SAVE HUNTERS HILL MUNICIPALITY COALITION

A coalition of community and precinct groups and residents determined to save the historic Municipality of Hunters Hill
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ANALYSIS OF NEW PLANNING BILL (2013) – 10 NOVEMBER 2013

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1. BACKGROUND

1.1 A draft Planning Bill together with a White Paper was placed on public exhibition by the NSW Government on 16 April 2013. Almost 5,000 submissions were received. As a result of the many community and community group submissions, including from the Better Planning Network (BPN), environmental and heritage organisations, councils and council bodies, and political parties and their members including from within the Liberal Party, some changes were made to the draft Bill resulting in the 'new' Planning Bill introduced into Parliament on 22 October 2013. At the same time a Feedback Report was released by the Department of Planning outlining the many areas of concern with the draft Bill and the Government's responses to those concerns.

1.2 An examination of the submissions and the Feedback Report reveals that the vast majority of submissions, including those of the community, supported increased growth and jobs in conjunction with the provision of infrastructure, strategic planning and upfront community involvement in strategic planning, a Community Participation Charter and evidence based planning.

1.3 However this examination also reveals that the vast majority of the submissions had real concerns with the draft Bill and wanted significant changes. They call for a balanced planning system including 'ecologically sustainable development (ESD) as an objective; to be consulted at the 'development application' (DA) stage when a specific development is proposed; for the environment and local character and heritage to be properly protected; certainty and restrictions on Ministerial discretions; and restrictions on code assessment and complying development.

1.4 The changes made to the draft Bill by the Government just before its introduction into the Parliament are set out in paragraph 2 below. They are welcomed, however many of the real concerns expressed in the submissions remain. There are still many fundamental flaws with this new Bill. They are set out in paragraph 3 below. The Bill passed the Legislative Assembly on 30 October, where the Liberal Government has a majority and it is now before the Legislative Council (Upper House), where it does not have a majority. It is to be considered in the 3 week sitting commencing Tuesday 12 November.

2. THE NEW PLANNING BILL

There are a number of changes made from the draft Bill, including the following provisions appearing in the new Bill:

2.1 **Objects Clause.** The Objects clause has been strengthened by expressly including protection of heritage in addition to environment, including Aboriginal cultural heritage, and adding effective management of natural hazards and natural resources, including minerals. However the use of 'sustainable development' as an object does not reflect the submissions made by an overwhelming number of residents and bodies seeking that 'ecologically sustainable development' (ESD) be included. ESD provisions incorporate significant internationally recognised principles.

2.2 **Planning Principles.** These have been removed from the Bill so as to eliminate overlap with the objects clause.

2.3 **Strategic Planning.** The Government retains 'effective control' over the higher levels of strategic planning, including State Planning Policies, the Planning Assessment Commission and Regional Planning Panels. Subregional Planning Panels, whose obligation is to follow higher plans and policies, may in some instances have a majority of council representatives, but this is not mandated. The community will be able to make a contribution to Strategic Planning as a result of the 'Community Participation Charter', being one participant of many in that process.

2.4 **Wide Discretions.** The draft Bill gave the Planning Minister unfettered discretions, including altering Plans. This has been slightly amended to require the Minister to place any proposed changes on public exhibition and publish reasons for decisions. However his wide powers remain.

2.5 **Savings.** Existing strategic planning documents, State policies, local environment plans, development control plans, conservation areas and local heritage items will continue while the new planning system is being implemented.

2.6 **Other Stated Changes.** The Government has announced other changes from the draft Planning Bill and White Paper, including adding a new 'Environmental and Heritage' Policy; keeping existing zonings (including residential and environmental) rather than collapsing them into a smaller number; stating that code assessment will be prioritised for growth, urban activation and renewal areas; that councils can decide in other areas where they have code assessment; that councils are not required to have code assessment in established, low density or heritage conservation areas; and that local councils can 'have a say' in adjusting complying codes to better reflect the character of their areas. However these announced improvements are not included in the provisions of the new Bill. There are no legislative protections that they will be in fact implemented.

3. SERIOUS FLAWS REMAIN WITH THE BILL

3.1 **Serious flaws.** Significant weaknesses remain in the new Planning Bill as passed by the Legislative Assembly. These are listed below. They are such that the Bill cannot proceed in its present form, and should be rejected by the Upper House of Parliament. There needs to be established a proper framework for future planning, one that will produce a fair and balanced Bill and planning system. This Bill certainly does not do that.

3.2 **ESD should be included.** In spite of the overwhelming number of submissions demanding that 'Ecologically Sustainable Development' (ESD) be the driving force of the Bill, and the recommendation from the 'Moore and Dyer' Report, the Government has steadfastly refused to include ESD provisions and principles in the Bill. The ESD clause is already included in similar legislation both in Australia and overseas. It must be included in the objects clause 1.3 to ensure that

there is an appropriate balance between economic, environmental and social considerations. There is only one inference that can be drawn, and that is that the Government does not want a balanced planning system.

3.3 **Code assessment should be confined.** Code assessment, ticking boxes with no community consultation, should only be allowed for minor or simple developments. In the new Bill if the boxes in a code are ticked a development must be approved within 25 days whether the community wants it or not. Code assessment can range from a new block of 20 units in an existing residential area of single and two storey houses to massive developments in proposed growth areas, urban activation areas and renewal areas. Where councils agree, this kind of development can take place across all areas. The Government's stated aim is to maximise this assessment process. This is not good planning. It will invariably lead to poor quality development, loss of character and amenity and social discord. Significant changes need to be made to Part 4 and elsewhere.

3.4 **Complying development should be minor.** Complying development in the Bill does not allow residents a say and is to be approved by private certifiers within 14 days. Such development can include a new two storey house in a residential zoning. There is a clear risk that amenity, privacy, views, design, character of the area and other issues will not be properly considered. It is intended that certain variations to such development can also be approved. It has been stated by the Minister that councils can modify complying development codes to reflect local character but only if they 'demonstrate no decrease in complying development outcomes'. This is a dog's breakfast. Complying codes should not be able to be varied and must be restricted to very minor matters that cannot affect the amenity of neighbours or the character of an area. Part 4 of the Bill needs changes.

3.5 **Heritage should always be merit assessed.** The objects clause seeks to protect heritage and the environment - clause 1.3 (f), and local plans can identify and protect conservation areas and local heritage items – clause 3.13 (j). Clause 3.3 deals with NSW planning policies, but does not specifically include a policy for Environment and Heritage. Clause 4.17 (1) lists a number of categories of development that are not subject to code assessment, but does not include 'conservation areas', or 'local heritage items' which form 97% of our State's heritage. It should, as these must be merit assessed. It can't be left to individual councils to seek an exemption from codes applying to such areas or items. Conservation by its very nature requires site specific analysis and consideration, and this can only come from merit assessment.
Clause 4.17(1) therefore needs to be amended to ensure that development within conservation areas and relating to local heritage items is not subject to code assessment. Clause 4.18(2) needs to be amended to ensure that with merit assessment a consent authority is to take into consideration the likely impacts of the development on conservation areas and local heritage items.

3.6 **There should be certainty in planning.** Good planning requires certainty, certainty for developers that if they follow legal requirements of the Act, and the planning instruments emanating therefrom, their developments will be efficiently and fairly assessed; and certainty for the community that provisions and protections in planning instruments will be adhered to, so as not to damage or adversely impact on their environment both built and natural.
The Bill does none of these things. It allows the Minister and developers to override agreed plans almost at will. The Minister has wide powers, including changing plans, calling in developments, and

declaring urban activation precincts, all of which allows him to override agreed plans. Developers can put in development applications that do not follow plans, seek re-zonings, seek reviews, appeal, run to the Minister to declare a development to be of State significance or an urban activation area, and seek 'strategic compatibility certificates'. All of these allow for developments that are beyond and different from the requirements of existing plans.
Frankly this is a farce, a mockery of good planning and provides no certainty for communities at all. The only certainty is that this State will be inundated with bad developments and that ICAC will need further resourcing. To provide certainty and clarity will require many sections of the Bill to be changed.

3.7 **Local Plans should offer real protection.** Local Plans need to give their areas real protection, in particular those things valued by those communities. This would include places with special character or heritage values, identified low density residential areas, open space and environmentally significant and sensitive areas. Unfortunately, local plans are at the bottom of the 'food chain'; they are subject to State policies, Regional and Sub-regional plans, declared 'growth areas', 'urban activation areas' and 'renewal areas', places declared to be of 'State significance', the Minister's discretion, and generally to all the vagaries of the present Bill. Local plans are also in their provisions to be subject to their 'impact on the financial feasibility of future development' and the 'likely impacts of future development', whatever that might mean – clause 3.24(2).
Subregional Planning Boards have the power to require individual councils to rezone specific land and to identify particular areas for code assessment and complying development, whether a council and its community agree or not. There is no public comment for code assessment and complying development.
Clearly in this Bill communities will not be properly protected as to what they value and are to be dominated by the dictates of the Government of the day, its bureaucracy and appointees. This is a far cry from 'returning planning powers to the community'. To offer real protections for local communities and to give teeth to local plans will require a rethink of many parts of the Bill.

3.8 **Elected representatives should play their proper role.** Councils that presently make decisions on developments are advised by council staff, including town planners and heritage advisers. They also are able to involve other expert consultants. Councils like Hunters Hill have expert advisory panels on heritage. Councillors determine the application having all this advice as well as their knowledge of the community and the area in which they live. They are elected by their community. Councillors are subject to training and education in relation to relevant legal requirements and the code of conduct. This is likely to be further enhanced by anticipated reforms to local government. There is no doubt that if you believe in participatory democracy this is a far superior system to appointed panels of people who are not elected, may not live in the area, are in a profession or firm that receives work from property developers and/or government, have no security of tenure, have to be paid, and will be under severe time constraints to make decisions under this new Bill. Will there be any takers for such a role apart from those seeking personal advantage?
Councillors should be encouraged to play their role in decision-making at the local level, not denigrated and marginalised by State Government. The Government and the development industry are pushing to get elected representatives out of decision-making on planning, and this must be resisted. The Government made a promise before the last election which is now embodied in the NSW Government's State Plan 'NSW 2012' Goal 32 'People to have a real say and be involved in localised decision making, including through local government'. Changes are required in the Bill to

ensure that Councillors are able to make planning decisions, with the ability to delegate where appropriate.

3.9 **Community should be consulted at DA stage.** The Bill pretends that the community will get a real say in strategic planning. As most submissions point out community involvement is problematic at best at the strategic level, given the complexity and perceived remoteness of this task. In reality few members of the community will be involved and only as one player in the process, and a small player at best, along with the NSW Government, bureaucrats, advisers, property developers, the property industry and professionals.
It is at the DA stage that the community can and should make its greatest contribution. It knows its area best, it is motivated to look for good development that will work in its environment and it has to live with the specific development when completed. It is wrong and counterproductive to essentially shut the community out from having a say at that time. Past experience shows that such involvement actually improves the quality of development, which is to everyone's advantage. Except for genuinely minor matters, all developments should be publicly exhibited for comment. The Bill fails dismally in this regard. Its main focus is to get rid of community scrutiny at the DA stage, a view pushed by the property industry. Major amendments will be required.

3.10 **Strategic Compatibility Certificates (SCCs) should be deleted.** The Bill allows through SCCs for the over-riding of existing plans at the instance of developers and the Director General of Planning. A recent change was made to involve the Regional Planning Panel if a council or 25 residents object to a SCC, but that Panel is subject to regional plans setting Government policy. The Bill simply requires a development proposal to be 'strategically consistent' with higher level plans. Such strategic plans would not be detailed or site specific and would thus enable developers to ride roughshod over existing detailed plans.
Considerable areas of Sydney, including low density residential zonings, are likely to fall under ever expanding 'growth areas' or 'urban activation areas or 'renewal corridors'. Affected property would be subject to these SCCs which can overturn existing plans and zonings. This will create division and uncertainty and runs a real risk of encouraging what are really 'spot re-zonings', that no doubt will later be seen by many as poorly planned development. The Bill makes no provision for the SCC to be temporary during a transition period; it appears that it will be an ongoing weapon of destruction. Any proper transition arrangement should require existing plans to be respected in the period before new plans are put in place. Changes will need to be made to the Bill.

3.11 **Policies, codes and regulations should be revealed.** State Policies guide the whole system, regulations give meaning to a Bill, and detailed codes are proposed. All these should have been exhibited at the same time as the Bill so to provide the community with an understanding of how the whole system might work.

3.12 **Private Certifiers should be controlled.** Many submissions were rightly critical of the use of private certifiers. They are chosen and paid by the developer and are clearly in a conflict of interest position. In relation to assessments, certifiers must be confined to 'complying development' only, and any variation from the code should not be permitted. Severe penalties must be provided for any breaches of the Bill and regulations. Developers should pay a fee to an independent body, which then appoints, monitors and pays the certifier. The Bill will need to be amended.

3.13 **Appeal and review rights should not be restricted.** These rights should not be restricted. It would appear that such proceedings are restricted in relation to State significant development and State Infrastructure development, and the validity of strategic and infrastructure plans – clause 10.12.

3.14 **Minister's and Director-General's powers should be confined.** As stated above recent changes to the Bill require the Minister to place proposed alterations that he wishes to make to existing plans on public exhibition and publish reasons for any changes of significance. However his wide discretionary powers remain to make these and many other changes, as do those of the Director-General. This easy system of subverting plans, plans worked out in detail over time and with some consultation, gives the Minister and key bureaucrats too much power. The decisions about housing targets, growth areas, State Planning policies and the like are all influenced by the Minister and the Director-General. Past history does not allow communities to have confidence in such a system with these kinds of wide discretions and powers. The Bill needs amending and further thought.

3.15 **The Bill should not be complex and difficult to follow.** This Planning Bill is overly complex and difficult to follow. It has a plethora of planning bodies, assessment routes, discretions, variations, exceptions and requirements that create uncertainty and involve huge costs. It is cumbersome and unbalanced. It is certainly not best practice. It fails to make proper use of councils and their staff, both locally and regionally through existing Regional Organisations of Councils (ROCs).

4. CONCLUSION – THE BILL SHOULD BE REJECTED

4.1 The whole direction for 'the new planning system' swung wildly off track when the Government decided to ignore its own Independent Panel of 'Moore and Dyer' and its report and recommendations, and go ahead with a totally different scheme dictated essentially by property industry lobbyists, resulting in the 'Green Paper'. Ever since then the scheme has lurched along a downward path for the benefit of property developers and to the detriment of communities and the environment.
That this is so can be clearly seen from the vast majority of submissions made not only by the community but from many other responsible bodies and organisations to the White Paper and draft Bill. The Government's cheer leaders are drawn from the property industry and professionals who seek to gain from the proposed changes. The community, including the Better Planning Network (BPN), on the other hand is backing the public interest. The community is not at all against sustainable growth and jobs and strategic planning, that is a given. What they want is a balanced planning system that embodies best practice and protects what communities value.

4.2 The modest changes made to the draft Bill by the Minister during October along with other announcements that are not in the new Bill, are welcomed. However they do not change the main thrust of the Bill which, as can be seen from the analysis above, remains focused on growth and expediency, pushing to one side environmental and community considerations. The spin from Government that this is not so reveals a lack of transparency and honesty with the community that is deeply worrying. It is treating the community with contempt.

4.3 The question must be posed as to whether this Bill in its present form is capable of being amended to rectify the many legitimate concerns, or should be rejected. An examination of the fundamental changes that need to be made, as set out in paragraph 3 above, reveals that there are

just too many changes affecting too many parts of the Bill, and that to try to amend what needs to be rectified will not produce a best practice piece of planning legislation. It just cannot be properly achieved.

4.4 Given the attitude of the Government and the importance of getting the planning reform right, there is no option but for this deeply flawed Bill to be rejected. The Government needs to then step back and re-assess its position. This may involve a new Minister and new staff being involved within the Department. The Government needs to take a close look at the 'Moore and Dyer' Report that had general support; the submissions and Feedback Report; and what is needed in a best planning system – one producing sustainable growth and jobs while properly protecting the environment and the community. The Government needs to respectfully sit down with the community, other stakeholders and all political parties, listen, and work co-operatively in developing a new, fair and balanced planning system, one that commands wide support.

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