

27 June 2013

The New Planning System  
NSW Department of Planning and Infrastructure  
GPO Box 39  
Sydney NSW 2001

NSW Business Chamber  
incorporates

- Sydney Business Chamber
- Australian Business Limited Apprenticeships
- Australian Business Lawyers and Advisors
- Australian Business Consulting and Solution

Dear Sir / Madam,

**Submission: New Planning System for NSW White Paper**

The NSW Business Chamber and the Sydney Business Chamber (collectively 'the Chambers') welcome and support the direction of the White Paper, *A New Planning System for NSW*.

The Chambers have been vocal in advocating for a planning system that promotes economic growth and prosperity, and are pleased with the White Paper's firm focus on growth and development. The Government should be commended for the White Paper's significant and positive proposed changes to the planning system. The Chambers welcome the move towards strategic integrated urban planning and infrastructure provision, the move towards consultation at the strategic planning phase, and the introduction of streamlined approvals processes.

Key to these reforms is the successful implementation of cultural and behavioural change within key stakeholders of the planning system, community acceptance and engagement with the new planning system. The Government, in partnership with industry, must work to bring about the required cultural and behavioural change and resources must be allocated to ensure broad engagement of the community at the strategic planning phase.

Although the Chambers are broadly supportive of the proposals put forward within the White Paper, concerns remain around specific issues including the system for collecting infrastructure charges, the approval processes in relation to major projects, and details around land use under new zoning provisions

**Community participation**

The Chambers welcome the White Paper's focus on community engagement, particularly in enshrining participation in legislation via the Community Participation Charter. The Chambers strongly support the focus on early community involvement, with an emphasis on feedback at the strategic decision making level. The Chambers commend the statutory obligations imposed by the Charter requiring planning authorities to prepare community participation plans and the provision of various physical and digital channels for consultation.

However, the Chambers are concerned that there may be a public backlash against the proposed planning process if communities do not feel adequately engaged in consultations. It will be challenging to get the broader community engaged in consultations at a strategic level, given that most individuals currently only participate in the planning processes when a development is identified that impacts them. Given that the proposed changes will restrict the ability of individuals to provide feedback at the project phase, the Government must ensure that the planning process provides maximum opportunities for consultations during the strategic planning phase. This may require the establishment of highly visible education and community outreach and awareness programs highlighting the role of local plans and opportunities for participation.

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The Chambers note the experience of the New Democracy Foundation in working with Canada Bay Council in developing a “citizen’s panel” to improve community engagement. Learnings from this process, such as utilising randomly selected representative groups (as opposed to a self-selected group), should be considered.

### **Cultural change**

Embedding a delivery culture for planning in NSW is the most vital and challenging reform highlighted in the White Paper. Legislative and process changes to the planning system will have little impact without changing the behaviours of those who work across the planning system, including those in the Department of Planning and Infrastructure and the 152 councils across the state. The Chambers commend the actions identified in the White Paper to bring about a delivery culture within the planning system, including collaborative programs between the Department and the Planning Institute of Australia. The Chambers would be happy to work with the Department in developing planning education resources to assist NSW business to better engage with the planning system. The Chambers note previous collaboration between NSWBC and the planning sector in developing a business user guide titled *Making the Planning System Work for You* and would be pleased to collaborate again in developing a support document to assist businesses engaging with the system.

Educational programs outlined in the White Paper will be important to bring about an effective delivery culture. This will require a multi-pronged approach, where planners and councils must physically engage with local community groups on planning reforms and also engage through traditional and new media. These programs must be delivered on terms that meet the community group’s interests. The Department-NSWBC collaboration

While educational program are important for cultural change, structural change of local councils will be absolutely necessary. Local councils play a central role in the planning system both at the strategic planning and approvals phases. They are often the main interface individuals have with the planning system. Despite their central role, many local councils do not have the required expertise or resources to professionally carry out their role within the planning system. The Chambers note the current local government reform proposals being put forward by the Independent Local Government Review Panel and encourage the Department to work closely with the panel to ensure that any local government structural reform process serves to support improvements to the planning system. To this end, the Chambers note the critical need to better align the sub-regions identified under the metropolitan strategy with the new council boundaries being proposed by the Panel.

### **Zoning provisions**

The Chambers are broadly supportive of the shift to broader and fewer zoning categories. The Chambers hope that this shift will provide more flexibility in the mix of developments within zones. A key aspect to zoning guidelines will be encouraging the right mix of densities, requiring a more flexible and principles based approach to approvals by local councils. The Canadian city of Vancouver, while not directly analogous to Sydney in terms of size and geography, provides a good example of flexible approaches to promoting appropriate density. Vancouver managed to significantly improve its density mix by allowing innovative approaches to densification, including the provision of soft density options (small scale infill projects), transport oriented development and the promotion of medium density housing. This has helped to increase the range of housing options available and has received general support in terms of community expectations around aesthetics and liveability.

Although the Chambers welcome these changes, in principle, a number of Chamber members have expressed concerns in relation to the rigidity of the new zones and their inability to effectively recognise and affirm current land uses. A failure to adequately address these issues will mean that the standard LEP is prone to the same failings of current planning instruments.

While the Chamber is supportive of the underlying principles identified by the review for the new Act, the principles as currently drafted fail to recognise the fundamental right of a property owner to utilise and gain value from their land. Although it is accepted that the essential purpose of a land use planning system is to temper a landholder's absolute right to use their land by regulating it, a guiding principle that explicitly recognises that a landowner has the power to use land to their benefit should also be included.

A failure to recognise a landowner's essential right to utilise their land, has been particularly concerning for member businesses in the tourism industry and those members who choose to supplement their business through holiday letting. The recent decision of the Land and Environment Court *Dobrohotoff v Bennic* [2013] NSWLEC 61 has pulled into sharp relief the fundamental tension in land use planning between a landowner's right to deal with a property as they choose and a regulatory authority's right to regulate that property. In that case, Pepper J held that a dwelling-house under the Gosford Planning Scheme Ordinance in the 2 (a) zone could not be used for holiday rentals by reason that the use would not be "for the purpose" of a dwelling-house because it was not being occupied in the way a family or other household group would do.

Pepper J stated in that case at [44]:

*[I]t could not be fairly said, looking at its use as a whole as short term holiday accommodation, that, as a matter of fact, the property was being occupied in the same way that a family or other household group in the ordinary way of life would occupy it. A tenancy granted to persons who are residing in a group situation for periods of a week or less for the purpose of bucks and hens nights, parties or for the use of escorts or strippers, is, in my opinion, not consistent with a use or occupation by a family or household group in the ordinary way of life, and therefore, not consistent with the use of the property as that of a "dwelling-house" (Blacktown City Council v Haddad [2012] NSWLEC 224 at [35])*

While the Chambers are in no way condoning the behaviour of those occupiers who used the property, it is interesting to consider that if an owner of a property immediately adjoining the subject property "for the purpose of bucks and hens nights or parties" applying the reasoning of the Land and Environment court there would be no ability for that use to be challenged (other than for the behaviour by noise complaints etc). This issue should be examined in more detail as holiday letting plays a key role in many regional economies and needs to be managed appropriately to ensure a balance is struck between community amenity and private property rights.

In determining broader zoning categories, existing use rights for businesses must be protected to ensure that commercial activity is not affected, including reasonable expansion of such activities.

The Chambers support the focus on the feasibility of various urban plans and development guidelines to ensure they can deliver desirable outcomes and do not place unrealistic burdens on development. It should be noted that changes outside planning requirements may be needed to ensure viability of developments. As an example, the *Retirement Villages Act 1999* places restrictions on the marketing of new retirement village developments prior to construction. This impacts on a developer's ability to gain sufficient presales, which in turn jeopardises their ability to gain access to finance and, ultimately, bring the development to market. This is an adverse outcome, particularly with the critical need for facilities and amenities for an ageing population.

## **Infrastructure**

The Chambers welcome the White Paper's focus on encouraging contestability for the provision of infrastructure, in line with recommendations made in our discussion paper titled *Diversity and Contestability in the Public Sector Economy*. The NSWBC is in agreement with Premier O'Farrell's comments around the efficient provision of services:

*“Where there is a better way of delivering a government service or program, which maintains or exceeds appropriate standards, delivers results and defends public value, I believe government is morally and economically obliged to consider it.”<sup>i</sup>*

In terms of infrastructure contributions, the Chambers support efforts to deliver a more transparent system of contributions, however there are concerns over the quantum of contributions and the delivery of new infrastructure overall.

There is concern over the lack of detail around the quantum for infrastructure charges, where charges will be determined after various infrastructure plans have been developed. A focus of this concern is the expectation around the scope of the terms ‘essential infrastructure’ and ‘growth infrastructure’ for the purposes of infrastructure planning and delivery. If these terms are taken broadly, where Local Infrastructure Plans and Growth Infrastructure Plans include a large shopping list of infrastructure wants to be funded through infrastructure contributions, it will be difficult to achieve the White Paper’s stated outcome of ensuring the financial viability of urban developments while at the same time ensuring a user pay model for infrastructure delivery.

An associated concern is the over-reliance on new developments to fund infrastructure delivery. The delivery of new infrastructure obviously benefits not only those in new properties but also those in existing properties. However, there is no provision within the planning system to value capture these benefits. There is a comprehensive body of work highlighting efficient frameworks that convert these benefits into funds to recover the cost for the provision of the infrastructure. Without a more equitable distribution of the costs for new infrastructure, the financial viability of urban developments will be jeopardised.

While these concerns relate to contributions for new infrastructure, the Chambers also hold concerns for the framework of delivery for essential (albeit unattractive) infrastructure such as waste infrastructure.

The Chambers understand that currently the Sydney metropolitan area is serviced by 3 landfills. The Chambers are further informed that this is likely to fall to just one landfill within a decade. Obviously, the new planning system needs to accommodate these types of development to ensure that Sydney can accommodate the growth estimates expected under Metropolitan Strategy.

### **State significant developments (SSD)**

The Chambers hold fundamental concerns in relation to the capacity of the new planning system to appropriately accommodate SSD. The recent decision of the Land and Environment Court to overturn the Minister for Planning and Infrastructure’s conditional approval of a mine expansion in the Singleton area (see *Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd [2013]*) makes apparent the challenges facing the system.

The decision by the Court in that case to reject the conditional approval of the mine on social and economic grounds has the potential to significantly reduce investor confidence and divert investment away from NSW. In light of the Warkworth decision, the Chambers recommend that planning reforms provide a way forward that ensures a reliable, transparent and effective approach to the process governing major projects.

Put simply, without a major projects approval process that provides certainty for potential investors, major projects are likely to move interstate or overseas. The Chambers have heard from a number of investors of their apprehension in investing in NSW due to the lack of certainty in the assessment process. This uncertainty will be detrimental to the Government’s ability to meet its state plan target of growing business investment by 4% per year to 2020.

The Chambers recommend that amendments be made to legislation to ensure that appeal rights by activists and single issue interest groups are not unnecessarily broadened. Under

the White Paper reforms, any state significant development that requires an environmental impact statement will trigger objector rights of appeal. This appears to unnecessarily expand appeal rights, particularly for activists groups who wish to manipulate the planning process. The Chambers also questions the judicial system's ability to undertake a merits review on complex planning matters.

As to the types of development that can be classed as state significant, the Chambers believe that reforms should address the omission of residential and commercial developments as state significant. Provisions should be included which balance the need to address critical housing shortages against the perceived misuse of state significant provisions for residential/commercial development under the previous regime.

The Chambers wish to thank the Department for seeking comment on the White Paper. Should you have any questions or require additional information, please contact Ash Salardini, Policy Advisor, NSW Business Chamber on 9458 7491 or [ash.salardini@nswbc.com.au](mailto:ash.salardini@nswbc.com.au).

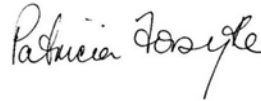
Yours sincerely,



**Paul Orton**

DIRECTOR OF POLICY

NSW Business Chamber



**The Hon Patricia Forsythe**

EXECUTIVE DIRECTOR

Sydney Business Chamber

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<sup>i</sup> Premier Barry O'Farrell, State of the State 2012 speech to CEDA, 16 July 2012