Submission
No 18

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

Organisation: Australian Property Institute - NSW Division

Name: Mr Chris Egan

Position: President

Telephone: 02 9299 1811

Date received: 5/01/2009

API
Australian Property Institute

NSW – Division
ABN 49 007 505 866
Level 3, 60 York Street
Sydney NSW 2000
Telephone: (02) 9299 1811
Facsimile: (02) 9299 1490
api@nsw.api.org.au
www.nsw.api.org.au
Gail Sanders Executive Officer

The Hon Tony Catanzariti MLC
Committee Chair
Standing Committee on State Development
Legislative Council
Parliament House
Macquarie Street
Sydney 2000

Dear Sir,

Re: Inquiry into the New South Wales planning framework

This submission constitutes a response to the invitation from the Standing Committee on State Development to respond to its inquiry into the New South Wales planning framework, as set out in the Terms of Reference attached to your letter of 25 August 2008 to the Institute.

The overall need for an investigation into national and international trends in planning as set out in Items (a) – (h) in the Terms of Reference is supported by the Australian Property Institute (API). In analysing the eight items in the Terms of Reference, API has formed the view that some of the various matters canvassed are strongly interrelated, however this connectivity and lack of integration appears to be poorly evident in the New South Wales planning framework.

The following comments and recommendations have been framed to respond to the sequence of Items (a) - (h) in the 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,**

RESPONSE

Development Applications

The API believes that the time frames for determination of Development Applications needs to be reconsidered. The current time frames are unrealistic for the determining authorities, especially when referrals are mandatory, and yet at the same time effectively disenfranchise applicants who prefer to lodge an appeal with the Land and Environment Court at an earliest possible date.

Whether a right of appeal to the Land and Environment Court should exist *ab initio* once a Development Application is lodged with a consent authority needs to be the subject of serious consideration. The interlocking of mandatory *s.34* Conferences combined with an *ab initio* right of appeal to the Court is in the view of the API a preferred pathway of dealing with this vexed issue.

Development Control Plans

The Institute is aware that many Development Control Plans (DCPs) unlawfully extend beyond the parameters of the relevant Local Environmental Plan (LEP). Amendments to the *Environmental Planning and Assessment Act 1979* (NSW). (*EPAA*) are necessary in the view of the API to ensure tighter control on the capacity of DCPs, and arguably instituting initial legal scrutiny by Parliamentary Counsel (PC) of all DCPs when first drafted by local Government authorities.

However, the API is also aware that the capacity of the PC to undertake such additional work is questionable as the current workload in scrutinizing LEPs is substantial. Additional funding to permit further staff to be employed by PC would be a parallel improvement with the amendment to the *EPAA* suggested above.

Harmonisation of rezoning processes

The rezoning process in New South Wales sits at odds with other States such as Queensland. In that State an application as of right can be made for a rezoning to the relevant local Government authority under the *Integrated Planning Act 1997* (Qld), and if not dealt with in a timely manner, an appeal to the Planning and Environment Court for a decision on the rezoning application can be made.

In New South Wales, the arbitrary manner in which local government authorities or the Minister for Planning decide to undertake rezonings is clearly unjust, especially given the continuing incapacity of parties to seek a judicial decision. It is not possible under the current regime of the *EPAA* for an application to be made for a rezoning, and subsequently prosecuted for a decision in a timely manner. Only local Government authorities and the Minister have the legal capacity to apply for a rezoning, effectively to themselves.

Given the existing scrutiny provided in the *EPAA* over the determinative process for development applications and the appeal right for applicants and even third parties (e.g. Designated Development) to the Land and Environment Court, it is in the Institutes view incongruous that a right of appeal on rezonings to the Court does not exist. It is the strong view of the API that significant amendments to the *EPAA* are required to give effect to the above recommendations.

Existing Use Rights

The vexed issue of existing use rights still requires attention by way of amendments to the *EPAA*. In 2007 the Institute over many months advised the Government that changes to existing use rights provisions had unintended consequences, however subsequent responses were at best begrudgingly reactive.

It is the strong view of the API that existing use rights provisions in the *EPAA* should be much clearer, and in particular where incremental or marginal changes in land use occur, these changes ought not to threaten existing use rights. Such rights arose initially from the *County of Cumberland Planning Scheme Ordinance* which was prepared pursuant to the *Local Government (Town and Country Planning) Amendment Act 1945* (NSW), and have continued in one form or another as statutory land use controls extended into the rest of New South Wales.

Statutory land use planning remains ostensibly a reactive process, and given the number of years that are involved in the gestation of a new LEP, the relevance of the planning controls in that new document are often outdated well before the gazettal of

the LEP. This issue of time delay in promulgating new LEPs has resulted in increasing reliance upon existing use rights flowing not only from pre statutory planning periods, but also from prior development consents under an earlier LEP.

Compensation for injurious affection arising from zoning change

It is the view of the API that the issue of compensation arising from injurious affection from zoning change has now become untenable. Notwithstanding the assertions in the *County of Cumberland Planning Scheme Ordinance* over a half century ago when statutory planning first commenced, the steady erosion of compensation for zoning change has now reached a critical point. The 1995 Kiama LEP provides a stark example of how zonings and reservations are being manipulated on the grounds of public good to constrict private purposes. The use of highly restrictive zonings is effectively circumventing the "public purposes" provisions in the *EPAA*, allowing local Government and State agencies to undertake defacto land acquisition by stealth.

Further, the provisions for inverse compulsory acquisition arising from a "public purposes" zoning have been significantly changed through the introduction of hardship provisions. Unless hardship can be proven, the authority gaining beneficially from the "public purposes" zoning does not have to acquire the property until it wishes. The problem with the hardship provision is that the normal heads of compensation such as special value, disturbance, severance, etc cannot apply, and the affected owner only receives the market value of the property, at the very time when he is suffering hardship. It is the Institute's strong view that private property rights are being significantly disadvantaged for the broader public benefit, at selective private cost.

The API strongly believes that significant amendments to the *EPAA* and to the *Land Acquisition (Just Term Compensation) Act 1991* (NSW) are now necessary to correct the above situation.

(b) **the implications of the Council of Australian Governments (COAG) reform agenda for planning in New South Wales,**

RESPONSE

The continuing absence of seamless interface between the States' statutory land use planning regimes represents a significant failure of the COAG Reform Agenda for New South Wales. Indeed the statutory planning legislation is each of the States has become even more divergent since the original 1992 COAG proposals for overall liberalisation of continent wide regulations.

In the earlier section of this submission by the API, it was highlighted that the Queensland provisions for rezoning are so markedly different from New South Wales, that one could be forgiven for believing that the COAG Reform Agenda had never existed.

The API believes that there is a significant reluctance by State planning agencies in every State of Australia to construct a seamless interface, relying upon their powers which are protected in the Australian Constitution. The six Australian States were until 2001 separate British colonies, and in 2008 they remain substantially responsible for

land management as this task is not a power specifically vested in the Commonwealth of Australia under the Australian *Constitution*. Critically, management of the water of rivers also remains firmly vested in the States under *s.100.*

(c) **duplication of processes under the Commonwealth Environment Protection and Biodiversity Act 1999 and New South Wales planning, environmental and heritage legislation,**

RESPONSE

The current Independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth.) by Dr Allan Hawke has invited submissions which close on 19 December 2008, and is focussed upon an examination of the Act as the Commonwealth's centre piece of environmental legislation.

The API is currently preparing a submission to Dr Hawke, and would be pleased to provide a copy of that submission to the Standing Committee in due course. Nevertheless, it is noted that the Minister for the Environment, the Hon Peter Garrett MP has stated (SMH 1 November 2008) in commissioning the review of the Act has stated that the seven triggers for referral may be increased by the inclusion of a "greenhouse trigger as part of the process".

The Institute is concerned that the inclusion of an additional trigger will lead to a significant number of development applications being referred to the Commonwealth for determination, resulting in an indefinite time frame for resolution of those development applications. Nevertheless, it is recognised that there is a growing body of case law dealing with the propriety of development in an environment of increasing climatic change, and legislative change flowing from the ratification by the Commonwealth Government in December 2007 of the *Kyoto Protocol* will occur in each Australian State.

It is clear that amendments to the *EPAA* will be needed in due course once the Commonwealth amends the *Environment Protection and Biodiversity Conservation Act 1999* (Cth.) to enlarge its referral triggers.

(d) **climate change and natural resources issues in planning and development controls,**

RESPONSE

The foreshadowed introduction in 2009 of a Carbon Pollution Reduction Scheme (CPRS) suggests that climate change and natural resources issues in planning and development controls will be critical. Much carbon sequestered in Australia will be in the land, primarily in plantations, and soil. There has never been in Australia's history a free standing property right in carbon separate from land, and it is uncertain how the foreshadowed CPRS will deal with this new land based right.

New South Wales established in 1999 a limited sequestration scheme known as "forestry rights", which are dealt with in *ss87A, 88AB(1)* and *88EA Conveyancing Act* 1919 (NSW), but these rights are clumsy and do not offer the necessary security for purchasers of high value carbon rights.

Where a carbon offset under the CPRS is supported by a land-based carbon property right, the existing planning and development controls appear to be wholly inadequate to provide protection for these rights in vegetation and/or soil. This is in an important issue in the view of the API, as carbon in the form of living wood fibre or organic

matter in soil is not envisaged in Australian property law which does not separate vegetation and soil from basic land ownership. It is problematic how the *EPAA* will respond to this issue, and it is the view of the API that significant amendments will be necessary to existing non urban statutory land use controls, which must be complimentary to the developing international trading regime.

(e) **appropriateness of considering competition policy issues in land use planning and development approval processes in New South Wales,**

RESPONSE

The Institute has dealt with this issue in its response to Item (b) above.

(f) **regulation of land use on or adjacent to airports,**

RESPONSE

As mentioned earlier in the API response to Item (a), the imposition of restrictive zonings for the intent of protecting public purposes ought not to be undertaken at a private cost which is not compensable. Whilst the regulation of land use on Commonwealth land such as airports is only with the consent of the Commonwealth, the regulation of adjacent land uses ought to be undertaken in a manner which is transparent.

The example of the Kiama LEP referred to in the API response to Item (a) is not regarded as a reasonable model for the regulation of land use adjacent to airports, unless the grounds for compensation for injurious affection are expanded to include such statutory controls in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

(g) **inter-relationship of planning and building controls,**

RESPONSE

The API considers that the introduction of Construction Certificates, and the parallel collapsing of Building Applications into Development Applications, has simplified the development process, but has also increased the front-end cost to applicants who are often merely seeking development consent to crystallise their property rights.

The raft of additional material that must now be provided in development applications has resulted in significant cost to applicants and clearly increased processing time by the consent authorities. The original intent of development applications as set out in the *Town and Country Planning Act 1932* (UK) sought to introduce development applications which in reality sought planning permission for a particular development in outline only. The intention being that an applicant for a particular development would gain formal advice from the consent authority as to the acceptability of the development in principle from the authority.

This principle established in 1932 subsequently informed the *County of Cumberland Planning Scheme Ordinance* when it was promulgated in 1945 in New South Wales, and this principle separating development and building remained for effectively a half century.

The Institute is of the view that the increased cost in preparing development applications is a significant issue both for applicants and for the consent authorities processing such applications. This is an issue that the Standing Committee should

consider, and arguably the interrelationship between planning and building controls ought to be revisited with a view to the re-establishment of the historic separation between development and building.

(h) **implications of the planning system on housing affordability**

RESPONSE

The API is of the view that the increased cost in preparing development applications and the incongruous and untidy rezoning process in New South Wales, referred to earlier in this submission, has a clear adverse impact on housing affordability. A shortage of supply in either housing stock or land availability and servicing, clearly has an effect upon the resultant cost of housing in the market place.

The cost of processing detailed rezonings and subsequent development applications simply adds to the cost of the final housing product in the hands of the intending purchaser. Arguably some of these costs should be born by the broader community over a long term, such as was achieved in the earlier construction of infrastructure in the Sydney metropolitan area.

The Institute has been pleased to provide the above submission and would be grateful for the opportunity to provide evidence to the Standing Committee on State Development when the public hearings are held in 2009. The New South Wales Divisional Executive Office Ms Gail Sanders (telephone 92991811) can be contacted once the Standing Committee has a timetable established for the provision of evidence.

The Chair of the Institute's Government Liaison Committee Mr John Sheehan together with Ms Sanders will be providing the evidence to the Standing Committee, and will be able to answer any questions that Committee members may raise in response to their perusal of the above submission by the API.

Yours sincerely

Chris Egan

President