Submission
No 46

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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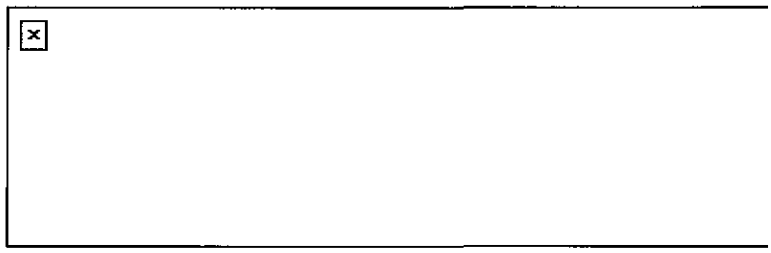
Date received: 13/02/2009



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File Ref: CRMS 770505195
Related Files: CM/06/337923

12 February 2009

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

Dear Sir/Madam

Submission to Inquiry into the NSW Planning Framework
[In response, please quote File Ref: CRMS 770505195]

Over the past three decades there have been several major changes to the Environmental Planning and Assessment Act. Those changes were introduced to address what were perceived to be shortcomings in the environmental planning and assessment system. It is accepted that reform of the legislation may now be appropriate. However, this reform is needed not because of the failings of the original legislation but due to the inadequacies of the subsequent amendments.

Unfortunately, too little regard has been had for the objects of the legislation. Today many provisions of s5 of the Act are ignored because the imperatives of sectional interests do not conform with the objects of the Act. Certainly, the objects of the Act must align with the intentions of the parliament and the detailed provisions within the Act.

Across NSW and Australia there are fundamental differences of opinion about what a "planning system" should be attempting to achieve. Some of this relates to poor understanding of the differences in terminology. However, for some participants in the planning system there is a genuine desire to include or exclude particular matters. Some "planning systems" are very broad in their scope and incorporate matters such as natural resource management. The NSW legislation relates to environmental planning. However, there are sections of the community that attempt to constrain the planning system to just land use planning.

Structure of Submission

Before responding to the specific terms of reference provided to the Committee this submission provides some general comments. In part these comments provide a background for some of the later arguments. They are also provided because the

discussion paper does not cover the context for planning and consider the factors that gave rise to the terms of reference.

What is Planning?

For government to be effective planning is a fundamental exercise. Just as any successful business requires a business plan to ensure that resources are used efficiently to achieve intended outcomes, so all spheres of government must also undertake planning. Whether or not a specific form of planning is included as part of the formalised planning system, that planning will be undertaken because it is necessary. It must be recognised that planning currently occurs external to the defined "planning system" and mechanisms to integrate all planning must be established.

From the terms of reference provided by the former Minister it is apparent that the Committee is expected to take a narrow view of what the planning framework should encompass. Certainly, the terms of reference envisage a planning framework narrower than the objects of the Environmental Planning & Assessment Act. Other previous Ministers have had a more holistic understanding of planning.

Irrespective of how narrowly the Committee defines the planning framework, a mechanism needs to be provided to enable this planning framework to be integrated into the broader planning system. One obvious example has been the formulation of the State Plan. It has been a forceful planning tool but is not recognised or integrated into the current planning framework established by the Environmental Planning & Assessment Act.

Is Planning More than Development Applications?

A narrow view of the purpose of planning is that it is a development control system. Under this interpretation planning is undertaken largely for the purpose of establishing statutory standards that will be enforced by the government through a regulated approval process. The key elements are:

- the importance of statutory approval processes
- the focus on land development principally the use of the land and the quantum of development permitted
- the absence of a broader consideration of utilities, infrastructure, social consequences, environmental input etc.

Under the Environmental Planning & Assessment Act a system is established for formulating planning controls. By s26 of the Act on environmental planning instrument can be made for the purpose of controlling development. Nevertheless, this is only one of the matters specified in s26. The existing planning system therefore does not support the limited view of planning. On the other hand the expansive view of planning that is permitted by the legislation has not been fully utilised and developed. This is the fault of those administering the legislation, not the Act itself.

Implementation of Plans

Across the community there is much confusion about the function of a local environmental plan and the development assessment system generally. A local environmental plan is not in itself a plan but rather an implementation tool used to achieve planning outcomes. Any plan can be delivered using a variety of means including:

- delivery of services
- provision of facilities
- enforcement of regulations that control the actions of people.

While this concept may warrant further discussion, within the NSW planning framework a local environmental plan is not a plan but a regulatory tool intended to implement a plan for a geographic area.

Perhaps some of the most important goals of a plan are achieved through the allocation of funds in a budget rather than the enactment of regulations. Implementation of a plan cannot be achieved through regulation alone and so, the planning framework must recognise links to the budget process. This concept is not new but it has been poorly executed.

Separation of Powers

One of the common criticisms of the current environmental planning system is that there is no "separation of powers" in relation to local government. The basis of this criticism is the concept that the body which makes a law should not be the same body that implements the law.

Specifically, in terms of environmental planning it is argued that a local council should not be the authority to determine development applications because it is the same authority that creates the local environmental plan against which a development application is assessed. While this position has some superficial appeal for those who are promoting a particular agenda, it has several failings that undermine its applicability. The specifics that are overlooked are:

a) a local environmental plan is not made by a council. It is made by the Minister. The council has an administrative role in compiling the document and arranging for its processing. However, the council does not approve the draft plan that is placed on public exhibition and does not approve the final document for gazettal.

   Frequently, the LEP that is made by the Minister is significantly altered from what the council may have prepared. As a consequence, the council is required to implement the Minister's plan, not the council's plan.

b) the arguments against councils determining development applications are not raised against the actions of the State Government. As there are frequently benefits for some in society who have access to the Minister, these groups do

not argue that the Minister should have no role in approving development proposals. With the Minister there is certainly no separation of powers.

For many one of the major shortcomings of the current planning framework is the manner in which the system has been changed to allow the Minister greater discretion to approve major developments without adequate assessment of environmental consequences or due process.

Does Planning Have to be Statutory?

When the purpose of a "planning" system is to control development with the usual rights for review and appeal it must be a statutory system. However, all of the other areas of planning can be performed and implemented without a statutory process for implementation.

Many planning programs are dependent upon funding and are therefore tied to budgets, whether the source of funding is federal or state government. Certainly most strategic/policy planning does not need to be undertaken according to a statutory process. Unless the output of the planning system will be tested through a judicial process, there is no need for the planning to be given statutory authority and enforced through a regulatory process.

Term of Reference 1(a)

As a result of several significant reforms to the Environmental Planning & Assessment Act, some problems have been inserted that have compromised its operation. Continued indiscriminate change should be avoided. Any future legislation should be drafted to achieve clearly defined goals. To that end the proper definition of a planning framework will be beneficial.

Fair for all: Criticism of the current planning and assessment regime comes from the broader community because the basic concept of an egalitarian society is not respected. Australians believe that all citizens should receive "a fair go". This means that the planning and assessment system should be accessible to everyone and the interests of all parties should be recognised and protected. Unfortunately, this opinion clashes with the position of those who argue that the system should be "flexible". In reality, flexibility in the assessment process provides the avenue for those with influence to obtain benefits that are not available to the general public.

The existence of State Environmental Planning Policy No. 1 is indicative of how the assessment system has been made flexible. While the use of SEPP No 1 at Wollongong City Council was corrupt conduct, there are similar instances across NSW where an applicant receives a benefit not provided to the broader community. Discretion can be exercised in a biased manner.

Given a choice between a flexible system and one that provides greater certainty about outcomes, the community would prefer certainty about the outcome.

Efficient: There are many examples of inefficiencies within the system that exist as a result of deliberate policy. Most councils have experienced the frustration of preparing a draft local environmental plan only to have the proposal rejected by the NSW government. It is inefficient for plans and policies to be formulated by an agency that is not eventually the body that approves the proposal.

Allow innovation: Over regulation is a current difficulty. Guidelines, policies, best practice notes and many other instruments are used to achieve uniformity often when consistency is not required. There is an obsession with ensuring that there is no innovation or variation from the NSW Government model. At times a uniform approach may be necessary but such instances should be kept to a minimum.

Avoid Parliamentary Counsel: One of the greatest obstacles to successful planning and assessment in NSW is the Parliamentary Counsel. Without exploring the reasons for this situation, there would be considerable advantage in having a planning and assessment system that can operate without reference to the Parliamentary Counsel. This may necessitate a system that is less statutory in nature.

Comprehensive: Within the NSW Government bureaucracy there is considerable opposition to comprehensive planning due to the fear that planning will constrain those organisations from pursuing their individual agendas. These agencies appreciate the discretion they have always enjoyed. However, at the highest level it has been recognised that sound planning can promote the efficient provision of an integrated plan for the provision of facilities and services.

The State Plan was a valuable initiative. Concurrently, the Department of Local Government is introducing a separate planning system for local communities; Community Strategic Planning. Other government agencies are also preparing and implementing plans for areas such as water catchments and river valleys.

Even if all planning is not integrated into a comprehensive system there needs to be a central repository where this fragmented system is illustrated and explained. There needs to be an acceptance that all of this planning is valid and necessary. If it is not necessary the NSW Government should eliminate it. If it is necessary and beneficial, it should be recognised as a legitimate component of a comprehensive planning system.

Reduce Development Control: In recent times there have been significant moves to eliminate government projects from the mainstream development control system. Introduction of the Infrastructure SEPP has enabled a large number of government projects to be approved without being subject to the usual assessment process. This is a more honest approach given that the assessment process had become a charade.

It could be argued that there could be parallel assessment and approval systems. The principal difference would be that the approval system for public land would not be a statutory system. Only the assessment and determination of development on private land would be subject to a statutory assessment process.

Since the Sydney Region Outline Plan there have been major planning policies that have existed without formal statutory recognition. Currently there are regional strategies, sub regional strategies and the State Plan. This submission argues that this is a valid method for planning. Rather than planning being constrained by the limitations of legislation, the planning can be innovative and responsive to changing circumstances.

All of these various areas of planning need to be recognised in legislation but it should be a comprehensive overview of the entire planning framework. The legislation could do no more than recognise that a plan can be made and define its role and purpose. The advantage is that in one place it would be possible to visualise how the various areas of planning are not fragmented but components within a comprehensive and holistic system.

If there is a need for some area of planning to be provided with statutory weight in order to ensure effective implementation, that can be provided through a separate regulation or Act. The key, however, is to remove as much planning from cumbersome statutory processes as is possible.

Term of Reference 1(b)

While the advantages of a consistent national approach to development assessment may be greatly overstated, there are no plausible reasons for not implementing this national approach. If this approach was adopted in NSW it may not overcome all of the current shortcomings but it could deliver significant improvements.

Merit assessment is essential for most significant development projects but in NSW the system is constructed to require full merit assessment of too many developments. Central to the problem is the "gap" between complying development and merit assessment. Under the national approach there is a transition from "self assess" to "merit assess" where "code assess" still requires expert judgement, but to a limited extent.

Under the existing complying development regime in NSW there are numerous criteria that must be satisfied for a proposal to qualify as complying development. Should a particular development fail to satisfy one of these criteria the merit assessment process does not consider just this one criteria. Every aspect and every criteria must be evaluated under s79c of the Act. Although a low level of merit assessment may be warranted, the council is required by law to undertake an assessment that is unnecessary and largely wasted.

The difficulty in implementing the necessary reforms is reflected in paragraph 1.11 of the discussion paper. This sentence illustrates a lack of understanding about the failings of the existing system, the inadequacies of the recent reforms and the basis for community concern about who will be capable of delivering improvements.

Term of Reference 1(c)

This is not an issue that causes concern.

Term of Reference 1(d)

Contrary to the assertions of the discussion paper, environmental planners have a sound understanding of the broad range of issues concerning climate change and their relevance to planning and development assessment. Action to adequately address ecologically sustainable development and the impact of climate change is being hindered by the reluctance of the NSW Government to take the necessary decisions.

The Committee must look beyond any statements of intent and acknowledge that minimal action is being taken in response to climate change. This is not caused by a shortcoming in the Environmental Planning & Assessment Act but a lack of will on behalf of the government. It can even be argued that one of the strengths of the Act is that it has the ability to incorporate new issues as they arise.

For the purpose of planning climate change is a risk that will be absorbed in the same way as other risks or constraints, such as flooding, bush fire, habitat loss etc. In some cases climate change will merely alter the criteria for a risk that is already considered. Flooding, for example, is already considered in planning. Climate change will have an impact on flood patterns, flood frequency and flood hazards and these changes can be recognised in the planning process.

Discussion point 1.21 identifies a much broader issue that was discussed earlier in this submission. Provisions are being established outside the EP&A Act to address planning and development control issues under legislation that duplicates what can be achieved under the EP&A Act. This highlights the fragmentation of the system. "Environmental" was included in the name of the EP&A Act to emphasise that it should encompass all areas of natural resource management and environment protection. The Act is capable of delivering but it is not being utilised to the satisfaction of other government agencies who have found it necessary to enact duplicate controls.

It is submitted that the Committee must decide whether it is preferable to have an integrated system or a fragmented system. At the moment it is a hybrid that is becoming more fragmented.

This submission proposes that planning should be comprehensive and integrated. There is not, however, a similar need for assessment and control to also be combined within one Act. Each regulatory agency could operate under a separate regulation with separate approvals. Such a system is directly contrary to what the 1997 Integrated Development Assessment Reforms were intended to achieve. Experience has shown that the expected benefits from those changes have not been realised.

It should also be recognised that the comprehensive plan produced as the result of an integrated planning process will be implemented using tools in addition to development control. Some planning objectives may only be achieved by the construction of infrastructure or the delivery of services. One of the policy responses to climate change may be, for instance, the acquisition of land at risk.

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Again, it is emphasised that development control is a tool to be utilised to implement some elements of a comprehensive plan. Planning is not undertaken for the purpose of formulating standards that will be enforced through development control.

The recent reforms with the establishment of the Planning Assessment Commission recognises that there can be merit in separating planning from development control. This move reflects the structure of most local councils where there are separate organisational units responsible for planning and development control. The relationships between the units are clearly defined and the different roles are understood.

Around the world it has usually been found that successful planning projects are most effective where there are strong links between planning and implementation. Where implementation is not coordinated and monitored there is inconsistent application of resources and effort. Implementation must be actively managed. It cannot be left to chance.

It follows that fragmented development control undertaken by various agencies in isolation from each other has the lowest potential of being effective and delivering the intended outcomes.

Term of Reference 1(e)

Without going into a detailed evaluation, the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries is not considered a credible study for the purpose of the Committee's investigation. Not only should competition analysis be part of the local planning process, it is currently a standard component of any strategic planning analysis. Retail consultants are routinely employed by councils to conduct retail studies as a means of identifying the need to provide additional land for retailing and allow competition.

Despite the conclusions of the ACCC Inquiry in Sydney there is potential for further retail development. From the perspective of the shopping centre developer the problem is that sites are not available where they desire to locate a shopping centre and, where land is available, it is expensive to purchase. The developer commonly would seek to develop a large cheap industrial site located at a major road junction. The developer does not wish to amalgamate small sites that are already developed with viable retail premises even if the sites are underdeveloped.

Within Sutherland Shire there would currently be 200 hectares available for retail development that is currently vacant that retail developers do not wish to develop. However, they do wish to develop large industrial sites that have extensive exposure to the Princes Highway.

The demands for competition should be accommodated by ensuring that an adequate supply of land is provided. At the planning stage studies will provide clear evidence as to what additional supply should be created. However, under the existing system retail developers usually have to compete with other developers, such as apartment

builders. In markets where there is demand for residential development, the retail developers are not willing to compete for sites.

Term of Reference 1(f)

The current system for the management of airports undermines the integrity of the Australian Constitution. Exclusive powers were transferred to the Commonwealth for a range of issues of national importance. It is an abuse of that concept for the Commonwealth to regulate the development of the land comprising the airport site when that development is unrelated to aviation.

This is not a matter that the NSW Government can solve because the support of the Commonwealth Government is required. The Commonwealth has exploited the provisions of the Constitution to generate huge revenue, at the expense of those who live in the vicinity of the airports.

While the situation is outrageous it is unlikely to change.

Term of Reference 1(g)

There is general acceptance that the current system for the approval of development could be improved. Amongst councils and builders there is a genuine effort to make the current process work as smoothly as possible. However, there are many impediments.

While the Committee does not need to concern itself with historical analysis, it should be noted that paragraph 1.31 of the discussion paper does not accurately summarise how the approval system operated prior to 1997.

Central to the problems with the current development approval system is that it does not reflect the process by which a development is designed and constructed. It is based on the assumptions that:

- a development is planned and designed in a single process. However, in practice, a development is designed through an interactive process of design development, refinement and improvement.
- all details of the intended method of construction of a development are considered and resolved prior to construction beginning. In practice, the method of construction continues to be reviewed and refined even as construction proceeds.

Persons from the development industry have informed council that they prefer a system where approvals can be obtained in stages from concept through to occupation. They become very frustrated with a process that requires the submission of a fully developed and documented design but which may be refused due to a fundamental problem at the concept stage. Applicants would prefer to have a process that avoids a waste of time and effort because the proposal receives approval through a series of decisions.

The division between "planning controls" and "building controls" is somewhat arbitrary. For both there can be merit assessment of performance criteria and technical compliance with numeric standards. To illustrate that the approval process does not require a merit assessment of planning controls followed by the technical evaluation of building controls, the initial evaluation is whether the proposed development is permissible within the zone and the final assessment considers the adequacy of the vegetation planting when the landscape plan is implemented.

This submission does not propose a solution. It supports the formulation of a system that better meets the needs of the building industry. Too often the system has been modified to satisfy the demands of interest groups or large developers. While there is much comment on the need to have a system that operates efficiently for small applicants such as the local builder, these are not the voices that are heard.

Terms of Reference 1(h)

It would be naïve to assert that an improved environmental planning and assessment system would result in housing affordability no longer being an issue. Even with the most efficient planning and assessment system housing could be unaffordable. Ultimately, the price of housing is determined by numerous market factors relating to supply and demand.

During the 1950s housing was more affordable when builders constructed small fibro cottages in localities with no sewerage system, no paved roads and no open space. As society became more affluent market demand changed and the building industry responded. There are many aspects of new housing that would not be supported by planners/designers but which are driven by the market.

Ultimately the price of land is a major influence on affordability. Again supply and demand are the biggest influences. Although the planning system may control the supply of land demand is determined by many other factors. Investment and speculation in land are critical because land is purchased and held for capital gain and therefore benefit from a shortage of supply.

It can be argued that all factors that determine the price of housing should come within the planning framework. This would include the release of land and the provision of infrastructure. Under this planning framework the development control component would be small. Other elements of government action would be critical. To be effective in making housing more affordable there would need to be greater intervention in the market by the NSW Government.

In reality, the current planning system could be altered to improve housing affordability to the same extent as implementing a totally new planning framework. If there is the political will additional land on the urban fringe can be released and funding provided for infrastructure. Similarly, large areas of poor quality housing in middle ring suburbs could be rezoned for significantly increased densities. Supply could be vastly increased. These initiatives can be taken without changing the planning system.

Within any planning framework a government can make decisions and implement programs that will affect housing affordability. Ultimately, it is those actions rather than the planning framework that determines the outcome. This submission argues that any efficient planning system that enables the speedy implementation of government decisions will improve housing affordability. There is no evidence that the planning framework can be designed with the principal goal of improving housing affordability.

Conclusion

Reform of the planning framework is warranted. This is not a result of a failure of the Environmental Planning and Assessment Act. Environmental planning is still being progressed to achieve what it was intended to achieve. Environmental assessment has been compromised by amendments to the Act that have been intended to avoid proper assessment.

This submission argues that the entirety of the planning framework should be established by legislation. The various components of the framework should be specified but any documents should not have a statutory force. Within this framework there should be recognition for broad documents such as the State Plan. Links to delivery programs for facilities and services should be identified as well as regulatory processes.

It is therefore envisaged that the majority of the planning framework will not be a statutory system. As it will be prepared by the government and implemented by the government there does not need to be a prescribed process and format.

Recognition must be given to the various regulatory processes to implement plans. They do not need to be within one piece of legislation but their relationship needs to be established. Experience with the integrated development assessment process highlights the difficulties of resourcing an integrated system so that it operates efficiently.

Certainly, it is recommended that in the first instance the Committee should focus on defining the full planning framework rather than being distracted by arguments that the development control system requires reform. Development control should be the servant of the planning framework because it is only one of the tools available to promote the social and economic welfare of the community and a better environment.

Yours faithfully

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