environmental defender's office new south wales

Submission on the Environmental Planning and Assessment Amendment Bill 2008

24 April 2008

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*
- *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- *the importance of indigenous involvement in protection of the environment.*

Contact Us

Environmental Defender's Office Ltd
Level 1, 89 York Street
Sydney NSW 2000

Freecall 1800 626 239

tel (02) 9262 6989
fax (02) 9262 6998
email: **edonsw@edo.org.au**
website: **www.edo.org.au**

For inquiries on this matter contact robert.ghanem@nsw.edo.org.au

*Submitted to **planningreform@planning.nsw.gov.au***

Introduction

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the *Environmental Planning and Assessment Amendment Bill 2008*. The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law.

The *Environmental Planning and Assessment Amendment Bill 2008* is contrary to the founding principles upon which the *Environmental Planning and Assessment Act 1979* was established. These principles include genuine public participation and engagement, consistency of decision-making, transparency and accountability. We believe that the Bill will cement the divorce between the Government and the public in planning in NSW. It facilitates a further diminution of public participation, which will in turn lead to a loss of faith in the planning system. Contrary to the Government's perception of community participation as an administrative burden, the EDO submits that an inclusive system of planning has greater benefits in terms of better decisions and the maintenance of a sustainable and democratic society. As has been observed in the United States:

> It is difficult to envision anything but positive outcomes from citizens joining the policy process, collaborating with others, and reaching consensus to bring about positive social and environmental change.[1]

The Bill deviates far from this ideal. Indeed, in introducing these reforms - apparently for "mum and dad" developers - the Government has ignored the fact that "mums and dads" are neighbours and community members too. The EDO therefore has deep concerns with the Bill as exhibited. **To properly examine these concerns and the serious departure of the Bill from the Act's founding principles, we call for an Upper House Inquiry into the Bill and the planning reforms process.**

In making this comment we refer to our extensive submission on the Discussion Paper *Improving the NSW Planning System* which can be found at: www.edo.org.au/edonsw/site/policy/improving_the_system080208.php. We note that none of our previous recommendations or concerns raised have been addressed in the Bill.

This submission provides comment on concerns under 5 broad areas of the proposed Bill:

1. **Regulations**
2. **Plan-Making**
    - Community Consultation
    - Minor plans
3. **Development Assessment**

[1] Renee Irvin & John Stansbury 'Citizen Participation in Decision Making: Is it Worth the Effort?' (2004) 64 (1) *Public Administration Review* 55.

- Membership of panels
- Independence of panels

4. **Complying Development and Private Certification**
    - Environmentally sensitive areas
    - 'Minor' variations
    - Private certifiers
5. **Appeals and the Land and Environment Court**
    - Land and Environment Court
    - Legal representation
    - Community participation
    - 'Public interest' appeals
    - Inadequate information

1. Regulations

In our previous submission, we expressed concern about the widespread lack of detail in the Discussion Paper, with many important matters being left to regulations and codes. The release of the Bill has not reduced these concerns, and in some respects has amplified them. Much of the important detail will be left to regulations and codes, none of which are yet available for public comment. Indeed, we have identified 35 provisions relating to environmental planning and development assessment alone that refer to further detail to be provided in regulations.

Many of the details that are designated to regulations and codes are crucial. These include complying development codes in environmentally sensitive areas, and community consultation guidelines for development assessment. It is therefore inappropriate for the Bill to proceed prior to these fundamental details being provided. As a result, the EDO calls for the Bill's passage to be delayed until the community has had an opportunity to scrutinise these codes and regulations, and to provide feedback. The workability and sustainability of the planning reforms will depend almost entirely on the content of the codes and regulations. These should be exhibited with the Bill prior to its endorsement by Parliament. The parts of the Bill that are dependent on these regulations should not commence until the public has been given an opportunity to provide comment.

The EDO understands from a meeting with the Minister that a lot of the detail has been consigned to regulations to allow the Department of Planning the flexibility to change some aspects of the planning regime in future without going through a formalised legislative process. Although this may be valid when clarifying administrative detail, this flexibility is inappropriate when it relates to issues that are crucial to achieving the objects of the Act, such as community consultation. Rights to community consultation must therefore remain enshrined in the Act itself, not relegated to an ancillary legislative instrument.

2. Plan-making

Community consultation

The EDO is deeply concerned about the removal of the community's right to consult on an LEP in its final form. The Bill indicates that a finalised LEP will not be exhibited. The rationale is that the community has already been consulted at the gateway stage so there is no need for further consultation. This reasoning is flawed. It is essential that a final LEP is exhibited. Although the EDO welcomes the engagement of the community at the strategic end of plan-making, which did not previously occur, we note that a final LEP is qualitatively different from a "planning proposal". An LEP is a legal document that sets the developmental blueprint for an area. It has the potential to dramatically impact on people's lives. Allowing the public to engage on the final LEP can also be of much value. The community and other stakeholders can bring to light unintended consequences of provisions or they can highlight inconsistencies between the final document and the "planning proposal". We therefore urge the Department to introduce a provision requiring mandatory consultation on a final LEP in addition to consultation at the gateway stage.

'Minor' plans

The EDO is opposed to the provision in the Bill that gives the Minister the discretion to determine that no community consultation is required at the gateway stage for "minor" plans (section 56(3)). The EDO has two main concerns with this power. *First*, what is considered "minor" will be a subjective determination that is entirely reliant on the Minister's opinion, not pre-determined criteria. Indeed, there has been a suggestion by the Minister that reclassification of land from community land to operational land will be considered "minor" under this section. This is inappropriate, especially given the requirements for community consultation in the *Local Government Act 1993*. This highlights the difficulties involved in making determinations that are not based on objective criteria. *Second*, even if a plan is considered "minor", public consultation is still required to ensure that people who may be affected can have a say. Often what is "minor" will in fact have significant consequences on particular people or areas. These impacts can only be determined *after* the community has been consulted.

3. Development Assessment

The EDO has significant concerns with the proposed planning panels. These have not been addressed by the Bill. Our concerns relate to the membership and independence of panels.

Membership of Panels

The EDO is concerned about the Bill's failure to ensure that a broad range of experts will sit on the PAC or JRPP. The Bill only requires that panel members have expertise in one of the listed areas. Therefore, there is nothing preventing a panel being made up completely of property developers, planners or architects.

Such a "stacked" panel would violate principles of accountability and transparency, and may also result in an inability to properly consider environmental considerations which is inconsistent with ecologically sustainable development. The Bill must be amended to ensure that a range of expertise is assured. An expert in ecology or environmental management should be a compulsory member of any panel.

Independence of Panels

The EDO is concerned about the Minister's role to appoint panel members to the PAC and JRPP. Although the panel will not be under the direct control of the Minister, it is nonetheless inappropriate that the Panel is chosen by the person who would otherwise be the consent authority. Panels need to be independent and transparent in order to build faith in the integrity of the assessment process. If the Minister appoints the panel members there will remain a perception that the appointee is under ministerial control even though this may not be the case formally. Although no impropriety may necessarily occur, the perception that some panel members are biased is unacceptable. In our previous submission we suggested that a mechanism should be introduced allowing members of the public to object to panel appointees. We again call for such a provision to be introduced.

4. Complying Development and Private Certification

Environmentally sensitive areas

The EDO emphasises once again that complying development categories should not be extended to environmentally sensitive areas. We strongly oppose the omission of Section 76A(6) from the Act that prohibits complying development in these areas. We submit that any development in these areas should be subject to environmental assessment and development approval as outlined in Part 4 of the Act.

The Department has indicated that the codes will ensure that these sensitive environments will be protected. We were told that complying development will only apply to internal fit-outs and other minor alterations which do not have any impact on the environment. However, we submit that even if the codes are robust and ecologically sustainable, they still offer only tenuous protection. Codes can be changed easily, without the need to go through parliament. The legislative protection offered by section 76A(6) should therefore remain as it ensures that the ecological integrity of these areas, which are crucial for biological conservation, is maintained. Furthermore, a code inevitably ignores the cumulative impact of a succession of "minor" developments, which, when considered holistically, may have a significant impact.

Minor variations

Consistent with our earlier comments, the EDO is strongly opposed to allowing certifiers to sign off developments as complying development where there have been 'minor variations' from the codes. This provision should be removed from the Bill. We believe that in the interests of simplicity and certainty, development should only be considered complying development if it complies with the standards. This is essential to the integrity of the standards. Otherwise a development application is needed, even if only for the non-complying part of the development. Moreover, it is highly inappropriate for certifiers, who work for developers, to make subjective value judgments on the potential impacts of non-compliance. This violates principles of transparency and accountability.

We note that in a meeting with the Minister last week, he indicated that he would consider removing this provision from the Bill in light of various concerns raised. We welcome this move.

Private Certifiers

The Bill introduces a range of accountability mechanisms for private certifiers. These include increased training, reporting, auditing, increased enforcement powers and limits the percentage of income that can be obtained from any one client. Although the reforms outlined in the Bill may improve the system, they do not go far enough in addressing perceptions of bias and the inherent conflict of interest in certifiers signing off certificates for those who pay them. We believe that a 20% limit of income per client is too high. Twenty percent is still a significant source of income so it does not sufficiently address the problem.

As the EDO has submitted on several occasions, a better approach is to establish a pool of certifiers. A developer would apply to the Building Professionals Board for a private certifier. A certifier is then drawn at random from the pool of accredited certifiers. This approach severs the direct link between certifiers and developers.

5. Appeals and the Land and Environment Court

Land and Environment Court

The reforms outlined in the Bill risk undermining the Land and Environment Court, which has long been the model for environmental courts worldwide. The appeal system will be complicated by the creation of new bodies: planning arbitrators, Joint Regional Planning Panels and a Planning Assessment Commission, which the Court now has to compete with. Developers have the option in some cases to go either to a panel *or* the Land and Environment Court.

This 'forum shopping' will serve to undermine judicial independence. Commissioners of the Court may feel pressure to make decisions favourable to developers to ensure the ongoing viability of the Court at present levels. Moreover, developers will likely avoid going to court as they may feel that the panels will be more receptive, especially since the panels will likely comprise property developers

and planners. The need to compete with other bodies will also have adverse consequences for the specialist role of the Court. Over the years, the Court has made significant headway in devising a consistent approach to planning matters – developing planning principles and principles of ecologically sustainable development. These planning principles improve certainty and consistency, and are an accountable and transparent means of decision-making. The decisions of arbitrators, panels and the Planning Assessment Commission will, unlike the Court, not be subject to public scrutiny nor the need to give reasons. Furthermore, the Land and Environment Court, unlike panels, is open to the public, is subject to strict rules of procedure and has inbuilt safeguards. Indeed, commentators have made it clear that the Land and Environment Court is the most appropriate forum for merits appeals. The reasons for this are many and they include:

- The Court is not affected by political considerations;
- The Court comprises experts with considerable experience in determining development applications;
- The Court provides a public forum;
- The Court publishes reasons in an accessible and consistent format;
- The Court ensures adherence to legislative principles and objects by administrative decision-makers; and
- The Court focuses attention on the accuracy and quality of policy documents, guidelines and planning instruments.[2]

In light of the above discussion, the EDO submits that developers should not be able to bypass the Land and Environment Court and pick a more favourable forum to hear their matter. The Land and Environment Court must stand alone as the ultimate arbiter of environmental appeals.

Legal representation

At the Department of Planning briefing we attended on the 17th of April, it was indicated that there are plans to remove lawyers from the appeals system. We were told that there will be no right to legal representation for panel and/or arbitrator matters. The EDO has not found any provisions in the Bill that address this. It may be that provisions limiting legal representation are to be included in the regulations.

The EDO has significant concerns with this proposal on equity grounds. Objectors and community groups often have limited resources and little experience with hearings, whether in front of panels or the Land and Environment Court. In contrast, developers have significant resources and advocacy experience. Further, developers often have agents and expensive negotiators that act on their behalf.

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[2] Brian Preston & Jeff Smith (1999), 'Legislation Needed for an Effective Court' in *Promise, Perception, Problems and Remedies – The Land and Environment Court and Environmental Law Conference Proceedings 1979-1999,* 103-121, Paul Lalich & Scott Neilson, 'Review of the Land & Environment Court Jurisdiction: Discussion of issues relating to the Working Party review and reform of the Court' (2001) 7 *Local Government Law Journal* p49-58.

Legal representation therefore levels the playing field. Also, panel and arbitrator hearings have the potential to affect people's legal rights so a legal advocate is often essential in providing advice to parties. We therefore urge the government to allow legal representation for panel and arbitrator matters.

Community participation

The EDO is concerned about the ability of the community to participate in matters that are heard by the planning panels and/or arbitrators. Currently, under section 39A of the *Land and Environment Court Act 1979*, the Court may, at any time order the joinder of a person as a party to the appeal if the Court is of the opinion:

> (a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or
> (b) that:
> (i) it is in the interests of justice, or
> (ii) it is in the public interest,
> that the person be joined as a party to the appeal.

There is no indication in the Bill whether there will be a similar provision that applies to panels and arbitrators. It is important that the community is able to attend panel hearings and to participate where they can provide input and assistance to the panel members. Considering that developers can now bypass the Court entirely, the community must be granted a legislative right to participate.

'Public Interest' Appeals

The rationale for merits review rights is to ensure that persons whose interests may be adversely affected by an administrative decision have an opportunity to have that decision reviewed.[3] The EDO has consistently submitted that merits appeal rights should be broadened to recognise that community and conservation groups may also be adversely affected by planning decisions. We support efforts to facilitate this. We therefore welcome the provision in section 96E of the Bill that states that the regulations may provide for new categories of objector merits appeals. However, the category labelled 'public interest' appeals (which allows objectors to appeal if development standards are breached by 25%), may be of limited effect. This is for two main reasons.

First, the appeal rights will likely be limited to those who live in the same geographic area. The EDO submits that the 'public interest' label is therefore a misnomer. It is only the neighbours and not the public at large who may appeal. The right to appeal should be broadened to those who can show sufficient interest in the matter, including environment and community groups. This would be more consistent with a true definition of 'public interest.' *Second*, the 25% threshold is set

[3] Brian Preston & Jeff Smith (1999), 'Legislation Needed for an Effective Court' In *Promise, Perception, Problems and Remedies – The Land and Environment Court and Environmental Law Conference Proceedings 1979-1999* at 111.

too high. Such a threshold might engender a view in consent authorities and developers that breaching standards *up to* 25% is acceptable. A much lower threshold, of say 10%, should be the trigger.

In a recent report by the Independent Commission Against Corruption (ICAC), entitled *Corruption Risks in NSW Development Approval Processes,* it was found that the extension of wider merits appeal rights for third parties can provide a safeguard against corrupt decision-making by consent authorities. ICAC recommended several other categories of third party merits appeals, including developments where council is both the applicant and the consent authority, major and controversial developments, such as large residential flat developments and developments which are the subject of planning agreements.[4] The EDO urges the government to institute these additional categories. This would go some way to satisfying the 'public interest' designation.

Inadequate information

The EDO is concerned about the proposal to allow developers to appeal to arbitrators when the council has determined that there is insufficient information contained in the development application. If an arbitrator can decide the application on this basis, then this may encourage unscrupulous developers to intentionally provide inadequate information to the Council and then appeal to an arbitrator who may be more favourable. The EDO is concerned with the possibility of development applications being determined on the basis of minimal information, especially relating to potential environmental impacts. The planning process should strive to improve the level of information provided to consent authorities, commensurate with community expectations. Currently the standards of information for developments expected by some consent authorities are less than the community expects, and the inadequate level of information regarding proposals has led to successful appeals by objectors (for example, *The Hub Action Group Inc v the Minister for Planning and Orange City Council*[5] and *Pindimar Bundabah Community Association Inc v Great Lakes Council & Ors*[6] cases).

Greater clarity is needed in the Bill. Will the arbitrator only determine whether the information attached to a development application is sufficient, or will the arbitrator determine the application in full? Although the Bill makes it clear that where an arbitrator believes there *is* enough information then the matter has to be sent back to council for determination, it does not say what happens when the arbitrator thinks that the information provided is insufficient. Will the arbitrator decide the matter on the basis of the minimal information before him or her? The EDO submits that councils are the most appropriate bodies to decide whether the

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[4] Independent Commission Against Corruption, *Corruption Risks in NSW Development Approval Processes* (September 2007). Found at: http://www.icac.nsw.gov.au/index.cfm?objectID=B4478FE4-BB1C-82EE-B517E8CF8897F293&NavID=24276998-D0B7-4CD6-F9D478C6A21599CF.

[5] [2008] NSWLEC 116.

[6] LEC Proceedings 10679/2006.

information provided in a development application is sufficient, and therefore, appeal to an arbitrator on this basis is not appropriate.

Conclusion

Although this submission addresses concerns relating to the scope of the Bill, there remains considerable concern about the broader 'streamlining' reforms to the planning system that are being expedited at the expense of genuine public consultation and comprehensive environmental impact assessment processes. The Government's obsession with shortening development approval times by cutting corners will necessarily result in poorer outcomes and inevitably undermine the principle that good process yields good outcomes.

While making clarifications and amendments on the community's issues of concern will help improve the Bill in small ways, the broader concerns are still being ignored. We therefore reiterate our concerns about reinstating the key elements of best practice planning (available at: **www.edo.org.au/edonsw/site/pdf/subs08/reforming_planning_nsw080107.pdf** , and seek that the Bill is referred to a Parliamentary Inquiry.