



## NSW Planning System Review Greens NSW Submission

*RE: Planning Green Paper*

14 September 2012

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Thank you for this opportunity to make a submission in response to the Green Paper. This review should provide an opportunity to make a planning system that works for NSW – that nurtures the environment, sustains people and communities and delivers a well-structured and resilient State economy.

### Principles and Objects

This submission will endeavour to articulate a number of areas of concern, and opportunities for reform, through a detailed consideration of the Green paper. However there is one essential starting point for any planning system that must be highlighted. That is the need to establish a set of guiding principles that will be used by decision makers who are tasked with implementing the Act.

The Green paper proposes that "the new planning system will support the achievement of the NSW Government's priority to drive economic growth." It places as its first proposed objective being "to promote economic development and competitiveness." It juxtaposes this with a separate objective of "protect[ing] the environment."

This is not a well structured or balanced set of objectives. The Greens support the more considered and balanced proposed object that was endorsed in the Planning Review undertaken by Tim Moore and Ron Dyer ["the Planning Review"]. That objective is:

*The object of this Act is to provide an ecologically, economically and socially sustainable framework for land use planning and for development proposal assessment and determination together with the necessary ancillary legislative provisions to support this framework.*

Adopting this objective would require decision makers to move away from the "silo mentality" that too often has developed in planning in this State which sees the environment and the community being considered as separate to, and in direct competition with, economic outcomes. More detailed consideration of objectives is included below.



Any new planning Act must make clear that short term economic growth that comes at the cost of a degraded environment and a fractured and unhealthy community is unacceptable. The proposed objectives in the Green Paper do not address this crucial point. The objective proposed in the Planning Review goes a substantial way to achieving this balance.

### **Time provided for submissions**

Clearly the timeframe provided to respond to the Green Paper has been inadequate. The Green Paper proposes radical changes to the NSW planning system that are well outside the scope of the recent state-wide planning review and require more considered and careful consultation than has been allowed.

The low public turnout at government-run consultation meetings regarding the Green Paper and the very low participation rate in the government-run online forums evidence the lack of community engagement with the Green Paper. This should not be acceptable to any government.

The poor engagement with the Green paper review stands in stark contrast to the substantial public interest in determining the principles and structures of any new planning system. This must be seen as a significant failure in the process.

It is hoped that this feedback is considered for the White Paper and Consultation Draft and that at least a six month period is provided for comments on these. Wider publicity about this process is also recommended. That consultation process should include a genuine debate on the merits of the proposals, and not simply position being presented in glossy brochures with bureaucratic endorsement.

### **Key recommendations of the Independent Panel's Planning Review**

Page 7 of the Green Paper contains the following statement in relation to the Independent Panel's Planning Review: "whilst neither endorsing nor rejecting their matters of detail, the two volumes of the Panel's *Review Report* provide an indication of the range of detailed implementation topics that will need to be considered". This statement neglects to address the series of key principles and recommendations from the Planning Review that have been either ignored or contradicted by the Green Paper.

Many of the new proposals including the principles underpinning the "Blueprint for Change" do not appear to have emerged from any of the state-wide consultation to date. The



Planning Review's "Recommendations of the NSW Planning System Review" have been ignored, particularly inasmuch as they raised sustainability or consultation requirements.

Those recommendations from the Moore and Dyer Planning Review that have been adopted are limited only to those that accord with the pro-market and anti-regulation themes that underpin the Green Paper. Ideologically-driven consultation and market-focused environmental protection will poorly serve the NSW community and fail the long term planning needs of this state.

Unless these biases are corrected in the further development of any new planning system, the 2013 NSW Planning Act will rapidly become just another illegitimate foray into state planning that will bring opprobrium on its sponsors and ultimately fail to achieve community acceptance.

The following recommendations of the independent report have been insufficiently considered and responded to in the Green Paper:

1. Ecologically Sustainable Development as overarching objective
2. Decision making by Councils, review role for Regional Panels
3. The creation of a concurrence co-ordination Unit
4. A strong need to respond to climate change
5. Time limited consents for 90 years for areas affected by sea level rise
6. Ways to ensure that cumulative impacts are adequately considered
7. Amending the Commonwealth *Copyright Act 1968* as it relates to DA exhibition, and
8. A statutorily independent State Planning Commission.

The use of an independent panel in the earlier stages of this review was a positive step. That panel engaged across the State and produced a more balanced set of proposals for planning reform. By contrast the preparation of the Green Paper was a step backwards that saw consultation and plan making move back to the government and the department. The government has clearly consulted almost exclusively with the development industry in producing its Green Paper.

In many ways the flaws in the development of the present Green Paper replicate those within the current planning system – though there are opportunities to be heard and make submissions, they are rarely, if ever, taken into consideration when final decisions are made.

It can only be hoped that that these matters will be seriously considered before the publishing of a White Paper and any proposed legislative reforms.



## **OBJECTIVES: GETTING THE BALANCE RIGHT**

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As is noted above, environmental and social concerns are insufficiently prioritised in this Green Paper. It appears to be the government's intention that economic concerns will be considered paramount in any decision making, throwing any claims regarding sustainability and community focus into question.

While the Green Paper identifies that "the achievement of sustainable development will remain the main objective of the Act" this statement does not go far enough. The word "ecological" must be reunited with "sustainable development" as the core objective of the Act. At the very least, the focus of the existing *Environmental Planning and Assessment Act, 1979* as a system of environmental planning should be retained.

In addition to an overriding objective of ecological sustainability, the blueprint for the new planning system must include the principled consideration of "Environmental Protection and Natural Resource Management". Many of our State's natural resources are finite, others are renewable but only if harvested at a sustainable rate, others are endangered or otherwise so precious that their protection must be paramount. Any new planning act must ensure that these factors are routinely considered by decision makers. As presently drafted the Green paper fails to achieve this.

### **Legislative reform and planning controls**

Any new planning system must have, in the words of the Planning Review:

*A clear and unambiguous legislative framework – beginning with broad strategic planning, running through to ensuring that development is carried out in accordance with its approval.*

The Green paper again fails this test. Firstly it proposes that Planning Policies be developed to replace SEPPs. While there is a meritorious argument in favour of rationalising the number and complexity of the current SEPPs, there is little merit in the Green Paper's proposal to limit state planning guidelines to high level policies with no statutory force and no specific statutory controls.

It is also of concern that rather than ensuring that state Planning Policies are subject to Parliamentary Review that instead they will be primarily conceived and promulgated by those within the planning department with no scope for democratic review or external input.



It is of equal concern that the government is proposing to remove the "narrow focus on measurable development controls (e.g. heights, floor space ratios) rather than merit-based planning outcomes" in local land use plans. These style of controls are open to subjective and ad-hoc decision making that removes certainty for the community and will produce even greater ambiguity in the planning controls.

These concerns are amplified when it is considered that the Green Paper intends to allow developers to pay for their own private certifiers to assess the "merits" of their applications against these local land use controls. The inevitable outcome from any such system is an institutional bias in favour of the proponents of development.

The Green Paper conceives of a high-level planning Act that operates as an "enabling Act" with all of the detailed or specific controls being established under policies, guidelines and procedures overseen primarily by state bureaucrats and the Minister for Planning and Infrastructure. This is likely to produce insufficient statutory safeguards for the environment, existing land owners and local communities.

If this course is pursued then it will clearly be necessary to impose stringent requirements on the making of any planning instruments. This will require external review and oversight, and far more clarity in the form of community participation and the extent of environmental study required. To date the Green paper has adopted the term "Public Participation Charter" with little if any guidance being given as to its content. Any new planning Act must do far more than this.



## COMMUNITY PARTICIPATION

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### *Effective community participation in planning at the strategic stages*

The current planning regime does not adequately engage the community in planning decisions. This is especially the case in regards strategic planning decisions. It does however contain useful principles of engagement with the community at all levels of planning decision making, which must remain a core element in any reformed planning system.

Public participation in planning must be an integral component of all stages of the process. To this extent the Green Papers promise of improved community consultation prior to and during plan making is welcome.

However the Green paper also proposes to remove most, if not all, community consultation from individual development decisions. This is a significant retrograde step for planning in NSW and will lead to even less community acceptance of planning decisions than exists under the present Act. Not only is community participation in decision making a method for democratising the planning system it also draws in local knowledge that will, if properly channelled and respected, significantly improve decision making.

Community participation must be meaningful. It must ensure that the community does not just get notified about relevant plans and developments, but has a level of control in decisions that impact upon them. Satisfying this requirement will generally mean keeping decisions with local councils so far as possible. At a minimum the community should be given at least an equal say to developers.

Improving access to the evidence base for decisions and IT access to planning documents as proposed in the Green Paper are steps in the right direction that may assist in achieving such goals. It is clear however that the proposed changes will not be sufficient as they currently stand to reorient the planning system so that the community is at its core.

While the Green Paper outlines the development of a Public Participation Charter and community consultation in strategic planning it should be noted that overall public participation will likely be greatly reduced in the planning system this paper proposes. This will not produce legitimate results.

### **Change 1 A Public Participation Charter**

*"Public Participation Charter to require the appropriate level of community participation in plan making and development assessment".*



The creation of a Public Participation Charter to guide community participation strategies is supported in principle. In the absence of detailed information about the content, or even guiding principles informing such a charter, it is difficult to provide further comment.

Compliance mechanisms for such a charter are also not clarified. Any Act would need to be more specific in relation to the essential requirements in developing a public participation charter, include minimum requirements and sanctions for non-compliance. It must also include the need to consider meaningful strategies to access vulnerable and marginalised members of the community including young people, the aged, Aboriginal people and those in housing stress. This, it is recognised, is a difficult task.

Adequate funding and resources will also be required in order to effect substantive changes to community consultation schemes. At present local councils do not have access to any surplus resources and the government must identify a revenue source to enable meaningful consultation to occur.

## **Change 2 Strategic Community Participation**

*"Strategic community participation to enable effective and early community participation".*

The Greens support well researched, democratic and principled regional strategic planning and will support any planning reform that aims to achieve this. In that regard, the Green Paper's broad proposal to include members of the community in strategic planning via *Subregional Delivery Plans* is a positive goal.

It must however be considered in the context of the overall reduced public participation proposed in the remainder of the Green Paper and the loss of democratic control of plan making through the imposition of unelected Regional Planning Boards.

It should further be noted that this change is merely an enhancement of an existing requirement for public participation in strategic planning, rather than an entirely new concept.

It will likely be complicated to get the community involved in discussing the policy aspects of strategic planning in the absence of clear indications of how these will impact themselves and their neighbourhoods. Residents in most areas are more interested in what will happen to their street, to their community – these are matters that are often difficult to conceive when considering planning at a regional level.



The likely result will be that some members of the community will be involved in strategic planning in terms of setting some generally planning outcomes. Developments will then be proposed and likely proceed with the community, under the structure proposed in the Green paper, unable to have input on each of them at a development application phase.

The failure of the department to engage with the public on any serious level on something as dramatic as this Green Paper's reform agenda shows how monumental the task will be to seriously and deeply engage the community in regional planning instruments.

Equally concerning is the failure of the present government to undertake responsive community consultation when developing the recent Strategic Regional Land Use policies. If this consultation process is to be considered in any way as the blueprint for community consultation on regional planning documents then it will not achieve the government's stated aims.

Overall the Green Paper's proposed regional planning process represents a substantial disenfranchisement of the public from the planning system in NSW. As a result it will not produce good planning outcomes nor will it achieve legitimacy in the community.

### **Change 3 Transparency in decision making**

*"Transparency in decision making to increase public access to the evidence base for decisions".*

The proposals including "developing a strong evidence base, improving access to planning information and providing accountability and a strategic context for decisions" are supported. However requiring councils to undertake specific economic analysis and modelling in relation to any land use planning changes will likely cause substantial delay and/or expense before any protective planning measures can be put in place.

If there are substantial new evidence gathering requirements being imposed on fiscally strained local councils then, again, they must come with clear funding streams from the state government to satisfy these requirements.

While an insistence on clear evidence-based decision making is appropriate, any new planning act must also allow land use decisions to be undertaken using the precautionary principle. This means that even where the information is imperfect, that decisions can still be made to protect the environment and the community from potential negative consequences from either specific planning proposals or failing to act.



#### **Change 4 Use of information technology and electronic planning**

*"Information technology and e-planning to simplify and improve community access to planning information and processes".*

Making information about planning decisions and policies available online is strongly supported. The development of an online planning portal is similarly supported.

I note however that concerns raised in previous stages of consultation regarding issues around the *Copyright Act 1968* as it relates to DA exhibition have not been considered by the Green Paper. Again we endorse the observations from the Planning review that for abundant caution, the State should seek to have the Commonwealth amend the *Copyright Act 1968* to make it clear that the making available of DA information to members of the public does not constitute a breach of the Commonwealth's legislative protection of copyright.

Any new Act should also require applicants to expressly waive any copyright they, or their contractors, have to the extent necessary to allow the dissemination of the material for the purposes of the Act.

Care must also be taken to ensure that prioritising electronic access to documents does not result in the exclusion of those community members who do not have access to the internet. Notification by post should also be retained where decisions will impact local areas.

#### **STRATEGIC FOCUS**

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##### ***Increased emphasis on strategic planning as the basis for all planning outcomes and to remove duplication***

As noted above, the Greens support increased strategic planning. However we do not support it where it is undertaken by unaccountable planning boards and without adequate or meaningful local consultation.

The strategic focus in the Green Paper is intended to be achieved through planning instruments which include the NSW Planning Policies, Regional Growth Plans and Sub-regional Plans. However as current plans mean that these instruments will not have statutory weight but be simply policy instruments, it is unclear how their objectives will be reliably achieved.



## **Change 5 NSW Planning Policies**

*"NSW Planning Policies replace SEPPs and Section 117 Directions and provide practical high level direction"*

The Green Paper proposes to replace existing SEPPs and Section 117 Directions with NSW Planning Policies which will not be statutory instruments. The Greens' general concerns in relation to this matter are expressed above.

The Greens note with concern that the loss of specific statutory controls from SEPPs and the failure to replace them in any NSW Planning Policies risks losing significant environmental and social protections contained in the existing SEPPs. These include:

- SEPP (Building Sustainability Index: BASIX) 2004
- SEPP (Housing for Seniors or People with a Disability) 2004
- SEPP No. 71 - Coastal Protection
- SEPP No. 65 - Design Quality of Residential Flat Development
- SEPP 70 - Affordable Housing (Revised Schemes)
- SEPP No. 62 - Sustainable Aquaculture
- SEPP No. 55 - Remediation of Land
- SEPP No. 58 - Protecting Sydney's Water Supply
- SEPP No. 26 - Littoral Rainforests
- SEPP No. 10 - Retention of Low-Cost Rental Accommodation

We share the concerns of the Nature Conservation Council that the removal of the SEPP 44 about protection of koala habitat is a concern in the context of no guarantee for additional protections for koalas.

The department has responded to this concern saying that "The Green Paper proposes better upfront protection for natural resource areas, which would include koala habitat, in regional and sub-regional plans". This well meaning statement is not evidenced in any specific proposed protections in the Green paper.

We strongly urge the government to retain these important controls in any new planning system.



## **Change 6 Regional Growth Plans**

*"Regional Growth Plans to align strategic planning with infrastructure delivery"*

The Regional Planning Boards proposed by the Green Paper are insufficiently accountable and provide statutory representation for the development industry and only discretionary engagement with environmental and community groups. At a minimum these boards must contain democratically elected members (potentially as representatives of local councils) together with members from peak environment and community groups.

Planning for regional growth and the provision of adequate infrastructure is on the whole a positive step. However the Green paper fails to identify what principles will be considered when formulating such plans – for instance will unfettered Greenfields growth be allowed at the expense of crucial agricultural and farm land?

Principles to be included in any growth planning must include habitat protection, food security, the maintenance and provision of wildlife corridors and the legitimate community interest in retaining the existing character and charm of their localities.

Of equal importance is the need to consolidate growth in areas that are well serviced, or will be well serviced, by public transport and other community infrastructure including open green space, water and sewerage as well as broader social and educational infrastructure such as hospitals and schools.

It is real concern that the Green Paper does not identify which environmental or other impact studies will be needed to inform the creation of Regional Growth Plans. It must be recognised that there will never be sufficient information, and there will never be adequate resources, for any public authority to undertake the detailed environmental assessment needed to understand the full impacts of development when undertaking regional planning. For this reason alone, while good and principled regional planning is an important step forward, it cannot replace detailed environmental consideration of applications at a later stage.

## **Change 7 Subregional Delivery Plans**

*"Subregional Delivery Plans that affect immediate changes to zones, are based on evidence in Sectoral Strategies and linked to Growth Infrastructure Plans"*

The observations above with regard Regional Planning are equally applicable to Subregional Planning.

Subregional Delivery Plans will result in substantial rezonings which will then apply templates containing standardised development guides and standards as determined by



land use type. The Green paper appears to be proposing that rezoning not be determined by need but could also occur for purely speculative purposes. There is no rationale to support this proposition in the Green Paper and it is clearly inconsistent with proper strategic planning and should be abandoned.

The proposed broad-based sub-regional rezoning represents a substantial potential boom for developers who will likely profit immensely from such rezonings at the expense of local communities.

Any certainty that the community might otherwise have achieved through regional and sub-regional planning under the Green paper is undermined by the proposal to allow developers to appeal local zoning decisions, even where the proposed rezoning is contrary to the regional planning instruments. Allowing developers, but not local residents, to appeal unfavourable zoning decisions by a local council to State-dominated JRPPs is a seriously backwards step and will produce poor quality ad-hoc planning decisions from non-accountable planning bodies. This proposal should not be proceeded with.

At least in the transitional phase of any new system it would be appropriate to require Subregional Delivery Plans to reflect work done to date on LEPs and DCPs whereby councils working with local communities have determined what they believe to be appropriate development guidelines.

### **Change 8 Simplifying Local Land Use Plans**

*"Local Land Use Plans with strategic context and performance based development guidelines".*

Local Land Use Plans will integrate four elements: strategic, spatial land use, infrastructure and development guidelines and standards. In theory such a move is positive, however it should be noted that the Green Paper is also proposing fewer statutory controls on development.

It is in the community interest to have measurable development controls (e.g. heights, floor space ratios) rather than relying on what are described as "merit-based planning outcomes" in local land use plans.

Non-measurable controls are too open to subjective and ad-hoc decision making that removes certainty for the community and will produce even greater ambiguity in the planning controls. As is noted above these concerns are amplified by the prospect of



developers having the merits of their proposals considered by private certifiers paid by them.

Despite the present administration's promise in 2010 to return planning controls to the community, the Green paper is proposing that the State Government be able to dictate to councils the requirements for local plans. This is not consistent with local decision making nor accountable government. Such a system will not have sufficient flexibility to be appropriately adapted to local areas.

Experience with the previous Government's "Standard LEP" was that in many cases the rezoning and template decision making required under the standard instrument removed protections for important public lands, thereby more easily facilitating their possible sale.

The current specifications relating to prohibited uses are proposed to be removed, resulting in anomalous and destructive situations such as industrial actions occurring in environmental protection zones. Such proposals run directly counter to the stated aims of the government's Green paper, namely to provide greater transparency and accountability in any new planning system.

### **Change 9 New zones and greater flexibility within zones**

*"New Zones to capture investment opportunities and preserve local character"*

The Green Paper is intending to allow new zonings to be imposed on local communities without consultation or concurrence.

The most worrying of the new zonings is the proposed "Enterprise Zone" that can cover some, or all, of a local government area which will be developer free-for-alls with "few if any" planning controls. The experience of enterprise zones in other jurisdictions (notably North America and the United Kingdom) has been poor. The best evidence is that they redirect existing investment dollars from other projects, suck existing jobs from surrounding localities and produce short term booms followed by long term declines in areas they have been applied.

The practically unrestricted nature of enterprise zones means that many local communities will entirely lose the ability to make decisions about development of their town centres and surrounds. This is entirely at odds with the public participation aims contained elsewhere in the Green Paper.



Suburban character zones are in effect similar to current low density residential zones and will allow those areas covered by them to not be bound by economic and population growth targets imposed by the State Government. It seems likely that this level of certainty and reduced flexibility will be used for the more affluent areas of NSW, while those in less wealthy areas will bear the brunt of unrestrained development.

The fact that only a modest part of the suburbs of this State will be protected by suburban character zones is proof positive that most suburbs will have their environmental protections seriously undermined by any new planning regime imposed on them. This is not in the public interest.

The final proposed new zoning is the Future Urban release zones which theoretically allows for the earmarking of certain areas for future development. While there is some benefit in identifying and earmarking future residential areas, this needs to be undertaken in a measured and careful manner and not be allowed to become a speculative venture that primarily enriches developers. Land release should closely mirror demand and must also take into account reasonable limits to urban sprawl in our major towns and cities.

As is noted above, the introduction of developer review rights where councils do not proceed with rezoning proposals is both overly complicated and skewed towards developer interests at the expense of the community. Councils will likely be pushed to approve rezonings to attempt to avoid litigation. At the very least, requirements for considering such reviews should include environmental studies and community consultation as well as mirrored rights for the community to appeal zonings they consider unfavourable.



## **STREAMLINED APPROVAL**

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### ***Faster and less complicated Development Approval as issues are resolved strategically***

Streamlined approval describes the process of shifting the planning system from a situation in which each application is considered independently, to a situation where there are presumptions in favour of approval of a wide range of developments. This is not in the public interest and fails the most basic consideration of the precautionary principle.

While timeliness of approvals is one performance indicator for a successful planning process, it cannot be used as the primary basis for assessing the functioning of the system. Unfortunately the Green paper elevates timeliness to the primary criteria for considering a successful development assessment process. This will, if made law, lead to degraded environmental outcomes and a lack of community involvement in, and acceptance of, planning decisions.

In particular, deemed approvals are simply gambling with the future amenity and environment of our state and cannot form any part of a sustainable planning system.

What will be lacking from this streamlined process is adequate consideration of ecologically sustainable development, community impact and any public consultation on developments that will affect local communities.

Basic rules for compliance on "merit-based" planning controls will mean that developments can proceed automatically without further assessment, regardless of their planning merits or the real impact on the local community and environment. As is noted above it is even more troubling that these decisions will be made by private certifiers paid for by the developer.

The Greens believe that code complying development should be limited to only minor development applications with minimal environmental impact, given the potentially disastrous impact of the alternative. All other matters should require a merit based assessment by democratically accountable local councils following community consultation.



### **Change 10 Depoliticised decision making**

*"Depoliticised decision making with development decisions streamed to independent experts"*

So-called "Depoliticisation" of planning decisions means the removal of democratic control over planning and local development from local communities. Local councillors, as community representatives, are accountable to their communities in ways that planning experts or the State Government planning bureaucracy never can be.

Local councils, through the actions of their councillors, are best placed to set appropriate controls on development for their area, within a framework of environmental protection under state laws and regulations.

The Greens endorse the recommendations of the Planning Review in relation to councillor involvement in development assessment which concluded:

- Elected councils are to retain the right to make decisions about development applications that fall within the council's jurisdiction.
- The exercise of this right and whether the right should continue to exist is to be a term of reference for the initial operational review of the proposed Sustainable Planning Act.
- If a council makes a resolution about a proposed development, and that decision is contrary to the recommendation made in the assessment report (or embodies a substantial variation to it), the council must set out the reasons why it has resolved to do so. If the resolution fails to do this, the resolutions shall be of no effect and the recommendation in the assessment report shall be deemed to be adopted.
- If a council determines a development proposal, a development proponent may seek a review by the Joint Regional Planning Panel whose decision after such review shall, if different from the council's original decision, be substituted for the decision of the council. The Joint Regional Planning Panel must give reasons for overturning or varying the council's decision.

### **Change 11 Strategic Compliance**

*"Strategic compliance to allow development that complies with strategic planning to proceed"*

The Green Paper proposes that "any development proposal which conforms to the parameters set out in the strategic plan should be allowed to proceed". The rationale being that the community will have been consulted about the theoretical limits imposed by the



plan, and therefore additional stages of consultation and approval for developments under this plan are not necessary.

Such a scheme amounts to presumed approval for developments, even for those that may not comply with other environmental requirements or may not be appropriate for various reasons for the specific site that is proposed. This will allow the proliferation of developments that are out of character with local areas and have a substantial negative impact on local communities.

As is noted above it is impossible to undertake adequate site specific analysis of the potential impacts of future developments in strategic planning. As a result site specific assessment remains essential to protect the environment and local character.

It is troubling to see that the use of *Strategic Compatibility Certificates* is intended to allow developments to proceed before their full impacts are understood. These certificates can be sought from the Department of Planning and Infrastructure for development proposals for developments that are theoretically consistent with planning outcomes, despite subregional planning processes not having been completed. Such a process will green light development which is not consistent with current LEP requirements or otherwise unsuitable.

The right to appeal any refusal of such a certificate to JRPPs represents a substantial expansion of developer rights without similar rights being delivered to communities. Similarly the provisions requiring JRPPs to meet with developers to try to find ways to approve developments will remove any remaining independence these flawed bodies possess and further strip environmental protections. This proposal runs directly counter to the rhetoric in the Green Paper of "transparent and accountable" decision making. It should not be proceeded with.

### **Change 12 Reforming state significant development**

*"Streamlined state significant assessment to deliver major projects sooner"*

Frustration with the previous Part 3A processes due to perceived and actual bias in the system and the exclusion of the community were matters that this government raised in its campaigning for office in 2010. Remarkably the planning changes proposed by the Green Paper repeat the most egregious elements of Part 3A.

The state significant development proposals in the Green Paper duplicate many, if not all, of the worst parts of Part 3A. If they become law then inevitably the current government will



come under the same level of scrutiny and ill will in relation to planning as the former Labor government. Whatever the politics of this, it is not in the best interests of the public.

The Green Paper proposes to retain both the Planning Minister and the PAC as decision makers for larger developments, but with even less time for consultation and assessment. Given the overwhelming bias of the PAC towards approving development (with a 94% approval rate for all developments and a 100% approval rate for mining developments since April 2011) this model provides no guarantees of any meaningful change in the planning system for NSW.

The Greens support the recommendation of the Review paper for a genuinely independent State planning Commission. To this extent we endorse the following recommendations from that paper:

- The Planning Commission is to be established by a separate Act to be known as the Planning Commission Act.

We also support the observations of the Planning Review that:

- The role of the chairperson of the Commission must be regularised and made fulltime. The independence of the Commission will be reinforced by the chairperson holding appointment as a Judge of the Land and Environment Court
- Changes to the terms of part-time Commissioners, in order to ensure that there is no suggestion that continuing membership of the Commission through the reappointment process makes members beholden to the Minister.
- ...
- The first essential matter is to ensure that the Planning Commission acts to make decisions about the merits of proposed major projects, through sound and proper processes. We have adopted a membership model that is broadly consistent with other tribunals in New South Wales and with tribunals dealing with planning matters in some other states. However, we have taken care to ensure that the proposed Planning Commission is not perceived as being a division of the Land and Environment Court. Indeed, a recurrent theme of concern from all sides during our consultation processes was the extent of legalism and the involvement of the legal profession in merit proceedings in the Court, with the attendant costs. Strong leadership of the Planning Commission will be required to ensure that the reforms do not lead down the path of mimicking the Court's processes. Having said that, there are some important safeguards that currently apply in the Court's merit proceedings that are appropriate to be adopted in the statute to establish the



Planning Commission. The first of these principles is that the Commission should be entitled to inform itself as it sees fit. That means that the Commission panel members are entitled to draw on their own specialist expertise provided that, in doing so, those participating are informed and given the opportunity to respond. This will require, as with merit proceedings in the Court<sup>77</sup>, a statutory requirement for the observation of due process and the affording of natural justice to those participating.

- The second critical element for the operation of the proposed Planning Commission is to ensure that its decisions are made using processes for its hearings that are open and transparent but which still permit its decisions to be made in a timely fashion.

It is unclear why the Green Paper has not adopted these modest, sensible and sound recommendations for reform of the Planning Assessment Commission.

The Green Paper proposes to include agency input at the strategic planning phase only, not in consideration of the detail of proposed development. The exclusion of concurrence authorities from this process mean that key stakeholders that represent crucial environmental concerns, like the Sydney Catchment Authority and Rural Fire Service will not be represented in decision making. The outcome of such exclusion will be the failure to adequately consider the impacts and safety of many developments. As is noted above the deemed approval structure is seriously damaging to the long term interests of the State.

Again we support the recommendation of the Review Paper in relation to a concurrence authority as a method to speed up the concurrence regime, as a far more sensitive and balanced option to the removal of concurrence requirements. Such a system, together with standard default conditions, would be a far preferable method to achieve more timely consideration by state authorities than the dangerous proposal of removing concurrence entirely as is suggested by the Green Paper.

### **Change 13 Smarter and timely merit assessment**

*"Smarter and timely merit assessment with requirements matching the level of risk"*

As noted above, the move towards 'merit-based' controls as opposed to stricter numerical controls (such as limits on storey height and setbacks included in development control plans) is open to systemic abuse by developers.

The continued reliance of the scheme on private certification is another opportunity missed- the private certification scheme continues to permit developers to choose their own private



certifiers to approve development. The fact that these certifiers are paid directly by the developers whose proposals they are certifying opens up a real risk of bias in any reporting.

The Green Paper proposes an expansion of the flawed private certification system, meaning that private certifiers will be directly involved in the approval of the majority of new housing and commercial development. This approval process within 10 days will also lack a right of appeal for affected neighbours and community groups and will not be subject to external review.

These changes will produce ongoing environmental damage and further degrade building certification standards in this State and are not supported.

At a minimum the commercial link must be broken between particular developers and particular private certifiers. This could be done by requiring developers to seek the appointment of a private certifier by way of random allocation from a list of appropriately qualified certifiers maintained by the department or the Building Professionals Board.

### **Change 14 Increasing the use of code complying assessment**

*"Increasing code assessment to reduce transactions costs and speed up approvals for complying development"*

Code complying assessment reduces the development approval process to a checklist approach, rather than an approach involving consultation and consideration of the merits of a proposal. Compliance officers, who may be closely associated with the construction or development industries, check that proposed developments comply with specified basic "merit and performance standards. Much of this will necessarily be subjective.

If proposals are said to comply with the code then they are certified as being approved. This removes the current consideration by local councils of environmental, social and other issues that are considered even for developments that are theoretically consistent with development controls.

The mere fact of technical compliance with guidelines does not ensure that a proposed development is appropriate. The specificities of each site, the character of the proposed changes, the impact on neighbours and possible cumulative impacts would all fail to be considered through such a process.

The simplest form of code complying assessment has a basic 10 day approval time during which private certifiers paid for by the developer approve the project. Developments that



can be considered in this category include a wide range of dwelling houses, industrial buildings and certain extensions to existing commercial and other buildings.

The proposed expansion of code complying assessment would result in the stripping back of many local environmental and heritage protections across NSW.

The Green Paper proposes that Developments that are not entirely within the development standards can still proceed in part through the code complying assessment channel but components that are said to be in breach of controls – for instance additional bulk – will be assessed by the local council. The slightly expanded timeframe for such applications of 25 days is still clearly insufficient for substantial consideration and will not allow for any community consultation.

Where non-complying development is considered the Green Paper proposes that rather than elected local councillors determining the matter it will be either council staff or an independent panel who will do so. This will by no means guarantee an adequate assurance of appropriate merit assessment and will reduce accountability.

The use of code complying assessment may have a limited function in any new planning system for consideration of genuinely minor and low impact development. This is not however the use proposed by the Green Paper.

These proposed changes cannot be supported and will produce a planning system that fails to gain public support or legitimacy.

### **Change 15 Right of review for rezonings and merit appeals**

*"Extended reviews and appeals to increase the accountability of decision makers".*

The Green Paper proposes granting proponents the right to seek a review from the PAC and JRPPs in those instances where "strategic planning intersects with development assessment on a site specific level". This planning jargon can be unpicked to mean developers will be able to achieve spot rezoning from both the JRPP and the PAC. Spot rezoning is antithetical to good strategic planning.

At present there is not right for property developers or the community to lodge appeals in the Land and Environment Court in relation to statutory planning instruments. The change of the status of these instruments under the Green Paper will mean that they will be contestable.



It is likely that this will result in increased litigation as well funded developers seek to protect investments and push test cases to further their interests. The additional burden this will place on the system will serve only to further exclude communities from the planning system and will inevitably see local councils bowing to inappropriate developments in the face of mounting legal costs in defending their zoning decisions. Again this is not in the public interest.



## **PROVISION OF INFRASTRUCTURE**

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The failure to provide adequate infrastructure to support development is a serious ongoing concern across NSW. It has resulted in some greenfield developments without adequate access to public transport, playing fields, schools and more.

Development contributions should be used to ensure that those who reap substantial financial benefits from development pay the costs of providing this development with infrastructure. If developers do not pay their fair share then the community is required to pay, through increased rates and through their taxes.

The Greens do not support provisions that allow for levies across existing residents to pay for infrastructure for new residents or industries. The real cost of development should be met by the developers who benefit, or otherwise by state government support where there is a public interest in promoting a specific project.

In particular the Greens believe that local councils must be able to levy developers to provide for green open space. It is not clear why the Green paper proposes to exclude this option.

### **Change 16 Contestable infrastructure provision**

*"Contestable infrastructure to enable greater private sector participation"*

The Green Paper presents current infrastructure levies as adding unnecessary costs to development, consistent with the paper's approach to supporting development ahead of community needs, in this case at substantial cost to local communities and taxpayers.

The Greens believe that public authorities, primarily local councils, should retain the key decision-making and approval powers for the delivery of local infrastructure.

### **Change 17 Growth infrastructure plans**

*"Growth Infrastructure Plans to link strategic plans with infrastructure provision"*

It is appropriate to link planning and infrastructure to growth projections. The introduction of more information in this area to allow developers and councils to plan ahead is supported.

There are however concerns that these targets will be imposed from above, rather than decided based on the data and in consultation with local communities. When such decisions



are made "from above" there is a risk that certain less politically favoured areas will be required to meet growth objectives, while other areas are protected.

In this regard the Greens reiterate their concern that regional planning as proposed under the Green paper will be handed over to unaccountable boards with statutory representation for the development industry. This will inevitably produce outcomes that are contrary to the public interest.

### **Change 18 Fairer, simplified and more affordable system for infrastructure contributions**

*"Affordable infrastructure contributions to provide a fairer and simpler system to support growth"*

The proposed new infrastructure contribution system is not supported. It will stop councils from being able to make developers make contributions to pay for open spaces in developments – potentially resulting in whole new suburbs with no parks or playing fields.

Where developers save money under such a system the rest of the community will pay – through compulsory levies on existing home owners. This is an unacceptable form of cost shifting.

### **Change 19 Public Priority Infrastructure**

*"Public Priority Infrastructure to streamline assessment for major infrastructure delivery".*

There is scope for improved planning processes for public priority infrastructure, however it must not come at the expense of unacceptable losses to the environment and our heritage. There is a notable absence of proposed protective measures for these factors in the Green paper and this is a matter that needs to be addressed in the White Paper..



## DELIVERY CULTURE

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### **Change 20 Chief Executive Officer's Group**

*"Chief Executive Officers Group to provide a whole of government approach to implementation".*

The failure to include the Chief Executive of the Office of Environment and Heritage in the CEOs Group must be remedied if any of the environmental aspirations of the planning review are to be achieved.

### **Change 21 Regional Planning Boards**

*"Regional Planning Boards to oversee regional and subregional strategic plan making".*

The Green paper proposes the creation of Regional Planning Boards to impose rezonings on communities.

As is noted above, the statutory provision for developer participation on such boards is likely to ensure that rezonings will fail to protect the State's heritage and environment and instead deliver more development flexibility. The fact that participation by environment groups will be by invitation further reinforces this likelihood.

These failings need to be addressed in the development of the government's White Paper.

### **Change 22 Mandatory Performance Monitoring**

*"Mandatory performance monitoring to publicly track performance towards achievement of strategic plans at all levels".*

Mandatory performance monitoring is supported.

However the measures that are proposed to be "measured" are overly simplistic and will not provide any substantial increase in knowledge about whether the system is working.

By way of example, measuring the "area of environmental land protected" is in itself largely meaningless. Contextual understandings require monitoring of what land has been protected and what has been degraded, the ecological value of particular land, whether it forms crucial habitat for endangered ecological communities or part of a wildlife corridor for instance.



Equally the current monitoring of DA assessment times provides only a small fraction of the information necessary to measure a council's development assessment performance. To be meaningful it would also require an assessment of the merits of the final decision, the acceptance of the local community and the views of the applicant and surrounding community.

In the absence of such deeper information the resultant "monitoring" may achieve little more than statistics for Government press releases and will likely be an obstacle to deeper knowledge and consideration of the real effects of any reformed planning system.

### **Change 23 Planning Culture**

*"Organisational reform to resource strategic planning and improve the culture of planning at all levels".*

The Green Paper proposes a tipping of the balance substantially in favour of development interests, meaning that many developments currently considered unacceptable would be approved under it.

Given the overly ideological bent of the Green Paper and its open strategy to benefit developers regardless of the cost to the community there does not seem to be anything concrete proposed which will change the State's planning culture for the better.

One of the biggest changes to planning culture was actually achieved through Greens campaigns to ban donations from property developers to political parties making decisions on their developments. This has had an effect on the development culture in NSW. Sadly much of this positive impact will be unwound if the proposed changes in the Green paper become law.

Change of the planning culture requires a strong set of guiding principles. These should be more meaningful and substantial than just increasing flexibility and innovation include planning for climate change and environmental protection, planning for vibrant and sustainable communities and planning for the long term. The Green Paper does not plot a path to reach these outcomes.



## **Matters Not Considered in the Green Paper**

*A number of matters of real importance to the future of the built and natural environment were not considered in the Green Paper and need to be addressed in any White Paper.*

### **(i) Affordable Housing**

Remarkably the Green paper fails to consider strategies to deliver greater levels of affordable housing in NSW. With housing stress at near record highs in NSW, reduced access to public housing and near record private vacancy rentals in regions from the Hunter to the outer suburbs of Sydney, the failure to address affordable housing strategies is inexcusable.

There are strong working models in other jurisdictions that can deliver affordable housing for NSW. These include schemes in place in:

- (i) London UK – with a target of 50% affordable housing for all significant new developments in the city;
- (ii) Vancouver Canada - with a target of 20% of the units in major residential projects be social/affordable housing.
- (iii) Melbourne, Victoria – with a target of at least 20% of new housing is affordable or social housing.

The Greens continue to urge the government to adopt a clear affordable housing target, supported by legislative requirements, to ease the State's housing crisis.

Whatever else may be true, \$500,000 house and land packages on Sydney's fringe are not an acceptable solution to housing affordability in this State.

### **(ii) Heritage**

The Green paper fails to provide any guidance on how the government intends to protect this State's natural, cultural and built heritage from the impact of development.

The Greens would urge the government to seriously engage with heritage in any future White Paper and put in place a planning scheme that:

- Shifted the emphasis to a system of managed heritage protection rather than the current scheme of managed destruction.
- Recognised Aboriginal peoples' rights as custodians of, and key decision-makers in relation to, Aboriginal culture, heritage and Country.
- Produced heritage laws which reflect our international commitments including United Nations conventions and the ICOMOS Burra Charter.



David Shoebridge MLC  
Member of the NSW Legislative Council

Planning Green Paper  
Greens NSW Submission  
September 2012

- Provided for serious penalty provisions for non-compliance with heritage legislation, particularly in relation to Aboriginal heritage.
- Removing heritage assessments from the influence of developers; and
- Allowing community petitions to trigger automatic consideration for heritage listing at a local, state and federal level

A handwritten signature in black ink, appearing to read 'D. Shoebridge', written in a cursive style.

**David Shoebridge**  
Greens NSW Planning spokesperson