Submission
No 101

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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Date received:	17/04/2009

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Preserving the Past, Enhancing the Future

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ES/KT/77.05/09

9 April 2009

The Hon Tony Catanzariti MLC
Committee Chair
Standing Committee on State Development
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Catanzariti

Attached is Council's submission to the Inquiry into the New South Wales planning framework.

Council wishes to present to the Inquiry in Albury on 29 May 2009.

Yours faithfully

David Laugher
GENERAL MANAGER

LEETON SHIRE COUNCIL

SUBMISSION TO THE NSW LEGISLATIVE COUNCIL'S PLANNING COMMITTEE ON STATE DEVELOPMENT – INQUIRY INTO THE NSW PLANNING FRAMEWORK

INTRODUCTION

A comprehensive Inquiry into the NSW planning and environmental legislation and planning system is highly welcome and long overdue.

The submission below represents Council's responses to each of the Terms of Reference and I would look forward to the opportunity to present Council's submission to a formal Hearing conducted in due course by the Standing Committee.

There is real opportunity with this Inquiry and the approach of the relatively new Minister for Planning, the Hon, Kristina Kenneally, to set planning in NSW on a new foundation.

GOVERNANCE

It cannot be over-emphasised how the future quality of planning in NSW and its service delivery to the community requires some fundamental changes in governance.

The NSW State Government has, over the last 3 years or so, progressively undermined local democracy as an integral part of decision making on planning, development and environmental matters at the local level. There has been a strong trend for centralisation of planning powers and responsibilities in the State Government and in particular under the jurisdiction of the State Minister for Planning. There have been no criteria, and there has been no agreed foundation, to support such removal of responsibilities from local to State level. Many State significant sites and applications under Part 3A have declared/called in on arbitrary bases, (.i.e. with no foundation in State and regional significance) and which have generated community perceptions about political motivations.

Joint Regional Planning Panels have been "imposed upon" as enabled by the legislation of June 2008 (the Environmental Planning Assessment & Amendment Act 2008). These Panels would comprise of "experts" who would make decisions on applications valued at $10M or more, Crown applications valued at $5M or more and DAs for which Councils are the proponents. It does represent an erosion of local democracy and decisions by Panel members who are "remote" from the issues and the local community culture that relates to such decision making.

Another example is the formation of the LEP Review Panel. This has some merits in re-establishing consistency at the State level in dealing with rezoning applications. However, it does lead to unnecessary delays compared to the matters being dealt with by the Regional Offices of the Department of Planning.

Governance in NSW planning can be substantially improved by a negotiated Inter-Governmental Agreement between State and Local Government that establishes:

- defined respective responsibilities for planning, infrastructure planning and delivery and environmental conservation and management;

- clear criteria for Ministerial direction State-wide or embodied in individual regional strategies as to what projects are of state and regional significance and therefore are appropriate for Ministerial or Planning Assessment Commission determination. This should also include fee structures that go with the process of certificates, implementation and compliance monitoring of approvals given by the Minister or the Planning Assessment Commission;

- systems and accountabilities to enable Councils to retain local decision-making on DA's currently intended to go to JRPPs.

RECOMMENDATIONS

- That the legislative review enables the negotiation of an Inter-Governmental Agreement such as that outlined above;

- That Ministerial directions and Regional Strategies establish criteria for sites and developments that are of State and Regional significance and therefore are to be determined by the minister;

- That the proposal to establish Joint Regional Planning Panels is discontinued and systems and accountabilities are refined for decision-making on the relevant categories of DA's be by Councils;

- That a revised concept of regional panels be established, lead by the Regional Office of the Department of Planning and comprising of relevant state agencies and constituent Councils and be responsible for judging the compatibility of Draft LEP's with the Regional Strategy and State policies ;

Terms of Reference *1 (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.*

The Environmental Planning & Assessment Act 1979 when promulgated was an excellent and leading piece of legislation. Fundamental questions now need to be asked about the purposes and intended effects of planning legislation. The objects of the Environmental Planning & Assessment Act 1979 (as amended) may not now, in the main, stand the test of scrutiny in terms of them being effectively adhered to and implemented – particularly the one that relates to effective sharing of responsibilities between the two levels of government.

Over the last 10 years or so, political and economic expediency and pragmatism have increasingly dominated interpretation of, and changes to, the planning legislation and system. These expediencies and this pragmatism can be argued as the fundamental causes of the progressive, ad hoc, piecemeal and detrimental changes to the legislation.

In addition to the complex and fragmented legislation that creates the context for State and Local Government there are excessive and different layers of Plans that apply to any one property and any one DA, i.e. State Environmental Planning Policies, Local Environmental Plans, Development Control Plans etc.

In this Council's submission, the principles that should apply to a comprehensive review of the legislation are:

a) Good governance – i.e. positive and formally agreed working relationships between state and local government;

b) The integration of development planning, infrastructure provision and environmental conservation and management;

c) Sustainability:

- Balancing and integrating the social, cultural, economic and environmental and governance factors in delivering an effective planning system (aligned CSP)

- Including the financial and resource capabilities of local government to play its rightful role in planning;

d) Reduced complexity and more efficiency;

e) Increased clarity and certainty in the system;

f) Increased transparency and accountability of decision making authorities within the planning system;

g) The improvement of user friendly legislation and the enabling of more user friendly legal and policy plans;

h) Climate Change – adequately responding to this international and national imperative with leadership from the State government to this major challenge;

i) Enabling the shift of emphasis of limited professional resources responsible for implementing the planning system from development assessment to strategic planning/policy making.

Review of the planning legislation and system cannot be effective without addressing the fragmented legislation of practice conducted by multiple agencies. This can lead to a plethora of referrals by local government to state agencies that has in part been remedied by the recent Circular on Referrals and Concurrences. This again has been expedient in terms of reducing timeframes for state government agencies to respond (21 days) and then Council can assume acceptance or concurrence with the proposal. This does not however necessarily support good consultation, quality and advice and outcomes on the ground. State government agencies in themselves are not required to produce policies that are publicly exhibited that would help Councils to have delegated assessment and concurrence functions.

Integrated development was an initiative in the Act Amendment 2000 and has a separate formal legal process associated with them, but this does not include key development proposals - notably the Threatened Species Conservation Act which, if there is significant impact, triggers the need for a separate approval by concurrence of the Director General of Environment and Climate Change.

Similarly, the requirements of the Bushfire Protection Act require referrals to the Rural Fire Service that are a significant delay factor. The Rural Fire Service position is obviously fundamentally important to a good outcome, but increased clarity of standardised requirements, better resourcing of the RFS to respond to local government development applications and, where appropriate (and endorsed by the RFS), accredited/agreed delegation to local government to determine the level of bushfire protection required or whether indeed an application for development is acceptable in a bushfire prone area.

In the period 2000-2002, a substantial review of planning legislation and practice was also conducted, with various taskforces established to review Exempt & Complying development, development assessment, strategic planning, statutory planning etc. There were many worthy outcomes of that initiative, including the recommendation to consolidate all relevant State, regional and local strategic planning content into a local strategy and plan for clarity to the local council and to enable easier interpretation of the planning controls that related to any individual property. Such local strategies as pre-conditions for a Comprehensive Local Environmental Plan and Development

Control Plans should be mandated with appropriate prioritised funding support by State government.

The prioritisation of regional strategies and the timeframes for completion of new LEPs for those priority regions should be tailored for funding support from the Planning Reform Fund - (there has never been any published statements of accounts by the State government of the income and expenditure allocations relating to the Planning Reform Fund, which is totally inappropriate given the contributions by development applicants and the administrative/management role by local government).

RECOMMENDATIONS

- That local strategic plans are mandatory pre-requisites for LEP's and DCP's – with the obligatory referencing of the strategic plan being embodied in the LEP;

- That the respective powers of the Minster, Director-General and Local Government are re-defined;

- That a revised, comprehensive new Act be drafted based upon the principles described in a) to i) above.

Term of Reference 1 (b) The implications of the Council of Australian Governments (COAG) reform agenda for planning in New South Wales.

The Commonwealth Government has been "noticeable by its absence" on planning matters. The COAG reform agenda has tended to focus upon 'red tape reduction" and cost savings associated with planning processes to increase housing affordability rather than addressing mechanisms to achieve better planning outcomes. These are very worthy goals; however this is leading to the dominance of process and administrative reform as distinct to reform to achieve better outcomes "on the ground".

The Development Assessment Forum (DAF) was formed in 1998 to recommend ways to "streamline development assessment and cut red tape – without sacrificing the quality of decision making". The DAF has done some excellent work which the Ministers of States and Territories have endorsed "in principle" on development assessment in particular but the declared intents of the Ministers are not translating into legislative reform and practices – certainly this is not the case in NSW.

In 2005, the DAF developed the leading practice model for development assessment which sought to achieve greater efficiency and clarity. Leading practices were recommended as well as six pathways through development assessment system:

- Exempt development
- Prohibited development

- Self assess
- Co-assess
- Merit assess
- Impact assess

In August 2005, the Local Government and Planning Minister's Council endorsed the above framework in principle and commonly stated it as "an important reference for individual jurisdictions in advancing reform of development assessment". Some of the elements can be considered to be embodied in the NSW Planning Reform, but it does not reflect the above framework to a significant extent.

In February 2006, COAG formally requested the Local Government and Planning Minister's Council to:

a) Recommend and implement strategies to encourage each jurisdiction to:

   (i) systematically review its local government development assessment legislation policies and objectives to ensure that they remain relevant, effective, efficiently administered and consistent across the jurisdiction

   (ii) ensure that referrals are limited only to agencies with a statutory role relevant to the application and that referral agencies specify their requirements in advance and comply with clear response times

b) Facilitate trials of electronic processing of development applications and adoption through electronic development assessment.

The Federal Government has recently allocated $30M for information technology initiatives and improvements from the Housing Affordability Fund in the interests of improving efficiency in approval processes - $6M of this is allocated to NSW. This again is a highly worthy initiative and one which will have really beneficial impacts on the system. The amount of money however is inadequate to address the costs that will be involved to local government to upgrade systems and establish sufficient compatibility of software across various Councils.

There are major planning issues at the national level which should be addressed by an enhanced Commonwealth approach to planning (recognising the constitutional parameters for such involvement):

- Climate change and coastal management;

- Growth management and infrastructure provision for major cities;

- The continuing demand for growth on the coastline and the related deterioration of social and economic positions of inland towns and rural and regional areas generally;

- Funding of infrastructure to enable planning growth to occur in an integrated manner;

- Highly relevant to NSW is the planning for the Sydney metropolitan residential demand and supply with related infrastructure provision, particularly insofar as it relates to economic implications and the effects of the immigration program managed at the Commonwealth level;

- Also relevant is the environmental management of the Murray Darling basin and its implications – particularly the social and economic effects on townships and employment – that are intricately related.

Terms of Reference 1 (c) Duplication of processes under the Commonwealth Environment Protection and Biodiversity Act 1999 and New South Wales planning, environmental and heritage legislation.

In this Council's experience, there have not been difficulties with duplication between the Commonwealth Environmental Protection and Biodiversity Act 1999 and NSW Planning environment and heritage legislation.

There are endangered, threatened and vulnerable species that are classified as such in the Commonwealth legislation but not classified that way in State legislation and vice versa. This has manifested as a lack of Commonwealth and State coordination.

The main issue with impact of the Commonwealth EP&B Act is the delays experienced in responsiveness of Commonwealth Department of the Environment.

Terms of Reference 1 (d) Climate change and natural resources issues in planning and development controls

There is a vacuum of legislation and policy output of the NSW State government on climate change. The Department of Environment and Climate Change has taken a public position that 0.91 metres is a scientifically valid basis for anticipated sea level rise by year 2100. However, there is no expressed consequential policy and there are no substantive policies or reference in the regional strategies produced by the Department of Planning in relation to climate change.

The issue of green house gas emissions from agriculture is still being identified and research is only now commencing in this area. The conflict of emissions and food security need to be resolved as a priority. The State Government urgently needs to fill the policy vacuum to give agriculture and rural communities some direction to manage climate change.

Terms of Reference 1 (e) Appropriateness of considering competition policy issues in land use planning and development approval processes in New South Wales

There is no doubt that planning decisions do influence competition in the private sector either by anticipated impacts or by unintended consequences. The zoning of land – particularly for retail and commercial purposes – could be argued to mainly inadvertently influence competitive forces in the commercial world. However, such economic factors are just one key domain of the overall sustainability basis for planning, i.e. such zonings are also fundamentally based upon social factors, community preferences and economic and environmental factors. What is missing most is probably the explicit analysis of how planning and development assessment takes into account such competitive forces and explicit acknowledgement of potential unintended consequences of such planning and development assessment/development determinations.

Terms of Reference 1(g) Inter-relationship of planning and building controls

There was relatively clear separation of planning and building functions until the amendments to the Environmental Planning & Assessment Act in 1998. Until that time, there were development applications and building applications. In 1998 these were consolidated in terms of having development applications and construction certificates. The former was reconfigured to encompass a wide range of building and technical matters that extended the detail at the DA stage and therefore extended the development assessment responsibilities and determination times – "everything had to be covered at the DA stage". There is no legal capability to impose conditions at the construction certificate stage.

Returning to the pre-1998 system would assist efficiency and clarity to a significant extent. It would enable the "concept" of developments e.g. building footprint, setbacks, design parameters and the land use to be addressed at the DA stage and lead to the engagement of community consultation and the heads of consideration under Section 79C of the EP&A Act whilst the technical building content would be subsequently left to a building application stage that also could be conditioned to ensure compliance with the BCA etc. This is a simple reversion to past legislation and practice that could assist future practice and effectiveness of the planning system, and reduce the cost of housing.

This principle applies also to subdivisions. Generally, Councils have worked collaboratively with developers to resolve the complexities of subdivision approvals and construction processes. The involvement of private certification has complicated it significantly, and many Councils must now "go to the n^{th} degree" to provide the detailed requirements to ensure that private certification results in the inheritance of assets to the public sector that are of adequate quality and sustainability.

Terms of Reference 1 (h) Implications of the planning system on housing affordability

There is substantial research to show that the planning system and developer contributions have only relatively marginal impacts upon the affordability of housing. The issues are much broader and complex – particularly relating to fiscal policies, interest rates and other factors which affect overall residential land demand and supply. The planning system has limited mechanisms to encourage or require the provision of affordable housing – not to say that the planning system should not adjust substantially to play its part in facilitating more affordable housing and high levels of residential land supply.

The Federal and State Governments need particularly to review policies and approaches regarding:

a) the provision of public housing – this has been progressively reduced substantially;

b) the need for alternative tax incentives and review for more encouragement of housing affordability;

c) Improving of the integration at, and between, all three levels of Government of infrastructure planning, funding and delivery with planning of future development patterns.

CONCLUSION

The Environmental Planning & Assessment Act is now 30 years old, much amended with additional layers of complexity added to what were originally simplified processes.

It is now time to look to developing a new Act with aims and objectives that look to the future. Climate change, food security and better management of the natural environment are areas that require inclusion.