

## **Improving our planning system**

**Submission to the NSW Government's Draft  
*Environmental Planning and Assessment Bill  
2017***

**March 2017**

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## Executive summary

The Property Council of Australia welcomes the opportunity to comment on the draft *Environmental Planning and Assessment Bill 2017* (the Bill) released in January 2017.

We note that the aim of the Bill is to build greater confidence in the planning system by:

- enhancing community participation;
- strengthening upfront strategic planning; and,
- delivering greater probity and integrity in decision making.

It is also intended to make the system simpler and faster for all participants, removing unnecessary complexity, and ensure that growth across NSW is carefully planned.

The NSW Government's work to improve the planning system is most welcome, and we have identified measures to build upon and improve the Bill to deliver the Government's objectives.

Improving the planning system requires actions in addition to those outlined in the current reform process. An ambitious reform agenda is needed to balance improved upfront community consultation with greater certainty in decision making during the assessment process.

Currently the Bill:

- emphasises front-loading community engagement and robust strategic planning; and,
- creates a more orderly and integrated hierarchy of strategies and plans.

However, this is not balanced with reforms to:

- create clearer rules and the primacy placed on depoliticised development assessment; and,
- recognise the need to overhaul culture across the system.

Given the planning system is one of the few substantial micro-economic levers available to a state government we urge the Government to build upon the Bill to create greater efficiency and effectiveness in the planning system.

Successfully implementing a package of reforms to the NSW planning system will also require that the Department of Planning, the Greater Sydney Commission and other key players within the system, such as Sydney Planning Panels, have adequate resources to undertake the roles assigned to them.

The Property Council also encourages the NSW Government to ensure this round of legislative reform is used to facilitate and implement initiatives to address the housing affordability crisis in NSW.

## About the Property Council of Australia

The Property Council of Australia is the nation's peak representative for the property and construction industry.

Our 2,000 member firms and 55,000 active individuals span the entire property and construction industry, which includes all:

- **Dimensions of property activity** – financing, funds management, development, ownership, asset management, transaction and leasing.
- **Major property types** – offices, shopping centres, residential development, industrial, tourism, leisure, aged care, retirement and infrastructure.
- All **major regions of Australia** and international markets.
- The **four quadrants of investment** – public, private, equity and debt.

### A pillar of NSW

The property and construction industry underpins the health and prosperity of the NSW economy. The sector:

- **Contributes \$54.5 billion to Gross State Product.** This is 11.1 per cent of the State's total wealth.
- **Generates over 311,000 jobs** – one in ten workers.
- **Provides \$20.3B in wages** to workers and families.
- **Pays \$17 billion in State taxes, Local Government rates, fees and charges** – the state's single largest tax payer
- **Pays over one-third of all state taxes** – 37 per cent of state revenue is sourced from property taxes as an annual average since FY2001.

## Reforms to turbo charge the planning system

In addition to our comments on proposed legislative changes, the Property Council believes that seismic change is needed to enable the planning system to cope with the volume of activity foreshadowed in the Greater Sydney Commission's draft plans.

The planning system can, and must, be made more efficient. We urge the NSW Government to revisit reforms to increase the use of code assessment to unlock efficiencies in the system.

### A strategic future and clear line of sight

The NSW Government has tasked the Greater Sydney Commission (GSC), to lead, develop and implement District Plans across the greater metropolitan area and to integrate them with local environmental plans and *A Plan for Growing Sydney*.

The Property Council supports the role and activities of the GSC and will provide detailed feedback on the six draft District Plans. It is imperative that the District Plans and *A Plan for Growing Sydney* are finalised by the end of 2017, thereafter the GSC's focus should shift to implementing the strategy.

### Greater Sydney Commission Act 2015

The *Greater Sydney Commission Act 2015* inserts a new Part 3B into the *Environmental Planning and Assessment Act* (the Act), establishing a hierarchy of strategic plans for NSW as follows:

- **Regional plans** will set the basis for strategic planning for a region. The Act declares *A Plan for Growing Sydney* to be the first regional plan for the Greater Sydney Region. Future regional plans will be prepared by the GSC and adopted by the Minister.
- **District plans** will set the basis for strategic planning within a district and will contain planning priorities consistent with the objectives, strategies and actions in the regional plan, and actions for achieving those priorities.
- **Local environmental plans** will continue to play the same role; however, councils will be required to review and prepare planning proposals to update their LEPs as soon as practicable after a relevant district plan is adopted, to give effect to the district plan. The GSC replaces the Minister as the authority empowered power to make LEPs for the Greater Sydney Region, although the Minister retains the ability to give section 117 directions and thereby influence the content of LEPs.

Consent authorities will not be required to take regional and district plans into account when assessing development proposals, as was proposed with respect to state and regionally significant development in earlier versions of the failed Planning Bill 2013. Accordingly, the effectiveness of regional and district plans will depend on how well their objectives are incorporated into LEPs.

## Reforming the planning system

Without a robust and efficient planning system, strategic plans are pointless. It is through the planning system, the rules and processes enshrined in law, that the theory mapped out in strategic plans either becomes a practical reality or remains an elusive vision.

The Act establishes the rules and processes of the NSW planning system. It is imperative that this legislation establishes a system capable of enabling the objectives of the strategic plans. Robust and inclusive of community input, the assessment system needs to be balanced with efficient and effective decision making.

The scale of activity and change which the planning system will need to process in NSW cannot be overlooked. The GSC estimates that at a minimum an additional 725,000 new dwellings will be needed by 2036 to house Sydney's future population; that equates to building approximately 36,000 new dwellings each year for the next 20 years. This target can simply not be achieved through the current planning system, which at best has delivered 35,000 dwellings in Sydney for the year ending January 2017 (a forty-year record, of which 5,000 are likely to be knockdown and rebuilds).

## Code based assessment

Creating a planning system that is capable of processing the volume of development applications required will require an increased use of code based assessment. Code assessable development provides for a fast-track assessment pathway for developments that comply with controls previously agreed to by the community.

The Property Council urges the Government to complete its reform of the NSW planning system by supplementing proposed legislative changes outlined in the Bill with additional reforms to facilitate the use of code based assessment for more developments, including high-rise and mixed use.

The advantages of code based assessment are:

- It depoliticises the development approvals process so that projects are judged exclusively on their merits; and
- Reduces development costs; according to research conducted by Deloitte in 2012 for the NSW Government, code assessment at that time would have been able to reduce the cost of building a single dwelling development by at least \$7000. Five years on, this figure would be higher.

Code assessment already applies in other states and territories and works well. It offers an additional development assessment pathway that injects improved certainty and consistency in decision making and is much better equipped to deliver more housing, more quickly.

The Government is already working on finalising a medium density housing code to facilitate the faster delivery of terrace style housing; the 'missing middle'. Broadening the application to include high-rise and mixed use developments is necessary to create a planning system which is able to process the volume of development applications.

The Property Council submits detailed work it undertook exploring the opportunities to introduce code based assessment in NSW for the Government's consideration. Originally authored in 2012 and then updated in 2015 by JBA on behalf of the Property Council, we

would welcome an opportunity to work with the Government to revise and update this work further and explore how a package of reforms embracing more code based assessment could be implemented.

**Attachments:**

- 'Supercharging' the Complying Development System in NSW, prepared by JBA Planning on behalf of the Property Council of Australia (NSW Division), September 2012
- Code Assessment Myth Busting, Property Council of Australia, July 2014
- Complying Development Report Card, prepared by JBA Planning on behalf of the Property Council of Australia (NSW Division), September 2015

## Recommendations

### Recognise the economic importance of planning

1. Insert an objective recognising the economic importance of the NSW planning system into the Bill, “to promote the growth of the State’s economy and increased productivity”.

### Community participation

#### *Community participation plans*

2. Remove the ability for a planning authority to impose mandatory requirements in a community participation plan other than those which are included in Schedule 1 of the Act.
3. Exclude small scale developments, which have minimal environmental impact (including development applications and section 96 modification applications) from community participation plans. Public exhibition of these minor applications should not be mandatory.
4. Community participation plans should specify minimum and maximum exhibition periods for the joint development assessment process and planning proposal process under Sections 72I, 72J and 72K of the Act.
5. Planning Agreements are required to be exhibited under the Regulations for a minimum of 28 days, this should be incorporated under Schedule 1 and addressed in participation community plans.
6. Clarity is required regarding what types of amendments to a development application or environmental planning instruments require re-exhibition so as to avoid legal challenge.
7. Bill should include provisions as to whether amended applications which the Court permits an applicant to rely on in an appeal also must comply with community participation plans.

#### *Community participation principles*

8. Impose maximum exhibition periods in addition to any minimum exhibition periods.

#### *Statement of reasons for decisions*

9. Restrict the ability for objectors and members of the public (who have already had an opportunity to make submissions during the community consultation process) to commence legal proceedings under section 123 of the Act.
10. Clarity is required in the Bill or Regulations as to what is to be included in a statement of reasons, particularly the level of detail required for the notification of the decision (will all community views be required to be addressed in the notice or is it that the exhibition and community consultation process followed is to be notified?)



*Stronger consultation requirements for major projects*

**11. Amend the Regulation clarifying the purpose, scope and scale of pre-lodgement notification be circulated for stakeholder feedback prior to being finalised.**

### **Strategic planning and better outcomes**

*Local strategic planning statements*

**12. Amend the Bill to provide that:**

- a local strategic planning statement is an explanatory note only and does not have any weight in the assessment of a development application or planning proposal; and
- include the ability for the Minister or the Secretary to direct that a local strategic planning statement be reviewed prior to the 5-year timeframe specified.

This change would also need to be incorporated into section 73 of the Act – review of environmental planning instruments. A requirement for more regular reviews in growth areas is likely to resolve the increasing reliance on spot rezonings.

**13. Appeals to the Land and Environment Court should be allowed for refusals of proposed rezoning applications.**

*Regular local environment plan (LEP) checks*

**14. Local Environmental Plans which are not updated within five years should be suspended and development applications in affected areas considered against relevant District and Regional Plans.**

*Standard development control plan (DCP) format*

**15. Implementation of standard DCPs is welcomed, but reforms should be implemented which remove matters in DCPs which are already included or are inconsistent with matters in a higher order planning control.**

### **Probity and accountability in decisions**

*Discontinuing Part 3A arrangements*

**16. Section 75W should be retained, or at a minimum replaced by a new provision section 96(2A) that:**

- applies to State Significant Development and retains the “consistent with the existing approval” test contained in section 75W(1) of the Act; and,
- provides for a Concept Plan to override LEP provisions.

*Directions for local planning panels*

**17. Retain the appointment of three experts as members of local planning panels.**

**18. Make Local Planning Panels mandatory.**

*Ensuring delegation to council staff*

**19. Delegation to professional staff to assess development applications is supported, with elected councillors focused on setting the direction for planning instruments.**

*Refreshed thresholds for regional development*

**20. Retain the regionally significant threshold at \$20 million.**

*Independent Planning Commission*

**21. Require the Independent Planning Commission to specify when a meeting constitutes a “public hearing” and for this to be noted in the minutes.**

**22. Include provisions that allow for a proponent to have a right of reply to any submissions or evidence given during a public hearing.**

**23. The test for non-disclosure and non-publication of materials as part of a public hearing should have regard to a proponent’s request to maintain confidentiality and the nature of the confidential information.**

*Enforceable undertakings*

**24. Local Planning panels should be mandatory for “all other development”.**

**Simpler, faster planning**

*Efficient approvals and advice from NSW agencies*

**25. Step-in rights for the Planning Secretary for integrated development is supported (as proposed), and step-in rights for the Planning Secretary for concurrence rights should be incorporated in the Bill.**

**26. There be a central checklist maintained by the Department, which is updated so as to identify all of the concurrence approval triggers in NSW.**

*Concurrence and notification in infrastructure corridors*

**27. Rights of review should also be able to be requested by a proponent, and not just the planning authority.**

**28. Amend the new Section 8.14(3) of Division 8.3 of Schedule 8 to make it clear that where a concurrence has been refused the Court may still determine the appeal.**

*Preventing the misuse of modifications*

**29. Remove the provisions which limit the ability for modifications to be approved for a non-compliant part of the development.**

**30. Clear direction needs to be given to planning authorities that they cannot include pre-determinations on future modification applications in a statement of reasons for an original consent.**

*Improved complying development pathway*

- 31. No changes be made to the Complying Development Code process should occur until the impacts of the proposed amendments have been carefully considered in consultation with all stakeholders.**

*Transferrable conditions*

- 32. This change is supported.**

*Clearer powers to update conditions on monitoring and environmental audit*

- 33. Provide a public declaration of the statement of reasons for these to be modified so that all stakeholders are clear about ho decisions are made.**

*Simplified and consolidated building provisions*

*Construction certificate*

- 34. Retain the “not inconsistent” language.**
- 35. Reduce the timeframe to challenge the validity of a construction certificate to 28 days instead of three months.**
- 36. Limit the ability for challenge to only a Council rather than “any person”.**

*Building work and certificates relating to building*

- 37. Reduce the timeframe to challenge the validity of a construction certificate to 28 days instead of three months.**
- 38. Limit the ability for challenge to only a council rather than “any person”.**

*Occupation certificates*

- 39. Retain existing arrangements for interim and final occupation certificates.**

*Subdivision work and certificates relating to subdivision*

- 40. Ensure that the established and understood principle of “physical commencement” as it exists under the existing provision of the Act are not made more onerous.**

*Compliance certificate*

- 41. Remove the ability for councils to issue stop work orders for seven days.**
- 42. Remove the ability for the Regulations to restrict the types of development included in the complying development codes.**

*Liability for defective building or subdivision work*

- 43. No comment is provided.**

*Building information certificates*

**44. No comment is provided.**

*Miscellaneous*

**45. Provision of a building manual is supported.**

*Other*

**46. Not supported.**

*Special infrastructure contributions*

**47. Not supported.**

*Reviews*

**48. Reviews of a determination should be undertaken by a higher authority to fully utilise the system and avoid costly court appeals, similar to the review rights for planning proposals.**

**Additional legal and regulatory changes**

*Merit appeal rights*

**49. Provide merit appeal rights to the Land and Environment Court for rezoning and LEP amendment determinations made by Planning Panels for proposals that are rejected or not approved within a prescribed timeframe.**

*State Significant Development*

**50. Make large scale residential development State Significant Development in western and south western Sydney local government areas to significantly reduce red tape in greenfield areas.**

*Planning Proposals*

**51. Mandate a one month approval timeframe, instead of the current Gateway process, for planning proposals in zone transition zones in growth centres and extend the zone transition to 200 metres rather than the current 100 metres.**

**52. Review the planning proposal and development application process to clarify and trim excessive information requirements and enshrine and encourage the ability to lodge concurrent applications.**

**53. Clarify the ability to lodge planning proposals within approved corridor strategies (potentially via a s117 ministerial direction) and provide a fast track process, with published timeframes, for when they are within the controls.**

*Rezoning Reviews*

**54. Amend the rezoning review guidelines issued in 2016 so independent Planning Panels have discretion to recommend or modify a proposal rather than just accept or reject it to avoid the process needing to start again when a proposal is rejected.**

*Voluntary Planning Agreements*

- 55. Ensure Voluntary Planning Agreement (VPA) reform is directed towards increasing flexibility and transparency and does not inadvertently entrench the worst aspects of the current system that legitimise poor council practice and increase the hidden costs of delivering housing.**

*Concurrences and integrated approval*

- 56. Reform state government concurrences and integrated approval arrangements via a State Environmental Planning Policy (SEPP) so a concurrence or integrated approval can be waived outright or waived if a development proponent commits to complying with pre-determined standards or requirements.**

*SEPP Reforms*

- 57. Remove exemptions from the current SEPP 65, or 'workarounds' to ensure appropriate densities are being achieved, especially in locations benefiting from major state government infrastructure spends.**
- 58. Deregulate minimum apartment sizes currently allowed under SEPP 65 to bring Sydney into line with other global cities like New York, so singles and first home buyers have greater choice at lower price points.**

*Other*

- 59. Change current lot mix controls that mandate 60 per cent are required to have lot frontages of greater than 11 metres and none are able to have less than 10 metres frontage in low density residential land. Implement instead maximum density, with a minimum number of larger lots, and extend code assessment to this type of development.**
- 60. Amend the current NSW housing code to override council LEPs that restrict subdivision by use of a minimum lot size map to facilitate complying dwellings down to 250 sqm with scope for further reduction over time.**
- 61. Take other meaningful steps to allow greater development in the areas identified in A Plan for Growing Sydney via the creation of a strategic compatibility certificate application process to the new Housing Delivery Unit, with a merit appeal right to the Land and Environment Court.**

## Recognise the economic importance of planning

### Objectives of the Environmental Planning & Assessment Act

A new set of objectives are outlined in the Bill, effectively providing a “mission statement” for the Act. Objectives are important because they are often used by proponents, public authorities and objectors to justify their position on development proposals.

The Bill omits existing objectives that:

- encourage “the proper management, development and conservation of natural and artificial resources”; and
- promote the “orderly and economic use and development of land”.

Instead the new objectives say the Act is about:

- the promotion of “the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources”;
- the promotion of “good design in the built environment”; and
- the “timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing)”.

The new objectives are almost directly lifted from the O’Farrell Government’s 2013 planning reforms (which were blocked in the parliament). However, in the previous proposal the first intended objective was “to promote the growth of the State’s economy and increased productivity”. This particular objective does not appear in the new Bill.

The Property Council supports the proposed objectives, but proposes that an objective recognising the importance of the Act and the role of the planning process to support the NSW economy should be included. This is critical to ensuring that sufficient weight is placed on the economic importance of development in the assessment of the merits of development applications.

### Recommendation

**Insert an objective recognising the economic importance of the NSW planning system into the Bill, e.g. “to promote the growth of the State’s economy and increased productivity”.**

## Community participation

The Bill proposes greater upfront community engagement to improve transparency and community understanding of individual projects as well as the broader strategic planning / growth objective.

We support endeavours to clarify and enhance opportunities for greater engagement in strategic planning, but it is crucial the rules around participation respect the need for market-sensitive strategies to emerge and for capital to be treated efficiently and fairly in such processes.

### Community participation plans - Schedule 2.1[1], clause 2.23910

Division 2.6 of the Bill introduces new community participation provisions requiring planning authorities to prepare community participation plans that:

- consider a set of community participation principles;
- include mandatory or discretionary requirements; and,
- can only be challenged within three months of being published.

Where councils have a community participation plan within their strategic plan, they do not need to prepare a separate community participation plan. The community participation plan prepared by the Secretary of the Department of Planning and Environment applies to the Minister and can be adopted by other public authorities. Planning authorities must report on the implementation of their community participation in accordance with the regulations.

Community participation plans will be able to set out mandatory requirements (for community participation) before development decisions are made by local councils, planning panels and other planning authorities. Of concern, is that, the introduction of new mandatory elements under the community participation plans could pave the way for increased legal challenge, with planning authorities (councils) given unlimited power to incorporate additional and unrestricted mandatory requirements into a community participation plan.

Section 123 of the Act provides for any person to commence a legal challenge for a breach of the Act. The Bill effectively provides for legal challenge for a breach of a mandatory requirement of a community participation plan. This expansion of grounds for a third-party challenge will result in:

- uncertainties for developers and planning authorities; and,
- increased costs and delays to development that would otherwise be acceptable on its merits.

To remedy this, the Property Council proposes that a planning authority should not have the power to impose mandatory requirements in a community participation plan other than those which are included in Schedule 1 of the Act and the Regulations. Failing this, the Minister should approve the community participation plans to ensure the drafting is clear and consistent, including meeting the requirements of the Act and any guidance notes.

At the very least, the ability of a third-party to challenge a determination made by a planning authority should be limited and not expanded. Furthermore, the time within which a community participation plan can be legally challenged should be reduced from the proposed three months to 28 days to avoid uncertainty for project proponents. The Bill should also provide that any declaration of invalidity of a community participation plan does not result in the invalidity of development consents or require re-exhibition of development applications already exhibited.

In addition, small scale development applications that are presently not publicly exhibited (e.g. office and shop fit-outs, internal renovations of heritage buildings, minor changes of use, retaining wall erections in large properties) would now be required to be publicly exhibited for 14 days, adding a new level of process and unnecessarily delaying activity. Small scale development which has minimal environmental impact (including development applications and section 96 modification applications) should be excluded from community participation plans and public exhibition requirements should be discretionary based on the scale and potential environmental impacts.

### **Recommendations**

**Remove the ability for a planning authority to impose mandatory requirements in a community participation plan other than those which are included in Schedule 1 of the Act.**

**Exclude small scale developments, which have minimal environmental impact (including development applications and section 96 modification applications) from community participation plans. Public exhibition of these minor applications should not be mandatory.**

**Community participation plans should specify minimum and maximum exhibition periods for the joint development assessment process and planning proposal process under Sections 72I, 72J and 72K of the Act.**

**Planning Agreements are required to be exhibited under the Regulations for a minimum of 28 days, this should be incorporated under Schedule 1 and addressed in participation community plans.**

**Clarity is required regarding what types of amendments to a development application or environmental planning instruments require re-exhibition so as to avoid legal challenge.**

**Bill should include provisions as to whether amended applications which the Court permits an applicant to rely on in an appeal also must comply with community participation plans.**

### **Community participation principles - Schedule 2.1[1], clause 2.23(2)**

A new proposed Schedule sets out the minimum exhibition periods for:

- Draft community participation plans;
- Draft regional or district strategic plans;
- Planning proposals for local environmental plans (other than minor proposals);



- Draft Development Control Plans (DCP);
- Draft contribution plans;
- Development applications;
- Applications for modification of consents;
- Re-exhibition of any amended application; and
- Environmental Impact Statements, including those for State significant infrastructure.

Any of the above plans, applications or other matters cannot be determined until the minimum exhibition period expires (or any longer period mandated under a community participation plan).

Any submission can be lodged during the minimum exhibition period (or any longer period mandated under a community participation plan). The period between 20 December and 10 January (inclusive) is excluded from the calculation of a period of public exhibition.

The Property Council believes that minimum exhibition periods for development applications, applications for modifications or consents, re-exhibition of any amended application and Environmental Impact Statements (including those for State significant infrastructure) should be discretionary based on potential environmental impacts. Furthermore, maximum exhibition periods should be imposed, and the period excluded from the calculation of a period of exhibition should be from 10 December to 26 January (acknowledging the absence of people and closure of business over the January Christmas period).

### **Recommendation**

**Impose maximum exhibition periods in addition to any minimum exhibition periods.**

### **Statement of reasons for decisions – Schedule 2.1[2], clause 19(2)(c)**

The Bill proposes to introduce a requirement for mandatory notification and a statement of reasons for a decision to be provided for certain determinations made by a planning authority. Relevant affected determinations include:

- the determination by the Minister (or the Independent Planning Commission) of an application for State significant infrastructure;
- the determination by the Minister (or the Independent Planning Commission) of a request for a modification of an approval for State significant infrastructure (being a request that was publicly exhibited);
- the determination by a consent authority of an application for development consent;
- the determination by a consent authority of an application for the modification of a development consent (being an application that was publicly exhibited); and

- the granting of an approval, or the decision to carry out development, by a determining authority where an environmental impact statement was publicly exhibited under Division 5.1.

The mandatory public notification requirement will require notification of:

- the decision;
- the date of the decision;
- the reasons for the decision (having regard to any statutory requirements applying to the decision); and
- how community views were taken into account in making the decision.

A requirement that there be a statutory “statement of reasons” for every decision introduces a new level of formality and potentially paves the way for all development consents and modification applications to become subject to legal challenge by way of judicial review. If a written statement of reasons does not identify a “mandatory relevant consideration” it faces possible legal challenge against the validity of a development consent. Similarly, a development consent could be challenged if the formal written reasons include a legally irrelevant consideration.

As currently drafted, the requirement for compliance with mandatory requirements (including those imposed by a planning authority at will) expands the grounds for a legal challenge to a determination made by a planning authority in relation to a development consent. An increase in mandatory requirements creates the chance of an error being made, by a planning authority, and a successful challenge to a determination. This reduces certainty for developers and could potentially impact on housing affordability and supply as any appeal will delay development. It is also likely that the introduction of mandatory requirements could cause additional and unnecessary delay to the assessment and determination of development applications.

Section 102 of the Act limits the grounds of challenge to a determination of the Minister in relation to a State significant development by restricting the mandatory requirements that must be met. This type of provision should also be applied to the developments the subject of a community participation plan so that the only mandatory provisions that must be complied with are the minimum exhibition periods in Schedule 1 and no other, including, for example, the statement of reasons.

We note that the Department will be preparing guidance notes on what needs to be included in the notice of a decision. However, if this aspect of community consultation remains as a mandatory element, significantly more clarity is required in the Bill itself, for example:

- the “statutory requirements” that are to be included in the statement of reasons, which, we suggest might be limited to development standards under an Environmental Planning Instrument; and
- the extent to which community views are to be addressed, which we suggest might be limited to the type of community consultation undertaken rather than addressing every issue raised in a submission.

To avoid uncertainty and potential legal challenges, the nature of the statutory requirements that must be taken into account (and how they should be addressed to satisfy this requirement) should be specified with absolute certainty in the Bill. Failure to do this will possibly result in increased grounds for legal challenge or planning authorities preparing reasons for a decision that are incredibly lengthy and complex (almost akin to a planning report prepared by the assessing authority) which is in conflict with the need to have a transparent and simplified planning system.

### **Recommendations**

**Restrict the ability for objectors and members of the public (who have already had an opportunity to make submissions during the community consultation process) to commence legal proceedings under section 123 of the Act.**

**Clarity is required in the Bill or Regulations as to what is to be included in a statement of reasons, particularly the level of detail required for the notification of the decision (will all community views be required to be addressed in the notice or is it that the exhibition and community consultation process followed is to be notified?)**

### **Stronger consultation requirements for major projects - Schedule 1.1 [23], Section 3.1 of the Summary of Proposals**

The Regulations may require applicants for development consent or other approvals under the Act (or for the modification of any such consent or approval) to undertake community consultation in relation to their applications.

State significant development proponents will have to demonstrate community consultation prior to lodgement of a development application as part of an environmental impact statement. Property Council members suggest that consultation of this nature already occurs, and the amendment potentially adds to, rather than streamlines, the planning system.

The Government is proposing to include incentives for early community consultation at a local development level, suggesting incentives might take the form of a discount in fees.

Further detail is required in relation to community consultation prior to lodgement of a development application including:

- how the initial consultation process will avoid duplicating what is required during the exhibition period conducted during the development assessment process (planning authorities, particularly for major projects, often require project proponents to address all of the submissions made);
- what type of development will be caught, i.e. only major development?
- clarity around what the consultation might entail, i.e. community forums, door-knocks etc;
- what the expected outcomes of the initial consultation period is to achieve, for example, will the proponent be obligated to incorporate this feedback and address concerns in its development application;
- whether there will be any minimum consultation periods;

- whether the consultation period prior to lodgement of a development application will be a mandatory requirement; and
- whether the exhibition period during the development assessment process will be reduced if community consultation has taken place prior to the development application being lodged. This could be a significant incentive for developers to engage in early consultation and it would also potentially make the planning assessment process more efficient and cost effective because:
  - developers will have had a chance to design a development responding to relevant and reasonable community concerns; and
  - developers will not need to lodge an “amended application” during the development assessment process, which sometimes requires the re-exhibition of the DA - inevitably lengthening the development assessment process.

The nature of the incentives should include time efficiencies during the development assessment process, for example, if community consultation takes place prior to lodgement of a development application then a reduced exhibition period should be required under a community participation plan. This will also resolve any duplication of process.

The Property Council supports initiatives that strengthen and streamline the assessment process, and we would anticipate assisting to inform the drafting of such a regulation prior to its introduction.

### **Recommendation**

**Amend the Regulation clarifying the purpose, scope and scale of pre-lodgement notification be circulated for stakeholder feedback prior to being finalised.**

## Strategic planning and better outcomes

The Bill proposes strengthening strategic planning at the local level to better guide the efficient distribution of resources and facilitate coordinated development outcomes.

We support endeavours to embed a stronger focus on long term planning to inform communities and create a clear “line of sight” between strategic plans; this must be done so as not to add additional layers into an already complex planning system or impede the ability of plans to be revised to reflect changing needs.

### Local strategic planning statements

The Bill introduces a new requirement for councils to prepare and publish a local strategic planning statement, and to review it every five years. The statement would explain how the council will give effect to regional and district plans within its LGA having regard to any community strategic plan under the *Local Government Act 1993*.

The statement will set out:

- the basis for strategic planning in the area, having regard to economic, social and environmental matters;
- the planning priorities for the area that are consistent with any strategic plan applying to the area and any applicable community strategic plan under section 402 of the Local Government Act 1993;
- the actions required for achieving those planning priorities; and
- the basis on which the council is to monitor and report on the implementation of local strategic planning statements.

While the proposal supports the Government’s aim to promote strategic planning, it conflicts with the other stated aim to establish simpler and faster processes by adding another potential layer of planning controls that must be referred to in the planning assessment process for development applications and planning proposals.

The merits of a local strategic planning statement for explanatory and transparency purposes are supported. However, the document should be treated as an explanation document only (much like an explanatory note to a Planning Agreement) and be excluded from any assessment process. In other words, there should be no legal weight given to the local strategic planning statement.

We note that preparation of a local strategic planning statement could add to the workload of councils to prepare and publish in addition to council LEPs and DCPs. The statement will not, of itself, mean any changes to planning controls embedded in a LEP or DCP, however, it could influence decisions on planning proposals (to change zoning and /or planning controls), limiting the ability of the planning system to respond to rapidly changing needs in local government areas including housing supply.

Requiring councils to commit to local planning statements creates the potential for land uses to be “locked” down for five years (the review period for the statements) in areas of rapidly growing populations and diversifying needs. If local strategic planning statements form part of the assessment on planning proposals, then a rezoning that does not meet the objectives in the statement will be unlikely to progress regardless of planning merits.

The planning system, to date, has not demonstrated that it can respond rapidly to changing needs, such as the increase in the need for housing. Spot rezonings are therefore an integral part of the planning system and enable land use to be changed in a responsive and timely fashion to meet changing needs, and the Gateway planning proposal process is rigorous.

There are areas where a five-yearly review of a local strategic planning statement will be inadequate. Therefore, a new provision should be included to the effect that a review must take place if directed by the Minister or Secretary. This will allow the planning system to respond quickly to changing planning needs.

### Recommendations

#### Amend the Bill to provide that:

- **a local strategic planning statement is an explanatory note only and does not have any weight in the assessment of a development application or planning proposal; and**
- **include the ability for the Minister or the Secretary to direct that a local strategic planning statement be reviewed prior to the five-year timeframe specified.**

**This change would also need to be incorporated into section 73 of the Act – review of environmental planning instruments. A requirement for more regular reviews in growth areas is likely to resolve the increasing reliance on spot rezonings.**

**Appeals to the Land and Environment Court should be allowed for refusals of proposed rezoning applications.**

#### **Regular local environment plan (LEP) checks – Schedule 3.1[13]**

The Bill proposes to give the Secretary authority to determine whether State environmental planning policies are updated every five years, and require that councils determine whether their LEPs are updated every five years.

Local councils are already required to review their LEPs under section 117 Directions of the Act. Section 117 allows the Minister for Planning to give directions to councils regarding the principles, aims, objectives or policies to be achieved or given effect to in the preparation of draft LEPs.

The proposed changes do nothing to force councils to actually update their LEPs. Instead, the onus should be placed on councils to update an LEPs every five years or have them suspended, with applications considered against District and Regional Plans instead.

### Recommendation

**Local Environmental Plans which are not updated within five years should be suspended and development applications in affected areas considered against relevant District and Regional Plans.**

### Standard development control plan (DCP) format - Schedule 3.1 [17]

It is proposed that the Department will introduce a standard format for development control plans (DCPs). Regulations may require DCPs to be standardised and authorise the Minister to enforce requirements as to the form, structure and subject matter of these plans. This will allow for DCPs to be spatially represented on the NSW Planning Portal.

Introducing standardised DCPs is welcome, however, it is only the form and structure of DCPs that are addressed whereas the wider issue is the content of those DCPs. DCPs often include matters unrelated to planning matters or matters that either duplicate or which are inconsistent with other higher order planning controls.

While there are provisions in the Act that seek to implement a hierarchy for planning controls so that a SEPP or LEP will take precedence, it is still common practice for a Council to have regard to conflicting or more onerous DCP controls in assessing development applications. For example, if a DCP deals with matters that are already included in SEPP 65, a Council should be required to remove such controls from the DCP completely.

#### Recommendation

**Implementation of standard DCPs is welcomed, but reforms should be implemented which remove matters in DCPs which are already included or are inconsistent with matters in a higher order planning control.**

## Probity and accountability in decisions

The Bill proposes increasing transparency and building community confidence through enhanced probity and accountability of decision-making in the planning system.

We strongly support measures to depoliticise the development assessment process and improve the quality and timeliness of decisions.

### Discontinuing Part 3A arrangements

The Bill notes that provisions of this Schedule will be transferred to the Regulations under the Act. The transferred provisions are to be amended to:

- prevent any further modification of approvals for transitional Part 3A projects under the former Part 3A modification provisions;
- enable those projects to become State significant development or State significant infrastructure; and
- make provision with respect to any outstanding Part 3A concept plans.

This will put an end to section 75W modifications so that future modifications of these approvals will be subject to the “*substantially the same development*” test that applies to normal development consent modifications in section 96 of the Act. This test is far more restrictive than the broad power of modification that currently exists under section 75W.

It is proposed that section 75W applications that are already underway and have received the Secretary's Environmental Assessment Requirements (SEAR) will continue to be assessed under section 75W if a SEAR is lodged within 12 months of the changes commencing. New modification applications under section 75W will be received for two months after the Bill is passed after which developers will not be able to access the section 75W modification path.

Precise details of the changes are unknown, as the Bill does not include specifics. The detail of these changes will be outlined in regulations which are yet to be released and will be finalised once the Bill has passed Parliament. Further clarity is also required around the treatment of Concept Approvals and whether those types of approvals will continue to be saved.

The proposal to repeal section 75W and replace it with section 96 provisions is problematic. Section 75W provides flexibility to enable large, staged developments like Central Park, Barangaroo, Huntlee, Woolooware Bay and Calderwood to adapt to changes in the market or changes in land use trends. This flexibility assisted some of these major projects to adapt to the new economic realities of the post-GFC world. It kept developments moving during an economic downturn.

Section 96 requires modifications to be “*substantially the same development*” as the original approved development. In respect of large, staged developments which can take many years to deliver, this is very restrictive and potentially prevents new uses or emerging demographic or infrastructure needs from being included in a development (e.g. private student housing which was not a recognised land use 10 years ago).

Part 3A introduced a Concept Plan mechanism that established a flexible framework for large, long-term developments; in effect providing industry with certainty of an envelope or



master plan approval, sufficient to secure financing. Key to this mechanism was the ability to modify approvals over time to reflect technological change, changes in land use trends or changes in economic conditions, with section 75W worded to provide this flexibility, by adopting the “consistency” test from the former Division 4, Part 5 of the Act that dealt with State Significant Infrastructure.

Section 75W may be perceived as enabling “development creep” by not requiring a modification to be tested against the original approval. However, in practice, the flexibility provided by section 75W has enabled large projects to be modified and improved to deliver better outcomes which are contemporary with the needs of communities when these projects are being completed. And, major section 75W modifications are required to go through the same full environmental assessment, consultation and determination processes as the original application, including:

- the Department requires a Secretary's Environmental Assessment Requirements (SEARs) request, consults with agencies and Council and issues SEARs;
- the proponent prepares a full EAR;
- the EAR goes through a test of adequacy;
- the EAR is usually publicly exhibited for the same period of times as the original application;
- the same triggers apply for Planning Assessment Commission determination as applied to the original application; and,
- the section 75W process is no different in time, complexity or rigour, however the benefit is that it enables changes to the development to be dealt addressed within the one approval providing for consistency and administrative efficiency.

The Property Council believes that section 75W should be retained. Failing this, we suggest that it be replaced by a new provision – section 96(2A) that applies to Stage 1 State Significant Development and retains the “consistent with the existing approval” test. This would enable large scale staged projects to again have an approval framework which provides flexibility to ensure that modifications can be made to project deliverables so that projects best reflect market and community needs if, and as, these emerge.

Another important aspect of Part 3A that will be lost if section 75W is repealed is the ability for a Concept Plan to override LEP provisions. This power should be retained for Concept Plans where the approvals exceed LEP controls.

### **Recommendation**

**Section 75W should be retained, or at a minimum replaced by a new provision section 96(2A) that:**

- **applies to State Significant Development and retains the “consistent with the existing approval” test contained in section 75W(1) of the Act; and,**
- **provides for a Concept Plan to override LEP provisions.**

## Directions for local planning panels - Schedule 2, Division 2.5

Independent hearing and assessment panels (IHAPs) are renamed “local planning panels”. The Bill proposes the introduction of Regulations which can require a Council to establish a panel.

The Bill provides that a local planning panel consist of three members, including a community representative and two independent members that must have expertise in at one least one of the areas specified, and be chaired by an independent member.

Local Planning Panel functions include:

- consent authority functions of a council, conferred under the planning legislation; and,
- assessing any aspect of a development proposal or planning matter referred to it by council.

Panel functions can be delegated to a General Manager or other council staff.

Councils must monitor panels’ performance and report to the Secretary on how many panels it has constituted in a year, their membership and the matters referred to them. Councils must also provide staff and facilities to enable local planning panels to exercise their functions.

The Bill proposes that a community representative be appointed by the council as part of the three member panel. Currently the legislation requires an IHAP to consist of experts in various areas of expertise, i.e. planning, government etc.

The type of person who might constitute a community representative is unclear. Also unclear is how conflicts of interest protocols will apply to a community representative rather than a person appointed for their expertise and subject to professional standards. Further, it is unclear whether a community representative is required to live and/or work in the community, suburb or local government area.

IHAPs have been working effectively with a panel of “experts” in the field. The introduction of a community representative without specialised expertise may threaten the effectiveness and success of those local planning panels (resulting in unfair outcomes for proponents and appeals). This will become a more significant issue if increasing reliance is placed on those local planning panels as opposed to district/ regional panels.

The Property Council strongly supports the role of IHAPs as a means to depoliticise the development assessment process, and believes this mechanism should be made mandatory across councils. We also believe that community representation is a function of the local government political process and inherently inconsistent with the functions of an IHAP.

## Recommendations

**Retain the appointment of three experts as members of local planning panels.**

**Make Local Planning Panels mandatory.**

### Ensuring delegation to council staff

A best practice model will be developed by the Government, setting out which matters should be determined by staff on delegation and which should be reserved for the council or local planning panel.

#### Recommendation

**Delegation to professional staff to assess development applications is supported, with elected councillors focused on setting the direction for planning instruments.**

### Refreshed thresholds for regional development

The thresholds for regional development will be moved out of the Act and into the Regulations so that they can be updated more easily. The Government has also proposed increasing the basic threshold for regionally significant development from \$20 million to \$30 million.

The Property Council does not support increasing the threshold. With the threshold at \$20 million Planning Panels are determining approximately less than five per cent of development applications in NSW annually.

#### Recommendation

**Retain the regionally significant threshold at \$20 million.**

### Independent Planning Commission - Schedule 2.1[3], clause 35

Division 2.3 establishes the Independent Planning Commission (IPC), renaming the existing Planning Assessment Commission, with members appointed by the Minister, to each have expertise in at least one of the areas specified. The Commission can arrange for the use of the Department of Planning's staff or engage consultants to exercise its functions.

The Bill proposes to increase the powers of the Independent Planning Commission to:

- compel a person to attend a public hearing of the Commission to give evidence or to produce to the Commission a document that is relevant to the hearing. Maximum penalties for failing to comply are \$11,000; and,
- restrict publication of evidence or direct any part of a public hearing to take place in private (and restrict the number of persons permitted to attend).

Schedule 8 of the Bill clarifies that there is to be no section 82A review of a decision where it has been the subject of an IPC public hearing.

Clarification is required around what constitutes a "public hearing". Currently, confusion arises around Planning Assessment Commission interactions and what constitutes a public hearing; this then creates confusion around whether appeal rights exist.

To remedy this, the IPC should be required to clearly notify and declare at the commencement of any meeting that it is a public hearing for the purposes of the Act and that this will result in the removal of appeal rights for proponents and objectors. This should

also be included in any minutes of the meeting (akin to notification of appeal rights in development consent).

There are no specified procedural fairness requirements, in particular, in relation to a proponent's right to make submissions (including in reply and a right to be heard by the IPC). Proponents continue to be at risk of not having an opportunity to adequately respond to submissions made by objectors and others, particularly those that arise in oral representations without prior notice. For example, does the proponent have the right to respond or make submissions?

Increasingly, confidential information is requested by the Planning Assessment Commission and this creates significant commercial disclosure issues for proponents. Currently, the test is that the Commission must be "satisfied that it is in the public interest because of the confidential nature of any evidence or matter" to make orders as to non-publication of evidence. This relatively narrow non-disclosure test risks commercial-in-confidence materials being made public.

The test for non-disclosure and non-publication of materials as part of a public hearing should also have regard to a proponent's request to maintain confidentiality and the nature of the confidential information. The test should be more akin to the public interest test contained in the *Government Information (Public Access) Act 2009* so that there are clear grounds upon which a proponent can claim that the nature of the materials are so confidential that they should not be disclosed. For example, considerations under the GIPA Act in relation to determining whether disclosure is in the public interest requires the Government to consider whether disclosure would diminish the competitive commercial value of any information to any person.

## Recommendations

**Require the Independent Planning Commission to specify when a meeting constitutes a "public hearing" and for this to be noted in the minutes.**

**Include provisions that allow for a proponent to have a right of reply to any submissions or evidence given during a public hearing.**

**The test for non-disclosure and non-publication of materials as part of a public hearing should have regard to a proponent's request to maintain confidentiality and the nature of the confidential information.**

## Enforceable undertakings

The consent authority for each category of development under the Act is:

- State significant development – Minister or Independent Planning Commission if identified in an environmental instrument;
- regionally significant development – Sydney district or regional planning panel; and,
- all other development – council or another public authority identified in an environmental planning instrument.

The Minister can direct that a local planning panel or council delegate determine development applications on behalf of the council. Transitional arrangements will ensure existing panels continue to operate for this purpose.

Local planning panels or council delegates can receive applications for approval under the *Local Government Act 1993* at the same time for development consent, and deal with them together.

The Property Council strongly supports the operation of local planning panels to depoliticise the decision making process. We believe that these panels should be mandatory to ensure that people with appropriate expertise are the consent authority, and not elected officials.

### **Recommendation**

**Local Planning panels should be mandatory for “all other development”.**

## Simpler, faster planning

The Bill proposes measures to create a system that is easier to understand, navigate and use.

Reforming the NSW planning system to make it faster and capable of processing a significantly increased volume of development activity is vital, otherwise strategic plan outcomes to house a growing population and provide employment places for future jobs – will simply not be met.

Creating an efficient and effective planning system would be a significant instance of micro-economic reform. The NSW planning system lags significantly behind other Australian states in terms of performance, being unable to process within reasonable and competitive timeframes the volume of development assessments required to provide for the State's future population.

### Efficient approvals and advice from NSW agencies - Schedule 4.1[12]

For integrated development, where concurrent approval is required from more than one government body, the Bill provides the Secretary of the Department with step-in powers to avoid delays and conflicts between different agencies. A similar intention is proposed for concurrences, but this is not reflected in the Bill.

The Property Council welcomes this proposal and suggests there should be a central checklist maintained by the Department which is updated to identify all of the concurrence approval triggers in NSW. This is particularly relevant given the new concurrence and notification arrangements required for infrastructure corridors proposed in Schedule 5 – new Division 5.3.

### Recommendation

**Step-in rights for the Secretary of the Department for integrated development is supported (as proposed), as well as step-in rights for concurrence rights.**

**There be a central checklist maintained by the Department which is updated so as to identify all of the concurrence approval triggers in NSW.**

### Concurrence and notification in infrastructure corridors

A State Environmental Planning Policy (SEPP) can designate future infrastructure corridors. To be designated this way, land must be zoned in an environmental planning instrument identified in a strategic plan for a future use or identified in an environmental planning instrument as requiring the concurrence of a public authority.

If a SEPP designates land as being within an infrastructure corridor, it can require a determining authority assessing an activity under Part 5 to obtain the concurrence of, or notify, a public authority before carrying out or approving the activity.

The public authority can refuse concurrence if it is satisfied the activity will unreasonably interfere with the future use of the land (including by unreasonably increasing construction or operating costs).

Where concurrence is refused, only a determining authority may seek a review of the refusal by the Secretary or the Minister, who can confirm the refusal or give the concurrence.

While supported, we believe the provision should not commence until all infrastructure corridors are mapped on the NSW Planning Portal. In addition the ability to seek a review of a decision should also be extended to the development proponent.

The appeal regime in the new section 8.14(3) of Division 8.3 of Schedule 8 requires an amendment to make it clear that where a concurrence has been refused the Court may still determine the appeal. The wording is unclear as it simply states that the Court may determine an appeal “whether or not consultation has taken place and whether or not the concurrence has been granted.”

### **Recommendations**

**Rights of review should also be able to be requested by a proponent and not just the planning authority.**

**Amend the new Section 8.14(3) of Division 8.3 of Schedule 8 to make it clear that where a concurrence has been refused the Court may still determine the appeal.**

### **Preventing the misuse of modifications – Schedule 4.1[15]**

Consent authorities must consider the statement of reasons for the original development consent when determining a modification application. And, a consent cannot be modified (except for modifications for minor error, mis-description or miscalculation) or to authorise development that has been carried out in contravention of the consent.

The Property Council acknowledges that the aim of this provision is to prevent the erosion of the planning principle that development is to be built consistent with how it is planned and approved, not through retrospective approvals for works that go beyond the original consent. However, we believe that appropriate controls need to be included, limiting the types of matters that can be included in a statement of reasons and also by reference potentially to the age of the original consent. This should include a clear direction that planning authorities cannot include pre-determinations on future modification applications in a statement of reasons.

Precedent on this point has consistently held that a section 96 modification cannot authorise historical breaches of a development consent. However, if the Court or consent authority approves a modification application that rectifies a non-compliance going forward, then this is permissible. The grant of a modification application in these circumstances must still demonstrate that the merits of the modification application are acceptable – as it would need to do in all circumstances.

Further, there is no guarantee that the modification application will be approved and the non-conforming component of the development may be subject to demolition orders or have its use ceased and penalties could still be imposed.

The amendment is unnecessary and adds another potential barrier to obtaining a modification to a development consent. For complex developments modifications are often required on numerous occasions to deal with unexpected issues that arise or with sensible and practical modifications to design. Often, a modification will achieve a better design outcome.

Notwithstanding the reasons for the original approval, the modification should be assessed on its merits (within the confines of the substantially the same test under section 96 of the Act). If the modification is assessed as being acceptable and the modification will result in substantially the same development as the original development, there should be no additional barrier to approval of that modification (including because it conflicts with a statement of reasons).

Additionally, the new community participation plans provide members of the community with the ability to make submissions during the public exhibition period of the modification application and have those submissions considered by the planning authority.

The status quo should continue particularly as a modification sought to rectify a non-conforming use may be acceptable on its merits.

### **Recommendations**

**Remove the provisions which limit the ability for modifications to be approved for a non-compliant part of the development.**

**Clear direction needs to be given to planning authorities that they cannot include pre-determinations on future modification applications in a statement of reasons for an original consent.**

### **Improved complying development pathway**

The Government has a stated objective to increase the take up of complying development by:

- introducing a medium density residential code;
- updating the codes to make them more user friendly;
- simplifying development standards; and
- implementing an education program for councils and certifiers.

However, the Bill will potentially reduce the use of the complying development pathway as a result of:

- a new regulation making power to specify classes of development for which an accredited certifier is not authorised to issue a complying development certificate (CDC) – Schedule 4.1[9];
- allowing CDCs to be subject to deferred commencement conditions – Schedule 4.1[8];
- extending planning agreements to apply to CDCs;
- allowing special infrastructure contributions to be levied on CDCs;
- establishing a compliance levy to fund compliance and enforcement actions by councils in relation to CDCs, which will be part of the fee structure for CDCs. Details of the levy are as yet unknown;



- granting councils a new investigative power to issue stop work notices (for a period not exceeding seven days) pending an investigation into compliance of CDC work with applicable development standards – Schedule 9.1[2], clauses 9.33 and 9.34;
- extending the notification requirements for a CDC to require a certifier to give prior notice of their intention to issue a CDC to council and direct neighbours (the period of prior notice is not specified), and to provide a copy of the CDC and endorsed plans to the direct neighbours once the CDC is granted; and
- requiring the court, when faced with a legal challenge to a CDC, to objectively determine for itself whether it is in accordance with the relevant standards and to declare the CDC invalid if it is not – Schedule 4.1[09]

Aimed at strengthening investigative and enforcement powers, and making it easier for neighbours to monitor compliance, these changes have significant potential to slow down the CDC process, even for fully compliant developments. They will make the CDC process a lot more like the development application process, but without the safeguards relating to mandated timeframes for assessment, and a right of appeal or internal review.

The Property Council suggests that amendments which add time and complexity into the planning system should be removed. As currently drafted, the proposed changes to the CDC pathway potentially add onerous new steps (e.g. notification for CDC). The CDC pathway is intended to streamline the process for minor matters that have minimal impact, and this needs to be preserved.

### **Recommendation**

**No changes be made to the CDC process until the impacts of the proposed amendments have been carefully considered in consultation with all stakeholders.**

### **Transferrable conditions – Schedule 4.1[6]**

The amendment will establish a mechanism of “transferrable” conditions; these are conditions of consent that no longer need to apply, because they are substantially consistent with conditions subsequently imposed under other regulatory approvals or licenses.

A development consent can be subject to conditions which cease to have effect once an authorisation under another Act is issued. For this to occur, the consent authority must be satisfied that the matters regulated by the condition will be adequately addressed by the authorisation under the other Act.

The Minister can impose new conditions on State significant development consents and State significant infrastructure approvals for monitoring or environmental audits by written notice. These conditions can be varied or revoked by written notice.

### **Recommendation**

**This change is supported.**

### **Clearer powers to update conditions on monitoring and environmental audit – Schedule 4.1 [18]**

The amendments will strengthen the Minister's power by clarifying that the Minister may vary or revoke monitoring or environmental audit requirements in existing approvals.

The Property Council proposes that where this occurs there should be a public declaration of the statement of reasons for these to be modified so that all stakeholders are clear about how decisions are made.

### **Recommendation**

**Provide a public declaration of the statement of reasons for these to be modified so that all stakeholders are clear about how decisions are made.**

### **Simplified and consolidated building provisions**

The amendments:

- consolidate the existing building regulation provisions in the Act into one part (Part 6); and
- place in the Act (rather than the Regulations) a clear requirement that a construction certificate must be consistent with the development consent.

### **Construction certificate**

Currently, a construction certificate must be "not inconsistent" with the development consent. "Not inconsistent" has been found by the Court to not mean the same thing as "consistent", so that construction certificate plans can be different from development consent plans.

The Bill proposes that the plans, specifications and standards approved by a construction certificate would have to be "consistent" rather than "not inconsistent" with the development consent. Under the proposed changes, there will be an express requirement that a construction certificate must be consistent with the development consent and the Court will be given the express power to invalidate a construction certificate where it forms the view that the plans and specifications or standards of building work specified in the certificate are not consistent with the development consent.

It is proposed that the Department will issue guidelines to help certifiers determine what is required by this new consistency test.

The proposed changes are likely to result in certifiers being reluctant to approve deviations from the development consent plans, resulting in construction times being extended. Minor inconsistencies (e.g. marginally different positions for windows, doors, ceiling bulkheads) that are currently normally acceptable will likely be regarded as inconsistent and no longer allowed.

The ability for a third party to commence proceedings challenging the validity of a construction certificate creates uncertainty for proponents of a development. Further, "any person" can file proceedings within a three month period after the issue of a construction certificate which means that construction work may be well underway when proceedings are filed.

Legal challenges to construction certificates are likely to increase and be upheld if the Court is permitted to determine whether or not the construction certificate is consistent with the development consent.

If a certifier makes an error, and a Council or third party commences a legal challenge, the Court will be able to declare a construction certificate invalid. This will halt any construction and create uncertainty, resulting in added time and cost to projects.

As a result of the revised wording, developers will be required to:

- prepare more detailed and precise drawings at the development application stage; or
- make modification applications to secure formal endorsement by councils of the 'for construction' plans prior to issue of a construction certificate by a certifier.

Councils will likely receive an increase of modification applications by developers seeking minor changes to their approved plans, changes which would previously have been dealt with through construction certificates.

### **Recommendations**

**Retain the “not inconsistent” language.**

**Reduce the timeframe to challenge the validity of a construction certificate to 28 days instead of three months.**

**Limit the ability for challenge to only a Council rather than “any person”.**

### ***Building work and certificates relating to building***

Division 6.3 requires a principal certifier to be appointed for any building work and sets out the procedural requirements before building work can commence.

A construction certificate is required for building work, but not for complying development or Crown building work. A construction certificate must not be issued unless the regulations have been complied with and any long service levy paid.

Additionally, if a certificate under Part 6 (other than an occupation certificate) is challenged within three months and the Court finds that it was not consistent with the development consent, the certificate can be declared invalid.

There are certain circumstances when an occupation certificate is not required (e.g. where a construction certificate authorises an alternative). An occupation certificate must not be issued unless preconditions in the development consent have been met, as well as other requirements.

### **Recommendations**

**Reduce the timeframe to challenge the validity of a construction certificate to 28 days instead of three months.**

**Limit the ability for challenge to only a Council rather than “any person”.**

### **Occupation certificates**

Currently, the Act provides for two different forms of occupation certificate; a final occupation certificate and an interim occupation certificate which allows occupation and use of a partially completed new building. Interim occupation certificates will cease to exist under the Bill.

Under the proposed changes, it will be possible to obtain an occupation certificate for parts of a building, but those parts will, arguably, need to be complete. Any conditions of consent expressed as needing to be satisfied “prior to the issue of an occupation certificate” will need to be met. This is likely to create barriers to obtaining an occupation certificate for a completed portion of a partially completed building.

Interim occupation certificates are important for major projects; they promote the efficient and economical development of land, for instance enabling residents in mixed use buildings to move in while retail outlets below are being fitted out. There is no reason to delay occupation of this type.

### **Recommendations**

**Retain existing arrangements for interim and final occupation certificates.**

### **Subdivision work and certificates relating to subdivision**

Division 6.4 requires a principal certifier to be appointed for any subdivision work and sets out the procedural requirements before subdivision work can commence.

A subdivision works certificate is required for building work, but not for complying development or Crown building work. A subdivision works certificate must not be issued unless the Regulations have been met and any long service levy paid.

There are a series of procedural requirements before a subdivision certificate can be issued.

A subdivision works certificate is intended as a replacement for a construction certificate in a subdivision consent. The term “subdivision work”, is broadly defined as “any physical activity authorised to be carried out in connection with a subdivision under the conditions of a development consent for the subdivision of land”.

Because “subdivision work” is so broadly defined, it potentially captures physical survey work such as pegging and, if so, this is likely to have adverse consequences in terms of lawful physical commencement of subdivision consents. In essence, this could mean that a development consent for subdivision cannot be lawfully commenced until a Principal Certifying Authority is appointed, a subdivision works certificate is obtained, and physical work is then carried out in accordance with the subdivision works certificate.

Furthermore, the Bill suggests that for many developers it will be necessary to obtain both a construction certificate and a subdivision works certificate.

As drafted, this arrangement complicates rather than simplifies the existing process and exposes a developer to the risk of injunctions and/or legal proceedings if a certifier wrongly issues one certificate when both should have been issued, or issues the wrong certificate.

## Recommendations

**Ensure that the established and understood principle of “physical commencement” as it exists under the existing provision of the Act are not made more onerous.**

### **Compliance certificate**

The Regulations can set out when a compliance certificate is required in relation to building or subdivision work and the procedural requirements before a certificate can be issued. Compliance certificates can also be obtained by a certifier in the other circumstances.

Compliance certificates can be issued by a certifier or another person prescribed by the Regulations.

Changes have been proposed which:

- allow for a complying development certificate (CDC) to be declared invalid if it does not meet the development standards in the Codes SEPP. This change is to address a recent Court of Appeal decision in *Trives v Hornsby Shire Council* [2015] NSWCA;
- require a certifier, before issuing a CDC in a metropolitan area to give a copy of the proposed certificate, any plans and other applicable documents to the Council and direct neighbours. As a follow up, the certificate itself must be issued to the Council and neighbours at the same time;
- limits complying development for sensitive areas or for development that might impact on local values. The Regulation will specify those limitations; and
- give new enforcement powers to Councils to issue a stop work order for seven days to allow Council to investigate a “genuine complaint”.

The regulations can make provisions for a levy on applicants for CDCs which reimburse councils for the costs of investigating and enforcing compliance with the planning legislation.

The proposed changes do not achieve a simpler and faster planning system, for instance:

- if a complaint is made in relation to work being carried out under a CDC by a neighbour, a Council will likely automatically issue a temporary stop work order under its new enforcement powers whether or not the complaint is “genuine”.
- the ability for the Regulations to limit the breadth of complying development is a step backwards and creates undue complexity. Also, the inclusion of restrictions on CDCs in the Regulation rather than the Codes SEPP itself is also contrary to simplifying the system as members of the public, proponents and certifiers will need to refer back between two sets of controls/legislation.

## Recommendations

**Remove the ability for Councils to issue stop work orders for seven days.**

**Remove the ability for the Regulations to restrict the types of development included in the CDCs.**

### ***Liability for defective building or subdivision work***

Division 6.6 provides that legal proceedings may only be brought in relation to defective building work or subdivision work within ten years of the completion of the work.

#### **Recommendation**

**No comment is provided.**

### ***Building information certificates***

Division 6.7 contains provisions for the application, issue, nature and effect of building information certificates.

#### **Recommendation**

**No comment is provided.**

### ***Miscellaneous***

A building manual is to be prepared by the certifier when issuing an occupation certificate for specified buildings and is to be maintained by the owner of the building. The building manual includes matters required to be checked for ongoing compliance, for example fire systems that must be maintained. It is an offence not to maintain a building manual.

Division 6.8 also includes provisions relating to:

- Certification of Crown building work;
- Exemption from liability for persons relying on a certificate issued under Part 6;
- Directions by principal certifiers; and
- Regulation making powers (including for smoke alarms in buildings providing sleeping accommodation).

#### **Recommendations**

**Provision of a building manual is supported.**

### ***Other***

Currently, occupation and construction certificates are a simple yes/no exercise (the latter can be issued with very limited conditions for certain fire safety matters). The Bill enables certifiers to issue these certificates, and the proposed subdivision works certificate, with conditions, in effect converting them into a new form of mini-development consents. This adds a new level of complexity to the planning system.

#### **Recommendation**

**Not supported.**

### **Special infrastructure contributions**

It is proposed that special infrastructure contributions be required for complying development. This would be done by the Minister directing certifiers to impose conditions for special infrastructure contributions in the same way consent authorities are directed. If the certifier doesn't impose the condition then it is taken to be imposed.

There should be a freeze imposed on all existing state and local government taxes and charges that impact on the cost of bringing a dwelling to market and existing levies, taxes and charges should be revised with a view to reduction as part of a housing affordability plan.

#### **Recommendation**

**Not supported.**

### **Reviews**

Division 8.2 sets out when reviews are and aren't available, and who conducts them, these are:

- An applicant may seek a review of:
  - a determination of a development application;
  - a determination of a modification to a development consent; and
  - a decision to reject a development application.
- Reviews are not available for:
  - complying development certificates;
  - designated development;
  - crown development; and
  - decisions made after the Independent Planning Commission has held a public meeting.

Reviews must be requested within six months after receiving notice of a determination or decision, or six months after the date of deemed refusal.

Where the original determination or decision is made by a delegate of the council (e.g. council staff), the review is conducted by a more senior delegate of the council (e.g. a senior council staff member).

Where the original determination or decision is made by a delegate of the Minister, the review is to be conducted by a more senior delegate of the Independent Planning Commission.

Determinations or decisions made by a Local Planning Panel, Sydney district or regional panel or the Independent Planning Commission, are to be reviewed by the body that made the original determination or decision.

When conducting a review, the consent authority has the same functions it had for determining the original development application.

After conducting a review, the determination or decision can be confirmed or changed.

The time limits for commencing appeals in relation to certain matters is proposed to be reduced from 12 months of refusal/deemed refusal to six months (in line with appeals in relation to development applications). These matters include:

- appeals in relation to construction, occupation, and subdivision certificates;
- appeals in relation to security; and
- appeals in relation to building certificates (now renamed “building information certificates”).

Where a developer wishes to appeal against a council's failure, or refusal, to release the security, where the security is provided in respect of contingencies that may arise after completion of the work to which the security relates, the appeal can't be commenced earlier than three months or later than six months after completion of the work.

This new time limit is unworkable, because section 80A(6)(c) specifically allows a council to retain security for a six month defects liability period, by which time a developer would have already lost its right of appeal against a failure to release the security.

### **Recommendation**

**Reviews of a determination should be undertaken by a higher authority to fully utilise the system and avoid costly court appeals, similar to the review rights for planning proposals.**



## **Additional legal and regulatory changes**

The Property Council has identified a raft of additional legislative reforms, outlined below, which should be considered as part of the current reform process to improve the operation of the planning system.

### **Merit appeal rights**

**Provide merit appeal rights to the Land and Environment Court for rezoning and LEP amendment determinations made by Planning Panels for proposals that are rejected or not approved within a prescribed timeframe.**

### **State Significant Development**

**Make large scale residential development State Significant Development in western and south western Sydney local government areas in order to significantly reduce red tape in greenfield areas.**

### **Planning Proposals**

**Mandate a one month approval timeframe, instead of the current Gateway process, for planning proposals in zone transition zones in growth centres and extend the zone transition to 200 metres rather than the current 100 metres.**

**Review the planning proposal and development application process to clarify and trim excessive information requirements and enshrine and encourage the ability to lodge concurrent applications.**

**Clarify the ability to lodge planning proposals within approved corridor strategies (potentially via a s117 ministerial direction) and provide a fast track process, with published timeframes, for when they are within the controls.**

### **Rezoning Reviews**

**Amend the rezoning review guidelines issued in 2016 so independent Planning Panels have discretion to recommend or modify a proposal rather than just accept or reject it to avoid the process needing to start again when a proposal is rejected.**

### **Voluntary Planning Agreements**

**Ensure Voluntary Planning Agreement (VPA) reform is directed towards increasing flexibility and transparency and does not inadvertently entrench the worst aspects of the current system that legitimise poor council practice and increase the hidden costs of delivering development projects.**

### **Concurrences and integrated approval**

**Reform state government concurrences and integrated approval arrangements via a State Environmental Planning Policy (SEPP) so a concurrence or integrated approval can be waived outright or waived if a development proponent commits to complying with pre-determined standards or requirements.**

### SEPP Reforms

**Remove “exemptions” from the current SEPP 65, or “workarounds” to ensure appropriate densities are being achieved, especially in locations benefiting from major state government infrastructure spends.**

**Deregulate minimum apartment sizes currently allowed under SEPP 65 to bring Sydney into line with other global cities like New York, so singles and first home buyers have greater choice at lower price points.**

### Other

**Change current lot mix controls that mandate 60 per cent are required to have lot frontages of greater than 11 metres and none are able to have less than 10 metres frontage in low density residential land. Implement instead maximum density, with a minimum number of larger lots, and extend code assessment to this type of development.**

**Amend the current NSW housing code to override council LEPs that restrict subdivision by use of a minimum lot size map to facilitate complying dwellings down to 250 sqm with scope for further reduction over time.**

**Take other meaningful steps to allow greater development in the areas identified in A Plan for Growing Sydney via the creation of a strategic compatibility certificate application process to the new Housing Delivery Unit, with a merit appeal right to the Land and Environment Court.**

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