SUBMISSION ON THE WHITE PAPER: *A NEW PLANNING SYSTEM FOR NSW* AND ASSOCIATED PLANNING BILLS

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27 June 2013

About the *Better Planning Network Inc.*
Established in August 2012, the *Better Planning Network Inc*. (the BPN) is an affiliation of more than 410 community groups across NSW working together to achieve a NSW planning system that is driven by Ecologically Sustainable Development principles; has community wellbeing at its heart; respects the right of communities to shape local planning and development decisions; protects our environment and heritage; and minimises the risks of corruption associated with planning and development decisions. The BPN is a volunteer-based, incorporated organisation and is not affiliated with any political party.
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1. Introduction

In 2011, the O'Farrell Government was elected on a promise to '*return planning powers to the local community'*[1]. Yet, contrary to this promise, the proposals contained within the White Paper and associated Planning Bills comprise the most significant reduction in community participation in planning and development decisions in 30 years.

A close reading of the White Paper and Planning Bills reveals that under the new planning system, ordinary residents will not be able to comment on up to 80% of developments, including major development such as blocks of residential flats or land subdivisions. Moreover, community consultation in strategic planning or development assessment will not be mandatory or enforceable; residents will not be able to challenge strategic planning decisions through judicial review proceedings and the Minister and Director-General of Planning will have broad discretion powers to amend strategic planning controls at any point in time, with or without consulting the affected community.

Planning is about balancing competing interests for the good of society, so that no one interest has an overwhelming right or advantage. However, the proposals contained within the White Paper and Planning Bills give significantly more weight to economic growth and the interests of developers than to those of ordinary residents. In doing so, these proposals depart significantly from many of the 374 recommendations made by Moore and Dyer as co-chairs appointed by the NSW Minister for Planning and Infrastructure to conduct an independent review of the NSW planning system.

The NSW Government's reforms are part of a suite of other planning reforms and decisions, including (but not limited to): the Independent Review of Local Government, the review of environment zones in the Far North Coast, proposed changes to the Local Government Act, the exhibition of the *Draft Metropolitan Strategy for Sydney* and the announcement of a series of Urban Activation Precincts across Sydney. The NSW Government has also recently reduced its levels of funding to the Environmental Defender's Office NSW, introduced guidelines to prevent the provision of ongoing legal advice to what it refers to as 'lobby groups' and abolished legal aid for environmental cases. Together, these elements are a strong indication of the Government's priority: development and economic growth. But at what cost?

'Economic growth' are the first words mentioned in the first Object of the Planning Bill, yet economic considerations are only one of many that need to be taken into account and acted on in a balanced manner to secure good planning outcomes for all.

'Sustainable Development' is also mentioned in the first Object of the Planning Bill but the definition provided in this Bill is far weaker than the one contained in our current planning legislation (see Appendix 1). This definition is also inconsistent with that recommended by the independent review of the NSW planning system conducted by Moore and Dyer[2].

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[1] See Barry O'Farrell, *Contract with NSW* (2011)

[2] See Volume 2 of the final report on the independent review of the NSW planning system conducted by Tim Moore and Ron Dyer (p. 81)

The BPN is deeply concerned that the emphasis given to economic growth in the Planning Bills, together with the Government's other reforms and proposals as outlined above, will result in poor outcomes for NSW residents, including an overall reduction in quality of life, residential amenity, good urban design, and environmental and heritage protection.

The BPN is also concerned that the Planning Bills will result in significantly more flexibility for decision-makers and an increased concentration of powers in the Minister and Director-General of Planning. This is problematic for two reasons:

1/ It greatly increases opportunities for corruption in planning and development decisions, and does not address the concerns raised by the Independent Commission Against Corruption (ICAC) in its submission on the Green Paper[3] or in its February 2012 report '*Anti Corruption Safeguards and the NSW Planning System'* (see Appendix 2).

2/ It erodes the role of local government and goes directly against the O'Farrell Government's promise to '*return planning powers to the community'* by undermining current mechanisms for local democracy and governance.

The BPN does not support the NSW Government planning proposals in their current form and urges the NSW Government to suspend further progress of the Planning Bills until community concerns have been addressed. The independent review of the NSW planning system conducted by Messrs Moore and Dyer represent an exceptionally thorough and broad reaching set of recommendations, and could still be used now as a basis for addressing community concerns and ensuring that the new planning system is fair and balanced, rather than developer-driven as are many aspects of the Planning Bills. A new planning system that is not accepted by ordinary residents and communities cannot work effectively.

In addition, **the BPN also recommends that the new planning legislation be audited by ICAC before it is finalised, and that ICAC recommendations to remove the risk of corruption be adopted, with the legislation changed accordingly.**

2. Key Issues

2.1 Objects of the Act

- The Planning Bill has numerous objects and no hierarchy between them leaving wide discretion for decision makers. This is inconsistent with Recommendations 6 and 7 of the Moore and Dyer report.

- **The overarching Object of the new Planning Act must be Ecologically Sustainable Development (ESD), not economic growth**. If promoting economic growth is the main purpose of the planning system then quality of life and community wellbeing (which is included in ESD and is not limited to economic considerations) will always be subordinate to the need for more development.

[3] To access a copy of the ICAC submission on the Green Paper, go to: http://www.planning.nsw.gov.au/Portals/0/PolicyAndLegislation/GreenPaperSubmissions/Independent_Commission_Against_Corruption.pdf

- As recommended by Moore and Dyer, **the definition of ESD must be consistent with that used in the *Protection of the Environment Operations Act 1995*.** More specifically, this definition must make reference to all key principles underpinning best practice in ESD: the principle of integration, the precautionary principle, intergenerational equity, the conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms (including the polluter pays principle)- see Appendix 1.

- **The Objects of the new Act must include the promotion of quality of life, residential amenity, local character and a high quality built environment**.

- **The Objects of the new Act must include climate change prevention, mitigation and adaptation**. Climate change is an internationally and scientifically recognised phenomenon, which our planning system cannot afford to ignore. To do so is irresponsible from every perspective- economic, environmental and social. The importance of addressing climate change is recognised in Moore and Dyer's Recommendation 8.

- **The conservation of built and cultural heritage must be identified as one of the Objects of the Act** (ie- not as a subset of the Object pertaining to the '*protection of the environment*'). **This Object should read: '*the identification, conservation and appropriate management of heritage'*. The current words '*sustainable use'* must be removed** as their meaning is unclear and unnecessarily confusing.

- The Objects of the Act should also include '***the identification, protection and appropriate management of Aboriginal heritage'.***

- The Object of the Act relating to agricultural and water resources must be amended to the following: '*the protection of prime agricultural land and water resources'*.

2.2 Community participation

- **Ordinary residents and communities must have the right to comment on development applications that will affect them.** Removing the right of ordinary residents and communities to comment on up to 80% of developments is considered irresponsible and undemocratic.

- **Complying and code-assessable development must only be available for those types of development that are genuinely low impact.** Many of the examples of complying and code-assessable development given in the White Paper (pp. 127 and 130) cannot be said to be genuinely low impact development. Letting individual developments proceed without community input will result in poorer design outcomes, reduced residential amenity, adverse impacts on our environment and heritage and increased community frustration with the planning system and the NSW Government.

- The new planning system must include mechanisms for **encouraging developers to identify and address the needs of those individuals and communities likely to be impacted by proposed developments.**

- **Adequate resources and time must be identified and committed by the Government to ensure meaningful community engagement in strategic planning** beyond what is already happening now.

- **The preparation and implementation of the Community Participation Plans under the Community Participation Charter must be mandatory in the Planning Bill and subject to judicial review rights**. Without these elements, the Community Participation Charter is worthless.

- The Planning Bill must contain a provision to **mandate the need to publish all submissions on planning and development decisions, as well as the reasons for particular decisions made by planning and consent authorities.**

- **The exhibition period mandated in the Planning Bill (28 days) is insufficient and must be increased to 84 days.**

- **The broad and unrestrained powers of the Minister to amend strategic plans (including Local Plans) without community consultation or community access to judicial review rights must be curtailed. As they stand, these powers can render community consultation meaningless** as everything agreed to by the community can be subsequently amended and changed by the Minister. There needs to be a provision in the Planning Bill which states that the Minister cannot amend strategic plans without further community consultation, including the public exhibition of any proposed amendments, the publication of all submissions received and the publication of the reasons behind the Minister's proposed amendments and ultimate decision.

- **Community engagement in strategic planning is further rendered meaningless by the range of ways in which strategic planning controls can be disregarded.** These include the ability of Councils or other planning authorities to approve spot rezonings after Local Plans have been made; the ability of the Director-General of Planning to grant proponents Strategic Compatibility Certificates even if the proposed development is inconsistent with existing local planning controls in Local Environmental Plans; and the wide discretion of the Minister to declare State Significant Development.

- **Given the 'line of sight' through cascading levels of strategic plans, community engagement in the preparation of subregional and local plans is likely to be limited in scope.** This carries the risk of increasing community frustration with the system. The 'line of sight' must flow in both directions initiating at the local community level and flowing upwards to regional and state planning, followed by an iterative process.

- **The first of the Regional Growth Plans (the *draft Metropolitan Strategy for Sydney*) has been prepared and is on exhibition before the new planning system is even in place.** It has not had significant community participation as the White Paper indicates that Regional Growth Plans should have.

- **There must be an ongoing mechanism for communities to provide feedback to the State Government on various aspects of the planning system (ie- what is working and what is not), during the transition period to the new system and beyond.**

2.3 Strategic planning

- The White Paper highlights the need for evidenced-based strategic planning. However, **there is no commitment of the necessary resources to prepare a consistent and reliable base dataset across NSW.** Further, neither the White Paper nor the Planning Bills provide a clear explanation of what specific evidence and data will be required to enable evidence-based strategic planning.

- **Outcomes based objectives for strategic planning are needed to set the framework within which decisions are made and to provide key performance indicators for performance monitoring and evaluation.** Examples of such objectives might include the requirement for strategic plans to protect or enhance quality of life and residential amenity, conserve built and cultural heritage, provide affordable housing, maintain or improve biodiversity and ensure the protection of prime agricultural land and water resources.

- **The performance of the planning system must be measured by a wide range of parameters beyond dwellings and jobs** such as: the 'liveability' of our communities, urban design and the quality of new built form, levels of affordable housing, public transport uptake, protecting our environment and heritage, and achieving Ecologically Sustainable Development.

2.3.1 Strategic Planning Principles

- **The 10 strategic planning principles make no reference to quality of life, residential amenity, housing affordability, environmental or natural resource management outcomes, heritage, cumulative impact assessment, climate change preparedness or urban sustainability. In addition, Principles 1, 3 and 10 clearly prioritise economic growth considerations at the expense of social and environmental outcomes.**

- Principle 1 states: '*Strategic plans should **promote** the State's economy and productivity through facilitating housing, retail, commercial and industrial development and other forms of economic activity, **having regard to** environmental and social considerations'*. The result of this Principle will be that environmental and social considerations are bypassed and will always be subordinate to development. This Principle could be re-written as follows: '*Strategic plans should identify and protect areas of high biodiversity significance and natural areas, areas of heritage significance or neighbourhood character and identify remaining areas for housing, retail, commercial and industrial development and other forms of economic activity.'*

- Principle 3 states: '*Strategic plans are to guide all decisions made by planning authorities and allow for **streamlined** development assessment'*. This principle should read: '*Strategic plans are to guide all decisions made by planning authorities to allow for development assessment based on the principles of Ecologically Sustainable Development*.'

- Principle 4 states: '*Strategic planning is to provide opportunities for early community participation'.* This principle should read: '*Strategic planning is to provide opportunities for early community participation, commencing at the local level and moving upwards to meet the planning vision for the subregion, region and state.'*

- Principle 10 states: '*Local plans should facilitate development that is consistent with agreed strategic planning outcomes and should not contain overly complex or onerous controls that may adversely impact on the financial viability of proposed development'* This principle should read: '*Local plans should permit development that is consistent with agreed strategic planning outcomes and provide planning guidelines to assist proponents in designing developments that fit into the local context and minimise adverse impacts on amenity, environment and heritage*.'

2.3.2 NSW Planning Policies

- **The NSW Planning Policies must involve meaningful community engagement and be subject to parliamentary scrutiny and judicial review**. If this is not the case, it will result in a lack of accountability which will undermine community confidence in the system, the Department of Planning and Infrastructure, the Minister for Planning and Infrastructure and the NSW Government as a whole.

- **The NSW Planning Policies will set critical standards for lower level strategic plans but no concrete details of the content of these policies is provided.** Neither are details available on how competing policies will be prioritised or how the consistency of lower level plans with these policies will be measured. At the very least, NSW Planning Policies should include:

    - A policy to promote quality of life and residential amenity.

    - A policy to ensure meaningful community engagement in planning and development assessment

    - Policies to replace or provide equivalent protection to all existing State Environmental Planning Policies dealing with protection of our environment

    - A policy to address/mitigate the expected impacts of climate change

    - A policy promoting the conservation of built and cultural heritage, which also recognises intangible heritage values, such as the spiritual values associated with Aboriginal heritage.

- If the NSW Planning Policies fail to protect quality of life, residential amenity, our environment and heritage, the strategic plans will be narrowly locked into growth driven policies at the expense of maintaining diverse and liveable communities.

2.3.3 Regional Growth Plans

- **Ecologically Sustainable Development must be the overarching planning objective for Regional Plans.**

- **Regional plans must protect quality of life and residential amenity, identify and protect environmentally sensitive areas and heritage, maintain or improve biodiversity and ecosystem function, enhance catchment health and water quality, protect local food production, prime crop and pasture lands, plan for the expected impacts of climate change and consider the cumulative impacts of planning and development decisions.**

- **The first of the Regional Growth Plans (the *draft Metropolitan Strategy for Sydney*) has been prepared and is on exhibition before the new planning legislation has even been introduced to Parliament.** It has not had significant community participation as the White Paper indicates that Regional Growth Plans will have. Neither does it give effect to the NSW Planning Policies as these do not yet exist.

2.3.4 Subregional Delivery Plans

- **Ecologically Sustainable Development must be the overarching planning objective for Subregional Delivery Plans.**

- **There is a significant level of State control and a lack of transparency in the making of the Subregional Delivery Plans** through the appointment of Subregional Planning Boards. The Subregional Planning Boards will comprise: a representative from each Council in the subregion, up to four state representatives appointed by the Minister and an independent chair appointed by the Minister with the concurrence of Local Government NSW. The level of local control and community influence over subregional strategic planning remains unclear.

- **Subregional Delivery Boards and other planning and consent authorities must be legally required to publish all submissions received, their analysis of these submissions, as well as the reasons for their decisions.** This will bring transparency into the decision making process and eliminate the current practice whereby governments tend to ignore the advice of experts and community if this advice is contrary to what they want to do.

2.3.5 Local Plans

- **Ecologically Sustainable Development must be the overarching planning objective for Local Plans.**

- **Low and medium density residential zones must not be collapsed into one broad Residential zone** as this will not encourage a diversity of housing stock and will offer unbalanced and too much flexibility for developers, which will result in reduced residential amenity.

- **Local Plans must ensure that residential amenity is protected in the proposed Mixed and Commercial zones.** As they stand, these zones are too wide-ranging (ie. they include everything from a neighbourhood centre to a metropolitan centre).

- **The White Paper is largely silent on the proposed Enterprise zone.** Further detail and opportunity for comment must be provided to allow for meaningful community comment.

- **Local plans must guarantee the long-term protection of areas currently zoned E1, E2, E3 and E4. The replacement of E3 and E4 zones with Rural and Residential zones is strongly opposed.**

- **Local plans must protect all existing heritage-listed items (both State and local) and all heritage conservation areas currently identified in Local Environmental Plans.** Strategic planning must also be comprehensively undertaken to identify currently unlisted heritage and establish new heritage

conservation areas in the future. As it stands, the Planning Bill contains no recognition of the importance of Heritage Conservation Areas and no indication that Heritage Conservation Areas or items of local heritage significance will be afforded any protection.

- **Consideration must be given to creating a heritage-specific conservation zone for Heritage Conservation Areas,** within which any development would be automatically merit-assessed.

- **The Standard Instrument (Local Environmental Plans) Order 2006 contains a number of compulsory and model provisions for environmental protection such as environmental zones, restrictions on exempt and complying development in environmentally sensitive areas, protection afforded to heritage conservation, provisions relating to acid sulphate soils, natural resources sensitivity and natural hazard mapping. These must be retained in the new Local Plans.**

- **In addition, the heritage provisions in the Standard Instrument must be immediately amended to reinstate previous provisions requiring consent authorities to consider the heritage impacts of proposed development in the vicinity of heritage items, rather than allowing this to be optional.** Similarly the previous provisions requiring development consent for alteration or removal of non-structural elements within the interiors of heritage items must be reinstated. Currently all existing non-structural elements, such as fireplaces, decorative plasterwork, ceilings, floors etc. can be removed from the interiors of heritage items without development consent.

- **The proposal to override existing planning controls in the Local Environmental Plans using Strategic Compatibility Certificates is strongly opposed.** Strategic Compatibility Certificates will have the effect of allowing development to proceed even if it contravenes agreed local planning controls in existing Local Environmental Plans that have been prepared in consultation with the community. Strategic Compatibility Certificates centralise power in the Director-General of Planning and are not good practice in minimising risks of corruption.

2.4 Development Assessment

- **The proposal to have 80% of all development in NSW determined as complying or code assessable development is not supported.** This proposal will mean that there will be limited assessment and no community consultation for most development proposals. In reality, many of these proposals will be high impact such as industrial buildings up to 20,000sqm and proposals for 20 townhouse dwellings. The figure of 80% is based on a report suggesting that 80% of all developments approved in NSW have a value of less than $290,000. However, the construction value of development does not correlate to its potential impacts. The assumption that 80% of developments can be code assessed without any significant or cumulative impact has no evidentiary base.

- **Complying and code-assessable development must only be available for those types of development that are genuinely low impact.** Many of the examples of complying and code-assessable development given in the White Paper (pp. 127 and 130) cannot be said to be genuinely low impact development. Letting individual developments proceed without community input will result in

poorer design outcomes, reduced quality of life and residential amenity, impacts on our environment and heritage and increased community frustration with the planning system and the NSW Government.

- **Complying and code assessable development must be prevented in 'environmentally sensitive areas' (this term needs to be defined in the Planning Bill), within Heritage Conservation Areas, in the immediate vicinity of any heritage item, or within places in respect to which Councils or the Minister have placed Interim Heritage Orders under Section 25 of the Heritage Act, to allow for proper identification and assessment of heritage impacts.**

- **It is unclear what types of developments can be included in the EIS development category.** This must be clarified and should include developments likely to have major environmental or heritage impacts and/or that breach the planning controls beyond a minor way.

- **It is unclear whether and how unlisted heritage, including Aboriginal heritage, would be protected as part of complying and code-assessable development,** as these development types do not appear to require any assessment of the potential for unlisted heritage to be present.

- **Any consultant who prepares studies related to development applications, such as environmental/ecological, traffic, visual or heritage impact assessments, must be objectively accredited and randomly selected** by an independent authority (that is, NOT directly employed by the proponent).

- **There must be a legal requirement in the Planning Bill to consider the cumulative impacts of development and Ecologically Sustainable Development principles as part of the development assessment process.**

2.4.1 Judicial review and merit-based appeal rights

- As recommended by the Independent Commission Against Corruption[4]**, third party merit-based appeal rights must be available in relation to all developments, including State Significant Development.** As extensively documented, third party review rights clearly do not result in a deluge of cases coming before the court. While appeal rights on either side are exercised in very few cases,[5] developer appeals make up the vast majority of merit appeals to the Land and Environment Court. In 2010-11, there were 378 developer appeals and only four objector appeals.[6] In other words, less than 1% of development determinations are appealed overall, and only 1% *of these appeals* are made by objectors.

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[4] ICAC, Anti-corruption safeguards and the NSW planning system (2012), p.22: *The limited availability of third party rights under the EP&A Act means that an important check on executive government is absent. [These] rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party merit appeal rights creates an opportunity for corrupt conduct to occur.'*

[5] 0.57% (indicative) as a proportion of development determinations. See Department of Planning, *Local Development Performance Monitoring 2010-11*, p 80, Table 6-1, at http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=29mGD0zKm9c%3d&tabid=74&language=en-AU.

[6] Department of Planning, *Local Development Performance Monitoring 2010-11*, pp 80-81.

- **There should also be a right for any person to go to the Land & Environment Court and seek judicial review in relation to ALL of the provisions of the Planning Bill,** including decisions by the Minister and his delegates (such as the Planning Assessment Commission and officers of the Department of Planning and Infrastructure) in relation to: Strategic Plans, Strategic Compatibility Certificates, and decisions relating to State Significant Development and Public Priority Infrastructure. The preparation and implementation of Community Participation Plans should also be subject to rights of review on judicial grounds.

- **Pre-gateway review rights introduced into the planning system in November 2012 support proponent-initiated rezoning proposals and add another layer to an already complicated process.** The public benefit of introducing such review rights is unclear.

- **Limiting judicial review and third party merit appeals rights is contrary to the promise made by the Government that accountability and transparency would be improved in the new planning system and severely undermines community confidence in this system, the NSW Department of Planning and Infrastructure, the Minister for Planning and Infrastructure and the NSW Government as a whole.**

2.4.2 Streamlining referrals and concurrences

- **The review of concurrences, as proposed by the NSW Government, must involve consultation, transparency and clear reasoning.**

- **The Heritage Council's existing approval role for Integrated Development Applications (IDAs) for items on the State Heritage Register must be retained as must the role of the Office of Environment and Heritage with respect to Aboriginal heritage. Allowing the Director General of Planning to issue General Terms of Approval in the place of the Heritage Council and the Office of Environment and Heritage will jeopardise protection of the State's most significant heritage assets.**

- **The Heritage Act must not be switched off for State Significant Developments.** There is no justification for this and a level playing field needs to be re-established between development and heritage conservation. The role and powers of the Heritage Council and the legal effect of the Heritage Act should be restored to that originally intended in 1977.

- **Concurrence requirements must be reinstated for State Significant Development and retained for any proposal likely to involve a significant environment impact or cultural heritage issue.**

2.5 Infrastructure

- Proposed improvements to the integration of infrastructure and planning are supported. However, it seems that the new infrastructure plans will mainly focus on new growth areas. Many new housing projects will occur in existing urban areas as part of urban consolidation. **Therefore, infrastructure plans for upgrading existing infrastructure and transport networks in established urban areas are also required before any additional development is approved.** Ongoing analysis of the cumulative impacts of urban consolidation on existing infrastructure, including schools, childcare centres, aged care facilities,

roads and transport systems is required, and should be addressed when preparing subregional delivery plans and growth infrastructure plans. Without this, the provision of social infrastructure such as schools, hospitals, childcare, sporting facilities etc. will be met at the discretion of relevant government departments and subject to the vagaries of departmental budgets.

- **There is no requirement for the supply of infrastructure to meet the level of infrastructure required at the time it is needed.**

- **There are no explicit powers for decision makers to delay or refuse development consent if infrastructure is not available.**

- **How will the community be able to request that a local infrastructure plan be updated?**

- **Housing affordability is an important consideration in the new planning system but there are no specific mechanisms being proposed to deliver more affordable housing. For example, housing affordability targets need to be explicitly set out in strategic plans and all existing public housing needs to be retained and added to as the need arises.**

2.6 Building Regulation and Certification

- A system where the regulated pays the regulator will always be open to misuse. The employer/employee relationship between developer and certifier must be dissolved and this would be clear in the legislation to ensure compliance. **Any certifier who is responsible for assessing and approving a development must be objectively accredited and selected** by an independent authority (ie- NOT directly employed by the proponent).

- No private certification should be permitted in Heritage Conservation Areas or in relation to developments that would impact on State or locally listed heritage Items.

2.7 Delivery Culture

- The argument put forward in the White Paper that there is an endemic problem within the planning culture, and that planners are resistant to change, is not supported.

- Many of the problems facing NSW relate to lack of political commitment and funding by the State Government for major public infrastructure projects.

- Traditionally, the work undertaken by the NSW Department of Planning and Infrastructure has been reactive, under-resourced, based on a questionable evidence base and not reflective of a whole of government approach with subsequent funding commitments.

- The impetus for the new planning system is a reactive response to the need for more housing which tilts the planning system in favour of the development industry at the cost of community wellbeing, our environment and heritage.

- A convincing argument has not been established by the State Government for many of the proposed reforms which are essentially using the planning system to

drive economic growth. This seems to be a direct response to pressure from the development industry, but one likely to alienate the community from planning decisions that directly affect them, diminish the role of local government in the planning process and result in detrimental impacts on the built, heritage and natural environments.

- What is needed is the political will to resist the blandishments of the development industry that seem to have hijacked the planning system. Planning should not seek to satisfy the requirements of one group at the expense of society as a whole. It must balance carefully social, environment and economic needs for the wellbeing of all.

Appendix 1

ECOLOGICALLY SUSTAINABLE DEVELOPMENT, SUSTAINABLE DEVELOPMENT AND THE NSW PLANNING REFORMS

THE FACTS

Overview

The NSW Government has issued a White Paper and draft Exposure Planning Bill that propose a new planning system for NSW. The first Object of the Planning Bill is '*economic growth and environmental and social well-being through sustainable development'.* The Planning Bill also states:

'Sustainable development is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development.'

This new, narrow definition of Sustainable Development (SD) is a significant departure from key principles of Ecologically Sustainable Development (ESD) that have long been enshrined in Australian law. The White Paper refers to two of these principles – the integration of environmental considerations and development objectives, and intergenerational equity – but renounces three other fundamental principles:

- The precautionary principle
- Biodiversity and ecological integrity as a fundamental consideration
- Improved valuation, pricing and incentive mechanisms (including the polluter pays principle).

Furthermore both the White Paper and Planning Bill consistently prioritise economic growth instead of focusing on the balanced integration of economic, environmental and social considerations based on the legally recognised principles of ESD.
Why has the NSW Government elected not to support all of the accepted principles of ESD in its proposed new planning legislation?

Recommendation

The *Better Planning Network* strongly advocates that:

- Promotion of ESD and its key principles should be identified as the primary Object of the Planning Bill.

- All planning and development decision-makers should be required (as a mandatory matter) to have regard to relevant ESD principles.

ESD and SD: Accepted definition and use

The term Sustainable Development was first defined in the 1987 Brundtland Commission report, *Our Common Future*, as: '*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*.' The concept of SD was further elaborated through a series of documents and legal instruments at the 1992 Earth Summit held in Rio de Janeiro, Brazil. The Rio declaration enunciated the key principles of sustainability as the principle of integration of environmental considerations and development objectives, the precautionary principle, the conservation of biological diversity, intergenerational equity and the promotion of improved valuation, pricing and incentive mechanisms (including the polluter pays principle).

Inserting the word "Ecologically" before "Sustainable Development" was an important Australian achievement in response to the Rio Declaration. Australian Commonwealth and State and Territory governments have adopted the *National Conservation Strategy for Australia* and the *Intergovernmental Agreement on the Environment* (1992), which refers to the internationally accepted principles listed above.

Since then, ESD has been the standard terminology used in Australia. ESD is also the standard terminology used in over 60 NSW statutes, including the *Environmental Planning and Assessment Act*, the *Mining Act*, *Coastal Protection Act*, the *Local Government Act*, *Water Management Act*, *Native Vegetation Act* and *Rural Fires Act.*

The definition of ESD used in all of these Acts refers back to the definition provided in the *Protection of the Environment Administration Act 1991* (NSW) that specifically includes the fundamental principles associated with ESD: the principle of integration of environmental considerations and development objectives, the precautionary principle, the conservation of biological diversity, intergenerational equity and the promotion of improved valuation, pricing and incentive mechanisms (including the polluter pays principle).

Australian courts are commonly applying ESD principles.

ESD in our current planning legislation

One of the current Objects of the *Environmental Planning and Assessment Act* 1979 (NSW) is to encourage ESD- see section 5(a)(vii).

As with other NSW statutes, ESD is defined with reference to section 6(2) of the *Protection of the Environment Administration Act* 1991 (NSW), as follows:

'*For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:*

> *(a) the precautionary principle-namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental*

degradation. In the application of the precautionary principle, public and private decisions should be guided by:
(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
(ii) an assessment of the risk-weighted consequences of various options,
(b) inter-generational equity-namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
(c) conservation of biological diversity and ecological integrity-namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
(d) improved valuation, pricing and incentive mechanisms-namely, that environmental factors should be included in the valuation of assets and services, such as:
(i) polluter pays-that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
(ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.'

ESD and the NSW Planning Reforms

The definition of SD proposed in the Planning Bill 2013 is a significant step backwards from the established principles of ESD that have underpinned planning and development decisions in Australia and NSW since the 1990s. In particular, this definition makes no reference to the conservation of biological diversity, improved valuation, pricing and incentive mechanisms (including the polluter pays principle) and the precautionary principle, a central tenet of environmental policy and case law in NSW for more than two decades.

This deliberate retreat from the principles of ESD is not consistent with other environmental and planning legislation in Australia: see, for example, section 9 of the *Planning and Development Act* 2007 (ACT), Chapter 1 of the *Sustainable Planning Act* 2007 (Qld) and section 3A of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth).

Appendix 2

CORRUPTION AND THE NSW PLANNING REFORMS

THE FACTS
June 2013

OVERVIEW

In April 2013, the NSW Government released a White Paper, draft Exposure Planning Bill and Planning Administration Bill (the Bills) proposing a new planning system for NSW.

In February 2012, the NSW Independent Commission Against Corruption (ICAC) released a report "*Anti Corruption Safeguards and the NSW Planning System*" (the Report) that identified six corruption prevention safeguards that would reduce the frequency of corruption if integrated into the NSW planning system. These safeguards, together with comments on where the Bills fall short, are set out below.

1. Providing Certainty

The principle: ***The existence of a wide discretion to approve projects, which are contrary to local plans and do not necessarily conform to state strategic plans, creates a corruption risk and community perception of lack of appropriate boundaries.***

In its Report, ICAC specifically mentioned the width of discretion in (the now repealed) Part 3A and SEPP1 objections as the most obvious examples of wide discretion to decision makers in the planning system posing corruption risks.

The Bills give the Minister and Director General of Planning extensive discretion in relation to the making, amendment and repeal of strategic planning instruments, the issue of strategic compatibility certificates and the declaration of State Significant Development.

Added to this, proposals to create a new "*Enterprise*" zone that will have very limited prohibitions and controls, and to merge existing low and medium density zones into one broad Residential zone, will introduce much more flexibility into the planning system, providing developers with potential windfall profits.

This is particularly concerning in circumstances where clause 10.12 of the Planning Bill significantly reduces the ability of any person to take action in the Land and Environment Court in order to restrain a breach or anticipated breach of the planning laws.

The Bills provide the Minister and the Director General of Planning with extensive discretion to approve projects that are contrary to local plans and allow the introduction of significantly more flexibility into the system.

2. Balancing Competing Public Interests

The principle: ***If it is the intent of the planning system to prefer a particular public interest over another, this should be clearly articulated in the legislation to avoid perceptions of undue favouritism.***

The Planning Bill contains nine objectives in clause 1.3. These are in no particular order and are consequently capable of causing confusion in decision makers and allowing corruption to be cloaked.

The absence of an overarching objective goes directly against Recommendations 6 and 7 of the NSW Planning System Review by Messrs Tim Moore and Ron Dyer.

3. Ensuring Transparency

The principle: ***Transparency is an important tool in combating corruption and providing public accountability for planning decisions.***

The extensive discretion provided to the Minister and the Director General of Planning is likely to lead to less transparency, as is the extension of powers to planning bodies.

The Bills provide for the continuation of the Planning Assessment Commission (PAC), Regional Planning Panels (currently known as Joint Regional Planning Panels), new Sub-Regional Planning Boards and ad-hoc committees and panels.

PAC members, Regional Planning Panel members and Sub-Regional Planning Panel members are appointed by the Minister for a period not exceeding three years (four for Sub-Regional members) and are part-time (although the Minister may appoint PAC members full time). This raises opportunities for patronage that could very well open the door for corrupt behaviour.

In addition, there is no restriction on the panel members engaging in other work, including carrying out work for developers.

Because the members of these planning bodies hold their positions at the will of the Minister and do not have tenure (unlike for example, a Judge), there will be at least the perception that these appointees will be doing the bidding of the Minister (notwithstanding the fact that the Bills provide that the appointees are not subject to the "*direction*" of the Minister).

A further concern is that the members will be able to continue to work in the private sector and in particular, to work for the very developers who will be the subject of the decisions they will be making. Even if the members excuse themselves from dealing with matters relating to existing clients, (or those of the firms they are

employed by) there may nevertheless be a perception of a pro-developer bias in respect of the Ministerial appointees.

The proposal to deny the community the right to comment on up to 80% of developments is also likely to reduce transparency.

The Bills will reduce transparency.

4. Reducing Complexity

The principle: ***A straightforward regulatory structure assists in the detection of corrupt conduct and acts as a disincentive for individuals to undermine the system.***

The system remains complex. There are four levels of plans, four "*streams*" of development assessment, "*EIS Assessed"* Development, State Significant Development, State Significant Infrastructure and Public Priority Infrastructure. In addition, there are a variety of bodies responsible for determining applications – the Minister, the Director General, the PAC, Regional Panels, Councils and Private Certifiers.

The Bills do not reduce complexity.

5. Meaningful Community Participation and Consultation

The principle: ***Meaningful community participation in planning decisions [relating to planning instruments and development proposals] is essential to ensuring public confidence in the integrity of the system.***

Whilst the Bills provide for a "*Community Participation Charter*" in respect of the development of strategic instruments, including local plans, this Charter is not mandatory or enforceable, and does not apply to development applications. Further the Minister has extensive powers to amend all strategic plans with or without community consultation, and the Director General has the power to issue strategic compatibility certificates to allow prohibited developments without public consultation.

The Bills do not ensure meaningful community participation.

6. Expanding the Scope of Third Party Merit Appeals

The principle: ***There is currently a disparity between objector and applicant rights on the issue of merit appeals. Merit appeals provide a safeguard against biased decision making by consent authorities and enhance the accountability of these authorities. The extension of third party merit appeals acts as a disincentive for corrupt decision making by consent authorities.***

The Bills provide that in almost all cases developers (proponents) have the right to appeal to the Land and Environment Court on the merits in relation to a decision about a development application. Proponents also have a right to seek a review of a Council decision not to proceed with a spot rezoning proposal.

However, third party appeal rights on the merits (third party appeal rights) are only available to objectors in relation to "*EIS Assessed*" development applications.

The Bills have not specified what categories of development will be "*EIS Assessed"* (which is itself a concern), but assuming that this follows the categories of "*Designated Development*" under the current *Environmental Planning and Assessment Act*, this class of development is quite limited.

In addition, the Bills remove the current rights of a third party objector to take action if they believe a breach of the Act or general law has occurred (judicial review) in relation to the making of strategic planning instruments and State Significant Development.

In contrast to the ICAC observations that increased review opportunities improve decision making, the Bills reduce the oversight of decisions provided by the right of legal challenges.

CONCLUSION

The Bills do not compare well with the six corruption prevention safeguards identified by ICAC. It is the view of the *Better Planning Network* that, if adopted, the Bills would lead to an increased risk of corruption in NSW.

RECOMMENDATIONS

1. The discretionary decisions of the Minister relating to the making, amendment and repeal of strategic plans be subject to mandated, robust and objective criteria.
2. The "*Community Participation Charter*" be made mandatory and enforceable, and the Minister and all consent authorities be bound by community participation plans.
3. The community's right to comment on all development applications that are not currently classified as exempt be retained.
4. Clause 10.12 of the Planning Bill (which limits the right of judicial review) be deleted.
5. Third party objectors have a right to appeal on merit to the Land and Environment Court in relation to all development applications and decisions to rezone land.
6. Strategic Compatibility Certificates be removed from the Planning Bill.
7. Members of the PAC and Regional Planning bodies be full time appointments and their members be precluded from acting for developers (or being in a company or firm that so acts) during the period of their appointment.
8. That ICAC carry out an audit of the Bills and that further progress of the Bills be suspended until issues raised by ICAC in their audit are fully addressed and the risk of corruption is removed.