

**Submission  
No 107**

## **INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK**

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# **DUFFYS FOREST RESIDENTS ASSOCIATION INC**

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6 May 2009

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

Dear Sir

**Re: Enquiry into the NSW Planning Framework**

The Duffys Forest Residents Association Inc. (DFRA) appreciates the opportunity to comment on most of the listed Terms of Reference. In addition, we wish to comment on:

- (i) The NSW Land & Environment Court and its role in planning decisions and the recognition of the role of Ecologically Sustainable Development (ESD) principles.
- (ii) The E P & A Act 1979 particularly with regard to the conflict between Bushfire Planning issues and Threatened Species legislation.

Residents of the non urban areas (2Ha subdivisions) of Terrey Hills and Duffys Forest have had experience with the NSW planning process since the early 1960's. The area then was seen as a "dumping ground" for inappropriate developments. These included an airport, several caravan parks, a quarry, indoor recreation facilities, schools, and a crematorium. There was little interest on the part of authorities for the environmental qualities of the area and the effect of development on the Ku-ring-gai Chase National Park (KCNP) including the catchment of the many tributaries of Cowan Creek. The efforts of the DFRA were successful in most cases in opposing these development applications.

In the '60s an airfield was proposed on Crown land adjacent to KCNP. In 1971 the development application was opposed by local residents and organizations and people throughout Sydney. This

overwhelming opposition was the concern about the noisy operation of a busy airfield, located in the peaceful bushland of the Park visited by 1.5 million visitors each year.

After thorough investigation the proposal was refused by the Federal Minister for Civil Aviation in 1971. His refusal was partly based on the information presented by the Residents Association at the time, that the site supported magnificent vegetation including many stands of Waratahs, later described as the Endangered Duffys Forest Ecological Community. This decision to refuse the airport was based on the protection of the environmental integrity of the site versus development as well as technical matters. The Residents Association continued the campaign and the airfield site was eventually added to KCNP in 1983.

In 1974 a large caravan park was proposed in Duffys Forest not far from the airport land. It was approved by Council but the matter was taken to Court by several residents. The Judge, Sir Laurence Street, who had independently inspected the area before the Court Hearing, listened to the evidence provided to the Hearing and recommended Refusal, based on the intensive commercial use proposed for the site. The case ended in a few hours and costs were awarded against the Council. Residents at the time were very pleased with the outcome of the campaigns against these two major developments. These issues and others at the time were dealt with under legislation existing before the EP&A Act 1979.

In 1974 and partly as a result of the airport controversy the Association was involved with the Duffys Forest/Terrey Hills Alternative Planning Strategy Committee established by Sir John Fuller, then Minister for Planning. The Minister then mentioned the issue of the conflict of land use decisions such as the airport D.A. had highlighted. Resolution of the problem was a prime concern for the Planning Department.

He asked for robust community involvement and this was forthcoming. The Study was based on a number of practical planning issues as well as further information about the environmental qualities of the area, public transport, water supply, etc.

The DFRA was involved with the Study. The 5 acre subdivision was upheld and there was careful investigation of the peripheral Crown lands left as a buffer zone between the developed area and the National Park. The environmental qualities, particularly hanging swamps (wet heath areas) waratahs,

mallee yellow top ash, to name a few were highlighted. The Study left us with the status quo partly because of problems with location, water supply and lack of sewerage. The need for areas which support semi rural small scale industries, such as riding schools, nurseries, and boarding kennels/catteries that benefit metropolitan Sydney was highlighted at that time.

In 1978 the DFRA approached Warringah Council because of the continual need to object to DAs for inappropriate development applications. The Council engaged Don Fox Planners to prepare a Development Control Plan (DCP) to accommodate many of these developments closer to Mona Vale Road. The Council decided on the Myoora Road area and this area was later transferred to the WLEP2000 as a different zoning (A4 Myoora road) from the other non urban areas.

In the 1980s the Association was involved with the non urban lands study (PPK) and its recommendations which were to be incorporated in the WLEP2000.

This previous input into planning issues is the basis for the Association wishing to comment on the current Enquiry.

### **Terms of Reference 1(a) – The need for further development of NSW Planning legislation**

Since 1993, a series of amendments to the legislation have led to the Minister for Planning now been directly involved in most decisions regarding major developments. The success rate for development applications has been extremely high despite strong opposition from the community. As a result local Councils and communities have little control over important planning decisions in their areas.

The recent experience of Warringah residents being able to address independent panels such as the Warringah Development Assessment Panel (WDAP) formally IHAP, has been successful and much appreciated. Residents now feel that they are presenting arguments to objective experts. The panels consist of a lawyer (chairman) and environmental, town planning, conservation and community representatives. The (WDAP) remain the delegated authority for Category 1 and 2 development applications and make recommendations to the General Manager for Category 3 developments.

However, in contrast there is now general concern about the power being given by the Planning Minister to the proposed Joint Regional Planning Panels composed of 2 Council representatives and 3 State Government appointees to determine regionally significant developments. This seems to remove

direct local involvement apart from submitting to the new Regional Panels, the composition of which is not clear.

We submit that the NSW Planning framework needs an overhaul. Public exhibition for comment should involve respect for community opinion, knowledge and commonsense. Long drawn-out cases with numerous amendments lasting some years do not benefit developers, residents or Councils. They are costly and draining. Perhaps mediation should be utilised more often in the early stages of a development application. This Association has long advocated the need for careful pre development application processes by Council.

The DFRA understands that the aims to be followed when planning need to involve provision of infrastructure before increasing housing density either unit development or peripheral residential development. For example, car parking, feeder buses to transport, open space. Social cohesion is very important. The guiding principles we suggest are the need to protect the natural, social and economic values emphasised in the Ecologically Sustainable Development Principles.

It is noted and understood that the Council of Australian Governments is emerging as a constructive forum that is appreciated by local councils. We would agree that the effect of the interaction is that the 3 tiers of government can be involved in the financial needs of State governments and local councils. Specific community grants for local projects have been an interesting example of responsible ways of spending Commonwealth government funds.

The Association believes that instead of relying on adding further layers to the existing legislation an effort should be made to review the present Act in its entirety and so improve it.

**Terms of Reference 1(c) Duplication of Processes under the Commonwealth Act  
Environment Protection and Biodiversity Conservation Act 1999 and NSW Planning legislation**

The Association has had an experience of Commonwealth involvement in a development application involving a controlled action. A great deal of effort went into the preparation of material forwarded to Canberra where the staff were interested and helpful. However we were told that the NSW Department of Environment still had the main responsibility for a decision. The staff in Canberra reassessed the Threatened Species on the site and referred the matter back to the NSW DECC which

concluded and gave approval for the development. This was a costly time consuming exercise for Council, the developer and the (DFRA) and led to the same outcome. However this opportunity for cooperation between the 3 tiers of government is appreciated and sometimes Commonwealth powers are needed. For example KCNP is now under Federal jurisdiction which means there is added protection for the Park.

### **Terms of Reference 1 (d) Climate Change and Natural Resources Issues in Planning and Development Controls**

It seems to be logical for Ecologically Sustainable Development principles to be applied to the issue of Climate Change and its effect on the future impacts of approvals for applications in areas subject to flooding, coastal and inland, and bushfire frequency and intensity. There must be concerns at present for the Council decision makers and anyone involved in the planning process as to how to deal with Climate Change. Again the ESD Principles are seen to be in the public interest so that refusals can be justified. We would suggest that this issue needs to be clarified in revision of the Act.

### **Term of Reference 1(g) Inter-Relationship of Planning & Building Controls**

The legislative changes in 1997 resulted in the Construction Certificate for a development being brought into the EP&A Act as well as Planning approvals. In 1997 Private Certifiers were proposed and applicants could choose between Council officers or a Private Certifier to issue a Construction Certificate and be responsible for monitoring the construction phase of a development. In the case of a Private Certifier being involved in a development, problems have arisen with delays because of the additional work for local councils. Councils still have to carry responsibility for problems that can arise in the case of Certifiers involvement.

In the case of a recent development approval in Duffys Forest which has been supervised by a Private Certifier problems have arisen which have been reported to the Certifier and the local Council. The legal position is unclear. However Council has to tread carefully to rectify the problem. In this case a steep site on environmentally sensitive land for subdivision is involved. Problems have arisen relating to the breaches of unenforceable complex conditions of consent imposed by the Court. This case is a good example of the problems arising from dual responsibilities.

It appears that there is a need for an overhaul of the use of Private Certifiers particularly in major developments. To ensure control over the detail of some development application, final certification should remain the responsibility of Council.

In the meantime appeal to the Professional Builders Board to dismiss the Certifier is a slow process. The local Council has no authority to act.

### **EP&A Act and Threatened Species legislation – Conflict with Planning for Bushfire Protection legislation.**

The EP&A Act 1979 has been revised on many occasions, the most recent being 2008. In 1995 the Threatened Species Conservation provisions were added to the Act and in 2002 the Rural Fires provisions was included in the same piece of legislation.

The DFRA was made aware of the problems of the power given to the Rural Fire Service (RFS) in its manual “Planning for Bushfire Protection” which was made available to local Councils and the community in 2002.

Until then, local Council planners had recourse to the advice of staff bushfire consultants re development applications before Council. Under the new legislation 2002 the RFS staff was expanded often to include the previous Council Fire Control Officers and came under the jurisdiction of the RFS.

We understand that local councils remain the Consent Authority for DA’s that involve referral to the RFS and other relevant bodies. The RFS provides a Safety Authority based on extensive clearing of land for protection of dwellings, (APZ) with requirements for fire trails and evacuation roads. The Council, however, as the Consent Authority can still refuse a DA based on location, aspect, and history of bushfires and evacuation issues. Both the Council and the RFS are responsible for the safety of fire fighters, most of whom are volunteers.

In our experience, Council seems reluctant to assert its Consent Authority if it conflicts with a RFS Safety Certificate.

Some Councils, e.g. Ryde Council still employ their own fire consultants who advise on technical matters. As Sydney continues to expand into bushland areas it is important that the issue of Council’s role as the Consent Authority should be resolved.

### **Threatened Species Legislation**

The conflicting role of the EP& A Act is its responsibility for the protection of flora and fauna through the Threatened Species legislation.

When a DA is lodged with Council, detailed EIS documents are prepared by developers and Council staff. These detailed reports provide scientific proof of the need to protect the habitat of plants and animals and how the development will ensure this. Resident groups in their turn employ ecologists to prepare a report.

In developing bushfire prone land on the edge of Sydney it is obvious in some cases a collision course is inevitable between bushfire protection for future residents and protection of the environment.

A contradictory situation exists in the legislation which in our opinion needs to be resolved. The Association and many other groups and residents in Warringah face the problems of developments being permitted in bushfire prone, pristine bushland adjacent to National Parks and catchments of important waterways. It is a planning issue that is often heard by the Land & Environment Court.

The DFRA submits that it is essential for this conflicting issue to be resolved in the public interest. Residents are well aware of bushfire issues. We support our local volunteer fire fighters and care about their safety. Local fire brigade staff is not permitted to comment on planning decisions in bushfire prone areas where they will be expected to defend life and property.

### **NSW Land & Environment Court**

When all else fails and Council's refusal of a DA is appealed by a developer, the case can end up in Court. This is a costly process and the DFRA has been involved in several cases over the past 40 years. The Court appears to be an important part of the planning process.

We are repeatedly told by 'experts' that once privately owned land is zoned, there is a 'right' for development to occur. The Court and planners appear to espouse this view at the present time. This makes it almost impossible to reject a subdivision, however bushfire prone or environmentally sensitive the land is. This has been our recent experience in Duffys Forest.



It will be interesting to see how the proposed template for LEP's throughout NSW will handle the matter of bushfire prone environmentally sensitive land.

The Court and local councils have the power to refuse developments. In a recent subdivision case in Duffys Forest the DFRA objected to the original plan and there were 4 amended plans before development approval was granted by the Court. A number of these amendments were suggested by the Commissioner of the Court during what appeared to be a mediation process. The Court appeared determined to resolve the negative impact on the natural environment through mediation and by applying a series of unenforceable, unachievable conditions to the development consent. There was 5 years of opposition by local residents to the proposal before it was approved by the Court with unenforceable Conditions of Consent attached.

Since then there have been major problems encountered in developing the site which have required extensive clearing of bushland for roads, access trails and fire trails, over a large part of each lot. The residents who will occupy the 5 houses on the restored site will be our neighbours. They will never know the heartache and angst experienced by the developer, the Council, the Volunteer Bushfire Brigade and residents during the development application period from 2001 to 2006.

The Association appreciates the opportunity to comment on the issues raised by the Enquiry into the NSW Planning Framework. The input to the Enquiry from many planning experts is encouraging. Residents of Duffys Forest represented by our Association continue to react strongly to unsympathetic developments in our beautiful locality. Any improvement to the legislation that will provide more protection for the environment will be commended.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Mary Newlinds', is written on a light green rectangular background.

Mary Newlinds, OAM

On behalf of

Duffys Forest Residents Association Inc.