Submission
No 55

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

Organisation: Byron Shire Council

Name: Mr Ray Darney

Position: Director of Planning

Telephone: (02) 6626 7161

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BSC File No:PLN101000.x/#822198
Contact: Ray Darney

EMAILED 13/2/09

Standing Committee on State Development
Parliament House
Macquarie Street
SYDNEY NSW 2000

and by email: statedevelopment@parliament.nsw.gov.au

Dear Sirs and Mesdames

INQUIRY INTO THE NEW SOUTH WALES PLANNING FRAMEWORK

EXECUTIVE SUMMARY

This submission has been prepared by Byron Shire Council Management in accordance with Council Resolution 08-703 of 13 November 2008.

It represents the view of Management and is the product of internal consultation with key technical staff including Council's Executive Team, Manager Legal Services and Manager of Planning and Manager of Building Services.

Significant reforms to the NSW planning system have been introduced recently, much of which has occurred with little or no consultation with Local Government or the community. Still further reforms are proposed to be implemented in the near future.

In its submission to the Department of Planning "Improving the NSW Planning System" Discussion Paper, Council noted that the "*current NSW planning system is outdated in many respects, complicated and difficult to operate within*". The recent and still proposed legislative reforms do seek to address some of the existing difficulties, however, they have been ad hoc and many introduce new layers of complexity to an already overly-complicated system.

Recommendations in this submission include:

- an integrated and holistic review of the entire system and supporting legislation;
- simplification of, and removal of duplication from, the planning system;
- that pending completion of a holistic review, there be no further ad hoc changes made to the current system;
- introduction of policy and legislation addressing climate change (including statutory immunities for Local and State Governments) and coastal zone management issues.

TERMS OF REFERENCE

(a) THE NEED, IF ANY, FOR FURTHER DEVELOPMENT OF THE NEW SOUTH WALES PLANNING LEGISLATION OVER THE NEXT FIVE YEARS, AND THE PRINCIPLES THAT SHOULD GUIDE SUCH DEVELOPMENT.

'The Need'

ALL COMMUNICATIONS TO BE ADDRESSED TO THE GENERAL MANAGER

PO Box 219 Mullumbimby NSW 2482 (70-90 Station Street)
Tel: (02) 6626 7000 DX 20007 Mullumbimby
Fax: (02) 6684 3018 Email: council@byron.nsw.gov.au
Web: www.byron.nsw.gov.au ABN:14 472 131 473

The current NSW Planning legislation is outdated in many respects, complicated and difficult to operate within.

The complexity of the current system is overwhelming at times. The complexities currently inherent in system reduce efficiency and increase cost and delays for all concerned, including landowners, developers and indeed Local and State Governments.

The current planning legislation is based on 1979 legislation which has been 'patched' and added to so many times that it now contains significant anomalies and inconsistencies which have compounded the complexity.

Some examples of duplications or anomalies arising from ad hoc legislative changes over the years include:

- The failure to integrate the provisions of the Water Management Act into the Environmental Planning and Assessment Act (or Local Government Act), with regard to s64 water and sewer contributions, leading to a duplicate requirement for additional approvals and certificates under the Water Management Act.

- The failure of the Standard Instrument Local Environment Plan to include dedicated coastal zones which is antipathetic to the NSW Coastal Policy and the mandatory inclusion of 'Environmental Protection Works' may be antipathetic to local government strategies developed under the NSW Coastal Zone Management Manual at great expense to councils and communities, depending on how the Court ultimately defines that term.

- There are also difficulties with the definitions included in the Standard Instrument and applying that to local circumstances. They are generally are hard to use with various different types of definitions and sub-definitions. There are also inconsistencies in the language and terminology used within the definitions. This appears to be mainly due to the fact the definitions appear to have been "cut and pasted" from a number of documents and sources without any form of holistic review and they do not all work together successfully.

  There is concern that some definitions may open up legal challenges for Council. Further, there is concern that definitions that have previously been the subject of judicial review and are settled at law have not been used or have been used but amended, when using the old definitions could avoid any further litigation. Examples of some of the definitions which staff have concerns about include the limited definition of "agriculture", the open ended definition of "retail premises" and the inclusive definition of "tourist and visitor accommodation".

  There are also some discrepancies in relation to the "parent" and "child" relationships of the definitions, particularly reflected in the matrix that was prepared by DoP.

- There is only one real environmental protection zone allowed for in the Standard Instrument, being the E2 Environmental Protection zone. A number of different environmental circumstances exist in the Shire worthy of environmental protection, all of which have importance but for different reasons. The option of various conservation zones is needed to tailor provisions to different environmental circumstances.

Many of the reforms proposed via the Environmental Planning and Assessment Amendment Act 2008 will further complicate the NSW Planning System and, in turn, increase costs to Councils and to the public.

One simple example is the proposed doubling of the number of determining authorities. Under the current system there are four determining 'bodies' being:

1. Council – staff under delegation (all applications other than state significant, including s82A reviews);

2. Council – elected body (all applications other than state significant, including s82A reviews);

3. State - Minister for Planning (state significant applications);

4. Land and Environment Court.

The proposed future changes would double the amount of determining 'bodies' as follows:

1. Council – staff under delegation (for minor/local development);

2. Council – elected body (for minor/local development);

3. Council – advisory IHAP (for "certain development" undefined but example given is "major SEPP 1 variations");

4. Council – planning arbitrators (for all s82A reviews and deemed refusals for small matters);

5. Combined Council/State – JRPPs (applications of regional significance);

6. State – PAC (applications of regional significance in some cases and most applications of state significance);

7. State - Minister for Planning (state significant applications for critical infrastructure);

8. Land and Environment Court.

This is an unnecessary and inefficient over-complication of the development assessment system which will have the following implications:

- increased confusion within the community, with resulting increase in frustration, dispute and potentially litigation;

- significantly increased resource implications for Councils, in terms of costs of IHAPs (which are advisory only and would perform exactly the same function as expert technical staff), JRPPs and planning arbitrators;

- potentially increased development costs, if the resource implications are to be offset by increased application fees;

- varying conditions of consent and decisions based on which authority determines the application

- significant time delays, for example a local applicant wanting to challenge a refusal say, will have to first have the matter referred to a planning arbitrator prior to proceeding to the Land and Environment Court;

Doubling the number of potential determining 'bodies' will only add many additional layers of bureaucracy and will actually adversely affect efficiency . This is but one example of a currently proposed ad hoc change to the NSW Planning System which will not simplify the system. Attached is a copy of this Council's submission to the Department of Planning "Improving the NSW Planning System" Discussion Paper dated 8 February 2008. While those submissions specifically addressed some of the then proposed reforms, many are equally relevant to this current inquiry.

Another example of a further recent ad hoc change, is the amendments made to this Council's Local Environment Plan by the State Environmental Planning Policy (Repeal of Concurrence and Referral Provisions) 2008. The changes made to Byron Shire Council's LEP via this SEPP appear to have been conceived without a complete review of the implications of those changes. For example, clause 45(2) was an 'enabling provision' not a mandatory concurrence or referral provision. That is the clause did not require concurrence or referral; however, it has been deleted nonetheless. Clause 45 of Byron LEP had been subject, in the 1990's and early 2000's, to extensive litigation and the interpretation of that clause was well settled under the case law. However, the ad hoc deletion of part of this clause may well open up what was well settled case law to legal challenge all over again. If this occurs, it will be at considerable expense to the Council, the property owners involved and ultimately to the community. This exposure to future expense is entirely unnecessary as the amendment made to the clause was unnecessary as it was not a mandatory concurrence or referral clause in the first place.

The above are only some examples of how changes and amendments made outside of a holistic review process, and without adequate consultation, can in the first place be unnecessary and secondly only generate uncertainty and possibly unnecessary and significant cost.

Recommendation:

I. Anomalies, duplications and inconsistencies need to be removed via a holistic and integrated review of all relevant legislation.

II. Further ad hoc amendments to the current legislation, including those currently proposed under the Environmental Planning and Assessment Amendment Act 2008, should be delayed pending such a holistic and integrated review.

Principles that Should Guide Future NSW Planning Legislation Development

The objects of the existing Act are still very pertinent today and any review or further development of the NSW Planning System should always be checked for compliance against those objects.

One of those objects is of course to encourage ecologically sustainable development. In accordance with this objective, all ESD principles should guide future development of NSW planning legislation.

Implicitly arising from ESD principles is the need for climate change implications to be taken into account by and mitigation and adaptation capacities to be built into future NSW Planning legislation.

Also fundamental to improving the NSW Planning system, and thereby reducing costs, is the need to remove duplication from the system (see Water Management Act example above) and to simplify it (which will not be achieved for example by doubling the number of approval bodies – see above).

Further, any review should focus on outcomes rather than processes. Any system which has fixed mandated processes has the capacity to generate challenge based on process technicalities as opposed to the planning outcomes sought to be achieved.

Finally, it is fundamentally important that any future development of NSW planning legislation recognise and accommodate non-metropolitan NSW and recognise the importance, both to communities as well as good strategic planning, of preserving local decision making powers and community consultation opportunities.

Recommendation:

III. The principles that should guide the review, include:

(a) the objects of the existing Act;
(b) ESD principles;

(c) the need for climate change implications to be taken into consideration during decision and plan making and the need for mitigation and adaptation capacities to be included within the framework of the planning system;
(d) simplification and removal of duplication;
(e) focus on outcomes rather than processes (eg maintaining merit appeal rights to avoid over-reliance on judicial review avenues);
(f) conserving local decision and plan making and community participation in all levels of decision making.

(b) THE IMPLICATIONS OF THE COUNCIL OF AUSTRALIAN GOVERNMENTS (COAG) REFORM AGENDA FOR PLANNING IN NEW SOUTH WALES.

This Council would support federal policy and legislation in the areas of coastal zone management and management of climate change issues.

At present Local Government is at the 'coal face' of management of both of these critical issues. Recent removal by State Government of the support role previously played in coastal zone management has left Local Government without any current Coastal Zone Management Manual or statutory support, via the previous process of gazettal, for Coastal Zone Management Plans. This is an unsatisfactory position for Local Government in terms of long-term management of one of the country's most valuable and vulnerable resources. Therefore, this Council would support, absent a commitment from NSW State Government, Federal policy and legislative intervention in the area of coastal zone management.

Similarly, Byron Shire Council would support federal and/or state government involvement in climate change issues and management thereof. This Council has taken a lead role in NSW as far as it has resolved to adopt certain 'climate change parameters' for the purposes of flood modelling and development assessment. We are aware that other NSW Councils are now taking similar steps, however, each Council having its own 'climate change parameters' is an ad hoc approach to an issue, of state and national significance, which is in need of truly systematic and holistic management. Further, it is critical for long-term planning that capacities for climate change adaptation and mitigation are built into all planning systems. Therefore, this Council would welcome any guidance or support that may arise from COAG intervention on the issue of climate change.

(c) DUPLICATION OF PROCESSES UNDER THE COMMONWEALTH ENVIRONMENT PROTECTION AND BIODIVERSITY ACT 1999 AND NEW SOUTH WALES PLANNING, ENVIRONMENT AND HERITAGE LEGISLATION.

This Council has not been involved in many Federal approval matters and staff are therefore unaware of what duplication may exist. As per the above, removal of any duplication should be one of the core objectives of any holistic review of NSW Planning.

(d) CLIMATE CHANGE AND NATURAL RESOURCES ISSUES IN PLANNING AND DEVELOPMENT CONTROLS.

As per the above, it is fundamental that any holistic review of NSW Planning address climate change issues and build in climate change adaptation and mitigation capacities into NSW Planning.

For example, the coastal zone is obviously an extremely vulnerable land-type in terms of climate change impacts which include sea level right, storm surge, increased storm intensity, increased rainfall intensity etc. A number of Coastal Council's have in existing LEP's zones 7(f1) (Coastal Land Zones) and 7(f2) (urban Coastal Land Zone) with provisions to restrict and control development on the fragile coastline. Yet, recent NSW Planning law reviews have failed to recognise or cater for this unique and particularly vulnerable land-type. For example:

- There are no dedicated coastal zones in the NSW 'Standard Instrument' LEP. This relegates coastal land to a 'risk category' (akin to flood or bushfire risks) and fails to recognise coastal lands as the unique category of land.

- There are no Standard Instrument clauses that deal with management of coastal lands and there appears to be little capacity for local clauses to be included in LEP's in this regard. Any inability of local councils to implement local clauses to address coastal management issues, will severely impact on Councils' abilities to develop and implement robust and locally responsive coastal zone management and climate change adaptation and mitigation strategies.

- There has been no statutory support (for example amendment to s79C of the Act or amendment of SEPP 71) which clarifies that climate change implications are a mandatory consideration in development assessment.

It is critical that NSW Planning 'catch up' and ensure that climate change issues, in relation to coastal land management as well as management of all other natural and other resources, are adequately accommodated in planning and development controls.

In developing any state-wide climate change management strategies it is imperative that recognition be given to regional variances, for example in predicted sea-level rise, and local management issues and that there is sufficient flexibility in all strategies to accommodate both.

Local Government is, rightly or wrongly, at the forefront of threats of claims for damages for climate change impacts. While common law and statutory provisions may ultimately prove successful in defending such claims, the reality is that Councils will be forced to expend significant sums of public funds defending such claims, either in terms of insurance premiums or excess payments (assuming local government insurance policies will extend cover to such claims) or legal costs and staff resources.

It is imperative that funds and resources be used in the most effective and efficient manner, namely in developing and implementing climate change adaptation and mitigation strategies rather than on defending past actions. Statutory exemptions against 'climate change' litigation are imperative to the protection of and efficient use of public funds and Council would support any review of NSW planning and controls introducing statutory immunities.

Recommendations:

IV. Statutory immunity for Local and State Governments from 'climate change litigation' and associated risk be introduced.

V. Climate change implications be identified in all relevant legislation and policies as mandatory considerations during development assessment of all types of development.

VI. Climate change adaptation and mitigation capacities, ensuring sufficient flexibility to accommodate regional variations and local issues, be incorporated in to relevant legislation and policies.

VII. Any future review of NSW Planning ensure that coastal lands be recognised as a discrete and unique category of land with sufficient management capacities incorporated into all relevant legislation and policies.

VIII. State Government provide 'best practice' guidance and manuals addressing climate change implications and management thereof.

(e) APPROPRIATENESS OF CONSIDERING COMPETITION POLICY ISSUES IN LAND USE PLANNING AND DEVELOPMENT APPROVAL PROCESSES IN NEW SOUTH WALES.

Currently proposed changes to the development assessment process relating to the consideration of 'commercial submissions' made to development proposals will not address competition policy issues, as development assessment staff are untrained and unable to assess competition policy matters. The proposed addition of another bureaucratic decision (ie whether any particular submission is or is not a 'commercial decision') will only expose the entire development assessment process to another ground for technical challenge.

Competition policy issues should have little place in land use planning and no place in the development approval processes in NSW.

(f) REGULATION OF LAND USE ON OR ADJACENT TO AIRPORTS.

We assume this term of reference relates to significant airports and not small or private airstrips, in which case no comment is made save to say that if any future regulation will also deal with smaller airstrips, Council would hope that local government would be consulted during the process of development of the policies/legislation.

(g) INTER-RELATIONSHIP OF PLANNING AND BUILDING CONTROLS.

The simplest, cheapest and quickest system of planning and building control was the combined Development Approval/Building Approval process which existed many years ago under the Environmental Planning and Assessment Act/Local Government Act dichotomy.

That system unfortunately devolved into a complicated mix of multiple approvals required under various pieces of legislation but this could be rectified by a reversion to a single, albeit improved, DA/BA system (for example both systems under the one legislation).

Recommendation

IX. ***Any review of the interrelationship of planning and building controls must:***

- ***(a) remove persisting duplication, for example the duplicity arising under the Water Management Act/Environmental Planning and Assessment/Local Government Act interaction;***
- ***(b) resolve difficulties and poor standards of certification that continue to persist with private certification in the building system;***
- ***(c) remove the absurdity that can arise from voluntary election whether a development proposal is integrated or not (for example someone elects to seek development consent only which is assessed and is capable of approval against planning laws in circumstances where the proposal will never be capable of obtaining a necessary integrated approval, eg a s100B bushfire safety authority).***

(h) IMPLICATIONS OF THE PLANNING SYSTEM ON HOUSING AFFORDABILITY.

Obviously there is a correlation between land use planning and development assessment processes and land values, which in turn can affect housing affordability.

Housing affordability is only one consideration, albeit an important one, in decision-making on land use planning. Regional and state strategic plans must take into account housing affordability issues, along with all other relevant considerations.

There needs to b e greater consultation between Planning NSW and other government agencies eg Department of Housing and Councils, during development of regional and state strategic land use planning strategies.
Immediate reductions in housing costs can be achieved in improving development assessment processes. However, that is not to say that all development should be exempt development because that could lead to houses being constructed in inappropriate locations for example in areas likely to be affected by natural hazards, such as coastal erosion or flooding etc. Inappropriate development could adversely impact housing affordability in the future. Proposed planning reforms, introducing further complexity to the system, will only increase development assessment costs with adverse impacts on housing affordability.

Recommendation

X. A holistic review of NSW Planning to remove duplication and inefficiencies.

XI. Increased consultation between with relevant state agencies and local government to ensure that state and regional plans and strategies adequately consider housing affordability, as well as all other relevant, issues.

CONCLUSION

Council would like to thank you for the opportunity of making a submission to this Inquiry which Council believes is both necessary and timely. There are significant improvements that need to be made to the NSW Planning System and there are emerging issues, such as climate change implications and coastal zone management, which need to be addressed in the immediate future.

Any correspondence or enquiries on this submission should be directed to:

Ray Darney
Director of Planning
Byron Shire Council
PO Box 219
Mullumbimby NSW 2482
Ph: 02 6626 7161
Fax: 02 6684 3018
E: ray.darney@byron.nsw.gov.au

Yours sincerely

Graeme Faulkner
General Manager

Encl:

1. Copy Byron Shire Council Submission to Department of Planning "Improving the NSW Planning System" Discussion Paper dated 8 February 2008 (#737543)

Submission

Department of Planning "Improving the NSW Planning System" Discussion Paper

8 February 2008

Email: planningreform@planning.nsw.gov.au

INTRODUCTION

This submission has been prepared by staff.

The current NSW planning system is outdated in many respects, complicated and difficult to operate within. The system has been added to and patched on so many occasions which has generated anomalies and inconsistencies and compounded the complexity.

While some of the proposed recommendations contained in the discussion paper seek to address particular areas of concern, they do represent more additions and patches to the existing system. While this may represent a necessary temporary 'work around', ultimately a complete review of the NSW planning system is required and should be undertaken as a high priority.

In the meantime, the Minister and Department of Planning are to be congratulated on the review of some of the issues with the planning system and Byron Shire Council appreciates this opportunity to make this submission.

General Comments on Current System

Delays within local government are only one component of the overall tardiness of the NSW Planning system:-

- Centralisation of strategic planning decisions and LEP amendments/decisions in Sydney is cumbersome.

  Any review, of the system should encourage local government to prepare their plans to state and regional guidelines but allow for variety and local initiatives.

  The system should not require urban centres, towns and villages to conform to a Sydney standard of development and EPIs should retain the capacity to accommodate some localised innovation.

  Greater delegations to DoP Regional Offices for decisions, both strategic and regional, should be granted.

- A major impediment to plan making has been the time taken for plans to pass through DoP in Sydney along with delays at the office of Parliamentary Counsel.

- The many amendments made over time to the Environmental Planning & Assessment Act 1979, have over-complicated the system and have generally added to the state and local government bureaucratic burden, to the point now where reliance by all concerned parties on planners has increased to a point where there are simply not enough planners to go around.

- The system of Private Certification to help developers get more expeditious approvals has generated additional processes and complications, particularly in relation to regulation and compliance, as Complying Development Certificates and Construction Certificates etc, are cumbersome and complicated. This has generated additional unnecessary work for local government which distracts resources away from core functions, such as certification of development, which in turn generates delays.

It is unanimously agreed that there are problems with the current systems and there are many areas that require reform, including those outlined in the discussion paper. Many of the proposed reforms are supported, by this Council, others are opposed and still others raise concerns which have been not been addressed in the discussion paper – refer below for more details.

General Comments On Discussion Paper

Data Relied Upon to Justify Reforms

There are questions as to the appropriateness of some of the information used to support the claims made by the discussion paper in relation to why reform is required.

Some of the figures quoted in the paper seem to be taken out of context and compared to other States that have different issues and populations to NSW.

Further some of the justifications have been extrapolated from the results of the recently introduced annual survey of local government. However the reporting template used by DoP did not contain the capacities to capture fundamental data. For example justification for the statement that 'some councils avoid decision making altogether' by reliance on one Council having 90% of its appeals upheld in Court may be misleading, because the reporting template did not contain the capacity to distinguish between those appeals which were truly upheld (ie where the relevant Council did not make a decision at all or where their decision was ultimately overturned) and appeals which were upheld by consent (ie where Council issue an approval via consent orders as a result of inadequate and/or inappropriate proposals being amended before the Court).

Finally, it is noted that some of the data collected in the annual survey does not appear to have been addressed in the discussion paper or recommendations. For example, the single greatest cause of delay reported by Councils is inadequate applications yet this issue was not investigated in the discussion paper. As a result, where appropriate, suggestions have been made as to how issues not otherwise the subject of recommendations might be addressed – refer to submissions below for more details.

The Devil is in the Detail

It is often said the "devil is in the detail" and this is one situation where the details of how these changes will work in practice is of great importance and relevance to all stakeholders. This

submission is made on the assumption that further consultation on the specific details of any reforms will occur.

Exposure to Legal Challenge

Many of the delays, particularly with the plan making process, are caused by the necessity of Council to follow procedures set out in legislation or policy made by the State in minute detail to avoid exposure to legal challenge on the basis of technicalities. Therefore for any proposed reforms, consideration needs to be given to how those reforms may generate additional exposure to legal challenge, particularly in relation to plan making as mentioned above.

Submissions On General Issues

Fees For Service

Many of the recommendations propose the introduction and/or review of 'fees for service'. Currently regulated fees, such as DA, S.96 and S.82A application fees, are grossly inadequate in meeting the cost of the development assessment service provided. It is important that this be reviewed and that this practice not continue.

Inadequate resourcing of Councils leads to delays in all processes. The discussion paper identifies delays in process as increasing the cost of development. Therefore, regulating fees below the standards required to truly meet the cost of the service provided may be counterproductive to attempts to reduce the overall cost of development.

Further, 'fees for service' infer a user-pays system is in place. Fundamental to maintaining land rates as low as possible, is the need to ensure that development services are adequately supported by the users and not from general revenue, ie that 'mum and dad' ratepayers are not subsidising proponents of development.

Reductions in Community Consultation

Many of the recommendations appear to propose removal of community consultation stages in some processes.

Community consultation is a fundamental component of good planning. Public participation in government decision making is a fundamental cornerstone of good governance.

The provision of "increased opportunity for public involvement and participation in environmental planning and assessment" is a stated objective of the Environmental Planning and Assessment Act – refer s5(c).

Notwithstanding all of this, community consultation processes have already been eroded by adoption of the new "one size fits all" approach to strategic planning.

Council opposes any further reductions in community consultation opportunities.

SECTION 3 CHANGING LAND USE AND PLAN-MAKING

Outlined below are general issues raised in relation to Section 3 of the discussion paper:

- Standardisation

The need for reform has encouraged the government to consider that standard documents for all local government areas is the way to solve the planning issues. Therefore the Standard LEP template was introduced and only lasted nine (9) months before a major review. The reforms are suggesting that this template idea should be encouraged and expanded to other instruments such as DCPs as well as well as processes.

Queries must be raised about the fact that the discussion paper laments the problems which arose from the "one size fits all" approach which has historically been applied to development assessment yet conversely advocates the introduction and expansion of the new "one size fits all" approach to strategic planning.

The new "one size fits all" approach to strategic planning has the potential to remove any uniqueness an area has been able to maintain and at the same times takes away opportunities for local areas to have input into what they want the character of their area to be in the future.

- Procedural nature of plan-making

The discussion paper is critical of the procedural nature of plan making. As mentioned below, the focus on process is a direct result of the potential for legal challenge to plans based on technicalities. Changing the process will not remove the potential for legal challenge and therefore will not remove the focus on procedure.

- Regional planning

The reforms recommend the removal of regional environmental plans and replace them with the regional strategies. This will take away the legislative power of the regional documents. It is suggested that the controls or policies currently included in regional documents could either be included in local or state plans. This is not considered an appropriate option, particularly with the number of cross regional issues.

The discussion paper does not seem to address the role of the regional offices of the Department of Planning. How are they to be involved in this reformed process?

- Gateway approach

The reforms for plan making suggest a consideration of the issues for a new plan upfront, called the "gateway" process in the discussion paper. This could potentially be a good process for relatively simple plans, but could run into trouble in the more complex plans for land that might have important environmental aspects for example, the actual extent of say threatened species or habitat may not be known until detailed investigations have been done on the site. This may take away from the limited information requirements upfront. And if this information is not provided, then a false sense of security may be given to the applicants. Once again, the detail of the reforms will be important.

- Justification report

The discussion paper suggests what the content of a justification report for a rezoning or plan may contain. These are very broad and there should be opportunity for Council to tailor it to their local government area. Also climate change should be added to the environmental constraint list,

particularly due to recent research and court cases. There is also concern about how some of the environmental constraints can be adequately or accurately addressed without study and assessment.

Detailed submissions in relation to particular Section 3 recommendations (P1 to P10) appear below.

SECTION 4 - DEVELOPMENT ASSESSMENT AND REVIEW

Outlined below are general issues raised in relation to Section 4 of the discussion paper:

- Approval bodies

Significant further changes to development assessment processes are proposed. It appears that more power is being removed from local Councils to regional or state bodies through the proposed reforms. This will take away the power of a community to make decisions that affect their neighbourhood and therefore is not supported. The proposed reforms also appear to significantly increase the number of determining bodies, and as a result the complexity of the various determination processes, so these reforms are not supported.

Detailed submissions in relation to particular Section 4 recommendations (A1 to A18) appear below.

SECTION 5 - EXEMPT AND COMPLYING DEVELOPMENT

Outlined below are general issues raised in relation to Section 5 of the discussion paper:

- Mandatory Code

The reforms suggest the introduction of a mandatory code for exempt and complying development in an effort to reduce the number of development applications. This assumes that all communities throughout NSW have the same requirements and will support this proposal. The discussion paper suggests Councils can develop their own code for certification (which of itself appears to defeat the stated intention to achieve uniformity) provided their own codes do not detract from the standard codes.

The introduction of the mandatory code also comes at a time where many Councils have spent time and resources reviewing their policy for the new Shire-wide LEPs that are required to be prepared. Now the State appears intent on repeating the work that has been recently completed by most Councils which is wasteful of Councils' precious time and resources.

Detailed submissions in relation to particular Section 5 recommendations (C1 - C18) appear below.

SECTION 6 - ePLANNING INITIATIVES

Outlined below are general issues raised in relation to Section 6 of the discussion paper:

- Council supports the introduction of ePlanning and agrees that it is a necessary way for the future. However there are concerns in relation to the funding, support and system compatibility for ePlanning, particularly for rural and regional areas where resources to provide these systems are not as readily available as they are in metropolitan areas.

- There are also concerns about duplication of work, with many Councils currently investing in their own eServices. It would be far more efficient if a Statewide system was introduced rather than individual Councils all being told what services they must provide and when

those services must be supplied by but then being left to their own individual efforts to meet those mandatory requirements.

Detailed submissions in relation to particular Section 6 recommendations (E1 – E9) appear below.

SECTION 7 -BUILDING AND SUBDIVISION CERTIFICATION

Detailed submissions in relation to particular Section 7 recommendations (B1 to B17) appear below.

SECTION 8 - STRATA MANAGEMENT REFORM

The recommendations in Section 8 appear to relate to management of the transition between a developer and the eventual owners of units in a strata plan.

While the concept of improving that transition and protecting the consumer is supported, no submissions are made on this Section, as it does not strictly relate to any of the functions of Councils.

SECTION 9 - RESOLVING PAPER SUBDIVISIONS

The discussion paper identifies this issue as affecting 3 local government areas, none of which are Byron Shire Council, therefore detailed submissions will not be made on this Section.

SECTION 10 - MISCELLANEOUS AMENDMENTS

Detailed submissions in relation to particular Section 10 recommendations (M1 to M12) appear below.

COMMENTS IN RELATION TO SPECIFIC RECOMMENDATIONS

P1 – INTRODUCTION OF NEW PLANNING SYSTEM

Council supports the following aspects of the proposed new Plan preparation process:

i. streamlining of the LEP process;
ii. rationalisation of planning instruments;
iii. centralisation of legal drafting obligations with DoP and PC.

Council is opposed to introduction of any additional power to the State to direct Council to prepare LEP amendments for rezoning of land.

Council believes that in developing the new system it will be important to:

a. Ensure sufficient checks are contained in the system to avoid inadvertently encouraging or increasing owner/developer driven LEP amendment requests contrary to the desired intention of minimising spot rezonings.

b. Ensure that, other than for State driven LEPs, Council retains the final decision making power at both ends of the process, ie resolutions to prepare a draft LEP amendment and to adopt, after PC drafting but before gazettal. This is necessary to ensure that local identified priorities are given the attention they deserve and to ensure that the intent of Council is not 'lost' in legal drafting.
c. Clarify the apparent confusion about whether REPPs are to be incorporated into LEPs or SEPPs. The clear hierarchy of SEPP, REP & LEP is well understood and Council questions the efficacy of amendments to the hierarchy.
d. Ensure that Councils are provided with adequate support to ensure no unreasonable resource impacts occur from any proposal to incorporate SEPPs and REPs into LEPs.
e. Ensure that additional potential for legal challenge is not generated by the proposed additional steps in the gateway system.

P2 – GATEWAY SCREENING SYSTEM

Council supports the concept of some upfront assessment of the appropriateness of a proposal. It also supports the delegation to Council of the power to make minor amendments. Some concerns Council does have, however, include:

i. Specific details of the criteria and proposed system are needed and should be subject to further consultation.

ii. In developing the System, consideration must be given to ways to reduce Councils' exposure to litigation which could increase as a result of introduction of additional steps and additional 'administrative decisions' in the process. Eg dispute over the reasonableness of a decision to declare a matter to be 'minor' or conversely dispute over a decision that a certain amendment should follow a certain 'stream' etc.

P3 – 'STREAMING' OF LEP PROCESSING

The concept is generally supported however, the specific details, such as criteria for each 'stream' are needed and should be subject of further consultation. In considering development of the 'streaming' process, regard should be had to:

i. Very clear and concise criteria being used and use of the words such as "minor", on their own without more, being avoided, as they are highly subjective descriptors apt to generate dispute;

ii. Consideration being given to ways to reduce Councils' exposure to litigation, which could potentially increase as a result of introduction of additional steps and additional 'administrative decisions' in the process. Eg dispute over the reasonableness of a decision to declare a matter to be 'minor' or conversely dispute over a decision that a certain amendment should follow a certain 'stream' etc.

Council opposes the following aspects of the proposed system:

a. Mandatory 'green lights' for proposals that pass the initial gateway criteria. A Council resolution to commence the process for owner/developer initiated proposals should still be required. This is necessary to address local priorities and to manage local resources appropriately.

b. Council reservedly supports the concept but would need further details of the proposal before forming a final opinion on the issue. Council would support Councils being granted the power to impose time-limits on re-zonings where appropriate but would be concerned to avoid the creation of a new type of 'temporary rezoning' as well as owner/developer initiated applications for temporary rezonings.

P5 – REFERRAL TO STATE AGENCIES

General concept of early referral is supported.

Referral at an early stage, however, may not identify all issues state agencies may have, leading to further submissions at later stages. This highlights the fact that consultation is an ongoing process and no "one size fits all" process is going to work in each instance.

Time limits on referral agencies should be for data collection purposes only, to be used to identify which agencies could improve referral response processes and identify possible options for improvement. Time limits should not result in 'deemed approval' as this may only lead to complications at a later stage, potentially even after gazettal of an LEP amendment when a landowner proposes to develop the site. This would not be conducive to good planning nor clarity and confidence in the planning system.

P6 – ACCOUNTABILITY FOR LEPs

Timeframes could only be supported if:

i. Council retained power to resolve to commence process. Without such power Council could be inundated at a particular time with the result being that no timeframes could be met.

ii. The timeframes are reasonable.

iii. The timeframes are used for reporting purposes only. Reporting on compliance with timeframes combined with Minister's powers in relation to planning administrators would be adequate to increase accountability.

Removal of control over development of LEPs from local government, whether it is to PAC (Recommendation P 6.2) or State government (Recommendation P6.3) due to expiry of timeframes is strenuously opposed. Referral to another agency because of the lapsing of a particular timeframe will not encourage accountability nor good planning. It will do nothing more than disempower local government further. Timeframes should be used to gather data about the system to be used to identify further ways to improve the system, they should not be punitive.

In relation to recommendation P6.3 Council notes that s74 does not currently provide any powers that allow the State to amend LEPs as suggested. Any amendment to s74 to introduce an increase in State power to direct LEP amendments (outside of the power that now exists with the template LEP system) is opposed.

JRPPs are opposed – see submission on recommendation A5 for further details.

P7 – "ONE STOP SHOP" FOR LEGAL DRAFTING

The concept is generally supported. However, Council raises the following concerns for further consideration:

i. Drafting cannot occur in a vacuum. That is, whoever is undertaking the legal drafting must consider the draft provisions in the context of the whole LEP and other relevant EPIs. This is more resource intensive but necessary to ensure that inconsistencies are not introduced into the LEP by an amendment.

ii. The "one stop shop" needs to undertake the drafting giving due consideration to liability issues and to potential for any drafted amendment to increase exposure to litigation.

P8 – RATIONALISATION OF SEPPs AND REPs

Review and rationalisation of SEPPs and REPs is wholeheartedly supported. However, Council raises the following concerns for further consideration:

i. REPs should not be simply substituted by Regional Strategies (P8.1), a true rationalisation and reduction is required.

ii. Introduction of 'Regional SEPPs' (P8.2) may be an unnecessary change and complication to the system. The hierarchy of SEPP, REP and LEP is well understood in the community.

iii. Removal of REPs could diminish the importance of regional issues. The distinction between SEPP and Regional SEPP could become increasingly difficult to identify, with potential for regional issues to disappear from the radar.

P9 – GUIDELINES FOR CONTENT AND TIMEFRAMES FOR LEPs and DCPs

While guidelines are obviously supported for the necessary assistance they provide, Council would object to any further reduction in the ability of Councils to adequately address local planning issues introduced in the guise of mandatory guidelines.

The alleged justification for mandatory guidelines, being to ensure compliance with SEPPs, is ill-founded. Non-compliance with SEPPs is already not permissible. Compliance with any SEPP has never been an issue. If a SEPP is properly and clearly drafted it will show on its face whether it sets minimum, maximum or mandatory standards.

In the case of SEPP 65 the drafting indicated it set minimum standards. If it was intended to set maximum standards it should be redrafted.

Addressing SEPP drafting errors in guidelines will only lead to further confusion as the process for identifying whether something applies or not would be to 'look at the SEPP which appears reasonably clear on its face but make sure you always check the guidelines in case they say something different'. An unnecessary and inefficient additional layer of regulation would be added.

A1 - HIERARCHY OF DECISION MAKING BODIES

In the current system there are four determining 'bodies' as follows:

1. Council – staff under delegation (all applications other than state significant, including s82A reviews);

2. Council – elected body (all applications other than state significant, including s82A reviews);

3. State - Minister for Planning (state significant applications);

4. Land and Environment Court.

The recommendations would double the amount of determining 'bodies' as follows:

1. Council – staff under delegation (for minor/local development);

2. Council – elected body (form minor/local development);

3. Council – advisory IHAP (for "certain development" undefined but example given is "major SEPP 1 variations");

4. Council – planning arbitrators (for all s82A reviews and deemed refusals for small matters);

5. Combined Council/State – JRPPs (applications of regional significance);

6. State – PAC (applications of regional significance in some cases and most applications of state significance);

7. State - Minister for Planning (state significant applications for critical infrastructure);

8. Land and Environment Court;

This is an unnecessary and inefficient over-complication of the development assessment system and is opposed.

This over-complication will have the following implications:

- increased confusion within the community, with resulting increase in frustration, dispute and potentially litigation;

- significantly increased resource implications for Councils, in terms of costs of IHAPs (which are advisory only and would perform exactly the same function as trained expert staff), JRPPs and planning arbitrators;

- potentially increased development costs, if the resource implications are to be offset by increased application fees;

- significant time delays, for example a local applicant wanting to challenge a refusal say, will have to first have the matter referred to a planning arbitrator prior to proceeding to the Land and Environment Court;

Doubling the number of potential determining 'bodies' will only add many additional layers of bureaucracy and will actually adversely affect efficiency .

Council implores the State to seriously reconsider these recommendations.

A4 & A5 – JOINT REGIONAL PLANNING PANELS

As per above, Council strongly opposes the introduction of yet another bureaucratic layer to the assessment process. In addition Council has other concerns specifically in relation to JRPPs for example:

i. The proposed composition of JRPPs indicates yet another reduction of Councils' powers to determine applications, with the majority being State representatives.

ii. It is unclear who would decide whether a Council has resources to support a JRPP, such that the matter would be referred to the PAC, and when such a decision has to be made ie would it made for each application or on an annual basis etc?

iii. It is unclear whether there would be any merit appeal rights from a decision of the JRPP. If there are, who would the respondent to the appeal be, considering that it would need to be a legal entity, and who would pay the costs of defending the appeal? Surely a Council would not be expected to meet the costs of defending an appeal against a decision of a JRPP when the decision was made by the majority State representatives?

iv. There are no details of the process for assessment and determination of a matter by a JRPP. Who would decide that a matter was such that it had to be determined by a JRPP. What would the timeframes be for referral, submissions, assessment, determination etc?

v. The additional decision as to whether a matter was regionally significant and determinable by a JRPP could be open to judicial review, exposing whoever that decision maker is proposed to be to potential additional litigation risks.

A6 – INDEPENDENT HEARING AND ASSESSMENT PANELS

As per above, Council strongly opposes the introduction of yet another bureaucratic layer to the assessment process. In addition, Council has other concerns specifically in relation to IHAPs for example:

i. Whilst IHAPs have proven successful for some large metropolitan Council's, the "one size fits all" approach is not appropriate and IHAPs are likely to have significant resource implications for smaller rural Councils for little or no benefit.

ii. IHAPs are proposed to be advisory only. Mandatory referral of a "certain matters" to an IHAP for advice will only cause delay in the assessment process thereby actually reducing efficiency and increasing processing times.

iii. The cost of convening an IHAP will have unreasonable resource implications for smaller rural Councils. This will unnecessarily detract resources from core function areas, for example development assessment.

iv. There is no guidance as to what types of matters will be required to be referred to an IHAP. The example given, being "major SEPP 1 variation" is of itself an anomaly, given that SEPP 1 objections are meant to be limited to minor variations, and demonstrates the confusion which may be generated as to the appropriate assessment process which will need to be followed if these additional layers are added to the process.

v. IHAPs were originally designed to be a probity tool and not as a general development assessment vehicle. The SA model is a significant variation on the original concept and is not comparable, in terms of potential to increase efficiency, to the current NSW model.

A7 – PLANNING ARBITRATORS (PAS)

As per above, Council strongly opposes the introduction of yet another bureaucratic layer to the assessment process. In addition, Council has other concerns specifically in relation to PAs for example:

i. It is proposed that PAs determine deemed refusals. Deemed refusal by its very nature indicates that the assessment has not been completed. It is unclear how a PA is expected to undertake a full assessment and determine the matter more quickly than a Council who only have to complete the assessment to be able to determine the matter.

ii. It is proposed that PAs determine s82A review applications. In the majority of cases, s82A reviews are already determined at a more senior, and therefore independent, level within Council. The need for an external independent review has not been demonstrated.

iii. S82A review is a two step process, being first the decision whether to review at all and second, if a decision is to be reviewed, completion of the review. It is unclear whether the decision making powers for both steps are to be referred to a PA or whether a PA would be responsible only for completion of the review ie the second step.

iv. S82A review applications can now incorporate unlimited amendments to the proposal as was originally submitted for determination. Those amendments can substantially change the nature and extent of proposed development and often require re-exhibition. It is firstly not appropriate that the power to determine a substantially amended proposal be removed from the Council. Secondly, it is unclear who would be responsible for carrying out the necessary community consultation for an amendment s82A review application?

v. The cost of retaining PAs will have unreasonable resource implications for smaller rural Councils. This will unnecessarily detract resources from core function areas, for example development assessment.

vi. It is assumed that appeal rights from s82A reviews and determinations will be retained. If so, it is assumed that PAs would be required to give evidence in the appeal proceedings as to the reasons for their determination etc. The appropriateness and mechanics of how this would be done do not appear to have been considered. There could also be a significant cost burden on Councils associated with PAs preparing and giving evidence. Further, to the extent that assessments and then potential litigation could be resource intensive, neighbouring Councils may not be willing to nominate staff to serve as PAs.

A9 – MANDATING NATURE AND EXTENT OF DA INFORMATION

Clause 50 of the Regulations was meant to mandate the nature and extent of information required for development assessment. However, the requirements of the Regulations have been substantially watered down by Court decisions which have found that there is no such thing as an invalid application and Councils really don't have the power to reject applications for lack of certain information.

If the reforms are to have any real practical effect, it is critical that legislation is amended to ensure that there is such a thing as an invalid application, that the requirements of the Regulations in

relation to mandatory information are absolute and that Councils do in fact have the ability to reject incomplete or inadequate applications (not just unclear and uncertain applications). See also comments on recommendation M7 below.

As the discussion paper notes at page 52 the sole greatest cause for delay in processing applications is inadequacy of information provided and this is the single biggest problem facing this Council's ability to improve processing times. Council is not concerned by 'mums and dads' who inadvertently forget some types of information, as this is nearly always quickly and easily resolvable with this assistance of staff. The significant problems occur with recalcitrate consultants who repeatedly lodge incomplete and inadequate applications and who refuse to participate in industry workshops organised by Councils or listen to Council suggestions as to how applications can be improved. We are not talking failure to lodge EISs here, we are talking about things as basic as not showing north points and scales on plans, lodging applications with no elevation plans, not showing all the development which exists on the site etc. Often with these types of applications, staff attempt to refuse the application only to have the consultant applicant oppose the rejection and threaten to proceed to an appeal on deemed refusal after 40 days.

While improvements in efficiency can occur through review of systems, recalcitrant consultant applicants and inadequate/incomplete applications will always prevent the system from becoming as efficient as is possible. Therefore, it is fundamental that Councils be granted the clear and unambiguous statutory power to reject incomplete/inadequate applications.

A10 – E-PLANNING

This Council is committed to e-planning and continuing to improve and roll-out e-planning services, which are identified as high priorities in Council's strategic plan for information and technology services. Council support the development of state-wide e-planning services. The major obstruction to the implementation of e-planning is a source of funding to buy and set up an e-planning systems. The money Councils collect for development applications does not even cover the cost of processing those applications and therefore there is no money in the budget for non-human planning tools such as e-planning. Council would welcome any assistance which may be available for the purchase and implementation of a suitable e-planning systems.

A11 – APPEALS

See comments above in relation to appeals from non-Council decisions

The reference to small local matters having to go before a planning arbitrator prior to going to Court suggests that all matters would have to be subject to a s82A review before an appeal right arises. Mandating s82A reviews will:

i. Increase the number of applications being made to Councils, which appears to contradict the intention of reducing the amount of applications Councils have to process; and

ii. Cause delays to the final determination of the matter, by adding an additional step to the process;

iii. Extend the period any application may be 'on foot' because an appeal must be lodged within 1 year of determination but an appeal from a s82A review can theoretically be lodged more than 2 years after a determination. That is, s82A review applications can be lodged up to 1 year after a DA determination and appeals from s82A review can be lodged up to 1 year after the date of the s82A determination. If the recommended mandatory s82A reviews before appeal

recommendation is pursued, a review of the time periods for lodging a s82A and appealing from a s82A determination should also be reviewed.

Council notes that the removal of appeal rights, in relation to determinations by PAC after public hearings (for regional and state significant development) removes a core component of transparency and accountability in government and significantly reduces the opportunities for public participation in government decision making, which is a fundamental component of good governance.

Further, Council notes that removal of merit appeal rights leaves only judicial review options available, which are often based on irrelevant technicalities rather than matters of substance. This in turn increases the focus on adherence to process. Being bogged down by process always moves the focus away from what should the single most important issue, namely good merit assessment. Therefore, removal of merit appeal rights can actually be counter productive and lead to inefficiencies in itself.

A13 – CONDITIONS OF DEVELOPMENT APPROVAL

Most Councils already have standard conditions of consent. It would be relatively easy I would think for most Council's to publicise those standard conditions. Similarly, there would clearly be some conditions which could be standardised across the state, for example sediment erosion control, construction signage, on-site toilet facilities etc.

However, other conditions may be specific to an local area or a particular constraint or hazard on the site. Therefore, it would be necessary for Council's to retain the power to develop, in addition to and state-wide conditions, their own standard conditions.

Further, not all applications are the same, some are for unique one-off events eg concerts and still others may be innovative, for example proposing use of cutting-edge technologies to mitigate environmental impacts. Therefore, it would be also necessary for Councils to retain the power to impose non-standard conditions in response to unique attributes of any development proposal.

A14 – MODIFICATIONS

Council wholeheartedly support reducing the number of s96 modifications which can be made to a development. In our experience, s96 has been used as a tool to achieve a substantially different development to what was originally proposed by the making of successive s96 applications.

Council does, however, have concerns about making s96 applications subject to SEPP 1. The concern is that a development proposal which complies with development standards may obtain approval, such that a subsequent SEPP 1 s96 may meet the statutory criteria for substantially the same, whereas, that development application, if lodged originally with the SEPP 1 objection may not have obtained approval in the first instance. Further, as noted above SEPP 1 objections have often been the source of dispute and litigation and expanding SEPP 1 to include s96 applications will only exacerbate that existing problem.

A15 – DEEMED TO COMPLY

The intent of this recommendation is unclear. Is it proposed that 'deemed to comply' periods will mean if that if an application is not determined within that period it will be automatically approved? This appears to be the case, given that the current regime is for 'deemed refusal' at the expiry of time periods, rather than the recommended new of 'deemed to comply'.

If the intention is to deem applications automatically approved if not determined within statutory time periods, then Council most strongly objects to the recommendation. Such a provision would make an mockery out of the NSW planning system and would have the potential to lead to entirely inappropriate development and potentially extremely poor planning and environmental outcomes, not to mention potentially placing people at risk from hazards such as bushfire, flood and coastal hazards.

If the intention is to only review the statutory determination periods, at the expiry of which an application will be deemed to have been refused, then Council:

i. Supports the proposed differential approach.

ii. Assumes that the references to days are to 'business days' and not 'calendar days' – clarity on this point is required.

iii. Objects to the proposed 10 day period of CDC's on the basis that it is too short and unrealistic and suggests 20 business days instead.

iv. Council would have to see what the criteria are for "DA's not requiring exhibition" before it could comment on the reasonableness of the proposed 20 (presumably business) day period.

v. "Small scale development" would have the defined before Council could comment on the reasonableness of the proposed 40 (presumably business day) period.

vi. Council supports any increase in number of business days for determination of "medium scale development" and "development equivalent to designated development" but the adequacy of the proposed calculation periods would depend on the definition of those terms.

A16. – DA FEES

Council supports a review of DA fees to ensure fee for service recovery.

Council would also recommend a review of S.82A and s96 application fees as anything other than the most minor of modifications is often as resource intensive as a DA and therefore the current fee regime for assessing s96 and s82A applications is more often than not grossly inadequate.

Similarly, Council would also recommend consideration being given to fees being paid to Council for the provision of assessment information for state and regionally significant applications being determined at a State level. At present Councils are called upon to provide expert assessment information to assist with determinations on large development proposals. Provision of such expert assessment information is resource intensive and without payment of fees, represents a significant drain on Council's development assessment resources.

A17 – COMMUNITY CONSULTATION

Council supports the proposal to require applicants to address issues raised during community consultation prior to final determination of the matter. This may assist in improving stakeholder relations and achievement of a sense of ownership by all stakeholders.

Council assumes (or recommends) that this proposal incorporate a second 'stop the clock' period to enable applicants to address community consultation issues at their convenience without impacting on the development assessment time limits.

C1 to C4 – DEVELOPMENT OF STATEWIDE EXEMPT AND COMPLYING CODES

Further consultation will be required to ensure that statewide codes adequately address local issues. Council requests that proposed statewide codes be placed on public exhibition with adequate time being provided for consideration and submissions.

It is important that codes are not metro-centric and that they adequately address coastal and rural issues. Consideration of hazards, eg coastal, flooding and bushfire hazards as well as potential hazards arising from climate change predictions, must occur when statewide codes are being developed.

C8 – MINOR NON-COMPLIANCES WITH CDC STANDARDS

Allowing variations to the CDC standards is opposed. This would appear to be akin to SEPP 1 variations which have historically been a source of dispute, litigation, delay and cost. A standard is just that and should not be varied in a CDC process.

The example given in the discussion paper of 10cm height difference demonstrates the unreasonableness of the proposal. That is, for the example given rather than conditioning the non-compliance or allowing a variation as proposed, the applicant could simply comply in the first instance. If an applicant chooses not to comply with a CDC standard then by default they should be choosing to proceed with the option of lodging a DA. The onus should be on the applicant to decide which assessment path they wish to follow.

Further if community consultation is going to be reduced as a result of increases in exempt and complying development, it is reasonable that the community should have absolute faith that the standards will be adhered to.

If non-compliances and variations are going to be allowed Council raises the following additional concerns arise:

i. Again the use of the word "minor" is going to create potential for dispute and delay;

ii. The guidance given on distinguishing "minor" from significant given on page 77 is already unclear. Variations of significance are said to "include proposals which seek to vary a numeric standard (by a small amount) whereas 'minor variations' are said to be "minor adjustments of numeric standards". Already the words 'minor' and 'small' are being simultaneously used creating yet further confusion, potential for dispute etc.

iii. It is unclear whether a Council's decision to 'call in' a CDC with other than minor variations would be appellable of itself or open to judicial review?

C9 – FEE FOR SERVICE MINOR NON-COMPLYING CDCs

Council opposes enabling variations to complying development standards, but if the recommendation is to be pursued, a fee for service for lodging a provisional CDC should be payable (not a fee payable only where a non-complying CDC issues).

C12 – COURTESY NOTICE OF CDCs TO ADJOINING OWNERS

Due to reduction in community consultation, at a minimum a courtesy notice is supported.

Council suggest that a standard form of Notice should be developed by the DoP to ensure consistency and adequacy of the information provided in the courtesy notice.

C16 – TARGET DATE FOR FIRST MANDATORY COMPLYING DEVELOPMENT CODE

A date of 1 July 2008 for introduction of "the first mandatory complying code" is grossly inadequate

This would allow less than 4 months for the necessary consultation with all stakeholders, including public exhibition, which is unreasonable.

By necessity this would mean very short timeframes for preparation of submissions in circumstances were Councils' resources are already stretched beyond their limits with obligations in relation to preparation of template LEPs, consideration of template amendments, introduction of significant new SEPPs etc.

Failure to adequately consult on such an important reform will result in widespread community dissatisfaction.

E1 to E4 – E-PLANNING

Council supports the development of e-planning tools but suggests that it needs to be developed and coordinated at a state level, rather than 152 individual Councils all having re-invent this particular wheel.

Council looks forward to working cooperatively and in consultation with the DoP on development of e-planning, however, Council opposes the state mandating the types of services, the types of computer platforms to be used and timeframes for provision of those types of services without providing at the same time as failing to provide any financial or resource support to Councils to introduce to meet these new mandatory requirements.

Further, there are areas of concern which will need to be very carefully analysed and addressed in development of any e-planning tools including for example, but not limited to:

i. The accuracy of the data relied upon for e-planning will need to be beyond reproach. Systems will need to be implemented to check, audit and monitor the accuracy of data;

ii. Many Councils' current data systems contain errors. The system would have to be implemented from a specified date, without reference to historical data as it is likely to be too resource intensive to verify and cleanse that historical data.

iii. Consideration needs to be given to the fact that GIS and aerial photography data usually contain rectification errors, which cannot be avoided.

iv. Security of the system and compliance with privacy laws with have to be prime considerations;

v. Consideration will have to be given to mitigating potential liability issues arising from the system. Liability could arise in very many and varied ways, eg inaccurate data, systems failures, incorrect usage etc. Liability issues could be potentially significant given the audience the system would cater to, the varying levels of reliance on the system by

various sections of that audience and the variety of purposes such a single system could be used for etc.

vi. Councils will require resource support for integration of the system with Councils' systems.

vii. Data infrastructure may need to be improved in many Council areas, particular in rural areas;

viii. Consideration will need to be given to the ongoing costs to Councils of maintain the system and the infrastructure necessary to support the system, for example annual costs of data links, hardware maintenance etc.

ix. Disability and access issues will need to be addressed to ensure that e-planning does not discriminate against any sections of the community.

This Council (and most likely many others) is currently in the process of investigating its own software and hardware requirements to be able to extensions to its current e-services to supply some of the services which e-planning is apparently now proposing to make mandatory. It would be a complete waste of resources for Council to continue with these investigations if the state is intending to implementation mandatory software/hardware requirements which may be different to those currently being investigated. Council's resources would be better used commencing investigations into what will be required to integrate Council's systems with any likely mandatory systems.

In this regard, Council requires guidance and information as to the details of the proposals for e-services, including any proposed software/hardware requirements, as a matter of extreme urgency to ensure that resources currently being expended are not wasted.

B1 to B 5 – Addressing Conflicts of Interest

No amount of regulation will remove neither the perceived nor actual conflicts of interest which exist in the private certification of development. The monetary exchange between owner/builder/developer and a private certifier immediately create a relationship which inherently conflicts with a private certifiers duties to enforce the conditions of development consent and building and construction standards.

The discussion paper identifies that only approximately 30% of development is privately certified. This indicates that private certification is only a minor and certainly not a fundamental component of development certification and yet considerable state and local government resources continue to be dedicated to regulating a private for-profit industry.

The only way in which the certification system can be returned to a position of utmost integrity is to have independent government organisations responsible for certification, whether that is Council and/or an independent body.

B6 to B8 – Accreditation of Certifiers

Council does not see the need for additional accreditation of Council staff. Council staff already have the requirements to the Local Government Act and the ICAC to guide and ensure appropriate behaviour.

The increased cost associated with the "accreditation of Council staff" will also lead to increase cost to the community and a reduction in affordable housing and development generally. Areas outside the major centres will undoubtably experience problems in providing the holistic services required

by the legislation, particularly where a Level A1 and A2 certifier can not be employed by Council due to skills shortages or resource issues, in which case Councils would have to seek consultants for these works with increases to the cost to Council, which would presumably be passed onto the developer.

If Council is required to be involve in the accreditation system it would recommend a transitional accreditation scheme for Council officers who are dealing with A1, A2 and A3 matters, rather than a blanket deemed A3 accreditation, with accreditation as per normal procedures after the transition period. This would allow a similar "grandfather" clause to that which was provided to the private certifiers that left Councils at the commencement of the certification process in 1998.

Finally it must be noted that one of the intentions of requiring Council staff to be accredited is to introduce a 'level playing field' between Council and private certifiers. This simply cannot be achieved because of the additional layers of duties and powers which are already placed on Council staff (and not certifiers), the fact that if Council staff do not process applications in accordance with statutory time frames a Court appeal can occur (which cannot occur with a private certifier) etc.

B9 to B 13 – Clarifying Responsibilities and Sanctions

To suggest that PCAs have not been responsible for enforcement of building and construction standards as well as development consent conditions ignores the clear statements which were made by the State government when private certification was introduced. Department of Urban Affairs and Planning Practice Notes issued at the time the system was introduced, clearly addressed the issue of PCAs' responsibilities, including responsibilities in relation to compliance (see for example DUAP "Guiding Development – Practice Notes, chapter headed 'Who's Responsible? Liability issues' 1999).

Further, it was unambiguously represented to Councils that Councils would have no role in checking construction certificates issues by private certifies nor would it be the Councils' responsibility to manage complaints during construction works. To erode this fundamental base is to further privatise the profits for the benefit of a few and instead place the burden on the public purse to the detriment of the community. This is unacceptable. PCAs and private certifiers have always been responsible for ensuring compliance with construction standards and development consent conditions and this should be reinforced as part of any reforms, assuming private certificate is to remain.

Mandating enforcement by Councils ignores the resource burdens of enforcement proceedings, the criminal nature of enforcement proceedings and the limitations which exist on the type of enforcement mechanisms available to Councils.

Mandating enforcement action also removes one of the fundamental discretions which has always been vested in government authorities which is unprecedented in any other sphere of government. For example, it is not mandatory for police to fine a speeding motorist, it is not mandatory for the Department of Police Prosecutions to prosecute a person alleged to have committed an offence and it is not even mandatory for the BPA to take disciplinary action on a complaint against a private certifier and yet the recommendation is to make enforcement by Council's mandatory under threat of penalty. This recommendation ignores the fundamental tenant of the need for discretion in government decision making. It also ignores the need for flexibility, which is so much relied upon for support for other aspects of the recommended reforms.

Mandating enforcement will also expose Councils to additional liability issues in circumstances where enforcement does not occur for any reason (including entirely reasonable reasons). This is because any mandatory statutory obligation by its nature usually creates a duty of care in all

circumstances, whereas discretionary obligations often only create duties of care in limited circumstances. Exposure to additional liability can have impacts on insurance premiums with resulting impacts on Councils' resources.

B9 to B 10 & B13 – Council Enforcement

Council vehemently opposes mandating enforcement obligations on Councils for the above reasons alone.

Further, in relation to the proposed recommendations to increase Councils' enforcement obligations and powers Council notes:

i. The resource implications of regulatory enforcement are considerable. Given Councils' limited resources and the vast array of regulation enforced by Councils (for example from issues like pets and food through to pollution conservation and construction) the ability to be able to prioritise enforcement action is fundamental. Mandatory enforcement of construction regulation would by necessity promote construction work enforcement ahead of any other type of enforcement, regardless of the importance (even in terms of public health and safety) of the other enforcement. This is not appropriate and surely not the intent of the Department of Planning.

ii. The criminal nature of enforcement action requires a high standard of evidence to exist before even a Penalty Infringement Notice can be issued. The standard of proof required is evidence "beyond a reasonable doubt" that a particular person committed a particular offence (which might have many components) at a particular time/date. Very rarely will someone admit to an offence, which means that Councils may only be able to gather evidence that offence occurred but not who precisely committed it. In such cases, Councils cannot even issue fines. (This is a very real issue, with this Council having had first hand experience of having a $1,500 fine end up costing the Council over $100,000 after the Supreme Court of Criminal Appeal overturned a local court conviction because the circumstantial evidence relied upon to issue the fine was ultimately found inadequate to meet the burden of proof and ordered Council to pay costs.) Simply creating particular categories of fines will not improve a Councils' ability to enforce compliance, particularly in circumstances were certifiers blame builders for non-compliance and vice versa, such that there is no clear evidence of who is responsible.

iii. Difficulties also exist with enforcement through civil actions, such as Notices and Orders. Under the current regime Councils' are required to issue Notices of Proposed Orders prior to issuing Orders and under common law requirements of procedural fairness Council are required to give warnings to the correct person responsible (see issue with identification of responsible persons above) etc. Councils' already follow these processes for construction matters, but often by the time the warnings have been given and then notice periods have expired, the construction works have been completed. Significant review of the Notices and Orders statutory provisions would be required if these were going to be the tools to be relied upon to enforce compliance, which revision would by necessity have to include introduction of clear and unambiguous privative clauses removing procedural fairness requirements of warnings and notice periods, combined with clauses excluding liability accruing to Councils where procedural fairness requirements have been statutorily removed etc.

B11 – Building Certificates

This Councils' experiences concur with the statements in the discussion paper that the Building Certificate system is being abused to avoid proper assessment and construction of

development. Building Certificates are being increasingly used to attempt to obtain legal status for inappropriate development which would never have gained approval in the first instance.

Council would support any recommendations to attempt to limit the increasing reliance on Building Certificates by non-compliant developers.

However, Council believes that the entire Building Certificate system itself needs to be reviewed. The relatively ancient Building Certificate was introduced at a time when BA's still existed and retrospective development approval of unauthorised buildings was expressly prohibited. However, the current ability to obtain prospective development approval to use an unauthorised building has made the intent of the original Building Certificate redundant. Council recommends that consideration be given to abolishing the Building Certificate provisions altogether. If this is not considered acceptable, an alternative option may be to include an additional reason for refusal of building certificate applications, namely that Councils' could refuse to issue a building certificate for construction works completed without, or not in accordance with, the necessary approvals.

B12 –BPAs Enforcement Powers

Expansion of BPAs enforcement powers is greatly supported by Council.

Council's experiences with complaint handling to date have been very poor. In the early stages of private certification, it took up to 3 years for Council to even receive a response to complaints lodged by Council about the activities of PCAs and private certifiers. Of recent times, none of Council's complaints have resulted in any form of disciplinary action, because the non-compliances have been deemed to be "trivial". It is difficult for Council and the community to have faith in the integrity of the private certificate system when clear and repeated non-compliances by some private certifiers are routinely ignored by the accreditation body.

B14 to B15 – Private Certification of Subdivision Certificates

The proposal includes a recommendation that a developer could appoint a private certifier from a list of five certifiers identified by Councils. This raises three main concerns:

i. Probity issues with the identification by Councils of those 'pools' of subdivision certifiers;

ii. The potential for Council's choice of certifiers for inclusion in the 'pool' being interpreted as some form of endorsement of those certifiers and/or some form of express non-endorsement of other certifiers;

iii. Potential issues of compliance with Trade Practices legislation in terms of restraint on trade.

Recommendation B14.2 allows a Council to 'challenge' a provisional subdivision certificate. There is no indication with whether there would be any limitations on the grounds on which a Council could challenge a provisional subdivision certificate, what the process would be if a provisional certificate is challenged and whether there would be any appeal rights against a challenge to a provisional certificate etc. More precise details of the proposal are required before Council cannot comment on whether it supports the concept of private certification of land subdivisions.

B16 – Miscellaneous Amendments

Council does not have any fundamental objections to the proposed miscellaneous amendments, however, the 'devil will be in the detail' and further consultation on the precise amendments is requested prior to the introduction of any legislative changes.

MISCELLANEOUS AMENDMENTS

M1 – LAPSING OF DEVELOPMENT CONSENTS

Council wholehearted supports review of existing provisions relating to the lapsing of consents. Issues as to whether a consent has lapsed or not can currently only be determined by the Land and Environment Court. This leads to considerable costs for both Councils and proponents. Council recommends that the power to determine whether a consent has lapsed or not be vested in Council or DoP, at least in the first instance, so where it is clear that consents have not lapsed litigation can be avoided. Clearly a far stricter and more clear threshold test is also required.

M2. - PUBLIC AUTHORITIES RESPONSIBILBLE FOR PROVIDING SERVICES USUALLY PROVIDED BY LOCAL GOVERNMENT

The specific details of this proposal will be needed together with further consultation on this proposal. It is assumed that the recommended reforms would be limited to specific development areas and would not generally apply to things like water or sewer services, for which there is already a dual rating system in place, or to Crown land reserves or the like.

M5 – COMPULSORY MEDIATION IN THE LAND AND ENVIRONMENT COURT

Council strongly oppose the introduction of compulsory mediation in the Land and Environment Court. This Council has been most successful in reducing litigation through a variety of measures, one of which is early negotiations with proponents to attempt to resolve issues prior to litigation commencing. Over recent years, the only matters which have ended up in the Land and Environment Court for this Council, are those in which pre-litigation negotiations/mediation have already been unsuccessful and therefore the prospects of successful of formal compulsory mediation would be very low. Further, the Courts currently already explore mediation opportunities in every matter and s34 conferences are already pursued by Councils where there reasonable prospects of success of at least reducing the issues before the Court. To force s64 conferences on parties where there are no prospects of resolution would be a complete waste of resources.

Finally, s34 conferences (mediation) are held in Sydney. Imposition of compulsory s34 conferences would place a significant additional cost burden on all non-metropolitan Councils which is unreasonable and unnecessary, particularly in cases where there is clear polarisation of the parties' position on the issues and no prospects of success for mediation, as does occur.

Participation in mediation before and during any appeal process should be left to the discretion of Councils who are of course in the best position to undertake analyses of the prospects of being successful in mediation in each appeal.

M6 – AMENDMENT OF PROPOSALS ON APPEAL TO THE LAND AND ENVIRONMENT COURT

Council support the recommendation to reduce the ability to make amendments to applications before the Land and Environment Court. No appeal against a decision of this Council has been upheld except where significant amendments have been made before the Court, in which case

the appeals have been upheld by consent (ie Council agreeing an approval should issue as a result of the modifications) in all but one instance in the last few years. Reducing the ability to amend before the Court is likely to reduce further the number of appeals for this Council and would certainly encourage better applications in the first instance.

It must be noted that costs orders resulting from the Court allowing amendments never fully compensate a Council for the additional work generated by those amendments because the Court only has power to impose costs orders for legal costs and statutory fees (ie costs orders do not include the cost of staff resources for reassessment, re-exhibition etc) and in respect of legal costs, party/party costs order usually only cover about 80% of the actual costs.

Council would recommend going further though. Allowance of "minor" amendments is a legal 'minefield' with potential to generate disputes over whether proposed amendments are minor or not. Traditionally, the Court has interpreted such provisions very generously to allow matters to proceed before the Court. All the 'bugs' in a proposal should have been 'ironed out before an appeal is brought, given that amendments can be made during the development assessment stage and again before and during a s82A review. Therefore, even minor amendments should not be necessary.

Council would recommend consideration being given to prohibiting all amendments to applications before the Court, in a genuine attempt to encourage honest and accurate applications, reduce the costs of appeals for proponents as well as Councils and other government agencies and the Court and to increase the speed in which appeals are determined.

M7 – MANDATORY REQUIREMENTS FOR SUBMISSION OF STATEMENTS OF ENVIRONMENTAL EFFECTS

Again Council support this recommendation but would like to the review apply to all aspects of clause 50 of the EP&A Regulations. SEE's are not the only part of the regulation which the Court's have watered down. For example the Courts have found that the consent of owners of land on which development is proposed to be carried out is not necessary at the time of lodgement but is something which can be rectified (ie supplied later) right up to the date of determination. It is unreasonable to require Council's to dedicate resources to assessment of applications where there is no prospect of an affected owner granting owner's consent, which as in fact occurred in this Shire.

M8 – REVIEW OF CONDITIONS OF DEVELOPMENT CONSENTS

Council has no general objections to the proposed review of conditions which provide for a trial or temporary period of operation of a consent, in as far as those conditions relate to temporary or unique development proposals.

But it must be remembered that conditions which impose time limits on development are also used in other contexts, for example to allow limited development until the realisation of a hazard such as, in this Council's case, until the occurrence of coastal hazards rendering continued use of coastal properties dangerous. This kind of use of development consent conditions is endorsed by various statutory documents, such as the Coastline Management Manual which is given statutory status by the Coastal Protection Act. It is critical that such type of time-limited conditions of consent remain permissible, particularly in the circumstances of predicted climate change impacts where temporarily optimising use of properties prior to the realisation of hazards may become more necessary.

M9 – PLANNING PANELS

Council objects to the extension of planning panels' powers to the making of s94 Plans.

Whilst contributions are levied in the development assessment process, the s94 Plans actually place obligations on Councils' General Funds and therefore directly affect the financial management of Councils and therefore it is not appropriate that planning panels develop s94 Plans.

If this recommendation is to be pursued, Council requests that Planning Panel's powers be conditional upon approval of any proposed s94 Plans by the Director-General of the Department of Local Government.

M10 – ENSURING PLANNING OUTCOMES ARE ACHIEVED

Council requests that the recommendation to confirm Council's powers to compulsorily acquire land for bona fide strategic purposes in circumstances were plans have been developed by Councils and approved by relevant Ministers, after appropriate public exhibition and consideration, also extend to Coastal Management Plans and Floodplain Management Plans.

M12 – MINOR AMENDMENTS

M12.2 – Section 96 modifications of development consent.

Council requests that the proposal to clarify that deferred commencement conditions may be imposed on s96 applications be extended to also clarify that s94 conditions of consent can be imposed on s96 modification approvals.

CONCLUSION

Again, thank you for the opportunity for comment on the proposed changes and I would hope that when the final improvements are incorporated it leads to a simpler planning system, rather then being further layers on an already over-complex process.

Yours faithfully

R. E. Darney

R.E Darney
Director Planning Development and Environment Services