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Public Participation in Planning in NSW: Resilient evolution or relapse?

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Resilient evolution or relapse?

ABSTRACT: *The Environmental Planning and Assessment Act 1979 and the Land and Environment Court Act 1979, comprise a legislative duo providing statutory control over the use of public and private property in the most populous state of Australia, New South Wales (NSW). Statutory planning in NSW arguably commenced in 1951 with the Cumberland Planning Scheme Ordinance which was in turn based upon pre-war English town and country planning, and is generally regarded as the foundation for much Australian planning.*

Since 1979 the NSW planning regime has matured into a complex exclusory zoning system, which has been further developed through case law to the point where it may be considered the poster child for statutory land use planning in Australia. However, a new planning regime is now evolving in NSW which is intended to be less prescriptive and more adaptive to the growing population demands of the state.

In this critique, it is argued that the well tested 1979 regime ought not to have been completely replaced with the proposed legislation which reduces community standing when consent authorities consider applications for development approval including major projects. It is argued in this paper that public participation in the evolving statutory planning regime ought not to have been reduced merely to produce questionable improvements in timeframes to gain development approval.

Introduction

The White Paper*: A New Planning System for NSW* (*White Paper*) was released by the Minister for Planning and Infrastructure (DPI 2013) in April 2013 for public consultation and input by 28 June 2013. The overall need for recasting of the State's somewhat dated planning regime was generally supported publicly, and the Department of Planning and Infrastructure (DPI 2013 p. 12) in the *White Paper* stated

> … the main purpose of the planning system is the promotion of economic growth and development in the State within a framework of environmental protection and enhancement of the population's life style…

and

> … to do this, the planning system has to facilitate development that is sustainable. Sustainable development requires the integration of economic, environmental and social considerations in decision making, having regard to present and future needs…

The *White Paper* (p.12) then makes damning reference to the existing legislation, namely the *Environmental Planning and Assessment Act, 1979* (NSW) (*EPAA*) stating:

> '…over time, the Act has become too complex and difficult to navigate and has not responded to the changing nature of our modern economy and society…'

There is also an assumption in the *White Paper* that a new regime for land use regulation will function apparently better than the current *EPAA*: '… [t]he purpose of this White Paper is to set out how the new planning system will function.'

Before proceeding with a detailed analysis of the new planning system, the following section of this paper provides a brief genealogy of statutory land use regulation in NSW giving an historical context for the subsequent analysis.

Planning Genealogy

The first statutory land use planning in Australia arose in Western Australia in 1928 with the creation of a Metropolitan Town Planning Commission for Perth which was supported by legislation enabling the making of statutory plans.(Brown, Sherrard and Shaw 1969) However, initial attempts at land use planning in NSW were rudimentary Residential District Proclamations (RDPs) promulgated under the *Local Government Act 1919* s. 309 (NSW) which had the intention of voluntarily separating residential areas from industrial uses perceived as offensive. The first significant planning legislation in NSW was the *Local Government (Town and Country Planning) Amendment Act 1945* (NSW) which was based heavily on the *Town Planning Act 1932* (UK). The 1945 legislation enabled the making of Planning Scheme Ordinances and subsequently, the *Local Government (Amendment) Act 1951* (NSW) created the *County of Cumberland Planning Scheme Ordinance* (*Ordinance*) on 27 July 1951. The *Ordinance* introduced planning and zoning along UK lines prevailing in the 1930s and, importantly, included compensation provisions for those owners injuriously affected by the new zonings, in particular:

> ... [l]legislation providing for planning must ensure that those injuriously affected by a scheme and those from whom land is compulsorily acquired will not be unjustly treated, but the legislation must also ensure so far as possible that the community will not be forced to pay unreasonably. In order to achieve these results, there must be carefully detailed clauses in the Act saying whether compensation is or is not payable in particular circumstances, and just how the assessment of compensation is to be determined. Town and country planning legislation almost invariably provides that owners of property which is injuriously affected and loses value when the scheme comes into effect will be entitled to payment of compensation by the responsible planning authority, usually the local governing authority, or council.
>
> (Brown, Sherrard and Shaw 1969, 365-366)

The *Ordinance* also provided for the collection of betterment charges for those owners gaining beneficially from zoning, although never greatly successful in NSW, except as part of the compensation assessment arising from resumption of actual private ownership rights under (currently) the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). Specific

provisions for betterment were also collected as an offset arising from public works, for example the construction of new railways under the *City and Suburban Electric Railways Act1915 - 1967* (NSW).

In summary, over the ensuing 63 years since the enactment of the *Ordinance,* planning and zoning in NSW has developed, albeit still based broadly on the framework established by the 1951 *Ordinance.* Also in 1919 the notion of separating uses by the State on the grounds of public health and amenity was a paramount objective of RDPs; a feature which remains the *liet motif* of planning and zoning under the *EPAA* in 2014. Arguably, experience over recent years suggests that a move away from the obviously outdated focus on exclusory zoning is overdue; and the next section attempts to deduce from the *White Paper* how much of this will be achieved. As always, it is a truism that the 'devil is in the detail' when complex reform proposals such as the *White Paper* are promulgated for public comment.

The White Paper Analysed

Throughout the *White Paper* asserts that the new planning system is intended to embody an overarching focus on community participation, and it is intended public engagement will facilitate the development of long-term strategic plans for various parts of the State. However, the definition of a 'community' for the purposes of participation in strategic planning raises the inevitable question of how a community will be contacted and their views obtained. The definition of 'community' is always a matter of judgement. As Wells (2010) points out any judgement as to the definition 'must be an informed judgement' and not merely the selection of a comfortable cohort of individuals to garner participation easily or effortlessly. Given that communities are by their very nature dispersed (particularly in regional and rural areas), the ascertaining of community views to inform the strategic planning process will always be a difficult task. Back in 1984, Logan (1984) reported in respect of surveys of various Melbourne municipalities:

> ...many of the planners were sceptical about the value of efforts to involve citizens in planning decisions. Some argued that, given the relatively low level of response, the funds, time and staff resources involved in participation exercises were excessive.

Crucially, Logan (1984) also pointed to a selectivity of responses given 'the problem of gauging the views of 'the silent majority' remained.' It is likely in the view of the authors that the problem of meaningful community participation in any new planning system in NSW will also remain unresolved. Gleeson (2011) considers the long history of earlier attempts in NSW to engender meaningful community participation is not encouraging.

However, the *White Paper* somewhat unconvincingly advises that apart from traditional methods of community engagement, the use of spatial data as a basis for community participation through ePlanning will be developed.

Further, the *White Paper* proposes the development of '3D interactive models, development guides and online systems for the community' (DPI 2013 p.25) presumably again to facilitate participation. Yet, the proposal in the 2012 *Green Paper* (DPI 2012) for a contemporaneous Spatial Information Act was not proceeded with in the *White Paper,* notwithstanding the proposal in the *Green Paper* would have underpinned many of the stated participatory outcomes sought in the *White Paper*. Nevertheless, the existing *Surveying and Spatial Information Act 1992* (NSW) could be amended to provide a robust spatial database upon which ePlanning could be founded. However the *White Paper* is also silent as regard such an alternative.

As stated earlier, there is a need to define the term *community*, and indeed clarification is required as to what is meant by *public interest* in the context of the various communities which constitute the population of NSW. However, useful case law has emerged since the enactment of the *EPAA* in 1979 from the Land and Environment Court of NSW in an attempt to canvas these vexed notions. Though Courts only respond to such questions from time-to-time arising from litigation for a particular development at a specific site, a new planning system ought to provide an opportunity to set out statutory definitions of *community* and *public interest*. Whilst the development of innovative methods of engagement with communities through such processes as ePlanning is encouraged, such communicative development also needs to occur parallel with clarification of the definitions of *community* and the *public interest* referred to above.

The *White Paper* (DPI 2013 p.57) lists five key legislative requirements for community participation, which are summarised below:

- A Community Participation Charter
- Community Participation Plans
- Publication of details, timeframes and contact points to facilitate community participation in a specific proposed strategic plan
- Minimum standards for exhibition of draft plans
- Minimum standards for exhibition of development proposals.

Given strategic planning endeavours in NSW will of necessity focus on the expansion of the footprint of the Sydney metropolitan area, the *White Paper* is silent on the criteria for

future disposition of population growth which in the past has occurred in areas ill-informed as to environmental and spatial constraints. The identification of such constraints is critical when attempting to avoid localities generally vulnerable to potential flood, bushfire or other risks. There also appears to be little understanding of the limitations of energy and water reticulation needs and capacity upon the disposition of future populations.

Crucially, the location of scarce and hence valuable arable land is not addressed, given such land which should be permanently quarantined from urban expansion. Given most residential housing growth continues to occur in peri-urban areas, the real impact of expansion of the footprint of the Sydney metropolitan area on the remaining stock of arable land in these crucial areas has not been considered in the *White Paper*. The importance of the peri-urban areas of Sydney has been described by Sinclair (2009) as: '…one of the State's food bowls. It produces $1 billion of agricultural produce each year.' Further, Sinclair (2009) points out that such peri-urban areas are a major supplier of perishable vegetable production providing:

> …91% of NSW Asian vegetable production, 90% of parsley, 82% of mushrooms, 76% of capsicum and chillies, 70% of cucumbers, 63% of basil and coriander and 61% of cabbages. The dominance of the Sydney region is also evident with poultry, nurseries, flowers and turf.

Anecdotal evidence provided to the authors by the NSW Division of the Australian Property Institute (API) strongly suggests comparable threats to arable lands exist in the peri-urban areas of Brisbane, notable in the rapidly urbanising south eastern corridor, and similar threats to peri-urban food production areas surrounding Melbourne are also reported. Unsurprisingly, the majority of Australia's land mass falls within the categories of poor to moderate potential for food production with much land barely arable, Flannery (1994) recording that by the early 1990s approximately 70% of arable land in Australia was significantly degraded. Community participation in the strategic planning process as proposed in the *White Paper* will require the provision of robust data on crucial matters such as vulnerable arable lands in the peri-urban areas of Sydney. Soberly, it can be surmised the five key legislative requirements for community participation will almost certainly fail in the absence of foundational information and tools so necessary for meaningful public engagement.

Moving forward from community participation in strategic planning, the intent of the *White Paper* in the area of development assessment is the creation of five distinct development tracks, namely: exempt, complying, code, merit and prohibited. (DPI 2013 p. 122)

The first two tracks of exempt and complying can probably be anticipated to operate reasonably well, however the third track (the code track) relies heavily on 'Model development guides' (DPI 2013 p.132) which will be available 'six months after the new planning legislation is to commence. It is a commonly held view that 'numerical standards' or 'less prescriptive' (DPI 2013 p.130) considerations will always need to be balanced in the development assessment process against site specific considerations and the unanticipated impacts upon adjoining owners and occupants. The *White Paper* advises where development complies with 'all the acceptable solutions' the Council 'cannot refuse the code assessment application.' (DPI 2013 p.130)

In specific site situations, mechanisms such as floor space controls and total building height bonuses can facilitate the creation of larger redevelopment plots. It is difficult to understand how these common mechanisms could be utilised unless it was possible for development proposals falling within the code assessment track to be easily reclassified into the merit assessment track, within a framework of further (but meaningful) community consultation. To some extent, this issue is recognised in the *White Paper* where some code assessment applications may not necessarily 'meet one of the acceptable solutions in the development guide.' (DPI 2013 p.131)

However, it is unclear how the criteria utilised in the earlier strategic community consultation will be developed to permit subsequent decisions on variations from the acceptable solution which are deemed 'minor.' Even where significant departures are proposed in the manner of possible 'alternative acceptable solutions' (DPI 2013 p.132), Councils can only receive comments through community consultation on those aspects that do not comply with the acceptable solutions in the performance criteria. Unconvincingly, the *White Paper* states: '...Consultation is not an opportunity to revisit aspects of the development that meet the vision and outcomes of the strategic plan.' (DPI 2013 p.132)

Axiomatically failure to meet a crucial development criterion cannot be considered in isolation. Long experience in the Land and Environment Court of NSW suggests such a failure often exposes unsurprisingly significant interrelationships with other aspects of the development which were initially thought to comply, but rely upon the non-complying aspect to garner their own compliance. It is a failure of the *White Paper* not to have considered this aspect of code assessment.

As regard those applications to be dealt with under the merit assessment track, where proposed development '*departs from the strategic vision'* the further community consultation

on the proposal appears to suggest it can be approved, notwithstanding the significant departure from the vision because of unspecified criteria. The *White Paper* provides an incredulous example where 'a 14 storey residential flat building is proposed in an area where only nine storeys has been agreed' (DPI 2013 p.135). In this example the *White Paper* indicates such a proposed development could be approved by Council through an unspecified 'streamlined development assessment' because of 'significant public benefit' such as open space or a childcare facility presumably within the development footprint. This example mocks any credible prospect of community participation in strategic planning, and surely disadvantages the impacted community due to the uncertainty surrounding the permissibility of what is in effect impermissible development.

As regard those projects falling within the category of State Significant Development (SSD), the *White Paper* states these applications will continue to be assessed as present (DPI 2013 p.138). Anecdotal evidence provided to the authors indicates the SSD category continues to be widely regarded with unease and problematic with little prospect for greater transparency.

A further class of development is those infrastructure and government activities currently captured by *Part 5*, *EPAA* for which environmental impact assessment is undertaken by the agency (whether public or private) and will continue to be undertaken 'under the new planning system, self-assessments.' (DPI 2013 p.142) Also, self-assessment of submissions received by the agency from the impacted community arising from public exhibition of the required Review of Environmental Factors (REF) and other community consultation will also continue unchanged. Anecdotal evidence provided to the authors by the API indicates some government infrastructure proponents fail to acknowledge numerous factual errors in their REF, and hence fail to comply with the mandatory requirements of *cl.228*, *Environmental Planning and Assessment Regulation 2000* (NSW). There is also evidence some proponents such as Transport for New South Wales (TfNSW) have failed to comply with the minimum public consultation period of 21 days under *State Environmental Planning Policy (Infrastructure) 2007*, and not less than 30 days under s.115Z, *EPAA*.

The continuation of the existing process of self-assessment of the merits of proposals by proponent agencies and the subsequent issuing of consent by proponents to themselves under *Part 5 EPAA* again mock the overriding intent of the new planning system to 'promote cooperation and community participation'. (DPI 2013 p.6)

In a final body blow to community participation, the *White Paper* proposes a new class of development assessment for major public and/or private projects to be known as Public Priority Infrastructure (PPI). In a bizarre statement, the *White Paper* advises PPI projects 'will be approved at the outset' (DPI 2013 p.152) and 'without the need for further planning approval.' (DPI 2013 p.171) It is unclear how these projects will be exposed to public consultation given the PPI project will be already approved once declared, and arguably the internal environmental assessment process would appear to be minimal.

The final section of this paper provides some concluding remarks about the *White Paper,* and some observations about the future of the proposed planning and zoning system.

Concluding remarks

The *White Paper* has provided a window on the desires of the NSW government to overhaul the existing planning and zoning system in NSW, through the repeal of the *EPAA* and the creation of new legislation. On 23 September 2013 it was reported (Daily Telegraph 2013) Cabinet had resolved to:

> ...defer planning reforms and send Mr. Hazzard back to the drawing board, saying he should work with key ministers and bring back a proposal on how the Coalition was actually 'returning power to local communities' as the Coalition had agreed to do at the 2011 election.

On 19 September 2013, Minister Hazzard released a statement advising: '... [t]he NSW Government has listened to the community and local council and a number of changes to the Planning Bill 2013 are currently being drafted.'

The Sydney legal firm Allens (2013) in its client newsletter of 19 November 2013 summarises the overall proposal as follows:

> ... [t]he focus on strategic planning, the elevation of economic outcomes in the planning principles described in the Bill, and the introduction of code assessable development are a clear policy driven departure from the current regime.

Subsequently, the new legislation was significantly amended by the Legislative Council in late November 2013, returned to the Legislative Assembly and those amendments were considered by the Minister over the 2013-2014 Parliamentary recess. Perhaps, the existing *EPAA* may now be amended given the long experience of the community, local government and the Courts in dealing with the 1979 legislation which, beyond question, requires updating but perhaps not repeal. The foregoing analysis of the *White Paper* revealed a shortfall in expectations as regard community participation in not only the much lauded strategic planning level, but also in the new development assessment process. It was not unexpected that opposition arose to the falsehood of community participation as proposed in the *White*

Paper leading to the demise of the *Planning Bill 2013* (NSW) in the Legislative Assembly in late 2013.

There was a salutary lesson in the outcome for the NSW government, and it is instructive to note the following comments of Brown, Sherrard and Shaw in 1969:

> '...our definition of town and country planning recognizes that the ultimate aim and object of planning is the welfare of the community. This is the fundamental basis of modern planning...'

This paper is obviously currently work in progress, and the authors await with interest the result of further consideration by the Minister as the Bill was withdrawn in early 2014 following the amendments made by the Legislative Council to the Planning Bill 2013 (NSW).

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