

8 February 2008

Planning Reforms  
Department of Planning  
GPO Box 39  
SYDNEY NSW 2001

Dear Sir/Madam

**SUBMISSION ON PLANNING REFORMS BY THE ENVIRONMENT AND PLANNING LAW ASSOCIATION (EPLA)**

EPLA is an organisation whose members are drawn from many environmental disciplines including the fields of planning, environment, architecture, local government and the legal profession. Its membership is drawn from city and country regions, in government and private enterprise.

Thank you for the opportunity to comment on the draft amendment to the planning reforms proposed by the NSW Department of Planning.

As will be observed from our membership base it is to be noted that EPLA does not have a vested interest in the development of land for any purpose. However the vast experience of our members means that EPLA is in a prime position to consider the amendments from a neutral position.

We attach our comments that we trust will assist in a consideration of the proposed reforms.

EPLA would be pleased to provide further comments at a late time that would be of assistance to the Department.

Yours faithfully

Sandra Duggan  
President

## **SUBMISSION ON PLANNING REFORMS BY THE ENVIRONMENT AND PLANNING LAW ASSOCIATION (EPLA) NSW, INC**

### **The proposed reforms**

#### **1. Changes to land use and plan making**

EPLA generally supports the proposed changes to the plan-making system. However EPLA recommends that the plan-making procedures be simplified and clearly identified to all stakeholders. For example the proposed “gateway screening system” for land use changes for large scale proposals is said to require “a whole of government approach.” It is envisaged that the requirement for several government departments to consider and assess proposed land use changes has the potential to cause significant delays during re-zoning applications.

#### **2. Development assessment and review**

The proposed reforms include a hierarchy of decision making which includes eight layers of decision making bodies. EPLA generally supports these changes but recommends that the roles and powers of each decision making body be clearly identified to all stakeholders.

EPLA also considers it appropriate for applicants to have some degree of flexibility in determining the decision making body. For example it is noted that the Planning Assessment Commission (PAC) would determine regionally significant projects where the host council does not have the resources to support a Joint Regional Planning Panel (JRPP). This approach is welcomed by the members of EPLA as it shifts the assessment process onto better resourced bodies. Often councils are criticised for their lack of timely decision making, however this is often indicative of a broader problem concerning a lack of resources.

#### *Appeal rights*

It is proposed that where a public hearing has been held into a State significant project (other than Critical infrastructure) or Regionally significant project that there would be no applicant or third party right to a merit appeal in the Land and Environment Court. EPLA cautions against the removal of these appeal rights. The right to a merits review of an administrative decision is an important feature of the *Environmental Planning and Assessment Act 1979* for both applicants and objectors. The Land and Environment Court has an important role in resolving these disputes and the structure of the class 1 appeals aptly facilitates this process.

It is frequently the absence of an appeal right for an objector which fuels an Administrative Law challenge to the decision (Class 4 proceedings) where the real (merit) issue in dispute is not able to be determined in the proceedings. The availability of a right of merit appeal would allow the real issue to be contested with a focus on better development not on the process by which the decision was made. The present position in Victoria affords the right of appeal to the Victorian Civil and Administrative Tribunal (V.C.A.T.) including a third party right of appeal. (Part 4 Division 2, Planning and Environment Act (Vic) 1987)

### *Planning arbitrators*

In respect of minor local applications it is proposed that section 82A reviews and deemed refusals be dealt with by planning arbitrators. Appeals would be allowed to the Land and Environment Court but only after a review by the planning arbitrator has been undertaken. EPLA welcomes the role of a planning arbitrator but recommends that appeals continue to arise in the normal way, that is after the deemed period. That way applicants have the choice of whether they appeal to the Land and Environment Court or request the planning arbitrator to make a decision.

The requirement for a planning arbitrator to review a deemed refusal and make a decision **before** an applicant may appeal to the Court will likely lead to further delays, costs and unnecessary duplication.

### *Section 96 modifications*

EPLA cautions against the imposition of an arbitrary limitation on the number of section 96 applications that may be made for a particular development. Often section 96 applications are required to deal with unforeseen matters that arise during construction. A more streamlined approach of dealing with section 96 applications should be encouraged.

## **3. Exempt and complying development**

EPLA supports the expansion of exempt and complying development as it will save the time and cost of preparing a development application for small scale development. The development of a mandatory code will be critical to this process as it will allow all stakeholders (including neighbours) to be aware of the standards for small scale development

It will also assist in dampening the expectation that may be held by a neighbour that they have a "right" to influence the outcome of a proposed development. When no such right exists, it is best to be clear about it.

## **4. Eplanning initiatives**

EPLA welcomes the proposed eplanning reforms. These initiatives will allow for greater efficiency and transparency in decision making.

## **5. Building and subdivision certification**

The certifier's role is central to many of the proposed reforms. EPLA generally supports the proposed changes but cautions against prescribing limits on the number of construction or complying certificates that can be issued to any one client by an accredited certifier. This has the potential to disrupt large developments that are subject to the issue of a number of staged construction certificates. EPLA recommends that an alternate means of measuring accountability be explored.

The reforms ought not imply that council involvement provides a second class service in the certification process. Frequently the service provided by councils in rural NSW is the only form of certification and where there is an alternative in rural areas the council is often the superior service. In the reforms creating further opportunities for private certification there is no cause to erode public confidence in existing certification particularly where certification by a council is the only available service in some areas.

## **6. Other reforms**

*Amendment of proposals on appeal to the Land and Environment Court*

EPLA cautions against the proposed restriction on amendments to proposals made on appeal. The main concern appears to be that applicants are allowed to make substantial or significant changes to proposals, which are said to be significantly different to the applications that councils had already assessed and refused to grant consent.

Regulation 55 of the Environmental Planning and Assessment Regulation 2000 (“the EPA Regulation”) is relevant to the amendment of a development application. It provides:

*(1) A development application may be amended or varied by the applicant (but only with the agreement of the consent authority) at any time before the application is determined.*

*(2) If an amendment or variation results in a change to the proposed development, the application to amend or vary the development application must have annexed to it written particulars sufficient to indicate the nature of the changed development.*

*(3) If the development application is for:*

*(a) development for which concurrence is required, as referred to in section 79B of the Act, or*

*(b) integrated development,*

*the consent authority must immediately forward a copy of the amended or varied application to the concurrence authority or approval body.*

The Land and Environment has considered clause 55 of the Regulation and the question of whether leave should be granted to rely on amended plan on numerous occasions. The decision of *Ebsworth v Sutherland Shire Council* [2005] NSWLEC 603 provides a convenient summary of the approaches taken by the Court:

*... that scope and extent of the statutory power of amendment created by cl 55 of the Regulation permits a development application “to be changed or altered resulting in an alteration, variation or modification in the proposed development.*

*... do not see any legitimacy in quest of the proper construction of cl 55 to superimpose upon the word “change” appearing in cl 55 of the Regulation the qualification of not being a “radical” change or to superimpose upon the adopted meaning of the word “change” namely “to make different” the qualification of “not being substantially different”*

*(Ervin Mahrer and Partners v Strathfield Council (No 2) 115 LGERA 259 confirmed in Elali v Campbelltown City Council (2004) 135 LGERA 85 and Rose Bay Afloat Pty Ltd v Woollahra Council and Another (2002) 126 LGERA 36).*

*... in applying that construction (Ervin Mahrer) questions of fact and degree do arise, and in turn, they are to be considered ... in the context of the surrounding circumstances of the development application and the category or character of the development.*

*(Urbis Pty Ltd v Sutherland Shire Council [\[2001\] NSWLEC 147](#))*

*... the Court is not empowered to entertain amended plans which are so substantially different from the original plans that the development as proposed cannot be said to be substantially the same development as was the subject of the development application (Dyldam Developments P/L v Holroyd City Council [\[2001\] NSWLEC 204](#))*

*The Court has no jurisdiction to entertain an original application. The Court cannot entertain an amendment which converts what was before the council into a fresh*

*application. Therefore if amendments convert the original concept into something substantially different from the original development application, the Court does not have the power to consider it* (Willoughby Municipal Council v Local Government Appeals Tribunal and Manchil Pty Ltd [\(1974\) 2 NSWLR 415](#) at 420, per Samuels J; Cambridge Credit Corporation Ltd v Parkes Developments Pty Ltd [\(1974\) 2 NSWLR 590 at 598](#), 602, per Hope JA). In *Cambridge Credit*, Hutley JA (at 612) adopted the phrase “differs in any material respect”, and the description of the constraint as “not to approve development which differs in any material respect from that described in the development application”, citing *Else-Mitchell J* in *Peter Rommel & Associates Pty Ltd v North Sydney Municipal Council* (1971) 23 LGRA 99 at 107–108. It is also follows that the comparison must be between the development application as originally made and the amendments that are now sought.

(*Waite v Blacktown City Council* [\[2004\] NSWLEC 157](#))

*... the Court ... does not have the power to allow an amendment which differs in any material respect from that described in the plans accompanying the development application.*

(*Chase Property Investments Pty Limited v Blue Mountains City Council* [\[2005\] NSWLEC 476](#)).

In *Ebsworth* the Court adopted two criteria for use in considering whether a development application may be amended or varied, as follows:

*(1) Whether the development as amended can be regarded as the same development as the one originally proposed in the context of the characterisation of the overall concept and the surrounding circumstance of the development application.*

*(2) Whether there are essential elements that are so altered in the context of a consideration under the EPA Act that they place the development in a different category for the purpose of assessment.*

The *Ebsworth* decision has been followed by the decision of *Radray Constructions Pty Ltd v Hornsby Shire Council* [\[2006\] NSWLEC 155](#). In *Radray Jagot J* said:

*I also consider that a broad approach to both the scope and application of cl 55 is appropriate. Clause 55 enables any application to be amended or varied with the agreement of the consent authority at any time prior to determination. An amendment or variation, as cl 55(2) contemplates, may result in change to the proposed development. The extent of change able to be authorised by agreement of the consent authority or by the Court exercising that function on appeal (and which does not result in the conversion of the application into an original application) will depend upon the facts of the particular case (including, for example, the nature of the site and the nature and characteristics of the proposed development).*

It should be noted that the re-introduction of the preliminary conferences provides the parties with an opportunity to discuss the issues that are in contention and negotiate a resolution. This may often involve amendments to proposals, however it should be recognised that this forum is not otherwise accessible or available to applicants and councils during the development assessment stage. EPLA believes that the development of case law in the Land and Environment Court prevents applicants from making significant amendments to proposals and provides sufficient protection for councils and other stakeholders.