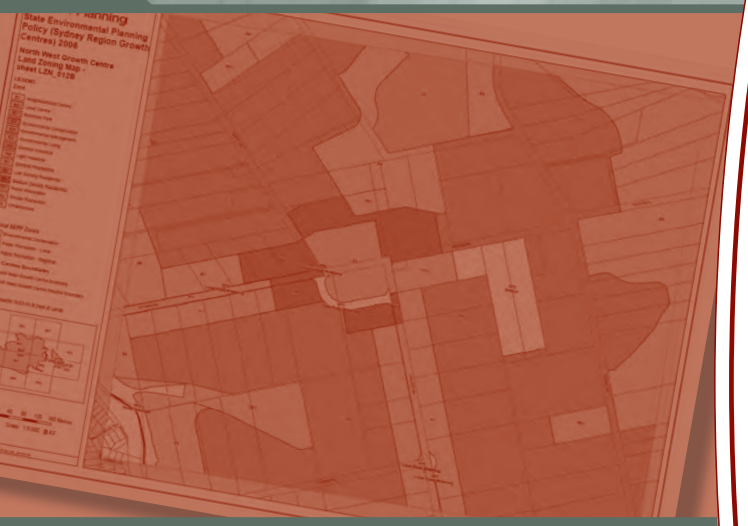

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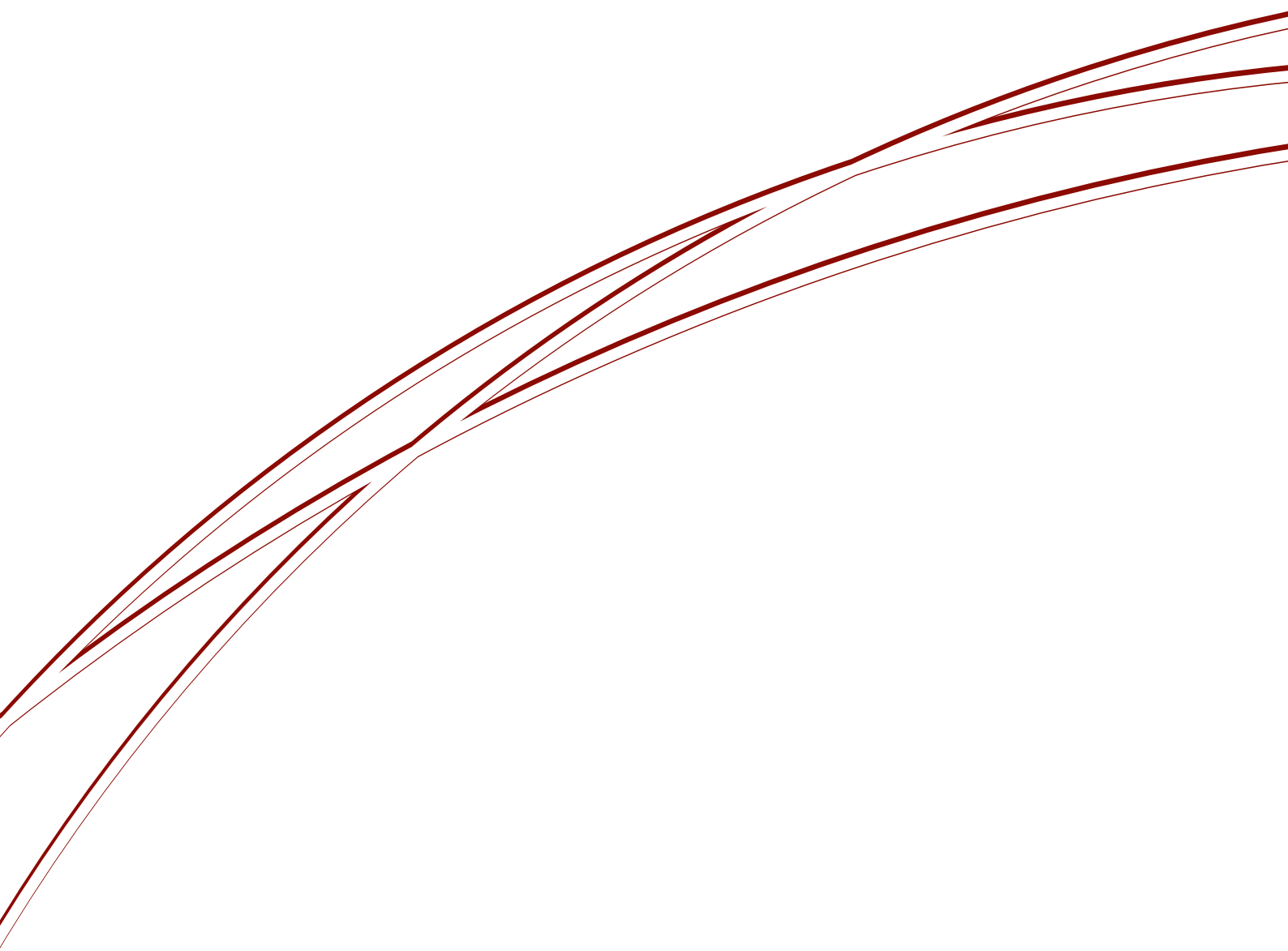
INDEPENDENT COMMISSION AGAINST CORRUPTION

ANTI-CORRUPTION SAFEGUARDS AND THE NSW PLANNING SYSTEM

ICAC REPORT

FEBRUARY 2012



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Public sector organisations are welcome to refer to this publication in their own publications. References to and all quotations from this publication must be fully referenced.

ICAC

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Chapter 1: Introduction and overview

The *Environmental Planning and Assessment Act 1979* ("the EP&A Act") was passed by the NSW Parliament on 21 December 1979 and came into force on 1 September 1980. The EP&A Act, combined with the creation of the Land and Environment Court at the same time, changed the way environmental and planning matters were handled in NSW through the establishment of this new body of law.

Since its inception, the EP&A Act has been continually revised and updated. It has also, since its inception, been responsible for creating subordinate regulation, principally in the form of state and local planning instruments.

A by-product of the constant, and at times significant, amendments to the EP&A Act has been a growing public perception of instability within the NSW planning system. There has also been a similar growing public perception, born out of the large amount of subordinate regulations attached to the EP&A Act, that the current planning system is unwieldy, overly complex and lacking in transparency.

In July 2011, the NSW Government announced a major review of the current planning system, its intent being to create new state planning legislation. The first phase of this review involved a "listening and scoping phase" chaired by two former NSW ministers. In December 2011, an issues paper[1] was released based on the outcomes of this first phase.

The creation of a new planning system provides opportunities to incorporate and integrate corruption prevention safeguards to a greater degree than is currently in place. Improving on the transparency, accountability and openness in the NSW planning system would do much to reinstate confidence in the governance of planning in NSW. This, however, requires imagination and foresight to avoid the regulatory gridlock that is typically associated with controls to prevent corruption.

1 Moore, Tim, and Dyer, Ron, NSW Planning System Review Joint Chairs, *The way ahead for planning in NSW? Issues Paper of the NSW Planning System Review* (December 2011).

Our functions

In addition to its investigative role, the Independent Commission Against Corruption ("the Commission") has a principal function to cooperate with other public authorities to review laws, practices and procedures in NSW with a view to reducing the likelihood of the occurrence of corrupt conduct. Among its other principal functions, the Commission has a role to instruct, advise and assist public authorities to eliminate corrupt conduct, and to enlist the support of the public in combating corrupt conduct. These functions are contained in section 13 of the *Independent Commission Against Corruption Act 1988*.

In producing this report, the Commission is communicating its view on the key anti-corruption safeguards that ought to underpin the NSW planning system in accordance with these functions.

Planning, corruption and the Commission

The Commission has had a long history of involvement with exposing likely and actual corrupt conduct in the NSW planning system. Since it commenced operations on 13 March 1989, the Commission has produced 30 reports exposing likely and actual corrupt conduct involving the NSW planning system. This history is underscored by the Commission's:

- first investigation (15 March 1989) on the conduct of persons involved in the making, processing and determination of development applications within Waverley Council[2]
- first published report (October 1989) on an alleged attempt to solicit a large bribe in order to

2 Independent Commission Against Corruption (ICAC), *Annual Report to 30 June 1989*, September 1989, p. 41.

facilitate a development approval from Sydney City Council.[3]

The Commission has also published numerous reports concerning the potential for corruption within the NSW planning system and provided recommendations aimed at eliminating or minimising the risk of corruption. Most notable of these are:

- *Corruption risks in NSW development approval processes* (September 2007)
- *The exercise of discretion under Part 3A of the* Environmental Planning and Assessment Act 1979 *and the State Environmental Planning Policy (Major Development) 2005* (December 2010).

The general principles outlined in these reports remain relevant to the review of the NSW planning system.

Complaints provided to the Commission regularly relate to the NSW planning system. The Commission's *Annual Report 2010–2011* identified the "development applications and land rezoning" workplace function as receiving the second highest number of public complaints concerning possible and actual corrupt conduct.[4] This ranking is not unusual. Over the last 10 years, statistics in the Commission's annual report show that workplace function consistently ranks within the top five most complained about in NSW.

This high ranking in complaint numbers, however, does not directly correlate with evidence of corruption. Many complaints received by the Commission are from members of the public seeking to voice their unhappiness or unease with a planning decision. Nevertheless, the number of complaints suggests that fundamental issues exist that may potentially undermine confidence in the governance of planning in NSW.

3 ICAC, *Report on investigation relating to the Park Plaza site*, October 1989.

4 ICAC, *ICAC Annual Report 2010–2011*, September 2011, p. 20.

Key corruption prevention safeguards

In this report, the Commission puts forward what it believes are six key corruption prevention safeguards that would reduce the frequency of corruption if integrated into the NSW planning system.

1. Providing certainty

Historically, developments have been assessed against planning instruments, which clearly articulate up front the set of "rules" that apply to a proposal. In recent years, there has been an increasing tendency towards departures from the stated requirements. The existence of a wide discretion to approve projects, which are contrary to local plans and do not necessarily conform to state strategic plans, creates a corruption risk and community perception of lack of appropriate boundaries. A re-emphasis on the importance of strategic planning, clear criteria to guide decisions and a consistent decision-making framework will help address this issue.

2. Balancing competing public interests

The planning system should recognise the spectrum of competing public interests, including environmental, social and economic outcomes. If it is the intent of the planning system to prefer a particular public interest over another, this should be clearly articulated in the legislation to avoid perceptions of undue favouritism.

3. Ensuring transparency

Transparency is an important tool in combating corruption and providing public accountability for planning decisions. A transparent planning system ensures the public has meaningful information about decision-making processes as well as being informed about the basis for decisions.

4. Reducing complexity

A straightforward regulatory structure assists in the detection of corrupt conduct and acts as a disincentive for individuals to undermine the system. The risk of error, which can provide a convenient cloak for corrupt conduct, is also reduced when established processes are clearly defined and understood.

5. Meaningful community participation and consultation

Meaningful community participation in planning decisions is essential to ensuring public confidence in the integrity of the system. Community involvement in planning outcomes includes the public exhibition of planning instruments and development proposals as well as planning authorities giving adequate weight to submissions received as part of this process.

6. Expanding the scope of third party merit appeals

Under the EP&A Act, there is a disparity between objector and applicant rights on the issue of merit appeals. Merit appeals provide a safeguard against biased decision-making by consent authorities and enhance the accountability of these authorities. The extension of third party merit appeals acts as a disincentive for corrupt decision-making by consent authorities.

This report examines each of these key safeguards and provides particular examples of corruption risks within the context of pre-approval processes and rezonings. The examples are not intended to be an exhaustive list.

The Commission has also made a number of recommendations that support the key safeguards. The recommendations are directed at the NSW Government and the NSW Planning System Review members, and are made in the context of the development of new planning legislation. The adoption of the recommendations will ensure the fundamental steps for a corruption-resistant planning system are well established and maintained.

List of recommendations

Recommendation 1

That the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective.

Recommendation 2

That the NSW Government makes it mandatory that major strategic policy documents are considered during the making of planning instruments.

Recommendation 3

That the NSW Government continues to ensure that adequate oversight safeguards are in place for the assessment and determination of development applications that propose prohibited uses.

Recommendation 4

That the NSW Government introduces changes to voluntary planning agreements that are consistent with those proposed in the yet-to-commence provisions set out in Schedule 3 of the *Environmental Planning and Assessment Amendment Act 2008*.

Recommendation 5

That the NSW Government introduces a system of continuing professional development for government planning practitioners.

Recommendation 6

That the NSW Government ensures that the new planning legislation clearly articulates its objectives and provides guidance on the priority (if any) to be given to competing objectives.

Recommendation 7

That the NSW Government ensures that its system for assessing and approving developments of state significance provides adequate opportunities for competing public interests to be considered.

Recommendation 8

That the NSW Minister for Planning and Infrastructure considers adopting a protocol to deal with situations where the minister disagrees with a departmental recommendation concerning a planning matter. The protocol should ensure that any decision by the minister to adopt an alternative approach, and the reasons for such a decision, are clearly documented and made publicly available.

Recommendation 9

That the NSW Department of Planning and Infrastructure produces and maintains a community guide dealing with development processes.

Recommendation 10

That the NSW Government takes steps to reduce the complexity of the planning system, including rationalising the number of control documents applying to a single parcel of land.

Recommendation 11

That the NSW Government requires community consultation to be undertaken and public submissions to be given due consideration before the release of a major strategic planning document.

Recommendation 12

That the NSW Government mandates that public submissions are to be considered by a planning authority following the exhibition of a draft voluntary planning agreement.

Recommendation 13

That the NSW Government requires planning instruments of state significance to be subject to community consultation, except where there are adverse environmental, social or economic impacts and where these adverse impacts outweigh the benefits of community consultation. Where community consultation has not been undertaken, then the specific reasons for not undertaking community consultation should be made publicly available when the planning instrument is made.

Recommendation 14

That the standard community consultation requirements for draft local environmental plans be given statutory backing.

Recommendation 15

That the NSW Government ensures that planning authorities are required to provide regular information and updates to the public about development applications under assessment, including any significant changes made to an application.

Recommendation 16

That the NSW Government considers expanding the categories of development subject to third party merit appeals to include private sector development that:

- is significant and controversial
- represents a significant departure from existing development standards
- is the subject of a voluntary planning agreement.

Involvement of the Department of Planning and Infrastructure

The NSW Department of Planning and Infrastructure ("the department") was provided with an earlier draft of this report for comment in early October 2011.

The Commission appreciates the efforts of the department in providing its feedback.

Chapter 2: Providing certainty

Issue

Various elements of the NSW planning system are highly discretionary. Excessive discretion in the planning system creates uncertainty about planning rules and how decision-makers apply such rules when determining development and planning proposals.[5]

The lack of certainty surrounding planning rules and planning decisions can lead the community to believe that controversial decisions have been corruptly made. A system that is, or is widely perceived to be, conducive to corrupt conduct can reduce public confidence in the integrity of state and local government.

Discussion

Wide discretion

The NSW planning system is a recognised area of the law. Planning law in NSW has been established via the EP&A Act, its Environmental Planning and Assessment Regulation 2000 ("the Regulation") and planning instruments, and by the establishment and operation of the Land and Environment Court.

A core belief in our society is that the law should not be arbitrary; the law should be certain, general and equal in its operation. Sir Ninian Stephen, former governor general of Australia, identified this as the last of four principles of the rule of law.[6] Legal certainty arises from the regular, open and predictable application of the rule of law according to these principles and, so, delivers confidence to society.

In planning, there has long been a conflict between legal certainty and a desire for flexibility to adapt to unusual or unforeseen circumstances. Flexibility has typically been delivered by providing greater discretionary powers to decision-makers. Such discretion is often not subject to a clear set of criteria.

State Environmental Planning Policy No.1 – Development Standards (SEPP 1)[7] and the former Part 3A of the EP&A Act ("the former Part 3A") are the most obvious examples of significant discretion available to decision-makers in the NSW planning system. The broad discretion available under the former Part 3A system and the lack of corresponding safeguards were well documented by the Commission in its 2010 report.[8]

SEPP 1 allows an applicant to lodge an objection to development standards, which typically include building heights and floor space ratios. SEPP 1 requires the consent authority to be satisfied that compliance with a particular standard is "unreasonable" or "unnecessary" or tends to hinder the attainment of the objectives specified in the EP&A Act. Despite this, there has been a tendency for SEPP 1 to be used beyond the scope for which it was originally intended. This has resulted in development standard creep and the use of SEPP 1 as a defacto plan-making device.

The inappropriate use of SEPP 1 has been a feature of past Commission investigations involving corrupt conduct. The attempted use of SEPP 1 to secure approval for an eight-

5 The discretionary nature of the NSW planning system has been noted by the Commission in past reports, including *Corruption risks in NSW development approval processes* (September 2007) and *The exercise of discretion under Part 3A of the* Environmental Planning and Assessment Act 1979 *and the State Environmental Planning Policy (Major Development) 2005* (December 2010).

6 Rule of Law Institute of Australia, *The Principles of the Rule of Law*, http://www.ruleoflawaustralia.com.au/principles.aspx (Accessed 18 July 2011, 11.55 am).

7 SEPP 1 is to be phased out as part of the introduction of the Standard Instrument (Local Environmental Plans) Order 2006. The standard instrument contains its own variation clause.

8 ICAC, *The exercise of discretion under Part 3A of the* Environmental Planning and Assessment Act 1979 *and the State Environmental Planning Policy (Major Development) 2005* (December 2010).

storey building on a site with development standards that stated no more than four storeys could be accommodated was central to the corruption found in the 2002 Rockdale City Council investigation.[9] It was also central to the corrupt approvals issued for development in the 2008 Wollongong City Council investigation.[10]

SEPP 1 is not alone, as there are many areas in the NSW planning system that provide considerable discretion. These are discussed elsewhere in this chapter.

The Commission made the following comment on discretion in its December 2010 report on the former Part 3A:

> *It requires no great leap of faith to suggest that anyone who has discretion to grant development approval, to rezone or to depart from stated requirements – whether they are elected officials or professional officers, and regardless of their level and political persuasion – is at risk of corrupt approaches. The greater the departure from the previous norm, the greater the corruption risk.*[11]

Investigations conducted by the Commission involving the NSW planning system have aptly demonstrated the corruption risks of wide discretion.[12] This is partly because of the huge windfall profits that can result from a change in planning rules.

The Commission acknowledges that positive planning outcomes can be achieved by adopting a flexible approach to planning matters provided appropriate safeguards are in place. Consequently, the Commission does not favour abolishing discretion; rather, the Commission has typically found that the most effective means of reducing the corruption risks associated with discretion is to construct safeguards through sets of criteria that are robust and objective.

Recommendation 1

That the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective.

Major strategic planning documents

The NSW Government develops major strategic planning policy documents to reflect long-term planning objectives and to cover issues such as housing supply and coastal protection. These documents include the NSW state plan, regional strategies (for example, the Metro strategy and Lower Hunter Regional Strategy) and sub-regional strategies.

Such strategic policy documents reflect key government goals and, consequently, ought to play an important role in the making of planning instruments and decision-making on development proposals. Yet, these strategic policy documents are prepared outside the legislative framework of the EP&A Act. Consequently, they can be discretionary and have no legal status unless the NSW Minister for Planning and Infrastructure directs that planning proposals be prepared in accordance with a strategy.[13] The December 2011 issues paper contemplates whether strategic plans

9 ICAC, *Report into corrupt conduct associated with development proposals at Rockdale City Council* (July 2002).

10 ICAC, *Report on an investigation into corruption allegations affecting Wollongong City Council - Part Three* (October 2008).

11 ICAC, *The exercise of discretion under Part 3A of the* Environmental Planning and Assessment Act 1979 *and the State Environmental Planning Policy (Major Development) 2005* (December 2010), p. 6.

12 Most recent examples include *Report on an investigation into corruption allegations affecting Wollongong City Council - Part Three* (October 2008), *Investigation into attempts to improperly influence Warringah Council officers* (June 2009), and *Investigation into the corrupt conduct of a Willoughby Council officer* (June 2011).

13 Section 117 of the EP&A Act.

should be statutory instruments that have legal status.[14] This is one option for addressing this issue, which would ensure more certainty for outcomes identified in strategic plans.

Recommendation 2

That the NSW Government makes it mandatory that major strategic policy documents are considered during the making of planning instruments.

Prohibited uses

The EP&A Act allows for two types of planning instruments. The first type is a local environmental plan (LEP), which is designed by local councils or the director general of the department and made by the minister. The second type is a state environmental planning policy (SEPP), which is made by the governor on direction by the NSW Minister for Planning and Infrastructure.

Traditionally, planning instruments establish the controls or rules that future development proposals will be assessed and determined against, including the permissible uses for a site. The NSW planning system has, however, allowed circumstances where a development proposal simultaneously proposes a planning instrument amendment to permit a development to be carried out. The power to amend planning instruments to permit a development that proposes a prohibited use has existed in the EP&A Act since 1996.[15] Although this approach alters the traditional process, it maintains the safeguards of openness and transparency by retaining public involvement in the process and not allowing development proposals to be approved without the planning instrument first being made.

The former Part 3A system represented an even wider discretion by providing for the setting aside of LEPs that prohibited developments without first requiring the planning instrument to be amended. This undermined the legal certainty attached to LEPs. The new system for projects of state significance has addressed this situation by requiring rezoning proposals to remove prohibitions where a project is wholly prohibited under an environmental planning instrument. Rezoning proposals must be determined by the Planning and Assessment Commission along with any associated development application. The same degree of robustness in terms of oversight mechanisms for changes to prohibited uses should be maintained in the new planning system.

14 Moore, Tim, and Dyer, Ron, NSW Planning System Review Joint Chairs, *The way ahead for planning in NSW? Issues Paper of the NSW Planning System Review* (December 2011), pp. 38–39.

15 Div 4B, Part 3, EP&A Act. This division was inserted by the *Environmental Planning and Assessment Amendment 1996* and came into force on 1 August 1996.

Recommendation 3

That the NSW Government continues to ensure that adequate oversight safeguards are in place for the assessment and determination of development applications that propose prohibited uses.

Voluntary planning agreements

A voluntary planning agreement (VPA) is an agreement entered into by a planning authority and a developer. Under a VPA, the developer agrees to provide or fund:

- public amenities and public services
- affordable housing
- transport or other infrastructure.

Contributions can be made through:

- dedication of land
- monetary contributions
- provision of a material public benefit (for example, construction of roads or other infrastructure).

A planning authority can secure contributions in a VPA as part of a development or plan-making proposal. The legislative provisions indicate that the contractual arrangements are to be initiated by the developer and are voluntary; that is, a consent authority cannot refuse to grant development consent on the grounds that a VPA has not been entered into in relation to the proposed development.

The EP&A Act and its regulation, along with circulars issued by the department, provide the only policy framework and information on the circumstances in which VPAs can be considered or accepted. The legislation does not compel a planning authority to prepare a policy document or include information in its contribution plan to provide further information in this regard.

The policy framework for VPAs provides wide discretion and flexibility to planning authorities. A public authority does not need to comply with normal developer contribution practices of ensuring a connection or nexus between the development and the public purpose.[16] Unlike normal developer contribution practices, VPAs can also be used to contribute money to fund a public authority's recurrent expenditure for public amenities.[17]

The removal of nexus and the ability to fund recurrent expenditure on public amenities via VPAs has the potential

16 Section 93F(4), EP&A Act.

17 Section 93F(2), EP&A Act.

to distort planning decisions. With most NSW councils facing infrastructure funding problems, this power provides an opportunity for a developer to make their non-compliant or controversial development more acceptable by proposing a generous VPA that would provide money for current or proposed council infrastructure. The perception could arise that a developer bribed a council to facilitate a favourable decision.

On the other hand, planning authorities have regulatory powers that can potentially be used as an indirect means of compelling developers to enter into VPAs. This practice would be more successful where proposals involve non-compliance with planning controls, where developers seek to take advantage of bonus provisions in a planning document or where landowners request land rezonings to permit higher and more profitable land uses (for example, residential flat buildings).

The ability of a planning authority to indirectly pressure developers to enter into a VPA also has the potential to distort the planning process and undermine the principle of certainty. The removal of nexus for VPAs means a planning authority can pursue contributions that are not commensurate with the scale of the development; for example, by seeking more open space than identified by an open space needs study. Further, if a planning authority uses indirect pressure to compel a developer to enter into a VPA, a perception will arise that it is no longer able to assess a development application impartially because it has an interest in seeing the associated development or planning proposal realised.

The most recent changes to the arrangements for VPAs are contained within the *Environmental Planning and Assessment Amendment Act 2008*. The amendment intended to preserve the concept of VPAs but proposed significant changes to improve accountability and remove issues of perceived exactions and inducements. These included:

- establishing reasonableness as a consideration in making VPAs[18]
- ensuring that council VPAs do not involve public infrastructure without ministerial agreement in certain circumstances.[19]

Parliament assented to the amendment on 25 June 2008. However, Schedule 3 of the *Environmental Planning and Assessment Amendment Act 2008*, relating to developer contributions and VPAs, is yet to be proclaimed and has not commenced.

18 Proposed section 116U and section 116D at item [6] Schedule 3, *Environmental Planning and Assessment Amendment Act 2008*.

19 Proposed section 116V at item [6] Schedule 3, *Environmental Planning and Assessment Amendment Act 2008*.

The December 2011 issues paper considered whether new planning legislation should make provision for VPAs to permit departure from numerical limits that would otherwise apply to a development.[20] In the Commission's view, the introduction of a requirement that the value of a VPA be proportionate to the profit involved in a development is the key issue involved in addressing the negative perceptions that can arise from the use of VPAs.

Recommendation 4

That the NSW Government introduces changes to voluntary planning agreements that are consistent with those proposed in the yet-to-commence provisions set out in Schedule 3 of the *Environmental Planning and Assessment Amendment Act 2008*.

Consistency in decision-making

Planners play a significant role in managing the environment in which we live. Planners provide advice to decision-makers on whether planning regulations should change or whether certain developments should be built. Planners are also involved in designing planning instruments and preparing legally enforceable approval conditions and refusal reasons.

An individual employed as a government planner need not have a town planning degree or equivalent.[21]

Furthermore, planners are not required to undertake continuing professional development to maintain, develop or increase their professional competence.[22] This is inconsistent with other professions. It is also undesirable, given the tendency for planning laws to be subject to constant change. The subjective nature of many planning rules, combined with the tendency for planning rules to be constantly revised, creates an imperative for government planners to continually update their knowledge. If this does not occur, the risk of inconsistent planning decisions increases, which undermines the certainty of the planning system.

20 Moore, Tim, and Dyer, Ron, NSW Planning System Review Joint Chairs, *The way ahead for planning in NSW? Issues paper of the NSW Planning System Review* (December 2011), pp. 88–89.

21 Although, conditions of employment sometimes specify a town planning degree as a requirement. Some employers, such as the NSW Department of Planning and Infrastructure, accept job applications from people who have a degree in an equivalent profession, such as architects, ecologists, engineers or land surveyors.

22 The Planning Institute of Australia (PIA) is a voluntary organisation with a membership of 5,000 planners and operates a continuing professional development policy that requires the completion of a quota of personal development courses within every two-year period. The policy is mandatory only for corporate PIA members. Planning law is not identified by the policy as a mandatory course.

In a previous investigation, the Commission stated that individuals who falsify their technical qualifications can place the community at risk.[23] This is also true for individuals who have not maintained and updated their skills. The risk posed by such planners is significant because their advice can lead to decisions that irreversibly change our environment.

A scheme that requires planning practitioners to participate in continuing professional development would help maintain certainty in the planning system by facilitating consistent and lawful decisions. It would also increase the likelihood that corrupt conduct will be detected and reported by peers due to an improved common understanding of appropriate decision-making processes and outcomes. In addition, the scheme would maintain the professional competency and standards of planners and safeguard their professional status by demonstrating that they are suitably qualified.

Recommendation 5

That the NSW Government introduces a system of continuing professional development for government planning practitioners.

23 ICAC, *Investigation into attempted corrupt payment and submission of false resumes to public authorities* (August 2010), p. 16.

Chapter 3: Balancing competing public interests

Issue

The Commission recognises that striking a balance between competing public interests can be a subjective exercise. There will always be community debate over whether an adequate balance has been maintained between competing economic, social and environmental dimensions. Nevertheless, it is important that planning legislation addresses this issue by recognising and providing guidance on the weight to be given to competing public interests. Disregarding or placing undue weight on relevant public interest objectives leads to perceptions of bias and corruption, which undermine the integrity of the planning system.

Discussion

Section 5 of the EP&A Act sets out the objectives of the legislation. The objectives include, inter alia, references to the economic use and development of land, the protection of the environment, ecologically sustainable development, and social outcomes such as the provision and maintenance of affordable housing.

Proper decision-making requires a decision-maker to consider and weigh up all the objectives that are relevant to a decision. Over recent years, a perception has been created that economic considerations, such as job creation, have dominated state government planning decisions. This perception has in part been created by the government's publishing of comparison data concerning local council development assessment processing times. Similarly, with the introduction of the now former Part 3A, ministerial media releases announcing project approvals predominantly focused on the delivery of jobs and investment in NSW. There was less focus and discussion on environmental and social outcomes.

The former Part 3A system provides a lesson in how economic considerations can be perceived to dominate planning outcomes. The Part 3A system created a streamlined process, with the department responsible for the assessment of proposals. Other government agencies representing particular public interest objectives, such as the protection and conservation of the environment, had a consultative role, where relevant. Prior to this, certain proposals were required to obtain separate approvals from different government agencies representing specific public interest objectives. The introduction of Part 3A removed the requirement for some of these separate environmental approvals. Approvals issued under the *Water Management Act 2000* and permits to damage marine vegetation issued under the *Fisheries Management Act 1994* are notable examples.

The December 2011 issues paper noted that many suggestions were made at community forums that there should be one overarching objective that would take precedence over all others. The overarching objective proposed was that new planning legislation should be based on ecologically sustainable development.[24] Any decision to make a particular objective pre-eminent is a prerogative of the government and not the concern of the Commission; however, such an approach ought to be clear on the face of the legislative requirements. The current objectives of the EP&A Act cannot be interpreted as supporting prioritising economic objectives. A failure to clearly prioritise economic objectives, and the reasons for doing so, can give rise to community perceptions of developers being favoured and proposals not being properly assessed on their merits.

Conversely, if it is not the intention of government to emphasise economic considerations over other competing

24 Moore, Tim, and Dyer, Ron, NSW Planning System Review Joint Chairs, *The way ahead for planning in NSW? Issues paper of the NSW Planning System Review* (December 2011), p. 27.

public interests, it is important that a perceived bias on this basis in favour of approvals does not exist.

The issue of competing public interests could be addressed in a number of ways in terms of the development assessment process at a state level. An example would be the establishment of a body representing all agencies with an interest in a development outcome. This body could be given a role in the assessment of state significant proposals as one way of ensuring that competing public interests are given due weight. Alternatively, a system of separate approvals could also be reintroduced as a means of addressing this issue. Competing community interests should also be equally represented and given due consideration by relevant approval bodies such as the Planning Assessment Commission.

This issue is important in the context of state significant development given that these types of proposals are large scale and have the potential for far reaching environmental impacts.

Recommendation 6

That the NSW Government ensures that the new planning legislation clearly articulates its objectives and provides guidance on the priority (if any) to be given to competing objectives.

Recommendation 7

That the NSW Government ensures that its system for assessing and approving developments of state significance provides adequate opportunities for competing public interests to be considered.

Chapter 4: Ensuring transparency

Issue

A lack of transparency in the planning system fuels adverse perceptions. Notwithstanding the absence of corruption, failure to explain processes and provide reasons for decisions can create perceptions of corruption.

A lack of transparency can also conceal actual corrupt conduct. In the Commission's experience, failure to provide transparency in any process involving government decision-making is conducive to corruption as it creates a low threat of detection. The corruption risk is exacerbated when secrecy surrounding process is allied with secrecy surrounding the basis on which a decision has been made.

Discussion

Publicly available information

The provision of information is fundamental to ensuring transparency and generating public interest in proposals. A transparent planning system requires the provision of publicly available information so that members of the public understand what is being proposed, why decisions have been made, what has influenced those decisions, and the processes involved in making a decision.

The information below is publicly available and should continue to be released by planning authorities in the revised system:

- departmental submissions for state significant project declarations
- applications to carry out projects, including statements of environmental effects and plans (within certain limits)
- environmental assessment requirements
- environmental assessment reports
- determinations.

Transparency surrounding professional advice and recommendations

The discretionary nature of planning decisions means that a corrupt decision may appear to be valid on its face. It also means that it may not be easy to detect when government staff have been subject to inappropriate pressure over the content of planning advice or a recommendation, as contrary views can still be contained within the spectrum of what is "reasonable".

In this context, the practice of professional government planners being directed to change the content of advice or a recommendation by decision-makers creates a corruption risk. This is because it blurs the decision-making process and makes it difficult for a third party to identify the source of a particular decision. It also creates the false impression that a decision-maker is merely acting on advice. Consequently, a corrupt decision-maker may feel a level of comfort in that the extent of their influence and involvement in a decision is hidden.

The issue of pressure from councillors has already been dealt via section 352 of the *Local Government Act 1993*, which provides that council staff are not subject to direction by councillors on the content of advice or recommendations. The Model Code of Conduct for Local Councils in NSW (June 2008) also deals extensively with proper channels for contact between councillors and staff members. These provisions promote transparency and create an appropriate level of protection against the possibility of inappropriate pressure on staff by councillors, although the success of these provisions largely depends upon senior management commitment and support.

There are no parallel protections in the state arena for professional planning staff. In the Commission's view, it would be beneficial for the NSW Minister for Planning and Infrastructure to adopt a protocol to deal with situations where he or she disagrees with a departmental recommendation concerning a planning matter. The protocol should ensure that any decision by the minister to adopt an alternative approach, and the reasons for such a decision, are clearly documented.

Recommendation 8

That the NSW Minister for Planning and Infrastructure considers adopting a protocol to deal with situations where the minister disagrees with a departmental recommendation concerning a planning matter. The protocol should ensure that any decision by the minister to adopt an alternative approach, and the reasons for such a decision, are clearly documented and made publicly available.

Community guides to development assessment processes

In September 1999 the former NSW Department of Urban Affairs and Planning published *Guiding Development: Better Outcomes*, a series of practice notes for planning practitioners and the community, that dealt with planning processes under the EP&A Act. The guidelines were updated in August 2001, are currently out of date and have not been re-issued by the present department. The Commission supports the publishing of similar community guidelines on development processes as an important means of explaining the planning system and informing the public about established systems and protocols. This information is useful in assisting members of the public to identify improper practices.

Recommendation 9

That the NSW Department of Planning and Infrastructure produces and maintains a community guide dealing with development processes.

Chapter 5: Reducing complexity

Issue

In the past, the Commission has commented on the complexity of the NSW planning system.[25]

Complexity creates opportunities for manipulating the system by encouraging "workarounds" and the establishment of alternative systems. Consequently, it is difficult to detect corrupt activities in a complex system, as any lack of clarity in a system provides an opportunity for corrupt actions to succeed. The inconsistent decision-making that results from a complex system also makes it difficult to establish that correct processes are being followed.

Delays are also a by-product of complex systems and a recognised trigger for corruption. Individuals needing to access a service in which delays are common may be tempted to bribe the official involved in order to move up the queue or short cut the process.

Discussion

As has been discussed, the complexity of the NSW planning system can, in part, be attributed to frequent incremental changes that have produced a layered approach to regulation. While individual instances of reforms to the planning system have merit, the cumulative impact of many changes has been that the planning system is in a constant state of flux. Even planning professionals have found it difficult to navigate the situation. In a paper prepared in August 2010, the NSW Division of the Planning Institute of Australia argued that the complexity of the legislation increases the risk of errors of interpretation and process. The paper expresses concern about the effect this has on decision-making in terms of risk aversion, delays and added costs.[26] This issue is largely being addressed by the development of a new planning act.

Some changes that were widely promoted at the time they were passed by the NSW Parliament are yet to commence, despite the lapse of considerable time. This has added to general community confusion about which rules apply. These changes include the arrangements for VPAs, the introduction of planning arbitrators, and the review of determinations by joint regional planning panels for certain applications that exceed existing development standards by more than 25%.

The multiple layers and different categories of control documents applying to a specific site also create complexity. To cite an example, in relation to the Quattro development, which was a subject of the Commission's 2008 inquiry into Wollongong City Council, the council identified 30 different plans, policies or other documents that could have informed the determination process.

Each individual parcel of land may be subject to different SEPPs. An LEP will also usually control development of the land. A development control plan may also apply to the site, which is entirely discretionary. This is in contrast to LEPs, which are binding with respect to land uses (with some exceptions)[27] but not binding with respect to development controls.

The December 2011 issues paper examined this issue and raised some options for rationalising the number of

25 See for example: ICAC, *The exercise of discretion under Part 3A of the* Environmental Planning and Assessment Act 1979 *and the State Environmental Planning Policy (Major Development) 2005* (December 2010), p. 9.

26 NSW Division of the Planning Institute of Australia, *A New Planning Act for New South Wales* (August 2010), pp. 2–3.

27 See, for example, site compatibility certificates provided for in the following SEPPs: cl 37 SEPP (Affordable Rental Housing) 2009, Part 1A SEPP (Housing for Seniors or People with a Disability) 2004, and cl 19 SEPP (Infrastructure) 2007.

planning instruments that can apply to a parcel of land.[28]

The decision-making criteria for Part 4 developments provide another example of complexity. Section 79C of the EP&A Act provides mandated criteria for consideration. Additional matters for consideration are scattered throughout different SEPPs and relevant LEPs, which may or may not apply to a particular parcel of land.

The complexity of the planning system makes it difficult for lay people and planning professionals to navigate the system. It also leads to delays in the system, which is an identified motivation for applicants to engage lobbyists, and contributes to perceptions of undue influence by lobbyists.

This issue was explored at the Commission's 2010 public inquiry into the lobbying of public officials in NSW. At the inquiry, former senator the Hon Fred Chaney AO stated that one of the reasons why paid agents and lobbyists are used for planning matters is because of the difficulty in getting decisions made. Mr Chaney also gave the following evidence about the interplay of delays in decision-making and complex rules:

[Q]: *Is delayed?*

[Mr Chaney]: *Delay, delay, delay and I think that honest people sometimes turn to less desirable people for the simple reason that they cannot get a decision out of normal processes so part of the problem arises from process*[es] *which are not in themselves transparent are not effective and those processes are inevitably very difficult where there are discretionary elements to the decision*[s] *which are made. Who gets rezoned, who doesn't. The nature of developments which, about which there can be honest differences of opinion, but the more the law permits discretionary decisions the more likely or the greater the possibility of corruption.*

[Q]: *And the greater the perception?*

[A]: *And the greater the perception because the disappointed person of course feels that there has not been a fair outcome. Now, again, I can say that my episodic and anecdotal experience of this … you look to find ways of unlocking that system so part of the answer lies in the approaches we adopt and it would be much better if government was to be more clear in setting policy objectives in these fields and setting out what it wants…*

The effect of delays in the planning process has been the subject of two recent investigations undertaken by the Commission. In investigations involving Warringah and Ku-ring-gai councils, delays in processing construction certificates and a traffic management plan led to allegations that individuals had offered bribes to influence council officers.[29] In its investigation involving Willoughby City Council, the Commission found that a building surveyor used his approval powers to reduce or remove delays to development processes and accepted corrupt benefits as a reward for these actions.[30]

Other jurisdictions have also identified system delays as a trigger for corrupt conduct. The Hong Kong Independent Commission Against Corruption identified a three-year timeframe to issue restaurant licences as a cause of corruption. In order that people could be less tempted to bribe officials or break the rules in some way, the organisation examined, coordinated and simplified the process for granting restaurant licences to shorten the time involved.[31]

Recommendation 10

That the NSW Government takes steps to reduce the complexity of the planning system, including rationalising the number of control documents applying to a single parcel of land.

28 Moore, Tim, and Dyer, Ron, NSW Planning System Review Joint Chairs, *The way ahead for planning in NSW? Issues paper of the NSW Planning System Review* (December 2011), pp. 40–41.

29 ICAC, *Attempts to improperly influence a Ku-ring-gai Council officer* (February 2009) and *Investigation into attempts to improperly influence Warringah Council officers* (June 2009).

30 ICAC, *Investigation into the corrupt conduct of a Willoughby City Council officer* (June 2011), pp. 24–25 and chapter 6.

31 ICAC, *Corruption risks in development approval processes – position paper* (September 2007), p. 24.

Chapter 6: Meaningful community participation and consultation

Issue

The December 2011 issues paper refers to community consultation as asking the community to provide submissions on a prepared draft plan, while community participation might include seeking community views prior to the preparation of a plan.[32]

Meaningful community participation and consultation in planning decisions helps ensure that relevant issues are considered during the assessment and determination of plans and proposals. It also allows the community to have some influence over the outcome of decisions.

Community participation and consultation requirements also act as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision.

Discussion

Considering public submissions

The development of strategic policy documents has typically involved community participation and consultation. Whilst this reflects the objectives of the EP&A Act, it is unclear whether community consultation places a requirement on government to give due consideration to any submissions made in this regard.

Similarly, the EP&A Act stipulates that draft VPAs are to be the subject of a public notice and made available for inspection for at least 28 days.[33] The EP&A Regulation details that further information in the form of an explanatory note is to accompany the draft VPA while it is available for inspection.[34]

The EP&A Act and its regulation are silent on the need for a public authority to consider public submissions made during the draft VPA inspection period. The legislation's silence creates a risk that it will be interpreted in practice by planning authorities as granting power to ignore public submissions.

Recommendation 11

That the NSW Government requires community consultation to be undertaken and public submissions to be given due consideration before the release of a major strategic planning document.

Recommendation 12

That the NSW Government mandates that public submissions are to be considered by a planning authority following the exhibition of a draft voluntary planning agreement.

State plan-making

The community consultation period for SEPPs is governed by ministerial discretion.[35] The discretion available is unfettered, as no provisions in the EP&A Act,

32 Moore, Tim, and Dyer, Ron, NSW Planning System Review Joint Chairs, *The way ahead for planning in NSW? Issues paper of the NSW Planning System Review* (December 2011), p. 35.

33 Section 93G(1), EP&A Act.

34 Clause 25D, EP&A Regulation.

35 Section 38 of the EP&A Act requires, inter alia, that before recommending the making of a SEPP by the governor, the minister is to take such steps, if any, as the minister considers appropriate or necessary to seek and consider submissions from members of the public.

its regulation or a separate public guideline identify the matters that the minister should consider before deciding whether or not to initiate community consultation by exhibiting a SEPP.

Generally, having clear statutory provisions detailing community consultation requirements is done in the interest of openness, promoting participation in the planning system and meaningful community influence. The Commission recognises that legitimate reasons may exist for a SEPP to dispense with community consultation requirements. This should occur only in exceptional circumstances and only after considering a set of criteria. This would include instances where the public exhibition of a SEPP would result in detrimental environmental, social or economic impacts that outweigh the benefits of community consultation. In circumstances where community consultation has been dispensed with, it should be a statutory requirement that the reasons for dispensing with community consultation be made publicly available when the SEPP is made.

Recommendation 13

That the NSW Government requires planning instruments of state significance to be subject to community consultation, except where there are adverse environmental, social or economic impacts and where these adverse impacts outweigh the benefits of community consultation. Where community consultation has not been undertaken, then the specific reasons for not undertaking community consultation should be made publicly available when the planning instrument is made.

Local plan-making

Prior to 2005, all draft LEPs, regardless of whether they were intended to be principal or amending LEPs, were required to be placed on public exhibition for at least 28 days.[36]

Community consultation processes were changed in September 2005 and July 2009. The changes in September 2005 allowed community consultation to be dispensed with in instances where the draft LEP was to correct an error in an existing LEP or address matters in the principal LEP that were of a "consequential, transitional, machinery or other minor nature" or deal with matters that did not have any "significant adverse impact on the environment or adjoining land".[37]

The changes in July 2009 fundamentally altered the way draft LEPs were prepared and made. The department identifies the benefits of the new system as assisting the NSW Government in reaching its target of a 50% overall reduction in the time taken to produce LEPs.[38]

The new system establishes a "gateway" decision-making process that determines whether a proposed draft LEP should proceed to be publicly exhibited and made. The amount of information provided to the community about a planning proposal and the opportunity for community consultation is now a matter of discretion. A planning proposal must meet requirements issued by the director general of the department but which are not prescribed in either the EP&A Act or its regulation. The minister now determines the level of community consultation required for a draft LEP.

The EP&A Act provides for regulations that may prescribe standard community consultation requirements. To date, no such standards have been prescribed. Instead, community consultation matters form part of the department's guideline document, *A guide to preparing local environmental plans* (July 2009), which sets an exhibition period at 14 days for low impact planning proposals (and which the document defines), and 28 days for most other planning proposals.

While the document and its companion, *A guide to preparing planning proposals* (July 2009) – the latter of which sets out the requirements of the director general of the department – are sound documents, they have no statutory backing. Accordingly, it is possible that they can be changed or replaced at any time by adopting a replacement guideline. In addition, no safeguards exist to require that amendments to the guidelines be the subject of community consultation. Of more concern, though, is that the guidelines do not bind the director general or minister, and it is possible for these parties to set aside all or part of these guidelines on an ad hoc basis.

Reducing the time taken to make LEPs is a worthy goal. Yet, the potential remains for community consultation requirements and the information available to the community to be significantly watered down for no justifiable reason because of the use of non-statutory guidelines.

Recommendation 14

That the standard community consultation requirements for draft local environmental plans be given statutory backing.

36 Former clause 13 of the EP&A Regulation (repealed), as at 30 June 2009.

37 Section 73A, EP&A Act.

38 Sourced from http://www.planning.nsw.gov.au/LocalEnvironmentalPlans/GatewayProcess/tabid/291/language/en-AU/Default.aspx (Accessed 3 August 2011, 11.06 am).

Development assessment

In recent years, the concern with community consultation in development assessment has focused on the former Part 3A. This has had the effect of ignoring the problems involving community consultation for development assessment under Part 4 of the EP&A Act.

The EP&A Act and its regulation require community consultation as soon as practical after the lodgement of a development proposal;[39] yet, they permit the planning authority to ask for, or the applicant to submit, an amended development proposal after any exhibition period.[40] This means it is possible to discount the individual concerns raised in a submission on the grounds that they are not relevant.

If development proposals are amended, planning authorities are not statutorily required to start a new community consultation process. This power is at a planning authority's discretion. This has resulted in reports of corruption to the Commission based on the degree of change between the development proposal originally lodged and that approved by the planning authority.

The NSW planning system could take advantage of improvements in technology to address these issues. The regulations could require planning authorities to keep plans, documents and other details of development proposals on their websites until a determination is made, and to also make available any changes to development proposals that have been requested, or initiated, by the applicant. The December 2011 issues paper has recognised the need for the new planning system to maximise the use of electronic lodgement facilities and public accessibility to this information.[41]

Recommendation 15

That the NSW Government ensures that planning authorities are required to provide regular information and updates to the public about development applications under assessment, including any significant changes made to an application.

39 Section 79(1), EP&A Act, in relation to designated development. Clause 87 of the EP&A Regulation, in relation to other advertised development. The timing for community participation for other notifiable development is determined by a development control plan under section 79A(2) of the EP&A Act. In practice, this usually follows the practice of seeking community participation shortly after a development proposal is lodged.

40 Clauses 54 and 55, EP&A Regulation.

41 Moore, Tim, and Dyer, Ron, NSW Planning System Review Joint Chairs, *The way ahead for planning in NSW? Issues paper of the NSW Planning System Review* (December 2011), p. 112.

Chapter 7: Expanding the scope of third party merit appeals

Issue

In general, the scope for third party appeals is limited under the EP&A Act.

The limited availability of third party appeal rights under the EP&A Act means that an important check on executive government is absent. Third party appeal rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system.

Discussion

Part 4 of the EP&A Act provides an example of the limited availability of third party appeals. Under Part 4, a third party objector to a development can bring a merit appeal in the Land and Environment Court against a decision to grant development consent only if the development is designated development.[42] For all non-designated development, third party objectors cannot make merit-based appeals to the Land and Environment Court and must rely on the decision having breached the EP&A Act or the law. This includes most development in urbanised areas, such as residential flat developments and townhouses. On the other hand, merit-based appeals for applicants are available for both designated and non-designated development.

The absence of an appeal right for objectors means that if an approval can be secured by corrupt means that are not detected, it can be acted on.[43] Conversely, the availability of appeal rights increases the possibility that a development approval may be overturned by an independent body. In past Commission investigations involving corrupt conduct and planning decisions, there has not been any prospect of the corruptly influenced decisions facing merit appeals.

The Commission has recommended that the right of third parties to a merit appeal should be extended on numerous occasions.

The Commission continues to support enlarging the categories of development subject to third party appeals. In order to balance the need to curb the potential for real corruption with the need to avoid unnecessary delays in the planning system, the Commission believes that third party appeals should be limited to "high corruption risk" situations. This could include limiting third party appeals to significant and controversial private sector developments and developments relying on SEPP 1 objections or their equivalent. This would also help ensure a degree of consistency with the national approach to third party appeals.[44]

This approach would also be consistent with the concept of providing additional safeguards for Part 4 applications that are reliant on significant SEPP 1 objections, which was adopted in the yet to commence provisions of the *Environmental Planning and Assessment Amendment Act 2008*. These provisions, once they commence, will provide for a review of determinations for certain applications that exceed existing development standards by more than 25%. The provision has not yet been proclaimed.

The Commission further recognises that consideration would need to be given to appropriately defining development that should be regarded as "significant". A

42 Designated development is development listed as such in the EP&A Regulation.

43 Section 124A of the EP&A Act confers power on the minister for planning and infrastructure to suspend a consent tainted by corrupt conduct, and provides for a procedural appeal to the Land and Environment Court, where a consent is granted through corrupt means.

44 See Development Assessment Forum leading practice 10 published in *Leading Practice Model for Development Assessment* (March 2005).

definition should include developments relying on SEPP 1 objections under Part 4 of the EP&A Act and other major controversial developments, such as large residential flat buildings.

Consideration could also be given to allowing third party appeals in the case of developments associated with VPAs. The introduction of an appeal mechanism is justified in this case, given the current loose framework surrounding the use of VPAs and the pursuant corruption risks. This issue is discussed in more detail in chapter 2.

The current practice of the Land and Environment Court allows for the awarding of costs in appropriate cases, and this capacity should be a disincentive to objectors who may be inclined to lodge frivolous or vexatious appeals or appeals that otherwise lack merit. Additional ways in which the impact of third party appeals can be minimised include reducing the time for appeals and introducing special procedures to ensure that, in urgent cases, speedy hearings are held. Appeals can also be restricted to original objectors and those objectors with leave.

Recommendation 16

That the NSW Government considers expanding the categories of development subject to third party merit appeals to include private sector development that:

- **is significant and controversial**
- **represents a significant departure from existing development standards**
- **is the subject of a voluntary planning agreement.**

I·C·A·C

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