concerned at the lack of detail in this provision and also considers that the amendments will diminish the ability of the public to participate in the planning process.

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PROPERTY LAW COMMITTEE

SUBMISSION

FEBRUARY 2008

Improving the NSW planning system

Department of Planning

Discussion Paper
November 2007

1276013/MHT/MHT/LJI16...1

PAGE/RECOMMENDATION	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
PART 1 – INTRODUCTION			
Executive Summary	Part 3A has resulted in improvements in certainty and transparency of the system.	Not acknowledged	There is no general merit appeal or other appeal rights under Part 3A -so the Committee disagrees that there have been "improvements in transparency".
	The majority of development applications are lodged by households wanting to improve their home or build a new dwelling. Latest figures show these applicants wait an average 68 days for approval for these "relatively minor works".	Position reserved	On a qualitative basis these are works that have an enormous impact on neighbours. The average dwelling home represents a house owner's life savings. The preservation of the value of the home is one of the most significant issues facing that owner. The preservation of the value of adjoining homes is also important for the neighbourhood and the community.
	"more exempt and complying development".	Position reserved	Given a choice between a 68-day wait for approval and the situation where a substantial proportion of residential development becomes exempt and complying, many "householders" may prefer the current system.
6	Expand use of exempt and complying from 11% to 50%.	Not supported	Not supported unless the private certification regime is tightened in terms of accountability, enforceability and reduction of conflict of interest. The impact of this will be on ordinary property owners. The existing system has practices such as notification, which give property owners some safeguards. The proposal for private certifiers to allow variations on 7 days notice to Council is not supported.

PAGE/RECOMMENDATION	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
21	"Greater housing affordability through the zoning and servicing of 55,000 lots by 2009 and ultimately the provision of 640,000 new residential dwellings by 2031.	Supported	Supported but noted that affordability may not be improved unless the historical design expectations of the community are addressed. Increased longevity and single person households may require influence on the demand side rather than the supply side.
17	Coalition for Planning reform is an alliance of 14 major development industry and planning organisations, including the Property Council of Australia, Planning Institute of Australia, Royal Australian Institute of Architects and the transport and tourism taskforce.	Supported	The Discussion Paper's "open for business" philosophy is supported however the involvement of the community and democratic accountability need to be safeguarded. The Law Society's focus is on the workability of the proposed planning framework. Included in the workability of the framework is effective involvement of the community as beneficiary of the outcomes of the framework.
PART 2 – THE NEED FOR REFORM			
11	Development industry requires greater certainty and efficiency.	Supported	However noted that the Discussion Paper appears to echo the UK's Barker Report. The Terms of Reference of the Barker Report were the better delivery of economic growth and prosperity. That is, the preservation of democratic accountability, quality of life and community amenity were not part of the Terms of Reference.
16	Eight councils took an average of over 100 days to deal with applications for relatively minor developments valued at less than $100,000.	No position	This inconvenience does not necessarily justify a loss of rights for residential property owners. Councils must have the ability to fund their operations. Councils' failure to perform should not be the driver for reform.

PAGE	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
21	Principles for a better system	Supported, but needs to go further	Principles should include: 1. Good design 2. clarity regarding consultation/community involvement
PART 3 – CHANGING LAND USE AND PLAN-MAKING			
26/27	SEPP/REPs	Partly supported	The Planning making process at State/Regional level is unclear, and fails the transparency/ accountability tests referred to earlier in the paper.(at page 21)
27	Site compatibility tests	Position reserved	Site compatibility tests may introduce more subjectivity. It is suggested that composition of the gateway panel and all other panels have input from other agencies and stakeholders.
	Establishment of LEP Review Panel to independently review council rezoning proposals		This recent change is supported.
30	Target of a reduction of spot rezoning.	Supported	The Committee supports the introduction of a right of appeal against refusal of an application for spot rezoning. An independent advisory panel or joint regional planning panel may be the appropriate body to hear an appeal against a Council's rejection of an applicant-initiated spot rezoning.

PAGE	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
32 P2	Introduction of criteria for deciding whether a rezoning should occur.	Supported	
34 P9	There is a strong case to ensure that DCPs do not raise standards above those set within State Codes eg. SEPP 65 – a number of councils have taken the design code to be a minimum and have applied their own standards of high levels through DCPs.	Supported	
35	Provide temporary rezoning.	Not supported	
36	Gateway systems for LEPs	Position reserved	It does not deal with the SEPP/REP changes referred to in pages 33-35.
37	LEP Review Panel	Query about composition accountability	
	CEOs land release panel	Query about composition	
	Any independent body established by the Minister such as Planning Assessment Commission (PAC)	Query about composition	
P4	Fee for service to assist in the consideration of proponent initiated plans.	Supported	

PAGE	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
40	"Provided the LEP was consistent with the proposal agreed at the gateway, LEP can be made without sign off by the Minister.	Not supported	The Minister will have control through composition of panels, but less accountability. There may be an ever-shifting line up of panel members to blame for unsatisfactory results.
42 P3	"extending the range of uses that can be dealt with under Section 73A as non notifiable, such as adding an additional land use to land use table where it is consistent with the zone objectives.	Not supported	Notification provisions should be strengthened. Adding a pre-school or a place of worship to a residential zone may have impacts on neighbours – they should have the opportunity for comment.
47/48	SEPP/LEP changes	Position reserved	Considerable discussion is needed to understand how the suggested gateway system will operate (see earlier comments). A clear path for making SEPPs is essential.

PART 4 – DEVELOPMENT ASSESSMENT AND REVIEW			
51 A6, A8	Independent Hearing and Assessment Panels	Supported	
54	Instead of Minister, Planning Assessment Committee to review non critical infrastructure projects under Part 3A	Not supported	Queries about composition of Panel and loss of accountability.
A3 A11	PAC would have powers to conduct public hearing but merit appeals would not be allowed for either the applicant or third parties (if public hearings had been conducted)	Not supported	

Page	Excerpts from Discussion Paper	Law Society Response	Comment
55 A7	Planning arbitrators to deal with Section 82A review and deemed refusals for all minor applications (under $1 million). Appeals would be allowed to Court but only after the review by the arbitrator.	Position reserved	The Committee does not oppose the concept of planning arbitrators provided that they operate under the umbrella of the Land and Environment Court system - that is, if the process is managed by the Land and Environment Court and a right of appeal is retained..
56	Complying developments would be certified by either Councils or accredited certifiers. There would be no appeal rights for complying development.	Not supported	May result in less certainty for householders as to what will be built next to them, particularly as certifiers can allows variations or conditioned certificates. This proposal will impact on the ordinary property owner, as 50% of DAs are to be complying development within 4 years.
58	Removal of concurrence provision.	No position	
A11 A13	Mandate structure of development consents.	Supported	
A14.1	Limited multiple amendments under Section 96.	Supported	
59	Increasing deemed refusal period.	Supported	Supported except for complying developments.
61 A15.1	Complying development – reduced notification requirements.	Not supported	

PART 5 – EXEMPT AND COMPLYING DEVELOPMENT			
73 **C1**	Expanding exempt development categories eg. solar hot water heater.	Supported	
74 **C4 & C5**	Mandatory default code.	Supported	However the default code needs careful consideration if it is to deal with set-backs; building envelopes; architectural design; and streetscape impacts –as there is later provision in the Discussion paper for certifiers to effectively allow variations and conditioned certificates.
77 **C8.2** **C8.4**	Variations to be allowed to private certificates.	Not supported	Under the proposed reforms there is generally less scope for neighbours to examine development proposals, particularly as notification may not occur and there is limited redress.
79	Section 149 planning certificates – council to provide a summary of the minor and routine development that is allowable in the land being purchased as well as a neighbouring property.	Not supported	The whole area of notification/ community education needs to be better addressed. The s149 certificate should not be the driver for this reform, but could be used in the process. The rate notice mail out, for example, is a more obvious place for this summary.
81 **C12**	Certifier (whether council or private) would have an obligation to provide a courtesy notice to immediate neighbours advising of the request for a complying development certificate, noting works found to be complying development would be automatically approved.	Supported	Any decrease in the current level of notification is not supported. Further, the "right" to notification needs to be strengthened, especially if there is to be an increase in complying development

PART 6 – EPLANNING INITIATIVES			
	General comment	Supported	The Law Society has been asking for an electronic register of development consents and other items for many years. There should further be an electronic register of the names of certifiers who certified certain buildings and the owner's names of those buildings, and of complying development certificates so that members of the public can ascertain whether there is a conflict of interest.

PART 7 – BUILDING AND SUBDIVISION CERTIFICATES			
96	Proposed to accredit council officers.	Position reserved	However noted that council officers are employed by a regulator and have a vested interest in good governance of the planning system, unlike proposed corporate certifiers. Mechanisms for accountability, integrity, and professionalism are already well established with local councils.
97	Building Professional Board can find certifiers guilty of unsatisfactory professional conduct.	Supported	The BPB needs to be able to suspend certifiers' licence for whatever period is reasonable for unsatisfactory professional conduct.
98 **B1 to B5**	The Building Professional Act does not define limits to the proportion of work a certifier can do for a single client as a means to limit close relations and conflict of interest.	Supported	However the amendments are unlikely to be effective as a corporate developer can have many subsidiaries, can sell 50% of its shares, or can assign. As a result, there are practical difficulties in establishing that one corporation is related to another corporation so closely as to be the same entity. Developer X may have 20 different company emanations.

Page	Excerpts from Discussion Paper	Law Society Response	Comment
B6	Proposed to allow corporate entities to be accredited as certifiers	Not supported	Sanctions are directed at individuals and are practically not enforceable against corporate entities.
99 B1 to B3	Needs to be a brake on the number of certificates that an accredited certifier can issue to one client.	Supported	However this will be hard to enforce in practice. One enforcement tool would be placement of all details on an electronic public register so members of public can check conflicts of interest.
B9 to B13	Where accredited certifiers act as the principal certifying authority for developments Councils are often apprehensive to use their power to enforce the development consent.	Supported	Understandable position of council, especially because certifiers do not necessarily assist council, nor is there any practical requirement for certifiers to assist Council. Council may need to be able to get back a service fee for enforcement.
101 B12	BPB disciplinary powers.	Supported	Disciplinary powers need to be widened and strengthened.
102 B1 and B2	Certifier will be required to red flag themselves.	Supported	However the Committee queries the effectiveness of self "red-flagging". This is an attempt to emulate disclosure regime of other regulators – but will not work for corporate certifiers because the argument is always available that one corporate development company has different shareholders to another. A complex corporate structural debate is too sophisticated for BPB to deal with. Generally disclosure or self-red flagging is unlikely to succeed given there are insufficient sanctions against certifiers. Further, the practical effect of disclosure may be that the certifier is allowed to keep working where the certifier has a conflict of interest or is in a situation of client capture.

PAGE	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
102 B3	Requiring staff of BPB to allocate certifier.	Supported	Note this is for large projects only (see rec. B3)
B4	Model set of contractual arrangements specifying the responsibilities of certifier and the developer.	Supported	
106 B9	Providing penalties against councils where they are made aware of an issue and do not act.	Not supported	
106 B10	Enforcement Bonds to be held by Council.	Supported	
	Daily or weekly fines would increase for failure to communicate a council directive.	Supported	
	Where the BPB has taken action to suspend the certifier's accreditation, appeals would be allowed to the ADT where the suspension is greater than one year and the maximum fine 107is issued. Consideration would be given to allowing compensation claims where the Tribunal overturn the decision of the BPB.	Supported as to right to appeal to ADT. Not supported as to compensation claims against decision of BPB.	

PART 8 – STRATA MANAGEMENT REFORM			
	The objectives in paragraph 8.1 state "it is necessary to ensure the establishment of any new strata scheme represents the interest of the owners and *purchasers* of the scheme fairly and comprehensively:	Supported (but see comments)	Strata schemes (whether new or established schemes) have a number of stakeholders including the owners corporation, owners, occupiers, original owner being the developer and mortgagees of lots. While it is agreed interests of owners in strata schemes should be protected, any initiative should not disregard the complexity of new developments or be so restrictive as to discourage development or hinder the construction of more complex developments.
	Paragraph 8.4 under the subheading "Owners' rights during the initial period" recommends: (a) increased education and information to owners; and (b) amendments to the legislation to make clearer the rights and responsibilities of owners corporations during the initial period.	Supported as to paragraph (a) and not supported as to paragraph (b)	

PAGE	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
114	At paragraph 8.4 under the subheading "Disclosure by executive committee members", it is proposed to amend the Act to require candidates for election to the executive committee to disclose connections they have with builder, developer.	Not supported	
115 S5 S4	At paragraph 8.4 under the subheading "Limitations on proxies and power of attorney", it is proposed to: (a) invalidate proxy votes used by a developer to vote against lodging a complaint about defective building work; (b) amend the conveyancing legislation prohibiting the inclusion in contracts for sale of clauses obliging the purchaser to give the developer their proxy and power of attorney (c) restrict the number of proxies able to be held by any one person; (d) enable owners corporations by special resolution to prohibit the use of proxies for particular purposes.	Supported as to paragraphs (a) and (c) and not supported as to paragraphs (b) and (d)	See the general comments in Annexure 'A' to this paper

PAGE	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
	At paragraph 8.4 under the subheading "Priority voting" it is proposed to restrict the use of priority votes by mortgagees, where the mortgagee is also the developer, where the vote relates to a proposal to take action in relation to defective building work.	Not supported	
	At paragraph 8.4 under the subheading "Reduction of developer's rights to block executive committee decision making" it is proposed to reduce the developer's right to block executive committee decision.	Not supported	
116	At paragraph 8.4 under the subheading "Exclusive use by-laws about parking" it is proposed to remove the car parking by-law exception from the initial period exclusions in s56	Supported	
S2	At paragraph 8.4 under the subheading "Application of caretaker provisions to building managers" it is proposed to extend the caretaker provisions to all building managers	Not supported	The proposal is a "band-aid" solution to a wider issue. Litigation continues on the current caretaker provisions. A wider perspective must be taken on the caretaker/delegation issues.

PAGE	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
S6	At paragraph 8.4 under the subheading "Access to common property by Office of Fair Trading building inspectors" it is proposed to provide a statutory right for Fair Trading inspectors to enter common property on the invitation of individual owners	Supported	
S8	At paragraph 8.4 under the subheading "Increasing owners' awareness of their rights" it is proposed to: (a) conduct an information campaign to increase awareness; (b) introduce proposals to require the Fair Trading booklet "Buying into a Strata Scheme" to be attached to contracts for sale and to s109 certificates.	Supported as to the proposal in paragraph (a). Not supported as to the proposal in paragraph (b)	The Committee does not support the option of attaching the Office of Fair Trading booklet "Buying into a Strata Scheme" to the contract for sale or s109 certificate. The Committee notes that often the s109 certificate is not seen by the purchaser, but rather is a tool used by the purchaser's solicitor in the conveyancing process. The contract for sale is often not retained by a purchaser either.
The Committee comments further on possible reforms to address developer control of strata schemes in Annexure 'A' to this paper.			

PART 9 – RESOLVING PAPER SUBDIVISIONS			
PA2	Trading model in North West Growth Centre and other areas.	Supported as to trading model Not supported as to government or State Owned Corporation role	There are many examples of these subdivisions. However, a scheme of arrangement should be able to be initiated by the private sector, rather than government. A scheme of arrangement, similar to the Deed of Company arrangement methodology (even with court approval) could be used to unlock the land.
PA1	Powers of acquisition.	Not supported	Taxpayers of the future should not have to support a "fix" to a problem of which purchasers of the past had actual or constructive notice. Some of these purchasers have speculated. Ultimately the market will correct the situation as private developers step in to implement a joint venture or other model. Any scheme of arrangement model would have to provide for appropriate compensation/ sharing of the return on sale, where dedication is proposed.

PART 10 – MISCELLANEOUS AMENDMENTS			
125 M1	Lapsing of development consents	Not supported	As an alternative, Councils' powers to require development to be completed could be strengthened, so that development does not lie dormant.
127 M4	Exhibition and amendment of Planning Agreements	Supported	The present system is unwieldy. Also, Councils should be able to be forced to enter into planning agreements, once development consents which have proposed them have been granted
127 M5	Compulsory mediation in the Land and Environment Court	Position reserved	Other initiatives should also be considered such as neutral evaluation. Commissioners need to be involved earlier in a matter so that issues can be resolved more promptly.

PAGE	EXCERPTS FROM DISCUSSION PAPER	LAW SOCIETY RESPONSE	COMMENT
M6	Amendment of proposals while on appeal to Land and Environment Court	Supported as to the first option	The options given are limited. Often a council will give no early indication of the need to amend a proposal, so the developer has no choice but to amend at the court stage. If the goal is a better planning outcome, what is wrong with making amendment to achieve that result? Either amendment is highly inflexible, especially considering the applicable rules themselves may be vague and highly subjective.
M8	Review of conditions of development consent - trial or temporary period of operation.	No position	This area does need clarity.
129 **M9.1**	Planning panels to do DCPs and contributions plans.	Not supported	It is difficult to see how this limited power will work , if Council retains other plan making powers
M10	Ensure planning outcomes are achieved by compulsory acquisition	Not supported	
M10	To ensure that easements can be granted by the Courts to implement a development scheme required as a condition of consent.	Not supported	
M12.2	To remove any doubt that a deferred commencement condition of consent may be modified under Section 96.	Supported	
M12.3	Proposed to amend the Section 82A of the EP&A Act to remove any doubt that an applicant may request a review of a determination in relation to an application made under Section 96 of the EP & A Act.	Supported	

STRATA MANAGEMENT REFORM

Education

The Committee supports the recommendations for increased education and provision of information to owners and proposed owners of strata properties.

Current rights of owners

The Committee points out that the current legislation already recognises the rights of owners in the initial period and places restrictions on the activities of developers during the initial period (for example, section 28 of the *Strata Schemes (Freehold Development) Act 1973* prohibits the registration of certain dealings during the initial period).

Disclosure

The Committee takes the view that education for *current* owners and disclosure of specified matters for purchasers in *new schemes* is required.

The Committee does not agree that annexure of consumer protection information to contracts for the purchase of strata units will resolve this issue or assist purchasers.

The Committee is also concerned to ensure the proper balance is achieved between consumer protection and the need for developers to carry out further steps post plan registration. Legislation should not be unduly restrictive so as to discourage development or hinder the construction of more complex developments.

The Committee points out there are many instances where the developer is obliged to carry out activities after registration of a strata plan. These activities are not necessarily always for the benefit of the developer. Some examples are:

1. Leases and easements in favour of telecommunication authorities;
2. Caretaker/operating agreements in resort hotels;
3. Activities associated with:
   - rights in favour of particular owners;
   - rights in favour of adjoining owners;
   - rights and obligations necessitated by development consents;
   - rights and obligations necessitated by consent and other authorities.

Development Disclosure Contract

The Committee proposes a mechanism which would permit post registration development activities, subject to disclosure, in a document registered on title.

It is noted that the concept of disclosure by way of a registered document is not a new concept. Current legislation contains mechanisms which permit development activities provided they are disclosed. Some examples include:

1. The activities to achieve the staged registration of a strata plan under Division 2A of the *Strata Schemes (Freehold Development) Act 1973* by the registration of a strata development contract.

2. The appointment of a caretaker under the community titles legislation provided the terms of the agreement are disclosed in the community management statement registered on title.

Under the Committee's proposal, a document similar to a strata development contract (possibly called a Development Disclosure Contract) would be registered which would have the following features:

1. it would be registered at the same time as the strata plan (similar to a strata development contract);

2. it would be registered against the title to the common property (similar to a strata development contract);

3. it would detail the proposed development activities, and like strata development contracts, it would contain warranted development activities (being ones the developer is obliged to do) and authorised development activities (being ones which the developer is permitted to do but not obliged to do);

4. in some instances (in the public interest) the terms of the proposed document would be disclosed in full (for example, a caretaker agreement which exceeded 3 years);

5. it would not require the consent of the council;

6. in the same manner as strata development contracts, it would have an expiry date (nominated in the disclosure contract);

The activities disclosed in the registered contract would be automatically permitted, in the same way a developer can register a plan of subdivision of a development lot in a staged strata scheme disclosed in a registered strata development contract.

The concept of a Development Disclosure Contract would have the twofold effect of permitting development without proxies while at the same time providing the appropriate vehicle for disclosure.

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Our Ref: HM:src:1278138

23 April 2008

Planning Reform
Department of Planning
GPO Box 39
SYDNEY NSW 2001

By email: planningreform@planning.nsw.gov.au

Dear Sir

Re: Changes to the NSW Planning System - Exposure draft bills 2008

Further to their consideration of the Improving the NSW Planning System discussion paper and submission of 13 February 2008, Law Society committees (the Environmental Planning & Development Committee and the Property Law Committee) have now reviewed the exposure draft Environmental Planning and Assessment Amendment Bill 2008, exposure draft Building Professionals Amendment Bill 2008 and exposure draft Strata Management Legislation Amendment Bill 2008 which were released for public comment on 3 April 2008.

A short period of 21 days has been allowed for public consultation on the bills, and I understand that the Minister for Planning proposes to introduce the final bills when Parliament next sits in May 2008. It is of great concern that much detail is yet to be revealed. In the absence of supporting regulations it is impossible to gauge the full impact of the changes and evaluate whether appropriate reforms will be achieved. The Law Society protests against the precipitate haste towards enacting legislation which will effect the most far-reaching changes to the State's planning system in thirty years.

Further, the Law Society considers that the matters proposed to be left to supporting regulations are of such general import that they ought to be included in the legislation rather than regulations.

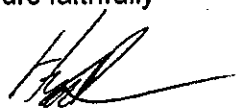
The exposure draft bills reflect the broad proposals put forward in the Department's discussion paper with, it seems, scant regard having been given to the concerns raised by the Society committees in their submission and the reported views of other stakeholders. It is very disappointing that stakeholders, including the Law Society, who made detailed comments on the discussion paper have not received a specific response to the points raised in their submissions. Given the scope and significance of the

proposed changes, the release of the Independent Report on Submissions prepared by Manidis Roberts Pty Ltd is no substitute for a detailed response to the comments made by each stakeholder. Accordingly, the committees ask that further consideration be given to their substantial submission of 13 February 2008. They have limited their comments on the exposure draft bills to matters that they regard are of paramount concern.

The Law Society urges the Minister to reconsider the legislation and, at the very least, release the supporting subordinate legislation for an appropriate period of consultation before proceeding to introduce and enact the substantive legislation.

I propose to make this submission available to other stakeholders, members of Parliament and the media.

Yours faithfully



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ENVIRONMENTAL PLANNING & DEVELOPMENT COMMITTEE

PROPERTY LAW COMMITTEE

SUBMISSION

Changes to the NSW Planning System

Exposure draft Environmental Planning and Assessment Amendment Bill 2008

Exposure draft Building Professionals Amendment Bill 2008

Exposure draft Strata Management Legislation Amendment Bill 2008

23 February 2008

INTRODUCTION

A short period of 21 days has been allowed for public consultation on the bills. The Law Society understands that the final bills are proposed for introduction when Parliament next sits in May 2008. It is of great concern that much detail is yet to be revealed. In the absence of supporting regulations it is impossible to gauge the full impact of the changes and evaluate whether appropriate reforms will be achieved. The Law Society protests against the precipitate haste towards enacting legislation which will effect the most far-reaching changes to the State's planning system in thirty years.

Further, the Law Society considers that the matters proposed to be left to supporting regulations are of such general import that they ought to be included in the legislation rather than regulations.

The exposure draft bills reflect the broad proposals put forward in the Department of Planning discussion paper with, it seems, scant regard having been given to the concerns raised by the Society committees in their submission and the reported views of other stakeholders. It is very disappointing that stakeholders, including the Law Society, who made detailed comments on the discussion paper have not received a specific response to the points raised in their submissions. Given the scope and significance of the proposed changes, the release of the Independent Report on Submissions prepared by Manidis Roberts Pty Ltd is no substitute for a detailed response to the comments made by each stakeholder.

Accordingly, the committees ask that further consideration be given to their substantial submission of 13 February 2008 and propose to limit their comments on the exposure draft bills to the following matters that they regard are of paramount concern.

EXPOSURE DRAFT ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT BILL 2008

General Comments

Removal of powers in review process and Cost shifting to Councils

The Law Society's primary objection to the draft bill is the removal of powers from Councils, the community and the Land and Environment Court (L&E Court) in the review process for Development Applications and the associated cost shifting on to Councils (see proposed section 23O, Part 2A – Schedule 2.1[12]).

It is generally accepted that legislation regulating the Administrative Decisions Tribunal, the Ombudsman and Freedom of Information was a package of reforms to improve decision making in NSW. All of these bodies are funded by the State Government, as is the Land and Environment Court. It is inconsistent with this funding structure that Councils be required, as is proposed in the Bill, to pay the cost of a review of a Council decision by Planning Arbitrators (PAs), Joint Regional Planning Panels (JRPPs) and a Planning Assessment Commission (PAC)) (see s23O on p 28 of the draft Bill).

Costs on section 97 appeals

The draft bill proposes requiring the L&E Court to order the applicant to pay all of a Council's costs if the plans are substantially amended, to ensure that applicants have submitted properly considered plans before contesting a consent authority's decision

(proposed section 97C – Schedule 2.1[35]). The bill does not apply a corresponding provision to the other review bodies (PAs, JRRPs and PAC). This will encourage applicants to seek reviews in those bodies rather than in the Court, so that they might avoid the cost consequences of late amendments to plans.

Restriction on appeals to Land and Environment Court

Nowhere in the November 2007 discussion paper was it flagged that the JRPPs and PAC would actually exercise review functions carried out currently by the L&E Court. Indeed, in Chapter 4 at p 53, the discussion paper said: "A good administrative decision making process incorporates transparency, accountability, efficiency, objectivity, consistency, equity and effectiveness. The decision making process for development assessment and review needs to be better tailored to suit the type of development proposals under assessment." This implied that appeals to the L&E Court would be retained since only the Court can provide the requisite transparency, accountability, efficiency, objectivity, consistency, equity and effectiveness while at the same time be flexible enough to consider each case on its merits and to tailor hearings to the type of development, for example using section 34, on-site hearings or traditional hearings in Court.

Further, on p 55 the discussion paper said: "Appeals to the Court would be retained as per current practices, unless projects were determined by the PAC and public hearings were conducted." and on page 62 at paragraph A11, it said: "Appeals to the Court would generally be allowed, as is presently the case. However, the need for appeals when the PAC has held public hearings should be reviewed. Small applications subject to local independent review should only proceed to the Court after the matter has been considered and determined by a planning arbitrator. Stricter accountability measures for complying development would be introduced (see Chapter 5), but no appeals would be allowed."

Role of certifiers

The Law Society welcomes provisions in the draft bill tightening up the provisions applying to certifiers. However, there are grave concerns about the effect of proposed section 109PA (Schedule 4.1[15]) and increasing the role of certifiers consequent on the expansion of "complying development". Neighbouring property owners will be unfairly disadvantaged by these provisions, as discussed elsewhere in this submission.

Specific comments

Reduced capacity for community involvement - Bill reneges on Objects of Planning legislation

This bill is contrary to the objects in section 5 of the Environmental Planning and Assessment Act (the Act), in particular:

a. To provide increased opportunity for public involvement and participation in environmental planning and assessment.

b. To promote the sharing of responsibility for environmental planning and assessment.

One of the purposes of administrative review of decision making by bodies such as Councils is to improve decision making by those bodies. The introduction, as proposed,

of a new system of review bodies (PAs, JRPPs and PAC) will not facilitate the improvement of decision making by such bodies. It will not represent community views on development, nor will it have the rigour, independence and consistency of a Court system. Arbitrators and panels cannot have the same level of independence as a Court because arbitrators and panel members will be on short-term contracts, do not have established systems to ensure fairness and transparency and, in many cases, members will be combining work for developers with sitting on review appeals part time. Conflict of interest provisions can deal with direct pecuniary interest, but not regulatory capture. This additional level of appeals is unnecessary and unfairly biases the system in favour of developers. This is likely to have the undesirable consequence of eroding public confidence in the planning system in New South Wales.

Limitations on Council's appeal rights to Land and Environment Court

It would appear to be fundamentally unfair to allow Applicants but deny Councils a right to appeal to the L&E Court from the decision of a planning arbitrator. This will not lead to improvement in decision making by planning authorities. As proposed, Councils would have no avenue of appeal other than in cases of an error of law, in which case costly class 4 proceedings would be their only option for a remedy. There should be an appeal as of right for both Councils and Applicants to the court in respect of decisions of arbitrators.

Limitation of right to legal representation

The bill proposes to amend section 152 of the Act to remove the automatic right for people to be legally represented in hearings (see Schedule 2.2[69]). The Law Society opposes the proposal to exclude lawyers from the planning arbitration and the PAC public hearing process. This exclusion is unjustified and is inconsistent with principles of access to justice. Members of the public should not be excluded from retaining a lawyer if they wish to do so in order to assist them in arguing their case and making submissions on complex planning legislation. The PAC is to deal with major and complex development proposals. Clients ought not to be prevented from having a lawyer of their choice appearing for them at public hearings to put their case. It is foreseeable that questions of law could arise in PAC or PA hearings, putting unsophisticated people at an unfair disadvantage as against experienced opponents. Likewise Councils should be able to choose to retain a lawyer to present their case before the arbitrator. There would appear to be no valid reason to exclude the legal profession alone from the process, as opposed, for instance, to other professions such as planners. This distinction will prove particularly problematic where a planner also has legal qualifications. If there is a real concern about lawyers being involved in these processes a clause similar to that found in section 71 of the *Administrative Decisions Tribunal Act 1997* should be included in the legislation.

Opportunity for bias in constitution of Planning Assessment Commission

The draft Bill makes it possible for a PAC to be constituted by the chairperson and three members appointed by the Minister, all of whom may be property developers (see proposed Schedule 3, Part 2, clause 2(3) – Schedule 2.1[52] p 47). This raises concerns that the system could operate with an unfair bias towards developers and would erode public confidence in the planning system in NSW.

Removal of requirement for consent – environmentally sensitive land

There is particular concern about the proposed deletion of section 76A(6) (Schedule 2.1[15]). This deletion will operate to remove the protection of scrutiny of the impact of specific development on environmentally sensitive land, critical habitat and listed heritage items. There is the potential for even fairly minor and standard developments to have serious impacts, for example changes to hydrology, loss of threatened species and heritage streetscape impacts. The automatic application of standards will not adequately protect sensitive environments. Accordingly, you are urged to reinstate consent authority oversight for all developments in sensitive areas.

Reduced accountability of certifiers

Proposed Section 109PA (Schedule 4.1[15] p 114) is inconsistent with requiring certifiers to be responsible and held accountable for the certification process and shifts the onus from the certifier to the Council.

Minister's powers – making of environmental planning instruments

The Law Society is concerned that amendment proposed to section 24 of the Act (Schedule 1.1[4]) gives the Minister the power to directly make a Local Environmental Plan and to delegate that power to another entity which may not be a Council.

Extension of compulsory acquisition powers

The Society objects to proposed clause 2 of Schedule 7 to the Act (Schedule 5.1[15] p 129) which gives compulsory acquisition power (for a planning purpose specified in a subdivision order) to the following non government or non core government agencies:

- the corporation,
- a council,
- Landcom,
- a development corporation under the Growth Centres (Development Corporations) Act 1974, or
- any other prescribed body.

The proposed provision greatly expands the use to which the government's compulsory acquisition power can be put, given that some of these bodies may have extensive powers to joint venture or contract with the private sector.

Incompleteness

As already commented, much detail of the government's proposals has not been revealed. There is an extraordinary lack of detail with many matters left to be prescribed in the regulations or codes, neither of which are available for comment at this time.

That the exposure draft bill is incomplete is of great concern. Schedule 1.2[37], which contains the savings and transitional provisions relating to plan making, indicates a number of areas in which additional provisions are anticipated but have not yet been made know to commentators.

Further, a number of concepts introduced in the Bill are remarkably vague, and invite uncertainty and in due course litigation about what is intended by the amendment. For example, proposed section 23M - Schedule 2.1[12] p 27) provides no guidance to assist PAC or JRRPs to determine whether to exercise a function that may have "a significantly adverse financial impact on a council".

EXPOSURE DRAFT BUILDING PROFESSIONALS AMENDMENT BILL 2008

While the Law Society recognises that building professionals are best qualified to comment on most aspects of this bill, your attention is drawn to the specific comments made in the Law Society committees' submission of 13 February 2008 about corporate certifiers. The Society urges you to give further consideration to the issues raised by the committees in their commentary on:

- Part 5 – Exempt and Complying Development raising issue about approval of minor variations and limitations on neighbours' ability to examine development proposals, together with the appropriate mode and level of community notification; and
- Part 7 – Building and Subdivision Certificates in relation to sanctions, enforcement and self-disclosure.

Also, it is suggested that:

- the Building Professionals Board (BPB) lacks sufficient expertise as a regulatory body for it to carry out the functions contemplated under the amendments.
- much more detail is required on the provisions on related entities and aggregation to prevent "certifier capture" (see proposed sections 66A and 66B – Schedule 1[41]).

EXPOSURE DRAFT STRATA MANAGEMENT LEGISLATION AMENDMENT BILL 2008

Developer Proxies should not be abolished

There is concern that the abolition of developer proxies will act as a deterrent to the development of these complex staged developments in NSW.

Developers of complex staged developments such as strata title hotels and retirement villages commonly employ proxies to facilitate the development. Caretaker agreements may only effectively commence at the expiration of the initial period or take effect after the expiration of the initial period. Developers' proxies are used to ensure the requisite resolutions of the Owners Corporation are achieved at the expiration of the initial period.

Accordingly, it is recommended that developer proxies should not be abolished. However, if developer proxies are to be abolished, it is suggested that either the bill limit abolition to specified circumstances or that the bill be amended to include a power to prescribe a list of exemptions.

Caretaker Agreements amendments do not reflect the Discussion Paper

Under the current caretaker provisions, a person is only a caretaker if the conditions in section 40A are satisfied (that is, occupation of some part of the common property). If the person's office is located elsewhere, the caretaker provisions do not apply regardless of whether the person is described as a caretaker or a building manager.

While the exposure draft legislation reflects the explanatory notes to the bill, it does not correspond to the notes accompanying the discussion paper. The amendment appears to do no more than show that the name or description of a person does not affect whether or not a person is a caretaker for the purposes of the Act. It is suggested that the bill does not go as far as anticipated in the discussion paper and it is submitted that further consideration should be given to this issue.

Powers of Attorney – removal provision may have unintended consequences

Schedule 1[3] proposes to amend Schedule 2 Clause 10 of the principal Act by effectively removing the right to vote using a Power of Attorney for any meeting.

Commentators were given to understand that the "evil" being addressed by the proposed amendment was the use of Powers of Attorney in the context of a developer requiring a purchaser under a Contract of Sale to give the developer a Power of Attorney for voting purposes.

However, the wholesale removal of the ability to vote at meetings using a Power of Attorney may have unintended consequences and you are urged to review the proposed amendment.

References to a person connected with another person

Further attention should also be given to the drafting of the categories of persons who may be connected with the principal person (see Dictionary, Part 2 Clause 7 [1] – Schedule 1[10]). There is concern that:

- paragraph (f) is exceptionally wide and would encompass shareholders in a public company, and
- paragraph (g) is also exceptionally wide and would include professional advisors such as lawyers or accountants.

CONCLUSION

The Law Society urges reconsideration of the legislation. At the very least, the supporting subordinate legislation should be released for an appropriate period of consultation before the substantive legislation is introduced into Parliament and enacted.