Woollahra Council – submission to the White Paper, Planning Bill 2013 and Planning Administration Bill 2013

Introduction

Woollahra Council welcomes the opportunity to participate in the NSW planning reform process and has previously made submissions on elements of the process, including the Issues Paper and the recent Green Paper. We consider the NSW planning system has become cumbersome, confusing and difficult to use.

We continue to say that reform is necessary. However, we remain concerned about the nature of proposed changes to the planning system presented by the State Government. We consider there is an unacceptable emphasis on promoting economic growth across NSW at the expense of environmental considerations.

Regrettably, many of our comments provided in response to the Issues Paper and Green Paper have not been taken up in the White Paper and legislation. Accordingly, we provide a mixed response to the White Paper, Planning Bill and Planning Administration Bill.

There are particular aspects of the White Paper and draft legislation which we support. These include:

- Efforts to increase community participation at the strategic planning level.
- Further recognition and encouraged use of ePlanning.
- The concept of community participation plans.
- Efforts to provide a coordinated approach to decision making, public spending and infrastructure delivery.
- Encouraging better development outcomes through the amber light approach to development assessment.
- Expanding critical stage inspections.
- Expanding inspections for areas of work which commonly exhibit defects.
- Expanding certification for particular aspects of a building such as disability access.
- Stronger enforcement powers, including expanding requirements for private certifiers regarding the regulation of development consent breaches.

In general, though, we are not convinced the new system will reduce the multi-layered and complex nature of planning across NSW. Furthermore, we find there are many changes proposed in the White Paper and draft legislation which we do not support. In particular, we strongly oppose the following proposals:

- Reducing opportunities for local communities to participate meaningfully and effectively throughout the whole planning process, including policy and development assessment stages.
- Permitting higher order plans to override local plans so that development can be approved which is not permitted under a local planning instrument.
- Reducing the local policy making role of councils by removing locally approved development control plans and developer contributions plans and requiring their

replacements to be approved by the Minister for Planning and Infrastructure within the framework of the new local plans.

- Shifting decision making from local government representatives towards joint regional planning panels and independent hearing and assessment panels.
- Reducing merit assessment of development proposals by expanding exempt and complying development types and introducing a new code based assessment process, all of which substantially removes a qualitative appraisal of development thereby potentially increasing poor environmental outcomes.
- Increasing monitoring of local government planning activities with the intention of forcing councils to meet state-wide performance indicators for development assessment.

Our comments to the principal areas of reform set out in the White Paper and aspects of the planning legislation are provided below.

Delivery culture

Council considers there is merit in discussing cultural change as part of introducing improvements within the planning system. However, our perception is that cultural change is being imposed on councils and communities. Many of the ways suggested to promote and co-ordinate cultural change seem to focus on facilitating the faster delivery of viable development in the interest of economic growth. Regrettably, token recognition is given to environmental considerations. Little thought is provided for the amenity and character of established localities and the delivery of high quality urban design outcomes.

Council does not support the full scope of measures presented in the White Paper to achieve cultural change. We say this for numerous reasons.

1. The measures are tailored to implement a new planning system which is heavily based on economic imperatives. Such a bias is not good planning practice.
2. Where economic viability and fast track development on a broad scale are overriding objectives, it is likely that the ability to achieve good environmental, urban design, planning and social outcomes will be compromised.
3. The new planning system will reduce the opportunities for public participation throughout the full planning process which spans the strategic planning stage to the development proposal and assessment stages.
4. It is apparent that changes to culture are mainly expected from and are to be imposed upon local government operations, in some cases by punitive measures which will remove decision making powers. These are inequitable expectations and actions, particularly in light of the range of stakeholders who work in the planning system.
5. The need for cultural change within the various stakeholders who form the development industry is substantially understated.
6. Little consideration is given to engaging the development industry to address concerns expressed by local communities about the poor aesthetic quality of development. The issue of building quality is largely centred on reducing defects from poor construction.
7. There is no suggestion to monitor the urban design quality of development that will occur as an outcome of new systems.

8. The role of planners within local government as independent professionals acting for the broader public interest will be compromised. Planners in these positions are not advocates for developers.
9. There is a disproportionate onus being placed on planners to drive the changes.

As a further comment, it is unclear how much responsibility the State Government will take in rolling out its new image of planning to local communities. We do not think it is reasonable for councils to be burdened with the role and expense of promoting the new system, particularly where their positions as planning authorities are to be significantly curtailed.

Community participation

We welcome continued efforts to involve communities in planning for their neighbourhoods and broader areas. This should be a keystone for effective planning in NSW.

Whilst the White Paper promotes community participation and contends that participation will be available on an ongoing basis, it is clear the intention is to compress most participation to the strategic plan making stages. This intention is confirmed by the state government's aim to have 80% of all development assessments made through the complying development and code assessment tracks. These types of assessments will not involve opportunities for community input to the consideration and determination of the majority of development proposals.

Section 1.3 sets out the object of the Planning Bill. Section 1.3(1) (b) seeks to promote "opportunities for early and on-going community participation in strategic planning and decision- making." In our opinion this object places an unequal emphasis on strategic planning. The reference to decision making is vague and ambiguous. It cannot be taken for certainty that opportunities for community participation in decision making will be allowed across the whole planning process.

With these points in mind, we can only give limited support for the community participation process within the proposed planning system. In summary:

- We submit that the object of the new Planning Act relating to community participation must be amended so that community participation is supported and encouraged equally throughout all stages of the planning and decision making processes.

- We consider the community participation charter, as a concept, has merit to some degree. It spells out basic public rights and how certain aspects of government should be conducted.

- However, the charter will have token value if communities see little to gain from contributing to higher level planning when they are prohibited from commenting on development proposals that directly impact on their lives.

- We do not consider that any participation plan or engagement strategy can be so fine-grained and rigorous at the strategic level so as to remove the need for notification even though a development proposal may satisfy numerical controls.

- We strongly disagree with the concept of limiting and removing community participation at the development assessment stage merely because a proposal meets a broad vision statement and generic standards established after community involvement at a strategic planning level. We say this for several reasons:

    - The approach is contrary to feedback obtained during exhibition of the Green Paper which sought increased opportunities for community participation at all stages of the planning process.
    - Generic development guidelines envisaged in the White Paper are not by themselves effective assessment tools because they cannot account for all site conditions or all forms of existing development on those sites. Therefore, impacts such as loss of privacy, overshadowing and view impacts need to be considered on a case by case basis using merit assessments rather than pure compliance against general numeric or written standards.
    - It is unrealistic to expect communities to be able to translate development guidelines into meaningful three dimensional buildings with functional uses. Whilst building envelopes can provide a crude indication of built form, they cannot show the level of design sophistication provided by architectural drawings which have details such as window and door openings, the location of private open spaces, landscaping features, car parking arrangements and building materials. These details are often critical to understanding environmental impacts and impacts on residential amenity.
    - Our experience is that the community is more likely to respond to planning matters such as development proposals adjoining their land or in their neighbourhood rather than to broad strategic matters.

- In principle, we support the concept of community participation plans, noting that Woollahra has a community engagement strategy in place. However, we reserve our final position on these plans because their content will be regulated by standards contained in guidelines yet to be released by the Department of Planning and Infrastructure (DPI). We do not know:

    - whether councils will be able to participate in the preparation of the guidelines
    - the basis for determining the success factors for community participation and the details for good practice engagement
    - whether the success factors and good practice details are realistic indicators for the varied communities across the state
    - what details have to be kept about community participation for the purpose of audits carried out by the DPI.

- Because the guidelines will have a major influence on the content and operation of community participation plans, all councils must be allowed and encouraged to participate in their preparation. We do not support selective participation in this process through representative groups such as Local Government NSW and the Planning Institute of Australia.

- We submit that a community participation plan must allow flexibility for councils to determine the notification warranted for development on a case by case basis. We do not support a state-wide, generalised approach to notification of applications.

- We note that all community participation plans will be audited by an expert panel established by the Director-General. We have concerns about this level of standardisation and auditing. It has potential to impact on the way in which a council wishes to communicate with its community. It also has potential to allow the Minister and other planning authorities to selectively restrict participation for nominated planning activities in the interests of economic expediency.

- The language of the community participation charter's principles is crafted to allow selective participation. This is a reasonable approach because there are many aspects of planning and development which can occur with limited participation. However, the openness of the principles allows an approach put forward in the White Paper which restricts and removes opportunities for community participation in important parts of the planning process where participation is currently occurring and expected by local communities. We do not support such a change to community participation.

- We support the use of ePlanning, with qualifications. Our current and anticipated electronic practices are consistent with those outlined in White Paper. We have a well-established electronic service for our planning documents on our website. We have also been investigating the use of an online service which allows customers to quiz our planning information for proposed development types on individual sites. However, our costs in contributing to a centralised system need to be identified.

Strategic planning framework

The White Paper places an overwhelming emphasis on higher level strategic planning and vision making as the tools for streamlining the delivery of new development and facilitating economic growth across NSW. It talks about a new system of engaging communities at the upper level of planning, and co-ordinating government agencies in order to deliver infrastructure more efficiently.

The pivotal aspects for achieving success with this model rest with community participation and changing the community's attitudes and expectations about involvement in the various stages of the planning process. In particular, to be successful the model requires:

- Meaningful community participation – in terms of a representative cross section of community members from all localities and quality input from those representatives.
- Significantly increasing community interest in high level planning.
- Expecting communities to translate visionary statements and broad development guidelines into detailed three dimensional, functional developments.
- Convincing communities to accept and adapt to a new planning system which might provide a faster approval process, but which also substantially reduces current opportunities for participation and comment on development proposals. In many cases those proposals directly impact on amenity and lifestyle.

We see merit in providing a stronger role for strategic planning in the community. However, we do not consider the changes suggested in the White Paper relating to community participation will be effective in terms of achieving the four points mentioned above. It is unrealistic to expect communities across NSW to change their approach to community participation within the short timeframe envisaged by the White Paper for implementing the new planning process. Therefore, we strongly oppose the approach put forward in the White Paper and Planning Bill which aims to increase higher level planning at the expense of proper environmental planning and community participation at the development assessment stage.

We do not consider the White Paper and supporting information sheets have been consistent in identifying the implications with the new planning system in relation to proper planning and community involvement across the whole planning process. Rather, the material appeals to one side of the development process, being the need to speed up assessments and provide quicker decisions in order to facilitate new development.

If the NSW government persists with its program for the new planning system, it must clearly spell out the true implications of the system when it conducts community consultation events involving the preparation of NSW Planning Policies, regional growth plans and subregional delivery plans. That is, it must indicate that whilst participation is occurring at the higher planning level, thorough merit assessment of applications and community notification will not occur for a substantial number of development applications.

Regional growth plans

We support a more coordinated approach to decision making, public spending and infrastructure delivery. However, for councils and communities to have confidence in these plans, the State Government must provide a strong and transparent evidence base, especially for setting housing targets. We have questioned the validity of the housing target set for the Woollahra LGA on many occasions and have not received adequate responses from the DPI.

Any revision of housing targets should be accompanied by fully researched material which demonstrates location of additional housing based on matters such as the capacity of existing infrastructure and services to cater for increased population. It must also identify all proposed infrastructure and services required to meet deficiencies in infrastructure and services.

Subregional delivery plans and subregional planning boards

There is a need to clarify whether subregional delivery plans will be prepared for all subregions within the Sydney Metropolitan Area. The White Paper says that these plans will be prepared for nominated subregions. However, it also says that the plans will apply to high growth areas and will establish how the housing targets set in regional growth plans will be distributed across subregions.

There is a need to clarify the role and status of the regional action plans recently released by the DPI in regard to the preparation of subregional delivery plans. We do not know whether these plans will be used to inform the new subregional delivery plans and if so whether the DPI intends to curtail important parts of the process in the interest of expediting the new planning system. This is a critical consideration because we are not aware whether the regional action plans involved the high level of community participation envisaged by the new planning system.

We are concerned about the capacity of subregional planning boards to prepare plans at a sufficiently detailed level and within the time frame suggested in the White Paper in view of the importance of those plans and their influence on local plans.

The financial and other resource contributions required from councils when contributing to the preparation of the relevant plan and participating on the board need to be established. The State Government may need to provide financial assistance to councils.

We question the efficiency and effectiveness of subregional planning boards which are based on the subregions identified in the Draft Metropolitan Strategy for Sydney 2031. We say this for several reasons:

- The subregions cover substantial land areas which have distinct characteristics, different environmental qualities and variable capacity for growth.
- It is arguable whether the interests of individual LGAs, particularly smaller areas like Woollahra, will be sufficiently recognised where membership on the boards is limited to one council representative.

The authority of the boards to influence and direct planning in local areas is considered excessive. For instance, we note that a board may prepare development guidelines to facilitate code assessed development in designated areas of regional and subregional significance. These guidelines will be placed within a local plan.

Furthermore, it is not clear how areas of regional or subregional significance will be identified or whether individual sites might qualify. Allied to this we are concerned about the potential trade-offs which might occur between subregional priorities and local expectations. For instance, it would be open to developers to approach a subregional board with a proposition that a development is important for the subregion. Such a proposal might have a substantial negative environmental impact on a local neighbourhood or local commercial centre.

In such cases, the relevant council has only one voice on the board to represent local interests. Council representatives, whether councillors, senior officers or independent appointees, will be placed in compromising positions where they are required to contribute towards planning matters which have a detrimental impact on their local communities or which conflict with local visions.

We contest the statement within the White Paper that state and local government will be brought together in stronger partnership through the subregional delivery plans. We say this because the clear evidence within the White Paper and new planning legislation is that the State Government is mandating important planning processes and intends to increase its monitoring of local government activities in order to obtain compliance with state objectives. This is not considered to be a partnership arrangement.

We are concerned about the ability of subregional delivery plans to identify sites for rezoning on the basis of those sites being of interest to the state or region. We say this because the criteria used to measure this interest are likely to be heavily influenced by the overriding objectives of the new planning system which are to encourage economic growth and expedite

development. We do not support the use of these criteria in isolation or in the manner they will be given priority if other criteria are used. We consider other criteria, including environmental factors, should be included so that a balanced approach occurs if rezoning is to be considered.

Local plans

Our ability to comment on local plans has improved since the Green Paper was published due to new information within the White Paper. However, important aspects which influence the final content of local plans are missing. For instance, the following documents have yet to be released:

- NSW Planning Policies and subregional delivery plans – local plans need to be consistent with these policies and plans and will incorporate relevant standards.
- The standard template for local plans – the White Paper says plans will follow a plain English standard format.
- Guidelines for preparing the plans – we expect a set of guidelines in a similar fashion to those used for preparing LEPs.
- Final details about the scope and content of development guides. For example, the White Paper says that model development guides will be prepared for assessing development within the code assessment track.

Our comments are based on the available information within the White Paper and Planning Bill.

Planning controls

We cannot provide a detailed comment on the proposal to reduce the number of land use zones without seeing the full set of land uses for each zone. To obtain a full understanding it will also be necessary to see other provisions which might regulate those uses.

Notwithstanding that, we do not think the general concept discussed in the White Paper of establishing land use zones for areas based on the separation of "genuinely incompatible uses" will result in good neighbourhoods. For instance, we note the suggestion to combine low medium and high density residential zones into a single residential zone. We do not consider this approach is appropriate for residential areas such as those in the Woollahra LGA which have large heritage conservation areas characterised by single dwellings or terrace house buildings.

We note the intention of introducing suburban character areas and their use in the new residential zone. The limitations on using these areas should be spelt out and their relationship with heritage conservation areas needs to be explained. For instance, it is not clear whether a suburban character area can overlay a heritage conservation area or part of it in order to exclude medium or high density development.

If there is ability for suburban character areas to overlay the residential zone, we question the benefit of the single residential zone.

Development guides

We understand that development control plans will be replaced by development guides. The White Paper provides limited information about these guides and therefore it is not possible

for us to make final comments about the new approach. We understand the DPI will release further information about the development guides and welcome an opportunity to comment on them. Notwithstanding that, we strongly oppose any intention to mandate standard guides.

We consider the development guides as presented in the White Paper are more suited to greenfield sites and for medium to large infill sites such as inner city or suburban brownfield sites. Whilst building envelopes can be refined to include aspects such as articulation and modulation, they are usually not presented to include details such as fenestration patterns, materials and other design features.

We do not consider basic building envelopes by themselves will be effective planning tools to address community concerns relating to matters frequently encountered with development applications in the Woollahra LGA such as visual privacy, acoustic privacy and view loss.

It is our experience that building envelopes are accompanied by other controls, including environmental and amenity controls, which allow appropriate design responses based on a site's conditions and context. For these reasons we cannot support a code assessment approach which signs off a development proposal merely because it fits within a building envelop.

The White Paper suggests that the development guides will include urban design and design excellence measures. (p.98) As a general response, we support these measures but need to know their details. We consider the guides should also include matters to address privacy, overshadowing, view loss, private open space, deep soil landscaping and site coverage. Our community will expect these matters and others to be included in the guides.

The White Paper states that "the economic viability of development guides will be tested and considered to enable appropriate development and support the intended outcomes of the plan." (p.98) We strongly object to this approach for several reasons:

- We question whether it is practical or meaningful to conduct such testing for generic guidelines across an LGA with its variable built and natural character and distinct development constraints such as flood prone land, contaminated land and potential acid sulfate soils.
- The degree of economic viability varies due to multiple factors, including macro-economic influences.
- Findings can have a short life span.
- Testing requires specialist skills which would need to be sought by councils at considerable cost to the planning exercise. It is not known whether the testing is required at regular intervals.
- The issue of economic viability is also related to individuals and their financial circumstances.

<u>Contributions</u>
Our comments regarding this part of local plans are contained in the section of our submission which addresses provision of infrastructure.

Strategic compatibility certificates

We wish to raise a number of points about these certificates.

We object to the use of strategic compatibility certificates as a means of circumventing local plans because they may potentially compromise proper merit assessment of development proposals.

Criteria which must be satisfied before the Director-General issues a certificate are set down in section 4.33 of the Planning Bill. They include – the development is consistent with either a regional plan or a subregional plan and the development will not have any significant adverse impact on likely future uses of the surrounding land.

We consider the first criterion is vague and subjective. It can have a very narrow interpretation, particularly where an argument based on economic growth is submitted by a developer. In this regard we note the manner in which economic growth and private sector investment are used as platforms for the new planning system. We consider this criterion needs further detail and explanation. This might be provided in the regulations or in a practice note.

The second criterion requires a quasi-merit assessment of the development proposal. The elevated importance of this assessment, and our concern about it, is given weight because under section 4.34(3) of the Planning Bill the Director-General is required to take into account the views of the relevant council and the advice of the regional planning panel. It should not be taken that the issue of a certificate in any way removes a full merit assessment of a development proposal, which includes the consideration of public submissions. This point is not evident in the legislation. Again, it is a matter which needs clarification.

Development assessment

General comment

We challenge whether the new development assessment system will be a simpler system and provide predictability and certainty. We say this for numerous reasons.

- The current exempt and complying development approach, largely contained in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Codes SEPP), is complex, legalistic and confusing. Adding to this approach will compound the problems currently being experienced.
- A combined code and merit assessment approach which may be used for a single proposal does not offer certainty and is likely to produce confusion and increased delays.
- The ability for minor variations to complying development proposals does not provide certainty for a proponent or neighbours.
- Neighbours will not be able to understand what precisely can occur on adjoining land without knowing the detail contained in a development application.

The White Paper contends that:

> A shift to a performance based system where decisions are faster and transparent but with no less rigour, which makes greater use of code complying development and which removes layers of assessment, will transform the way development assessment takes place in NSW. (p.114)

We do not support this approach for several reasons:

- A system which allows the majority of development across LGAs to occur simply because it meets generic development standards is not a rigorous system.
- A system which is highly reliant on community participation at the upper level of the planning process but then effectively denies participation at the critical assessment and decision making stages is not a transparent system.
- Merely advising the community of decisions is not fulfilling the true definition of participation and is not a fully transparent system.
- It is unreasonable to assume that any community participation strategy can be so fine grained and rigorous that it removes the need for notification for the majority of development within a LGA.

Assessment targets

We strongly oppose the proposed 50 per cent and 80 per cent target figures.

- No rationale has been provided in the White Paper to justify how the target figures have been calculated and then fixed at their particular levels. They are arbitrary and rely on the broad-sweeping objective of achieving economic growth in NSW which permeates the White Paper.
- The figures represent a standardised approach to development assessment across NSW. This is not justified for the primary reason that local government areas contain diverse built and natural characteristics which dictate the type of environmental assessment for development proposals. The characteristics of some council areas will warrant a more rigorous development assessment approach than is available under the complying development and code assessment tracks.

Additionally, we consider object 1.3(1)(h) of the Planning Bill[1], when aligned with the target figures, will transmit an unsatisfactory message to the development industry. That message is that the speed of processing takes primacy over the quality of built environmental outcomes. For that reason we consider the object should be deleted.

Assessment tracks

We note that a NSW Planning Policy will be prepared to assist councils in determining the development types to be included in particular assessment tracks. We also note the policy will require certain types of development to be code assessment in specified circumstances, subject to a risk assessment. We have several concerns about this approach:

- We do not know what risks are being contemplated.

[1] Object 1.3(1)(h) states: "(to promote) efficient and timely development assessment proportionate to the likely impacts of proposed development."

- We consider standardised state-wide criteria should not be used. Such an approach denies contextual considerations and is contrary to allowing local communities an opportunity to express their vision for an area.

We strongly disagree with the suggestion in the White Paper that "the zone for an area will guide the assessment track for development." (p.122) We consider this is a simplistic approach to guiding development assessment. For instance, it cannot be assumed that dwelling houses in a low density residential zone should be code assessment development. The context of that zone will play a major role in the type of planning assessment that should be undertaken. For example, a low density residential zone may be located within a highly scenic area such as the foreshores of Sydney Harbour. New development in that area and a range of alterations and additions should be merit assessment rather than code assessment development.

Expansion of exempt and complying development

We do not support an expansion of the state-wide exempt and complying development regime as currently set down in the Codes SEPP. This Council and other councils have repeatedly advised the DPI of the significant shortfalls of the Codes SEPP and the private certification system.

We have made several submissions on the Codes SEPP and its amendments. We repeat our concern that the Codes SEPP represents an erosion of local, place-based planning controls. The Codes SEPP uses a one-size fits all approach that is compromising environmental sustainability and the quality of the built and natural environments.

Expansion of the Codes SEPP through the introduction of new codes and additions to the original codes exacerbates these problems and is having a cumulative impact on the character of local areas.

Multiple changes to the Codes SEPP have also increased the complexity of a system which was introduced with the intention of streamlining the development process and providing certainty for land owners and developers. Instead of providing clarity and certainty, we find that the "mums and dads" of our community on the whole are unable to use this complex and confusing system.

We have also noticed that many private certifiers are struggling to interpret the Codes SEPP because of its convoluted and legalistic structure. Certifiers are, in general, not legally trained or experienced in interpreting planning legislation. We can provide numerous examples where certifiers have incorrectly interpreted the provisions of the codes. This has led to financial loss to applicants, additional work for Council to assist in remedying problems and loss of confidence in the system. It is apparent from our experience that the system, which was largely introduced to promote certainty in the development process, is not achieving this goal.

Complying development with variations

We do not, in principle, support the proposal to allow complying development with minor variations. The intent of complying development is to introduce an element of certainty into the development process. When the community is asked to consider a draft complying development code at the public exhibition stage it does so with an understanding that the type of development will not change once the code commences operation. This is the element of

certainty the State Government has regularly sold to the community. If the development does not meet criteria, a different assessment track should be required.

The White Paper states that "councils will be able to approve variations referred to them by accredited certifiers that do not have significant additional adverse impacts on neighbours." (p.128) The term "significant additional adverse impacts" is vague and confusing. Aside from this, we consider accredited certifiers will simply pass on a large number of complying development applications to councils.

Furthermore, we do not support the deemed approval concept which would apply if a council failed to consider these variations within 14 days. At a minimum, we consider that where a council is unable to complete its assessment within the 14 days, the variation must be deemed to have been refused and not approved.

If the DPI continues to support the variations approach, we consider a number of changes are required:

- The criteria for variations need to be more certain and less subjective.
- Variations should not be allowed in sensitive locations such as foreshore areas, heritage conservation areas and heritage items.
- The timeframes for councils to consider the variations need to be expanded.
- A deemed refusal rather than a deemed approval should apply if the council's decision is not made within the specified timeframe. Notwithstanding that, an extended timeframe might be allowed under nominated circumstances.
- Councils need to be financially reimbursed for their work.

Code assessment

It is difficult to provide a substantial comment on code assessment because the White Paper and Planning Bill lack important details. For instance, we have previously commented on the absence of information about the proposed design guides which will be used for the code assessment track.

We support the limitation of code assessment development types in certain locations due to site factors identified during "risk assessment" (p.124). However, as mentioned before, we consider the DPI should spell out what a risk assessment means. We consider various environmental conditions and amenity situations should be included with such an assessment. These would include matters such as whether:

- The land is potentially contaminated.
- The land is within a high category of potential acid sulfate soils.
- The land is within a heritage conservation area.
- The land is or contains a heritage item.
- The proposed development is within a foreshore building line area.
- The land is within a scenic protection area and development could have an impact on views of Sydney Harbour and iconic sites.

Merit assessment

We have several concerns about the merit assessment approach outlined in the White Paper.

There is a suggestion within the White Paper that development which is a core use within a zone will not undergo merit assessment (p.134). We do not support this approach. We consider context and other factors should be determining factors for merit assessment rather than whether a development is for the purpose of a core use in a zone. For example, merit assessment should be carried out for dwelling houses in a low density residential area which is also a heritage conservation area. A similar situation applies for dwelling houses in a foreshore area.

The practice of encouraging an acceptable development outcome (the amber light approach) is supported in principle. We often follow this approach as part of our pre-DA process and during the assessment process, particularly in response to public submissions.

Code and merit assessment combination

We consider the combined code and merit assessment approach is flawed for a number of reasons:

- The ability to separate code and merit assessment components is complicated because development proposals are usually integrated designs.
- Changes to a merit assessment component arising from the consideration of submissions or general assessment my require changes to an associated component which is code assessable.
- When reviewing a proposal placed on public exhibition, people are unlikely to distinguish code assessment components from merit assessment components. The most likely scenario is that people will comment on the whole proposal and may expect changes to elements that are code assessable.
- When notification occurs to neighbours, there is an expectation that council will provide a full merit assessment.
- A mixed process does not provide certainty to the applicant or anyone who wishes to make a submission.
- There is no guarantee that time savings will occur.

We consider a mixed assessment process may have some benefit for very large proposals on greenfield sites where master plans are submitted for initial consideration. The value of the process on normal urban blocks in built up areas has not been justified in the White Paper and is therefore not supported. The process should be removed.

Stop the clock

We do not support the proposed stop the clock provisions. We consider they may work against the amber light approach where merit assessment development is concerned. In the case of code assessment development, where no stop the clock provisions are proposed, it is possible more refusals will occur because of the tight determination timeframe.

Changes to the stop the clock provisions have potential impacts on assessment times and the outcome of applications. These are matters which are relevant to a council's performance under the new planning system. This is a concern to us because monitoring of performance by the DPI has generally been based on numerical statistics. The White Paper identifies punitive measures which may be taken by the Minister if councils fail to meet benchmarks. One of those measures is the imposition of a determinative IHAP to replace councillors in development assessment decision making (p.116).

Based on these points we consider the proposed stop the clock provisions should be reviewed.

Standard conditions

Council does not object to the standard conditions of consent provided they are a guide only. Each council could then tailor the model conditions to the constraints and site management expectations of their area.

For example, a standard condition which relates to a construction management plan being prepared may need to be more prescriptive for a precinct such as Paddington where lots are characterised by restricted and narrow site access points. We would not support standard conditions of consent which were mandated in any new legislation.

We also reject the notion that conditions of consent are applied in a manner which is superfluous or irrelevant to the development to which consent is granted. Our standard conditions have been carefully designed in a manner which is consistent with section 80A of the Act and the tests contained in *Newbury DC v Secretary of State for the Environment [1981] AC 578*. Non-standard conditions are considered in terms of the tests set out in *Mison v Randwick MC (1991) 23 NSWLR 734; 73 LGRA 349*.

Increased role of IHAPs

The White Paper calls on councils to establish expert IHAPs to determine development applications. It also mentions that councils that consistently fail to meet benchmarks will be required to establish decision making IHAPs to replace councillors in development assessment decision making.

The White Paper fails to identify the relevant benchmarks to be met by councils, but we suspect they are associated with determination times for applications. We do not know whether the benchmarks will also include the State Government's target figures for complying and code assessment approvals.

We strongly object to the imposition of IHAPs and do not support their introduction to determine local development. We consider it is appropriate for a development application that is deemed to be in the public interest to be determined by elected representatives of the local community.

We have a well-developed delegations structure which is carefully designed to ensure that routine development with minimal or localised public interest is determined by staff delegation, or internal staff panels subject to complexity. Those matters which engender a broader public interest, or are a class of development likely to give rise to a substantive environmental impact, are elevated to either an open public panel of senior staff, or to a committee of Council comprising elected members of the Council.

This instrument of delegation elevates development decision making through the various levels of delegation on the basis of class of development, likely impact/complexity or the public interest. Thus, we consider Council has already achieved the objective contained in the White Paper that decision making should align with the complexity and likely public interest engendered by a development proposal.

Finally, this Council has in place protocols and a code of conduct which prevent any political interference during the assessment and formulation of a recommendation by Council officers.

Performance monitoring

The White Paper identifies a number of areas where councils will be subject to performance monitoring. We object to the proposed increased monitoring particularly as the intention is to force councils to meet state-wide performance indicators for development assessment which are based on economic imperatives.

The performance of the planning system should be measured by a wide range of factors beyond housing and employment targets and the percentage of applications which are assessed under a particular method. Performance should take into account outcomes such as the quality of new built form, the up-take of public transport, success in protecting a community's heritage and success in achieving ecological sustainable development objectives.

Performance of the planning system needs to go beyond economic factors and include social and environmental outcomes.

The performance monitoring system should also include a review of dwelling and employment targets at a sub-regional level having regard to environmental capacity of the local government area to support increased development.

Provision of infrastructure

Our comments on this chapter of the White Paper and the associated provisions of the Planning Bill are made in regard to four aspects:

1. Contributions in general
2. Regional infrastructure contributions
3. Local infrastructure plans
4. Local infrastructure

Contributions in general

When discussing the new infrastructure contribution system, the White Paper states that "Smaller scale developments such as alterations and additions will not pay contributions." (p163) Under the current section 94 and section 94A contributions regime of the *Environmental Planning and Assessment Act 1979* (EPA Act), ministerial directions limit monetary contributions. It is not clear whether similar limitations are intended for the new system. This point needs to be clarified and all intended limitations should be made available for comment.

Regional infrastructure contributions

We have a number of concerns about regional infrastructure contributions.

- The White Paper states that "Contributions collected within a subregion will only be used to fund infrastructure projects within that subregion." (p.165) Initially this would

appear to be a reasonable approach. However, we note the size of the proposed subregions within the Draft Metropolitan Strategy for Sydney 2031 and have reservations about the allocation of funds in an equitable manner for those LGAs which may not experience large population growth, do not have strategic sites or other significant subregional items such as development corridors, transport hubs or important infrastructure. In particular, because of the emphasis in the White Paper and Planning Bill on the timely delivery of additional housing, we think that areas with higher growth estimates will attract more funds at the expense of lower growth areas, which will still have pressure on their infrastructure

- Allied to the above point, we are concerned that regional infrastructure contributions will be a further mechanism by which councils and their communities are required to subsidise provision of infrastructure outside their area.

- The current Metropolitan Greenspace Program is one example where councils are required to make substantial annual financial contributions for the provision of open space within the metropolitan area. The White Paper does not mention whether this and similar programs will be continued under the new system. We consider the addition of a regional infrastructure contribution will place further burdens on local communities which are not in a position to have funds reallocated to their LGA. In view of this we submit that the Metropolitan Greenspace Program should be discontinued.

- The White Paper says that growth infrastructure plans will not only focus on growth infrastructure but will also address existing major infrastructure such as passenger rail lines, arterial roads, schools and hospitals. (p.158) It is not clear how this approach will be implemented across Sydney. For instance, if all Sydney's LGAs are expected to provide opportunities for housing and employment growth, will some areas which have outdated and dilapidated infrastructure, particularly inner ring areas which only have opportunities for minor growth through infill or replacement development, be seriously considered for infrastructure upgrading and improvement?

Local infrastructure plans

We do not support a requirement for plans to be approved by the Minister. We say this for several reasons.

1. If plans are prepared to comply with statutory requirements and any guidelines issued by the DPI, together with Ministerial directions, we consider there are adequate measures for allowing councils to approve them.
2. Councils are accountable for meeting all requirements for preparing and implementing plans. They are open to legal challenge if the plans are inconsistent with legislation. This is the current arrangement for contribution plans prepared under section 94 and section 94A of the EPA Act.
3. Requiring Ministerial approval for amendments to these plans is inefficient, particularly if amendments are of a minor nature.

We do not consider there is any benefit in listing other infrastructure within the local infrastructure plans if contributions cannot be raised towards their implementation. The council has a capital works program which it approves as part of the annual budget and which it can amend from time to time. It is not necessary for the Minister to approve these works or

is it efficient for council to amend a contributions plan before it can add the works to its program.

Local infrastructure

We have a number of comments about the term local infrastructure and expenditure of funds.

- We require clarification and further information about the term local infrastructure and reserve our final comments. Local infrastructure is defined inconsistently within the White Paper and Planning Bill. The Planning Bill defines local infrastructure as local roads, local drainage works, open space and community facilities. However, the White Paper uses the terms local roads and traffic management, local open space and embellishment, basic community facilities (land and capital) and capital costs for drainage. The White Paper also mentions that a Contributions Taskforce will refine the list of essential local infrastructure. We consider this important aspect of the proposed local contributions system should be clarified and made available for comment before the new Act is made.

- The term open space is too narrow. It should be expanded to include recreational facilities. This is consistent with the current approach in section 94 of the EPA Act and is necessary for the delivery of essential local infrastructure.

- It is unclear whether the term local roads is intended to apply to the road reservation which comprises the road carriageway, footpaths and verges. We consider it should.

- We consider those parts of State roads which are maintained by council, (namely those parts of the reservation other than the carriageway), should be included as local infrastructure.

- We consider traffic management devices should be included as local infrastructure. Councils often have to provide these devices to cater for increased road usage arising from new development or as a consequence of increased vehicle ownership within the community.

- We do not support a mandated timeframe of three years for the use of monetary funds. It is common for the planning and implementation of some capital works to occur over a longer period. We consider there should be no statutory time period. It would be more beneficial to allow a range of implementation times. These might be addressed in guidelines for the preparation of new local infrastructure plans.

Building regulation and certification

Having regard to the submissions received on the Green Paper and the overarching intention of proposed changes to the building regulation and certification system, our comments on the White Paper and Planning Bill are concentrated on three aspects which are central to work carried out by Council:

Private certification

Understanding the role of a private certifier

The lack of community confidence in the current certification system was a matter we identified in previous submissions on the planning reform process. We consider that the role of the private certifier needs to be more clearly defined and needs to be promoted by the government in the wider community. Simply, the public needs to know what it can expect from a private certifier.

The White Paper states:

> It is proposed that the responsibilities of the building certifier, the consent authority and the council be clearly defined to reduce confusion, create better community understanding, reduce unnecessary overlaps and define the limits of their relevant functions. (p.192)

Whilst the functions of building certifiers and subdivision certifiers are listed in section 8.3 of the Planning Bill, they not are substantially clearer than how the roles are expressed in the current legislation. Therefore, it is unlikely that the White Paper's intentions will be achieved.

Expanding the role of the private certifier

With councils no longer involved in the majority of building sites, many matters which would normally have been detected and rectified during building inspections, such as unauthorised or unsafe works, are no longer being addressed.

We note that the responsibilities of a building certifier will be expanded to enable them to report unauthorised work and provide assistance to councils during an investigation in relation to that issue. Additionally, we note that section 8.24 of the Planning Bill requires a certifier to issue notices if they become aware of non-compliances. We support this new measure.

However, the results can only be seen over time and will rely heavily on the diligence and professionalism of certifiers. In this regard we feel that private certifiers will be placed in a compromising position since they are employed by a developer or property owner to act in one capacity which is to facilitate completion of the development.

Ensuring development application consents match construction certificate application approvals

We consider more certainty should be built into the planning system to ensure that a development consent takes precedence over any certificate issued by a certifier. This is particularly the case with major developments which follow a thorough assessment process and include direct community consultation and input. Therefore, the actions of a certifier must never be able to amend a development consent.

The White Paper includes a section titled *Compliance with the development approval* and states that:

> [B]uilding certifiers will be given the option to call on the expertise of additional occupations and relevant professionals to certify the construction plans are not inconsistent with the development consent for small, low scale developments. This will be mandatory for more complex building types. (p.190)

While a development compliance report may be required to be issued before the construction certificate is determined, it is not clear what is meant by the phrase "not inconsistent with the development consent" and which additional occupations and professions will provide the required development compliance reports. More detail and clarity is required on this issue.

The White Paper also states:

> Completed building work will have to be consistent with the development consent. An accredited person will be available to provide this certification, such as an accredited builder. (p.193)

This new provision may give the building certifier added protection. However, it will not increase the confidence of the community in the process. The community expects to see what was approved at the development consent stage is what eventuates on completion of works. It is considered that the White Paper is still not achieving the level of confidence required by the community.

Ensuring that all completed works are in accordance with the development consent before a final occupation certificate is issued

Presently, the statutory obligation on the certifier is to simply confirm that a development consent has been issued. There is no statutory obligation to certify that the works have been completed in accordance with the development consent and its conditions.

The White Paper introduces the concept of a *compliance certificate (completion)* in lieu of an occupation certificate for items which fall within the definition of buildings such as fences and swimming pools and which cannot be occupied. The White Paper further states that:

> [T]he occupation and compliance certificates (completion) will certify the building work is consistent with the development consent or complying development certificate. (p.196)

However, these changes are not identifiable in the Planning Bill. For example, section 8.8 of the Planning Bill lists the restrictions that prevent the issue of occupation certificates. Compliance with the development consent or complying development certificate is still not specified. We consider this aspect needs to be further considered so that appropriate requirements are placed in the planning legislation. Put simply, the community wants to be assured that a development complies fully with what was approved.

Ensuring accuracy in notices issued by private certifiers

We note that under section 8.24 of the Planning Bill certifiers are required to issue notices if they become aware of non-compliances. Under the current arrangement, certifiers are able to issue notices, but in our experience the notice is vague and lacks detail about the breach or non-compliance and how the remedy is to be achieved. Most notices are issued with simple statements requiring the work to be carried out in accordance with the applicable development consent. We often need to reissue the notice with clearer details, particularly in regard to the remedial works.

So that the new system envisaged under section 8.24 has better affect, we recommend measures be introduced to improve the quality and accuracy of notices when they are prepared by private certifiers.

Expanding critical stage inspections to include all major stages of inspection
We have previously identified that nominated critical stage inspections need to be expanded to include all major stages of construction. While certifiers should be permitted to rely on certificates from suitably qualified professionals such as structural engineers and hydraulic engineers, they should still be required to undertake inspections at all stages of the development to ensure works are proceeding in accordance with the development consent.

With the current regime of critical stage inspections, departures from the development consent are not detected until it is too late and then the matter is handed to councils to try and remedy the problem.

We note that significant improvements are proposed to address our concerns, although the full detail of the likely changes is still unknown. Nevertheless, the White Paper makes a number of specific suggestions, comments and recommendations that are relevant to our concerns, including the following:

- Requiring the installation and commissioning of critical building systems to be certified by an accredited person. (p.205)

- The fire safety certificate will no longer be accepted to certify compliance of fire safety measures. Independent certification from an accredited or otherwise competent person of the compliance of the fire safety measures will be required. (p.193)

- Introducing revised mandatory building inspections that are better tailored to the risks and complexity of a building's design and construction, particularly for Class 2–9 building. (p.205)

- It is proposed that the role of FRNSW, during the construction phase, be amended to increase confidence that all fire protection systems relied upon by FRNSW operate effectively and meet its needs. The inspection role of fire engineers and other experts during the construction will be clarified. (p.195)

It is evident that the existing accreditation scheme will need to be expanded to cover more professions and occupations than just building surveyors. However, it is unclear from the current documents what professionals and occupations will be captured and this will need to be considered further at a later stage.

Dealing with unauthorised work

The position put forward in the White Paper to manage unauthorised work largely reinforces the current practices and legal position with the exception that a compliance certificate (completion) will be introduced. Regrettably, it appears the White Paper takes a view that greater emphasis should be placed on finalising the building process to allow occupation of a building rather than curbing unauthorised building practices.

We do not consider the proposed building information certificate (replacing the current building certificate) is the best way of regulating unauthorised building work for numerous reasons:

- There is no statutory requirement for a building information certificate to be lodged for unauthorised work.
- A building information certificate only lasts for seven years, after which time Council can serve notices and orders to have the unauthorised work removed.
- A building information certificate does not follow the same statutory assessment process as a development application and is not required to be notified to neighbouring properties.
- Conditions are unable to be imposed on a building information certificate.

Accordingly, it is strongly recommended that the revised planning system should introduce a requirement for retrospective development consent for unauthorised work.

Any new provisions would need to make it mandatory for a development application to be lodged for unauthorised works and this could be enforced by introducing a new order type. The new order would require the lodgement of a development application to permit the proper statutory assessment of the illegal works that were carried out without development consent where prior development consent was required.

Any new order for this purpose should be applied in a similar manner to the current order 19 – *Cease work order* contained in section 121B of the EPA Act, without the need for a notice of intention to give an order. Councils need to be able to act swiftly on these matters so the community can be confident that their concerns will be considered.

Where there is a development consent and unauthorised work is undertaken in relation to that consent, retrospective approval can currently be sought by seeking a modification of the consent pursuant to section 96 of the EPA Act. There are benefits in this practice remaining. However, there must be an onus to require the lodgement of the section 96 application to ensure a full assessment is undertaken. The provisions suggested above would apply equally to this form of authorised work.

The issue would be whether or not the unauthorised work would result in the development being substantially the same, which determines whether or not the matter could be considered as a section 96 application or if a new development application is required. Either way, for the reasons identified above, unauthorised work should be required to be assessed pursuant to the development application process.

Development control orders – currently notices and orders

We do not consider substantial changes have been made to the orders regimes proposed under the Planning Bill compared with the current range of orders under the EPA Act. Therefore we reiterate our previous concerns about orders and notices:

1. Where there are discrepancies between a construction certificate and a development consent, the development consent must take precedence and Council should have the power to issue a ‘development control order’ to require that all works are undertaken in

accordance with the development consent and not the inconsistent construction certificate.

2. We consider an order type should be introduced requiring the submission of a development application or complying development certificate (as applicable), where unauthorised works have been undertaken without consent and where prior consent was required.

3. We consider an order type should be introduced requiring the disposal of roof water and/or stormwater in accordance with Council's adopted stormwater management plan or the like where other land, or a building on the land or other land, is being damaged or is likely to be damaged.

4. The current provisions of sections 121ZR and 121ZS of the EPA Act that relate to brothel closure orders should be extended to include actions against unauthorised boarding houses, backpackers accommodation, houses let in lodgings and the like. This change would permit development control orders to be issued based on circumstantial evidence and result in more effective enforcement proceedings including the disconnection of utilities, where appropriate.

Missing details

Important components of the new planning system are not provided in the current release of documents. These include:

- The regulations for the Planning Act which will provide details on many operational matters.
- NSW Planning Polices - in particular, the policy which sets out principles for determining the development types to be streamed into the code assessment track.
- Guidelines for preparing subregional delivery plans.
- Transitional provisions for Standard Instrument LEPs, development control plans, section 94 and section 94A contributions plans.
- Community participation plan guidelines and the auditing process for those plans.
- A template or standard instrument for new local plans, including the final list of land uses.
- Explanatory notes and guides for local plans to address elements such as suburban character areas, in particular their relation to heritage conservation areas.
- Model development guidelines for local plans.
- The likely cost and resources required by councils to contribute to the ePlanning program.
- Final details about the definition of local infrastructure.

In keeping with the proposed community participation charter, it is critical that these documents and details are made available for comment prior to their introduction.