NSW Business Chamber

1 March 2012

Mr Tim Moore & Mr Ron Dyer
NSW Planning Review Panel
Planning System Review
GPO BOX 39
SYDNEY NSW 2001

NSW Business Chamber incorporates
- Sydney Business Chamber
- Australian Business Limited Apprenticeships
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Submitted via online portal

Dear Sirs,

The NSW Business Chamber (NSWBC) welcomes the opportunity to provide a submission on the *"The way ahead? Issues Paper of the NSW Planning System Review".* This follows the NSWBC's initial submission to the review of the NSW Planning System and its foundation legislation, the *Environmental Planning and Assessment Act 1979* ("the Act") dated 4 November 2011.

A1 What should the objectives of new planning legislation be?

The statutory objectives set out under section 5 of the Act should frame the entire planning process and be used as guiding principles across all aspects of land use. Accordingly, these principles should be realigned to reflect that the objectives of the Act should:

- Support economic growth;
- Promote sustainable development;
- Maintain an open, transparent and timely assessment process;
- Improve liveability; and
- Promote whole of community strategic planning.

A3 Should there be strict controls in plans and A4 Should applications that depart from development plans be permitted?

With communities across NSW facing vastly different land use challenges, there is a need for flexibility to exist within plans to ensure that different land use priorities can be met. Applications that depart from plans should be permitted. In circumstances where the consent authority for a development is a council and the council rejects an application on the basis that it does not conform to lot size, height, etc. the applicant should be granted a right of appeal to the JRPP who could then consider the merits of the application in more detail.

There should be no third party appeal rights on the merits of such consent once granted as such appeals unnecessarily delay the planning system and would significantly impact on the ability of the State Government to meet its new housing targets set out in the *NSW 2021* Plan.

NSW Business Chamber Limited
140 Arthur Street
North Sydney NSW 2060
ABN 63 000 014 504
Locked Bag 938
North Sydney NSW 2059
DX 10541 North Sydney
t 13 26 96
f 1300 655 277
e navigation@nswbusinesschamber.com.au
Regional Offices ACT, Mid North Coast, Western Sydney, Northern Rivers, Hunter, Murray/Riverina, Illawarra, Southern Sydney, Northern Sydney, Central Coast

A6 Should new planning legislation provide a framework for regional strategic planning processes? If so, how should appropriate regions be determined for strategic planning? A7 Should strategic plans be statutory instruments with greater weight?

The lack of a clear nexus between strategic and statutory plans leaves NSW highly exposed when attempting to plan for and manage urban growth. As identified by UDIA NSW, *"the new Planning Act must align its strategic planning provisions with the state's economic development plans, population growth forecasts and demographic changes"*[1].

The NSWBC supports the introduction of new strategic planning requirements into the Act with opportunities for key community stakeholders, such as the NSWBC, to play a leading role in the development of such longer term, strategic plans.

In the absence of any genuine "push" by the Government to undertake the amalgamation of councils within the Sydney basin, the appropriate regions for strategic planning within Sydney should be based upon the 10 subregions identified by the Metropolitan Strategy.

Outside of metropolitan Sydney, regions should be based on Regional Organisation of Council catchments.

To ensure that targets and priorities are met, strategic plans should be made statutory instruments. Such a move would help to change the emphasis from local planning outcomes to regional targets and priorities. This will also assist in better planning for future growth, managing our local environment and providing employment lands.

A10 How should levies for local and state community infrastructure be set?

As noted in our previous submission, the present contributions base is far too narrow. While developers do need to contribute a proportion of funding to new infrastructure, they should not be left to fund it all. The current system raises significant questions in relation to inter-generational equity. Developers will ultimately pass on infrastructure costs to final purchasers of a property, however the infrastructure that has been contributed to can be enjoyed by the entire community.

The NSWBC supports the rationalisation of local and state level contributions so that a broader base including state agencies, councils, developers and the wider community contribute to the provision of new infrastructure under a single contribution framework.

Further to this, the NSWBC strongly supports removing "upfront" developer contributions in favour of requiring contributions to be made at final settlement or at the completion of works. This would help to ensure that development can continue in a "tight" credit market.

A12 Who should decide regionally significant development and local development applications and A13 Should Joint Regional Planning Panels decide development applications? If so, which applications should the panels decide? Who should identify these and A14 Should councils be able to apply to be exempt from the Joint Regional Planning Panel process?

The consent authority for all regional development and for development applications in excess of $20 million should be a Joint Regional Planning Panel (JRPP).

Councils should remain the consent authority for all local development. However in circumstances where a council chooses to go against the recommendation of staff and reject a DA, reasons must be given and an appeal right provided to the applicant to have the DA reassessed by the JRPP.

[1] UDIA NSW *Building a Better New South Wales: Getting our Act Together* Submission to the NSW Planning Review 2011 p.2

In no circumstances should councils be able to exempt themselves from the JRPP process. The underlying premise of JRPPs is to have decisions made by a body with regional planning coverage. No council in NSW currently meets this criteria.

A 15 Should any changes be made to complying development and the process of approving it?

The NSWBC supports an expansion of matters that can be dealt with as complying development. Too often, minor works to aid business expansion are slowed down unnecessarily by the DA process.

A18 Should there be a right of review or appeal against a council decision concerning the zoning of a property and A20 If there is to be a right of appeal or review of a council zoning decision, who should decide that appeal or review?

The NSWBC strongly supports a right of appeal from the decision of a local council regarding the zoning of a property.

The introduction of the standard template LEP has created a number of zoning anomalies for businesses in regional areas. It's appropriate that a formal right of review be provided for the zoning of a property to be re-assessed. With the proposal outlined in the Issues Paper for strategic planning to form an integral part of the new planning system, there is a need for an appeals process so as to ensure that councils are implementing the targeted outcomes of the strategic plan.

JRPPs would be the appropriate body to review such disputes.

B1 What should be included in the objectives of new planning legislation and B2 Should ecologically sustainable development be the overarching objective of new planning legislation and B3 Should some objectives have greater weight than others?

As discussed elsewhere in this submission the statutory objectives set out under section 5 of the Act should frame the entire planning process and be realigned to reflect that the objectives of the Act should:

- Support economic growth;
- Promote sustainable development;
- Maintain an open, transparent and timely assessment process;
- Improve liveability; and
- Promote whole of community strategic planning.

It is the NSWBC's firm view that no single objective, such as ecologically sustainable development, should be given greater weight in this matrix. Land use planning is about balancing the competing objectives inherent in changing land uses and the objectives of the Act should reflect this fact.

B6 Are the current definitions in the Act still relevant or do they need updating?

The NSWBC does not see any overarching need to amend or update the current definitions in the Act. Similarly, the NSWBC does not support the definition of such a vague term as "public interest" being introduced into the Act.

B12 Should there be a statutory requirement to review legislation periodically?

It is the view of the NSWBC that periodic review of planning legislation should be avoided. Putting in place review timeframes would create uncertainty for both developers and the community. In addition, it could

also allow Governments to "put off" urgent legislative amendments until such time that a periodic review had been undertaken.

B14 Should the information available about land on a central portal be able to be legally relied upon, if there is the ability for it to be certified for accuracy? and B15 Would this be able to replace section 149 planning certificates?

The NSWBC strongly supports any change to current practice that leads to an improvement in the accessibility of land use information. Information provided in this manner should be free of charge and able to be legally relied upon. The NSWBC notes the work of the Victorian Government in its attempts to develop better information online via its eGovernment Resource Centre[2].

This information would replace the role of local councils in issuing s149 certificates. This would present a significant cost saving for businesses looking to develop and expand their operations in an area.

B16 What provisions should there be for independent decision making?

The NSWBC strongly supports independent decision makers' involvement in the planning process. In order to better facilitate independent decision making, it may be appropriate to introduce a "Model Code of Conduct" for decision makers under the Act.

The provisions of the Act would give recognition to the Code, with the code itself being made under delegated authority by the Director General. This would allow the code to be regularly reviewed and updated to ensure that it remains relevant.

B17 What should be the role of the Minister in a new planning system?

The Minister for Planning, or his delegate, should retain the current powers under the Act to determine development or infrastructure identified as state significant. This is an appropriate mechanism to help guarantee that major projects and infrastructure are determined expeditiously. A statutory timeframe for these determinations should however be introduced to ensure that projects are not "sat on".

C1 Should there be an independent State planning Commission to undertake strategic planning? Or should there be an independent Planning Advisory Board?

Regardless of whether it is constituted as a commission or board, an independent body should be established to undertake strategic planning at the state level.

It is noted that an appropriate legislative framework needs to be put in place so as to ensure that such a body can co-ordinate with other relevant agencies such as Infrastructure NSW and Transport NSW when exercising its plan making function.

C2 Should regional organisations of councils be recognised in new planning legislation?

While the NSWBC supports the sharing of resources by councils, including planning resources, it does not feel that Regional Organisations of Councils should be recognised under the new Act. As noted elsewhere in this submission, the NSWBC supports JRPP's being the consent authority for developments of regional significance. Accordingly, ROC's would not have a role to play in this consent framework.

[2] http://www.egov.vic.gov.au

C3 Should new legislation prescribe a process of community consultation?

Public consultation requirements should form part of the new planning legislation. Consultation should however be a "front end" process with consultation focused primarily on strategic priorities for the community with plans being developed from those priorities rather than plans being drafted in isolation and then consulted on.

C4 Should there be required consideration of the 'public interest' in the plan making process? And C5 Should there be a definition of what constitutes the 'public interest'?

As discussed elsewhere in this submission, the assessment function under the new Act should be undertaken in reference to the Act's statutory objectives. Adding an amorphous concept such as "public interest" would only serve to confuse the process.

C8 How can new planning legislation co-ordinate with council planning under the Local Government Act?

Councils' community strategic plan made under s 402 of *the Local Government Act 1993* should inform and also be informed by the new state and regional land use plans developed by an independent strategic planning body. Recognition of these plans should therefore be provided in the new Act.

Furthermore, councils' strategic planning consultations should form the basis of councils' local environmental plans. In developing plans, councils should work closely with local businesses and developers to ensure that zoning and development controls within local plans create commercially viable development opportunities. By doing so, plans will be more likely to grow in the way intended under the plan rather than force developers and businesses to seek amendments to plans or be forced out of developing in an area as it is simply not commercially viable to do so.

C11 Should there be a requirement for plans to address climate change?

This issue is already primarily addressed in planning policies such as the *NSW Coastal Planning Guideline: Adapting to Sea Level Rise*. Accordingly, the NSWBC does not support climate change being introduced as an additional requirement for land use plans.

C12 Should biodiversity and environmental studies be mandatory in the preparation of plans?

The NSWBC does not support biodiversity and environmental studies being made mandatory in the preparation of plans unless such studies can be legally relied upon and replace the need for separate environmental impact statements to be prepared for proposed development in an area.

C14 Should new planning legislation provide a statutory framework for strategic planning? C15 Should strategic plans be statutory instruments that have legal status? C17 To which geographical regions should strategic plans apply – catchments or local government areas?

As indicated elsewhere in this submission, under the new Act strategic plans should be made statutory instruments. Accordingly a framework on the way in which plans are made should also be developed.

The NSWBC views the appropriate regions for strategic planning within Sydney should be based upon the 10 subregions identified by the metropolitan Strategy.

Outside of metro Sydney, regions should be based on Regional Organisation of Council boundaries**.**

C18 Should there be State environmental planning policies? If so, should they be in a single document? Or should they be provisions in a local environmental plan? Should there be statutory public participation requirements when making SEPPs? C20 Should a SEPP be subject to a disallowance by Parliament?

State Environmental Planning Policies (SEPPs) have been a good feature of the present system however the volume of policies at this level has made them difficult to negotiate. The recent rationalisation of SEPPs (to around 50) has been a step in the right direction but to ensure the process of review continues, perpetual monitoring should be embedded in the Act to ensure there is an ongoing process of reviewing SEPPs and that problems are identified and dealt with quickly.

SEPPs should remain separate from LEPs and should not require the same level of public participation requirements. They should be used as strategic planning instruments to ensure that what has been proposed in state level strategic plans are implemented at the local level.

In the interests of planning certainty, SEPPs should not be subject to a disallowance by the Parliament.

C21 Should there be a review process to deal with issues arising between the Department and councils that relate to the preparation of local environmental plans? And C22 Should there be a legislative provision to establish this?

NSWBC members have reported experiencing a number of problems in terms of the implementation of the standard LEP template. Primarily, these problems have related to planning anomalies (particularly around existing uses). In light of these issues as well as the need to review LEP's continually to ensure that they are consistent with strategic priorities, a review power by the Department or JRPP should be established under the new Act.

C23 How should rezonings (planning proposals) be initiated? And C24 How can amendments to plans be processed more quickly?

Rezonings should be able to be initiated by individual property owners and referenced to the objectives and priorities established under the strategic planning framework for a given area. Such amendments could be processed more quickly if power to approve rezoning was delegated to JRPP's or an IHAP.

C25 Should there be a right of appeal or review for decisions about planning proposals?

There should be a reasonable right for landowners to seek a review of a planning proposal if they feel that a rezoning negatively impacts on their property. However this right should not be granted to third parties. Joint Regional Planning Panels could play a key role in undertaking such reviews.

C34 How should new planning legislation facilitate cooperative cross border planning between councils?

Regional strategic plans should be the facilitation mechanism for councils undertaking cross border planning. The process of developing a LEP will by necessity be driven by the priorities and targets set out under the strategic plan. The review of council LEP's should be undertaken in light of how well they achieve the objectives set out under regional and state strategic plans. If they fail to effectively achieve these objectives, a JRRP could step in to work with councils to overcome issues.

D6 Should there be a public process for evaluating complying development?

There should not be a public process for evaluating complying development. Complying development is appropriate for many minor types of work necessary for continuing business operations. Subjecting this work to a public evaluation process would place an unnecessary cost on small to medium business enterprises undertaking basic works on their workplace.

D7 Should there be an absolute right to develop land for a purpose permitted in the zone subject only to the form proposed? And D8 Should there be an automatic approval of a proposal if all development standards and controls are satisfied?

It is the NSWBC's firm view that zoning should be a facilitative process which promotes permissible land uses in a particular area. While it is accepted that there are circumstances where permissible development within a zone should not be approved, this should be the exception rather than the rule.

The process of zoning and the assessment of applications against zones should be as open and transparent as possible. Accordingly, the NSWBC strongly supports the introduction of a process for applicants to have a declined council rezoning application reassessed by a higher tier body such as a JRPP or PAC. There should however be no ability for third parties to seek such a review.

The NSWBC also agrees with the Productivity Commission's view that zones should be drafted broadly so as to reduce the necessity of coupling development applications with applications to rezone[3]. Broad zones can also help to foster competition by removing the overly prescriptive nature of many LEPs which often means restricting certain businesses from operating in an area.

It follows, from the position stated above, that there should be an automatic approval process for proposals that satisfy all development standards and controls.

D10 Should a new planning system reinstate the ability to convert one nonconforming use to another, different nonconforming use? And D11 Should existing nonconforming uses be permitted to intensify on the site where they are being conducted (subject to a merit assessment)?

The NSWBC supports the new planning legislation including a more flexible approach to the issue of nonconforming uses. Such flexibility can assist well established, local businesses maintain operations in an area.

D17 Should it be possible to apply for approval for development that is prohibited in a zone?

NSWBC members have reported a number of planning anomalies arising from the implementation of the state-wide LEP. In light of these problems and the difficulties inherent in introducing a "one size fits all" LEP, a mechanism that allows landholders to apply for development that is prohibited in a zone should be introduced.

D18 Should there be a single application to the council to obtain permission to use an unauthorised structure? And D19 Where a small scale proposal requires an environmental impact statement, should it be possible to seek a waiver?

The NSWBC supports any reasonable steps that lead to a more efficient planning application and assessment process for NSW businesses. A single application process to seek approval to use an unauthorised structure would help simplify this process. Allowing EIS requirements to be waived on small scale proposals would also assist in reducing the time and cost of development for many small to medium businesses.

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[3] *"the wider the definition of allowable uses encompassed in a given zone, the less likely it is that land with that zoning will require rezoning in order to be put to a different use"* ibid p.131

D23 How can the application process be simplified?

The DA process could be simplified significantly by standardising application forms across all councils and also increasing the ability to submit forms online.

D27 Should deemed approvals take the place of deemed refusals for development applications?

The 2010 *NSW Business Chamber's Red Tape Survey* found that NSW councils and the NSW Department of Planning are two of the highest ranked organisations in terms of level of red tape for business[4]. Anecdotally, NSWBC members have identified that the cost and time taken in the development process are the key reasons for why these organisations rank so highly.

To combat these issues, new provisions need to be incorporated into the Act to help streamline the development application process. These provisions should include strictly applied timeframes (with the deemed approval of development if the application is not dealt within these limits). A deemed approval process, will give consent authorities incentive to deal with matters in a swift and efficient manner (as a failure to do so will mean that the development is approved without the authority's input).

The NSWBC supports the deemed approval timeframes put forward by the Urban Taskforce in its submission being:

- 10 days for complying development;
- 20 days for development not requiring exhibition;
- 40 days for small scale development;
- 60 days for medium scale development; and
- 90 days for development equivalent to designated development.[5]

D31 How should State significant proposals be assessed? D32 Should the Crown undertake self-assessment? D33 Should the Crown undertake self-determination? D34 Should councils undertake self-assessment?D35 Should councils undertake self-determination?

The ability of the Crown to undertake self-assessment and determination should be retained in the new planning act. With the Government's *NSW 2021* Plan setting ambitious infrastructure targets, the process by which these projects are approved should be as streamlined as possible.

D39 Should the economic viability of a development proposal be taken into account in deciding whether the proposal should be approved or in the conditions of consent for approval?

It is the NSWBC's strong view that any determination of the economic viability of a project should be left to the proponent of that development only. Economic viability should not be assessed in any way by the consent authority.

D40 Sometimes there are changes that would rectify problems with a proposal and thus permit its approval. Should it be mandatory during an assessment process for the consent authority to advise of this?

NSWBC members have expressed frustration with the lack of constructive advice provided by councils during the development application and approval process. Any changes to the legislation that helps to improve the facilitation of development by consent authorities would be welcomed by the NSWBC.

[4] NSW Business Chamber Red Tape Survey December 2010

[5] Urban Taskforce *Making it Work* Initial Submission by the Urban Taskforce to the preliminary stage of the Planning Review August 2011 p.135

D41 Should a new planning system permit adverse impacts on the value of properties in the vicinity of a proposed development to be taken into account when considering whether a development should be approved?

As noted in the issues paper, there is a long settled legal position that the concept of blight should not be taken into account when assessing a proposed development. This should be reflected in the revised Act.

D56 What are appropriate performance standards by which council efficiency can be measured in relation to development assessment? And D57 Should there be random performance audits of council development assessment?

The Department of Planning needs to consistently monitor councils to ensure they are meeting assessment targets. This should include both regular reporting to the Department on the progress of applications as well as the introduction of performance audits. Councils who consistently fail to meet these targets should have their assessment powers referred to the relevant JRPP who would undertake to assess all local development for that area.

D62 Who should make decisions about State significant proposals?

As discussed elsewhere, the Minister or his delegate should be responsible for making decisions related to State Significant development.

D70 Should a new planning system include Joint Regional Planning Panels?

Joint Regional Planning Panels have been a welcome feature of the current planning system and their role and authority should be expanded in a revised Planning Act.

Councils should be able to refer any or all matters before it to the JRPP. However, there should be no matters, referrable from the JRPP to the council.

D78 Should a council should be able to apply to the Minister to be exempt from a JRPP?

In the interests of consistency, no council should be able to apply for an exemption from a JRPP or its involvement in the JRPP process. JRPPs can play a significant role in delivering regional objectives divorced from the parochial local issues that often limit councils' regional decision making.

D82 Should elected councillors make any decisions about any development proposals?

There have been numerous examples of council corruption in undertaking planning assessment. In the interests of reducing corruption risks and conflicts of interests, it may be appropriate to refer all development decisions away from councillors and towards independent panels. Councillors would still however have a role to play in terms of policy development.

D89 Should it be possible to grant a long-term time-limited development consent for developments that are potentially subject to inundation by sea level rise caused by climate change?

NSWBC coastal members have expressed frustration with the inability of local councils to deal sensibly with the issue of sea level rise. Taking positive steps to ensure that development can be facilitated within a changing environment should be an important outcome from this review of the Planning act. The proposal to allow councils to grant long-term time limited development consent may be one approach to assist councils in dealing with these issues in a more practical way.

D91 Should new planning legislation make it possible to impose performance bonds or sureties unrelated to the protection of public assets?

The NSWBC is strongly opposed to the imposition of performance bonds on developers. Such a requirement would act as an as unnecessary brake on development and impact significantly on the ability of the Government to meet its new housing targets.

D98 Is it reasonable to require IPART to undertake a detailed analysis of each contributions plan developed by councils? And D101 Should there be a requirement for councils to publish a concise, simply written, separate document on community infrastructure funds collected and their proportionate contribution to individual elements in the council's contributions plan?

NSWBC members have reported that the s.94 contributions levied by councils provide a significant disincentive for the expansion of local business.

One NSWBC member, who is seeking to expand his business, has cited the current car-parking contribution levied by Manly Council as being a clear example where s.94 contributions are stymying local growth. Currently, council is levying a car parking contribution of $32,931.50 per parking space. With council requiring a contribution of more than one space for this particular development, our member has, understandably, decided not to expand his business at this stage. Clearly the quantum of this levy acts as an economic disincentive for the growth of small business in the Manly area and has flow on impacts on local employment and investment.

While there is a role for the IPART in reviewing residential s.94 contributions plans in greenfield development areas, no such mechanism exists more generally for contributions in other contribution areas. The NSWBC would strongly support a provision placed in the new Act which would allow a development proponent the ability to appeal to the IPART for a review of a contribution sought by a local council. If the contribution plan were found to be unreasonable, the IPART could then step in and require the plan to be amended.

In the interests of transparency, councils should be required to clearly detail in a standard template document, the amount of community infrastructure contributions that they hold. This information should be reported on at least quarterly and reflect exactly what works contributions are proposed to fund.

D114 Should the 'substantially commenced' test for ensuring the ongoing validity of development consent be retained? And D116. How long should development consents last before they lapse?

The substantially commenced test is an appropriate mechanism to ensure the validity of development consent and should not be amended as a result of this review.

In light of current economic circumstances, consideration should be given to allowing a longer period prior to the lapsing of a development consent.

D133 What fees should councils receive for development applications?

With the fees councils charge varying markedly, a schedule of fees should be introduced into the Act to reflect that councils may only charge fees on a cost recovery basis. Council's fees should be able to be reviewed by the IPART.

E3 In what circumstances should third party merit appeals be available?

As discussed elsewhere in this submission, third party merit appeals should be removed from the Act.

E18 Should a consent authority have a wider right to revoke a development consent?

The current revocation rights are appropriate and should not be expanded in any way.

F1 What should be the role of the Department in implementing a new planning system? Should the role and resourcing of regional offices be embraced? And, if so, in what respects?

The Department of Planning should undertake a more facilitative role in the development process. Working with councils and developers to help move matters through to resolution. To this end, the NSWBC would support a greater emphasis on engaging with planning issues outside of metropolitan Sydney. Such engagement would include improved resourcing of regional planning offices.

F2 What should be the role of councils in implementing a new planning system?

Councils should continue in their role of undertaking local planning and assessment. However, it should be noted that the number and range of matters merit assessed by councils would reduce due to the increase in complying and code assessable development as discussed elsewhere in this submission.

F5 What changes can be put in place to ensure more effective cooperation between councils, government agencies, the community and developers within the planning system?

During the recently convened Ministerial Planning Day a number of attendees raised state agency concurrence delaying the assessment process. To overcome these issues NSWBC suggests that a deemed concurrence process (similar to that described above in relation to deemed approvals) be introduced so as to ensure these matters are dealt with in a reasonable timeframe. The RMS was identified as a key agency of concern in relation to this issue.

F7 How can information technology support the establishment of a new planning system?

While the NSWBC supports, wherever possible, the provision of more information online, this information needs to be presented in a standardised way so as to be useful to businesses and the community. A single, standardised application process would be strongly welcomed by NSWBC members as well as a standardised reporting by councils of their development fees and charges so that prospective areas for development can quickly and easily assessed against one another.

Please contact Luke Aitken of the NSW Business Chamber's Policy unit via email at luke.aitken@nswbc.com.au or on phone 9458 7582 should you have any queries about this submission.

Yours sincerely

Paul Orton
Director, Policy & Advocacy