

Meeting Date: Tuesday 14 February 2012
Location: Council Chambers, Level 6, Civic Centre, 1 Devlin Street, Ryde
Time: Following the conclusion of the adjourned meeting of
13 December 2011

ATTACHMENTS – VOLUME TWO

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ATTACHMENT 1

The way ahead for planning in NSW?
Issues Paper of the NSW Planning System Review

December 2011



ITEM 8 (continued)

ATTACHMENT 1

About the Authors

Tim Moore:

- Appointed Senior Commissioner of the Land and Environment Court of New South Wales on 12 March 2009
- Commissioner of the Land and Environment Court (appointed November 2002)
- Bachelor of Laws (UNSW) 1977
- Graduate Diploma in Planning (UTS) 2008
- Member of the NSW Legislative Assembly for the Electorate of Gordon between 1976-1992
- Minister for the Environment 1988-1992
- Executive Director of the NSW Master Builders Association 1992-1993
- Assistant Secretary, Department Prime Minister and Cabinet and Secretary to the Council for Aboriginal Reconciliation 1993-1996
- Practised as a barrister in the areas of planning and environment law, commercial and corporations law and building disputes 1997-2002

Ron Dyer:

- Admitted as a solicitor of the New South Wales Supreme Court 1972
- Diploma in Criminology 1975
- Member of the NSW Legislative Council between 1979 and 2003
- Minister for Community Services, Minister for Aged Services and Disability Services 1995-1997
- Minister for Public Works and Services 1997-1999
- Deputy Leader of the Government in the Legislative Council 1995-1999
- Chair, Legislative Council Standing Committee on Law and Justice 1999 – 2003
- Member of the Board of the Motor Accidents Authority of NSW since 2006



The way ahead for planning in NSW?

Issues Paper of the NSW Planning System Review

December 2011

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ISBN 978-0-7313-3968-6

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A note about Terms

Unless otherwise noted:

- Minister refers to the Minister for Planning & Infrastructure
- Department refers to the Department of Planning & Infrastructure
- State refers to the state of NSW
- Governor refers to the Governor of NSW

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BACKGROUND

Why have we produced this issues paper?

The first two terms of reference for our review of the NSW planning system are:

1. Consult widely with stakeholder groups and communities throughout the State to identify the issues that require consideration in developing a new planning system.
2. To consider stakeholder and community submissions on issues identified during the consultation process.

From our extensive consultation process over the last several months and the many written submissions sent to us, we have harvested questions about what matters should be considered as part of a new planning system for NSW. Those questions and issues are represented in this issues paper.

We now seek stakeholder and community feedback, suggestions and ideas about the possible answers to these questions to enable us to fulfil the second step above in our review process.

Comments on extra matters which may not have been included in this paper but which are relevant to our review are also welcome.

Submissions can be made via our website at www.planningreview.nsw.gov.au or by mail to NSW Planning System Review, GPO Box 39, Sydney NSW 2001. Closing date for submissions is 17 February 2012.


Tim Moore

Ron Dyer

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LETTER TO THE MINISTER FROM JOINT CHAIRS



NSW
GOVERNMENT

Planning System Review

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29th November 2011

Hon Brad Hazzard MP
Minister for Planning and Infrastructure
Parliament House
SYDNEY NSW 2000

Dear Minister,

Since we were asked by you in late July to undertake a review of the New South Wales planning system, we have conducted an extensive consultation process to seek the broadest possible range of views on strengths and weaknesses of the present system. This has been undertaken pursuant to the first of the terms of reference of our review process.

Following completion of our consultation process, we have finalised this issues paper to seek public and stakeholder input to enable us to meet the second of our terms of reference. Obviously, this issues paper merely reflects the matters raised during the consultations – it does not seek to set the vision or details for the new, simplified planning system you have asked us to recommend. The next step is for us to consider responses to this paper (as well as best practice models from other jurisdictions, both Australian and internationally). Only then can we prepare our proposal for a new planning system to serve the economic, environmental and social needs of the State.

We are also mindful of the economic importance to the State of eliminating unnecessary delay and costs in planning processes. The recommendations that will be contained in the Green Paper coming from the next phase of our review will have these concerns as one significant focus. In addition, mindful of the need for timeliness, we anticipate that this Green Paper will be presented to you by no later than the end of April 2012 which should permit preparation of draft legislation for the Spring session of the Parliament.

The broad range of questions posed in this paper seeks further detailed public input to contribute to our review process. There were a number of issues that were raised that are not canvassed, as they are clearly outside the scope of our review. An obvious example of this is a widely expressed view that there should be a significant reduction in the number of councils – particularly in metropolitan Sydney.

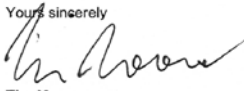
The submissions and notes taken at all consultations are published on our website. Names of the stakeholder groups and the locations of the community forums together with costs of the Review to date are appendices to this issues paper.

We particularly wish to acknowledge the professional support provided by Elizabeth Lamb and Rosemary Bullmore – without their assistance, the availability of information from our consultation processes and preparation of this issues paper would not have been possible.


In conclusion, we express our gratitude to staff of the Department of Planning and Infrastructure who have provided critical logistic support for our endeavours to date. However, we have ensured that, despite this support, the substantive review process activities have remained independent.

We **recommend** that you release this discussion paper for public comment until the close of business on 17 February 2012 (given that there is traditionally a slow time over the festive season).

Yours sincerely



Tim Moore
Co-Chair



Ron Dyer
Co-Chair

The review is being undertaken by independent members, with logistics support by the Department of Planning & Infrastructure

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TERMS OF REFERENCE

The New South Wales Planning System Review is to undertake the following tasks in advising the New South Wales Government on a new planning system for the State and a new legislative planning framework to replace the *Environmental Planning and Assessment Act 1979*. In doing so, the Planning System Review is to:

1. Consult widely with stakeholder groups and communities throughout the State to identify the issues that require consideration in developing a new planning system;
2. To consider stakeholder and community submissions on issues identified during the consultation process;
3. Examine interstate and overseas planning systems to ensure that relevant best practice options are considered for inclusion in a new planning system for New South Wales;
4. Recommend a statutory framework and necessary implementation measures for a new planning system for New South Wales that:
 - enunciates what should be the philosophy and objectives to underpin a new planning system;
 - contains clear and simple processes embodied in legislation written in plain English;
 - identifies what plans should be made and what should be the processes, including stakeholder and community participation and consultation, for the making of those plans;
 - sets out a development proposal assessment and decision-making framework that promotes the environmental, economic and social needs of the State;
 - identifies and sets out the role of, processes for and accountability of each body undertaking decision-making concerning development proposals and how such decisions can be made in a timely fashion;
 - sets out the basis for stakeholder and community participation in the development proposal decision making process;
 - sets out how other matters in the present planning system not listed above should be dealt with;

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5. Promotes the maximum use of information technology in:
- making and processing of development proposals;
 - availability of information to development proponents and the community about the assessment processes for and determination of individual development proposals; and
 - maximising the availability of government held information about individual parcels of land through a single electronic access point; and
6. Any other matters that the Planning System Review considers should be included in their recommendations that are not otherwise dealt with the above.

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LIST OF FEEDBACK QUESTIONS

- A1 What should the objectives of new planning legislation be?
- A2 Should any overarching objectives be given weight above all other considerations?
- A3 Should there be strict controls in plans?
- A4 Should applications that depart from development controls be permitted?
- A5 What should the test be for a proposed variation?
- A6 Should new planning legislation provide a framework for regional strategic planning processes? If so, how should appropriate regions be determined for strategic planning?
- A7 Should strategic plans be statutory instruments with greater weight?
- A8 How should implementation of strategic plans be facilitated?
- A9 In a new planning system, how can we improve community participation opportunities? How can we improve consultation processes for plan making and development assessment?
- A10 How should levies to pay for local and state community infrastructure be set?
- A11 What alternatives to – or additional funding sources for – such infrastructure should be considered?
- A12 Who should decide regionally significant development and local development applications?
- A13 Should Joint Regional Planning Panels decide development applications? If so, which applications should the panels decide? Who should identify these?
- A14 Should councils be able to apply to be exempt from the Joint Regional Planning Panel process?
- A15 Should any changes be made to complying development and the process of approving it?
- A16 What changes should be made to the private certification system?
- A17 How can private certifiers be made more accountable?
- A18 Should there be a right of review or appeal against a council decision concerning the zoning of a property?
- A19 Should there be any distinction between a council decision to change a zoning and a council refusing an application to change the zoning?
- A20 If there is to be a right of appeal or review of a council zoning decision, who should decide that appeal or review?
- A21 What are appropriate measures that might be implemented in a new planning system to create public confidence in the integrity of environmental impact statements (and their supporting studies) for major development projects?
- B1 What should be included in the objectives of new planning legislation?
- B2 Should ecologically sustainable development be the overarching objective of new planning legislation?
- B3 Should some objectives have greater weight than others?
- B4 Should there also be separate objectives for plan making and development assessment and determination?
- B5 Should the objectives address the operation of the new planning legislation?
- B6 Are the current definitions in the Act still relevant or do they need updating?
- B7 Does the present definition of 'development' need to be rewritten? If so, in what respect?
- B8 Should there be a definition of 'minor'? If so, what should it say?
- B9 Should 'public interest' be defined? If so, what should it say?

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- B10 Should there be one act or separate acts for different elements of the planning system?
 - B11 What should be in regulations?
 - B12 Should there be a statutory requirement to review legislation periodically? If so, at what interval?
 - B13 Should there be requirements to periodically review other planning instruments and maps?
 - B14 Should the information available about land on a central portal be able to be legally relied upon, if there is the ability for it to be certified for accuracy?
 - B15 Would this be able to replace section 149 Planning Certificates?
 - B16 What provisions should there be for independent decision making?
 - B17 What should be the role of the Minister in a new planning system?
 - C1 Should there be an independent State Planning Commission to undertake strategic planning? Or should there be an independent Planning Advisory Board?
 - C2 Should regional organisations of councils be recognised in new planning legislation?
 - C3 Should new legislation prescribe a process of community participation prior to the drafting of a plan?
 - C4 Should there be required consideration of the 'public interest' in the plan making process?
 - C5 Should there be a definition of what constitutes the 'public interest'? And what should it say?
 - C6 Should plans and associated maps have prescribed periodic reviews?
 - C7 At what suggested intervals should such reviews occur?
 - C8 How can new planning legislation co-ordinate with council planning under the Local Government Act?
 - C9 What information and data should be used when preparing plans?
 - C10 Should there be a requirement to make it publicly available?
 - C11 Should there be a requirement for plans to address climate change?
 - C12 Should biodiversity and environmental studies be mandatory in the preparation of plans?
 - C13 How should landscapes of Aboriginal cultural heritage significance be identified and considered in plan making?
 - C14 Should new planning legislation provide a statutory framework for strategic planning?
 - C15 Should strategic plans be statutory instruments that have legal status?
 - C16 How can the implementation of strategic plans be facilitated?
 - C17 To which geographical regions should strategic plans apply – catchments or local government areas?
 - C18 Should there be State environmental planning policies? If so, should they be in a single document? Or should they be provisions in a local environmental plan?
 - C19 Should there be statutory public participation requirements when drafting SEPPs?
 - C20 Should a SEPP be subject to disallowance by Parliament?
 - C21 Should there be a review process to deal with issues arising between the Department and councils that relate to the preparation of local environmental plans?
 - C22 Should there be a legislative provision to establish this?

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LIST OF FEEDBACK QUESTIONS

- C23 How should rezonings (planning proposals) be initiated?
- C24 How can amendments to plans be processed more quickly?
- C25 Should there be a right of appeal or review for decisions about planning proposals?
- C26 Should there be a right for a landholder to seek compensation for the consequences of a rezoning of their land?
- C27 When local environmental plans are being made or amended, how can transparency and opportunities for negotiation be improved during consultation with government agencies?
- C28 Should some individual rezonings not require any merit consideration at a state level?
- C29 What should be the processes prior to listing an item of local heritage in an LEP?
- C30 Should student housing be included as affordable housing?
- C31 How can abuses of 'student housing' be prevented?
- C32 What should be the legal status of a DCP?
- C33 Should there be a standard template for DCPs?
- C34 How should new planning legislation facilitate cooperative cross-border planning between councils?
- C35 Should a program be developed to integrate Aboriginal reserves properly into a new planning system and, if so, how should that program be developed and what timeframe could be targeted for its implementation?
- C36 Should developers of greenfield residential land release areas be required to make provision for a registered club and associated facilities?
- C37 Who should have responsibility for planning in the unincorporated area of the State?
- D1 How should development be categorised?
- D2 What development should be designated as State significant and how should it be identified? Should either specific projects or types of development generally be identified as State significant?
- D3 What type or category of development, if any, should be identified as regionally significant and be determined by a body other than the council?
- D4 What development should be exempt from approval and what development should be able to be certified as complying?
- D5 How should councils be allowed local expansions to any list of exempt and complying development?
- D6 Should there be a public process for evaluating complying development applications?
- D7 Should there be an absolute right to develop land for a purpose permitted in the zone subject only to assessment of the form proposed?
- D8 Should there be an automatic approval of a proposal if all development standards and controls are satisfied?
- D9 Should conceptual approvals be available for large scale developments with separate components?
- D10 Should a new planning system reinstate the ability to convert one nonconforming use to another, different nonconforming use?
- D11 Should existing nonconforming uses be permitted to intensify on the site where they are being conducted (subject to a merit assessment)?
- D12 Should existing nonconforming uses be permitted to expand the boundaries of their present site (subject to a merit assessment)?

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- D13 Should properties with existing nonconforming uses have access to exempt and complying development processes?
- D14 When there is a change in zoning of the land, should an application be able to be made to a council for a declaration of the nature and extent of an existing use?
- D15 Should there be a system of transferable dwelling entitlements to permit owners of an agricultural holding to:
- transfer a dwelling entitlement from that land to another parcel of land?
 - D16 - extinguish that dwelling entitlement on the original agricultural landholding?
- D17 Should it be possible to apply for approval for development that is prohibited in a zone?
- D18 Should there be a single application to the council to obtain permission to use an unauthorised structure?
- D19 Where a small scale proposal requires an environmental impact statement, should it be possible to seek a waiver?
- D20 Should dual service connections be permitted for residences in greenfield residential developments?
- D21 What provisions, if any, should be made for pre-lodgement processes?
- D22 How should Director-General's requirements fit in the planning process?
- D23 How can the application process be simplified?
- D24 Should there be standard development application forms that have to be used in all council areas?
- D25 What public notification requirements should there be for development applications?
- D26 How can the community consultation process be improved?
- D27 Should deemed approvals take the place of deemed refusals for development applications?
- D28 Should councils be able to charge a higher development application fee in return for fast-tracking assessment of a development proposal?
- D29 If an application partially satisfies the requirements for complying development, should it be assessed only on those matters that are non-complying?
- D30 How can unnecessary duplication of reports and information seeking be eliminated from the development process?
- D31 How should State significant proposals be assessed?
- D32 Should the Crown undertake self-assessment?
- D33 Should the Crown undertake self-determination?
- D34 Should councils undertake self-assessment?
- D35 Should councils undertake self-determination?
- D36 How can the integrity of an environmental impact statement be guaranteed?
- D37 Should new planning legislation make provision for councils to appoint architectural review and design panels?
- D38 What changes, expansions or additions should be made to the present assessment criteria in the Planning Act?
- D39 Should the economic viability of a development proposal be taken into account in deciding whether the proposal should be approved or in the conditions for approval?
- D40 Sometimes there are changes that would rectify problems with a proposal and thus permit its approval. Should it be mandatory during an assessment process for the consent authority to advise of this?
- D41 Should a new planning system permit adverse impacts on the value of properties in the vicinity of a proposed development to be taken into account when considering whether a development should be approved?

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LIST OF FEEDBACK QUESTIONS

- D42 Should local development controls be allowed to preclude high-quality, environmentally sustainable, residential designs on the basis that they are inconsistent with the existing residential development in the vicinity?
- D43 How can the planning system ensure that the impact of development that is remote from but directly affecting a community is taken into account in the assessment process?
- D44 Should a consent authority be required to consider any cumulative impact of multiple developments of the same general type in a locality or region? Should this be a specific requirement in assessment criteria?
- D45 As part of the assessment process for some classes of development projects, should there be a mandatory requirement in a new planning system for full carbon accounting to be considered?
- D46 Should the broader question of the public benefit of granting approval be balanced against the impacts of the proposal in deciding whether to grant consent?
- D47 Should a consent authority be able to take into account past breaches of an earlier development consent by an applicant in considering whether or not it is reasonable to expect that conditions attached to any future development consent would be obeyed?
- D48 Should objections to complying with a development standard remain?
- D49 Should an 'improve or maintain' test be applied to some types of potential impacts of development proposals?
- D50 If so, what sorts of potential impacts should be subject to this higher test?
- D51 Should there be a specific assessment criterion that requires risk of damage as a consequence of either short-term natural disasters or long term natural phenomenon changes to be included in development assessment?
- D52 What water issues should be required to be considered for urban development projects?
- D53 When development is proposed that has an impact on an existing, nonconforming residential use, should any special assessment criterion be required to take account of the residential use?
- D54 Should new planning legislation fix a time at which a council assessment report concerning a development application is to be made available for access? If so, when should that be?
- D55 When should an amended application be re-exhibited and when is a new application required?
- D56 What are appropriate performance standards by which council efficiency can be measured in relation to development assessment?
- D57 Should there be random performance audits of council development assessment?
- D58 How should concurrences and other approvals be speeded up in the assessment process?
- D59 What approvals, consents or permits required by other legislation should be incorporated into a development consent?
- D60 Should a council be able to delegate to a concurrence authority power to impose conditions on a development consent after the council approves the proposal?
- D61 Should there be some penalty on a council if a referral to a concurrence authority has not been made in a timely fashion?
- D62 Who should make decisions about State significant proposals?
- D63 What concurrence decisions should be able to be delegated?
- D64 Should there be a model instrument of delegation?
- D65 What decisions should the Planning Assessment Commission make? Should the Commission's processes be inquisitorial or adversarial?
- D66 What should be the processes required for hearings of Planning Assessment Commission panels?

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- D67 Should a local member be on any Planning Assessment Commission panel considering a proposed development?
- D68 If so, should this be mandatory for all commission panels?
- D69 Should the development assessment criteria for the Planning Assessment Commission be the same as for any other development assessment process?
- D70 Should a new planning system include Joint Regional Planning Panels?
- D71 What should be the composition of a Joint Regional Planning Panel?
- D72 What should be the hearing processes for a Joint Regional Planning Panel?
- D73 Should a council be able to refer a matter to a Joint Regional Planning Panel for determination even if the matter would not ordinarily fall within the jurisdiction of such a panel?
- D74 Should State nominated members of a Joint Regional Planning Panel be precluded from taking part in any decision concerning the local government area in which they reside?
- D75 If a proposed development is recommended for approval by council staff, has no public submission objecting to it and is not objected to by the Department, should it be determined by the council?
- D76 Should it be possible to constitute a Joint Regional Planning Panel with a single representative of each of the affected councils to consider and determine a significant development proposal that extends across the boundary between two local government areas?
- D77 If located entirely within one local government area, should a significant development proposal that is likely to have a significant planning impact on an adjacent local government area be determined by such a two council panel?
- D78 Should a council should be able to apply to the Minister to be exempt from a JRPP?
- D79 Should aggregation of multiple proposals to bring them within the jurisdiction of a Joint Regional Planning Panel be banned if, separately, they would not satisfy the jurisdictional threshold?
- D80 Should an elected council have the right to pass a resolution to supplement or contradict the assessment report to a Joint Regional Planning Panel?
- D81 Should the Central Sydney Planning Committee be established under legislation for a new planning system or should it remain established by a provision of the City of Sydney Act?
- D82 Should elected councillors make any decisions about any development proposals?
- D83 What should be the requirement for a decision making body to give reasons for decisions – in particular as to why objections to a proposal have not been accepted?
- D84 If a council resolves to approve a development proposal where the assessment report recommends rejection, should the council be obliged to provide reasons for approval of the development?
- D85 Should approval of development proposals for quarries be removed from councils?
- D86 Should there be a range of standard conditions of consent to be incorporated in development approvals?
- D87 Should new planning legislation make it possible for public interest conditions to be imposed that go beyond the conditions that immediately relate to a particular development?
- D88 Should nominated conditions of consent be able to be reviewed at regular, specified intervals?
- D89 Should it be possible to grant a long-term time-limited development consent for developments that are potentially subject to inundation by sea level rise caused by climate change?
- D90 Should consent authorities be prohibited from requiring public positive covenants as part of development approvals, if the

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- matter could be dealt with by a condition of consent?
- D91 Should new planning legislation make it possible to impose performance bonds or sureties unrelated to the protection of public assets?
- D92 If so, should there be any restrictions on the reasons for which such bonds or sureties could be required?
- D93 Should a new planning legislation system permit a council to impose a condition that requires payment of charges that would fall due under the Local Government Act?
- D94 If there is to be a more concept based development application process, should councils have the power to impose conditions on construction approvals?
- D95 Should IPART be given a general reference to examine and make recommendations about how any shortfall in development contributions plans for necessary community infrastructure should be funded?
- D96 Should IPART be given a reference to make recommendations about what should be the extent, standard and nature of community infrastructure works that should be included in contributions plans?
- D97 In light of the particular circumstances that might apply to the area covered in a contributions plan, should IPART be given a standing reference to enable councils to apply for variation to the cap on community infrastructure contributions?
- D98 Is it reasonable to require IPART to undertake a detailed analysis of each contributions plan developed by councils?
- D99 Would it be preferable to give IPART a general reference to develop an appropriate plan preparation methodology and approach to construction costing for community infrastructure contributions plans?
- D100 Should IPART be given a reference to make recommendations as to when community infrastructure contributions should be available? Should this include recommendations as to whether a delayed payment system should apply and, if so, at what development stages payment should be made?
- D101 Should there be a requirement for councils to publish a concise, simply written, separate document on community infrastructure funds collected and their proportionate contribution to individual elements in the council's contributions plan?
- D102 Should IPART be given a reference to consider whether or not guidelines and/or mandatory requirements should be set for councils about community infrastructure prioritisation and levels of community infrastructure funds permitted to be available?
- D103 Should new planning legislation make provision for voluntary planning agreements to permit departure from numerical limits that would otherwise apply to a development?
- D104 Should any appeal be allowed against the reasonableness of a development contribution, if it has been approved by the Independent Pricing and Regulatory Tribunal?
- D105 Should developer contributions apply to modifications of approved development?
- D106 Should regional joint facilities funded by developer contributions shared between councils be encouraged?
- D107 What should be the permitted scope of modification applications?
- D108 Should there be a limit to the number of modification applications permitted to be made?
- D109 Should any modification be able to be approved retrospectively after the work has been done?
- D110 If so, should retrospective approval be confined only to minor changes and not more substantial ones? Should this be the case even if major changes leave the development substantially the same development as the one originally approved?
- D111 Should minor modification applications made to the Planning Assessment Commission or Joint Regional Planning Panel approvals be decided without a public hearing?

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- D112 Should councils be able to deal with minor modification applications to major projects?
- D113 Development applications that propose breaches to (or increases in breaches to) numerical limits in local environmental plans are subject to special tests. Should modification applications be subject to these same special tests?
- D114 Should the 'substantially commenced' test for ensuring the ongoing validity of development consent be retained?
- D115 If the present test was not retained, what new test should replace it?
- D116 How long should development consents last before they lapse?
- D117 Should private certifiers have their role expanded and, if so, into what areas?
- D118 Should private certifiers be permitted, in effect, to delegate certification powers to other specialist service providers and be entitled to rely, in turn, on certificates to the certifier from such specialist professions?
- D119 Should certifiers be required to provide a copy of the construction plans that they have certified (as being generally consistent with the development approval) to the council to enable the council to compare the two sets of plans?
- D120 Should there be a requirement for rectification works to remove unacceptably impacting non-compliances when these are actually built rather than leaving an assessment of such non-compliances to either a modification application assessment or to the Court on an appeal against any order to demolish?
- D121 What statutory compensation rights, if any, should neighbours have against a certifier who approves unauthorised works that have a material adverse impact on a neighbouring property?
- D122 Should construction plans be required to be completely the same as the development approval and not permitted to be varied by a private certifier for construction purposes?
- D123 Should developers be permitted to choose their own certifier?
- D124 What should the Department's compliance inspection role be?
- D125 Should Interim Occupation Certificates have a maximum time specified and, if so, how much should this be?
- D126 Should a certifier issuing a Final Occupation Certificate be required to certify that the completed development has been carried out in accordance with the development consent?
- D127 What might be done to have power delegated by the Commonwealth to State authorities or councils to give approval under the Commonwealth Act?
- D128 Should there be a guide prepared to explain to councillors what their roles are in the development proposal assessment and determination process and how it is appropriate that they fulfil that role?
- D129 If there were to be such a guide prepared, who should have the responsibility for its preparation and what participation and consultation processes should be undertaken in its development?
- D130 Is it appropriate to consider, in legislation for a new planning system, providing a statutory basis for spreading the cost of a necessary rehabilitation or stabilisation measure across all property ownerships benefited by such a measure?
- D131 Should there be specific statutory obligation to require the establishment of (and the procedures for) community consultation forums to be associated with major project developments?
- D132 Should a quantity surveyor's report be required to accompany applications for large projects?
- D133 What fees should councils receive for development applications?
- D134 When and how should council development application fees be reviewed?
- E1 What appeals should be available and for whom?
- E2 Should anyone be able to apply to the Court to restrain a breach of the Act?

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LIST OF FEEDBACK QUESTIONS

- E3 In what circumstances should third party merit appeals be available?
- E4 Should approval bodies or concurrence authorities be the respondent to some appeals?
- E5 What should be the time limit for any appeal about local environmental plan provisions?
- E6 Should the Court have absolute discretion as to costs orders? Or should the Court's discretion be limited and, if so, in what respects?
- E7 Should any appeal be allowed against the reasonableness of a development contribution if it has been approved by the Independent Pricing and Regulatory Tribunal?
- E8 What sort of reviews should be available?
- E9 Who should conduct a review?
- E10 What rights should third parties have about reviews? And what provisions should apply regarding the costs of the review?
- E11 How might recommendations by the Planning Assessment Commission be reviewed?
- E12 Do some present penalties need to be increased?
- E13 What new orders should there be or what changes are needed to the present orders?
- E14 How can enforcement be made easier and cheaper for consent authorities?
- E15 Should councils have a costs or other remedy against private certifiers in certain circumstances?
- E16 Should monitoring and reporting conditions be reviewable?
- E17 Should there be an appeal right for third parties in proceedings against private certifiers?
- E18 Should a consent authority have a wider right to revoke a development consent?
- E19 Should councils have a statutorily created 'best endeavours' defence?
- E20 Should council compliance officers be given rights of entry and inspection and of access to official databases for compliance and enforcement inspections under planning legislation on the same basis as they have such rights under the Local Government Act?
- F1 What should be the role of the Department in implementing a new planning system? Should the role and resourcing of regional offices be embraced? And, if so, in what respects?
- F2 What should be the role of councils in implementing a new planning system?
- F3 What can be done to ensure community ownership of a new planning system?
- F4 What actions can be undertaken by bodies preparing strategic plans to increase community engagement with the planning system?
- F5 What changes can be put in place to ensure more effective cooperation between councils, government agencies, the community and developers within the planning system?
- F6 What checks and balances can be put in place to ensure probity in the planning system?
- F7 How can information technology support the establishment of a new planning system?
- F8 Should the new planning system contain mechanisms for reporting on and evaluating objectives of the legislation?
- F9 How should information about the planning system be made more accessible in a multicultural society?

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INTRODUCTION



The NSW Planning System Review has been given the task of developing a new planning system and new planning legislation in consultation with stakeholders and the community. As part of this process, 91 community forums have been conducted, spread across 44 locations in NSW. Almost 2,000 people have told the Review Panel of their concerns about the present planning system and the *Environmental Planning and Assessment Act 1979* (the Planning Act). Also, approximately 70 stakeholder meetings have been held with participants from across the spectrum, ranging from those with property development interests to environmental groups. In total, more than 330 written submissions were received from the public and interested parties.

Some of the issues submitted raise questions of broad principle, whilst others relate to matters of detail arising from the present system. The value of flexibility, and the idea that 'one size does not fit all' were recurring themes throughout both community and stakeholder meetings.

Common complaints about the current Planning Act included:

- its lack of relevance, particularly given that it was drafted more than 32 years ago
- the overly legalistic language and complexity of the provisions.

More general concerns were expressed about overly complicated processes and the openness of decision making. This was particularly the case in the context of plan making and in development assessment and determination processes.

This introductory section sets out the major and recurring themes and questions that arose during the consultation phase of the NSW Planning System Review. A wider range of more detailed and specific issues and questions relating to these themes are set out in subsequent sections of this Issues paper.

1.0 A new planning system: What should the underlying principles be?

Throughout the community forums, there was a widespread desire for the new planning system to be:

- simple, accountable and transparent
- written in plain English.

There was also a strong message expressed by both stakeholder groups and the community that unnecessary delay in planning processes should be eliminated.

The discussions were not without tension. The balance between the 'right to be heard' and the 'right to decide' regarding development proposals was frequently explored during the community forums. In relation to plan making, an issue that arose frequently during discussion was the balance between participation (the community

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being asked what it wants in a plan, in a bottom-up process) and consultation (a top-down process in which a community is asked its opinion of a draft plan).

1.1 An overarching objective for new planning legislation

One of the topics raised during the consultation process was: what should the philosophy and objectives for new planning legislation be? Interestingly, little to no concern was raised about any of the present objectives, which were set out in the 1979 Planning Act. However, many entirely new objectives were suggested.

These ranged from pro-development objectives through to environmentally conservative ones. One suggestion was to give a different weighting to various objectives, to reflect their comparative importance in the processes of plan making or development proposal assessment.

Two questions that were consistently raised were:

- Should ecologically sustainable development (ESD) be the primary objective of legislation for a new planning system?
- If so, how should it be defined?

Another frequent suggestion was to include specific reference to climate change as well as ESD.

A1. What should the objectives of new planning legislation be?

A2. Should any overarching objectives be given weight above all other considerations?

1.2 Flexibility and the planning system

The statement 'one size does not fit all' was said at virtually all of the community forums. Behind this commonly expressed view, however, were a number of different concerns.

A common concern was the need for greater flexibility in inland rural and regional areas. Discussion in this context centred on significant differences between urban planning needs in:

- coastal and metropolitan areas, where there is an emphasis on controlling development
- rural and inland regions, where planning priorities focus on promoting growth.

Many participants also expressed a desire for flexibility in planning controls, instead of rigid adherence to specified numerical controls. This was particularly the case in relation to issues such as minimum lot sizes for dwelling entitlements in rural areas.

In contrast, there were also some submissions that advocated strict, rigid controls in plans – for example for lot size, height or floor space ratios. These controls would not be able to be varied, no matter how small the change or how compelling the merits.

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If limits were to be relaxed on the basis of merit, concerns were expressed that the reasons given would need to be fully justified.

A3. Should there be strict controls in plans?

A4. Should applications that depart from development controls be permitted?

A5. What should the test be for a proposed variation?

1.3 Strategic planning

Overwhelmingly, the submissions we received supported facilitating a rigorous strategic planning process that included community participation.

Strategic planning was identified as having the potential to:

- provide certainty for the community as to future development in their area.
- reduce some of the tension and potential controversy around individual development applications.

Questions were also raised in this context regarding:

- the status or weight to be given to strategic plans
- the manner in which strategic plans might be implemented
- ways to achieve more certainty that the targets in strategies would be attained.

Submissions were made that new planning legislation should place more emphasis on strategic planning. However, concerns were expressed about the capacity and resourcing of local councils to undertake these tasks. Others questioned what might be the appropriate way to identify regions for such strategic planning.

Related issues that were raised include the following:

- How valid is the data (including population projections) available to inform strategic planning?
- Regional strategic land use planning is currently being undertaken to address the tensions between agricultural and mining interests. How could new planning legislation accommodate the outcomes of this process?

A6. Should new planning legislation provide a framework for regional strategic planning processes? If so, how should appropriate regions be determined for strategic planning?

A7. Should strategic plans be statutory instruments with greater weight?

A8. How should implementation of strategic plans be facilitated?

Strategic planning is planning for an anticipated development pattern for an area or region, including the provision of supporting infrastructure. Strategic planning can address issues such as:

- *environmental constraints*
- *where employment can be created to make travel times shorter*
- *community infrastructure necessary to provide transport, health and education facilities for healthy, liveable settlement patterns.*

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1.4 Community involvement

During the community forums, many participants expressed frustration at a perceived inadequacy of community involvement in both making plans and determining development.

In part, it was clear that this frustration arose from perceptions about the way in which major development projects have been determined during recent years. However, there was also considerable concern expressed that the process for developing plans was a 'top down' one that did not enable ordinary citizens to be consulted.

An instance of this, raised in urban areas on a number of occasions, was the policy decision to adopt a uniform land use zoning for whole urban blocks containing public institutions such as schools or churches. This has resulted in these community facilities often being zoned residential, giving rise to suspicions that there is a secret long-term agenda to sell and develop these public assets. The policy decision to deny such facilities a special-purpose zoning to reflect their use (as in the past) has reinforced these suspicions.

Concerns related to development assessment ranged from a perceived inadequacy in notifying neighbours or the community through to the difficulty of accessing and copying information. In particular, people expressed frustration about accessing and providing a response to environmental impact statements (and supporting documentation) for proposed larger development projects.

For local development, a number of issues arose concerning complying development where:

- residents may get only a few days' notice before activities such as demolition or construction commence
- neighbours have had no opportunity to view or comment upon the proposal.

A9. In a new planning system, how can we improve:

- **community participation opportunities**
 - **consultation processes for plan making and development assessment?**
-

1.5 The provision of infrastructure and community facilities

A recurring theme in the consultation process was the question of how local and broader community facilities and infrastructure should be planned for and financed. Concerns were expressed across the spectrum by everyone from industry stakeholders through to councils and local community members.

Issues arose frequently in relation to:

- the amount charged
- what the money could be spent on

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- how those charges were accounted for
- community expectations for the provision of facilities.

In urban areas, there was very often a perceived disconnect between the approval of higher density development and the provision of major public infrastructure – particularly public transport infrastructure.

Other issues and views raised included:

- the impact of charges on housing affordability
- the equity of making residents of new developments pay for community facilities that previously had been paid for by general revenue.

Some supported State government capping of charges, whilst others expressed concern that this would result in inadequate facilities in emerging communities on urban fringes. Some questioned whether the standard of facilities funded by such levies was too expensive and unaffordable, whilst others identified excessive delays in delivering infrastructure to meet community expectations.

Finally, concern was expressed that money raised through the State infrastructure charges was not seen as adequately providing major public transport or other facilities for the community from which it was raised.

A10. How should levies to pay for local and state community infrastructure be set?

A11. What alternatives to – or additional funding sources for – such infrastructure should be considered?

1.6 Development decision-making

Should all decisions be made by councils or should elected councillors be removed entirely from development decision making? This question reflects the contradictory views expressed on how decisions should be made about individual development proposals.

There was widespread agreement that some projects were large, complex or economically significant enough for decisions to be made at a state level. However, there was disagreement about whether such decisions should be taken by the Minister or by an independent body such as a Planning Assessment Commission. How to identify what sort of projects should be determined at a state level was also a concern.

If such decisions were to be taken by a Planning Assessment Commission, there was considerable discussion about:

- the need for openness and transparency for its processes
- whether these processes should be adversarial or inquisitorial.

Whilst there was a broad agreement about the benefits of independent

Inquisitorial process: Process in which the decision maker combines investigative and judgemental roles.

Adversarial process: Process in which representatives of the plaintiff and defendant oppose one another.

This issues paper outlines matters raised in meetings held and submissions received during the consultation period and questions put by the Planning System Review Panel about them. Any views or opinions presented in this paper do not necessarily represent those of the Panel.

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decision-making for projects that might be State significant, there was no such consensus about local development applications.

At present, for projects of a value of more than \$20 million identified as regionally significant development, decisions are made by Joint Regional Planning Panels (with a majority of members appointed by the Minister). The remainder are determined by councils.

Many councillors supported the role of Regional Panels as a way of ensuring that additional external expertise was available in the decision-making process. Some expressed the view that councils should have the option of referring controversial matters to a regional panel even though the development would not ordinarily be decided by a panel. They argued that the ability to do so would ensure that a proper planning decision was made on the merits of the proposal in a fashion less divisive of the local community than if the councillors were forced to make such a decision.

However, there was also a forcefully expressed minority view that these panels removed decision-making from democratically elected councillors who were accountable to the local community. Those who held this opinion wished to see the Joint Regional Planning Panel system abolished.

A12. Who should decide regionally significant development and local development applications?

A13. Should Joint Regional Planning Panels decide development applications?

- *If so, which applications should the panels decide?*
- *Who should identify these?*

A14. Should councils be able to apply to be exempt from the Joint Regional Planning Panel process?

1.7 Other matters

There were four other matters that arose regularly during the consultation process that should be noted in this discussion of recurring themes. They are:

- community concerns about the scope and processes for complying development
- the role of private certifiers in the construction process
- changes to zoning
- the integrity of environmental impact statements.

1.8 Complying development

Complying development provisions enable proposals that 'tick all the relevant boxes' to be approved by a certification process without notifying the community or providing opportunities for comment or objection.

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Many questions were raised about the scope and appropriateness of complying development. Some were of a specific nature, such as whether or not demolition of buildings that might contain asbestos or the erection of fences in heritage conservation areas should be regarded as complying development. These questions particularly related to the fact that complying development is not subject to the greater level of community scrutiny that would arise if a development application were required.

Other concerns of a broader nature included whether local councils should be able to identify what should be complying development for their areas. Individuals and community groups expressed concerns that there were important issues ignored by the process (such as streetscape appearance, overshadowing or privacy impacts) and that the level of community involvement in the process was inadequate.

There were also strong supporters of the complying development process, who thought much more should be able to be achieved without the need for an expensive and cumbersome development application.

Indeed, in the past, targets have been set by the State government that 50 per cent of development proposals should be able to be dealt with as complying development (or as exempt development that did not require any consideration at all). There were concerns, however, that only around 17 per cent of development was in fact being approved through such processes.

A15. Should any changes be made to complying development and the process of approving it?

1.9 Building certification

Some years ago, changes were made so that private certifiers as well as councils could inspect and certify development and building works. As part of the Review's stakeholder group consultations, representatives of the private certification industry expressed general satisfaction with the system. However, there was a widespread current of community and council dissatisfaction with the present process.

There were broad philosophic objections to the concept of private certifiers being paid by applicants for providing certification. However, by far the greatest concerns related to:

- the activities of the minority of certifiers who were regarded as 'shonky'
- the inadequacy of compliance and enforcement provisions to address breaches or provide effective disincentives for breaches.

Council representatives expressed concern that councils unfairly bore responsibility for remedying breaches and they had inadequate powers and resources to do so effectively.

Community concerns included:

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- the impacts on amenity caused by breaches
- the inadequacies of enforcement and compliance.

A16. What changes should be made to the private certification system?

A17. How can private certifiers be made more accountable?

1.10 Changes to zoning

Changes in the zoning of land were raised during consultation in two contexts.

First, questions were frequently asked about the rights people should have if the council proposed zoning changes to their land as part of the preparation of a new local environmental plan. This issue was raised primarily in non-urban areas where changes of zoning proposed for the new local environmental plan was regarded as restricting future land use and lowering the value of rural properties.

Second, in the context of an applicant seeking a rezoning, the question was raised as to whether there should be rights of appeal or review if the council did not support the proposed rezoning.

Both of these issues give rise to the same broad question – whether or not an individual dissatisfied with a council decision involving rezoning should have any right to challenge the council's decision.

A18. Should there be a right of review or appeal against a council decision concerning the zoning of a property?

A19. Should there be any distinction between a council decision to change a zoning and a council refusing an application to change the zoning?

A20. If there is to be a right of appeal or review of a council zoning decision, who should decide that appeal or review?

1.11 Environmental impact statements

An issue that concerned both the community and some stakeholders was the reliability and validity of the information contained in:

- environmental impact statements
- assessment reports supplied by an applicant.

A broad philosophical concern raised was that consultants hired by a proponent could never provide completely fearless and independent commentary.

There were also discussions related to testing the accuracy of data, and the problems

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with making decisions when science may not be settled.

The common expectation was that 'those who paid the piper called the tune', and that environmental impact statements and their studies inevitably favoured a development proponent.

Suggestions ranged from requiring consultants to be certified to removing the right of applicants to engage consultants. Another question raised was whether consultants should be funded by applicants but allocated by the government.

A21. What are appropriate measures that might be implemented in a new planning system to create public confidence in the integrity of environmental impact statements (and their supporting studies) for major development projects?

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KEY ELEMENTS, STRUCTURE AND OBJECTIVES OF A NEW PLANNING SYSTEM

It is important to clarify the objectives of new planning legislation, because these will provide the basis for a new planning system.

New planning legislation will set out the framework for making plans and taking decisions about development. It will also define roles for those in the planning system – for everyone from the Minister to individual council officers.

In addition, it will set the basis for community engagement, particularly in relation to how the planning system should serve the social, economic and environmental goals of our society.

1. 0. The objects and philosophy underpinning a planning framework

1.1 Objectives of new planning legislation

The objectives of the *Environmental Planning and Assessment Act 1979* (the Act) underpin the processes, procedures and decisions made under the Act. They also provide broad philosophic guidance for the operation of the planning system

These objectives have changed little since the Act was passed by the parliament in 1979. The comments made and submissions we received did not express great concern about the objectives in the present Act, although it was suggested that the language needs to be modernised.

Rather, most of the submissions relating to the Act's objectives suggested additions to the current objectives.

B1. What should be included in the objectives of new planning legislation?

Some of the suggestions put forward included:

- requiring the **precautionary principle** to be applied to both plan making and development evaluation
- promoting **economic growth**
- **transparency and accountability** in both plan making and proposal assessment
- protecting prime **agricultural land** for sustainable agricultural use
- encouraging **decentralisation** of population and employment
- facilitating a **balance** between social, economic and environmental priorities and outcomes

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- ensuring that an adequate supply of land is released to meet the **housing needs of urban areas** – particularly to service the population of the greater Sydney region
- ensuring that there is broad, integrated and open **electronic access** to information in both the plan making and development assessment processes.
- facilitating the planning and construction of **essential public infrastructure**
- **flexibility** in both plan making and development assessment
- development resulting from habitation planning should foster **healthy living patterns** – such as walkability and access to public transport – for those who live in it
- planning on a **regional rather than a localised** basis
- taking into consideration **broad cultural landscape issues**, including Aboriginal cultural landscapes, as separate contexts to individual items of cultural heritage
- **independence** in both the plan making and proposal assessment and determination processes
- preserving **diversity**
- protecting **Aboriginal cultural heritage**
- protection of **urban forests**
- recognition of **significant landforms** and landscapes
- requiring the consequences of **climate change** to be considered
- promoting **tourism**
- encouraging **architectural quality** and good urban design
- ensuring that **social impacts** and social resilience are considered.

The precautionary principle states that where there are threats of serious or irreversible environmental damage, implementing measures to prevent environmental degradation should not be delayed because of a lack of full scientific certainty.

When applying the precautionary principle, decisions should be guided by:

- *careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment*
- *assessment of the consequences of various options in terms of their risks.*

1.2 An overarching objective

Many suggestions were made at community forums that there should be one overarching objective that would take precedence over all others. The overarching objective proposed was that new planning legislation should be based on *ecologically sustainable development*. It was also proposed that this term should be defined.

B2. Should ecologically sustainable development be the overarching objective of new planning legislation?

1.3 Ranking or weighting of objectives

Currently, all objectives of the Act are given equal weight and equal consideration. One idea proposed was that there should be different importance placed on some objectives or that they should be ranked.

B3. Should some objectives have greater weight than others?

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KEY ELEMENTS, STRUCTURE AND OBJECTIVES OF A NEW PLANNING SYSTEM

1.4 Separate objectives for plan making and development assessment

During a number of the consultation forums and stakeholder meetings, participants suggested that there should also be separate objectives for plan making and development assessment and determination.

B4. Should there also be separate objectives for plan making and development assessment and determination?

1.5 Operational objectives

Currently, there are no objectives of the Act that guide how processes are to occur. One idea put forward was that there should be specific 'procedural' objectives that would set a framework for the operation of a new planning system.

For example, there could be express objectives such as:

- clarity
- simplicity
- transparency
- due process
- certainty
- timeliness.

There was also consistent emphasis on a range of desirable processes for plan making and – in particular – development assessment and determination. These processes would require new planning legislation to include:

- the right to be heard
- the right to have open and accessible determination processes
- the right to be given reasons for decisions (with the extent of the reasons being proportionate to the complexity of the issues raised)
- statutorily guaranteed Independence of those making development decisions at all levels.

In our assessment, there was a position that was adopted almost universally across all interest groups. This common position was that decision making in any new planning system should be undertaken in a fashion that:

- eliminated unnecessary delays
- provided clarity and certainty of outcome to both the project proponents and the community.

This applied particularly to the determination of development proposals.

B5. Should the objectives address the operation of the new planning legislation?

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2.0 Definitions

Definitions of terms in an act are important guides to applying and interpreting statutory provisions. Definitions should provide clarity to assist in applying the provisions in a practical sense. However, they can also reflect the philosophies underpinning the statutory provisions.

B6. Are the current definitions in the Act still relevant or do they need updating?

It was highlighted during the forums that three other terms of systemic importance need their definitions revised.

- i. The first was the definition of 'development'. The *Environmental Planning and Assessment Act 1979* presently contains a broad definition of this term. The only thing excluded from this definition by the *Environmental Planning and Assessment Regulation 2000* is *demolition of temporary structures*.

B7. Does the present definition of 'development' need to be rewritten? If so, in what respect?

- ii. The second was that 'minor' should be defined. The word 'minor' in legislation is used as a way of describing an activity that usually requires little or no special consideration.

The word is not defined in the Act and this leads to confusion and uncertainty. It also leads to people trying to take an entirely inappropriate advantage of provisions that use the expression.

There should be a definition of 'minor' in any new planning legislation. Court decisions on this point are confusing and are unclear.

B8. Should there be a definition of 'minor'? If so, what should it say?

- iii. It was also suggested that the term 'public interest' should be clarified in the new planning system, as a wide variety of sources can be considered in assessing the public interest in particular circumstances.

B9. Should 'public interest' be defined? If so, what should it say?

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KEY ELEMENTS, STRUCTURE AND OBJECTIVES OF A NEW PLANNING SYSTEM

3.0 The structure of new planning legislation

3.1 A single instrument

The *Environmental Planning and Assessment Act 1979* combines provisions for:

- plan making
- development
- assessment and determination
- compliance
- monitoring
- enforcement.

The Act also includes a number of other provisions that relate to building and construction such as the certification of structures.

Should the elements listed above be divided into separate statutes? This question arose during the consultation process. For example, a single statute might deal with the making and contents of plans. Other separate statutes might provide for matters relating to development assessment, building or construction; or the operation of the Planning Assessment Commission.

Submissions expressed differing views on this idea. On one hand, a combined act was said to foster a holistic and cohesive approach. However, separating legislation into components might make it simpler to navigate the system.

B10. Should there be one act or separate acts for different elements of the planning system?

3.2 Regulations

Elements of a regulation can be amended much more quickly and easily than those in an act. This might mean that it is more appropriate for certain types of provisions to be in a regulation.

Currently, for example, consent authorities are allowed to impose fines and require remedies for breaches. The order making powers that enable this, however, are currently located in the Act. If these were regulations rather than provisions, they could be more responsive to changing circumstances and could be more effective in their operation.

B11. What should be in regulations?

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4.0 Reviews of new planning legislation and planning instruments

4.1 Periodic review of planning legislation

Throughout the consultation period, the value and benefit of reviewing current legislation was commonly supported and recognised. Some submissions suggested that there should be a statutory requirement to review new planning legislation regularly – every five years, for example. Another suggestion was to make it compulsory for the review to be undertaken by an independent body.

B12. Should there be a statutory requirement to review legislation periodically? If so, at what interval?

4.2 Periodic review of other elements

On a number of occasions, it was suggested that regular reviews of other statutory planning instruments – such as local environmental plans – should also be required. In particular, there were many specific concerns raised in relation to maps in these instruments. There were suggestions that these should be required to be regularly reviewed and checked for accuracy.

B13. Should there be requirements to periodically review other planning instruments and maps?

5.0 Information technology and a new planning system

The only specific outcome requested by the Minister was that the NSW Planning System Review consider and make recommendations relating to the integration of information technology and the planning system.

Two objectives have been identified:

- Increasing accessibility to data about land (such as zoning, or flood related development controls) in NSW. This is to be facilitated by a user friendly, single access internet portal that will collate data currently held by a variety of State agencies.
- Maximising the use of electronic lodgement and publication of documents in planning processes such as development assessment.

There was almost universal support for these proposals during the consultation period. However, there was also concern relating to implementation and resourcing. Submissions identified that a cooperative approach with other agencies and with local government would be vital.

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KEY ELEMENTS, STRUCTURE AND OBJECTIVES OF A NEW PLANNING SYSTEM

Other specific questions that arose in discussions on this topic included the following:

- How accurate is the data that is presently held?
- What would the procedure be for the inclusion of sensitive information, such as the location of Aboriginal cultural sites or endangered species?

B14. Should the information available about land on a central portal be able to be legally relied upon, if there is the ability for it to be certified for accuracy?

B15. Would this be able to replace section 149 Planning Certificates?

Section 149 Planning Certificates are issued by councils to landowners and prospective purchasers and contain information about a specific parcel of land, including the planning controls or policies applying to the land.

6.0 Decision making

The Act identifies decision makers and their roles and functions in the planning system. Two key themes that emerged during consultation were:

- the benefits of independent decision makers
- questions about the role of the Minister .

6.1 Independent decision making

Currently the Act provides independence in decision making by establishing Joint Regional Planning Panels (JRPPs) and the Planning Assessment Commission (PAC). These Panels currently exercise decision making functions such as determining specific types of development. They also perform functions such as providing advice to the Minister, conducting public hearings, and performing plan making functions as the relevant planning authority.

Generally, there was widespread support for these independent bodies. However, there were some questions raised regarding appointments, composition, processes, and the scope of functions.

The most frequent questions about independent decision making generally included the following:

- What provisions should be made for independent decision making and what functions should independent decision makers have?
- Should there be a separate act for the Planning Assessment Commission?
- Who should be appointed to independent panels and who should make the appointments? What should the terms of the appointments be?
- What processes should new legislation set out for independent decision making? Should those processes be inquisitorial or adversarial? Should they be conducted in public?
- What rights of appeal and review should there be when a decision is made?
- What role or involvement should third party objectors and the community have when a decision is made?

B16. What provisions should there be for independent decision making?

Inquisitorial process: Process in which the decision maker combines investigative and judgemental roles.

Adversarial process: Process in which representatives of the plaintiff and defendant oppose one another.

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6.2 The role of the Minister

Opinions differed widely on what role and functions the Minister should have in a new system.

There are two separate and distinct aspects of the Minister's potential involvement.

- The first aspect relates to policy, through the making of plans, directions, regulations and other instruments such as State environmental planning policies or regional strategies
- The second aspect relates to the Minister's role in determining some types of development proposals. For example, the Minister currently determines development and infrastructure identified as State significant.

In addition to identifying functions, new legislation could also identify whether or not a decision may be delegated. For example, functions could be delegated to the Director-General of the Department of Planning and Infrastructure, to independent planning panels or to councils.

At the heart of the questions raised was the issue of whether there should be any political element operating within the framework of a new planning system.

B17. What should be the role of the Minister in a new planning system?

State significant: State significant sites are presently listed in schedule 3 of the State Environmental Planning Policy (Major Projects) 2005. These are urban, coastal or regional sites of economic, environmental or social significance to the State, and the wider NSW community.

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 **MAKING PLANS**

This chapter begins with questions that cover plan making in a broad sense.

It addresses principles and key issues relevant to both the content and process of making plans. These relate to both of the following types of plans:

- plans that set out broad land use planning strategies
- plans that prescribe very specific development standards and controls for an area.

Following this are issues that are relevant to specific types of plans and policies in the current system, for example:

- strategic plans
- State environmental planning policies (SEPPs)
- Local environmental plans (LEPs)
- Development control plans (DCPs).

A State Planning Commission or a Planning Advisory Board?

An objective raised at many community forums was to take politics out of the plan making process at the strategic level.

During the consultations, both community and industry members expressed frustration at being unable to convey policy and systemic issues to the Minister.

To alleviate this, many people suggested that an independent expert body, such as a State Planning Commission, should conduct:

- strategic land use planning
- assessments of interaction with other plans (such as catchment management plans).

A Planning Advisory Board is another option to provide the Minister with high-level strategic advice on planning issues. This could be small in size, with a planning focus and members appointed from across the spectrum of diverse interests.

State Planning Commission: A body to make decisions

Planning Advisory Board: A body to give advice

C1. Should there be an independent State Planning Commission to undertake strategic planning? Or should there be an independent Planning Advisory Board?

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Regional organisations of councils

At the present time, regional organisations of councils do not have any statutory recognition in either the *Environmental Planning and Assessment Act 1979* (the Planning Act) or in the *Local Government Act 1993*. Regional organisations of councils have, however, performed valuable coordinating roles across a wide range of councils' activities, including planning.

C2. Should regional organisations of councils be recognised in new planning legislation?

1.0 Plan making: Process

1.1 Community participation

At several community forums, a number of people raised the question of whether there should be a distinction between participation and consultation in the plan making process.

- Community *consultation* means asking the community to provide submissions on a prepared draft plan.
- Community *participation* might include seeking community views prior to the preparation of a plan.

Currently, the Planning Act provides community consultation requirements for local environmental plans (LEPs). There was a view that community concerns relating to LEPs are less likely to be considered because a draft plan requires re-exhibition if the amendments proposed are significant.

It was proposed that community concerns were more likely to be addressed adequately if the planning process required community participation prior to drafting a plan.

C3. Should new legislation prescribe a process of community participation prior to the drafting of a plan?

1.2 The public interest

It was suggested to the Panel at some community forums that the public interest should be a required consideration in the plan making process.

The matters that decision makers may take into account when considering the public interest varied widely in discussions, from economic considerations and social impacts to issues such as risk management associated with natural disasters.

C4. Should there be required consideration of the 'public interest' in the plan making process?

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C5. Should there be a definition of what constitutes the 'public interest'? And what should it say?

1.3 Regular reviews

In the current Planning Act there is a requirement for some plans to be reviewed regularly, however no review interval is specified. It was put to the Panel during several forums that serious issues have arisen where plans or the documents they reference – such as maps – are outdated or inaccurate.

C6. Should plans and associated maps have prescribed periodic reviews?

C7. At what suggested intervals should such reviews occur?

1.4 Co-ordination with planning under the Local Government Act

The Local Government Act now requires councils to develop community and social plans. During a number of community forums, discussion took place about the need for consistency between new planning legislation and the planning processes that fall under the Local Government Act.

It was suggested that coordination between new planning legislation and planning under the Local Government Act would be desirable. This would particularly be the case if the emphasis was on strategic planning rather than more immediate and detailed issues of land use and development control planning.

C8. How can new planning legislation co-ordinate with council planning under the Local Government Act?

2.0 Plan making: Content

2.1 Data and statistics

State and local governments use population and other statistical projections for a variety of planning purposes. Several aspects of statistical forecasting were raised during the consultation processes.

Broad population policy does not fall within the scope of this review of the planning system. However, the use of population growth statistics is being considered. This would assist in allocating dwelling targets to particular local government areas and planning infrastructure.

Independent from this review, the Minister has commenced a review of the

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population projections used for planning. This is being done with a view to coordinating these projections with data produced by the Australian Bureau of Statistics.

In relation to growth targets, the following points were submitted to the Panel:

- The process of assigning growth targets in plans should be transparent.
- The reasoning must be made available as well as the data on which the decision is based.

A specific example raised at one forum was the use of projections for inbound tourist numbers and anticipated destinations when planning for tourism facilities.

Statistical forecasting concentrates on using the past to predict the future by identifying trends, patterns and business drives within data to develop a forecast.

This forecast is referred to as a statistical forecast because it uses mathematical formulas to identify the patterns and trends while testing the results for mathematical reasonableness and confidence.

C9. What information and data should be used when preparing plans?

C10. Should there be a requirement to make it publicly available?

2.2 Climate change

Should new planning legislation be required to consider climate change? This question was considered in the context of planning as well as in terms of broader objectives. It was suggested that plans could be required to implement policies related to climate change such as staged retreat or adaptation.

It was also suggested that plans and policies such as the Residential Flat Design Code or BASIX should be required to be regularly reviewed to ensure that they remain relevant in the face of changing science and projections.

BASIX: Building Sustainability Index Sets energy and water reduction targets for houses and units, with a view to ensuring that homes are designed to use less water or energy and produce fewer greenhouse gas emissions.

C11. Should there be a requirement for plans to address climate change?

2.3 Biodiversity

A number of community members suggested that undertaking biodiversity and environmental studies was so important to planning outcomes that it should be mandatory in the preparation of any plan.

C12. Should biodiversity and environmental studies be mandatory in the preparation of plans?

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2.4 Aboriginal cultural landscapes

Formal recognition of landscapes that are part of Aboriginal cultural heritage is usually by identifying sites:

- that are significant for specific cultural reasons, or
- where there are acknowledged deposits of habitation or utilisation artefacts to be found.

There is currently no practice of identifying broader landscapes that may be of Aboriginal cultural significance.

C13. How should landscapes of Aboriginal cultural heritage significance be identified and considered in plan making?

3.0 Strategic planning

Overwhelmingly, the submissions we received supported facilitating a rigorous strategic planning process that included community participation.

Strategic planning was identified as having the potential to:

- provide certainty for the community as to future development in their area
- reduce some of the tension and potential controversy around individual development applications.

Issues were also raised as to how strategic plans might be implemented and whether there could be more certainty that the targets in strategies would be achieved.

3.1 A statutory framework

Currently there is no statutory framework for the process of making a strategic plan. Submissions received on the topic of strategic planning emphasised the importance of community and stakeholder participation. They also questioned whether specific steps – such as community participation – should be statutory requirements.

C14. Should new planning legislation provide a statutory framework for strategic planning?

Strategic planning is planning for an anticipated development pattern for an area or region, including the provision of supporting infrastructure. Strategic planning can address issues such as:

- *environmental constraints*
- *where employment can be created to make travel times shorter*
- *community infrastructure necessary to provide transport, health and education facilities.*

3.2 Legal status

Strategic planning in the present system is carried out through the preparation of non-statutory plans. These are then implemented through provisions in environmental planning instruments. New planning legislation might give greater legal status to strategic plans and require them to be considered in planning decisions.

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This might be one way of providing more certainty for outcomes identified in strategic plans. On the other hand, this might restrict flexibility in decision making or introduce more complexity. It may mean that provisions would be needed to deal with accompanying issues such as the amendment of strategic plans.

C15. Should strategic plans be statutory instruments that have legal status?

3.3 Implementation

A common concern was that the implementation of a strategic plan could not be guaranteed, even though good strategic planning might be undertaken. This issue was raised by:

- stakeholders who want more certainty
- those who identified the benefits of strategic planning in reducing conflict and issues during development assessment.

Giving strategic plans legal status might be one approach to this issue. There were also other ideas put forward such as:

- requiring inter-agency agreement on the content of a strategic plan
- requiring that the plan also include details and tangible steps relating to its implementation
- requiring that strategic plans be reviewed and evaluated periodically.

C16. How can the implementation of strategic plans be facilitated?

3.4 Geographic area

One issue frequently discussed at the forums was how to define the area to which strategic plans should apply.

Currently, there are planning strategies for specified regions that are developed by the Department in conjunction with councils and other agencies such as the forthcoming strategic regional land use plans (see info box).

There are also strategies specific to metropolitan areas such as the Metropolitan Plan for Sydney 2036.

One approach discussed was to create strategic plans based on catchment areas, in order to facilitate better environmental outcomes.

Another approach could be to create a clear hierarchy of strategic plans, with one high level plan applying to the whole State.

Strategic regional land use plans: The preparation of strategic regional land use plans is currently being undertaken by the Department in parallel with this review. This strategic land use planning is designed to deal with issues such as conflicts between agricultural land use and the mining and gas industries, amongst other things. The outcomes of this process will need to be accommodated by a new planning system.

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C17. To which geographical regions should strategic plans apply – catchments or local government areas?

4.0 Environmental planning instruments

4.1 State environmental planning policies (SEPPs)

State environment planning policies (SEPPs) are environmental planning instruments made by the Governor. Two significant characteristics of SEPPs are that:

- they can override the provisions of other environmental planning instruments
- they can apply to the entire State or to specified land.

During the consultation process, a number of submissions expressed a desire to abolish SEPPs completely. The submissions that were not in favour of SEPPs mainly expressed concern at the ability of the State to override local planning provisions.

For example, local planning provisions might encourage development of a different or more intensive character – for example affordable housing and seniors' living units. Specific concerns were raised about SEPPs that could override these provisions.

However, there were also submissions received in support of those SEPPs that were providing social benefits. Public comments that supported SEPPs identified benefits in establishing consistent state wide policies for:

- environmental protection
- social policy
- economic activity.

A number of SEPPs were identified as having successfully created uniformity in coastal policy and the design of residential buildings. Examples include:

- Environmental Planning Policy No 14 – Coastal Wetlands
- State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development.

One of the ideas put to the Panel was to proceed as follows:

1. remove SEPPs from the system altogether
2. place the relevant provisions in a schedule to the Standard Instrument local environmental plan.

This would be one method of ensuring that SEPP provisions are consistent with local provisions. It would also mean that SEPP provisions could be updated and amended easily.

Another idea was to rationalise current SEPPs as follows:

1. review all provisions for inconsistencies

Environmental planning instruments (EPIs) are legally enforceable documents that control development and prescribe policies such as state environmental planning policies (SEPPs) and local environmental plans (LEPs). They do not include development control plans (DCPs).

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- place provisions that zone land or that relate to specified land in local environmental plans
 - Consolidate all remaining provisions in a single instrument.

This would address the common complaint that the system was too complex because of the sheer number of planning instruments that could apply to development.

C18. Should there be State environmental planning policies? If so, should they be in a single document? Or should they be provisions in a local environmental plan?

4.2 Public participation

In the present planning system, the Minister has the power to determine:

- whether or not a draft SEPP should be exhibited
- whether submissions from the public should be sought and considered.

If SEPPs are to be retained in a new planning system, should this discretion be removed? Should there be a statutory requirement for public consultation on a draft SEPP?

C19. Should there be statutory public participation requirements when making SEPPs?

4.3 Disallowance by Parliament

Presently, SEPPs are not statutory rules that can be disallowed in whole or in part by either house of the State Parliament. Some submissions suggested that the process would be more democratic and accountable if they were statutory rules. This would require amendments to the *Interpretation Act 1987*.

It could also be possible to achieve the same result if SEPPs were instead characterised as regulations.

C20. Should a SEPP be subject to disallowance by Parliament?

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4.4 local environmental plans (LEPs)

local environmental plans (LEPs) set out planning controls for local areas. LEPs control development by:

- imposing development standards
- zoning land.

LEPs might also make provision for the protection of the environment or might address any other matter as authorised by the Planning Act. In 2006, a Standard Instrument was introduced for LEPs to create consistency. The process of replacing LEPs with new plans using the Standard Instrument template is ongoing.

Although the matters of detail concerning new local environmental plans have been referred to the Local Planning Panel (see side panel), it is likely that issues of this nature will arise on a continuing basis.

C21. Should there be a review process to deal with issues arising between the Department and councils that relate to the preparation of local environmental plans?

C22. Should there be a legislative provision to establish this?

Standard Instrument local environmental plan:

In September 2011, the Minister established a Local Planning Panel, made up of three local government members and two State appointed members. The purpose of this panel is to:

- *increase local government involvement in the plan-making process*
- *improve the flexible delivery of the Standard Instrument (Principal local environmental plans) Order 2006 (Standard Instrument LEP).*

The specific aspects of the Standard Instrument LEP will not be subject to this review, as the Local Planning Panel is responsible for reviewing the content of the Standard LEP.

However, as the community raised a number of concerns regarding the Standard Instrument LEP during the consultation process, these will be forwarded on to the Local Planning Panel for consideration.

4.5 Preparation of zoning proposals

A draft local environmental plan is called a planning proposal under the current Planning Act. It may include

- an entirely new LEP
- a proposal to amend an existing LEP.

Planning proposals are prepared by the relevant planning authority, which in most instances is a local council. However, it may also be the Director-General of the Department or another body prescribed by the regulations.

One type of planning proposal deals with proposed changes to zoning of land. There was general support expressed for the current provisions. In relation to landowners seeking a rezoning, however, some questions were raised as to whether there could be a more formal statutory process. This might include the ability to make a formal application to a planning authority seeking consideration of a proposed rezoning.

Ideas submitted included the following:

- An applicant for a rezoning should have to demonstrate a positive public benefit beyond the private benefits.

Rezoning as part of the reclassification of council land
In many community forums it was raised that the process of reclassification of council managed land should be addressed in this review. The provisions that allow council managed land to be reclassified through a local environmental plan is located in the Local Government Act 1993 and as such falls outside this review.

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- Planning proposals could be prepared by landowners as well as planning authorities.
 - Applicants could be subject to requirements setting out the required environmental studies and other considerations. These could be issued by the Director-General.

C23. How should rezonings (planning proposals) be initiated?

4.6 Timeframes

One of the most frequent comments in relation to local environmental plans was that the process of amending a plan takes too long. In particular, it was noted that simple amendments take longer than what was considered appropriate to the nature of the amendment.

Although the Planning Act allows for minor matters to be processed more quickly, some submissions questioned whether the scope of this provision could be expanded or whether the process could be improved.

It was suggested that there should be prescribed statutory timeframes for the process – including the initial stages of requesting a planning proposal. This would use development assessment as a model.

Another suggestion was that the Minister should not always be the decision maker for all types of planning proposals. For example, some types of amendments to plans should be made by councils or an independent body such as an independent hearing and assessment panel.

C24. How can amendments to plans be processed more quickly?

4.7 Appeals and reviews

There are three main decisions in the process of making of an LEP (or amendment):

1. A non statutory decision by the relevant planning authority to initiate a proposal
2. A 'gateway determination' by the Minister to proceed
3. The decision of the Minister to make a plan.

It was frequently put to the Panel that some or all of these decisions should be able to be reviewed or that there should be appeal rights – in particular appeals for rezonings.

It was also put to the Panel that there should be a deemed refusal period for planning proposals. A deemed refusal period would then trigger appeal rights or a right of review.

The issue of rezoning raised much discussion at community forums. There was

Gateway determination:
An initial review of the planning proposal by the Minister, who determines whether the matter should proceed, and whether it should be amended.

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particular support for the concept in the context of rezonings initiated by council, as well as where a rezoning is sought by a landowner.

For example, it was suggested that landowners who proposed rezonings should be able to seek a review of a council decision not to prepare a planning proposal. On the other hand, it was also suggested that where councils have initiated a rezoning, a landowner should be able to appeal the making of the plan if they were disadvantaged by the rezoning.

Related topics explored included:

- the role of independent decision making bodies such as the Court or Joint Regional Planning Panels
- third party appeal rights
- the role of objectors.

C25. Should there be a right of appeal or review for decisions about planning proposals?

4.8 Compensation for the consequences of a rezoning

At several community forums, it was suggested that there should be an entitlement to compensation if a change to the zoning of land had the effect of disadvantaging the owner of the land.

The most common examples given of disadvantages that should attract compensation were rezonings that restricted the development potential of land.

Related issues raised included:

- the calculation of any compensation
- who should pay
- how compensation should be negotiated during the planning process.

C26. Should there be a right for a landholder to seek compensation for the consequences of a rezoning of their land?

4.9 Consulting government agencies when making or amending a local environmental plan

A constant concern in the community forums was the amount of time it took to gain comments from a government agency during the consultation process of a planning proposal.

Another frequently raised issue was that there was no recourse for the developer or

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council where the comments received from the agency were unsuitable. This can have the practical effect of bringing the planning proposal to a halt.

Developers and councils both submitted that it might be appropriate to formalise the role of government agencies and the consultation process. This might be achieved by:

- requiring comments to be publically available
- providing the opportunity to respond to submissions
- a formalised process of dispute resolution and review.

C27. When local environmental plans are being made or amended, how can transparency and opportunities for negotiation be improved during consultation with government agencies?

4.10 Minor rezoning proposals

Some simple, minor rezoning proposals merely seek to implement something that has been clearly identified in a strategic plan.

The following suggestions have been made in this context:

- Where there has been a clear identification of such a change in zoning, there is no need for the Minister or the Department to be involved in any merit assessment.
- The role of the Minister and the Department should be confined to undertaking a routine check that the proposed rezoning has gone through to the local processes and is entirely in accord with the relevant elements of the strategic plan for the area.

In these circumstances, the state-level involvement would be purely process oriented and would not involve any merit assessment.

C28. Should some individual rezonings not require any merit consideration at a state level?

4.11 Heritage issues in local environmental plans

Although participants in some community forums raised issues relating to the *Heritage Act 1977*, this is outside the scope of the review.

However, matters concerning heritage listing in local environmental plans were also raised. In particular, the following question was raised: should an owner of an item proposed to be listed as being of local heritage significance have the right to veto such a listing?

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The availability of information about assessment of local heritage items was also canvassed.

C29. What should be the processes prior to listing an item of local heritage in a local environmental plan?

4.12 Student housing

Student housing for university students is primarily directed at younger people who are on low and often casual incomes. Access to affordable student housing may ease access to higher education for students from lower socio-economic backgrounds.

Because students are often unable to afford cars, such projects might be assessed on a lower parking demand basis. However, there have been abuses of 'student housing' because of lack of specific planning for this.

C30. Should student housing be included as affordable housing?

C31. How can abuses of 'student housing' be prevented?

5.0 Development control plans and other instruments

Development control plans (DCPs) are prepared by the relevant planning authority (usually the council) and may provide detailed requirements on the following matters:

- development controls and standards
- identifying exhibition and public notification requirements for some types of development proposals
- compliance and enforcement.

A development proposal does not have to comply with the provisions in a DCP. However, the DCP is a fundamental element to be considered when a consent authority determines an application.

5.1 Legal status

The single most frequent issue raised in relation to DCPs was the fact that they are not binding on decision makers. It was repeatedly suggested that decision makers should be required to give greater weight to the standards in a DCP.

In contrast to these submissions were those that called for more flexibility in the system. If DCPs were to be given greater weight in decision making there might also be a need to address the ability to have variations from the standards in DCPs.

One related issue that flows from this question is that of how DCPs should be made.

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If DCPs are to be given greater legal weight, should there be a prescribed role in the plan making process for:

- the Department
- the Minister
- independent bodies such as Independent Hearing and Assessment Panels or Joint Regional Planning Panels?

C32. What should be the legal status of a DCP?

5.2 A standard instrument DCP

It was put to the Panel that there could be a template for development control plans that would set out standard terms and definitions and a standard form, structure and subject matter for all DCPs. This would be similar to the standard instrument local environmental plan. A standard DCP was considered one way of simplifying the system and making it easier to navigate.

C33. Should there be a standard template for DCPs?

6.0 Planning issues across council boundaries

A range of issues arose during the consultation process concerning planning issues that extended across local government boundaries. These primarily relate to:

- coordinated planning to ensure proper consideration of the nature of zoning
- current or likely future development in the adjoining council area.

A34. How should new planning legislation facilitate cooperative cross-border planning between councils?

7. Other matters

7.1 The anomalous position of Aboriginal reserves

Aboriginal reserves are not properly integrated into the present planning system. This anomaly arises because of their status as remnant legacies of a bygone colonial era.

Many difficulties arise in integrating these reserves, which are now owned by the relevant Local Aboriginal Land Council, into a new planning system. Factors to be considered include their location outside urban areas and inadequate infrastructure (such as roads, water and sewerage).

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Aboriginal reserves are held in single titles and individual home ownership is not possible.

C35. Should a program be developed to integrate Aboriginal reserves properly into a new planning system and, if so, how should that program be developed and what timeframe could be targeted for its implementation?

7.2 Provision of land for registered clubs in new release areas

ClubsNSW raised the issue of whether or not major new greenfield land releases should set aside an area of land that would permit the establishment of a registered club with necessary associated facilities.

During the planning process for the release area, it was suggested that such an area of land should be designated and appropriately zoned to facilitate the establishment of a future registered club as a facility for that community.

C36. Should developers of greenfield residential land release areas be required to make provision for a registered club and associated facilities?

7.3 Planning in the unincorporated area of New South Wales

The unincorporated area has not been included in any local government area. The unincorporated area is in western New South Wales and comprises approximately 29 per cent of the State. The villages of Silverton, Tibooburra and Pooncarie are located in the unincorporated area. It was suggested that there is currently little or no functional planning for development and this has the potential to impact on the heritage character of these settlements.

Some planning functions in the unincorporated area are vested in the Western Lands Commissioner.

C37. Who should have responsibility for planning in the unincorporated area of the State?

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Members of the community are most likely to be engaged with the planning system when they are seeking to build, or when there is a development proposed in their neighbourhood.

As expected, the most frequently raised topics at every community forum were development proposals and the regulation of carrying out development. The issues discussed related to:

- applying for permission to carry out development
- the assessment process
- decision making
- post-approval procedures such as modification of approvals and certification of building works.

If councils are to be given more responsibilities for decision making in terms of development, issues also arise in relation to:

- ensuring council performance
- ways that councils can assist by making decisions in a prompt and economically responsible manner, whilst still fulfilling their social and environmental assessment roles.

1.0 Types of development

In the present planning system, there are nine different types of development categories. These are:

- State significant infrastructure
- State significant development
- designated development
- integrated development
- regionally significant development
- ordinary DA (Development Application) development
- complying development
- exempt development
- development without consent.

In addition, there is development that is prohibited.

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There are too many different types of development and their titles and categorisation are confusing. The number and titles should be reduced and made easier to understand.

The NSW Division of Planning Institute Australia suggested that this list should be simplified and the names of the type of development made clearer. Adopting simplified development categories would also enable new planning legislation to provide a clearer structure.

A simplified list could be based on a proposed national model categorisation set out by a multi-interest group called the Development Assessment Forum. These categories would be:

- assessable development
- certifiable development
- exempt development
- prohibited development.

The first of these categories can accommodate several tracks for the assessment process, without the need for separate categories of development in separate parts of legislation.

These potential new categories are merely an example of the ways in which present development applications might be simplified. There is no doubt, however, that the present complexity must be rationalised.

D1. How should development be categorised?

1.1 State significant development

There was consistent support for the idea that certain types of State government and private development should be identified as State significant. This might be subject to a different process, or determined by a decision maker other than local councils.

The types of development submitted as an example included large public infrastructure projects like railways or coalmines, which might cross several local government areas. One submission also suggested that development that is of social benefit – such as affordable housing projects – should be identified as State significant.

Methods that could be used to identify these types of proposals were discussed. There was general support for a process in which:

- a statutory instrument would identify which proposal types are to be designated as State significant
- amendment would require public consultation and a transparent process.

Some submissions raised concerns about identifying specific projects (rather than types of development generally) as State significant. Currently, the Minister has the

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power to designate specific projects as State significant. This discretion was examined during the forums in the context of its potential to be influenced by politics rather than planning considerations. One idea put was that it might be appropriate for public consultation to occur before development is designated.

There were also concerns raised as to how and when the public should be informed about specific State significant proposals in their area. In order to identify these project types, it was suggested that there should be a requirement to amend environmental planning instruments as early as possible.

D2. What development should be designated as State significant and how should it be identified? Should either specific projects or types of development generally be identified as State significant?

1.2 Regional or local significance

The current hierarchy of categorising development as being of State, regional or local significance received general support during the community and stakeholder forums.

Currently, types of regionally significant development are determined by Joint Regional Planning Panels (JRPPs). Unlike State significant development, however, local councils still deal with the assessment of these applications.

A number of people thought the criteria for regional development should be reviewed. They suggested that more development should be identified as only of local significance, to be determined by a council.

On the other hand, a number of submissions suggested giving councils discretion to earmark additional types of development to be decided by a JRPP. This could function to take the political heat out of a decision on a particular project.

D3. What type or category of development, if any, should be identified as regionally significant to be determined by a body other than the council?

1.3 Exempt and complying development

The present planning system identifies limited types of development that are 'exempt and complying'.

- **Exempt development** may be carried out without planning approval.
- **Complying development** is subject to a limited evaluation and certification.

The types of development that might be identified in these categories include carports, swimming pools, advertising signs and barbecues. There was general support for providing simple processes for these simple types of development.

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Some submissions were concerned with limiting the scope of development that is identified as complying. These submissions were in favour of excluding some types of works, such as:

- those involving asbestos removal
- buildings or places that were under investigation for heritage significance
- areas of high conservation significance.

By far the majority of submissions supported expanding the scope of development identified as exempt and complying – in particular in rural and regional areas. Many councils sought flexibility to expand any State determined list. It was also proposed that the range of complying development on mine or quarry sites be extended.

Other submissions received included those that supported the following:

- extending applications for change of use for retail shops (except those that are restricted premises)
- identifying amateur radio aerials as exempt or complying development.

D4. What development should be exempt from approval and what development should be able to be certified as complying?

D5. How should councils be allowed local expansions to any list of exempt and complying development?

2.0 Other development issues

2.1 Is complying development contrary to objectives of the Planning Act?

At one community forum in southern Sydney, issues were raised in relation to the certification process for complying development. It was suggested that there should be public notification and participation in this process.

It was also suggested that every complying development application should be required to be exhibited, particularly if an objective of new planning legislation was to be 'to provide for public involvement in environmental planning and assessment'.

D6. Should there be a public process for evaluating complying development applications?

2.2 Development 'as of right'

At several community forums, it was suggested that there should be an absolute right to develop a property for a purpose permitted by its zoning. This would mean that development would be allowed to proceed without being required to assess

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environmental attributes or relevant factors of the land, both of which may otherwise make development impossible.

This is contrary to the present legal position, which merely presumes that a property may be developed in this way.

D7. Should there be an absolute right to develop land for a purpose permitted in the zone subject only to assessment of the form proposed?

At meetings with stakeholder groups from the property and development industry, a number of submissions supported the idea of categorising development into two types:

- development that complies with all numerical controls such as height, floor space ratio and setbacks
- development that exceeds controls.

It was suggested that:

- for development that complies, there should be no merit assessment, and there should be an absolute right to develop
- plans that zone land and specify development controls would identify complying development for an area
- an applicant would be entitled to develop anything within these development controls
- only non-complying development would be required to submit an application for a full assessment.

Others have expressed reservations about this proposal. They support the idea that controls are targets, not entitlements. That is, they support the conventional idea that an applicant can seek to achieve controls (such as a maximum height limit) subject to merit assessment.

D8. Should there be an automatic approval of a proposal if all development standards and controls are satisfied?

2.3 Staged development applications

At one community forum it was discussed whether conceptual approvals (such as master plans) should be used more frequently for large scale development, where it is proposed that individual components will be completed consecutively.

It was suggested that consent authorities should encourage the use of conceptual approvals, rather than having a piecemeal approach to large sites and complex development. This would result in better planning outcomes overall.

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D9. Should conceptual approvals be available for large scale developments with separate components?

2.4 Issues relating to existing use rights

Some time ago, the Planning Act was changed to stop a person owning a property with a nonconforming use from exchanging it for another, different nonconforming use.

A submission suggested that this places an undue restriction on an owner's ability to use a parcel of land on which there has been an existing nonconforming use.

Nonconforming use:
A nonconforming use is a land use that is not permitted by a zoning law but which already existed at the time the zoning law or its amendment was enacted.

D10. Should a new planning system reinstate the ability to convert one nonconforming use to another, different nonconforming use?

It is also difficult to intensify or expand the size of a site that has a nonconforming use. It was suggested that this is a barrier to valid economic expansions of existing businesses.

D11. Should existing nonconforming uses be permitted to intensify on the site where they are being conducted (subject to a merit assessment)?

D12. Should existing nonconforming uses be permitted to expand the boundaries of their present site (subject to a merit assessment)?

Further, it was proposed that existing nonconforming uses should be able to take advantage of the exempt and complying development process. This would mean that owners could undertake minor or non-impacting works on their sites.

The suggestion was that it is not reasonable that development which is categorised as exempt or complying (and is thus considered uncontroversial) should not be available for uses that are classified as nonconforming.

In this case, there may need to be a restriction clarifying that the works have to be ancillary to the existing use. This would, for example, avoid construction of dwellings in inappropriate locations.

D13. Should properties with existing nonconforming uses have access to exempt and complying development processes?

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Concerns were raised that when a new local environmental plan changes the zoning of land, there was no guarantee that the existing use rights of owners would be protected properly. Some changes in zoning (for example from a rural zone to an environmental zone) may making an existing use one no longer permitted for new development in the new zone.

D14. When there is a change in zoning of the land, should an application be able to be made to a council for a declaration of the nature and extent of an existing use?

2.5 Transferable development rights for agricultural land

During the non-metropolitan community forums, there was frequent discussion in relation to farmers retiring and passing their farm to a future generation of the same family. In this context, it was suggested that there should be a form of transferable development rights available for existing agricultural holdings.

One proposal relates to situations where an agricultural holding has more than one dwelling entitlement (whether existing or in potential). In this situation, it should be possible to transfer that dwelling entitlement to another allotment in the same council area that does not have one. Extinguishing the original dwelling entitlement would prevent the fragmentation of the landholding.

D15. Should there be a system of transferable dwelling entitlements to permit owners of an agricultural holding to transfer a dwelling entitlement from that land to another parcel of land

D16. Extinguish that dwelling entitlement on the original agricultural landholding?

2.6 Challenging prohibitions in a zone

In stakeholder group discussions, it was suggested that it should be possible to lodge an application that proposes a type of development that is prohibited in the relevant zone.

In effect, this is a suggestion that there should be no such thing as prohibited development, and that every development application should simply be subject to a merit assessment. This was advanced as an alternative (and likely faster) process than seeking to rezone a property.

D17. Should it be possible to apply for approval for development that is prohibited in a zone?

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2.7 Approving unauthorised structures

To be able to use a structure that has been built without development consent, it is necessary to get both:

- a building certificate for the adequacy of the structure
- a development consent to use the structure.

This involves two separate applications with different tests. It is possible to be given a building certificate (because the structure has been built properly) but not get approval to use it (because the proposed use is unacceptable or prohibited). Having two separate applications is said to be cumbersome and expensive.

D18. Should there be a single application to the council to obtain permission to use an unauthorised structure?

2.8 Flexibility in requiring an environmental impact statement

Currently, particular classes of development require an environmental impact statement (EIS). These are presently contained in schedule three of the Planning Act. At one community forum, a council planner questioned whether the requirement for an EIS should be more flexible.

He gave an example of a small concrete products plant proposed to be located in an existing industrial area, within 250m of a residential area boundary. He suggested that the scale of the plant was small enough not to require an EIS, and that undertaking a study of that nature would mean the business was unworkable.

D19. Where a small scale proposal requires an environmental impact statement, should it be possible to seek a waiver?

2.9 Anticipating future changes to residential patterns in single dwelling areas

At one stakeholder consultation, a proposal was made in relation to greenfield residential developments. The proposal was to permit single dwelling houses to be developed with dual service connections. This would provide more residential options in the future, should it then be permitted to have some form of attached dual occupancy on those sites.

D20. Should dual service connections be permitted for residences in greenfield residential developments?

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2.10 Applications for community events

At several community forums, it was suggested that there should be a specific and simple application process for short term community events such as markets, fun runs, and festivals.

The Panel Chairs have considered that this matter might be dealt with better during any review of the *Local Government Act 1993* and they have written to the Hon. Don Page MP, Minister for Local Government, to draw his attention to the issue.

3.0 Pre-development application process

Many councils currently provide applicants with a pre-Development Application (DA) process, which is voluntary and non-statutory. In this process, applicants might meet with council planning staff to discuss issues such as the information that should accompany an application.

There were many comments made at community forums about the benefits of pre-DA meetings. It was suggested that they could be formalised and could become a mandatory step in the assessment process – particularly for larger development proposals.

Some suggestions relating to the process of these meetings included:

- requiring that minutes to be taken
- requiring any decisions made during the meeting to be binding on councils
- requiring the staff member who attended the meeting to be involved in the assessment of the DA.

Another pre-DA process raised was the involvement of 'precinct committees'. Some councils have a policy of referring pre-DA matters to committees made up of community members in order to:

- facilitate negotiations
- encourage problem solving
- involve the local community early in the process.

Currently, precinct committees are not statutory bodies. However, new planning legislation might provide for them to be constituted and given a formal role in the DA process.

D21. What provisions, if any, should be made for pre-lodgement processes?

3.1 Director-General's requirements

In the current planning system, the Director-General may issue requirements relating to either:

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- a planning proposal (draft local environment plan)
- the preparation of an environmental impact statement.

There were concerns raised that relate to the process of amending these requirements. It was suggested that:

- reasons should have to be provided for amendments
- the Director-General should develop standard requirements for different categories of planning proposal or development.

D22. How should Director-General's requirements fit in the planning process?

4.0 Making an application

4.1 Simplifying the process

Delays in the development assessment process were a concern from all points of view. To many, delay represents a significant cost. To others, it is an element of serious uncertainty about development in their neighbourhood that might have an impact on their lives.

One suggestion the Panel heard frequently during community forums was that the system should be simplified by reducing the amount of detail required in development applications, which has increased since the introduction of private certification.

Councils now require construction detail plans to accompany development applications in case they are not involved at the construction plan approval stage. They felt obliged to assess the proposed development in greater detail than previously.

To address this, a 'concept' development application was described to the Panel. This would be an application for approval of conceptual matters like a building footprint and envelope or a type of use. More detailed plans would then accompany a 'building application'.

The process described was similar to previous development applications and building applications that were required prior to 1997. To reflect more accurately what was being requested, it was suggested that:

- the first application might be called a 'development concept application'
- the second application might be called a 'construction approval application'.

Currently, councils use a variety of development application forms. These application forms will have to be standardised for each type of development if the use of electronic lodgement is to be increased. The forms will need to be able to be easily understood by anybody looking at them on the internet, regardless of which

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council area they might live in. Standardisation will also increase efficiency for those developers who operate in more than one council area.

D23. How can the application process be simplified?

D24. Should there be standard development application forms that have to be used in all council areas?

5.0 After an application is lodged but before assessment

5.1 Public notification

Public notification and the availability of information was raised both in the context of development applications assessed by councils and those assessed by the State.

Major issues related to State significant development were:

- the availability of information
- the information that should be required to be available.

One suggestion was to create an interactive map of the State, which would identify all State significant development. This would enable people to access detailed information. It would also mean that all information in relation to an assessment would be publicly available. This would include correspondence dealing with the merits of the application.

It was also suggested that there should be quick reviews for decisions to withhold information classified as 'commercial in confidence'.

There were further suggestions related to the public notification period for development applications more generally. Suggestions included:

- a uniform minimum public notification period
- different minimum public notification periods based on the complexity of the proposal
- extending public notification periods if there are public holidays.

It was also suggested that complex proposals with large impact statements could not be properly reviewed by the public within a minimum 28-day exhibition period.

D25. What public notification requirements should there be for development applications?

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5.2 Community consultation and submissions

Consultation and participation in the assessment process were important concerns for those who attended the community forums. Many of the submissions concerned the consultation process for State significant proposals and identified issues such as:

- inadequate time to prepare a submission regarding a complex proposal
- the need to present the information exhibited about a proposal to the community in an easy to read format.

Another concern was the cost that the community bears when a submission is prepared on a complex proposal. Members of the community might fund expert reports to inform their submissions.

It was suggested that a portion of the assessment fees could be used to fund community submissions on complex proposals. Alternatively, there might be a central fund administered by the State.

A further concern that was raised related to the State significant development assessment process. Currently, after the community consultation period ends, there is no further opportunity to comment on a proposal unless significant changes are made and re-exhibited.

Forum participants suggested that should be an opportunity for the community to make submissions again, after the proponent's response to submissions has been notified.

D26. How can the community consultation process be improved?

6.0 Assessment of development proposals – processes

The most frequent theme to emerge in relation to development assessment was that both stakeholders and the community want a quicker, simpler, and therefore cheaper process.

The community, in particular, sought processes that supported increased public participation and the public right to know about development proposals.

6.1 A quicker process

In discussions on how to speed up the assessment process, the following question was raised: should councils should still be able to request additional information during an assessment without affecting the deemed refusal time period?

One suggestion was that there should be different time periods allowed for different applications – for example, a new coal mine proposal should be allowed extra time but a small extension to a house should require only a short time.

Another issue was related to deemed approvals and refusals. It was suggested that

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there should be a deemed **approval** of an application if there is a time limit for deciding on applications in new planning legislation. This would replace the current system of appealing against a deemed refusal.

Deemed refusal appeals are time-consuming and unduly expensive. It was suggested that a system of deemed approvals would give a consent authority an incentive to deal with an application in a quick and timely fashion.

D27. Should deemed approvals take the place of deemed refusals for development applications?

During one community forum, there was a suggestion that an applicant might be prepared to pay to fast-track a development assessment. In this scenario, a higher fee would be charged, which could assist in meeting the cost of ordinary development application processing. In some councils, this cost is currently subsidised by general council rate revenue.

D28. Should councils be able to charge a higher development application fee in return for fast-tracking assessment of a development proposal?

During several community forums, there was a suggestion relating to applications that are generally compliant but which do not completely fit within the requirements for complying development approval.

It was suggested that a more limited assessment process could be undertaken, which could be confined to only those elements of the proposal that are non-compliant. This would speed up their assessment.

D29. If an application partially satisfies the requirements for complying development, should it be assessed only on those matters that are non-complying?

6.2 A less expensive process

It was suggested that many reports for major projects ended up being duplicated at several stages of the assessment process. This was said to be a particular problem for subdivisions and caused not only delay but also significant extra expense.

D30. How can unnecessary duplication of reports and information seeking be eliminated from the development process?

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6.3 State significant development

One issue raised was whether State significant development should be assessed against the same criteria as other types of development and whether the assessment process followed should be the same. It was put to the Panel that there needed to be a greater role for the local councils in this process, even though it might be appropriate for the assessment of State significant proposals to be undertaken by the State.

D31. How should State significant proposals be assessed?

6.4 Crown development

Under the current planning system, Crown development can be assessed and determined by the authority undertaking the works, for example an electricity authority. This is the case as long as it is not otherwise identified as either regional development or State significant. The issue of whether this arrangement should continue was discussed at a number of meetings.

At some community forums, there was support for the idea that Crown development should be assessed and determined by someone other than the applicant.

However, the Panel also heard submissions seeking to increase the development that could be subject to self-determination. For example, it was suggested that public social housing projects should be able to be determined by the public social housing provider.

D32. Should the Crown undertake self-assessment?

D33. Should the Crown undertake self-determination?

6.5 Council as an applicant

Presently, councils may self-assess and determine development that is not otherwise identified as regional development. Some councils have a policy of engaging independent consultants to prepare these assessment reports and others have a policy of implementing confidentiality requirements, screening council staff who undertake the assessment from decision makers.

The questions that were asked included whether this should continue at all or whether there should be a formalised process for councils undertaking self-assessment.

D34. Should councils undertake self-assessment?

D35. Should councils undertake self-determination?

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6.6 Environmental impact statements and assessment reports prepared by the applicant

Environmental impact statements and their accompanying expert reports form part of the application submitted to a consent authority for assessment. They contain reports which assess the impacts of the proposed development. These reports are usually prepared by consultants. Concerns about these documents were raised at a number of the community forums in relation to a range of issues.

Frequently, there were concerns about the independence of the impact assessments when they are prepared by consultants that are engaged by the applicant.

The ideas put forward to counteract this situation included the following:

- establishing an accreditation system for consultants
- requiring for a funding system that permits councils or community groups to engage an expert reviewer
- stipulating that the consent authority must engage the consultants, rather than the applicant
- stipulating that all reports must be peer reviewed by externally nominated reviewers.

D36. How can the integrity of an environmental impact statement be guaranteed?

6.7 Architectural review and design panels

During the course of the stakeholder group discussion with the Institute of Architects, it was pointed out that a number of councils have appointed architectural review and design panels. It was suggested that there should be some basis in new planning legislation for the establishment of such panels.

These panels could operate in a similar way to Independent Hearing and Assessment Panels. They could provide advice to the council on the architectural and design merits of proposals, and recommend modifications to rectify design defects.

It was not suggested that such panels would have any decision-making powers.

D37. Should new planning legislation make provision for councils to appoint architectural review and design panels?

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7.0 Assessment of development proposals – assessment criteria

7.1 The broad framework

At the present time, the broad assessment criteria for a development proposal are set out in section 79C of the Planning Act. At one community forum, it was suggested that these criteria should be more detailed. It was also suggested that the concept of the 'public interest' should be clarified and included.

D38. What changes, expansions or additions should be made to the present assessment criteria in the Planning Act?

8. Additional specific matters suggested for development assessment

8.1 Project viability

In a number of stakeholder discussion groups and community forums, it was suggested that a relevant factor in assessing a development should be its commercial viability.

Such an assessment should take into account a wide range of factors, including:

- yield permitted on a site
- departures sought from any development standards
- the proposed quality of the finishes to the built form
- reasonableness of requiring underground car parking
- the amount of car parking
- the extent of landscaping required.

It also was suggested that the total cost of the following should be taken into account:

- site acquisition
- holding costs
- construction costs
- a reasonable allowance for profit.

D39. Should the economic viability of a development proposal be taken into account in deciding whether the proposal should be approved or in the conditions for approval?

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8.2 Mandating the amber light approach?

At several community forums, frustration was expressed at council staff displaying what was perceived as a 'just say no' approach, rather than helping to resolve problems constructively.

In recent years, the Court has adopted what it has described as the 'amber light approach' in project assessment during merit review appeals. The amber light approach involves a three-step consideration of a proposal rather than a straight green/red – yes/no approach. The questions that the Court asks itself in assessing the merits of a proposal are:

- Is the proposal acceptable in its present form? If it is, it is approved (the green light).
- If the proposal is not acceptable in its present form, can the Court require modifications to it, within the scope of the present proposal, that render it acceptable? If there are such changes that can be imposed, the Court imposes those changes and approves of the project (amber turns to green).
- If the proposal is not acceptable and there are no changes that the Court can require that would render it acceptable, the proposal is refused (amber turns to red).

This approach is one that can be adopted in any determination process. If the amber turning to green approach is appropriate, some changes can be imposed by conditions of consent. Other changes may require plans to be amended. In this case, revisions must be shown on plans rather than just referring to conditions of consent. This practice is used, informally, by some councils but it is not a mandatory process.

D40. Sometimes there are changes that would rectify problems with a proposal and thus permit its approval. Should it be mandatory during an assessment process for the consent authority to advise of this?

8.3 Impact on property values

It is a long settled legal position that planning assessment processes should not consider the impact that a proposed development might have on the value of properties nearby. The concept of blight is not something to be taken into account in considering whether or not to approve a particular development proposal.

At one community forum, the question was raised as to whether or not it would be appropriate to change this position in a new planning system. This would permit the impact of a development on the value of neighbouring properties to be taken into account when considering whether a development should be approved.

D41. Should a new planning system permit adverse impacts on the value of properties in the vicinity of a proposed development to be taken into account when considering whether a development should be approved?

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8.4 Design excellence

Some local planning controls include provisions such as a requirement for consistency with an existing streetscape or development pattern in a neighbourhood. During the consultation process, concern was expressed that such requirements could have the unexpected and/or undesirable consequence of excluding contemporary design. This may be of a high standard and/or may incorporate ecologically sustainable design elements such as passive thermal efficiency.

D42. Should local development controls be allowed to preclude high-quality, environmentally sustainable, residential designs on the basis that they are inconsistent with the existing residential development in the vicinity?

8.5 Impacts beyond the immediate locality of a site

As communicated at a forum in Muswellbrook, several participants felt that new coalmines in another locality had had a direct impact on their community. They expressed their frustration that this had not been taken into consideration during the assessment period because the mines were geographically removed from their community.

The particular matters of concern related to the increased frequency of long haul trains through the centre of Muswellbrook. The consequence was that the two level crossings from the northern to the southern parts of Muswellbrook were often blocked for extensive periods of time. This made ambulance access difficult and thus posed risks to life for some residents.

D43. How can the planning system ensure that the impact of development that is remote from but directly affecting a community is taken into account in the assessment process?

8.6 Cumulative impacts

During a number of community forums, in rural and metropolitan areas under development pressure, the issue was raised of the extent to which the planning system was able to take account of cumulative impacts of particular types of development. Such developments could include, for example, coalmines in the Hunter Valley or increased density in existing urban areas.

D44. Should a consent authority be required to consider any cumulative impact of multiple developments of the same general type in a locality or region? Should this be a specific requirement in assessment criteria?

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8.7 Project life cycle impacts and greenhouse gas emissions

During various parts of the consultation process and in a number of written submissions, there were questions about whether the true environmental cost of projects for approval is taken into account.

There were concerns that the extent to which such assessments are specifically required is insufficiently broad. The policy proposed was that mandatory carbon accounting, including downstream emissions from product utilisation, should be incorporated in legislation for a new planning system, particularly for major development projects.

D45. As part of the assessment process for some classes of development project, should there be a mandatory requirement in a new planning system for full carbon accounting to be considered?

8.8 The weight to be given to the 'public benefit' of a proposal

In assessing a proposal for a new mine or an extension, the State Environmental Planning Policy for Mining uses a three-step process.

The first step requires the impact of the proposal to be assessed. If there are no adverse impacts or if the impacts are within an acceptable range in the circumstances of the application, then, by implication, the project is to be approved.

Whether or not this is the case, the second and third steps are still required to be undertaken.

The second step requires an assessment of the public benefits flowing from the proposal and the third step requires a review of measures that might be required to lessen any impacts of the proposal.

This three-step approach requires that the question be considered of whether or not there is some broad public benefit that would outweigh the adverse impacts of the proposal. This may warrant approval of the proposal that might otherwise not have succeeded through a conventional assessment process.

D46. Should the broader question of the public benefit of granting approval be balanced against the impacts of the proposal in deciding whether to grant consent?

8.9 Past unsatisfactory performance by a development applicant and future development applications

During one community forum, the question of unsatisfactory performance by a development applicant was raised, specifically in relation to future development applications.

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Currently, there are situations where a person or company has been given development consent in the past, and has not obeyed its conditions. If a fresh application is made, a consent authority is generally not permitted to take this into account.

It was suggested that, if a person or company breached the conditions of an earlier development consent, the extent and nature of those breaches ought to be a matter able to be taken into account in considering whether or not any future development consent should be granted subject to conditions.

D47. Should a consent authority be able to take into account past breaches by an applicant of an earlier development consent in considering whether or not it is reasonable to expect that conditions attached to any future development consent would be obeyed?

8.10 Variations to standards

There are presently 'facultative and beneficial' processes by which a proponent of a development can object to complying with the terms of a development standard. These terms are the provisions of local environmental plans that impose numerical limits on development in certain circumstances.

They include matters as diverse as:

- the maximum height permitted for a building in the relevant location
- minimum allotment sizes upon which dwellings are permitted in rural areas.

A number of tests must be satisfied before the objection can be upheld. The nonconforming development may be approved in breach of the development standard. The upholding of an objection requires the Director-General of the Department to agree. However, if this is delegated to a council, the council is the sole assessing body for such an objection.

Some objected to any relaxation whatsoever of any development standard whilst others thought the process too complex.

D48. Should objections to complying with a development standard remain?

8.11 Applying an 'improve or maintain' test

The general test in deciding whether to approve a development is whether or not the impacts are acceptable. It was suggested that for some issues, acceptability of the extent of the impact is not good enough. These issues may include, for example, discharge into waterways, impacts on native fauna or the need to clear native vegetation (including threatened or endangered species or ecological communities).

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It was proposed that the test for these types of issues should be whether the development can improve or maintain that position that exists before the development is carried out. For these particular impacts, the potential for cumulative effect would be removed if this higher test is applied.

D49. Should an 'improve or maintain' test be applied to some types of potential impacts of development proposals?

D50. If so, what sorts of potential impacts should be subject to this higher test?

8.12 Risk of natural disaster as an assessment criterion

During the stakeholder discussion, representatives of the Insurance Council raised issues relating to the risk of natural disasters and their potential impact on development.

The question was raised as to whether the planning system should be required to consider the risk of natural disasters and other natural phenomena and their impact when assessing development.

Matters referred to included the risk of bush fire or flooding, as well as risks related to long-term climate change. These may include but are not confined to coastal erosion and coastal inundation.

D51. Should there be a specific assessment criterion that requires risk of damage as a consequence of either short-term natural disasters or long term natural phenomenon changes to be included in development assessment?

8.13 Urban water issues

Issues were raised during the course of one community forum relating to urban water capture and its efficient use and reuse. It was suggested that a new planning system should promote urban water capture and its use or reuse for domestic purposes, given expected climate changes in the future.

This issue was also raised in another forum as to whether or not assessment should take into account the impact of residential development on urban aquifers.

D52. What water issues should be required to be considered for urban development projects?

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8.15 Existing residential uses in industrial zones

During a consultation forum in Newcastle, a resident raised concerns relating to existing residential uses that rely on existing use rights. Specifically, the concerns were about the impact of industrial developments, in industrial zones, on these residential uses.

These concerns related to development that permitted building right up to the property boundary. This leaves the adjacent residence with insufficient side setback to undertake property maintenance because of the narrowness of the gap to its own boundary.

D53. When development is proposed that has an impact on an existing, nonconforming residential use, should any special assessment criterion be required to take account of the residential use?

8.16 Availability of assessment reports

At the very first community forums in Broken Hill, the following question was asked: when should an objector have access to a council assessment report concerning a proposed development?

An instance was referred to in which those objecting to the development did not have timely enough access to the assessment report. It was suggested that having earlier access to the report would have enabled them to undertake legitimate lobbying of the Council in support of their objections.

D54. Should new planning legislation fix a time at which a council assessment report concerning a development application is to be made available for access? If so, when should that be?

9.0 Amendments to applications

Development applications may be amended during the assessment, before a decision is made. Amendments may be made in response to:

- issues raised by the consent authority
- issues identified in submissions from other agencies and the community.

Two questions were raised in this regard:

1. When should amendments trigger re-exhibition of a proposal?
2. When should amendments require a fresh application because the nature of the amended proposal?

D55. When should an amended application be re-exhibited and when is a new application required?

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10.0 Ensuring council performance

10.1 Local government performance monitoring

At a number of community forums, concern was raised about the performance of local government in the development assessment and determination processes.

Some of this can be attributed to concurrence issues, discussed above. However, there was nonetheless a significant concern about how local government performance would be monitored if more decision-making powers were returned to councils.

It was suggested that the current league table model was inadequate, in which tables are published showing the time taken to deal with development applications. This was because these tables did not take into account the nature or complexity of proposals.

D56. What are appropriate performance standards by which council efficiency can be measured in relation to development assessment?

10.2 Local government performance auditing

Some people also suggested that there should be random performance audits of council processes.

D57. Should there be random performance audits of council development assessment?

11.0 Concurrences and other approvals

11.1 Concurrences from other government bodies

The Planning Act does not operate in isolation – a proposal under the Planning Act might require approvals under other legislation, or it may raise issues dealt with by other agencies.

A development application may be notified to other agencies seeking comment or concurrence. Another approval body may also be required to issue terms of approval to be incorporated in the consent.

The most common concern relating to the current system of concurrences was excessive delay in receiving a response. Some of the options canvassed to improve response times included:

- setting a 'deemed concurrence' or 'deemed approval' time period
- developing default standard minimum conditions of consent.

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It was also discussed whether the State should co-ordinate agency responses via a centralised co-ordination unit.

D58. How should concurrences and other approvals be speeded up in the assessment process?

Another common concern raised was that there should be increased integration of other statutory consent and approvals.

The current system already provides for integrated development assessment for some types of development. However, some submitters suggested that the scope of this should be increased to incorporate other consents, approvals and permits required by other acts.

It was also suggested that the consent authority should be permitted to impose a condition in which agreement is required from another concurrence authority. This would replace the current system by giving the concurrence authority power to add extra conditions of consent.

D59. What approvals, consents or permits required by other legislation should be incorporated into a development consent?

D60. Should a council be able to delegate to a concurrence authority power to impose conditions on a development consent after the council approves the proposal?

11.2 Timely dispatch of applications to concurrence authorities

In the course of one community forum, it was suggested that there is a long delay between when an application is lodged and the relevant referral fee paid, and when some councils dispatch applications to concurrence authorities.

D61. Should there be some penalty on a council if a referral to a concurrence authority has not been made in a timely fashion?

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12.0 Making decisions

Currently, there are three levels of the decision-making process for determining whether or not any proposed development should be approved, and what conditions should attach to it.

Those levels are:

- determination by the local consent authority
- determination by a Joint Regional Planning Panel
- determination at the State level by the Planning Assessment Commission or by the Minister.

At the first two levels of decision-making, the staff of the local consent authority broadly assess the appropriateness of a development proposal. In some instances, however, the Director-General of the Department must agree in order for a development to be approved that is not compliant with a development standard. In this case, staff of the Department may undertake additional assessment

For State level determinations, assessment of the development proposal is undertaken by the Department. Opportunity is provided to the local consent authority to have input into that assessment process.

Currently, local decision-making is undertaken by either:

- the elected members of a local council
- staff of that council operating under delegated authority from the elected members.

Matters that are dealt with on a regional level are dealt with by a Joint Regional Planning Panel. This panel comprises five members of whom three, including the chair, are nominated by the Minister. The other two are nominated by the relevant local consent authority.

These Joint Regional Planning Panels operate over multiple local consent authority areas. The State government nominees remain the same, however, the locally nominated participants vary depending on where the proposed development is located.

The matters that are determined by Joint Regional Planning Panels are defined by the monetary value of a proposed development. This value is currently set at a minimum project value of \$20 million, an amount that has recently been increased from \$10 million.

At the State level, the Planning Assessment Commission operates in one of the following ways:

- as a determining authority
- to provide a recommendation to the Minister.

The Planning Assessment Commission currently comprises a range of part-time members who are appointed for a period of three years and are eligible for reappointment. The Commission also has the ability to have temporary members,

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appointed for shorter periods of time, when the workload of the Commission makes this desirable.

The composition of the panels of Commission members to deal with any application is determined by the Chair of the Commission. There is no fixed panel size for deliberation by the Commission for development proposals. At the determination of the Chair of the Commission, the Commission's deliberations have been conducted by one, two or three members.

There was broad acceptance of the appropriateness of a Planning Assessment Commission model. However, as earlier noted, some suggested that it should have its own, separate legislation.

The purpose of this section of the discussion paper is to set out for consideration matters relating to each of the three levels of the decision-making process.

12.1 State significant development

The question of who should make decisions about State significant development was raised on a number of occasions. Questions arose about political determination of these proposals.

Discussion took place as to whether or not there should be Ministerial discretion to identify specific proposals. The most frequently raised topic was whether State significant development should be determined by the Minister or by an independent body.

D62. Who should make decisions about State significant proposals?

12.2 Delegations

Not all decisions can be delegated under the Planning Act. In the interests of removing politics from some decisions, should all decisions be able to be delegated?

Another question refers to situations in which concurrences are required from decision makers. Under new planning legislation, should decision makers be able to delegate their concurrence functions to council staff?

D63. What concurrence decisions should be able to be delegated?

Another interesting suggestion put was that a set of 'model instruments of delegations' for councils to use might be developed. This instrument might give guidance to councils as to the appropriate levels of delegation for decisions. It would also be able to be modified to suit a particular council.

D64. Should there be a model instrument of delegation?

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12.3 Planning Assessment Commission – scope of role

Currently the Planning Assessment Commission is not a consent authority under the Act. Instead, it delegates functions at the discretion of the Minister.

Questions were asked as to whether new legislation should assign a consent authority role for some decisions to the Planning Assessment Commission.

D65. What decisions should the Planning Assessment Commission make? Should the Commission's processes be inquisitorial or adversarial?

12.4 Planning Assessment Commission processes

Community concern at Planning Assessment Commission panel processes centred on the lack of rights to be heard at a proper hearing rather than at a public meeting.

It was not clear what processes the panel was obliged to undertake. It was also unclear as to whether objectors or supporters of a project were being allowed sufficient time to present their views.

Unflattering comparisons were made with the open process that had taken place through the now abandoned Commissions of Inquiry processes.

D66. What should be the processes required for hearings of Planning Assessment Commission panels?

12.5 Local participation on Planning Assessment Commission panels

During the course of several community forums, questions arose relating to the difference in composition between Planning and Assessment Commission panels and Joint Regional Planning Panels.

There was a particular concern that whilst Joint Regional Planning Panels had local members, no such arrangement existed for a Planning Assessment Commission panel.

It was suggested on several occasions, that there might be greater acceptance of Planning Assessment Commission processes and decisions if there were local representation on a panel.

D67. Should a local member be on any Planning Assessment Commission panel considering a proposed development?

D68. If so, should this be a mandatory for all commission panels?

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12.6 Assessment criteria for the Planning Assessment Commission

At a number of community forums, participants expressed concern about the processes for Planning Assessment Commission deliberations.

Specifically, these concerns related to applications under the repealed Part 3A of the Planning Act, which did not permit a Planning Assessment Commission panel to consider the terms of any relevant development control plan (DCP).

This issue was pressed most strongly during the community forums in Goulburn and Yass. Here, the Upper Lachlan Shire Council Renewable Energy DCP was cited in the context of wind farm developments. However, the issue has also been raised at other places in more general terms.

These concerns raise the broad proposition of whether there should be a uniform approach to development assessment criteria – specifically, whether this approach should also apply to significant developments that considered by the Planning Assessment Commission.

D69. Should the development assessment criteria for the Planning Assessment Commission be the same as for any other development assessment process?

12.7 Joint Regional Planning Panels – general

During the consultation process, a wide range of conflicting views emerged concerning the use of Joint Regional Planning Panels for development determination.

At the negative end of the opinion spectrum, a number of individuals and councils expressed the view that Joint Regional Planning Panels, with their mandatory State government appointed majority, were an unwarranted and unacceptable infringement of the right of democratically elected councils to make decisions about proposed developments within their local government area. It was suggested that, if they were to remain, the majority of members (including the chair) should be locals.

At the opposite end of the spectrum, a wide range of interests, including the majority of councils attending the consultation forums, expressed the view that Joint Regional Planning Panels perform a legitimate and valuable role in the planning system.

One mayor expressed the view that it would also be desirable for a council to be able to refer to a Joint Regional Planning Panel a development proposal that might not ordinarily be within the scope of such a planning panel's delegation. He suggested that this may depoliticise controversial development proposals. It would also allow a decision to be made on the proper planning merits (rather than the politics) of the application.

Concerns were also expressed about how the limits are determined for the jurisdiction of Joint Regional Planning Panels. Other concerns questioned the openness of panel procedures.

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Finally, concerns were also expressed at whether or not it is appropriate for State nominated members of a Joint Regional Planning Panel to take part in any decision concerning the local government area in which they reside.

D70. Should a new planning system include Joint Regional Planning Panels?

D71. What should be the composition of a Joint Regional Planning Panel?

D72. What should be the hearing processes for a Joint Regional Planning Panel?

D73. Should a council be able to refer a matter to a Joint Regional Planning Panel for determination even if the matter would not ordinarily fall within the jurisdiction of such a panel?

D74. Should State nominated members of a Joint Regional Planning Panel be precluded from taking part in any decision concerning the local government area in which they reside?

Some councils also commented that some matters that had fallen within the jurisdiction of a Joint Regional Planning Panel had been returned to the council for determination by that panel. This process had, as a consequence, delayed the approval of a project that was otherwise uncontroversial.

D75. If a proposed development is recommended for approval by council staff, has no public submission objecting to it and is not objected to by the Department, should it be determined by the council?

12.8 Development across or impacting across council boundaries

Sometimes development will occur that extends across council boundaries or has planning impacts that extend across the boundary between two local government areas.

There are many examples of this – the major commercial and retail centre at Bondi Junction is one. Decisions made about development proposals in one council area may have a significant impact on existing or future development in the adjoining local government area. The concerns of both councils need to be considered in any decision making process about such developments.

D76. Should it be possible to constitute a Joint Regional Planning Panel with a single representative of each of the affected councils to consider and determine a significant development proposal that extends across the boundary between two local government areas?

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D77. If located entirely within one local government area, should a significant development proposal that is likely to have a significant planning impact on an adjacent local government area be determined by such a two council panel?

12.9 Exemptions from JRPPs

In some cases, a council's planning capacity and decision making may be sufficiently robust that a JRPP is not needed for that council. It was also suggested that, if there were to be JRPPs, councils should be able to apply to the Minister to be exempt from them.

D78. Should a council should be able to apply to the Minister to be exempt from a JRPP?

12.10 Aggregation of developments on different sites to attract the jurisdiction of a Joint Regional Planning Panel

In one community group's submission from Sydney's eastern suburbs, concern was expressed that an applicant had been permitted to aggregate the costs of several distinct and separate proposals, at separate sites owned by the same proponent. This enabled the total aggregated project costs to be brought above the threshold for the jurisdiction of the relevant Joint Regional Planning Panel.

This, it was suggested, enabled the applicant to avoid decisions being made by the local council in circumstances where the council would otherwise have been the determining authority. It was suggested that, had the council been the determining authority, one or both developments that were approved, in aggregate, by the Joint Regional Planning Panel might not have been so approved.

D79. Should aggregation of multiple proposals to bring them within the jurisdiction of a Joint Regional Planning Panel be banned if, separately, they would not satisfy the jurisdictional threshold?

12.11 Council resolutions to Joint Regional Planning Panels

During the course of one consultation forum, it was suggested that there was doubt about whether or not a council could pass a resolution concerning the merits of proposal being considered by a Joint Regional Planning Panel.

This concern was raised in the context that the assessment would be undertaken by the council's staff or a consultant but the elected council might wish to put a supplementary or contrary position that differed from that in the assessment report.

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D80. Should an elected council have the right to pass a resolution to supplement or contradict the assessment report to a Joint Regional Planning Panel?

12.12 The Central Sydney Planning Committee

During the course of the stakeholder consultation with the Council of the City of Sydney, the Central Sydney Planning Committee was discussed.

It was emphasised that this body performed a valuable role and should continue. However, it was noted that the committee had been formed by provisions in the *City of Sydney Act 1988* rather than under the Planning Act.

It was suggested that it was more appropriate that the committee should be established as a specialist Joint Regional Planning Panel under planning legislation, rather than left in the *City of Sydney Act*.

If this were to be the case, there would need to be special provisions to accommodate this Committee, particularly to accommodate the fact that it is not chaired by a state nominee but is chaired by the Lord Mayor of Sydney. It was not suggested during the discussions with the council's representatives that this position should change.

D81. Should the Central Sydney Planning Committee be established under legislation for a new planning system or should it remain established by a provision of the City of Sydney Act?

12.13 Council decision making processes

At a number of forums, the question was asked by a number of speakers whether elected councillors should have their role confined to setting policy. In this case, they would not make any decisions about specific development proposals of any type.

Others held a strongly contrary view, saying that councillors were elected and accountable for precisely a role in deciding developments in their own community. Any problems, they said, would be resolved by the ballot box.

D82. Should elected councillors make any decisions about any development proposals?

12.14 Giving reasons for a decision – general

At a number of community forums, concern was expressed that it was not always clear why a particular decision had been made. Specifically, it was sometimes unclear as to why the views of objectors had not been accepted.

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This was said to be because, at the time the decision was announced, adequate reasons were not provided as to why the decision had been reached, even in a summary or verbal form. This concern related to all levels of decision making, from the Planning Assessment Commission to elected councils departing from council recommendation to refuse a proposal (see below).

D83. What should be the requirement for a decision making body to give reasons for decisions – in particular as to why objections to a proposal have not been accepted?

12.15 Giving reasons for a decision – council approving a project recommended for refusal

During the course of one community forum, discussion took place about situations in which a council overrides a staff recommendation to approve a development proposal and resolves to reject it. In this situation, the council is obliged, in its resolution refusing the proposal, to provide reasons for that refusal.

On the other hand, if a council considered an assessment report that recommended refusal and the council approved it, the council did not have to provide reasons in its resolution that explained why the recommendation was rejected.

This was said to be an undesirable inconsistency. It leaves no publicly available basis to explain the reasons why the assessment recommendation had been rejected, and the proposal approved by the council.

D84. If a council resolves to approve a development proposal where the assessment report recommends rejection, should the council be obliged to provide reasons for approval of the development?

12.16 Who should be the consent authority for quarry applications?

Because of the potential for local controversy about quarry industry proposals and their broader public benefit, it was suggested that such developments should not be dealt with by councils. These should be dealt with by the Minister, a Planning Assessment Commission or a Joint Regional Planning Panel.

D85. Should approval of development proposals for quarries be removed from councils?

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13.0 Conditions on developments

13.1 Standard conditions of consent

Consistency in conditions of consent was raised on a number of occasions during the course of both the stakeholder and community consultation forum processes. A number of suggestions were made concerning the possibility of standard sets of conditions of consent being available, either as default conditions of consent or as standardised, mandatory ones.

D86. Should there be a range of standard conditions of consent to be incorporated in development approvals?

13.2 Public interest conditions

The power to impose a condition on development is limited by three tests that conditions must satisfy. These are known as the Newbury¹ tests. They are in the following terms.

- The condition must be for a planning purpose.
- The condition must fairly and reasonably relate to the development.
- The condition is not so unreasonable that no consent authority would have imposed it.

During the consultation process, it was suggested that conditions of consent should be able to be imposed that did not strictly relate to the proposed development but were in the broader public interest. This would involve replacing the second Newbury test to permit this to occur.

Such conditions might include provisions for community compensation funds for major impacting developments such as coalmines or wind farms.

It was suggested that community compensation should go beyond those affected in the immediate vicinity of such developments and be able to be used for broader community benefits within a local government area or region. Conditions should be able to be imposed on modification applications generally rather than only on matters arising from the modification sought.

The power to impose public interest conditions would also be necessary if there were to be an ability to require performance bonds, as discussed below. This is because these would arise out of past development rather than for the developments which the approval is being sought.

D87. Should new planning legislation make it possible for public interest conditions to be imposed that went beyond the conditions that immediately relate to a particular development?

¹ *Newbury District Council v Secretary of State for the Environment* [1981] AC 578

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13.3 Reviewable conditions

It was suggested that there should be an ability to revisit the conditions of consent imposed on an existing development to either:

- account for the cumulative impact of any new development
- impose reviewable conditions on new developments.

The Panel does not consider that it is appropriate to consider a retrospective right to impose changes on existing development consents. However, the following matters are examples of what may provide an appropriate basis for further consideration of existing conditions of consent:

- modification applications
- negotiations for the extension of the life of an existing mining consent.

Being unable to review conditions of development consent means that:

- changes in technology cannot be taken into account, particularly where the same economic output could be achieved
- further evidence-based information about the risks of particular activities cannot be taken into account.

D88. Should nominated conditions of consent be able to be reviewed at regular, specified intervals?

13.4 Climate change and time limited consents

During the course of one community forum, a suggestion was made during a discussion of the possible long-term consequences of sea level rises caused by climate change.

It was suggested that a new planning system should incorporate the possibility of very long-term, time-limited development consents. These would take account of projected rises in sea level and the impact that that might cause by inundation of coastal developments.

Currently, councils are faced with a choice between prohibiting development subject to such risks, or permitting such development knowing that it is likely to be inundated and being unable to do anything about it.

It was suggested that coastal councils might grant time-limited development consents in areas that were projected to be affected by long-term sea level rises. These development consents could be limited ~ 90 years, reviewable as science evolves.

D89. Should it be possible to grant a long-term time-limited development consent for developments that are potentially subject to inundation by sea level rise caused by climate change?

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13.5 Public positive covenants

During the community consultation process, the use by local councils of public positive covenants in favour of the local council (as an additional measure to enforce conditions of development consent) was raised.

It was suggested that the use of such covenants was a duplication of matters that were appropriate to be dealt with through the development consent process. As a consequence, they imposed an unnecessary expense. It was suggested that the use of such public positive covenants in favour of the council should be prohibited.

D90. Should consent authorities be prohibited from requiring public positive covenants as part of development approvals, if the matter could be dealt with by a condition of consent?

13.6 Performance bonds or financial sureties

At present, the imposition of conditions requiring financial performance bonds is limited. It is confined to financial bonds or sureties to ensure the protection of public assets such as footpaths, roads or street trees.

During the course of the community forums, discussion took place about imposing bonds or financial sureties on developments in the broad public interest but not relating to protection of public assets.

This concept arose in two distinct contexts.

The first was where a developer may have had an unsatisfactory performance history of compliance with development conditions. In this case, rectification costs might fall on an innocent landholder or, potentially, on a local council. Or, rectification of non-compliance or non-performance may not be able to be funded readily.

The second arose during the discussion, at a number of consultation forums, of what was perceived to be the differing treatment of mine sites and wind farms. Bonds or sureties are required for rehabilitation for mine sites. However, there is presently no ability to impose conditions to guarantee that wind farm turbines and infrastructure will be dismantled and rehabilitated when the wind farm ceases operating.

D91. Should new planning legislation make it possible to impose performance bonds or sureties unrelated to the protection of public assets?

D92. If so, should there be any restrictions on the reasons for which such bonds or sureties could be required?

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13.7 Imposing conditions requiring payment of charges imposed under the Local Government Act

Under the present system, a council is unable to impose conditions of development consent when these conditions require fees and charges to be paid according to the Local Government Act.

The issue that arose during community forums was whether or not new planning legislation should permit a condition to be imposed that the payment of such fees or charges is required.

D93. Should a new planning legislation system permit a council to impose a condition that requires payment of charges that would fall due under the Local Government Act?

13.8 Putting conditions on construction plans

It was suggested on a number of occasions that if the planning system is to go back to a development application based on concepts (with more detail required for construction approval), greater care will need to be taken with construction approval.

If the system of private certifiers is going to continue, the only time that councils will be able to impose conditions will be during the initial development assessment process. Councils currently do not have the power to impose conditions on construction approvals.

As a consequence of this limitation, in cases where a private certifier is giving construction approval, councils would need to be given the power to impose conditions on that subsequent construction approval. This would be part of the development assessment process.

If the council was engaged as the certifier, the council would be able to impose its own conditions.

D94. If there is to be a more concept based development application process, should councils have the power to impose conditions on construction approvals?

13.9 Compulsory condition of consent for EIS based development approvals

There is currently a mandatory requirement that a condition of consent require compliance with the Building Code of Australia. It was suggested in one community forum that, in the same way, there should be a mandatory condition for development proposals based on an environmental impact statement, that the development should be carried out in accordance with the Environmental Impact Statement.

The question that therefore arises is:

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- Should there be a mandatory condition of development consent for approvals based on an application supported by an Environmental Impact Statement that the development is carried out in accordance with that Environmental Impact Statement?

14.0 Infrastructure contributions

14.1 Community and State infrastructure contributions

The consultation process revealed that there is a real and significant tension within the present planning system about the level, purpose and scope of financial contributions levied to fund community and State infrastructure.

These are amounts charged for each new development, and are a proportionate contribution toward the cost of either:

- new community infrastructure
- State infrastructure.

Financial contributions charged for community infrastructure are collected by the council and are accumulated toward the cost of providing designated community facilities set out in a document known as a Contributions Plan.

At the present time, the State government has maintained a cap on community infrastructure charges. The cap is set at:

- \$20,000 for new infill development
- \$30,000 for allotments in new release areas.

These amounts are the maximum that can be levied by a council for these purposes.

State infrastructure contributions are pooled by the State Treasury and go toward the cost of providing broader State funded infrastructure. These State infrastructure charges have been temporarily reduced by the State government to about \$12,250 per lot for greenfield developments in Sydney's west (the amount is approximate, as it is levied on a per-hectare basis).

There is clearly widespread dissatisfaction with the present system and its ability to deliver community infrastructure in a timely and equitably funded manner.

Councils were concerned that, in many instances, the capped amount is too low, if the full cost of all the proposed community infrastructure works and facilities were to be met by new development.

On the other hand, the development industry considers that such caps represent an undesirable and upward impact on the costs of development and, consequently, on housing affordability for first home buyers in new release areas.

However, such caps represent a desirable method of controlling and limiting the price pressures that are exerted on housing affordability,

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These tensions are intractable and it is not appropriate, in our opinion, for us to pose questions about:

- an appropriate level for such contributions
- whether such contributions should be levied or not.

The answers to each of those propositions from the various interests are entirely predictable and, more importantly, are a matter for fundamental government economic policy.

It is, however, legitimate in this planning review process to pose questions about relevant process matters. This assumes that community infrastructure levies are to continue in a new planning system.

State infrastructure charges, we consider, must remain the exclusive economic policy preserve of the government. Thus, we have thus not posed any questions concerning them.

The Independent Pricing and Regulatory Tribunal (IPART) was given references in late 2010 that caused it to undertake an examination of the details of three community infrastructure contributions plans. These were prepared by councils in western Sydney and covered a proposed new residential release area.

IPART's examination of these plans involved an exhaustive analysis of the costings in each of the plans, which showed that very modest savings in the costings might be achieved. However, the analysis also demonstrated that, even with those costings taken into account, there was a very large shortfall between the amount that would be raised under the present contributions caps and the amount that was needed if all the identified works were to be constructed.

Whilst IPART set out a number of options, the scope of its references did not encompass making preferred recommendations on how the shortfalls should be met. They also did not encompass examining whether or not in those specific instances, a variation to the uniformly applying cap might be justified because of any special circumstances concerning the areas to which the contributions plans applied.

D95. Should IPART be given a general reference to examine and make recommendations about how any shortfall in development contributions plans for necessary community infrastructure should be funded?

Particular elements were taken into account in assessing these three contribution plans. These were those contained on a list of what were then determined to be appropriate works or facilities for which contributions should be levied.

D96. Should IPART be given a reference to make recommendations about what should be the extent, standard and nature of community infrastructure works that should be included in contributions plans?

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In the three contributions plans that were examined, the costs required ranged from approximately \$40,000 to \$70,000, if the whole plan were to be funded by such levies.

Presently, cap amounts are applied uniformly across release areas. This does not reflect differences in costings for the community infrastructure covered by the relevant plan.

D97. In light of the particular circumstances that might apply to the area covered in a contributions plan, should IPART be given a standing reference to enable councils to apply for variation to the cap on community infrastructure contributions?

As earlier noted, IPART's analysis of the detail of the three plans examined showed that minor savings ranging from 4 per cent to 7 per cent could be achieved by a rigorous analysis of the content of the plans.

In the overall context of the many hundreds of millions of dollars required to undertake the works identified in these plans, the savings probably fall within what might be regarded as the potential statistical sampling error. In addition, IPART has indicated that some further, minor construction savings might be able to be achieved.

D98. Is it reasonable to require IPART to undertake a detailed analysis of each contributions plan developed by councils?

D99. Would it be preferable to give IPART a general reference to develop an appropriate plan preparation methodology and approach to construction costing for community infrastructure contributions plans?

Development interests also raised issues concerning the timing of payment of such contributions. They suggested that delaying payments until later in the development cycle would assist to reduce holding costs and thus increase housing affordability.

Unsurprisingly, there was limited support for such a suggestion by council participants in the consultation process or in written submissions from councils.

D100. Should IPART be given a reference to make recommendations as to when community infrastructure contributions should be available? Should this include recommendations as to whether a delayed payment system should apply and, if so, at what development stages payment should be made?

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Concerns were also raised, not merely by development industry interests but somewhat more broadly, about the amount of accumulated community infrastructure contributions that were held by councils and were not being expended. An amount of over \$800 million was mentioned as reflecting the presently held accumulated, unexpended funds across NSW.

No information was given about individual council levels of accumulation. However, concern was also raised that the accounting processes were opaque and it was often difficult to find out how much money was held by each council and for what community infrastructure projects elements of that money had been collected.

D101. Should there be a requirement for councils to publish a concise, simply written, separate document on community infrastructure funds collected and their proportionate contribution to individual elements in the council's contributions plan?

Although councils accumulate money for community infrastructure on an apportioned basis, they do have the power to apply accumulated funds to particular projects in advance of the full cost being accumulated. They can do this in circumstances where works priorities will arise, which makes it more desirable to undertake some projects earlier than others.

However, it was suggested that some councils did not take sufficient advantage of this and that some funds were being accumulated by councils that could appropriately be expended earlier, providing needed stimulus to the civil construction and/or building industries.

D102. Should IPART be given a reference to consider whether or not guidelines and/or mandatory requirements should be set for councils about community infrastructure prioritisation and levels of community infrastructure funds permitted to be available?

14.2 The use of voluntary planning agreements to purchase additional development rights

Voluntary planning agreements were raised during a number of community forums and in written submissions. Concerns were raised about the use of voluntary planning agreements to obtain additional development entitlements, beyond those that would ordinarily be available for a particular site.

These concerns related to lack of transparency of criteria for assessing:

- acceptability of proposed departure from numerical limits

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- relevance to the local community of any benefits
 - lack of time available to the community to consider the terms of any proposed voluntary planning agreement
 - the inability of community groups, such as precinct committees, to be involved in the negotiation of or basis for any voluntary planning agreement.

On the other hand, concerns were also expressed by development interests that, in some instances, 'voluntary' planning agreements were not, in fact, voluntary. That is, that they were entered into because the development proponent was given a clear understanding that any proposal for departure from numerical limits, no matter how minor, was not likely to be approved if there were not to be such a voluntary agreement.

D103. Should new planning legislation make provision for voluntary planning agreements to permit departure from numerical limits that would otherwise apply to a development?

If it were to be concluded that a new planning system should incorporate provisions permitting voluntary planning agreements for these purposes, a number of further questions arise for consideration.

These questions are:

- What opportunities, if any, should be provided for community participation in the development of a voluntary planning agreement?
- Should there be a minimum public display period for any voluntary planning agreement before a council could enter into such an agreement?
- Should there be any limits to any departure from a development limit to be authorised by a voluntary planning agreement?

14.3 Appeals against reasonableness of development contributions

At the present time, it is possible to appeal to the Court against the reasonableness of the nature or amount of a contribution, when this contribution is imposed on a developer according to a plan made under the Planning Act.

Councils were concerned that this undermined their contributions plans. As discussed above, it is possible that one result of this Review will be that the role of the Independent Pricing and Regulatory Tribunal will continue, in some form, to scrutinise and approve the reasonableness of contributions plans imposed under the Planning Act.

D104. Should any appeal be allowed against the reasonableness of a development contribution, if it has been approved by the Independent Pricing and Regulatory Tribunal?

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14.4 Developer contributions for development modifications

At the present time, developer contributions are charged for development approvals but not for modification applications. Council representatives questioned whether this was fair. Whilst many modifications do not add to the demand for community facilities, some residential modifications will satisfy the tests of increasing the demand for those facilities. Modification to non-residential development may also increase the demand for community facilities by increasing the workforce in an area.

D105. Should developer contributions apply to modifications of approved development?

14.5 Regionally-based community facilities

During the course of one community forum, it was suggested that options should be considered for regional community facilities that might be funded by developer contributions rather than being provided on a single council basis.

This might permit a lower cost to the individual council of a shared facility. Alternatively, the combined facility cost were lower, a larger and more substantial joint facility might serve the needs of combined communities.

D106. Should regional joint facilities funded by developer contributions shared between councils be encouraged?

15.0 Making changes to an approved development

15.1 Modification applications – general

The main issues raised during the community forums concerning modifications to approved proposals were the following:

- What scope of changes is appropriate for a modification application?
- When should changes be considered so great that a new development application should be required?

Some submissions proposed that new planning legislation should define the scope of modification applications more clearly.

Another issue related to modification applications included concerns about incremental modification applications being used to increase the size of a development.

D107. What should be the permitted scope of modification applications?

D108. Should there be a limit to the number of modifications applications permitted to be made?

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15.2 Modification applications – retrospective approval

Concerns were raised that modification applications can be used to get retrospective approval for changes to development that has already been built without approval.

This enables quite big changes to be approved after they have been built – provided the development is essentially the same development as that originally approved.

Councils are reluctant to refuse modification applications for work that has been already done because of the difficulty in getting unapproved works demolished. Refusing to give retrospective approval to work that has already been constructed does not mean that the unapproved work has to be demolished. However, councils have to go through a cumbersome and often expensive legal process to get other authorised work demolished. Courts are often reluctant to order demolition, as well.

This means that impacts on the community or neighbours can be increased retrospectively with little risk to the developer of the changes not being approved retrospectively.

D109. Should any modification be able to be approved retrospectively after the work has been done?

D110. If so, should retrospective approval be confined only to minor changes and not more substantial ones? Should this be the case even if major changes leave the development substantially the same development as the one originally approved?

15.3 Modifications to Planning Assessment Commission or Joint Regional Planning Panel approvals

Some questions were raised about modification of approvals given by the Planning Assessment Commission or a Joint Regional Planning Panel.

Major changes should be dealt with by the Planning Assessment Commission itself. However, this is not the case for minor changes that will have little or no potential impact that needs to be considered.

There should be a simple process that lets the Planning Assessment Commission or a Joint Regional Planning Panel deal with minor modification proposals without the need for a public hearing. Bigger modification applications should have a public hearing.

In addition, for minor modification applications, where there is not likely to be any impact, these might all be delegated to the local council (as presently can be done for Joint Regional Planning Panel modification applications).

D111. Should minor modification applications made to Planning Assessment Commission or Joint Regional Planning Panel approvals be decided without a public hearing?

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D112. Should councils be able to deal with minor modification applications to major projects?

15.4 Modifications that breach a numerical limit

At the present time, a development application that asks permission to breach a numerical control in a local environmental plan has to satisfy the special tests before it is permitted to do so.

Those special tests do not apply to modification applications that either:

- breach such a limit
- increase an already permitted breach of such a limit.

Concerns were raised that the special tests apply to the initial application but not to any modification of an approved application made later. It was suggested that this encourages applications that do not initially propose any breach of a numerical limit, because applicants know that it is easier to apply for a subsequent modification.

D113. Development applications that propose breaches to (or increases in breaches to) numerical limits in local environmental plans are subject to special tests. Should modification applications be subject to these same special tests?

16.0 Matters relating to consents

16.1 Lapsing of development consents

At the present time, a development consent will lapse if the development has not been 'substantially commenced' by the end of the time expressed in the consent for it to be operative – a period of up to five years (depending on how long, in the past, the consent was granted).

The test of whether there has been 'substantial commencement' has been the subject of considerable litigation over the years. Court decisions have determined that as little as a survey of the land, with the placing of a range of surveyor's pegs, can constitute substantial commencement. Once a development has 'substantially commenced', in this legal sense, there is no time-based obligation to undertake further work as the development consent remains 'alive' and valid indefinitely.

During the course of the community forum consultations, concern were expressed that this test was flawed and not sufficiently stringent. This was because it enabled minimum work to be undertaken whilst preserving what some might regard as a speculative development consent – effectively in perpetuity.

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It was suggested that a more stringent test should be applied. This would mean that sufficient and significant activity must be undertaken on the development. This activity would, effectively, guarantee that the development would proceed to completion within a reasonable period of time.

D114. Should the 'substantially commenced' test for ensuring the ongoing validity of development consent be retained?

D115. If the present test was not retained, what new test should replace it?

16.2 Time periods before lapsing of a development consent

During a number of the community forums, issues were raised concerning the time period for which development consents remained operative. The comments raised a range of unconnected and, in some instances, conflicting suggestions.

First, it was suggested that there was a need for a longer period of time within which to commence development if the development was in a rural zone. This was necessary to reflect the climatic and commodity price vagaries of rural occupations. In addition, it was suggested that development proposals related to agricultural activity are expected to be relatively minor and have less of an impact.

A different suggestion, made at another consultation forum, related to the period of time for which approval is given. Currently, an approval can be given for a period of less than the maximum period of five years. This period can be extended for up to a further year, as long as the extended period does not exceed the maximum five-year period.

In the view of the person raising the issue, this is unduly complex. It was suggested that there should not be an ability to grant a development consent for any period that was shorter than the maximum period within which development had to be commenced

D116. How long should development consents last before they lapse?

17.0 Certifying compliance of development

17.1 Private certification

Private certifiers are, unsurprisingly, strongly in favour of a continuation of their role in the planning and development process and, equally unsurprisingly, advocate expansion of that role. For the most part, development interests are also supportive of the role of private certifiers for reasons that generally related to their responsiveness and speed.

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On the other hand, a wide range of questions were raised by others, across a broad spectrum of perspectives, about:

- the adequacy of supervision of private certifiers
- the expressed perception that, because they were paid by a developer, they were more likely to turn a blind eye to unapproved departures from the development consent plans without approval of a modification
- inadequate penalties imposed on certifiers who permitted significant unapproved variations to projects.

Although there were very significant frustrations expressed concerning the private certification process, limited enthusiasm was expressed for a return to a council-only inspection and certification system.

As a consequence, this discussion paper does not advance for consideration any question as to whether or not a private certification system should be abandoned.

The questions posed below reflect a wide spectrum of perspectives. Some may be perceived as pro-certifier and others as anti-certifier. This, of necessity, reflects the nature of the issues raised during both the stakeholder group and community consultation forum discussions.

D117. Should private certifiers have their role expanded and, if so, into what areas?

D118. Should private certifiers be permitted, in effect, to delegate certification powers to other specialist service providers and be entitled to rely, in turn, on certificates to the certifier from such specialist professions?

D119. Should certifiers be required to provide a copy of the construction plans that they have certified (as being generally consistent with the development approval) to the council to enable the council to compare the two sets of plans?

D120. Should there be a requirement for rectification works to remove unacceptably impacting non-compliances when these are actually built rather than leaving an assessment of such non-compliances to either a modification application assessment or to the Court on an appeal against any order to demolish?

D121. What statutory compensation rights, if any, should neighbours have against a certifier who approves unauthorised works that have a material adverse impact on a neighbouring property?

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17.2 Changes to development approval plans

One frequently raised issue related to private certifiers approving modified construction certificate plans.

There was concern about the extent to which private certifiers approved construction certificate plans with variations to building form, layout or footprint. Specifically, there was concern when these variations went significantly beyond that which would be consistent with the development consent.

It was frequently suggested that such variations were being permitted without requiring modification of the development consent. Thus, there was no notification to the Council or to those potentially adversely impacted by such variations.

Many concerns were expressed that the present planning system permits private certifiers to make changes to plans that are approved in a development consent. They can do this provided the resulting construction plans are 'generally consistent' with the development approval.

The comment was repeatedly made that this was being applied with an entirely inappropriate degree of flexibility by some certifiers. This meant that unacceptable changes are being made to plans that would not have been approved if incorporated in the original development application. This often made it impossible to rectify adverse impacts on neighbours.

D122. Should construction plans be required to be completely the same as the development approval and not permitted to be varied by a private certifier for construction purposes?

17.3 Choosing a certifier

Concern was expressed that developers choosing their own certifier leads to biased processes.

The frequency of this complaint during the consultation process reflects the fact that it is the primary reason for discontent with the private certification process. However, it was generally acknowledged throughout the consultation process that this behaviour arose from the practices of a minority of private certifiers.

The complaint was raised frequently, by both council staff and community members at a wide spread of locations. This made it clear that the problem was not confined to a narrow range of geographically confined locations, nor could it be said that it was confined to a limited range of potentially identifiable certifiers.

These complaints also led to frequent suggestions that there should be a mandatory 'cab rank' approach. In this approach, a development proponent wishing to use a private certification process would be obliged to accept a certifier assigned to them from a rotating list. This list would be maintained either by the Building Professionals Board on a regional basis or by the relevant local council.

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Where there might only be one certifier, as is the position in some of the regional areas of the State, it was suggested that this certifier and the local council should receive alternate appointments to undertake certification of projects.

It was suggested, frequently, that this requirement to 'take the first cab off the rank' would address a perceived inappropriateness in the system. Specifically, that giving permission to a person undertaking development to choose their own certifier would result in a captive and compliant certification process. This has been characterised metaphorically as being a process in which 'he who pays the piper calls the tune'.

D123. Should developers be permitted to choose their own certifier?

18.0 Other matters relating to development

18.1 Ensuring compliance for major projects

It was suggested that the role of the Department undertaking compliance inspections using its small coalmining compliance inspectorate based in Singleton should be extended across a wider range of projects assessed and recommended for approval by the Department.

D124. What should the Department's compliance inspection role be?

18.2 Occupation certificates

Two types of occupation certificates can be issued by a development's certifier.

An Interim Occupation Certificate can be granted when the project is sufficiently complete for it to be used, but other work remains to be completed. With an Interim Occupation Certificate:

- There is no obligation to complete the project.
- There is no time limit on the operation of the Interim Occupation Certificate.

In effect, the Interim Occupation Certificate can act as an informal Final Occupation Certificate for a project that remains incomplete.

D125. Should Interim Occupation Certificates have a maximum time specified and, if so, how much time should this be?

A Final Occupation Certificate certifies that the work is completed but it does not require the certifier to say that the work has been undertaken in accordance with the

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development consent.

This means that there is no way the council and local community can be satisfied that the development has been undertaken in accordance with the approval as originally given.

Councils have no legal obligation to act on complaints, as investigating complaints about certifiers or builders are not the council's legal responsibility. Councils only act on complaints if they choose to do so.

D126. Should a certifier issuing a Final Occupation Certificate be required to certify that the completed development has been carried out in accordance with the development consent?

18.3 Coordination with Commonwealth approvals

Some development proposals also require approval under Commonwealth legislation known as the *Environmental Protection and Biodiversity Conservation Act 1999*. Getting this approval presently requires submission of a Commonwealth application. This process can add delay and cost to the development approval process.

Proper environmental studies supporting a strategic planning process, if undertaken with sufficient rigour, may provide a basis for the Commonwealth government delegating these approvals to State authorities or councils.

This would be a significant step in removing unnecessary costs duplication and delay for projects requiring approval under the Commonwealth Act and under State threatened species legislation.

D127. What might be done to have power delegated by the Commonwealth to State authorities or councils to give approval under the Commonwealth Act?

18.4 Guidelines for the role of councillors in the planning process

During several community forums, it was suggested that there was inadequate information provided to local councillors about the nature of their role in the development assessment and determination process.

Unsurprisingly, the nature of the guidance that was proposed should be provided to councillors varied markedly depending on whether or not the speaker believed that councillors should have a determining role for such proposals or should be confined to a policy development and setting process.

D128. Should there be a guide prepared to explain to councillors what their roles are in the development proposal assessment and determination process and how it is appropriate that they fulfil that role?

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D129. If there were to be such a guide prepared, who should have the responsibility for its preparation and what participation and consultation processes should be undertaken in its development?

18.5 Aggregated developments in mine subsidence areas

During the course of the community forum in Newcastle and in the stakeholder group consultations that had preceded it, issues relating to the difficulties in revitalising parts of Newcastle’s central business district were raised. These difficulties arose as a consequence of the extensive network of unmapped, historically old underground mine workings under the CBD.

As a consequence of the risks of subsidence, significant stabilising work is required to be carried out prior to redevelopment in these locations. Quite significant volumes of concrete are required to be placed into the disused mine workings. This is both for stability of new structures and because risk of subsidence extends beyond single sites proposed to be redeveloped.

This means that a development proponent would need, if doing the first redevelopment of a site within a city block the within the CBD, to undertake remediation beyond the site boundaries.

This would effectively provide a significant subsidy to those who followed, particularly as the volume of concrete required to be placed into the mine workings would provide benefits significantly beyond the site of the proposed redevelopment.

The practical effect of this is that no one is prepared to undertake such a redevelopment because of the significant underpinning costs and the inability to recover the transferred benefit to adjacent sites that would result from stabilising a single site.

This could be remedied, if it were to be possible to levy some form of charge across the totality of a city block in the CBD, so that there was proper cost apportionment across all the beneficiaries of such underpinning. Further, as we understood it, planning for and coordinating stabilisation across the whole city block was also considered desirable. This could be done using a legislative base provided within a new planning system.

D130. Is it appropriate to consider, in legislation for a new planning system, providing a statutory basis for spreading the cost of a necessary rehabilitation or stabilisation measure across all property ownerships benefited by such a measure?

18.6 Community engagement after approval

A number of mining projects have established community consultation committees

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with, at least in some instances, an independent chair. Issues were raised, during some of the regional community forums, about the nature and functions of such bodies.

Concern was expressed that, if such bodies were established by the project company on a purely voluntary basis, there was no performance monitoring or ability to mandate the activities of such bodies. This was because they had not been established by any conditions of consent attached to the project approval.

As these were voluntarily established, public provision of information to satisfy the 'right to know' aspiration of local communities is also a matter appropriate for consideration by the Review.

D131. Should there be specific statutory obligation to require the establishment of (and the procedures for) community consultation forums to be associated with major project developments?

18.7 Calculating fees

Three diverse issues arose in respect of development application fees during consultation.

- The first was whether calculations of fees based on the estimated cost or value could be more accurate if a quantity surveyor's report was required to accompany applications for large projects.
- The second issue raised was whether a portion of the assessment fees for State significant development should be allocated to councils to fund their submissions on the proposal.
- The third was the fact that council development application fees were not reviewed at regular intervals. Indeed, we were informed that the most recent review had been preceded by many years without any adjustment of these fees.

D132. Should a quantity surveyor's report be required to accompany applications for large projects?

D133. What fees should councils receive for development applications?

D134. When and how should council development application fees be reviewed?

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APPEALS AND REVIEWS; ENFORCEMENT AND COMPLIANCE

When it was introduced in 1979, the *Environmental Planning and Assessment Act* was characterised by accountability through rights of appeal and review. The extent of rights to appeal or seek reviews of decisions has, however, remained a matter of controversy since that time

During both phases of consultation, the NSW Planning System Review Panel sought comments about processes for, and availability of, the following:

- appeals and reviews of decisions
- enforcement and compliance.

1.0 Appeals

Appeals in this context relate to legal proceedings which can include:

- appeals against the merits of a decision
- those seeking judicial review of a decision (where there has been an error in the process of making the decision).

Currently, appeals can be available for applicants or third parties. Whether or not an appeal is available can vary depending upon:

- the type of decision made
- who made the decision
- the type of development or application
- when the appeal is made
- who is seeking to make an appeal.

In relation to appeals, frequent themes that were raised during consultation included questions about:

- the role of concurrence authorities
- a role for joint regional planning panels in reviews
- rezonings
- open standing
- third party appeals
- costs.

E1. What appeals should be available and for whom?

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1.1 Open standing

Currently the Act provides for 'open standing' in respect of restraining breaches of the Act. This means that anyone may appeal to the Court if they think a process in the Act has not been followed properly and if they think there has been a breach of the provisions in the Act.

Generally, there was widespread support for including a similar provision in new legislation. However, there were some submissions that suggested that there should be limitations. For example, one suggestion was that only those who could demonstrate a direct interest in the subject of the appeal should be able to commence proceedings.

E2. Should anyone be able to apply to the Court to restrain a breach of the Act?

1.2 Objector appeal rights

Currently the Act provides third party merit appeals in limited circumstances. The range of opinions on this issue ranged from those who thought these appeals should be available for all merit decisions without limitation, to those who thought that there should be no third party merit appeals at all.

Some suggestions included:

- A threshold test. For example, merit appeal rights might be available for third parties only where they have made a submission on the proposal during the assessment period.
- Appeal rights should only be available to those who live close to a proposed development, or who will experience its direct impacts.
- Appeal rights should only be available if a proposed development does not comply with development standards in a local environment plan.

There was also a related question as to what role objectors could have when an appeal is made by an applicant, or when proceedings are brought by a consent authority. Should third parties have a broader right to be heard in these proceedings than they currently have?

E3. In what circumstances should third party merit appeals be available?

1.3 Approval bodies and concurrence authorities

There was a concern that councils are incurring legal costs for defending decisions with which they do not agree.

For example, at one community forum, the issue was raised as to what should happen

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if a council wished to approve an application, but an approval body or a concurrence authority had a different view. It was suggested that if the applicant chose to appeal a refusal in this instance, the respondent in the proceedings should be the concurrence authority or approval body, rather than the council.

Similarly, the following question arises: if a concurrence authority has not provided a timely response and an application has been deemed as refused, should the concurrence authority be the respondent in proceedings, if council would otherwise have approved the development?

E4. Should approval bodies or concurrence authorities be the respondent to some appeals?

1.4 Time limit for appeals about local environmental plan provisions

If there were a right to appeal about local environmental plan provisions, there must be a time limit after which such an appeal could not be made. This would function to remove uncertainty about whether a plan was valid.

E5. What should be the time limit for any appeal about LEP provisions?

1.5 Costs orders

Currently, the Act provides that when plans are amended during proceedings, the Court **must** make an order that the applicant is to pay the costs incurred as a result of the amendment.

This provision aims to encourage applicants to save time (and money) by amending their plans before going to court. Previously, the provision required an applicant to pay all costs if plans were amended during proceedings.

Questions related to this included:

- If plans are amended, should the applicant again be required to pay all costs?
- If amendments minimise impacts of the proposed development, should the applicant be required to pay costs?
- Should there be any limit on the Court's discretion to make costs orders at all?

E6. Should the Court have absolute discretion as to costs orders? Or should the Court's discretion be limited and, if so, in what respects?

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1.6 Appeals against reasonableness of development contributions

Currently, it is possible to appeal to the Court against the reasonableness of the type or amount of a contribution imposed on a developer, according to a community infrastructure contributions plan.

It is possible that one result of this review will be that the role of the Independent Pricing and Regulatory Tribunal will continue, in some form, to scrutinise and approve the reasonableness of contributions plans imposed under the Planning Act.

E7. Should any appeal be allowed against the reasonableness of a development contribution if it has been approved by the Independent Pricing and Regulatory Tribunal?

2.0 Reviews

Reviews are considered distinct from appeals, as they are not undertaken in the Court.

Currently, the Act provides for a range of different reviews. In most instances, though, a reviewing body does not have the power to re-make the decision. For development applications and modifications, however, a matter can be re-determined on review. Councils or delegates of councils conduct these types of reviews.

Reviews are cheaper than lodging an appeal to the Court and are usually quicker. In the current system, reviews also do not replace the right to appeal to the Court.

Submissions raised the following questions:

- Should a review decision be final?
- Should a review decision be able to be appealed to the Court?

The submissions also raised questions about whether there might be scope to introduce reviews for other types of decisions – such as rezonings or whether a project is a State significant development – where a reviewing body would have power to re-make these decisions.

E8. What sort of reviews should be available?

2.1 Independent review

Reviews are usually undertaken by someone other than the original decision maker. However, in the present system, if a development application was determined by the council (and not a delegate), the council conducts the review.

The City of Sydney has set up a Small Permits Appeals Panel. This panel comprises the Deputy Lord Mayor, a senior officer of the Council and an appropriately qualified independent member. Its characteristics are as follows:

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- It constitutes an inexpensive internal appeal process for reviews.
- Its decisions are binding on the Council.
- It does not review decisions by the Councillors but does review ones made under delegation.

Submissions received suggested that there may be a role for independent bodies to review decisions that were made by the elected councillors. These independent bodies might include:

- Independent Hearing and Assessment Panels
- Joint Regional Planning Panels
- the Planning Assessment Commission.

E9. Who should conduct a review?

2.2 The role of objectors

In relation to objectors, submissions raised the following questions:

- Should third party objectors have a right to be heard or to make a submission during a review?
- Should objectors have the right to initiate a review of a decision?
- Should there be somewhere other than the Court for objectors to seek a review of a decision?

The question of whether reviews might be available for third parties also raises questions of cost:

- Should objectors have to pay for the costs of the review?
- Should a reviewing body have the power to determine who should pay for a review?

E10. What rights should third parties have about reviews? And what provisions should apply regarding the costs of the review?

2.3 Recommendations by the Planning Assessment Commission

If the Planning Assessment Commission made recommendations, those recommendations should be open to some form of review.

E11. How might recommendations by the Planning Assessment Commission be reviewed?

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3.0 Enforcement and compliance

When a party seeks to restrain, remedy, or prevent non-compliant or inappropriate development or activities, the current Act provides for a range of orders, processes, monitoring provisions and appeal rights.

The key issues of concern raised at the forums in relation to penalties and orders included:

- third party rights
- the liability of private certifiers
- the accuracy of data supplied for monitoring purposes.

3.1 Penalties

At one community forum, it was suggested that the current penalties for carrying out development without consent or for non-complying development were not large enough to be effective deterrents.

For example, section 122 E prescribes large penalties – \$250,000 for a corporation or \$120,000 for an individual – while section 188 N only prescribes 20 penalty units.

E12. Do some present penalties need to be increased?

3.2 Orders

Councils currently have the power to issue a wide range of orders to control, rectify or prevent the impact of illegal or unapproved development, to protect the community.

At one forum, it was suggested that orders should be able to be issued to control activities that have a visual impact. The examples given were for council to have the ability to:

- issue a demolition order for derelict buildings that affect the streetscape
- order cleaning up an unsightly property even if there were no health or fire risk.

Participants at other forums raised the current special provisions relating to illegal or unapproved backpacker hostels and brothels. It was suggested that, where there are illegal or unapproved uses that cause a significant negative impact on amenity, early and special statutory intervention should be allowed to force institutions to cease their operation.

It was suggested that all such activities should be subject to special order provisions, similar to those currently provided for illegal or unapproved brothels. Legislation should not single out special closure orders against brothels but should be available against all illegal or unapproved uses causing significant adverse impacts on amenity.

At several forums, concerns were also expressed that, once a development had commenced, there was no way to require it to be completed. It was suggested that, in some instances, this led to inappropriate occupation of partially completed structures

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or unsightly partially completed structures from which the developer may have walked away.

It was suggested that a council should be able to require the owner of the site to complete the development. If a completion order was not obeyed, the council should be able to demolish a partially completed structure and recover the costs of doing so.

E13. What new orders should there be or what changes are needed to the present orders?

3.3 Improving enforcement

A concern that was expressed a number of times was the cost of enforcement for councils. As a result of the Court overturning orders which were not drafted with precision, it was expressed that some councils were now reluctant to issue orders in case the matter escalated to a court appeal.

Suggestions relating to this included:

- making available a standard template order notice and accompanying correspondence for all consent authorities to reduce the risk of technical legal challenges
- providing statutory protection that would mean an order could not be challenged because of technical drafting defects if the intention was clear.

Another very common issue raised at a number of forums was that of the costs incurred by councils in pursuing non-compliance when a private certifier has certified the unauthorised work.

It was suggested that councils should be able to recover costs from the private certifier for any inspection and enforcement activities when unauthorised works have been certified. It was also suggested that councils should be able to serve the order requiring remedial works, demolition or otherwise on the certifier.

E14. How can enforcement be made easier and cheaper for consent authorities?

E15. Should councils have a costs or other remedy against private certifiers in certain circumstances?

3.4 Reviewable conditions for monitoring and compliance

Currently, there are a number of conditions that require monitoring and reporting. The Act prescribes offences related to complying with these conditions.

One issue raised at the forums related to the data provided when complying with these kinds of conditions. Participants pointed out that:

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- this data is often not in a form which allows a consent authority or the public to properly analyse it
 - the conditions that require the data do not specify in enough detail in what form the data should be submitted.

It was proposed that it should be possible to:

- review consents to impose more rigorous or more specific reporting requirements
- amend consents to reflect changes in scientific opinion.

E16. Should monitoring and reporting conditions be reviewable?

3.5 Private certification and third parties

Third party involvement in compliance was raised in the context of private certification. Currently, the Building Professionals Board has the ability to take disciplinary proceedings against building certifiers who contravene the Act. One question asked was whether the Building Professionals Act 2005 should provide third party appeal rights for appeals against the decisions of the Building Professionals Board in disciplinary proceedings.

E17. Should there be an appeal right for third parties in proceedings against private certifiers?

3.6 Revocation of development consents

At the present time, a development consent can be revoked only on a limited range of grounds. At one community forum, it was suggested that a council should have an unfettered right to decide to revoke a development consent, provided that proper and appropriate compensation was paid to reflect the loss of the consent.

E18. Should a consent authority have a wider right to revoke a development consent?

4.0 A 'best endeavours' defence for councils?

At several community forums, concern was expressed about circumstances where a council may have made an error that had, in some fashion, had an impact on another party but where the council had used its best endeavours to comply with the relevant statutory requirement.

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Two examples were given of when this may have occurred.

- The first related to a failure to carry out, completely, the relevant notification processes prior to approving a development.
- The second arose out of the fact that councils were given little or no warning that changes needed to be made to the terms of planning certificates, as a result of changes to State environmental planning policies.

The issue of potential liability was raised in relation to persons who may have relied on an incorrect planning certificate prior to it being corrected.

E19. Should councils have a statutorily created 'best endeavours' defence?

5.0 Right of entry for council officers

At the present time, council compliance officers undertaking inspections to see if unapproved or illegal development has taken place do not have any right of entry to enter into and inspect a property or development for this purpose. They are also unable to access external databases, such as vehicle registration databases, for this purpose.

However, council compliance officers do have rights of entry available under the *Local Government Act 1993* for other enforcement or compliance inspection purposes.

E20. Should council compliance officers be given rights of entry and inspection and of access to official databases for compliance and enforcement inspections under planning legislation on the same basis as they have such rights under the Local Government Act?

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IMPLEMENTATION OF THE NEW PLANNING SYSTEM

F

A statutory framework is one element that will ensure that a new planning system commences effectively. Implementation measures must also be developed, however, and must be considered by government.

Some of these measures will be of a transitional nature. Others may require structural change, financial and/or staffing reallocation from within the existing structures, or supplementation of the financial and staffing resources already available.

During the course of the community consultation process, the Panel expressly noted that there were not likely to be significant budget increases available to support implementation measures. As a consequence, implementation recommendations would need to be of modest budget cost. Alternatively, they would need to be able to be implemented progressively over a number of years if a larger commitment is needed. This might be the case, for example, for increased use of information technology.

The implementation of a new planning system will be key to its success. During the consultation, a number of suggestions were made on how to implement the new system effectively.

The role of the Department in the implementation of the new planning system

The Department plays the role of administering some aspects of the planning system, for example:

- assessing State significant development proposals
- supporting councils in preparing environmental planning instruments
- developing policy, such as strategic planning
- performance monitoring of local government development assessment practices.

A number of councils, community members and industry bodies stated that a lack of resourcing within the Department contributed to the delayed progression of planning proposals and State significant projects.

Regional councils expressed the need for the Department to provide greater support. This could be the provision of technical expertise and explanatory information to assist the council in implementing the system.

One of the suggestions was that the Department should have a system of seconding professional staff to councils, to supplement the skills within the council when a specific need arose, such as the development of a new local environmental plan.

It was also suggested that the Department establish a regional trainee planner scheme, which would not only serve the purpose of meeting the skills shortage of planners in rural areas, but would also provide planners with skills and experience in rural and regional issues.

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F IMPLEMENTATION OF THE NEW PLANNING SYSTEM

In addition, there was a perception that there is a centralisation of power within the head office of the Department. This was perceived as contributing to the costs in the process and delays in decision making due to the need to travel to Sydney for meetings.

It was suggested that there should be:

- more delegation of decision making from the Department's head office
- greater resourcing of regional offices.

There was strong support to increase the capacity of the Department in regional areas.

F1. What should be the role of the Department in implementing a new planning system? Should the role and resourcing of regional offices be embraced? And, if so, in what respects?

The role of councils in implementing a new planning system

The local council is often the first and sometimes the only point of interaction with the planning system for most people. Because of this relationship, it is likely that the council will play a large role in assisting community members in their interaction with a new planning system.

Presently, councils administer:

- assessment and determination of local and regional development proposals
- preparation of local environmental plans and development control plans
- compliance and enforcement functions.

Other chapters in this paper discuss potential roles for councils in the implementation of the system, such as a statutory pre-development application lodgement process.

F2. What should be the role of the council in implementing a new planning system?

Changing the culture of the planning system

An issue raised at forums about the present system was the lack of community focused education materials about the planning system. People submitted that this had led to a lack of community ownership of the system, which has reduced active community participation. Understanding and public ownership of the new system will be key to its successful implementation and ongoing effectiveness.

One of the suggestions to improve a sense of community ownership of the planning system is to provide practical guides to various aspects of the planning system. These should be written in plain English, and should include information on how to lodge an objection to a development proposal.

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Another suggestion made at a regional forum was that it might be useful if information and educational resources were provided to councillors, in particular to those with a non-planning background.

F3. What can be done to ensure community ownership of a new planning system?

Encouraging public participation

A general concern raised was the challenge of increasing public participation in the strategic planning processes and encouraging input from a more diverse cross section of the community.

The statutory process of public participation is covered elsewhere in this paper. This issue, however, deals with ways to encourage broad community engagement, for example:

- conducting community workshops
- holding stalls in local shopping centres to seek community input into strategic plans.

It was raised that by simply requiring strategic plans to be exhibited and requesting submissions, the consultation process did not reach a truly representative selection of the community.

F4. What actions can be undertaken by bodies preparing strategic plans to increase community engagement with the planning system?

Better co-ordination

Another practical concern was the lack of cooperation between stakeholders such as

- government agencies
- councils
- the community
- developers.

A number of suggestions were made as to how better cooperation and co-ordination could be facilitated.

For example, in the recent review of the planning system in the United Kingdom, the new legislation introduced a 'duty to cooperate' in planning for sustainable development. This statutory duty requires stakeholders such as councils and government agencies to engage constructively, actively and on an ongoing basis in co-ordinated planning processes.

ITEM 8 (continued)

ATTACHMENT 1

F IMPLEMENTATION OF THE NEW PLANNING SYSTEM

Another suggestion is the establishment of an urban development committee of Cabinet, with a supporting committee of relevant heads of government agencies. This committee would coordinate government agencies' involvement in the process of major urban land release projects. Such a committee existed in the late 1980s and 1990s, and coordinated the provision of services such as water, sewerage and electricity as well as overseeing the necessary strategic planning.

F5. What changes can be put in place to ensure more effective cooperation between councils, government agencies, the community and developers within the planning system?

Ensuring probity in the planning system

A number of suggestions were made as to how to improve probity within the system. These submissions proposed:

- requiring an independent person to be present during meetings between planning staff of the Department or council with developers or registered lobbyists
- requiring an independent overseer to manage the preparation of voluntary planning agreements.

F6. What checks and balances can be put in place to ensure probity in the planning system?

Application of information technology to a new planning system

When the Review was established, the Minister expressly indicated that information technology was to be integral in establishing a new planning system.

The two relevant areas are:

- integration of the publicly held databases so that the maximum amount of information concerning any parcel of land is available through a simple-to-use internet portal
- maximising the use of electronic lodgement of (and public accessibility to) applications seeking approval for development.

F7. How can information technology support the establishment of a new planning system?

ITEM 8 (continued)

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Monitoring and evaluating objectives

It was highlighted by a number of stakeholders that the present planning system does not include mechanisms for monitoring and evaluating how well the objectives of the Act and environmental planning instruments are being achieved.

As an example, it was suggested that if the new legislation is to include an objective to encourage affordable housing, there should be a reporting requirement to monitor the number of building starts for affordable housing projects.

One issue with this approach is that not all of the objectives of the planning system will be measurable in a quantitative manner. A reporting framework may need to include reporting aspects which are qualitative. Another idea is to ensure independence of evaluation by requiring reporting to an independent body.

F8. Should the new planning system contain mechanisms for reporting on and evaluating objectives of the legislation?

The planning system in a multicultural society


At present, the Planning Act, and the planning system generally, operate in an English language based system. This does not reflect the multicultural diversity of the State.

F9. How should information about the planning system be made more accessible in a multicultural society?

ITEM 8 (continued)

ATTACHMENT 1

LETTER TO INDEPENDENT CHAIR OF LOCAL PLANNING PANEL



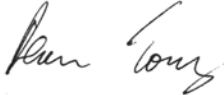
NSW
GOVERNMENT

Planning System Review

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25th November 2011



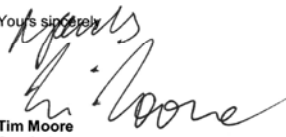
As you are aware, we have been commissioned to undertake a review of the New South Wales planning system and to recommend legislation to replace the *Environmental Planning and Assessment Act 1979*. As part of this process, we have recently completed an extensive consultation process involving meetings with stakeholder groups and holding a series of community consultation forums across the State. During the community forum process, we visited 44 different regional and metropolitan locations and conducted 91 consultation forums. In addition, we received over 300 individual submissions from a wide range of perspectives.

During the course of the community forums, you will not be surprised to know that a wide range of a quite specific matters were raised concerning detail in (and the process for the implementation of) new Local Environmental Plans being developed using the Standard Instrument template.

The nature of our review process is such that we are unable to consider, at the level of detail that would be involved, these specific matters. In addition, as we understand the role of your Panel, many (if not all) of them would fall within the scope of your Panel.

As a consequence, during the period after the release of the issues paper arising from our consultation process and the public submissions, we will be extracting for your Panel a summary of those matters that we perceive fall within the scope of your deliberations. We expect to be able to provide material to you by about the end of January 2012.

Yours sincerely,



Tim Moore
Co-chair
NSW Planning System Review

The review is being undertaken by independent members, with logistics support by the Department of Planning & Infrastructure

ITEM 8 (continued)

ATTACHMENT 1

MEETINGS WITH KEY STAKEHOLDERS

Association of Accredited Certifiers	Local Government and Shires Associations of NSW Annual Conference
Ausgrid, Endeavour Energy, Essential Energy and Transgrid	Master Builders Association
Australian Hotels Association	Natural Resources Commission
Australian Institute of Architects	Nature Conservation Council NSW Conference
Australian National Retailers Association	Northern Sydney Regional Organisation of Councils
Australian Petroleum Production & Exploration Association	NSW Aboriginal Land Council
Building Designers Association - NSW Chapter	NSW Commission for Children and Young People
Building Professionals Board (Ms. Sue Holliday)	NSW Farmers Association
Bulky Goods Retailers Association	NSW Health
Cement, Concrete and Aggregate Association	NSW Minerals Council Ltd
Central Coast Development Protocols Steering Group	Office for the Ageing
City of Sydney	Outdoor Media Association
Clean Energy Council	Planning Assessment Commission
Clubs NSW	Planning Institute Australia (12 Aug)
Council of Social Service of NSW	Planning Institute Australia (17 Oct)
Crookwell Landscape Guardian Group	Property Council of Australia (10 Aug)
Development & Environmental Professionals Association	Property Council of Australia (17 Oct)
Division of Local Government, Department of Premier & Cabinet	Regional Planning Directors Group
Environment Interest Groups	Shopping Centre Council of Australia
Environmental Planning Law Association Conference	Sydney Business Chamber
Glen Brookes MP 7 Sept	Sydney East Joint Regional Planning Panel
Gloucester Project Association	Sydney Ports Corporation
Hon. Craig Knowles	Sydney Water
Hon. Frank Sartor	Sydney West Joint Regional Planning Panel
Hon. Gary West	The Greens NSW
Hon. Justice Terry Sheahan	The Law Society of NSW
Hon. Linda Burney MP	The National Trust of Australia (NSW)
Hon. Robert Webster	The Premier's Council for Active Living
Housing Industry Association	Tourist and Transport Forum
Housing NSW	Transport NSW
Hunter Business Chamber	Urban Development Institute of Australia
Hunter Development Corporation	Urban Development Institute of Australia Conference
Infrastructure NSW	Urban Taskforce
Infrastructure Partnerships Australia	
Insurance Council of Australia	
John Mant	
Justice McClellan	
Local Government and Shires Associations of NSW	

ITEM 8 (continued)

ATTACHMENT 1

MEETINGS WITH MEMBERS OF PARLIAMENT

Brian Doyle MP
Christopher Holstein MP
David Elliot MP
David Shoebridge MLC & Hon. Jan Banham MCL
Jai Rowell MP
Jamie Parker MP
John Flowers MP
Jonathan O'Dea MP
Lee Evans MP
Rob Stokes MP
Ross McInnes on behalf of the Hon. Linda Burney MP
The Hon. Adam Searle MP
The Hon. Don Page MP
The Hon Jan Barham MLC
The Hon Katrina Hodgkinson MP
The Hon Paul Green MLC
Tim Owen MP
Troy Grant MP
Charles Casuscelli MP

ITEM 8 (continued)

ATTACHMENT 1

LOCATIONS OF COMMUNITY CONSULTATION FORUMS

Albury	Tamworth
Armidale	Taree
Ashfield	Wagga Wagga
Ballina	Warringham
Batemans Bay	Willoughby
Bankstown	Wollongong
Bathurst	Yass
Katoomba	
Broken Hill	
Campbelltown	
Castle Hill	
City of Sydney	
Coffs Harbour	
Cooma	
Dubbo	
Deniliquin	
Glenn Innes	
Gosford	
Goulburn	
Griffith	
Lithgow	
Liverpool	
Merimbula	
Moss Vale	
Muswellbrook	
Murwillumbah	
Narrabri	
Newcastle	
Nowra	
Orange	
Parkes	
Parramatta	
Penrith	
Port Macquarie	
Queanbeyan	
Randwick	
Sutherland	

ITEM 8 (continued)

ATTACHMENT 1

NOTES

ITEM 8 (continued)

ATTACHMENT 1

NOTES

ITEM 8 (continued)

ATTACHMENT 1



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