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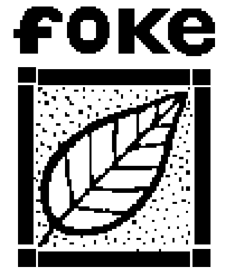


FRIENDS OF
KU-RING-GAI
ENVIRONMENT INC.

The New Planning System
The Department of Planning and Infrastructure
GPO Box 39
SYDNEY NSW 2011

27 June 2013

Dear Minister,

**RE: White Paper and Planning Bills – NSW Planning Reforms – A new planning system for NSW.**

We thank you for the opportunity to comment on the White Paper and the draft Planning Bills.

Having consulted with our members, the Better Planning Network, local community groups and organisations and attended a number of White Paper briefings we have come to the conclusion that we cannot support the White Paper and the Planning Bills you have exhibited. We believe what the state government is planning to deliver by way of a new planning system for NSW is unbalanced, unfair and a "corruption risk". We believe the O'Farrell government's planning system will produce far worse planning outcomes than the disgraceful years of Labor. The new system like the years of Labor is biased towards the development industry at the cost of our democratic rights, community wellbeing, our environment and heritage.

The O'Farrell government was elected on a promise to "*return planning powers to the community*" following years of community distrust in the Labor planning system. We believe the new planning system is a clear betrayal of that promise. The NSW wide community consultation process undertaken by Tim Moore and Ron Dyer made 374 recommendations for reforming the planning system, following the conclusion of the Green Paper consultation. Their final report was released in June 2012. The White Paper and Planning Bills depart significantly from many of the 374 recommendations contained in the Moore and Dyer report. This is very disappointing and undermines community trust in the new planning system and reinforces the distrust of the Department of Planning and Infrastructure.

We are extremely disappointed that the state government has swamped the NSW community with so many draft Plans all at the one time –being the White Paper and Planning Bills, the draft Sydney Metropolitan Strategy to 2031 and the Future Directions Local Government Review with all submissions due on the 28 June 2013. It is clear the state government has a pro-development agenda and is ticking the boxes with respect to consultation. Having not taken into account the Green Paper submissions there is real scepticism out in the community that the submissions on the White Paper and the other exhibited Plans will be ignored too!

We **object strongly** to the White Paper and draft Planning Bills for reasons stated below:

**Ecologically Sustainable Development**

The Planning Bill removes Ecologically Sustainable Development (ESD) from the NSW Planning System and thus will ensure that economic issues will be a key component and driver of our planning system and not ESD principles which have been an accepted part of the planning system for decades.

We have real concerns that the decision makers in the new planning system will not be required to exercise their functions in accordance with the internationally accepted principles of ESD. Australian courts are currently applying ESD principles and this should continue in NSW.

The new, narrow definition of Sustainable Development as proposed in the draft Planning Bill is a significant departure from key principles of ESD that have long been enshrined in Australian law. The white Paper refers to only two of these principles- the integration of environmental considerations and development objectives, and intergenerational equity – but leaves out three other fundamental and important principles: the precautionary principle, biodiversity and ecological integrity as a fundamental consideration and improved valuation, pricing and incentive mechanisms, including the polluter pays principle.

The overarching Object of the new Planning Act must be ESD, not economic growth. "Economic growth" however, are the first words mentioned in the first object of the Planning Bill and yet economic considerations are just one of the many factors that need to be taken into account in a planning system. It is essential the definition of ESD and the precautionary principle is maintained in the new Act as it has for the past 30 years.

The Planning Bill must define Sustainable Development with reference to the principles of ESD and we support the continued use of the definition in the *Protection of the Environment Administration Act* 1991.

**Objects of the Act**

The legislation must clearly state that all decisions, powers and functions under the new Act and relevant subordinate instruments must be exercised consistently with the principles of ESD.

The new Planning Act must promote quality of life, residential amenity, local character and a high quality built environment and include climate change prevention, mitigation and adaption.

The conservation of built and cultural character must also be identified as one of the Objects of the Act and expressed in the Act as "*the identification, protection and appropriate management of heritage*". The current words "*sustainable use*" in the Planning Bill make the interpretation of built and cultural character unclear and confusing.

The protection of Aboriginal heritage should be strengthened and defined in the Act as "*the identification, protection and appropriate management of Aboriginal heritage*".

There should be specific references in the Act to the '*protection and conservation of native animals and plants*' and '*the provision of land for public purposes*' in the general environmental protection objective.

We believe the provisions of the Bill that allow a Minister to override local plans and allow developer's increased flexibility to bend the rules, have the potential to seriously undermine the strategic planning process and trust in the planning system.

**Community Participation**

The Community Participation Charter is not supported by precise and enforceable legislative provisions to ensure for community participation in the draft Planning Bill. The planning provisions do not establish community participation requirements at each stage of the planning process, including the development assessment stage. The Community Participation Charter must be enforceable and all planning authorities must be required to comply with the Charter's broad principles including the making of Community Participation Plans to make it a fair planning system.

There must also be a guarantee in the Charter that community consultation and input will be reflected in strategic plan and that minimum notification and statutory exhibition periods be at least 60 business days for draft strategic plans and at least 60 business days for draft strategic (environmental) impact assessments. Twenty eight days is totally inadequate as a mandated exhibition period for Strategic Plans.

Ordinary citizens and local communities must have the right to comment on development applications that affect them. Removing the right for ordinary citizens to comment on up to 80% of developments is undemocratic and unfair.

We are concerned the government has released the first of the Regional Growth Plans for Sydney before the new planning system is accepted and in place. The Draft Sydney Metro Strategy has not had significant community input, participation or consultation as the White Paper indicates that the Regional Growth Plans should have. The premature release of the Sydney Metro strategy is putting the planning 'cart before the horse' and contrary to the government's promise to hand back planning powers to the community.

**Strategic Planning**

Strategic planning principles in the draft Planning Bill do not establish clear outcomes-based objectives for achieving environmental and social outcomes.

The new Planning System does not establish outcomes-based environmental and social objectives (e.g. maintain and improve water quality and catchment health to identify and protect environmentally sensitive areas) in order to effectively protect the environment and people's way of life. In fact the ten strategic planning principles make no reference to the quality of life, residential amenity, housing affordability, environmental or natural resource management outcomes, heritage, cumulative impact assessment, climate change or urban sustainability. Economic growth is prioritised over social and environmental outcomes.

It is also not made clear that existing environmental protections will be carried over into the new system, such as the environmental protections in existing planning instruments and policies, based on decades of research and experience. We are concerned these important protections will be weakened or will they be lost in the transfer to the new system.

The Government will not confirm its support for evidence based strategic planning by ensuring that there is a consistent and reliable base data set across NSW, and making this available to all users of the NSW Planning System.

The draft Planning Bill reduces the number of environment zones under the new planning system when Environment protection zones, as part of existing Local Environment Plans, zones which have

provided fundamental protection for our natural areas in NSW for nearly 30 years, and their continued use is necessary for the conservation and management of environmental values.

We are concerned the proposed legislation will allow developers to override existing planning controls while strategic plans and local plans are being developed under the new system. Therefore, we do not support the proposal to introduce strategic compatibility certificates (SCC). It is totally in appropriate to allow developers to override existing planning controls while strategic plans and local plans are being developed under the new system. The discretions of the Director General (Clause 4.33 of the Planning Bill) in issuing a SCC are too broad and a local council would not be able to refuse a development application to a decision to grant a SCC. Moreover, no rights of judicial review or third party merit appeal (cluse 10.12 of the Planning Bill) would be available in relation to a decision to grant a SCC. This is a real threat to the democratic rights of local communities allowing developers to exceed existing local strategic planning controls and a potential "corruption risk".

**Subregional Planning Boards**

The provisions of the draft Planning Administration Bill does not ensure that persons with appropriate expertise in ecology, conservation and natural resource management will be on each board. This proposal does not ensure a balanced and fair planning system.

There is considerable concern that there will be a significant level of State control and lack of transparency and accountability in the making of the Subregional Delivery Plans through the appointment of Subregional Planning Boards. The proposed make- up of the Boards is unbalanced, with the proposal to limit the Boards make-up to just one representative from each council in the subregion and with up to four state representatives appointed by the Minister including an independent Chair appointed by the Minister. This is our view will diminish any local control and put the planning for the local are in the direct control of the Minister and his/her Ministerial bureaucratic appointees. This is in direct conflict with the policy of the Liberal state government to hand back planning power and control to local communities.

We do not agree with the Minister having unrestricted veto over delivery plans drafted by Boards.

The Sub regional planning Boards and other planning consent authorities must be legally required to publish all submissions received, their analysis of these submissions as well as the reasons for their decisions so as to be fully transparent and accountable.

**Development Assessment**

The government proposing that 80% of all development in NSW will be determined as complying or code assessment development, with limited environmental assessment and no community consultation, is not a democratic or fair system. This system will be perceived as favouring developers over the community. The NSW community has rights too!

The new planning system does not prescribe clear and objective criteria for decision making, including clear criteria for merit assessment.

Whilst we are encouraged by efforts to improve the quality of environmental impact statements, including proposals to strengthen the offence relating to false and misleading information, however, the Government is not committing to introducing a scheme for accreditation and independent appointment of environmental consultants. We believe this must happen to start to put trust back into the planning system.

**Local Plans**

The replacement of E3 and E 4 zones with Rural and Residential zones is not supported as is the collapsing of the low density, medium density and high density into one broad Residential zone as this will not encourage a diversity and range of housing stock and become a one -size-fits-all zone! Not only will this discourage a range of housing choices but will also give developers too much flexibility to bend the rules and result in reduced residential amenity. Local plans must ensure residential amenity is protected over and above the interests of developers.

Local plans must also guarantee the long term protection of E1, E2, E3 and E4 zones and must also ensure that residential amenity is protected in the proposed Mixed and Commercial zones. Local Plans must protect all existing State and local heritage-listed items and all heritage conservations areas identified in LEP's.

Spot rezoning should be limited to exceptional circumstances that maintain or improve environmental outcomes.

Local councils should be able to include controls in the Strategic Plan to include additional controls to suit local needs for environmental conservations purposes and there should also be clarity built into the Plans around how local heritage will be protected by suburban character zones.

The current Standard Instrument contains a number of compulsory and model provisions for the protection of the environment such as environmental zones, restrictions on exempt and complying development in environmentally sensitive areas, protection afforded to heritage conservation, provisions relating to acid sulphate soils , natural resources sensitivity and natural hazard mapping. These must remain in the new Local Plans.

In addition consideration must be given to creating a specific heritage conservation zone for Heritage Conservation Areas and to reinstate previous provisions requiring consent authorities to consider heritage impacts of proposed development in the vicinity of heritage items, rather than this being optional.

First and foremost there should be equitable rights between developers and the community and strict and defined limits on development outside established strategic planning processes.

**Transparency and Accountability**

The Planning Bill seeks to prevent third party environmental appeals or judicial review proceedings, which are contrary to the NSW Government's statements about improving accountability and transparency in the NSW Planning system.

The Planning Bill severely limits the circumstances in which community members can initiate merit review proceedings or use the open standing provision to remedy breaches of the Act.

The Planning Bill does not address the concerns raised by the ICAC in its submission on the Green Paper. The Planning Bill ignores the ICAC concerns and concentrates the powers in the Minister and Director- General of Planning and along with the highly problematic increased flexibility for decision makers in deciding plans, this greatly increases opportunities for corruption in planning and development decisions. This also erodes the role of local government and that of an elected council and goes directly against the promises of the O'Farrell government to "*return planning powers to the community"*.

The O'Farrell government could well be accused of betraying the residents and community of NSW in not making good the Liberals repeated election promise to *"pledge to return local planning controls to local councils"* (letter to the Ku-ring-gai Residents Alliance 18 August 2009)

**Review and Appeal Rights**

The draft Planning Bill plans to remove current third party merit appeal rights to those people objectors of objectors of designated development (except in circumstances where there has been a public hearing of the Planning Assessment Commission). As recommended by the ICAC, third party merit –based appeal rights must be available in relation to all developments, including State Significant Development. If we are to be a democratic society, there should also be the right for any person to go to the Land and Environment Court and seek judicial review in relation to all of the provisions of the Planning Bill.

The draft Planning Bill contains a provision for the exclusion of legal proceedings which have the potential to limit the circumstances in which those appeal rights can be used, and that proponents are provided with expanded review and appeal rights with respect to rezoning applications and application for strategic compatibility certificates.

The Community Participation Charter is not enforceable or reviewable. The community must has an assurance that the Charter will be reviewable and enforceable and that the Minister will not use his/her powers to override it.

**Protection of the Environment**

The wording *having regard* to environmental and social considerations in Strategic Planning Principle No 1 in the Planning Bill part 3 is not strong enough to ensure adequate consideration of environmental and social issues. We are concerned the wording *having regard* will not have any legal standing in the Planning Bill.

The wording of Strategic Planning Principle No 10 in the draft Planning Bill Part 3 implies that local planning controls should not affect the financial viability of development, thus undermining controls designed to protect the environment, heritage and community amenity.

The statement in the draft Planning Bill (4.19 (2) (d)) *in determining and application…a consent is to take into consideration…the public interest, in particular whether any public benefit outweighs any adverse impact* has the potential to undermine environmental and heritage protection, as well as residential amenity.

**Environmental Impact Statements**

The new planning system does not ensure the nexus between the developer and the environmental consultant, in maintaining integrity of environmental impact assessment, is not at the risk of bias, undue influence and unethical practises.

There should be mandatory accreditation of environmental consultants who prepare Environmental Impact Assessment (EIS). Consultants should be required to assess cumulative impacts of proposals, the potential impacts of feasible alternatives and climate change impacts.

The EIS decision making processes must be strengthened to be able to reject consultant's reports which are unsatisfactory or incomplete. Public authority self- assessment must be replaced with arms-length approaches.

**Existing Environmental Protections**

The White Paper does not ensure that new statutory instruments and local plans will keep existing environment protections are retained or be improved or remain legally enforceable in the new Planning System.

Existing areas of environmental and heritage significance should be afforded the same level of protection under Local Plans as is currently available under the Standard Instrument and Exempt and complying Codes.

**Environment Zones**

We do not support the proposal to reduce the number of environment zones, as environment protection zones have been instrumental in providing important protection for our natural areas in NSW for three decades. These environment protection zones are important for the conservation and management of the environment and natural resources.

We do not support E3 and E4 zoned land as rural and residential respectively. In Ku-ring-gai the E3 zone are for lands of hazard or severe bushfire prone land. The E3 zone as a rural zone will reduce the effectiveness of the range of objectives which have been included in the Ku-ring-gai LEP and draft LEPs to limit the type of development permitted in that zone e.g. child care centres.

The RE2 zone should also be retained. Ku-ring-gai has zoned golf courses RE2. It would be completely inappropriate for such sites to be subjected to broad commercial uses that would be permitted in a commercial centre.

Proper identification and management of environment protection zones is essential for the proper conservation and management of biodiversity and natural resources.

It is important that we have robust and reliable assessment of environmental values, identification and protection of high conservation value, including endangered ecological communities, critical habitat and wildlife corridors. These environmentally sensitive areas must be given proper protection through appropriate zoning that restricts or prohibits inappropriate development.

**Evidence Based Strategic Planning**

If the government is transitioning to upfront evidence based strategic planning the community needs to assured that there will be a consistent and reliable base data set across NSW, and to make this data and information available to all users of the NSW Planning System.

The White Paper provides no clear indication of what data and evidence will be required to underpin effective strategic planning.

**Urban Design**

The new Planning System is promoting standard, rather than contextual controls i.e. 'tick the box' developments with no local and limited Council input.

**Private Certification**

Under the new Planning System developers will still be allowed to employ private certifiers to approve their proposals when there has been considerable community concern and criticism about this flawed practise. We believe the private certification system has fundamental flaw at its core – in that the private certifier is selected and paid for by the developer. Consequently the private certification system is currently seen for allowing and promoting bias and 'corruption' of the development processes. A system where the regulated pays the regulator, will always be open to 'corruption of processes' and malpractice.

We believe the private certification system needs to be closely monitored and audited. It should not be left to residents and local communities to monitor and be the watchdogs/ whistle blowers for reporting private certifiers who are breaching planning and building regulations.

We believe if the private certification system is to be fixed to prevent "corrupt practises" from occurring there must be a system planned to ensure developers cannot develop 'relationships' with certain certifiers. There is a need for a system in which developers have to be assigned a certifier from a common pool rather than choosing them directly. As in the current system it is well known developers form relationships with certain private certifiers and clearly expect particular outcomes.

The practise must also be stopped where a developer whose non complying development is rejected by a private certifier can bypass the local community by applying to a council for a "variation certificate" to approve a non-compliant element of the development.

Private certifiers should not be able to assess development proposed in heritage conservation areas or for State or locally heritage listed items.

**Housing Affordability**

The new Planning System does not contain practical mechanisms for addressing housing affordability. The NSW Government appears to be hoping this will be addressed simply by increasing housing supply. This is not satisfactory planning. Targets needs to be set in strategic plans to deliver and achieve affordable housing.

It will be important for all existing public housing to be retained and added as the need arises.

**Risk of Corruption**

The draft Planning Bill is investing too much power in the Minister to be able to amend any strategic plan at any point in time and too much power in the Director General who can issue Strategic Compatibility Certificates to developers, even if the proposed development does not comply with the local plan and ignoring the ICAC "corruption risk "concerns.

The significant statutory powers invested in the Director General of Planning prevent the Minister from dismissing a Director General on the nature of his/her decisions. This must be changed in the public interest.

The community has lost faith in the planning system following years of the Labor's dictatorial and high handed planning. The only way the trust will be restored, is a system that is built on equity, transparency and fairness to all. The O'Farrell White Paper is a promoting a planning system with a top down and dictatorial approach to planning that relegates residents and communities at the bottom

of the tier of planning control and hands over much of the power to the Minister, planning bureaucrats and vested interests. The White Paper is unbalanced and unfair and with real concerns of "corruption risks" associated with it.

**Heritage Protection**

The roles and power of the Heritage Council and the legal effect of the Heritage Act being changed to allow state heritage laws to be "turned off" or undermined in the new Planning System will in effect, make the Heritage Act powerless. The powers and role of the Heritage Council and the legal effect of the Heritage Act must be restored. The Director General of planning must not be able to issue General Terms of Approval in the place of the role of the Heritage Council and the Office of Environment and Heritage and to do so will threaten the protection of State significant heritage assets.

The new Planning System proposes unlimited potential to approve development exceeding controls, and increased restrictions on refusing development which will not only undermine current incentives to conserve heritage, but also increase financial pressure to demolish heritage for redevelopment profits.

Complying and code assessable development must be prevented within heritage conservation areas and within the vicinity of a State or local heritage listed item or places with Interim Heritage Orders, to allow for proper assessment and identification of heritage impacts. Any consultant who prepares heritage studies must be objectively accredited and randomly selected by an independent authority that is not associated with the proponent. This should also apply to consultant who prepares studies such as environmental, traffic and other studies to assess impacts of development for a proponent.

The Heritage Act must not be turned off for State Significant Developments and the role and powers of the Heritage Council and the legal effect of the Heritage Act are reinstated to what was originally intended in 1977.

**Infrastructure**

There no requirement in the planning Bill for supply of infrastructure to meet the level of demand created by new homes and jobs, at the same time they need them. Before any additional development is approved in urban areas, infrastructure plans for upgrading local existing infrastructure must be planned and approved and that ongoing analysis of the cumulative impacts of development on existing infrastructure be assessed.

There no explicit powers to delay or refuse consent on the basis of an infrastructure impact assessment, only powers to impose contributions.

Local councils will only collect contributions for essential community facilities; even though community facilities have not been defined (similarly "education establishments" are not defined).

The provision of social infrastructure services such as child care, pre-school and out of school hours care etc. will be able to fall through the cracks of both local and regional infrastructure funding. The mechanism of collecting contributions and building infrastructure through local and regional infrastructure plans will not consider for whether these local and regional plans are fit for purpose in determining how many schools are enough, how many childcare centres are enough etc.

**Final comment**

We recommend that the Planning Bills be audited by the ICAC before they are finalised and legislated, and that all recommendations to minimise the risk of corruption be adopted and the Bills changed accordingly.

We hope that our submission will be read and taken into regard and acted upon and that the White Paper and Planning Bills will be amended to take into account all the recommendations from the Better Planning Network and affiliated member groups, The EDO NSW, The Heritage Council, The National Trust (NSW) and the Nature Conservation Council. Thank you.

Yours sincerely,

Kathy Cowley
PRESIDENT

cc The Premier of NSW, the Hon Barry O'Farrell MP, Member for Ku-ring-gai
cc The Hon Jonathan O'Dea MP, Member for Davidson
cc Mayor of Ku-ring-gai and Councillors