24 April 2008

The Hon F E Sartor MP
Minister for Planning
Level 34 Governor Macquarie Tower
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Sydney NSW 2000

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Dear Minister

Improving the NSW Planning System, Exposure Bill and Amending Regulations

The Planning Institute of Australia, NSW Division represents planning professionals in State Government, Local Government and planning consultancies. These planning professionals have an interest in ensuring that the State’s Planning System embodies and achieves the aspirations of liveable communities, a healthy natural environment and a prosperous economy. Many of the legislative proposals support these three ‘pillars’ of good planning.

In broad terms, the Institute reiterates its support for the move to reform the planning system in NSW, and supports certain initiatives in the proposals, as outlined in our two submissions to the Discussion Paper.

The Institute’s analysis of the draft legislation and the following comments have been framed by several considerations, namely

* the Regulations and some other parts of the legislative package are not yet available

* an assessment of the combined impact of other recent reforms (eg standard LEP) with the current proposals

* public comments by the Minister including those at the recent PIA National Congress

* the broad nature of the Institute’s Chapters and their desire to promote all areas of planning such as urban design, social planning and transport

* the potential for a future Minister in a future government to interpret and use the legislation in a manner not currently intended.

On this basis PIA respectfully submits that certain aspects of the legislation need to be withdrawn or reconsidered.

The Institute’s previous Submissions on the Discussion Paper, which included a survey of planning professionals, pointed out the positive features of the planning changes. Following
release of the Exposure Bill and the Explanatory Notes, the Institute has, at very short notice, conducted three forums:

1. A metropolitan forum attended by over 70 practising planners;

2. A southern region forum at Wagga attended by 20 planners from regional Councils and consultancies; and

3. A northern region teleconference which included 10 practising planners from rural and coastal areas.

Department of Planning staff attended the Sydney Forum to provide clarification and information which was greatly appreciated.

Whilst this Submission does not address the detailed drafting of the draft Bill, the Institute urges the Minister to reconsider aspects of the reform legislation as listed below.

1. **NON-COMPLYING COMPLYING DEVELOPMENT**

   It is accepted that too many development applications are required for minor developments where a full merit assessment of the proposal is not warranted. This proposal does not address the fundamental requirement that the level of merit assessment must be appropriate for the nature of the development. The changes allowing certifiers to issue complying development certificates (CDCs) that do not comply with the pre-set standards and will fundamentally prejudice the primary intent of “as-of-right” complying development provisions. That intent is to codify pre-set standards for minor development so that an approval can be given without any exercise of discretion or merit judgement.

   The new provisions (s85A (7A)-(7C)), notwithstanding the mechanism for a ‘veto right’ by Councils, will require a subjective assessment by Council or the certifier as to whether a proposed non-compliance with a development standard or condition is of a “minor nature” or “not likely to cause any substantial net adverse impact on owners of adjoining or adjacent land or the land on which the development is carried out”. The consequences of this exercise of discretion will:

   a) undermine the credibility of and the confidence in the CDC system which the Department plans to expand under a new code;

   b) expose the CDC system to, at best, confusion by certifiers, the community and Councils, and at worse create potential for abuse of the process;

   c) add more levels of complexity to a process that is intended to be simple and give certainty about outcomes;

   d) introduce codes for specified developments to create certainty and remove inconsistency but introduce a mechanism that can circumvent the codes, thereby permitting different interpretations and inconsistency; and.

   e) establish a further bureaucratic process requiring more record keeping, correspondence, payments and, inevitably, disputes.

   Most certifiers have no training in merit assessment or in understanding the intent of planning codes. In the absence of comprehensive training in areas that principally
involves planning judgement or the introduction of accredited planning specialists by the Building Professionals Board, the system is inherently flawed.

The Institute submits that the provisions for allowing non-complying complying development needs to be withdrawn from the current legislative reform package (S.85A (7A)-(7C)).

In respect to the proposed Complying Development Code or SEPP, the Institute’s members have expressed concern that the target of a 50% transfer of DAs to CDCs will mean a much greater relaxation of standards or broadening of scope for CDCs. Whilst this is supported in principle as a means of reducing the number of DAs for minor work, there are real concerns that a uniform or blanket set of CD standards to apply across all circumstances and building typologies will not work. The Community Guide accompanying the legislation indicated preparation of the residential codes based on lot sizes.

The Institute submits that a mandated uniform code applying across all locational conditions (topography, drainage, bushfire hazard and heritage conservation) and building typologies (terraces, detached dwellings, townhouses and semi-detached dwellings) will not succeed. There is also a need for a Rural Complying Development Code developed in consultation with rural planners.

Differentiation by lot size alone is not sufficient.

The failure of such an important plank to the reform agenda must not occur.

The Institute urges the Minister to defer commencement of the new Complying Development system until the Complying Development Expert Panel has determined the nature and scope of draft codes to be developed across the State. Further when draft codes are released they must be subjected to “reality testing” by planning practitioners and the code incorporate a simple but logical matrix of standards based on

1) primary locational characteristics, including rural areas, and
2) building typologies.

2. NEW LEVELS OF PLANNING ADMINISTRATION

The Institute supports the creation of the Planning Assessment Commission and recognises the merit of introducing the Planning Arbitrator role to reduce planning litigation but is concerned about the additional layers of administration being created.

The Planning Arbitrator is to determine applications for a review of a reviewable determination (s96c). This review can relate to the actual or deemed refusal of a DA or s96 application, or in relation to a condition of consent or satisfaction of a deferred commencement condition, or indeed any other class of application yet to be prescribed by the Regulations.

The additional administrative burden and cost associated with operating the Planning Arbitration system is of concern to the Institute’s Local Government members as is the likely difficulty in obtaining a sufficiently large enough pool of planners to register and perform the function across NSW Councils. How will the Minister determine an appropriate application fee to fund the remuneration, costs and expenses of a Planning Arbitrator (s230 (3))?
The Institute notes the legislation requires a person with certain expertise to perform the role of Arbitrator.

The Institute will only support the registration of Planning Arbitrators if they have requisite skills and qualifications to be Full (Corporate) Members of the Planning Institute of Australia and Certified Practising Planners under the Institute’s certification scheme. In addition to the “expertise” such members bring to the role, Institute Members are bound by Codes of Conduct and Professional Behaviour that are necessary to properly fulfil the role of Planning Arbitrator. This skill and qualification level should also be a requirement for those preparing a statement of environmental effects.

The Institute requests that guidelines for registration of Planning Arbitrators contain a requirement that they be a Certified Practicing Planner and a Full (Corporate) Member of the Planning Institute of Australia.

In relation to Joint Regional Planning Panels (JRPP’s), the Institute submits that the legislation be amended to provide that this new body only serve in an advisory role, unless any of the constituent Councils delegate to the JRPP any consent role. In the advisory role the JRPP would provide advice to

a) the Minister or PAC for Crown Development and regional infrastructure projects; and
b) Councils, which have not delegated their consent role, for other classes of projects designated in the draft Bill.

It is envisaged that under the new legislation there would be no role for an independent hearing and assessment panel established by a Council. If the JRPP can perform the role intended for an IHAP it is preferable to have only one body which would be the JRPP.

The Institute considers that the JRPP should serve as a consent authority only if Councils delegate this role. Where no delegations apply the JRPP should serve in an advisory capacity providing expert opinion to the consent authority, including where relevant the Minister. The Institute requests that the draft legislation be amended to reflect this changed role for the JRPP.

The ‘new’ levels of planning administration must be properly resourced and formally required to maintain full and complete records of their processes and reasons for determination or advice, be accountable and be able to be accessed by the public, just like a Council. Concerns have also been raised about the appropriate assignment of legal responsibility files documents and applications are transferred between Councils, JRPPs and Planning Arbitrators and who objectors speak to when an application is referred to the Panel or arbitrator. This must be clarified.

3. DEVELOPMENT CONTRIBUTIONS

The provisions in the draft Bill foreshadow requirements for Councils to review their current Contribution Plans according to the new tests enunciated in the draft Bill. This has immediate resource implications for Councils. Moreover, the new contributions system has the potential to create uncertainty for the development industry where long term development projects are involved, for example, involving staged subdivision developments and the timing of contributions as well as for provision by Council or applicants of the community infrastructure.
These issues must be resolved before Councils embark on preparation of new or revised Contribution Plans.

The Institute believes that the timetable proposed for repeal and adoption of new Plans is only workable if a standard model s.94 (and s.94A) Plan is available to Councils that is framed according to the planning context in which the contributions are levied.

The Institute requests that the Minister instruct the Department of Planning to urgently prepare a ‘model’ s.94 Plan that would be applicable and relevant to:

1. Regional, coastal and rural Council areas;
2. Inner Metropolitan Council areas;
3. Outer Metropolitan Council areas; and
4. Growth Centres (including new urban release areas)

The model s.94 Contribution Plans should cover the “community infrastructure” classes for contribution, the contribution “tests” and have regard to the common priorities, financial conditions and future growth implications of each of the 4 areas. The Department’s Regional Teams can work with local Councils and property development representatives in each area to devise the templates which would be approved by the Minister.

Furthermore, given the timetable proposed in the legislation, a high priority must now be given to developing guidelines and criteria as to how applications for Ministerial approval of “additional community infrastructure” are to be prepared and handled. This includes specifications for standard business plan format and independent verification that will streamline the Minister’s determination process.

The Institute offers the services of its Executive team and Members to assist the Department in its preparation of the model s.94 (s.94A) Plans and the Additional Community Infrastructure Guidelines.

4. COMMUNITY CONSULTATION

The draft legislation contains several areas where community consultation will be reduced or removed in order to expedite the approvals process.

In respect to the CDC process, it is acknowledged that extension of the classes of CDC will involve some curtailing of consultation. It is imperative then that the residential CDC process, the classes of CD, examples of common CD types, and the CD codes themselves are well communicated to all residents and design professionals (who will prepare the certificates) and that they fully understand the procedure and likely outcomes. This communication cannot be left to Councils only and the State Government must use the widest media mechanisms to get the message across. Brochures on the Department web-site or at its Information Desk are not enough.

The Institute submits that the new complying development certificate (CDC) proposal should not be introduced until there has been a broad information campaign across NSW on the benefits, rights and responsibilities under the CDC system. This should include publicity through TV and local press
advertising at a minimum as well as community briefing in all local areas through Councils.

In relation to the operation of the new planning bodies, the Regulations should provide that PAC, JRPP, IHAP (if retained) and Arbitrators must inspect a site the subject of an application referred to them and should provide an opportunity for objectors and applicants to be heard if requested. This is necessary for procedural fairness and natural justice to the parties involved.

The Institute supports, in principle, the introduction of “public interest development” approval reviews if raised by objectors. However, the concept was not included in the Discussion Paper and there are concerns with the implementation of the proposal:
1) Applicants and Councils may abuse an arbitrary 25% threshold;
2) Objectors may frustrate reasonable proposals and cause unnecessary delays by making unmeritorious objections; and
3) The administration cost of operating the process may be prohibitive.

These concerns must be addressed through guidelines or Regulations prior to commencement of the provisions.

The gateway screening process for LEPs provides a good opportunity for setting requirements for community consultation that relate to the scope and nature of the LEP. Furthermore, the draft legislation must be modified to require

**that issues of impact on threatened species be included in the initial screening process through early consultation with the Director General of the Department of Environment and Climate Change.**

Similarly, a standardised approach to DA (and CD) notification based on primary location characteristics across Councils would be beneficial and the Institute has a team of Planners who are available to assist the Department to prepare or review a standard instrument.

5. **COUNCIL CONSULTATION**

The Institute is concerned that the draft Bill does not explicitly require Councils to be consulted when “Relevant Planning Authorities” are empowered to prepare LEPs, or variations to ‘planning proposals’ are proposed. This creates potential problems with property records, s149 certificates, liability of Councils if inaccurate information is issued and s79C considerations.

The draft legislation must be altered so that Councils must be consulted when other authorities are permitted to prepare LEPs and consider variations to ‘planning proposals’.

6. **COSTS: COST SHIFTING AND INCREASING COUNCIL COSTS**

There are very real costs associated with the reforms. Additional processes will need to be established to manage and support panels. Section 23O requires a Council to pay to the Director-General out of its consolidated funds, the remuneration, costs and expenses of the PAC, JRPP or Planning Arbitrator incurred in respect of the exercise of their functions, including the provision of any service by the PAC or JRPP to the Department. If the application fee relating to a DA or Part 3A application referred to the PAC, JRPP or Planning Arbitrator is to be paid to Council then the level of fees should be such as to cover both the assessment costs and council’s administration
costs. If, however, the fees are paid to the Department this provision will impose an unacceptable cost burden on Councils.

In addition to this, Councils will be required to carry the cost of defending decisions for which they may not be responsible and where the fee base could decline significantly in real terms if not annually indexed.

The Institute requests that the Minister review the funding mechanisms for the approval bodies and prepare a funding package that will enable Councils to implement the reforms without affecting the delivery of other Council services.

6. ROLE OF LOCAL GOVERNMENT PLANNERS

The planning profession, particularly at the local government level, is already under considerable stress. The Institute is concerned that the reforms will increase the administrative burden on local government planners leading to further shortages and loss of experienced planners in the industry. The Institute would like to work with the department to address this not only in the context of the reforms but generally through the industry.

7. OTHER ISSUES

From our workshops concerns were raised about several other matters:

a) Councils will potentially no longer offer the applicant the opportunity to submit additional information and may simply refuse where an early conference with the Council Planner may address an information requirement. The legislation should be altered to include reference to pre-DA consultation as a necessary component of the DA process.

b) A formal link is required between the planning legislation and the proposed provisions for integrated planning and reporting in the Local Government Act.

c) Concern was expressed as to the justification of no longer requiring LEPs to have aims and objectives (s25). These aims and objectives are frequently and appropriately relied upon in Court proceedings to assist in better understanding the underlying intent of the plans. Whilst it is now to be discretional, the intent behind the change is not clear.

d) Concern with Section 23N and the potential penalties that could be incurred by the General Manager and Council staff if they ‘obstruct’ PACs or Arbitrators. The meaning of ‘obstruct’ is not clear in the draft Bill nor who is able to make such a claim. The application of penalty points and fines in this instance is considered out of character with the intent of the EP&A Act.

e) The objects of the EP&A Act as provided in s5 have not been reviewed even though some of the amendments are in conflict with the objects. To avoid the potential for legal challenges it would be appropriate for s5 to be amended, particularly subsections (b) and (c).

f) The draft Bill leaves much of the technical detail of the planning reforms to the Regulations. This detail and implementation is largely unknown. The Institute requests that the Minister exhibit the proposed Regulations in draft form for comment and progressively enact the reforms. First, those not reliant on the as yet to be
exhibited Regulations, followed by other parts of the Bill which do rely on Regulations that are yet to be drafted.

g) A major concern in administering the current planning system is the apparent lack of accountability of state and other agencies involved in the environment, planning and development assessment processes. This has not been addressed in the planning reform proposals and is a deficiency that needs to be rectified through the yet to be drafted Regulations.

h) Clarity of definition will be required in relation to what constitutes physical commencement and substantial commencement of a DA, CDC and staged DA to avoid unnecessary litigation. A Circular or clarifying Direction would assist this concern.

CONCLUDING REMARKS

The Institute has generally supported the proposals in the reform package. Some proposals, as outlined in this Submission, however need to be either withdrawn or reconsidered.

If the points raised in this Submission are not addressed, the Institute considers that the successful implementation of the other working reforms will be overshadowed by failure in the areas outlined above.

This is likely to worsen the tension that is undermining the planning reform agenda between Councils, the State Government and property industry.

Furthermore, the matters raised in the Submission will lead to significant additional costs to Councils, applicants, certifiers and “mums and dads” that will be at odds with the intent to reduce costs and improve affordability.

The Institute is willing and able to work with the Minister and the Department to resolve the issues that have been identified with the draft legislation.

Yours faithfully

Julie Bindon
President
NSW Division