

Submission  
No 65

## INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

**Organisation:** Blue Mountains City Council  
**Name:** Mr Adam Searle  
**Position:** Mayor  
**Telephone:** (02) 4780 5000  
**Date received:** 20/02/2009

---



19 February 2009

Office of the Mayor

Reference File: File No F04657

The Director  
Standing Committee on State Development  
Legislative Council, Parliament House  
Macquarie Street  
SYDNEY NSW 2000

By email to: [statedevelopment@parliament.nsw.gov.au](mailto:statedevelopment@parliament.nsw.gov.au)

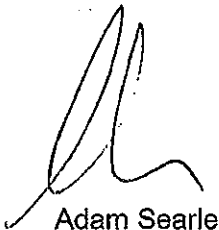
Dear Sir

**SUBJECT** Inquiry into the New South Wales Planning Framework

Thank you for the invitation to contribute to the work of the Standing Committee on State Development's *Inquiry into the New South Wales Planning Framework*.

The attached Submission on the Terms of Reference outlines matters of relevance and concern to Blue Mountains City that would benefit from the inquiry and reporting of the Standing Committee.

Yours faithfully



Adam Searle  
Mayor

# **Response from Blue Mountains City Council to the New South Wales Legislative Council's Standing Committee on State Development Inquiry into the NSW Planning Framework**

## **Summary**

The following summary outlines the key points made in Council's response to the Terms of Reference of the Standing Committee into the NSW Planning Framework. A more detailed submission follows this which addresses the various terms of reference.

## **Working Relationship between the State and Local Governments**

A strong and efficient working relationship between State and Local Government is critical to a successful planning system, as the work of the planning system integrates a wide range of State and Local Government policy matters. The policy direction of the State Government also requires implementation through Local Government and directly impacts the work-load and budget of Councils. The Council advocates a more communicative and responsive working relationship between the NSW State Government and its planning and development agencies, and Local Government.

## **Council's LEP 2005 and the Standard Instrument Local Environmental Plan**

In the case of the SI LEP the standardised provisions do not adequately provide for the different geographic and natural environments; and varying cultural and economic contexts across the state. Blue Mountains City Council adopted LEP 2005 after a 10 year development and has consistently raised objections to the need to review this instrument against a standard template that still does not sufficiently accommodate the planning considerations made in LEP 2005.

A key discussion item between the Council and DoP continues to be the need for inclusion of more local provisions to give effect to planning and development policy to suit our LGA. Unnecessary staff time and costs have been incurred in this process.

In addition there is the likely outcome that conforming the current LEP 2005 into SILEP will result in significant and serious loss of protection for the environment. It is noted that LEP 2005 was a key factor in the recognition of the Blue Mountains as a World Heritage Area.

## **The NSW Housing Code**

The 150-page NSW Housing Code will lay down requirements for double-storey homes to pass the test of "complying development" with the aim of being processed within 10 days without the need for a development application.

The Code will accommodate 80% of all project homes available in the market. However after exclusions are applied this will not apply to many areas of the Blue Mountains.

## **State Agencies and the Planning and Development System**

Where proposed and new legislation are not responsive to the needs of Local Government, there are significant implications for the planning and development of NSW. These implications include:

- The human resource and financial cost to Local Government of lengthy negotiation processes during development of planning instruments;
- The development of planning and development instruments and provisions that are difficult to implement at the local level, leading to delays in the development system that result in direct and indirect costs (delays) to applicants that are then 'passed on' to purchasers of housing, with impacts on;
  - Housing affordability; and

- The efficiency of land release and housing availability.

### **Background and Context of the City Of Blue Mountains**

The Blue Mountains Local Government Area (LGA) is a place of great natural beauty and rich cultural resources. In particular, the unique natural environment of the mountains has been acknowledged through the establishment of the Greater Blue Mountains World Heritage Area, which covers some 70% of the entire LGA.

The 27 individual towns and villages in the LGA are located along a 100km sandstone ridgeline, surrounded on either side by the World Heritage Area, with a total current population of 77,000, which is projected to reach 80,000 within the next decade.

The City is also known as the City of the Arts and has over 70 cultural events and festivals held throughout the year, and attracts two to three million visitors from around the world, making it one of the top tourist destinations in Australia.

Planning for the City of Blue Mountains is guided by *"Towards a More Sustainable Blue Mountains - A 25 Year Vision for the City"* which was produced from an innovative and awarded community consultation process facilitated by Council in which over 6000 members of the community were involved in developing a vision for the Blue Mountains.

The Vision is supported by the implementation framework *"A Map for Action 2000-2025"* that details the following *"Key Directions and Outcomes for a More Sustainable Blue Mountains"* (enclosed):

- Looking After Environment;
- Looking After People;
- Using Land for Living;
- Moving Around; and
- Working and Learning.

Within this strategic framework the Council has been able to prepare and implement Local Environmental Plans, Development Control Plans and other council policies that generally enable provisions to support the corporate framework and decision making processes.

The changing planning and development environment of the last few years appears to be progressively in conflict with the Vision and implementation framework and therefore increasingly unable to support the Council in meeting its broad responsibilities and its strategic planning objectives.

There are a number of areas where the management needs of the Blue Mountains City Council are not met, or are obstructed by the current planning framework. Some of these are important because of the particular circumstances of the Blue Mountains. Others are areas of concern likely to be held in common with other Local Authorities.

### **Blue Mountains City Council's Response to the Commission of Inquiry:**

- (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**

#### I. Consolidate Legislation

From a Council viewpoint the many policy, legislative and administrative changes that have occurred over a twenty-year timeframe since the adoption of the EP&A

Act have resulted in:

- Fragmentation of the physical document, with an increased likelihood of omissions and errors in implementation of the Act;
- Overlapping and sometimes conflicting technical requirements (for example the requirements of the Rural Fire Service and Environmental Buffers); *and*
- Reduced integration of policy and technical provisions because of:
  - the wide range of types of reform, *and*
  - the varying reform climates that drive the changes.

There is a need to ensure legislative stability and continuity within the planning system, which has already been heavily impacted by frequent changes. However production of a better structured and consolidated EP&A Act would be of benefit.

2. Improve working relationships with regional coordination:

The working arrangements between State and Local Government could be improved by an administrative arrangement for regional co-ordination through the ROCs.

3. Principles to guide future development of planning legislation:

The planning and development framework should recognize:

- Climate change and the ways local Government can work to minimise its effects, in the:
  - SI LEP by explicitly addressing Climate change as the SI LEP does not adequately provide for environmental issues; *and*
  - The objects and provisions of the EP&A Act.
- The ways that EP&A Act actions can support Affordable Housing:
  - Currently, key Council management tools for affordable housing are:
    - State Environmental Planning Policy No. 10 — Retention Of Low Cost Rental Accommodation, *and to a lesser extent*
    - State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004;
  - The SI LEP does not make specific provision for affordable housing.
  - The (repealed) Environmental Planning and Assessment Amendment (Development Contributions) Act 2005 No 19, made provisions for a contribution towards affordable housing and this should be reconsidered.
  - This submission suggests that the Standing Committee inquire and report on the option of re-introducing provisions for contributions towards affordable housing into the EP&A Act, and into the SI LEP, in addition to the current SEPPs.
- The coordination of legislation for Management of Bushfire Risk:
  - At this point in time it is a requirement of the NSW Planning system to forward planning applications to the Rural Fire Service for comment when proposed development is located within the flame zone (as determined by the Planning for Bush Fire Protection 2006 Guidelines) as there are currently no deemed to comply guidelines for development within this zone. This applies if the development is a new dwelling, infill

development or alterations or additions to an existing building. It is further understood that the Australian Standard (Australian Standard 3959 Construction of buildings in bushfire-prone areas, Standards Australia, 1999) has no guidance in this area although recent drafts have moved in this direction.

- It is suggested that consideration be given to RFS amending the 2006 guidelines for Planning for Bush Fire Protection to include deemed to comply provisions on infill development or alterations or additions to an existing building so that these developments can be assessed by council officers until such time as the Australian Standard is amended.

#### 4. Working relationship between State and Local Government

A strong and efficient working relationship between State and Local Government is critical to a successful planning system.

Where the relationship does not function optimally there are significant implications for important areas including:

- Delays in the planning and development system that result in direct costs to applicants that are then 'passed on';
- Efficient land release and housing availability;
- Housing affordability;
- Efficient and cost-effective infrastructure provision and viable agreements between State and Local Governments;
- Provision of public transport; *and*
- The environmental consequences where all these (and other) elements are not effectively integrated.

Two recent examples; the Housing Code, and the Standard Instrument for LEPs (SI LEP) exemplify the difficulties that arise when there is insufficient agreement between the legislators and those tasked with implementing at the local level.

Difficulties have included, in the case of the SI LEP:

- Lengthy delays as the SI LEP passed through several versions with increased work loads resulting for councils.
- The 'one size fits all' approach across the diversity of the State is unlikely to satisfactorily accommodate the various inputs across different geographic and natural environments; and varying cultural and economic contexts.
- The lack of accommodation of the variations in built-form across the State where climate, geography, housing, heritage considerations, demographics and community expectations, all vary widely.

And in the case of the Housing Code:

- The 150-page code will lay down requirements for double-storey homes to pass the test of "complying development" and be processed within 10 days without the need for a development application.
- The code was intended to simplify and speed up straightforward developments but was widely criticised as too complex and likely to have the opposite result.
- Local Government advised that a test run of the code by 11 councils showed that fewer homes would pass the code than under present council rules. Some council planners have argued for a code of a few pages, not 150.

There are gaps that need to be bridged in (at least) three areas. These areas are:

- financing,
- levels of influence in policy making, and
- organisational arrangements.

It is unlikely that the Inquiry is tasked to review State and Local Government financial arrangements. However, recognition of these arrangements must inform the inquiry and reporting of the Committee. The planning framework shares key structural difficulties with other Local Government functional and service responsibilities. These difficulties include:

- Financial difficulties arising from an inadequate proportion of revenues being available to Local Government, exacerbated by limits to borrowing and rate caps;
- Difficulties in attracting staff, particularly senior and experienced staff, partly as a result of financial limitations;
- The continuing devolution to Local Government of the detailed and costly task of implementing the planning and development system; while having insufficient influence on the policy framework and administrative structure of that system; including in the areas of:
  - Environmental monitoring and assessment;
  - Previous concurrence arrangements with State Departments and Agencies have been devolved with token financial contribution.

Our experience with WSROC suggests that the Regional Organisations of Councils (ROCs) are well positioned to bridge the high-level legislative and policy making of the State Government, and the policy making and implementation role of Local Government.

This cooperation can be captured and extended into an enhanced framework of ROCs with the capacity to quickly react to issues and provide a regional response. Similarly, the Office of the Minister for Housing and Minister for Western Sydney is well positioned to function as an effective advocate for the Western Sydney Region.

#### 5. Role of the Land and Environment Court

The experience of this Council has been that the Court has not always upheld the planning controls contained within the Council's LEPs. It is appreciated that merit assessments can, and do, vary. Changes to the operation of the Court have significantly improved with the established role of expert witnesses and the mitigation of ongoing and contradicting expert evidence being presented to the Court. However, when a Council wishes to apply or enforce a control contained within its planning schemes, the Court should be of a mind to apply such controls in a consistent and similar manner. To do otherwise undermines and diminishes faith in the planning assessment system for NSW.

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

No comment is provided under this consideration.

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

The experience of this Council is that the duplication of process between

Commonwealth and NSW legislation was effectively managed with the Assessments Bilateral Agreement, although it must be noted that the number of applications to the Council, where this agreement is applicable are few.

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

Strategic planning plays a leading role in the location, layout and functioning of cities and towns, land uses and infrastructure, and in the protection of natural areas, with clear and known impacts of this on climate change. Both strategic planning and development assessment foci are required in the area of climate change.

The current emphasis in the NSW planning system seems to be on climate change as a constraint to, rather than an outcome of, the planning process. For instance, the Metropolitan North West Strategy limited climate change issues to natural impacts only (biodiversity, flood and bushfire) and from a risk perspective.

It is recommended therefore that the State Government prepare policy documents on the following areas, up to and including the preparation of a State Environmental Planning Policy and associated Codes.

- Planning for a low carbon economy, in particular in the areas of peak oil/energy descent. One way would be to provide flexibility in permissible uses and forward planning relating to decentralization of power supply (local small-scale generation of power, trigeneration<sup>1</sup>, on-site power generation), food security (community gardens, allotments), waste recycling (commercial collection of green waste) and urban greening (green roofs), all of which will become increasingly important as tools for approaching climate change;
- Examples include consideration of local power generation being a permissible use in appropriate areas in accordance with a state code, and sites for local power generation being identified in LEPs. Current examples in decentralized power generation in NSW include the BASIX Multi-Unit Residential Cogeneration Demonstration Project in Rouse Hill and Chatswood and the GridXPower development at Glenfield. A strategic level example is the aim of the London Climate Change Agency to have a quarter of that city's energy coming from local (decentralized) low carbon sources by 2025, and increasing that proportion to more than 50% by 2050;
- Food security issues (relating to food 'miles' and associated energy costs of food production) and taking into account approaches such as making community gardens and other urban food sources exempt or complying uses on private and community land;
- The role that planning approaches, such as Transit Oriented Development and healthy and walkable cities, will play in decreasing reliance on private transport; *and*
- The changes to fire risk as a result of climate change needs to be explicitly addressed and guidance for forward planning needs to be provided in collaboration with the Rural Fire Service.

It is recommended at (a) 2 of this submission that the Committee inquire into and report in broad terms on how the frameworks of the SI LEP and EP&A Act may address Climate Change.

---

<sup>1</sup> Tri-generation is the simultaneous production of three forms of energy (electricity, heating and cooling) from a single system like a small scale gas generator.



This may include that DoP consider further Planning Policy relevant to Development Control Plans and Council policies, in the following areas:

- Increased requirements for private and civic landscaping (green cover) in urban areas to reduce the heat island effect, increase rainfall uptake, increase biodiversity and, with appropriate planning and species selection, increase local food production. The role that green cover in urban areas will play in the mitigation of climate change effects was acknowledged as "the single most important design and development feature in the context of climate change" by the Chief Executive of the Town and Country Planning Association (UK) in 2006;
- Increased use of climate appropriate designs for residential, commercial and industrial development in order to minimize use of mechanical cooling devices (this would also impact on energy supply sensitivity issues);
- The role that micro generation of power at individual building level in moving towards a zero carbon/carbon neutral approach. As an example, the London Borough of Merton requires all new commercial buildings to generate 10% of their energy use on-site;
- Increased use of Water Sensitive Urban Design at residential and subdivision scale;
- The importance of guaranteeing solar access for both on-site power generation and food supply (vegetable gardens) versus the need to conserve biodiversity and green cover is an increasingly complex issue and needs to be reviewed with the aim of providing policy guidance.

In relation to BASIX (the NSW State Government Building Sustainability Index tool) it is recommended that the Committee inquire into and report on further work to accommodate the following areas:

- Developing zero carbon/carbon neutral targets for new residential and commercial building. As an example, in the United Kingdom all new homes will have to be Carbon Neutral by 2016 and this is being achieved by a progressive tightening of appropriate building codes;
- The minimum energy and water targets for new dwellings and renovations, and the role that rating systems such as NABERS and Greenstar can play in this area;
- Developing methods to incorporate micro generation of power (or the use of decentralized power supplies, as discussed above) at individual building level in energy calculations; *and*
- Increase the role that passive design plays in thermal comfort and energy use assessment.

It is essential to consider the skill set of planners as a key element in the effective application of the planning framework in NSW. As an example, the 2008 analysis by the Planning Institute of Australia of the urban planning performance of each state and territory showed there was a growing need in all states for the profession to understand the potential impacts posed by climate change.

It would be useful for the Committee to inquire into and report on State of the Environment Reporting by Councils, to specifically include climate change mitigation and adaptation strategies as a major part of these reports. It is noted that in 2007 only 18% of NSW Councils reported on green house gas emissions in their State of the Environment Report.

In relation to the specific questions raised in the briefing document it is noted that climate change in the NSW planning framework can be addressed through the

development of specific policy documents, relating to both strategic and development assessment aspects of planning, as outlined above. With the development of appropriate state, regional and local level policy guidance the current framework should be able to consider not only the potential effects of climate change, but also to plan for climate change by strategically planning urban and rural areas of NSW for the reality of a low carbon future through LEPs, DCPs and with the support of a strengthened BASIX.

In relation to natural resource issues, there is a need for a coordinated approach at a Regional and State level and the development of appropriate regional strategies is seen as a viable step forward in this area.

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

**1. Underlying Principles:**

It is not clear what the planning system can contribute in this area beyond the Strategic Planning Framework it currently provides. At this stage it would seem that the limited resources allocated to the planning and development system would be better spent on attending to the current planning function of preparing sound retail and commercial studies and a clearly defined commercial/retailing hierarchy.

Principles that underpin the relationship between the planning and development system and competition policy have been established over a considerable time. They have been supported in findings of the Land and Environment Court of NSW, notably in *Cartier Holdings Pty Ltd v Newcastle City Council and Anor* [2001] NSWLEC 170 (2 August 2001), where the Court found that:

*“.. it is at least arguable from the fact that the Trade Practices Act now applies to local government councils, that if a local council were to refuse or to limit a proposal for development on the ground of competition with a trade competitor, it could be guilty of anti-competitive conduct contrary to Pt 4 of that Act”.*

It has also consistently been the view and the finding of the Court, that there is a role for the planning and development system and Councils in considering the viability of development (and particularly the retailing component) with regard to *‘the preservation of public benefit’*.

Recently *‘the preservation of the public benefit’*, has underpinned findings of the Court in support of this broad sectoral or strategic role for the planning and development system.

The strategic planning system provides the framework for management of the development assessment process. Strategic plans are unable to discriminate a finer grain of commercial planning than they do at the present time, with comprehensive retail studies and strategies prepared by, or with the input of economic planners, to produce a framework for the retailing hierarchy.

The Court has consistently found that there is not a role for the planning and development system in mediating or deciding between conflicting claims for space in the market.

**2. The nature and capability of the Planning System:**

Increasingly, the planning system has extended out into management of the land and built form requirements of allied disciplines. The system is required to accommodate the land and built form impacts arising from and impacting back upon:

- The transport system, both roadways and the public transport

system;

- The natural environment;
- Social planning for cities, towns and communities;
- Commercial and retail planning at the strategic level, *and*
- Safety and health implications of built form.

If competition policy in development matters is to be considered as part of *land use planning and development approval processes* it will need to be demonstrated that there is are clear, tangible and general benefits, and not a simple sideways shift of responsibility.

It is critical that a practical and legally sound basis for how competition policy would be incorporated within the planning and development system is presented, including :

- The role and function of such considerations in the planning and development system and it's policy framework;
- What the planning system can contribute to implementation of competition policy;
- How such considerations would be presented in the planning and development system;
- How this would interface with the Trade Practices Act;
- The implications for the Trade Practices Act itself;
- How embedding competition policy within the planning system will contribute to competition policy; *and*
- A clear definition of those competition policy matters that would be dealt with under any legislative changes, including the relationship between the relevant Acts, and the forum for hearing of disputed matters.

The ongoing question of resourcing the over-burdened planning and development system must also be addressed. Competition Policy work would be yet another discipline to be serviced within the planning system. Because of its specialized nature, appropriate human resourcing will be expensive and perhaps difficult to secure. Councils will once again be in the position of employing expensive consultants, with the costs exacerbated because the ground of dispute can be foreseen as being through the Court system.

It is likely that additional costs would have to be recouped by a commensurate increase in fees for development applications, particularly taking into account that a site based evaluation of competition policy would be for work towards defining a private benefit, rather than a public benefit.

(f) Regulation of land use on or adjacent airports: no comment provided.

**(g) Inter-relationship of planning and building controls**

The EP&A Act integrates planning and building controls to a high degree and significant amounts of information are required to support a development application. As a result, there is a high level of certainty that the development application will be suitable to progress to working and engineering drawings for building approval.

However, this integrated approval process requires provision of substantial amounts of information at the time of submission of an application for development approval. This produces the following difficulties:

- The expense and time involved in taking a project to this detailed

stage is an impediment to requests for changes to the plan, when planners should be able to freely negotiate with the applicant in this early stage of the project;

- This may be a factor in applicants appealing to the Court, rather than negotiating a satisfactory outcome with council planners and experience suggests that some applicants have this view;
- Projects that are not approved become a substantial financial loss, especially to the small developers who are increasingly important with the trend towards smaller infill developments and the need for improved housing affordability. It is important to keep these people within the system.

The option of providing Initial Concept Advice for a development application on the basis of a more limited range of information may have merit. At this first stage the applicant would submit plans and advice including:

- A footprint plan to enable assessment of relationship to boundaries and protected areas, and overlapping requirements for resolution by referral agencies;
- Contours, and ability to drain the development;
- Blocking diagrams to assess scale, height and impact on neighbours and views etc;
- A scope of works for detailed studies to be completed to meet the information requirements of Schedule 1 of Environmental Planning and Assessment Regulation 2000;
- Servicing capability for the site, including drainage, sewer, and water.

The Initial Concept Advice would include additional requirements from the Council on the scope of works proposed for detailed studies, any further policy areas to be addressed; and on the form of development (constraints on windows and overlooking etc), at this stage. This would enable applicants to proceed to preparing and submitting the DA with reliance on their Planning Consultant and with the benefit of preliminary Council advice.

For the option of a two-stage DA process to be feasible, the following points are suggested:

- The idea of Initial Concept Advice would need to be inserted into the EP&A Act with a high level of clarity on the limited status of such advice and the need for the application stage to satisfy those requirements;
- The fee would be the sum required to substantively cover costs of providing the advice;
- A Practice Note should be produced by a joint working party of DoP, council representatives, planners, development industry and community representation.

#### **(h) Implications of the planning system on housing affordability**

1. There are two well known and agreed *'big picture issues'* in the New South Wales planning and development system that impact housing affordability, these are:

- The geographic constraints of Sydney and difficulties presented for Greenfield and large-infill land release; *and*
- The management of sub-regional Infrastructure provision through the S 94 and 94A and 94E Plans.

A third element is the policy making and working relationship between State and

Local Government, which is addressed at (a)3 of this submission. Review of these working arrangements would facilitate progress with the 'big-picture issues' noted above.

2. A number of recognised elements that have the potential to improve housing affordability are already within the power of State and Local Government. The City of Blue Mountains Housing Indicators Study<sup>2</sup> provides an overview of strategies employed by local authorities and governments locally and internationally, to encourage the supply of affordable housing, they include:

- Inclusionary Zoning;
- Incentive mechanisms including higher density developments in appropriate locations, concessions in development standards and transferable development rights where appropriate;
- Accessible Dwelling Units; and
- Attention to the retention of low cost rental accommodation by implementation of State Environmental Planning Policy No. 10 — Retention of Low Cost Rental Accommodation.

The (repealed) Environmental Planning and Assessment Amendment (Development Contributions) Act 2005 No 19, had, prior to its appeal, made provisions for a contribution towards affordable housing. Currently, key requirements that apply generally across the State are:

- State Environmental Planning Policy No. 10 — Retention Of Low Cost Rental Accommodation, *and to a lesser extent*
- State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

The SI LEP, as noted at (a) of this submission, is a narrowly focused document that does not facilitate the implementation of a number of policy areas, including policy initiatives for housing affordability.

The Standing Committee could inquire and report on the re-introduction of provisions for contributions towards affordable housing into the EP&A Act, and into the SI LEP, to reinforce the Policy provisions of State Environmental Planning Policy No. 10 — Retention Of Low Cost Rental Accommodation.

---

<sup>2</sup> City of Blue Mountains Housing Indicators Study: Affordable Housing: Final Report, John Nicolades and Associates, September 2004.