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SUBMISSION ON WHITE PAPER

A NEW PLANNING SYSTEM FOR NEW SOUTH WALES

Introduction

The review is timely in view of the presently over-complex nature of the system. Innumerable amendments to the excellent Environmental Planning and Assessment Act of 1979 have successively confused and unnecessarily complicated the planning process. Many of the proposals in the White Paper for changes to the *forward planning* part of the system have the potential to significantly improve outcomes and better address critical environmental and social issues. Encouragement and support for greater involvement of the broader community in this part of the process is admirable.

On the other hand the proposals relating to the 'assessment' component, - the *development control* system, -would in effect exclude the community from the process in a large majority of cases and are extraordinarily retrograde and unacceptable. Likewise the proposals to exclude our elected representatives from the decision-making process in favour of a largely bureaucratic regime are deeply flawed.

My submission in response to the former 'Green Paper' emphasized the critical underlying principles on which any planning and development control system in a democracy must be based. These would be undermined by many of the present proposals relating to the development process in particular, and need to be further articulated.

Fundamental Principles

. In a democracy we elect councilors and members of parliament to represent the community, uphold our values, and make decisions on our behalf. They are responsible and accountable at the ballot box for those decisions. Planning for the future of our environment, and control of development of are some of the most important tasks for which our representatives must assume responsibility, both at Local and State levels.

. Decisions about planning and development control *are by nature political decisions.* To ignore this fact and deliberately exclude our representatives from much of the process as now proposed, on the unacceptable premise that it should be 'depoliticised' (see p.116), is to take a naïve and/or threateningly undemocratic stance.

. Involvement of the community in both the plan-making and development control processes has been a fundamental and cherished part of the system since its inception, and the rights of the community were reinforced by provisions of the original EP & A Act. The White Paper proposes greater involvement of the community in much of the former,

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whilst stripping the community in effect of most of its rights in relation to development control.
.Our State and Council representatives need access to the best possible expert advice on planning issues and development proposals, but must not abdicate or be denied the power and responsibility in relation either. *In relation to the latter they should and must be able to delegate the large majority of decisions to expert staff and appointed external panels, but must always retain determinative power whenever necessary or desirable, whether because of the size, social or environmental concerns, or impact on the community no matter how small the scale.*

Serious Concerns
THE PLANNING SYSTEM
This submission concentrates on the development control system but there is also a critical issue relating to the nature of the *forward planning* system. No matter how well-intentioned and well-resourced the community might be during the strategic and local planning stages of the process:-

(a) Only a very small percentage of the community will participate at those stages

(b) Many, and typically, *most* of those affected by any particular development proposal will have had no say in the evolution of the relevant planning controls affecting a site. Many will not have lived in the area or been absent at the time they were formulated. The average length of residence in one location in Australian cities is as short as approximately seven years, and very much less in higher density areas. Many people affected will have been too young or too old to take part in any debate at the time the controls were developed.

(c) Physical, environmental and social change is constant, plans quickly become outdated or irrelevant.

It is at the development proposal stage that people are most immediately affected, -when they will want to be and will need to be consulted and involved, -yet it is here that the White Paper proposes largely stripping away the right to be involved and to contribute.

THE DEVELOPMENT CONTROL SYSTEM
Planning controls are imperfect inventions. The New South Wales system has progressively improved in recent decades in its ability to describe the critical constraints which should apply generally to sites within each zone, but the variables in relation to any specific site are literally infinite. Their applicability and relevance to every particular site cannot be assumed, and more importantly in many cases the controls cannot necessarily be adequate to ensure an acceptable outcome. This conclusion arises from experience with some thousands of applications in various capacities as developer, consultant, adviser and assessor. Although an application may comply with all the applicable controls

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its merit is *always* a critical consideration and cannot be 'codified', -irrespective of how small or large a development proposal may be. The proposition that *merit* should be excluded from consideration in assessing the very large majority of applications is untenable.

The White Paper posits the idea that, -aside from those 'prohibited', -development applications should be categorized into four types, Exempt, Complying, Code, and Merit:-

'Exempt Development'
Proposals even within the 'Exempt' category include structures which could potentially have significant negative impacts on neighbour(s) and/or on the character of the immediate area. Of the examples given (p.126) of proposed 'Exempt Development Types', three are 'Carports', 'Fences', and 'Landscape'. Yet alarmingly it is proposed that these will *not require any 'approval'*, and *not* even require notification of neighbours, let alone consultation with those affected. (p.126) The threatening consequences of this provision are outlined in Appendix A, *The Parable of the Old Lady, the Carport and the Rose Garden,* a scenario developed from my previous submission. Similarly a gross new fence along the frontage of an attractive suburban street could comply with the local plan, -which cannot possibly deal in detail with every street in the area, -yet be totally out of keeping with the character of the neighbourhood.

Only merit assessment can address either of these situations.

'Complying Development'
Similarly, in this category which potentially includes much larger structures, the right of those affected to lodge objections which must be taken into account in assessment has been excluded, and no provision for considering merit is to be allowed. The 'encouragement' of developers to 'discuss' their proposals with neighbours is no substitute for removing statutory rights to object. Again there is a misguided assumption that 'black and white rules' will always lead to acceptable outcomes. For example some of the potentially more modest applications listed in this category are 'granny flats': it is again naïve to assume that any preconceived 'rules' could prevent the further proliferation of 'complying' ugly red brick structures in the backyards of suburbia. It is noted that it is suggested in the Paper that Councils would be able to make merit assessment of applications if there are minor non-compliances (p.128), but otherwise full and proper assessment by Council would be disallowed.

Only merit assessment can address applications of this type.

The time of 10 days proposed to be allowed for assessment is unreasonably short. Some affected members of a community will inevitably be absent for longer periods. Anybody involved with the development industry is fully aware of the propensity of developers to

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conveniently lodge applications just before a holiday period begins, -a time when neighbours are very likely to be absent on annual holidays for several weeks. It must also be noted that in reality very few developments proceed shortly after approval, -most not beginning until months later, -or not unusually being abandoned after approval is received. There appears to be an obsession with reducing approval times: processing of applications must be efficient, but not reduced to unreasonable periods. Buildings are likely to remain in place for decades and sometimes centuries: the right outcome must not be prejudiced for the sake of a few extra days. The time taken for approvals is very often not critical, and for this category of development at least 30 days would be a reasonable maximum for determination, and then only on the proviso that no legitimate objections requiring more time for assessment have been lodged. Experience has demonstrated that time must be allowed for the discussions and negotiation between the parties that so often can result in an improved and mutually satisfactory outcome.

'Code Assessment'

The process outlined perpetuates the unfounded assumption relied upon in relation to the first two development categories that complying development will necessarily be acceptable development. Refer to numerous Land and Environment Court cases where 'complying' development has been held for very good reasons to be unacceptable. Again, in this case it is proposed that the community will not be entitled to submit objections, but merely 'notified', and that merit assessment will not be permitted unless the development in 'non-complying'. With all due respect to those who prepare future codes, how can it be realistically expected that a development will comply with a 'vision' developed in consultation with the community when codes cannot cover all issues, without also assessing the full character and impact of a proposal, and when there may be obviously superior alternatives ? Why should a designer be entitled to 'propose an alternative design' (p.130), but not the community or Council? Why can Council consider only those comments from the community that relate to non-complying aspects of an application (p.132)? Those closely involved at the 'grass-roots' of the assessment process could readily identify numerous examples of poor quality but 'complying' applications, despite the relevant codes appearing to be comprehensive. There is no comfort in the somewhat glib 'PR' statement that this would be 'win-win for industry and communities' (p.131) when the system described is heavily biased towards the applicant/developer.

The schedule 'Examples of Development Types' (p.130) includes groups of up to 20 two-storey townhouses, as well as six-storey commercial and residential buildings. These could be very large structures any of which could potentially have major negative impacts in the locality even if 'complying', -yet Councils would have no legal right to take into account submissions from neighbours or those who might be impacted in the broader community.

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The exclusion from consideration of:-

. All merit issues other than those 'which do not comply with 'acceptable (??) solutions'(p.132)
. Submissions on 'code-complying' development

would be highly restrictive and unacceptable.

'Merit'
The process described is broadly acceptable and follows the procedures that should in fact properly apply to all four categories of development. But it would be acceptable only if both Councils and Ministers were to be held responsible for the delegation of decision-making to expert panels or staff when appropriate. But in this respect the process described is in fact deeply flawed for two fundamental reasons:-

. Decision-making would be irrevocably *relegated* to 'Regional Planning Panels'. Such panels are un-elected and unaccountable to the electorate: such unalloyed power is inappropriate in a democratic society. It is entirely reasonable for Councils and Ministers to *delegate* such authority, but irresponsible for an Act of Parliament to require them to *abdicate* their responsibilities.

. The proposed times allowed for consultation with the community are extraordinarily and unacceptably short. Development proposals at State and Regional levels can be vast in scale and difficult for even the most accomplished experts to fully understand at short notice. They can impact on very large numbers of people. The nominated times of only 28 and 14 days respectively will be inadequate. The proposed 14 days would be unacceptable in all cases for the reasons already canvassed in relation to 'Complying Development'. It may be that in some instances 28 days would suffice for minor minimal-impact proposals, but if they are indeed of 'Regional' or 'State' significance this would be most unlikely. In rare case 28 days may be acceptable, but for most a considerably greater time would surely be essential for a genuinely consultative process.

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Conclusions

. FORWARD PLANNING

The proposed promotion and encouragement of greater involvement of the community in the plan-making process is applauded whilst cautioning that, -however well-intentioned, - it is most unlikely that more than a very small proportion of the community will ever be willing and able to take part.

. DEVELOPMENT CONTROL

There are major concerns for the reasons given above that the proposals in the White Paper:-

. Would very seriously undermine the right of the community to be actively involved in the process.

. Would exclude consideration of the merit of a very large majority of applications, on the fundamentally flawed assumption that 'codes' could include adequate guidance and control to describe every situation.

. Would exacerbate the increasing trend towards undermining the democratic nature of the process by depriving our elected representatives, -both at Local and State level, -of the right to determine applications, instead conferring strong power on appointed panels which are unelected and unaccountable.

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APPENDIX A

THE PARABLE OF THE CARPORT, THE OLD LADY AND THE ROSE GARDEN

In a far-away suburb in a quiet suburban street in a town in the State of New South Wales, Australia lived an elderly lady. She was elegant and eloquent, discrete and retiring, a contributor to charitable causes, and a pillar of the local community.

Her splendid rose garden ornamented the front yard, the like of which had not been seen in the town before, -every year for two decades the winner of the Council's Regional Garden Award. Resplendent with innumerable exotic species, -Rosinas, Bettinas, First Loves, Virgos, Goldilocks, Simple Simons and Floribundas.....her creativity and imagination knew no bounds.

She was oblivious of a powerful government in a distant capital city plotting to overhaul the State Planning System. Indeed it soon relentlessly hauled over the planning controls, producing both Strategic Plans and assurances that Outcomes for the citizenry would be faster, purer, brighter and better, and most critically would stimulate The Economy.

Her neighbour, Businessman and newcomer to the town, was the proud owner of a sparkling black 4 WD, parked in the street exposed to blazing sunshine and the gaze of all. A protective new carport was what his car most relished. Checking his I-Pod he chanced upon shiny new Local Planning Controls, where under the mysterious category of 'Exempt Development' were listed 'Carports'. Triumphantly it dawned that his potential car-protector would need no approval from the local Council, nor would he need to tell his neighbour! The Businessman knew that neighbours were apt to be troublesome and should be avoided at all costs. The carport was quickly erected, -a double one of necessity, sturdily supported by Doric columns of exquisite proportion. He basked in a warm glow knowing that he alone had stimulated the local Economy.

Unfortunately the block on which the businessman and his Carport resided was uphill, above and to the north of the adjoining rose garden belonging to the Old Lady. The rose-bed was fatally overshadowed. The roses became unhappy, curled up their petals in protest, faded away and died. The little Old Lady was desolate: curled up in her lonely bed, she too shriveled and passed away. The town grieved but it was too late.

The Council Town Planner lamented that he was not allowed to notify any Old Lady, or even think of the 'Merit' of the carport under the provisions of the Act in relation to Exempt Development: even if it had been 'Complying Development' thoughts about 'Merit' were irrelevant and how could the 'Local Plan' possibly protect everybody's front garden? The Businessman did fret a little, knowing he could easily have placed the Double Carport on the further side of his land causing no shadowing: why on earth had nobody suggested it to him? The Minister was away on a vital Ministerial overseas mission and could not be contacted. The Friendly Garden Society memorial plaque in the garden honours the Old Lady with the words "She was Exemplary but He was Exempt".