

**NSW Government Planning Review Green Paper, July 2012**  
**EDO NSW Preliminary Briefing Note – KEY ISSUES SUMMARY**

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**1. Background – The process for a new planning system**

On 14 July 2012, the NSW Government released *A New Planning System for NSW – Green Paper*, outlining its broad proposals and policy directions for a new planning system.

This briefing note gives a preliminary outline of the proposed changes, and identifies key issues including strengths and weaknesses, and issues requiring further information. Our comments are based on our extensive experience as an independent, not-for-profit community legal centre specialising in public interest environmental law. EDO NSW will continue to engage throughout the process of these once-in-a-generation reforms. We will provide a more fulsome analysis, recommendations and submissions in due course.

*How can you get involved?*

The Green Paper is open for consultation, submissions and online comment until **Friday 14 September 2012**. The eight weeks of consultation are a valuable opportunity to have your say on:

- how we should plan for the future of our neighbourhoods, towns and cities
- how the planning system can meet the needs of the community, local councils and businesses
- how state and local government should involve the community and other stakeholders.

The Green Paper is informed by:

- two reports by an independent expert Planning Review panel, drafted after comprehensive consultation and an Issues Paper submissions process
- a *Review of International Best Practice in Planning Law* by a US environmental law academic, commissioned by the Planning Department, and
- The NSW State Plan, *NSW 2021* (available at [www.2021.nsw.gov.au](http://www.2021.nsw.gov.au)).

The Green Paper, the Independent Review Panel reports and further information is available on the Planning Department’s website at: <http://www.planning.nsw.gov.au/a-new-planning-system-for-nsw>. After this consultation process, the Government will release a White Paper with more detailed proposals, and draft legislation, expected in late 2012.

## **2. Overview of the Green Paper's planning framework**

*What is being proposed?*

The five broad policy drivers in the Government's Green Paper are:

- **Community Participation** – *Involving the community early on key decisions that will shape our cities, towns and neighbourhoods*
- **Strategic Focus** – *Preparing good policies upfront to guide growth and development*
- **Streamlined Approval** – *Making the assessment of proposals faster and simpler by removing duplication*
- **Provision of infrastructure** – *Ensuring infrastructure is planned and delivered to support new and existing communities*
- **A 'delivery culture'** – *Promoting a 'can do' culture in planning with government and local councils accountable for delivering results*

The Green Paper proposes that the new planning system be underpinned by an 'enabling Act' which establishes the broad framework while giving flexibility to respond to change. Major structural change will include a new four-level hierarchy of planning instruments (see Green Paper p 28, Figure 7):

- **NSW Planning Policies** – The NSW Cabinet will agree on around 10-12 of these policies to provide practical high level planning direction on key policy areas.<sup>1</sup> Current State Environmental Planning Policies (SEPPs) will be repealed, and where necessary given effect further down the hierarchy. Unlike SEPPs, NSW Planning Policies will not be statutory planning instruments, but will be identified in the new Act and be implemented through strategic regional, subregional and local plans.
- **Regional Growth Plans** – These plans will provide the principal direction for regional or metropolitan growth over 20 years. They will deal with spatial planning, population growth scenarios, development patterns, key actions on regional issues, cumulative impact considerations, accountabilities for delivery, and review (among other things). Again these plans would not be statutory in themselves, but the Act would refer to them. These plans would be implemented by Subregional Delivery Plans below.
- **Subregional Delivery Plans** – The Green Paper describes these as 'the new transformative delivery tool for high growth areas' (p 36). They will directly rezone land, provide a framework for code-based ('complying') assessment and development parameters, consolidate agencies' development requirements and link with infrastructure planning. Subregional plans will also identify priority growth areas, biodiversity corridors, conservation areas and prime agricultural land. Local councils and 'Regional Planning Boards' will be central to consulting on and developing these plans. Subregional plans are to include 'growth infrastructure plans' and be further underpinned by evidence from 'sectoral strategies' (eg housing, environment).
- **Local Land Use Plans** – These plain-English spatial and land use plans would replace Local Environmental Plans (LEPs). They will give guidance on desired development outcomes, but emphasise merit-based assessment rather than strict controls. Agency concurrence and referral requirements would be minimised. Local plans will cover four common areas – strategic intent (comparable to existing Community Strategic Plans); a statutory spatial land use plan; delivery of

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<sup>1</sup> For example: housing, employment, biodiversity, agriculture, mining/petroleum, coastal management, retail, tourism, regional development and infrastructure (see Green Paper, p 32); as well as a clear policy 'focused on the achievement of natural resource management outcomes' (case study, p 35).

infrastructure and services; and development guidelines and performance monitoring requirements.

The Green Paper proposes that strategic planning at all levels (regional, subregional and local) will take account of economic, social and environmental impacts; and include common elements to ensure community and stakeholder engagement, evidence-based policy, better policy integration and delivery, performance measurement and public reporting (p 29). Strategic planning would flow down to inform development decisions at the local level.

As currently proposed, the trade-off in focusing on community participation early on is the intention to give developers greater certainty (and in some ways more flexibility) to have development approved once local and regional strategies are set. More on this below.

### **3. EDO NSW Preliminary comments on key issues**

The EDO's focus in the NSW planning review centres on two issues – **community participation** and **protection of the environment**. The Government's planning review is a major opportunity to advance both these elements as integral parts of the planning system. In our view, community participation and environmental protection are critical to public confidence in the new system, the State's future prosperity and the wellbeing of its citizens. In previous submissions to the NSW Planning Review, we called for a planning system that provides for:

- Ecologically sustainable development (ESD) as the overarching objective
- Mechanisms for achieving environmental outcomes (to value, maintain and improve our natural capital)
- Genuine and meaningful public participation
- A legislative framework for effective strategic planning
- Improved integrity of environmental impact assessment
- Mechanisms to mitigate and adapt to climate change, including in strategic plans
- Mechanisms for ensuring accountability and improved enforcement.<sup>2</sup>

The EDO's initial views on the Green Paper's key proposals are outlined below. We note a range of strengths and weaknesses, and matters needing further information. This is a preliminary analysis only. Our thinking will be shaped by further research, understanding and consultation during this comment period and beyond. Importantly, this will include further consideration of the Independent Review Panel's reports and recommendations.

#### ***a. Potential strengths – some positive steps***

The Green Paper outlines a number of positive reform proposals. For example:

- Legislated, genuine and early **community engagement** in relation to:
  - strategic planning at all levels, and
  - a range of development assessment (for example, state significant development, merit assessed development, priority infrastructure, and merit-related/design aspects of code-assessed development)

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<sup>2</sup> *Planning for Ecologically Sustainable Development*, Submission to the NSW Planning Review Issues Paper by Nature Conservation Council of NSW, EDO NSW and Total Environment Centre, March 2012, at: [http://www.edo.org.au/edonsw/site/pdf/subs/120314ncc\\_edo\\_tec\\_joint\\_sub\\_planning\\_system\\_review\\_issue\\_s.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/120314ncc_edo_tec_joint_sub_planning_system_review_issue_s.pdf). See also EDO NSW submission to NSW Planning Review (Stage 1), November 2011, at [http://www.edo.org.au/edonsw/site/pdf/subs/111104review\\_nsw\\_planning\\_stage\\_1.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/111104review_nsw_planning_stage_1.pdf).

- Adoption of a **public participation charter** to inform new participation strategies, and which ‘could’: recognise rights to participate in plan making and development assessment; require accessible information to engage with; encourage new engagement methods; and provision for authority feedback prior to decisions (p 22)
- A **strategic planning framework** with consistent and interlinking tiers, and that is proposed ‘will deliver improved biodiversity and environmental outcomes’ (p 6)
- Clear efforts to **integrate land use planning with infrastructure**, and agreement to integrate land use planning with **natural resource management**
- Commitments to greater **evidence-based** planning and policy development, and **cultural change** for greater transparency, service and engagement
- Proposed **suburban character zoning** to allow communities to preserve local character
- Improving environmental assessment through use of **accredited consultants** (currently proposed for State significant development), and the consideration of **cumulative impacts** of development in regional plans
- Harnessing **information technology** and ‘**e-planning**’ for accessibility and efficiency
- Improved **transparency, monitoring and accountability**, including via:
  - plain-English materials and better explanation of engagement opportunities
  - evidence-based strategic planning
  - increased use of online development tracking
  - clearer agency accountabilities, performance monitoring and regular review.

The Green Paper also proposes that ‘The achievement of sustainable development will remain the main objective of the Act’ (p 17), rather than simply being *one* objective (ecologically sustainable development is discussed below). Some more procedural objectives are also proposed to ensure the system is simple, certain, transparent, efficient, effective, integrated and responsive.

Overall, the Government’s commitment to genuine reform is encouraging, as is the acknowledgement that considerable time, resourcing and further engagement will be necessary to finalise and achieve positive reforms that must be ‘owned’ by the community. Notwithstanding those positives, we believe there is considerable work to do in a range of areas.

### ***b. Areas of concern that should be addressed in the White Paper***

EDO NSW supports the Government’s State Plan goal to restore public trust and integrity to the planning system. Much of the success and legitimacy of the new system will depend on the details – how big picture aims are implemented in practice. There are a range of proposals in the Green Paper that are of potential concern regarding environmental protection, sustainability and equitable rights for the community. For example:

- The purposes and objectives of the Act and planning system must place **ecologically sustainable development at the apex**. This should inform how the Act is applied, and reflect the type of economic and social development we want in NSW. The Green Paper focuses heavily on economic growth and indicators. More consideration is needed on how to apply a truly ‘**triple bottom line**’ approach.
- **Strategic planning** must give more focus to **climate change, improved environmental outcomes** and **urban sustainability and design**. While we support

the aim to rationalise existing SEPPs, in doing so we would like to ensure the high-level 'NSW Planning Policies' deal with these areas, supported by cultural change.

- The Green Paper proposes the **removal of agency concurrence and approvals** for individual projects, on the basis that these will be dealt with upfront in strategic plans. (Similar exemptions applied to major projects under Part 3A, and apply now to State significant development and infrastructure.) While we agree that some concurrences can be handled upfront (eg bushfire risk), potential concerns here relate to transparency of inter-agency decisions, adequacy of environmental assessment (ensuring assessment matches impacts), and adequacy of approval conditions (if regulators cannot make independent decisions).
- Proposals to '**streamline**' **environmental impact assessment** requirements, including for state significant development, are a significant concern (p 59). Proposals for strategic level 'concept plan' approvals, 'streamlining Director General Requirements' and 'reducing the 28 day consultation period if not required' all risk eroding public trust, and reducing environmental standards instead of improving them. In addition, if statutory approval timeframes are proposed, they must take account of delays caused by applicants supplying inadequate information.
- The Green Paper proposes to apply a fast-track, **code-based approval process** to 'low risk low impact development types' (p 63). The legitimacy of this proposal, and arguably the reforms as a whole, depend on limiting code-based approval to projects of genuinely low risk and impact. Also of significant concern is the proposal to consider extending code-based approval to industrial and other buildings.
- Although 'certainty' is one of the Government's key policy rationales, the Green Paper proposes additional **flexibility for developers**, including at the development assessment stage. For example, even if a project **exceeds local development standards**, it can still be considered 'based on its merits and in the context of plan objectives' (p 18). This has the potential to reduce certainty, clarity and consistency.
- If the above proposal is adopted, there needs to be legislated rights for **public participation**, and **merits appeal rights** for third party objectors.<sup>3</sup>
- Developers would have further flexibility under **proposals for rezoning** – both the ability to apply for rezoning in the first place, and new rights of review if rezoning is refused. There is no clear public benefit to these proposals, and spot rezoning undermines strategic planning – the cornerstone of the Government's reforms.<sup>4</sup>
- If spot rezoning *is* allowed, we oppose the new rights for **developers to seek review** of council or department refusals, particularly without equitable community rights. Developers should not be given new rights for non-compliant projects, particularly if councils and communities cannot refuse or object to projects that *do* comply.
- A '**CEOs Group**' involving key agencies is proposed as a governance mechanism for the planning system – given the overlap of environmental and planning issues, one notable omission is the Chief Executive of the Office of Environment and Heritage.
- It is proposed that 'existing appeal rights under the Act be retained' (p 66). Beyond this, there is no explanation of how **merit appeal rights** will function in practice. Strategic planning, if done properly, will in itself reduce disputes and appeals over

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<sup>3</sup> For example, ICAC recommended expanding merit appeal rights for private sector developments that represent a significant departure from existing development standards; or that are significant and controversial (among other things). See Independent Commission Against Corruption, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 16.

<sup>4</sup> See further EDO NSW submission (May 2012) on the Government's 'More local, more accountable plan making' Discussion Paper, at [http://www.edo.org.au/edonsw/site/pdf/subs/120504lep\\_changes.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/120504lep_changes.pdf).

individual projects. However, appeal rights provide an important community safety net, as well as a range of benefits for accountability, public trust, and planning outcomes in the public interest.

In addition to addressing these issues, the transition from the Green Paper to the White Paper needs to deliver a range of further measures, consistent with the key principles in our previous submissions. In particular:

- Embed a **commitment to ecologically sustainable development (ESD)** and **urban sustainability** in the objectives and throughout the new Act and system – for example –
  - strategic plans and development decisions should be required to adopt the principles of ESD, and outcomes should be measured against achieving ESD;
  - a State Planning Policy on ‘sustainability’ should require minimum standards for energy and water efficiency (updating BASIX), climate change mitigation and adaptation, other building design standards, and measures to encourage clean industry<sup>5</sup>
  - performance monitoring should include a range of sustainability indicators that are more sophisticated than the ‘area of environmental land protected’.
- Establish **clear decision making criteria** and **objective tests** for development assessment and approval – in particular, that **environmental outcomes are maintained or improved** (for example, in relation to water, salinity, biodiversity, native vegetation, pollution, heritage, energy and water efficiency).
- Provide more detail on mechanisms, models and resources to **involve local communities** in planning processes.
- Ensure that **communities do not feel sidelined** by efforts to streamline development assessment and approval (including consultation and appeal rights).
- Ensure that our **valuable natural areas** are properly **identified and protected** at local, regional and state level, to avoid inappropriate or incompatible development.
- Implement appropriate **design quality standards** including for residential flat developments, such as those now contained in SEPP 65.
- Deliver clear statements on how **climate change** will affect NSW, and a preparedness to engage with and manage this risk – via comprehensive **mitigation and adaptation** plans and policies (for example, a dedicated NSW Planning Policy).
- Demonstrate how **natural resource management** will be **integrated with land use planning**, and how **cumulative impacts** will be fully considered (Green Paper p 35).
- Recognise the triple bottom line **value of ‘green infrastructure’** – these are the parks, gardens, waterways, trees, cycleways and biodiversity corridors that make our communities more liveable, valuable, healthy, connected and climate change-ready.
- A flexible range of **regulatory tools and penalties** should be available to address planning breaches, including **‘open standing’** to bring enforcement proceedings.
- **Compliance and enforcement policies and statistics** should be published in a consistent and comparable form, backed up by relevant **performance indicators**.

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<sup>5</sup> See for example, Ernst & Young, *Business opportunities in a low carbon economy* (September 2010), report for Industry and Investment NSW. Available at: <http://www.business.nsw.gov.au/innovation-and-research/innovation-in-nsw/innovation-resources-and-publications/cross-sectoral-analyses>.

**c. Key issues where further information needed**

The table below sets out a range of key issues requiring further information and explanation.

<b>Key issue in Green Paper</b>	<b>What the community needs to know more about</b>
<b>Participation</b> – Citizen participation is a major focus of the Green Paper, with early engagement opportunities for communities to shape planning strategies at local, sub-regional and regional levels.	How will the Government invest in getting communities involved across the State? This will require time, effort and money to ensure real and informed community participation.
<b>‘An enabling act’</b> – The Government will set its high-level planning agenda through an enabling act and overarching NSW planning policies set by the Cabinet.	How will substantive rights – including those to ensure the community’s interest, environmental and heritage protection, and sustainable development – be enshrined in the enabling act and the higher-level agenda-setting for the planning system?
<b>Infrastructure</b> – Long-term planning for key infrastructure such as transport will be integrated with land use planning, with a clear agenda to promote funding and timely infrastructure delivery.	Better integrated planning is important, but also adds to the stakes and complexities for communities to understand and participate in the strategic planning process. How will this be addressed?
<b>Natural resources</b> – Commitment to integrate natural resource management (NRM) with land-use planning.	This is vital to ecologically sustainable development objectives. It is important to spell out clearly how this will be achieved.
<b>Evidence-based</b> – Robust, evidence-based strategic planning and de-politicized decision-making.	How will the community’s right to be involved and its access to information be balanced with the clear economic objectives to promote growth and expedite compliant development approvals?
<b>Streamlined</b> – Streamlining of assessment and decision-making processes, including approval of major project ‘concept plans’, ‘strategic compliance certificates’, and removal of concurrence powers from government agencies and authorities.	The community needs assurance that the Government doesn’t tip the balance too far towards development interests by removing ‘checks and balances’ in its desire to streamline the planning system to be faster and more cost-effective. How will this be achieved, and how will the system avoid the risks and pitfalls of former Part 3A?
<b>Participation charter</b> – Creation of a ‘Public Participation Charter’ that could include: recognition of the right to participate; requirements for easy to understand information; support for new methods of engagement; provisions for clear feedback; encourage best practice.	How will the Government finalise the Charter, ensure it is comprehensive, and that it includes a commitment to inclusive law reform processes to uphold and maintain the public interest and community participation?

<p><b>Technology</b> – Bringing the planning system into the 21<sup>st</sup> century by way of online access, e-planning, use of information technologies and cultural change in the Planning Department.</p>	<p>Timely access to information – backed by plain-English language – is vital to facilitating community participation. Given that this is a huge area of challenge to move from highly technical and bureaucratic approaches, how will it be achieved?</p>
<p><b>Cumulative impacts</b> – strategic plans will take into account the cumulative impacts of multiple developments in an area, not just the impacts of individual projects.</p>	<p>How will this be put into effect? It is not clear from the Green Paper what mechanisms will achieve this, or what will be the practical effects. Will cumulative impacts also be considered and responded to at the development assessment stage? If so, how?</p>
<p><b>Code complying</b> – The Government has expressed an intention that ‘Code complying development will be maximised and where more detailed assessment is needed, the level of assessment will match the level of impact.’ (Green Paper, p 6)</p>	<p>How will community views be sought and reflected in code-making? How will this affect community rights to be heard (or appeal) on developments in their neighbourhood? How will the Government ensure robust project assessment and code compliance, given widespread concerns about private certifiers and oversight?</p>
<p><b>‘Public priority infrastructure’</b> – The Green Paper is signaling that there will be expedited approvals for projects that are deemed to be ‘public priority infrastructure’.</p>	<p>Major public infrastructure projects can have significant environmental and social impacts, just as private projects do. How will these impacts be avoided and minimised, and what rights will the community have?</p>
<p><b>Enterprise zones</b> – Aimed at promoting investment and jobs, these are characterized by ‘little, if any development controls providing they do not result in any significant adverse environmental impacts’.</p>	<p>How will adequate standards and thresholds be maintained to protect community and environmental values? Could these zones be linked to ‘sustainability’ policies that support investment in clean industry?</p>
<p><b>Transitional arrangements</b> – These arrangements are important as strategic plans, codes and policies are finalised.</p>	<p>As strategic planning, data gathering, meaningful engagement and code formulation will necessarily take time, how will public confidence be assured in the interim? How will the transition ensure communities have an equitable say?</p>

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