

Local Government  
Association of NSW



Shires Association  
of NSW

## **Planning - Draft Exposure Bills**

# **Local Government and Shires Associations of NSW Preliminary Assessment**

**April 2008**

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## **Introduction**

The Associations support reform of the NSW planning system but not the suite of changes proposed by the NSW Government. There is a need for the simplification of the planning system for all users to improve clarity, certainty and transparency. The government's proposed changes introduce further complexity into the planning system and override a fundamental planning principle, embedded in the Environmental Planning and Assessment Act 1979, that recognises the importance of public participation in the process.

The draft bills will reduce the local communities' participation in the planning process, by substantially reducing councils' role in planning decisions and minimizing residents' opportunities to make submissions on planning issues. The changes will also increase the financial burden on growing communities by reducing overall development levies on new development.

The Associations preliminary assessment of the key provisions of the Environmental Planning and Assessment Amendment Bill 2008 are presented in this paper.

## **Time for submissions**

The 3 week period (3 April to 24 April 2008) is too short to allow for meaningful review and submissions on over 200 pages of legislation. This is clearly designed to short cut any proper consultation with Local Government, stakeholders and the community. The Associations call on the State Government to extend the time available to make submissions on the legislation.

## **Lack of detail**

Many sections of the legislation reference and rely on subordinate legislative provisions – regulations, directions, orders and codes – that are not yet available for parliamentary or public scrutiny. Most concerning is that the proposed housing codes (extending the use of complying codes) are not yet finalised and may not be made available until just prior to or after the legislation is debated in Parliament. This again appears designed to short cut review of the full impact of the legislation by MPs, Local Government, stakeholders and the community. The package of reforms, including the details of amendments to subordinate legislation, should be made available for parliamentary scrutiny.

## **Responding to submissions**

The draft exposure bills differ in only a few respects from the recommendations contained in the discussion paper released in November 2007. Yet the independent report on submissions, released on 19 March 2008, highlighted a number of areas that were of concern to a range of stakeholders. The Associations are concerned that issues raised by councils and the community in submissions on the discussion paper have not been properly considered in the drafting of the exposure bills.

## **Key concerns**

Local Government has a number of key concerns with the draft bills: communities may lose their right to have a say over local development, councils' role in the development process will be significantly reduced, and funding of local infrastructure will be under threat. In particular, the Associations are concerned with:

- Community rights - the overall reduction of the role of council and community in the planning process;

- Complexity – the likelihood that the legislation, rather than simplifying the development assessment process, will make it more complex and difficult to navigate. Many of the real problems with the DA process have not been addressed by the legislation, which relies on reducing the role of councils and the right of local communities to have a say over development.
- Probity – greater corruption risks due to the expanded role of appointed panels and the introduction of planning arbitrators.
- Increased costs – borne by councils and their communities, due to changes to the development contributions framework and costs associated with supporting regional panels and arbitrators.

There are a number of positive aspects of the Bill such as the establishment of the Planning Assessment Commission (PAC), improvements to plan making and the creation of the ‘gateway test’, which may have practical merit. Many of the proposals are difficult to evaluate however, as much of the detail will be contained in regulations or through complying codes which are yet to be released.

### **Preliminary assessment of draft legislation**

The draft exposure bills contain over 200 pages of legislative amendments to three main Acts – the *Environmental, Planning and Assessment Act*, the *Building Professional Board Act* and the *Strata Management Act* – and a number of minor amendments to other Acts.

Due to the large number of changes proposed, and the short time available for review and comment, it has not been possible to provide an assessment and response on each of the proposed amendments and all draft bills. Instead, the Associations have undertaken a preliminary assessment of the *Environmental Planning and Assessment Amendment Bill 2008* using the following key themes:

1. Decision making processes
2. Reviews and appeals
3. Development contributions
4. Certification and extension of exempt and complying development
5. Plan making
6. Heritage

**A brief assessment of the key changes proposed and the Associations’ position is provided below.** The assessment is cross-referenced to the specific sections or divisions of the draft exposure bill to assist council members and staff to better understand the legislative changes.

Separate papers on each theme, containing more detailed information and assessment of the proposed legislative changes, will be available on the Associations’ website – [www.lgsa.org.au](http://www.lgsa.org.au) – in the coming week.

## 1. Decision making powers

Schedule 2

### **Planning Assessment Commission (PAC)**

The Associations support the model of the PAC subject to:

- Oversight of decisions re membership and operation of the PAC by a Parliamentary Committee similar to the committee on the ICAC. (Could add to responsibilities of existing ICAC Committee to save costs).
- Satisfaction with the details of the proposed regulations.
- Removing the ban on legal representation.
- Making available appeal rights for applicants and third parties.
- Restricting intervention opportunities by the Minister.

### **Joint Regional Planning Panels (JRPPs)**

The provisions relating to JRPPs significantly extend the powers of JRPPs from those initially proposed in the discussion paper. JRPPs will operate as a consent authority; a review body for decisions made by planning arbitrators and panels; advisory body to the Minister on planning and development matters or EPIs; and will have functions in respect of applicant and third party merit reviews.

JRPPs will be identified in a State environmental planning policy as consent authority for:

- designated development;
- nominated development over \$5m including Crown development, private infrastructure and where council has an interest;
- residential, commercial and retail development over \$50m; and
- nominated subdivisions and certain other development in coastal zone that is currently under Part 3A.

*The Associations oppose the establishment of JRPPs as an unnecessary duplication of existing government and judicial bodies and one that will add costs and time to the development assessment process.*

*The Associations propose that:*

- *The Land and Environment Court be retained for appeal and review work.*
- *Councils with an IHAP undertake major development decisions and local developments in the coastal zone.*
- *A sub-committee of the PAC should act as consent authority for those developments where councils have a financial interest or projects are of genuine regional significance.*

### **Independent hearing and assessment panels (IHAPs)**

The proposed IHAP model is opposed as being unnecessary. Councils that have used an IHAP (some for over ten years now) have operated them successfully and with no complaints. Processes should not be regulated unnecessarily and IHAPs should not be used as a vehicle for Ministerial intervention in councils' operations.

Should the State Government wish to promote the use of IHAPs, this can be provided administratively by the Department of Planning. The Associations are supportive of the use of advisory IHAPs by councils as a means of improving the development process.

## **Planning arbitrators**

The legislation proposes to set up a completely new system of planning arbitrators who would be private consultants appointed by the Minister; to conduct hearings on reviews with regard to minor applications; and that are paid for and supported by councils.

The Associations believe that the proposed system of planning arbitrators should not be established as would be:

- an unnecessary duplication of existing processes and appeal bodies;
- costly for councils to support;
- likely to distort councils priorities by requiring them to respond to arbitrator reviews of small scale and minor developments;
- open to undue pressures from developers and other interest groups;
- likely to encourage ambit claims with additional appeal steps;
- requiring a complaints procedure that is currently not detailed and potentially will be ineffective; and
- open to political pressure.

*The Associations strongly oppose the model of planning arbitrators as being unjustified, a costly duplication of acceptable appeal processes, and a high probity risk.*

As suggested previously by the Associations, the s82A review provision should be abolished and an appeal to the Court reinstated as the only avenue following a council refusal. To improve the current system the following could occur:

- Councils should make greater use of IHAP hearings;
- Consideration could be given to an IHAP panel member being asked by council to conduct a conciliation process before council makes a decision;
- Merit appeals should be retitled to reflect the essentially non-adversarial nature of the hearing; and
- Access to the Court for conciliation could be made even simpler. (If there is something wrong with an existing body, fix the body rather than creating an additional one.)

None of these suggestions would require legislative change.

## **2. Reviews and appeals**

Schedule 2, new Division 7A

The bill proposes a raft of changes to the existing system of reviews and appeals that reflect the proposed new decision making and review bodies. The new system provides for a complex set of arrangements of reviews and appeals depending on:

- the type of development;
- whether you are an applicant or objector;
- the consent authority for the application;
- whether a public hearing has been held (in the case of the Planning Assessment Commission);
- whether a JRPP has been established for the area in which the application is lodged; and

- in the case of planning arbitrators, the particulars of the review process and whether council supports an appeal to the court.

All appeals to the Land and Environment Court are to be made within 3 months of the applicant receiving notice of the determination. Currently the time allowed to make an appeal is 12 months.

*The Associations oppose the proposed system of appeals and reviews as unnecessary, costly and open to corruption risks.*

### **3. Development contributions**

#### Schedule 3

The draft bill repeals the existing provisions of the *Environmental Planning and Assessment Act* relating to development contributions (Part 4, Divisions 6 & 6A) and replaces it with a new Part 9.

Development contributions levied by councils have been renamed community infrastructure contributions and now comprise ‘direct contributions’ (s94) and ‘indirect contributions’ (s94A). The bill also introduces a two-tier system that limits the use of community infrastructure contributions to funding ‘key community infrastructure’. Contributions can be levied for ‘additional community infrastructure’ only if approved by the Minister. Councils must provide a business case or an independent report to the Minister when requesting approval to additional community infrastructure. Land for riparian corridors cannot be approved as additional community infrastructure. Community infrastructure contributions from Growth Centre councils will be collected and held in trust by Treasury.

The legislation gives the Minister wide ranging control over local contributions and introduces new state infrastructure contributions in greenfield release areas outside the growth centres. The legislation:

- places limits on the types of projects for which local levies can be used;
- gives power to the Minister to approve projects outside the prescribed list;
- gives the Minister the power to direct councils in relation to the type of community infrastructure that can be levied for, the means for determining contribution levels; the maximum amount of any direct contribution; type or area of development for which community contribution may be imposed and maximum percentage of an indirect contribution; and time frames for spending contributions; and
- provides for Growth Centre councils’ contributions to be collected and held by Treasury. The Minister can also declare other areas to be covered by these provisions via an order in the Government Gazette.

*The Associations welcome the State Government’s concession on councils being able to levy contributions to pay part of the cost of upgrading or building district or council wide facilities, although the wording of the bill and the lack of detail about the types of projects that can be funded is still of concern.*

*The Associations oppose:*

- *the wide ranging and discretionary powers given to the Minister to direct councils’ collection and use of development contributions;*
- *Treasury control over Growth Centre councils’ funds from development contributions.*

- *the lack of a formal mechanism for determining levies in greenfield release areas with significant potential for State levies to ‘crowd out’ local levies.*

#### **4. Certification and extension of exempt and complying development**

Schedule 4 and Schedule 1

##### **Private certification**

The Minister has rejected the Associations’ alternative solution of having certificates issued to government and has instead sought to address the symptoms of a fundamentally flawed private certification system. i.e. a certifier exercising discretionary judgements on the respective rights of citizens when being paid by one of those citizens.

Proposals in the bill to improve enforcement and disciplinary provisions in relation to accredited certifiers are generally supported. The Associations will provide more detailed comments in relation to each of the respective proposals in the draft bills in a later submission.

##### **Increasing the range of exempt and complying development**

The introduction of mandatory state-wide codes for exempt and complying development has the potential to reduce legitimate public participation in development decisions, negatively impact on the amenity of residents and alter the character of local neighbourhoods, particularly in inner city and metropolitan areas. The housing codes are still under development and may not be placed on public exhibition before the framework legislation is passed. This is of major concern to the Associations which support deferral of the complying development provisions until the whole ‘package’ of changes is available for public review.

The draft legislation makes a number of changes to the current system of complying development. These include:

- Complying development does not have to ‘comply’. A Complying Development Certificate (CDC) can be issued for a development that does not comply with the development standards or conditions if:
  - the variation is of a minor nature; and
  - it is not likely to cause a substantial net adverse impact on owners of adjoining and adjacent land or on the land on which the development is carried out.
 Council is to determine whether the variation is minor within a prescribed period.
- Public notification of Complying Development Certificates (CDCs) and their determination will be under the regulation made by the Minister rather than being placed in councils’ Development Control Plan (DCP).
- Removing restrictions on where complying development can be approved, including all previously established exclusions such as designated development, heritage land, critical habitat, wilderness land, heritage items and environmentally sensitive land.

*The Associations oppose:*

- *The provision to allow minor variations to complying development as this will result in arguments over the degree of non compliance and an assessment by council of the impact on neighbours, which is effectively a DA.*
- *Moving the provisions for development that has to be publicly notified from being in a Development Control Plan (DCP) to a regulation.*

- *Wholesale removal of existing exclusions for complying development without any details of the intended scope of future exemptions and their impact at the local level. Local councils are better placed to determine the scope of exemptions for complying development in their area.*

## 5. Plan making

Schedule 1

### State Environmental Planning Policies

Schedule 1.1[8]

The legislation provides for a SEPP to be made about any matter of State *or regional environmental planning significance* (s37). The provisions relate to the intent of the Government to remove regional environmental plans (REPs), which had requirements for publicity and submissions. Now Minister can arrange for a SEPP to deal with regional significant matters without any prior exhibition. Under the provisions, the Minister *may* publicise a draft SEPP and seek submissions.

*The Associations recommend that draft SEPPs should have to be publicised and submissions received. If objections cannot be satisfied there should be a compulsory hearing by a panel similar to the Victorian system.*

### Relevant planning authority

s54

The draft bill widens the list of those who can initiate a Local Environment Plan (LEP) to include the Director-General or *any other body identified by Regulation*:

- where the Minister thinks it is of state or regional environmental planning significance;
- to tidy up Part 3A decisions;
- to implement changes to the standard instrument;
- where the PAC or JRPP recommends; or
- where council failed to comply with its obligations at all or *in a satisfactory manner*.

These provisions effectively give the Director General of Planning and other bodies (yet to be detailed in the regulation), with Ministerial support, the right to initiate amendments to LEPs.

*The Associations believe these provisions are contrary to the original intent of the Act (to limit spot rezoning to local government initiatives), can be achieved through a SEPP or use of Part 3A, and lack probity. If these provisions are to be included in the legislation, there should be a requirement for a compulsory panel hearing as part of the process.*

### Process for making LEPs

ss 55-60

The draft legislation creates a new set of procedures for studies and consultation, hearing and drafting of LEPs. It also provides a 'gateway' process whereby some details of the proposal are given to the Director General for a determination by the Minister of how a rezoning should proceed, including any required further studies and particularly the consultation process that must be undertaken.

*The Associations support this proposal in principle as potentially more efficient and effective than current processes. However further time to consider the details of this proposal and obtain feedback from councils is necessary.*

## **6. Heritage**

Schedules 1.3 & 2.3

The changes proposed in the draft Bill have followed the general approach recommended in the report of the Independent Expert Panel on the review of the Heritage Act i.e. to reduce the consideration of heritage matters as stand alone matters.

Key changes in the draft bill include:

- heritage is to be considered under the ‘gateway test’ in the LEP process;
- complying development can apply to land subject to a heritage conservation orders and items of heritage significance; and
- current rights of review (now available to the Commissioner of Inquiry) will be referred to the Planning Assessment Commission (PAC).

*The Associations:*

- *support in principle the consideration of heritage under the ‘gateway test’ but would like to see further details of the proposal;*
- *oppose the application of complying codes to heritage items; and*
- *note the transfer of review rights to the Planning Assessment Commission (PAC).*