Submission No 111

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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Inquiry into NSW Planning Framework

By

The Legislative Council Standing Committee on State Development

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Section 1 Executive Summary

This submission reviews the need for a new Planning Act for NSW to replace the existing Environmental Planning and Assessment Act introduced 31 years ago. It concludes that there is a strong case for a new planning Act which should be prepared over a 3-4 year period and have due regard to national planning principles being finalized under the auspice of COAG.

The submission contains the following recommendations.

1 That the Committee recommend the preparation of a new Planning Act over the next 3-4 years and that such an Act be subject to extensive community consultation and be consistent with National Planning Principles currently being developed. Work on such an Act should commence in 2010.

2 Consistent with planning reforms in other States, and similar recent reforms in NSW, a new Act should be guided by national best practice principles and the outcomes of current work to reform the planning systems of Australia under the auspice of COAG and the Local Government and Planning Ministers Council.

3 In the formulation of a new Planning Act the objects of the Act should be expressed with greater clarity and should contain a requirement that Planning instruments (such as zone objectives within LEPs) contain a clear hierarchy of objectives.

4 It is recommended that in a new Act:

(a) Specific provision be made for strategic land use planning which is to include infrastructure plans;

(b)That land use strategies and plans address key environmental considerations such as climate change, structure planning for large sites, and this be integrated with infrastructure planning and address the omissions listed in this submission..

5 That in a new Planning Act, the provision of local and regional infrastructure be integrated with land-use strategies and planning instruments, to ensure that the development of land properly considers infrastructure needs and that the resources needed for the provision of infrastructure are allocated at the time of plan making.

6 That in a new Planning Act the provisions which determine development applications (ie Part 3A, Part4, and Part 5) be replaced with a single provision which contains flexibility of process to cater for the different levels of complexity associated with development applications as recommended by the Development Assessment Forum (DAF);

7 That development application decision making be completely de-politicised at Commonwealth, State and Local Level;

8 That development applications at local level (other than complying development) be determined by independent panels appointed by each council drawn from a State accredited list of experts, subject to the exception that small applications may be delegated to council staff;

9 That all development applications at State level (ie State significant sites) be determined by a State Planning Assessment Commission constituted under the new Act, subject only to Ministerial review rights for State infrastructure. The Act should also provide that, for such applications, a State Co-Coordinator General be empowered to resolve inter-agency concurrences and disputes;

10 That, likewise, the Commonwealth Minister for the Environment, either accredit the State assessment and consent process for development applications, or delegate his/her power to an independent Commission or Authority;

11 The merit appeal processes of the Land and Environment Court should be altered by legislation to provide for an inquisitorial rather than adversarial process, and appeal costs should be capped together with rules to ensure appellants, and other parties, are not disadvantage because of their means.

12 If independent panels are introduced to make development decisions, and given a much cheaper and more efficient merit appeal system, then third party appeal rights should be extended to allow merit appeals for third parties who live in proximity to a development, and where a consent granted by a consent authority involves a breach of a development standard.

13 That a new Act contain provisions to establish appropriate corporate vehicles, such as growth centres corporations, to integrate land-use plans with infrastructure provision and expedite land release.

Section 2 Terms of Reference

1 That the Standing Committee on State Development inquire into and report on national and international trends in planning, and in particular:

(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,

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

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

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

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

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

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

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

Section 3 Recent History of the NSW Planning System

In considering the future framework for planning legislation in NSW, it is important to reflect upon the evolution of the current legislative basis.

The Environmental Planning and Assessment Act was passed in 1979. It reflected the issues current at the time and addressed key problems at that time, particularly:

- The failure to consider physical environmental factors in planning and the need for planning to address the destruction and degradation of the natural environment.
- The need to explicitly address the role of planning in social equity and to consider social and economic effects in the light of the high growth in metropolitan and regional areas, particularly the Macarthur Growth centre, western Sydney and the central coast.
- The need to establish basic citizen and applicant rights in the face of the experiences under the Askin Government of no meaningful community involvement and the growing calls for community involvement following the Green Bans movement.

The Act has been subject to evolutionary change since its original enactment with the principal changes being as follows:

- In 1997 the development assessment provisions in Part 4 were significantly amended to provide for integrated development and State Significant Development and the building application provisions of the Local Government Act were incorporated in the EP&A Act with a system of construction certificates and private certifiers.
- In 2005 the provisions relating to Major Projects and the separate Part 3A approval stream was inserted building upon both the State Significant Development provisions introduced in 1997 and the processes under Part 5 for environmental impact assessment of major projects.
- In 2008 the significant changes to establish the Planning Assessment Commission, the Joint Regional Panels, new appeal arrangements with Planning Arbitrators and a revamped system for plan making in Part 3.

Unlike the Victorian system where planning and building matters have been remained separated, the EP& A Act was purely a planning act and did not intend to cover building matters. However, since the mid nineties the Act and the development control processes it sponsors have effectively merged planning and building considerations into the one process. The Act was never designed for this purpose.

The reasons for this have been twofold.

Firstly there have been several cases in the Land and Environment Court in the nineties such as Hadoat Pty Limited v. Bathurst City Council, Land and Environment Court No 20063 of 1995 by Justice Talbot which held that planning merit considerations could be redebated at the building control stage, effectively duplicating considerations..

Secondly, the culture of local councils has changed and led to a heavily interventionist role. When construction certificates were introduced and building approvals abolished, in the late

nineties, instead of reducing the number of matters that required development approval, these have doubled to about 120,000 each year (although this has recently been lower due to lower economic activity). Many matters that were previously dealt with summarily by Council staff as a building application became advertised to the neighbours.

Victoria with a distinct building process managed by the Victorian Building Commission has maintained separate processes for development and building matters.

These changes have been genuinely evolutionary from the original legislation and sought to address and refine problems areas and pursue approaches to regulatory reform. They have provided for much needed improvement in particular areas, but they were only incremental changes and they also gave rise to some often unwanted consequences, such as the demonization of Part 3A and the distortion of the integrated development provisions by other approval bodies.

Now that 30 years has elapsed since the original Act, it is worthwhile to consider some more fundamental reform. So what has changed to require such an approach?

Firstly the reform agendas since 1979 focussed upon legislation rather than the role of planning practice. In a way it was considered that legislative change would drive changes in performance and attitude. In reality often practice continued unchanged despite legislative change and the efforts at legislative reform shifted the spotlight away from anachronistic practice.

Secondly, there has been, over many decades, a mismatch between the geographic spread of Sydney and the provision of infrastructure and services, particularly in respect of rail transport. This has been caused by the decline in public revenues, the growth in population, and a reduced appetite for debt funding since the 1980s as well as the efforts to commercialise utility bodies. These factors resulted in short term visions in infrastructure planning and maintenance of some infrastructure due to competing budget priorities.

Thirdly, there has been a growth of a conflict mentality in debating urban planning. The opportunities for participation and review in planning decision making have not developed a culture of debate, constructive problem solving, mutual respect and consensus building. Rather, we have development a culture of confrontation, mistrust and slogans by the competing interest groups in the planning process.development application decisions are sometimes more an outcome of a contest of political influence than a planning merit consideration.

Fourth, the Global Economic Crisis represents a fundamental turning point in the generally uninterrupted post war growth economy. It has changed fundamentally the cost equation for development and the appetite for risk in economic development. In such a changed situation the issues of lack of certainty, unnecessary time delays in decision making and the lack of confidence in infrastructure planning and delivery will hamper our prospects for sustainable economic recovery.

Fifth, the issue of reconfiguring our cities and regions to a carbon constrained future to address the challenge of global climate change require us to fundamentally rethink our pattern of development.

More specifically, there are a range of other current and emerging shortcomings in the Act that need to be addressed in the decades ahead.

1 The Act is, in large measure, a development control act, and does not provide adequately for comprehensive land-use planning including resource allocation. The infrastructure provisions in the Act, such as the section 94 provisions, which relate to local government infrastructure are not integrated with land-use planning decisions. A new Act would need to provide for strategic planning and the provision of infrastructure in a fully integrated manner where the current act only deals with plan making.

2, The development assessment provisions in the Act provide confusing complex and multiple pathways involving Parts 3A, 4 and 5 of the Act. . Although ideal for large and complex developments such as coal mines,, Part 3A is too complex for a range of developments of State significance. Part 4 is inflexible, has a "one size fits all" approach, and requires the involvement of a multiplicity of agencies

3 In the allocation of consent responsibilities across the various consent authorities the Act, as it stands, is a cumulative set of compromises. The current consent arrangements need to be rationalized, simplified and depoliticised.

4 The development merit appeal system has continued to be expensive, cumbersome, and inaccessible to many people. Moreover the current appeal system makes no provision for the inequality of resources between competing litigants. It also follows an adversarial model, which is expensive, time-consuming, and unnecessary, for the merit review of development applications.

5 Since the Act was introduced, Parliament, in response to community concerns has introduced many new constraints on development, such as the Native Vegetation Act, the Rural Fires Act, and other acts to protect environmental or other values. This has introduced complexity and delay by empowering a range of different government agencies through a concurrence role. There is a need to create processes that address these externalities without delay and inefficiency.

6 In the last decade there has been substantial work at a national level to harmonise planning and development processes across Australian states. This work is likely to be completed within the next 1-2 years. Moreover other states have carried out substantial planning and development regulatory reforms as well. There is a growing need for national harmonisation and this will require a new planning and development act for New South Wales.

Therefore, there would be substantial public benefit in creating a new Planning Act that overcomes the deficiencies in the current Act, and meets the needs of the future.

Recommendation

That the Committee recommend the preparation of a new Planning Act over the next 3-4 years and that such an Act be subject to extensive community consultation and be consistent with National Planning Principles currently being developed. Work on such an Act should commence in 2010.

Section 4 Towards a National Approach

Under the leadership of COAG from the early nineties, there has been a strong national agenda to harmonise regulations across Australia. Much has been achieved in areas such as company regulation, electricity regulation, and defamation law..

Attempts to harmonise Planning laws led to the formation of the Development Assessment Forum (DAF) which comprises senior planning officials from all State jurisdictions and other stakeholders.

DAF has been working toward a common approach to development assessment. Since 2004 it has published a range of "Leading Practices" and "Principles" to achieve a model development assessment system applicable across all States in Australia. This is described in "A leading Practice Model for Development Assessment in Australia" published in March 2005.

These Principles and Leading Practices are summarised in a newsletter published by DAF titled "Road Map to a Model DA Process" February 2004. See Appendix A.

The DAF devised twelve leading practice for a model development assessment system. These principles are briefly summarized as follows.

- focus on achieving high quality sustainable outcomes;
- encourage innovation and variety in development;
- integrate all legislation, policies and assessments applying to a given site;
- encourage appropriate performance based approach to regulation;
- promote transparency and accountability in administration;
- promote a cost effective system;
- promote a model that is streamlined, simple and accessible;
- employ standard definitions and terminology;
- incorporate performance measurement and evaluation;
- promote continuous improvement;
- promote sharing of leading practice information; and,
- provide clear information about system operation.

The Development Assessment Forum also articulated nine Leading Practices which give meaning to the above principles in the newsletter. They are listed below together with actions taken todate to achieve them in NSW .

1. **Separation of Roles** to achieve "transparency and equity, minimize conflicts of interest, and match skills and responsibilities".

It specifically recommended that "elected politicians take responsibility for the development of planning policies and that independent bodies (such as panels, which may include elected politicians) be responsible for assessing applications against these policies".

NSW has partially introduced this regulation through the establishment of the Planning Assessment Commission, and Joint regional Planning Panels contained in the June 2008 Amendments to the Act.

<u>This is an important issue to be addressed in a new Act. See Section 8</u>

2 **Technically Excellent Assessment Criteria** in order to "engage the community in clear policy development and convert policies into explicit rules and assessment criteria"

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It specially recommended that the community values and policy objectives set by governments should be codified as objective tests and rules. It is important to engage with the community early in the policy making process. Once developed, these rules are the criteria by which development applications are assessed.

In NSW this has been addressed in some planning instruments but the merit considerations in the Act remain very general in nature. This concept is great in principle but will be very difficult to implement across all development. <u>Nevertheless the issue should be further addressed in any new Act.</u>

3 **A Single Point of Assessment** so as to "limit referrals to those agencies with a statutory role, increase policy consistency; and a whole of government approach.

It specifically recommended that "decisions on development applications, based on technically excellent criteria are best integrated by a single entity. Relevant government agencies, with a defined statutory role, will also provide their advice; however, this advice must conform to their own technically excellent assessment criteria."

NSW has partially addressed this approach for development of State significance where assessments are done by the Department for Planning, and while other agencies are consulted, the Department and the Minister are the final authorities for the development decision.

This issue should be further addressed in any new Act.

4 **Independent and Expert Assessment** so as to "match project complexity to assessment skills; separate policy making from assessment; increase transparency, and cut red tape".

It proposed that "panels be established at local or regional level to assess projects not determined by professional staff, and to review staff decisions.
It is anticipated Ministers may wish to retain call-in powers based on criteria prescribed by statute".

NSW has partially addressed this through the establishment of the PAC and Joint Regional Planning panels. <u>This should be further addressed in any new Act.</u>

5 **Appeals as a Second Assessment** so as to "reduce legal complexity and cost; maintain the integrity of an approach based on technically excellent criteria; and, ensure equity".

More specifically it proposed that "discretionary decisions should be reviewable. In a merit appeal, applications should be assessed against exactly the same criteria by a more senior independent expert body. It is proposed that each state and territory establish an independent expert commission to assess projects called in by the relevant Minister and to review appealed local panel decisions."

The NSW system provides for applicant appeals against decisions adverse to them. .Any expansion of appeal rights for applicants also needs to consider an expansion of appeal rights for third party objectors.

<u>NSW recent expanded appeal rights for third party objectors where a development approval involves the breach by certain development standards beyond 25%.</u>

<u>The further expansion of appeal rights needs to be considered in any new Act. See Section 9</u>.

6 **Defined Third Party Involvement** so as to "ensure political policy making remains independent of administrative assessment of applications; greater certainty; and, fewer delays.

More specifically it stated " Under the proposed model, a development assessment is made against technical criteria that enshrine policy developed after community consultation. Unless an error in administration occurs, third parties are encouraged to advocate change to the policy driven criteria. Appropriate checks and balances will need to be included to ensure appropriate governance of the assessment process".

The current Planning Act provide for extensive third party involvement. Third party appeal rights were expanded in the recent amendments to the Act.

It is important that the rights of third parties be betterdefined to better manage community expectations both for development decisions as well as Plan making.

<u>This would be an important issue for consideration in a new Act.</u>

7 **Private Sector Involvement** so as to "provide flexibility and free up and speed up approvals" .

It further stated that "In specified circumstances it is recommended that private sector experts provide advice that attests to compliance with technically excellent criteria. In other cases, the advice of private sector experts would be considered by the assessing authority (whether government officer, panel or commission)".

NSW already provides for private sector involvement through the use of private certifiers for complying development and construction certificates. Further expansion of self-assessment raises a number of difficult public policy issues and may undermine community confidence in the planning system.

Any expansion of private sector involvement in any new Act would have to be approached with caution.

8 **Stream Assessment into Tracks** by matching project complexity and impact to decision-making processes; and hence reducing assessments backlogs; and, better using resources.

It specifically proposed that "Early in the development assessment cycle, a project application should be streamed into a specific assessment track. Each track comprises a specific set of decision-making steps relevant to the project's complexity and impact on the built and natural environments. The scope and nature of these tracks is a policy issue to be decided by governments. The track to be used for each assessment will need to be clear from the outset".

NSW has introduced this provision in the June 2008 amendments to the Act for the making of Local Environment Plans.

This should be a key reform in any new Planning Act and replace the current complex system of development assessment involving Part 3A, Part 4, and Part 5 of the Act.

9 **Built- In Improvement Mechanisms** to ensure **"**continuous improvement of the development assessment process; greater strategic thinking by stakeholders; and, real world practice to help inform policy."

I It proposed that "Formal feedback loops with the development assessment are proposed. This approach would incorporate lessons learned by key stakeholders into overall planning policy, technical assessment criteria and the operation of the development assessment system".

NSW already required LEPs to be regularly reviewed. Moreover, in 2006 it introduced comprehensive performance reporting of development assessments by local Councils.

This issue should be more explicitly provided for in any new Act.

The DAF initiative stalled somewhat but recently received new impetus when the Local Government and Planning Ministers Council adopted a National Development Assessment Reform Program as part of the COAG reform program.

The components of the Reform Program include the following:

1 The implementation of the **eDA (electronic development application processing**) national wide. Victoria and Western Australia are finalizing a report by June of this year;

2 A **national development performance monitor** to be implemented by 2010. This project is being lead by South Australia.

3 A nationally uniform **template for complying development codes** together with electronic application of the template. This is being lead by NSW with a report to be prepared by mid 2009;

4 The development of **national planning system principles** building on the work of the Development Assessment forum, (DAF). This is being lead by Queensland and a discussion paper is being prepared by June 2009.

5 An **assessment of the benefits** of harmonising aspects of the planning system is being prepared by the ACT.

In June 2008 KPMG was commissioned to compare NSW planning reforms, then before parliament, with those of other states. KPMG found:

> "Current planning reforms appear to bring NSW in line with reforms that have been or are being progressed in Victoria, South Australia and Queensland."

It also reported;

> "KPMG finds that overall, the planning reform being undertaken in SNW, Queensland, Victoria, and South Australia is generally aligned with the DAF leading practices. Therefore there is a good platform for a national planning reform agenda along the lines of the DAF leading practices."

Recommendation

That consistent with planning reforms in other States, and similar recent reforms in NSW, a new Act should be guided by national best practice principles and the outcomes of current work to reform the planning systems of Australia under the auspices of COAG and the Local Government and Planning Ministers Council.

Section 5 Clarifying the Objectives of the Act

Section 5 of the Environmental Planning and Assessment Act, provides that the objects of the Act are:

"(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

(iii) the protection, provision and co-ordination of communication and utility services,

(iv) the provision of land for public purposes,

(v) the provision and co-ordination of community services and facilities, and

(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and

(vii) ecologically sustainable development, and

(viii) the provision and maintenance of affordable housing, and

(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment."

While there is nothing about these objects that one can disagree with, they fail to provide clarity as to the principal purpose of the Act.

This problem recurs frequently throughout the planning system. For example, local environmental plans frequently contain many non-differentiated objectives. In fact, within an LEP, each zoning often contains up to 10 objectives which are sometimes contradictory.

The Act and all of its subordinate legislation and instruments, especially those produced by local government, are full of motherhood statements, each designed to appeal to a particular constituency. These politically motivated multiple aims often create unrealistic expectations concerning development or environmental matters.

During the formulation of the Planning reforms enacted in June 2008, it was suggested by advocates that the Planning Act represented a “system of justice”. Others suggested the principal purpose of the EP& A Act was to manage property rights.

The great difficult with abandoning the view that the principal purpose of the Act is to manage the exercise of property rights, is that it would require a rethink of the fundamental property rights that are a cornerstone of British law, and hence Australian law.

In respect of property rights, the provisions of the current Act allow for:

(a) The removal of property rights subject to compensation under the Just Terms Compensation (Acquisition of Land) Act. This requires a legitimate public purpose. These provisions are sparingly used and require the allocation of public funds for the acquisition;

(b) The constraining of property rights so as to ensure that the exercise of individual property rights does not violate the public interest, where the public interest may involve environmental issues, the protection of the amenity of other land holders and users, matters of public safety, the provision of infrastructure or a range of other planning considerations.

However, the objects of the Act in S5 do not mirror the provisions contained in the Act and do not re-enforce the fact that the principal purpose of development processes is to reconcile property rights against other public interest consideration and the rights of neighbouring land holders.

The lack of clarity as to the relative importance of objectives makes the interpretation of planning instruments highly subjective.

It also can create false expectations during the assessment and determination of development applications.

Recommendation;

In the formulation of a new Planning Act the objects of the Act should be expressed with greater clarity and should contain requirements that Planning instruments (such as zone objectives within LEPs) contain a clear hierarchy of objectives.

Section 6 Land Use Plans

Part 3 of the EP&A Act deals with plan making. Under the Act there is a hierarchy of planning instruments including State Environmental Plans, Local Environmental Plan, and a Development Control Plan. The recent amendments removed the provisions allowing for Regional Environmental Plans.

The June 2008 legislative amendments included a completely new Part 3. This represents a significant improvement in the processes required for plan making and aligns with DAF Leading Practice No 8 which requires that assessment processes are tailored to the level of complexity and impact associated with the proposed development.

Nevertheless, while these changes have significantly improved the processes for Plan making, there remain a number of significant omissions in the Act. These include:

- The lack of appropriate provisions to allow for strategic land use planning – eg regional planning strategies should have statutory force;
- The absence of infrastructure planning from the strategic and use planning process particularly for greenfield sites;
- The Act does not explicitly address climate change, including mitigation and adaptation;
- Existing strategic planning and plan making process should address and deal with key environmental considerations such as the provisions of the Native Vegetation Act and the Threatened Species Act so as to avoid the need for multiple concurrences at development assessment stage.
- There is a need for the provision of structure planning for large sites, as they are currently dealt within variously by SEPPs, LEP, DCPs, and Master Plans within explicit powers.
- The proliferation of multiple and often conflicting objectives within environmental planning instruments;
- The lack of definition of the role of development control plans which are often used extensively by councils in a manner contradictory to their own local environmental plans;
- The need to have regard to the emerging national planning principles being prepared by COAG.

Recommendation:

It is recommended that in a new Act:

- **Specific provision be made for strategic land use planning which is to include infrastructure plans;**
- **That land use strategies and plans address key environmental considerations, climate change, structure planning for large sites, and this be integrated with infrastructure planning and address the omissions listed above.**

Section 7 Infrastructure Planning

The existing Act provides for local and regional infrastructure via development levies.

The main difficulty with the current provisions is that they treat infrastructure as a separate process to land use planning. This is particularly inappropriate in the case for greenfield areas.

The effect of this is that often infrastructure plans such as S94 contribution plans reflect the wishes and whims of a contemporary body such as a Council and are often decided independently of the land uses foreshadowed in a planning instruments.

A decision to release land for development, or to increase development density, is inextricably linked to the provision of appropriate infrastructure to service that development.

It would make more sense for infrastructure provision (particularly local infrastructure) to be addressed at the time land use strategies are finalized and included in planning instruments such as LEPs in accordance with State wide guidelines. They should not be separate instruments from planning instruments and should be reviewed each time an instrument or land use strategy is reviewed.

This would have the effect of recognizing that planning is not just a regulatory function but also involves the allocation of resources in a holistic manner.

Accordingly, this would mean that infrastructure provision should not be limited to that infrastructure which will be required to be provide by the developer but should also include other infrastructure that is an integral part of the development area (or the region) which may be provided by government.

It needs to be recognized that developers release large tracts of greenfield land and currently provide for infrastructure appropriate for the land uses proposed for the site. Some of the infrastructure they choose to provide may be market driven in terms of the positioning of particular development in the general property market. However this does not obviate the need for a land use plan to contain minimum requirements and a range of infrastructure considerations that would need to be addressed in the plan.

Recommendation:

That in a new planning Act the provision of local and regional infrastructure be integrated with land-use strategies, and planning instruments, to ensure that the development of land properly considers infrastructure needs and that the resources needed for the provision of infrastructure are allocated at the time of plan making.

Section 8 Development Control

The current act provides that development may be approved under a range of provisions including Part 4, Part 3A, and Part 5. There are a number of concerns with the existing provisions:

Part 5 has been reduced in importance since the introduction of Part 3A. It has a maximum and minimal approval process, with no mid point between a full EIS and brief Review of Environmental Factors.

Part 4 is a one size fits all approach to development assessment, and is now affected by the need to gain concurrence from a multiplicity of agencies due to the introduction of a range of new Acts since the planning act was first enacted e.g. the Native Vegetation Act.

Part 3A a removes the need to gain other concurrences. However, it is a process designed for large and complex developments but is not ideal for many urban developments even when they are of state significance. For such projects, it causes substantial delay and complexity when it is not required. Contrary to various public assertions, the 3A process is much more transparent, rigorous and accountable than the Part 4 process.

There is also a problem with the allocation of responsibility for development decisions.

South Australia has moved to a system where councils appoint independent panels who make the development decisions. It has now been operating for over two years and has been well accepted. It is now not a contentious issue in South Australia. This suggests that resistance to independent panels for DA's is largely driven by Councillors rather than the community.

Recent reforms to the NSW planning act provided for the use of Joint Regional Planning Panels (JRPPs) to replace councils for development applications of regional significance and established the Planning Assessment Commission (PAC) which allows the Minister for Planning to delegate Part 3A (state significant projects) to the Commission when previously the Minister had no discretion to delegate such applications.

While the current jurisdiction of the joint regional panels (ie for DA's with a capital value of $5-10m) and delegations to the PAC (DA's where there is a conflict of interest) are not as intended when the amendments were introduced, these are subjective matters and more fundamental changes are required in any new planning Act.

There are significant problems associated with elected representatives continuing to exercise an arbitral role in the determination of individual development applications. These include:

1 **An advocate cannot also be an impartial arbiter**. An elected representative such as a councillor (or Minister) is, by the nature of their position, an advocate.

Representatives are lobbied by the various stakeholders and the community and are under pressure to advocate on behalf of such stakeholders as this is one of their key roles. It is difficult to see how an advocate in a course can sit in judgement in the same course. A person advocating a position should not be exercising an impartial arbitral function.

2 **The process by which developments are determined needs to be transparent**. An elected person is frequently approached, or lobbied, by constituents and other stakeholders over particular proposals. This often occurs in an informal setting such as a social function, or in the office of the official,, or even in the aisles of a supermarket. It is not appropriate for an elected person to refuse to listen to such representations particularly from objectors . Similarly, proponents of development and other constituents may also wish to speak to their elected representatives. Both scenarios put elected officials in a difficult position given their representative role.. Accordingly when elected person sits in judgement on a development application it is difficult to know the extent of representations that they have received and from which quarters such representations may have come. This in turn leads to concerns about partiality and bias and undermines the integrity of the planning system.

3 **Elected official are often under pressure to pre-judge an application**. Communities, objectors, and even applicants, will often ask an elected representative to state their position on a development well before all assessment information is available. For example, a public meeting may be called when an application is placed on public exhibition and elected representatives are asked to attend and state their position. This leads to development applications being pre-judged.

4 **Elected people, especially when newly elected, often do not have planning skills.** They usually do not have architectural, planning, property, or environmental qualifications. It can take new Councillors some years before they become familiar with development assessment processes. Some developments are very complex and require particular skills and knowledge. For example, reading plans of complex developments is not something that all councilors do well. In addition, there are significant planning policies and laws that must be considered when determining development applications with which inexperienced councillors would not be familiar.

5 **Perceived conflict due to election donations**. Elected representatives are required to campaign to get elected. Either individual representatives, or their political party, need to raise funds for such election campaigns. Even though there has been recent discussion about banning election donations, advice to the NSW government indicates that such bans would be illegal under the Australian constitution. Hence some form of donations will remain.

Accordingly, it follows that if applicants for development, or objectors, donate to candidates, questions may be raised about their impartiality in dealing with such applications. This has been a constant media theme over the last few years and serves to undermine the perceived integrity of the planning system. The use of non-elected experts to determine will put an end this controversy.

6 **Separation of roles**. Elected representatives make laws and planning policies. Good regulatory practice suggests that the implementation of such policies is best separated from the makers of them, as occurs in other jurisdictions.

It is concluded that there is an overwhelming case for the introduction of independent planning expertise to determine all development applications. There would be significant gains in community and developer confidence due to the greater expertise, impartiality, transparency, and perceived integrity that would be achieved.

However, given the removal of elected representatives from this part of the development approval process there would be a need for improving and expanding appeal processes to ensure that stakeholders had recourse if they became concerned about the decisions of experts who may be perceived to be unaccountable. This is addressed in Section 10.

Recommendations:

1 That in a new Planning Act the provisions which determine development applications (ie Part 3A, Part 4, and Part 5) be replaced with a single provision which contains flexibility of process to cater for the different levels of complexity associated with development applications as recommended by the Development Assessment Forum (DAF);

2 That development decision making be completed de-politicised at Commonwealth, State and Local Level;

3 That development applications at local level (other than complying development) be determined by independent panels appointed by each council drawn from a State accredited list of experts, subject to the exception that small applications may be delegated to council staff;

4 That all development applications at State level (ie State significant sites) be determined by a State Planning Assessment Commission constituted under a the new Act, subject only to Ministerial review rights for State infrastructure. The Act should also provide that, for such applications, a State Co-Coordinator General be empowered to resolve inter-agency concurrences and disputes;

5 That, likewise, the Commonwealth Minister for the Environment either accredit the State assessment and consent process for development approvals, or delegate his/her power to an independent Commission or Authority;

Section 9 Appeal and review processes

In simplistic terms, the planning appeals system through the NSW Land and Environment Court (L&E Court) comprises three broad components:

1. Appeals on matters of law:
2. Merit appeals by an applicant:
3. Merit appeals by objectors where a development is defined as a "designated development".

In the June 2008 reforms additional third-party merit appeal rights were introduced where a development consent exceeded certain development standards by more than 25%...

Even though over time successive Chief Judges of the L&E Court have made a range of improvements to processes of the court, the merit appeal processes remains adversarial and legalistic and hence often are cumbersome, expensive, and daunting to many (particularly for small applications).

While appeals to the Court on matters of law may, by necessity, be matters that need to be dealt within an adversarial system, there is no justifiable reason why merit appeals should rely on an adversarial process rather than an inquisitorial process.

The L & E Court follows an adversarial process even for Class 1 and 2 (ie merit appeals). This has been reflected in a Judgment by Tobias J in Segal & Anors v Waverley Council 920050 NSW CA . In that judgment Tobias J stated:

> "95 Furthermore, I am in no way convinced that in the context of adversarial proceedings in the Land and Environment Court, there is any place for the so-called principle of consistency in administrative decision making. As I have observed in (51) above, that concept is more appropriately applied to true administrative decision making at the level of executive government or local government. It has no application to adversarial proceedings where the merits of any particular application depend upon the facts and circumstances of the case and the substantive issues joined between the parties"

However, it was not intended that merit appeals in the Court where to be handled in an adversarial manner as explained by McClellan CJ in *Residents Against Improper Development Incorporated & Anors v Chase Property Investments Pty Ltd (2006) NSWCA 323:*

> '223 I appreciate that for many years Class 1 proceedings in the LEC were apparently conducted in the form of conventional adversarial litigation. This no doubt explains the statements by Tobias JA *in Segal v Waverley Council (2005) NSW CA*

310 64 NSWLR 177 especially at (42), (51) and (95), However, the statutory framework has remained the same from the inception of the LEC and the assumption that proceedings in Class1 of its jurisdiction were conventional adversarial litigation was contrary to the expectation of the legislature when the planning legislation was enacted. When the Court Bill was introduced into the Parliament the Minister said, inter alia:

> "The court is a novel concept bringing together in one body the best attributes of a traditional system and of a lay tribunal system. In consequence, the court will be able to function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice permit in accordance with clause 38 (Second Reading Speech, LA 14 November 1979 p3051)"

Given the custom and practice of the Court since its inception, legislative amendment will be required to return the processes of the Court in merit appeals to an administrative /inquisitorial format. The comments of Justice McClellan suggest that this would be quite appropriate.

If the court followed an inquisitorial process for merit reviews, delays and costs could be substantially reduced.

In the June 2008 legislation provision was made for Department of Planning appointed arbitrators to arbitrate on small development matters such as single dwellings not exceeding two stories in height. This reform has yet to be implemented, but the basis of reform was that it would provide a non-legalistic low-cost process to give ordinary people appeal rights which currently they have at law but they are often not able to exercise for costs and other reasons.

Over 95% of all development applications have a capital investment value (CIV) of less than $1m, and about two thirds of all applications have a CIV of less than $100,000. Applicants wanting redress concerning such applications should not have to deal with an expensive judicial process.

If the processes of the Land and Environment Court were restructured to reduce costs and delays and to make the arbitral process much more accessible for ordinary citizens who cannot afford expensive legal advice and representation it follows the number of appeals would increase.

In a year of normal economic activity one would expect about 1000 cases to be dealt with by the Court of which only a minority (say 40%)would normally be by applicants whose developments were valued at under $1 million. Given that about 95% of all developments have a capital cost below $1 million, it shows that small applicants, i.e. the mums and dads, do not exercise their appeal rights in the same way that large developers are able to do. They are clearly deterred by the costs and processes of the Court.

It also follows that if the merit appeal process is much less expensive and appeal costs for small matters are capped at say $500-$1,000 (as had been proposed for planning

arbitrators) many more applicants with small developments would be able to exercise their rights to have decisions reviewed on appeal.

Hence an improved merit appeal process would significant enhance people satisfaction with the planning system,

A benefit of stopping the adversarial system is that the costs of representation would be slashed, as the Commissioner would drive the case rather than the legal representatives of the parties. Given that many inexperienced and unskilled Councillors sit on Committees assessing DA's and making decisions on them, it is difficult to see why an experienced Commissioner could not do likewise on appeal.

Another issue relates to the introduction of panels and the consequent removal of elected politicians from decision-making in respect of development applications. One of the reasons some sections of the community support councillors remaining as the consent authority is because objectors feel that they can "appeal" (ie lobby) to councillors in respect to developments. It follows that if elected politicians are removed from development consent decisions that in return objectors should be given greater third party appeal rights as is the case in Victoria, and to a lesser extend , in Queensland.

This is a further important reason why the appeal review process must be drastically streamlined.

This trend has been commenced with the June 2008 legislative amendments where third-party appeals were introduced for developments which exceed certain development standards by more than 25%.

In a system where all development decisions are made by panels as opposed to elected officials, it would make sense to allow third-party appeals for all developments where a consent allows the breach of a development standard. This would greatly improve public confidence in the development process and would provide ordinary citizens with a review mechanism given that panel members may be perceived as "unaccountable" experts.

Recommendations

1. **The merit appeal processes of the Land and Environment Court should be altered by legislation to provide for an inquisitorial rather than adversarial process, and appeal costs should be capped together with rules to ensure appellants, and other parties, are not disadvantage because of their means.**

2. **If independent panels are introduced to make development decisions, and given a much cheaper and more efficient merit appeal system, then third party appeal rights should be extended to allow merit appeals for third parties who live in proximity to a development, and where a consent granted by a consent authority involves a breach of a development standard.**

Section 10 The role of government development agencies

The existing Growth Centres (Development Corporations) Act 1974 contains provisions for the establishment of growth centres and growth centre corporations. However, New South Wales does not use development agencies to the same extent as other States such as Victoria and West Australia.

In Sydney, the Growth Centres Commission (GCC), before it was abolished, released. rezoned and prepared LEPs and structure plans for 20,000 dwellings in near record time - under two years – in the North West and South West Growth Centres

The Victorian Growth Areas Authority is likewise facilitating the development of five growth areas around the periphery of Melbourne.

Government agencies that facilitate development are very useful in unlocking new development areas and for urban renewal projects which involve untangling a range of other interests especially amongst government agencies. Unlike the Department of Planning, which regulates development, their role is to facilitate development, and,subject to planning constraints imposed by the Department, they can be very effective vehicles for achieving land release, infrastructure co-ordination and improved housing affordability.

It follows that a new planning act should make greater provision for the use of development facilitation corporations. This is particularly important where complex infrastructure planning issues need to be resolved.

The need for better strategic land use planning and infrastructure provision has been highlighted in Sections 6 & 7. Government development agencies, such as the GCC and Landcom, are ideal for facilitating better land use and infrastructure integration, especially for large sites. A new Act needs to provide for such organizations and appropriately empower them

Recommendation:

That a new Act contain provisions to establish appropriate corporate vehicles, such as growth centres corporations, to integrate land-use plans with infrastructure provision and to expedite land release.

Section 11 Conclusion

The planning reforms enacted by Parliament in June 2008 are currently being implemented and will produced substantial benefits in terms of the efficiency of the planning system. However, the E P & A Act is now 31 years old and it is time to reconsider the entire Act to meet the challenges of the 21st century.

As outlined in Section 3 there are a number of important reasons why a new Planning Act should be prepared. Moreover, given the current work being carried out at national level it would give New South Wales an opportunity to align its planning system with that of other States and lead Australia in modern land use planning and development control.

A reasonable time horizon for the preparation of new legislation governing the planning system of New South Wales would be in the order of 3 to 4 years. This would also allow adequate time for a national approach to be settled.

It also would allow sufficient time for appropriate research to be carried out and consultation with all the relevant stakeholders.

Recommendation

It is recommended that the government commence work on the preparation of a new Planning Act by 2010 with a view to such act being introduced within a 3 to 4 year period, and that the process involve extensive stakeholder consultation and regard for national planning principles.

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