



THE LAW SOCIETY
OF NEW SOUTH WALES

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2 March 2012

The Hon Tim Moore & the Hon Ron Dyer
Co Chairs
NSW Planning System Review
GPO BOX 39
SYDNEY NSW 2001

Dear Mr Moore and Mr Dyer,

NSW Planning System Review Issues Paper: The Way Ahead for Planning in NSW? (Issues Paper)

I am writing to you at the request of the Law Society's Environmental Planning and Development Committee (Committee).

The Committee has responsibility to consider and deal with any matters relating to or associated with environment planning and development law, and to advise the Council of the Law Society on all issues relevant to that area of practice. Membership of the Committee is drawn widely from experienced professionals whose expertise has been developed variously in representing the interests of local government, government instrumentality, corporate and private clients.

The Committee applauds the initiative of the NSW Government in embarking on a major review of the system which defines how planning decisions are made. The Committee appreciates that consultation with stakeholders is a critical part of this process.

The Committee notes that the terms of reference for the review require the Planning System Review 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".

After the consultation and consideration of stakeholder views, the Planning System Review is to recommend a statutory framework and necessary implementation measures for a new planning system in New South Wales.

Introduction

The Issues Paper contains a list of 238 feedback questions. Stakeholders are also invited to comment on matters that may not have been included in the paper but which are relevant to the review. The scope of the specific questions range from those exploring the philosophy and underlying principles of a new planning system to matters of detail arising from issues raised in the consultation phase relating to the present system.

The Committee considers that it is neither possible nor productive in the time available for its members to attempt to provide detailed comments on each of the questions raised in the Issues Paper. The Committee has chosen instead to focus on the objectives underpinning the Act and operation of the planning system. Any review must in addition, in the Committee's view, be considered against the backdrop of the rule of law.

The Committee has also made specific comments on the issues raised in Chapter E of the Issues Paper relating to appeals and reviews and to the role of the Land and Environment Court.

Objectives of the Act

The original philosophy underpinning the *Environmental Planning and Assessment Act 1979* (Act) and the operation of the planning system was:

- 1 The Act would bind the Crown and public authorities.
- 2 The level of environmental assessment and public participation was to increase where a proposal was likely to have an increased environmental impact.
- 3 Where a development application was required under Part 4 of the Act certain matters had to be taken into consideration and relevant planning instruments would apply.
- 4 Where development consent was not required (for example those matters set out in schedule 1 of the Environmental Planning and Assessment Model Provisions 1980) environmental assessment was nevertheless required and where the proposal was likely to have a significant impact on the environment a higher level of assessment was also required.
- 5 There was to be an increased level of public participation to that which had existed under the previous planning regime and in particular there was provision for public exhibition and public participation in respect of planning instruments under Part 3.
- 6 A specialist Land and Environmental Court (LEC) was set up to deal with both merit appeals and judicial review matters under the Act.
- 7 Whilst there was power for the State government to make State Environmental Planning Policies and for the Minister for Planning to call in a particular development application (section 101) this would be subject to checks and balances.

This was reflected in the objects of the Act set out in section 5.

The Committee considers that these objects remain valid and should inform the development of a new planning system.

The Act has been amended on many occasions since the original enactment, one of the most substantial amendments being the introduction of Part 3A (now repealed) providing for a planning and assessment regime outside the provisions of Part 3, 4 and 5 of the Act.

The rule of law

Overview

The Honorable Justice B Preston, Chief Judge of the LEC delivered a paper to the Environment and Planning Law Association (NSW) annual conference on 30 October 2011 entitled 'The Enduring Importance of the Rule of Law in Times of Change'. The paper is reproduced on the LEC website.

The theme of the speech was that public confidence in the Australian legal system rests in part on the "rule of law". Basic tenets of the rule of law were set out on pages 5 to 8 of His Honour's paper and some excerpts from those pages are reproduced below:

Generality

The law must be general and should apply without exception to everyone whose conduct falls within the prescribed conditions of application.

Equality

Everyone is equal before the law, including government officials.

Public Accessibility

Laws need to be publically promulgated, adequately publicised and readily available.

Prospectivity

Laws ordinarily need to be prospective, not retrospective.

Clarity

The meaning of the law must be clear as to what it enjoins or forbids.

Certainty and Predictability

The law is not contradictory or requiring of the impossible.

Stability

Relative stability for consistency in the law is necessary for developers, investors, residents and the community to be guided in their short-term and long-term decision-making.

An Independent and Impartial Judiciary

This statement of the principle of independence is particularly apposite to a specialist court, such as the LEC which deals with environmental and planning disputes where there is a high potential for significant external pressures.

It should also be noted that in his address to the Opening of Law Term dinner on 30 January 2012, the Chief Justice of New South Wales, the Hon Tom Bathurst, also spoke of the importance of the rule of law, saying "while the rule of law and sound governance are the foundations of a free and stable society, they are also essential to a prosperous one". While his comments were directed to the criminal justice system primarily, they are nevertheless apposite in the context of the planning system. He made reference to the fact that public confidence in a system is essential

and that those who have the least confidence in a system tend to be those who have the least information about it. Public participation at every level of the planning system will improve the level of information available and consequently understanding of and confidence in it.

Application to the planning system

It is the Committee's submission that any review of the planning laws of NSW should be conducted within a framework which incorporates the concept of the rule of law.

Core attributes of a planning system guided by rule of law principles include:

- 1 The continued right to approach the LEC to restrain a breach of the planning laws by any person (open standing)
- 2 The continued role of the LEC both as a court of judicial review and in respect of merit appeals for planning decisions.
- 3 The planning laws (and subordinate provisions, regulations, state policies, local environmental plans etc.) should be readily available, understandable and applied consistently by consent authorities.
- 4 Where there is proposed to be a change in the planning laws or planning provisions then generally there should be advance notice and an opportunity to comment on such changes. [Many examples come to mind of significant changes of the planning laws which were effected with no notice whatsoever such as the Affordable Housing SEPP and the changes to existing use rights provisions].

Community Ownership

The Issues Paper identifies the concept of community ownership as a key objective in implementation of a new planning system.

F3 What can be done to ensure community ownership of a new planning system?

This theme was the subject of a number of discussion papers preceding the introduction of the Act. It was acknowledged that in the face of very limited opportunity for public participation in the planning system civil disobedience had occurred manifested in particular by the "Green Bans."

Accordingly the Committee considers it imperative that the review of the NSW planning system should allow adequate time for all stakeholders (including local councils given their pivotal role in the planning system) to make informed comment.

The role of the LEC

The Committee considers that the LEC is an institution that enjoys public confidence and respect. It is perceived as an impartial and authoritative forum where applicants, respondents and concerned third parties are afforded a full hearing. The LEC has a pivotal role in the Committee's view in ensuring a sense of community ownership of the planning system. As previously discussed it also plays an integral part in a system based on the rule of law.

It is the Committee's view that where there is to be an appeal in respect of a planning decision, that appeal should be to the LEC and not to another body (e.g. the Planning Assessment Commission or the Joint Regional Planning Panel).

The types of matters that should be the subject of an appeal

Merit appeals against refusals and deemed refusals of development applications have existed for a long time in the NSW system. Those appeals have generally (except for designated development) been only available to the applicant.

Some stakeholders have expressed the view that there should be a more general third party appeal right granted.

The Committee is of the view that the original philosophy of the Act that third party rights of review be available to certain classes of development is a sound one; however consideration may be given to a review of the classes of development.

The Issues Paper raises the possibility of a right of appeal against a council decision not to proceed with a re-zoning application or a council decision to so proceed.

It is the Committee's view that to provide such a right of appeal would inherently conflict with the strategic planning role of zoning.

The following observations of McClellan CJ in *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] NSWLEC 399 at 117 are apposite:

*In the ordinary course, where by zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development of any site.... planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted. The more specific the zoning and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects (Nanhouse Properties Pty Ltd v Sydney City Council (1953) 9 LGR(NSW) 163; Jansen v Cumberland County Council (1952) 18 LGR(NSW) 167). **Part 3 of the EP&A Act provides complex provisions involving extensive public participation directed towards determining the nature and intensity of development which may be appropriate on any site. If the zoning is not given weight, the integrity of the planning progress provided by the legislation would be seriously threatened.*** (Bold emphasis added)

Chapter E: Appeals and Reviews; Enforcement and Compliance

The Committee's comments in relation to the specific questions in this chapter are set out below.

E1 What appeals should be available and for whom?

The current classes of appeal and standing in those appeals are appropriate, although it might be appropriate to review the classes of development.

E2 Should anyone be able to apply to the Court to restrain a breach of the Act?

The current "open standing" provisions are considered appropriate.

E3 In what circumstances should third party merit appeals be available?

Third party merit appeals should continue to be available in the case of designated development. There is an argument that third party merit appeals should be available in other cases, for example where a proposed development does not comply with development standards in a Local Environmental Plan (LEP).

E4 Should approval bodies or concurrence authorities be the respondent to some appeals?

Yes. Concurrence authorities should be the respondent to appeals that concern a challenge to conditions of consent in relation to a concurrence.

E5 What should be the time limit for any appeal about local environmental plan provisions?

The Committee does not support a merit appeal about LEP provisions. If this question is really about judicial review then the current period of three months should remain.

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?

Yes. The Court should have absolute discretion as to costs orders.

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?

If IPART review of section 94 Contributions Plans continues, an appeal against the reasonableness of a plan should not be allowed.

E8 What sort of reviews should be available?

Current arrangements are satisfactory.

E9 Who should conduct a review?

There should be no extension of appeal or review rights to Independent Hearing Assessment Panels, Joint Regional Planning Panels, or the Planning Assessment Commission. All appeals (whether called 'reviews' or 'appeals') should be to the LEC.

E10 What rights should third parties have about reviews? And what provisions should apply regarding the costs of the review?

See the answers to E3 and E6 above.

E11 How might recommendations by the Planning Assessment Commission be reviewed?

The Committee considers that all appeals should be heard by the LEC.

E12 Do some penalties need to be increased?

Current penalties are adequate. Councils should be allowed to undertake enforcement action for recovery of fines and costs rather than relying on the State Debt Recovery Office.

E13 What new orders should there be or what changes are needed to the present orders?

The Committee does not suggest any changes.

E14 How can enforcement be made easier and cheaper for consent authorities?

See the response to E12 as to recovery of fines and costs. For consents, and if a principal certifying authority (PCA) is involved in respect of a development, then the PCA should be required to monitor and enforce its own approvals. The removal of section 127(7) of the Act (which would enable a council to take injunction proceedings and prosecute simultaneously) would make enforcement easier and cheaper for councils.

E15 Should councils have a costs or other remedy against private certifiers in certain circumstances?

No. The Building Professionals Board (BPB) should be the regulatory body to monitor and review the actions of private certifiers.

E16 Should monitoring and reporting conditions be reviewable?

No comment.

E17 Should there be an appeal right for third parties in proceedings against private certifiers?

No. Third parties have the right to lodge a complaint against a private certifier to the BPB.

E18 Should a consent authority have a wider right to revoke a development consent?

A consent authority should not have a wider right to revoke a development consent than at present.

E19 Should councils have a statutorily created 'best endeavours' defence?

No comment.

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?

No comment.

Conclusion

The Committee appreciates the opportunity to participate in the review process and looks forward to the opportunity to comment further following the release of the Green Paper in April 2012.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Justin Dowd". The signature is written in a cursive, flowing style.

Justin Dowd
President