



environmental defender's office new south wales

Submission on the Discussion Paper for the Metropolitan Strategy Review – *Sydney Towards 2036*

30 April 2010

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

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Introduction

The Environmental Defender's Office NSW (EDO) is a community legal centre specializing in public interest environmental law. The EDO has had a long history of engagement with the planning system in NSW, in particular over the past few years in relation to the various reforms that have been made.¹ We therefore welcome the opportunity to comment on the Discussion Paper *Sydney Towards 2036* ('Discussion Paper') and contribute to the review of the Sydney Metropolitan Strategy ('Strategy'). Given the broad focus of the Discussion Paper, the EDO will limit this submission to brief comments on those aspects of the Strategy relevant to our role as a community legal centre that specialises in environmental and planning law. The EDO is particularly interested in the role of planning laws to actually implement the Directions of the Strategy.

As a preliminary comment, the EDO is concerned about the failure of the Discussion Paper to focus on, or even refer to, the principles of ecologically sustainable development (ESD). As the EDO has previously stated in relation to the planning system as a whole, our view is that the Strategy should be centered on the principles of ESD to ensure that the equal integration of environmental, economic and social considerations is at the core of the Strategy. This is critical given that this document is intended to be the long term strategic vision for Sydney's future. While the Discussion Paper touches on the issues of climate change and the need to balance land use on the city fringe to protect agricultural land, we are concerned that the Strategy does not even refer to the need to ensure that Sydney manages its growth in line with the principles of ESD. Instead, it focuses heavily on increasing jobs and housing, without integrating principles of ESD throughout discussion of these issues.

We provide comment on the following 'Proposed Directions' canvassed in the Discussion Paper:

- Making Sydney climate change ready;
- Integrating land use with transport;
- Balancing land uses on the city fringe; and
- Implementation.

Making Sydney climate change ready

The EDO strongly supports the recognition of the need to address climate change impacts in the Strategy. We have consistently called for better incorporation of climate change considerations into the existing planning framework in NSW.²

In particular, the Discussion Paper seeks guidance on how the planning system can help Sydney adapt to the impacts of climate change. In order to do so, our position is that fundamental changes must be made to planning law in NSW, given that the planning system is closely linked to mitigation and adaptation activities for climate change in Sydney and NSW more broadly.

¹ Past EDO submissions in relation to the planning system are available on our website: <http://www.edo.org.au/edonsw/site/policy.php#4>

²For example, see the EDO's recent submission on the Draft NSW Coastal Planning Guideline, available at: http://www.edo.org.au/edonsw/site/pdf/subs09/091130coastal_planning_guideline.pdf

Ecologically Sustainable development

Not only should the principles of ESD underpin the Metropolitan Strategy, they must guide implementation of the Strategy through law. Specifically, the EDO submits that there is an urgent need for legislative amendment to ensure that ESD is *the* fundamental principle underpinning all plans and decisions made under the *Environmental Planning and Assessment Act 1979* ('EP&A Act'). The decision of *Minister for Planning v Walker* [2008] NSWCA 224 found that a failure to consider ESD and the impacts of climate change does not necessarily invalidate a Minister's decision to grant approval under Part 3A of the EP&A Act. This means that currently ESD (and by extension climate change impacts) need not necessarily be considered in the assessment and approval of major projects. The strengthening of ESD under the EP&A Act will allow the incorporation of climate change considerations in a proper, integrated and upfront manner.

To this end, there is a need to move beyond an approach where ESD must simply be considered when making decisions. In such a situation the decision-maker is free to give greater weight to other considerations once ESD has been given due regard. To achieve sustainable outcomes, ESD needs to move 'up the chain' to a position of prominence. This could be achieved by making the principles of ESD the guiding principles of the EP&A Act. This will ensure that ESD provides the context within which all decisions made under the Act are to be made.³ Alternatively, a provision could be introduced to require a decision-maker to be satisfied that a proposed development, or draft LEP, is sustainable (in accordance with the principles of ESD) or it cannot be approved.

We also submit that additional amendments are necessary to specifically ensure that greenhouse gas (GHG) mitigation becomes an integral consideration when assessing applications for projects that are likely to be highly-emitting. Climate change assessment and consideration should therefore become mandatory for all projects, in particular for Part 3A projects, and changes to the EP&A Act should be made that specifically require assessment of GHG emissions.

Adaptation: Sea level rise

The Discussion Paper does specifically refer to sea level rise projections (p12), and again the EDO submits that comprehensive laws are needed to underpin the Strategy. In terms of adaptation, we note that there are currently no state-wide laws in NSW that require local councils to prohibit or restrict development in response to the projected impacts of climate change, such as sea level rise and increased storm surges. While we acknowledge the government has been developing policy in relation to sea level rise, the EDO submits that this focuses too heavily on the protection of property rather than making adequate changes to the planning system to ensure there is long-term capacity to adapt to sea level rise impacts.

There are a myriad of potential adaptation activities that planning laws should prescribe as mandatory, particularly those that focus on the coast. Robust laws could include planned retreat policies in relevant LEPs, restrictive zoning, setbacks, resilience building measures (such as dune re-vegetation), early warning systems and emergency response plans. Requiring such measures to be undertaken through the use of legally enforceable

³ This could be achieved by amending the objects clause in s5.

legislation will go a long way to ensuring that a precautionary approach to coastal climate change impacts is taken in Sydney, and throughout NSW.⁴

Biodiversity

Maintaining green and open space is critical both for the wellbeing of communities but also for conserving biodiversity in the Sydney region. In particular in relation to adaptation to climate change, conserving areas and networks of native vegetation will be critical to ensure that biodiversity within the Sydney region has scope to move and adapt, and to survive additional pressures placed on it by a changing climate. Conserving agricultural land in the Sydney basin will also assist Sydney to adapt to climate change as it will provide food security in the future, when changing climate conditions and the expense and greenhouse gas emissions associated with transporting food from more distant locations make it increasingly important to source food locally. This is discussed further below.

Sustainability and energy efficiency

The Discussion Paper also seeks input as to how planning in Sydney can be improved to boost water, fuel, energy and waste efficiency. In addition to changes to planning laws proposed above that would ensure climate change is an integral part in decision-making processes within the planning system, the EDO submits that amendments to planning laws are also needed to enhance energy, waste and water efficiencies. Efficiencies in water and energy in particular would contribute to mitigating and adapting to climate change, as well as ensuring that ESD more broadly is a central concern. The planning system will be a central focus of this, through the regulation of development assessment processes. For example, a significant and necessary measure would be to strengthen the BASIX sustainability index, and to extend its operation to commercial and industrial sites, rather than its current application to new dwellings only.

Planning laws should also establish mandatory sustainability requirements for retrofitting of existing buildings (in particular commercial and industrial), as this is another area that is currently unregulated. This is particularly important given the emphasis placed on urban renewal within the Discussion Paper, meaning that future housing supply may come from existing buildings and therefore not be captured by BASIX.

Further, the EDO submits that a holistic approach to sustainability and climate change must be taken, with approaches also necessary to improve energy, water and waste efficiency that fall outside of the operation of the planning scheme, although related. In addition to incentive programs provided by Government, regulatory measures are still required. For example, changes to residential tenancy laws that insert sustainability clauses into residential leases, and laws to require mandatory disclosure of the energy and water efficiency of properties for sale and for rent, are a way to improve sustainability in residential rental properties where split incentives may mean that voluntary measures are not taken up by landlords.⁵

Whole of government approach

⁴ R. Ghanem, K. Ruddock & J. Walker (2008). "Are our laws responding to the challenges posed to our coasts by climate change?" 14(2) UNSWLJ Forum, 40-46.

⁵ See EDO submission on the draft *Residential Tenancies Bill 2009*:
http://www.edo.org.au/edonsw/site/pdf/subs09/091217residential_tenancies_act.pdf

Finally, we note that Department of Environment, Climate Change and Water (DECCW) is preparing a *NSW Climate Change Action Plan* which will be the key NSW policy document setting out the strategic direction of the NSW government on climate change.⁶ In preparing the Strategy, the EDO submits that the Department of Planning should consult with DECCW throughout this process to ensure that the Strategy supports and encourages action on climate change in line with the ‘whole of government’ Action Plan.

Integrating land use with transport

The EDO submits that the focus of any policy to integrate land use with transport should be on ESD. As the *Sustainable Cities* report observed, Australian cities have largely been constructed around the car, creating a culture heavily reliant on private car use, which has negative environment, economic, social and health impacts.⁷ To achieve ESD, the Strategy should therefore focus on measures to reduce car dependency and improve public transport in Sydney, not only to meet the demand for transport services that will result from a growing population, but to contribute to climate change mitigation measures and to assist with the transition to a low carbon future.⁸

The EDO therefore strongly supports the integration of land use with transport, and particularly calls for a focus of this approach to be on investment in public passenger transport infrastructure and services to address the negative impacts of car dependence. This means instead of building more roads, promoting sustainable modes of transport such as walking, cycling and public transport, as well as a strengthening urban centres around transport hubs (such as train stations).

Other policy measures that should be integrated within the Strategy to ensure better integration of land use with transport include the use of levies such as congestion charges, requiring drivers to pay a per day fee if they wish to continue driving in Sydney’s CBD during peak hours. This would reduce the number of private cars on city roads, and encourage the use of other more sustainable modes of transport. Other incentives could be ‘green car’ incentives which could involve the introduction of legislation to provide benefits for users of ‘green cars’ (such as hybrids) and ‘car-sharing’ such as lower annual registration fees and the greater use of transit lanes, for example.⁹

Balancing land uses on the city fringe

The EDO supports the Discussion Paper’s recognition of the importance of agricultural lands in Sydney’s fringe areas, and the need to protect those lands from incompatible and inappropriate uses. This is particularly essential given, as noted previously, the need to

⁶ <http://www.environment.nsw.gov.au/climateChange/actionplan.htm>

⁷ House of Representatives Standing Committee on Environment and Heritage, *Sustainable Cities*, August 2005, p.59.

⁸ Road transport is by far the largest contributor to transport emissions, accounting for 88 per cent of total emissions in 2005. Of this, passenger car emissions are the largest source of road vehicle emissions, making up 62 per cent of road emissions in 2005 and are projected to grow to 40 per cent of 1990 levels by 2020, unless trends are reversed: Department of Climate Change, *Transport Sector Greenhouse Gas Emissions Projections 2007*, February 2008, p17. Available at: www.greenhouse.gov.au/projections/pubs/transport2007.pdf

⁹ For further detail see: *ANEDO Submission on the investment of Commonwealth and State funds in public passenger transport infrastructure and services*, March 2009; available at: <http://www.edo.org.au/policy/090300publictransport.pdf>.

enhance food security for the Sydney basin in the context of climate change, as well as to reduce greenhouse gas emissions associated with long distance transportation of food.

There are a number of ways this could be done, including through the use of an environmental planning instrument (such as a SEPP) that instituted special controls on development on land identified as agricultural production lands in the Sydney region, as well as on adjacent land, to ensure that there are no conflicting and inappropriate uses of land on surrounding lands that would affect the use of that land.

However, while the Discussion Paper focuses on the need to protect agricultural lands on the fringe of Sydney, the EDO submits that the Strategy should also focus on the importance of protecting green and open spaces throughout urban areas across Sydney, including promoting the use of land in urban areas for food production, such as on street verges and in community gardens. Additional planning controls could be introduced to facilitate the greater use of urban open space for growing food, as well as to be used as places for community recreation and habitat for native fauna and flora.

The Discussion Paper also seeks comment on the extent to which land on the city fringe should be identified and protected for open space and conservation. The EDO strongly supports the position that land on the city fringe (in addition to existing open space land within urban areas) should be protected for conservation and open space. For example, Cumberland Plain Woodland, an endangered ecological community located only in the Sydney Basin has already been pushed to the brink and continues to be threatened by the spread of Sydney suburbs. Plans for release of further greenfield sites for housing releases should be strictly limited, and greater emphasis should be placed on protecting land on the city fringe for conservation. In this regard, the EDO supports the acknowledgement in the Discussion Paper that urban renewal and consolidation of existing urban areas will be essential to meet the future housing needs of Sydney.

Implementation

The EDO supports the emphasis placed by the Discussion Paper on urban renewal for mixed use development, as it presents an alternative to the expansion of the footprint of Sydney. While we acknowledge the utility in having a specialist authority such as the proposed Sydney Metropolitan Development Authority to drive this process, we make some comments in relation to how this may operate, based on our experience with the implementation and operation of the current planning system.

Changes to planning laws in NSW over the past few years have generally been undertaken with the goal of promoting efficiencies and ‘cutting red tape’. However, though our work advising community groups and individuals on the operation of planning laws, we have witnessed that these new regulatory processes and structures that have been introduced for these aims have greatly eroded the critical processes of environmental assessment, and community participation in decision-making. These have traditionally been the cornerstones of the planning system in NSW. These processes ensure that decision-making in the planning system is accountable, and that good decisions are made. Recent amendments and planning instruments, such as the Infrastructure SEPP and the Nation building legislation, have created confusion within the community through misapplication by government authorities and councils, who have used these mechanisms to rush through inappropriate development or avoid

community consultation and environmental assessment requirements.¹⁰ These mechanisms operate contrary to the aims of long-term ecologically sustainable strategic planning.

Therefore, the EDO is concerned that the powers available to a new Authority may similarly enable it to circumvent environmental assessment and community participation and consultation requirements. This is particularly if the Authority is given broad powers to rezone and compulsorily acquire land to promote urban renewal. As the Discussion Paper itself acknowledges, 'urban renewal is about transforming under-used or dilapidated areas, building on the strengths of a place and providing multiple or mixed uses that meet the needs of the community'. In this context, the EDO strongly submits that community consultation and participation in decision-making about those plans for renewal, as well as requirements to conduct robust environmental assessment, must be an integral part of the operation of any new Authority.

For more information relating to this submission please contact Rachel Walmsley on (02) 9262 6989.

¹⁰ More detail on the EDO's concerns with the Infrastructure SEPP are set out in the EDO's recent submission, available at: http://www.edo.org.au/edonsw/site/pdf/subs10/100412infrastructure_sepp.pdf