FOKE • P.O. BOX 403 • KILLARA 2071 • TEL (02) 9416 9007
www.foke.org.au Est. in 1994

FRIENDS OF
KU-RING-GAI
ENVIRONMENT INC.

Minister for Planning, Minister for Housing &
Special Minister for State
The Hon Anthony Roberts MP
GPO Box 5341
SYDNEY NSW 2001

30 March 2017

Dear Minister Roberts,

RE: Proposed NSW Planning Law changes and updates 2017

Thank you for giving us the opportunity to provide our comments on the proposed changes to the Environmental Planning and Assessment Act 1979 (EP&A Act).

Since the Government withdrew the 2013 Hazzard Planning Bills the Government has opted to make a series of subsequent changes and updates to the EP&A Act rather than starting afresh by involving the community and stakeholders and engaging in wide community consultation regarding a new blueprint for Planning in NSW.

The Minister and State Government has turned its back on the election promise made by former Premier Barry O'Farrell MP on behalf of the Liberal Party, to ensure the community have a greater say and role in planning for their area. Rather than bringing the community with the Government, the Minister has instead opted for the old 'top down' bureaucratic approach, consult only once you have made the decisions, an action which failed to win the public over with the Hazzard Planning Bills in 2013 and why is was withdrawn.

While there are some commendable updates to the legislation such as a proposal to enhance community participation; promote strategic planning; and increase probity and accountability in decisions making, there are still major concerns that the Government has not adequately addressed.

The stated objective of the 2017 updates is to 'promote confidence in our state's planning system' by:

- Enhancing community participation
- Promoting strategic planning
- Increasing probity and accountability in decision-making
- Promoting simpler, faster processes for all participants.

In order to achieve the first 3 objectives and not have these subsumed by fast-tracking inappropriate development, the following document covers the areas that FOKE considers should be amended or need to be included.

Overall, it must be emphasised that speed of approvals is NOT an indicator of sound assessment and decision-making.

New Objects of the Bill

Current objects to encourage land for public purposes, utilities, community services and facilities are removed. These need to be re-instated.

Ecologically Sustainable Development:

The Act's current object to 'encourage ecologically sustainable development' (ESD)' has been watered down to 'facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations'. The ESD object should be rewritten to 'achieve' ESD by 'implementing' ESD principles in decision-making, or acting 'consistently' with them. It should refer to 'effectively integrating short and long term considerations, not simply 'relevant' considerations, not unlike the wording within the Biodiversity Conservation Act 2016 (NSW). In this way, environmental factors would be highlighted in any decision-making rather than only included as a reference.

FOKE believes we are the guardians of our environment for future generations, and as such a consideration of 'equity' should be included to take into account the longer term impacts in favour of fairer outcomes, as is consistent with ESD progressive generational principles.

As per our 2013 Planning Review submission, we recommend that ESD be the over-arching Object of the Act, not one of many. This primary object needs to be have decision-making consistent with ESD principles.

Other Objects that need to be included that are currently omitted are:

- Objects for the protection of habitats of native animals and plants are omitted and need to be included. The NSW Government needs to set clear long-term goals to protect the state environment. All planning bodies need to consider environmental and other impacts (as required to do under s. 79C of the Act); to establish and pursue complementary policies; or to know if planning laws and policies are working, and what needs to be amended.

- There is no new object to address climate change, as evidenced by increased beachfront erosion and more intense storms, and respond to NSW Government's recent target of net zero emissions by 2050. This object should be given effect at key decision points such as strategic plan making and development determinations. Mitigation actions should be prioritised where possible, noting that reducing emissions now will also reduce the costs of adaptation later.

The Object to promote *'timely delivery of….housing opportunities'* reflects NSW Planning's push for faster processing of development applications and expanding the number of complying developments. This is at odds with the good planning outcomes, including the new objects to promote 'good design' and the management of natural and built heritage.

Community Participation

- FOKE supports the adoption of community participation plans and principles. However, the provisions of a community participation plan are only mandatory if the provision is identified by the plan as mandatory. Mandatory requirements will include minimum public exhibition and notification periods, giving reasons for decisions, and other matters identified in individual plans.

Importantly, there is no guarantee the principles will be reflected in a community plan, as planning authorities are only required to consider the principles when formulating the plan, not implement them or show how their plan complies.

This is a good move that needs more work to ensure a community participation plan is enforceable and effective. ***Plan obligations should be mandatory by default.***

- The exhibition periods for public exhibitions will be a minimum of 28 days for State Significant applications, and only 14 days for smaller developments with the maximum 45 days for draft regional and district plans.

  What is omitted is minimum timeframes for proposed SEPPs and amendments. These should not be only at the Minister's discretion. Similarly, exhibition requirements for any form of strategic plan should include the requirement for due consideration to be given to public submissions before finalisation, and the reasons for divergence to not only be given, but community comment and appeal mechanisms to be included.

- Decision makers within Councils will be required to give public notice of the reasons for certain decisions made with regard to development approvals, including how the community views were taken into account. However, it is unclear what the community recourse is to appeal such a decision.

  This is a good step in building transparency, however, the process must be seen as authentic and truly accountable. The community again must be given full disclosure of information with a mechanism for comment or appeal.

  It is unclear, however, why reasons for decisions on infrastructure (approved under Part 5 of the Act) would only be required in rare cases where an Environmental Impact Statement is prepared. This should be included in the above.

- Importantly, this prior requirement does not apply to exhibiting or amending State Environmental Planning Policies (SEPPs). It is within the SEPPs that the State Government allows the greatest number of complying developments, such as the Draft Medium Density Code to allow medium density housing such as terraces, townhouses or small blocks of flats as complying development within R2 residential zones. ***This community notification, exhibition and consent must apply to all development applications under a community engagement plan. To exclude the most intrusive and contentious areas from such a regime is nothing short of underhanded.***

Local Strategic Planning Statements

Although local strategic planning statements can draw on Community Strategic Plans as developed by councils, the Planning Department (or the Greater Sydney Commission) must endorse each council's statement before it is published. ***This poses a real risk of top-down determinism, where local preferences are again completely subservient to State priorities, and must be amended or removed.***

The community's role in preparing local statements should be clarified. There are no mandatory community participation requirements relating to the statements in the draft Bill.

Standard Development Control Plan format

Any change towards a standardised DCP format must ensure that the local environment, biodiversity sensitivities and local preferences are not abandoned, or over-ridden by State priorities.

Early consultation with neighbours

We agree that there are many advantages to encouraging consultation in the early stages of a development. With the current community mistrust of NSW Planning and development consents, it is essential that this is not just considered a 'tick-the-box' exercise with foregone conclusions. More information is required as to how a constructive, independent and responsive consultation is delivered.

Early consultation is not just relevant to major developments, but would also benefit complying development (now expanding significantly) and other forms of local development.

Efficient approvals and advice from NSW agencies (concurrences)

FOKE does not support the proposal to empower the Planning Secretary to take the place of environmental agencies including the Office of Environment and Heritage (OEH) or the EPA. Such a move would concentrate too much decision-making power in the Planning Department where expert environmental advice or co-approval of decisions is warranted.

This amendment to the Bill would permit the Planning Secretary to determine which agency should prevail in the event of a conflict, without reference to any decision-making criteria. Timeframes already apply to agencies with concurrence roles, especially when additional information is required.

A proposal that would allow the Planning Secretary to make arbitrary decisions to push through with the approval without expert information is not supported. This amendment could have many unintended consequences overriding good policy requirements in a provision that prioritises speed of approval over rigorous decision-making processes.

Concurrences and referrals

Any review of concurrences should be consultative, transparent, evidence-based and clearly reasoned. The review should also consider the effect of changes to concurrences arising from the Biodiversity Conservation Act 2016. There would be particular public sensitivity if environmental concurrences are wound back.

Development Assessment

Limiting misuse of modifications, and considering original reasons

FOKE supports the revision to improve the current misuse of modifications of development consents. Planning Authorities, including Councils, will no longer be able to retrospectively approve a modification to a development consent (where works completed did not meet the development approval). More clarification on how this will operate in the field is still required if it is aimed at encouraging greater compliance with approved development consents.

However, we remain concerned that there the is no limit to the number of times a proponent can apply to modify a project. It is essential that modification approval is as rigorous as the original

approval, as we have seen in Ku-ring-gai, a determined effort by developers to regularly modify the original approval in order to gain more floors, more units, reduced landscaping etc.

We strongly support the proposal to require planning authorities to consider the statement of reasons for the original consent when determining a modification application. Although this will not prevent modifications that lead to overdevelopment by stealth, it will ensure the consent authority is fully aware of the reasoning and intent of the original decision.

Complying Development

Changes to the complying development regime include the requirement that the certifier give notice of such a development to the relevant council and neighbours prior to issue including a copy of the plans and how it meets standards. Currently neighbours are not provided with plans and documentation. However, neighbours still do not have any legal right to make a submission for any amendment or issue they have with such a development. This should be rectified if there is to be community confidence in the complying development regime.

Similarly, larger scale complying developments do not currently require public exhibition for community comment. This similarly needs to be changed.

Though NSW Planning has sought not to go down the path of the detested 'code assessable' development category of the failed 2013 reform proposals, the categories of housing and other complying developments have been expanding ever since.

If NSW Planning is seeking community confidence in its planning regime, this needs to be addressed, including but not limited to:

- Ensuring community engagement on zoning, place and design standards.
- Avoiding cumulative impacts which are all too visible as the consequence of complying development without due consideration of community impact, both visual and amenity based.
- Improving enforcement action and governance of private certifiers to avoid poor quality construction, overdevelopment and design.
- Ensuring leading practice sustainability standards.

Powers and resources for councils

We strongly support changes to empower councils to issue temporary stop work orders in order to investigate whether a development is being constructed in line with the complying development certificate, and to recover costs. This will help to stop unscrupulous developers exceeding standards and benefitting from councils' limited resources to take action.

The introduction of a compliance levy is also strongly supported. The proper functioning of the complying development pathway requires councils, as the enforcement body, to be appropriately resourced to undertake monitoring and enforcement activities. In FOKE's view, Council resourcing has not kept pace with government expansion of complying development.

Local Planning Panels

A number of councils currently use Local Planning Panels for complex development approvals including Ku-ring-gai Council.

The way they are to operate is recommended to be standardized. However, the draft Bill does not require the panel members to have a range of expertise to bring to such a panel. Similarly, how will

community representatives be identified (and should these include elected councillors), how to ensure independence of panel members to ensure that they act in the public interest. ***These are oversights that need to be addressed.***

Independent Planning Commission (IPC)

In its new form the former Planning Assessment Commission, will no longer have a review role in assessing State Significant Development. But otherwise appears much unchanged.

The area of concern is that Public hearings will continue to remove merit appeal rights to the Land and Environment Court, which is a much more rigorous review and assessment of a development than through the Commission.

It is about time that following a public hearing, if not satisfied, the public should be allowed to commence a merit appeal to the Land and Environment Court (as recommended by ICAC). Existing appeal rights will be curtailed if the Commission holds a 'public hearing' on a project when directed by the Minister. Concurrently, the Bill proposes to extend developers' rights to internal review of refusals or conditions on large or complex projects.

***This exacerbates the existing difference in rights between developers and residents which reduces public confidence in NSW Planning and makes decision-making less inclusive and less robust*.**

In line with ICAC's recommendations, community access to the Court as an impartial expert body should be facilitated, not curtailed. Further, the Bill should not expand internal reviews to major projects, to the exclusion of local participation.

Code-based assessments

Though we support the proposal to require certifiers to notify direct neighbours and council prior to issuing a complying development certificate in metropolitan areas, we remain concerned with the ever-expanding list of code-based developments. This increasing mode of developments result in detrimental cumulative impacts on the environment and the amenity of residents.

Issues occurring from lack of governance or enforcement of private certifiers, lack of leading practice sustainability standards and meaningful engagement with the community on the impact of these developments are not addressed in this Bill.

State Significant Developments

- Give legislative effect to measures to improve the quality of environmental impact assessment (EIA) for major projects. Requiring professional accreditation of environmental consultants and agency staff, and a process of arms-length peer review for significant EIA reports. These and other parallel policy changes are critical to public assurance, but the draft Bill does not enact them.

- ***Strengthen the role of expert environmental agencies in assessing major projects.*** Ongoing exemptions for major projects from inter-agency referrals and 'concurrent' approvals do not provide that transparency, or public assurance that projects with the greatest impacts receive the greatest scrutiny. Nor does the forthcoming Biodiversity Assessment Method, which will be central to environmental impact assessment in the Act.

- Limit discretion to allow 'serious and irreversible' impacts of major projects; 'discounting', 'variation' and supplementary measures instead of rigorous offsetting. Serious or irreversible impacts must require refusal, and OEH concurrence for any redesign.

- Ensure 'Part 5' activities (such as local infrastructure) are subject to serious or irreversible impact assessment. Mining and gas exploration should no longer be assessed under Part 5, but require consent under Part 4 like other private development.

- Discontinue Part 3A completely. We strongly support discontinuing the Part 3A 'transitional' arrangements. However, the intent and implications of regulations to preserve 'outstanding' (approved) Part 3A concept plans must be clarified. There should be no allowance for a two month window within which to make modifications. This amendment should have effect immediately. Future modifications should be assessed on whether the project is substantially the same as the development originally approved (as for all other section 96 modifications) instead of 'as modified'. If it is not, a new development application should be prepared.

- Ensure equitable access to justice. We do not support the expansion of developers' rights to seek internal reviews of decisions about complex 'integrated' developments or major projects. This will allow closed-door negotiations on controversial projects at the expense of local participation. ***Unfortunately, the draft Bill reinforces existing disparities, so that community appeal rights continue to be curtailed while proponents' review rights continue to be expanded.***

Elevating the role of Design

We support references to good design and heritage protection (including Aboriginal cultural heritage) in the revised objects of the Act. The objects should clarify that promoting 'good design' is intended to create healthy, inclusive, adaptable and sustainable communities.

The object must be reinforced by high standards in state building codes and sustainability standards that drive continuous improvement (through BASIX, the Building Sustainability Index, and beyond – such as reducing building waste and greenhouse emissions).
Good design also means recognising and prioritising the role of 'green infrastructure' such as urban bushland, parks and gardens, waterways, cycleways, street trees and biodiversity corridors.

Conclusion

These proposed changes to the EP&A Act aim to increase community participation to help influence high level principles and strategies but at the expense of more restrictive and less community rights at the local and neighbourhood level. This is where the previous 2013 Hazzard Planning Bills similarly failed, as it is at the local community and neighbourhood level where a greater participation is sought on development issues. This is what the community was promised by former Premier Barry O'Farrell and the Liberal Party, but has not been delivered. Governments who fail to listen will fail in the long term.

As a community group which represents members throughout Ku-ring-gai, we have consistently communicated over a number of years to Ku-ring-gai's MPs and the State Government about the loss of public trust in the NSW Planning system, which puts developers ahead of community. We require a planning system that is transparent, accountable and robust. We do not believe this Bill will restore public confidence in NSW without considerable changes and amendments.

It is to be hoped that the State Government will listen to community concerns and amend the Bill accordingly.

Yours faithfully,

Kathy Cowley
PRESIDENT

cc The Premier, The Hon Gladys Berejiklian MP
cc Mr. Jonathan O'Dea MP Member for Davidson, Parliamentary Secretary to the Premier and Treasurer
cc Mr. Alister Henskens SC MP Member for Ku-ring-gai, Parliamentary Secretary to the Minister for Finance.
cc The Hon. Paul Fletcher MP, Federal Member for Bradfield and Minister for Urban Infrastructure
cc Mayor and Councillors Ku-ring-gai Council