The cards are on the table – Gadens' analysis of the NSW Planning System overhaul

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On 16 April the NSW Government released for public comment its ambitious White Paper ('A New Planning System for NSW'), as well as draft legislation, laying bare the Government's policies and directions for an entirely new planning system that is expected to commence by early next year.

The White Paper is certainly ambitious – it seeks to achieve a planning system in which everyone will be a winner - developers, councils, State Government and even existing residents will all work cooperatively in a 'partnership' to systemically deliver new and more affordable housing, while spurring on economic activity generally, resulting in environmentally sustainable development that delivers only what the local community wants for its area. In short - the antithesis of the current adversarial and highly uncertain NSW planning system, and therefore a reform package that will depend for its success on a complete change in mindset by all players at every single layer of the system.

Read on for our concise review of the White Paper and the equally-important draft legislation.

Introduction

Since its election just over two years ago, the NSW Government has been engaged in a comprehensive review of the state's *Environmental Planning and Assessment Act*. Our comprehensive review of the Government's earlier Green Paper (July 2012) can be found here.

The White Paper spells out some of the detail of the government reforms over its 211 pages. Draft legislation has been released in the form of two bills, the Planning Bill 2013 and the Planning Administration Bill 2013, totalling a further 155 pages – and signalling that the

Government is committed to implementing this reform package promptly and does not expect significant amendments. However, the White Paper does not necessarily represent the government's final position. The government has invited further public comment, with submissions due by 28 June 2013. This allows the government to further tinker with the proposals before finalising the reform package.

This update will only attempt to give you a broad sense of the extensive proposed reform package, but will focus on what we have identified as being some of the critical issues.

The draft legislation

It is important to understand that the White Paper is simply an explanation of policy, whereas the accompanying draft legislation will actually implement that policy, and the text of the legislation is therefore of critical significance, and warrants close scrutiny. The draft legislation totals a further 155 pages, and some important detail may therefore be at risk of slipping under the radar. Some further details will typically come in regulations, which may not be released until after the legislation has passed.

Objects of the new Act

The change in emphasis between the existing Act and the proposed new legislation is best illustrated by some of legislation's new objects. The objects are important as they are frequently used as a reference point by decision-makers at all levels of the planning system. The proposed new objects do not emphasise (as the current objects do) 'orderly' economic use and development of land. Instead the emphasis is on economic growth and efficient decision-making.

Also, the references in the current legislation to 'ecologically sustainable development' are replaced with 'sustainable development'. While this change may seem minor, it has the effect of removing any explicit statutory reference to the 'precautionary principle', which has been heavily criticised by many development proponents (particularly in greenfield areas and for heavy industry). Objectors often argue that the precautionary principle requires development consents to be refused even when there is only a modest risk of adverse environmental effects.

Strategic planning and 'top down' approach

While we have had multiple layers of strategic plans for some time there has been major lack of alignment between the statutory plans (state environmental planning policies and local environmental plans) and non-statutory strategic plans. The White Paper seeks to break down this distinction by expressly incorporating 'NSW planning policies, 'regional growth plans, and 'subregional delivery plans' as statutory documents alongside 'local plans', albeit in a very clear, hierarchical structure.

In preparing a 'regional growth plan' (for, say, Sydney or the Lower Hunter) the Department of Planning and Infrastructure will be required 'to give effect' to the NSW planning policies. Similarly, when a new 'subregional delivery plan' is prepared by a subregional planning board (see below) it must 'give effect' to the NSW planning policies and the relevant regional growth plan. Finally, when a council prepares a 'local plan' (which replaces local environmental plans and development control plans) it must 'give effect' to the three layers of statutory strategic plans that sit above it.

Therefore if the Government is hoping to facilitate more development and more housing in particular, we expect that the final Metropolitan Strategy (which is also currently on public exhibition) will mandate that certain housing targets must be achieved within a limited timeframe in each subregion, meaning that lower-order instruments that are being prepared later (such as the 'subregional delivery plans' and 'local plans') will be forced to comply with some tough pre-determined criteria that the relevant councils may not like at all.

Therefore, the question for councils within a subregion may be precisely where to allow a mandated amount of new dwellings, rather than whether to allow them at all. This will no doubt generate some serious debate between the councils that make up each 'subregion', and /or some trade-offs to cooperatively arrive at a strategic planning outcome that each council can live with.

In most cases, local plans will continue to be the most decisive layer in the cake, as they will contain:

- The actual zoning of the land
- The land uses that are prohibited
- Any rigid binding development standards
- Further standards to 'guide' development
- Development assessment codes.

Local plans will not exclusively be under the control of local councils. As stated above, they will need to comply with the 'subregional delivery plans'. In addition, there will be components of the plans that deal with matters that were traditionally included in state environmental planning policies (SEPPs). These matters may be mandated for inclusion (by the State Government).

A new level of government?

The subregional delivery plans will be prepared by new 'subregional planning boards'. There will be a board for each subregion (and it appears likely that there would be 6 in Sydney), which will have the status of a NSW Government agency (and be supported in their work by the Department of Planning and Infrastructure).

However, if the Draft Metropolitan Strategy's proposal for six Sydney subregions is adopted, all but one of the 'subregional planning boards' are certain to be dominated by local council representatives. For example, the Central Subregion Planning Board would be made up of 17 councils and therefore the makeup of its subregional planning board would be:

- 17 council nominees (1 for each of the local councils). Councils will be free to appoint a local politician, a council officer or someone else as their representative
- Up to four members appointed by the Minister
- A chairperson appointed by the Minister (and normally with the agreement of the Local Government and Shires Association).

Having said this, if a subregional planning board does not comply with a ministerial direction, the Minister for Planning and Infrastructure is able to appoint the Planning Assessment Commission to prepare the subregional delivery plan in its place.

Ultimately, the Minister will have to sign-off on the plans prepared by the subregional delivery board before they come into effect. As part of this process, the Minister will have the power to immediately and directly zone land in key 'regionally significant' precincts, based on the approved subregional delivery plan.

Community participation

At the heart of the reform package is the idea that community consultation should be ramped up at the early strategic-planning phase, when communities and government will decide together how their local areas shall look and where they will achieve growth going forward. Conversely though, community participation at the DA stage should be scaled back or eliminated, at least in respect of development that complies with the strategic planning goals that the community has already endorsed for its area. This will require a complete change in mindset for most citizens of NSW, who are accustomed to their right to object to a DA on a reactionary basis - when they receive a notice of a DA in the mail, but they may otherwise be oblivious to what the planning controls in an LEP or SEPP even allow.

As the SMH recently reported, "getting people involved in planning their local neighbourhood before they get angry is not going to be easy". Even so, the change in approach has thus far received in-principle support from most industry players, other than some environmental groups and local councillors, who seem to prefer the adversarial approach of objecting to each and every DA.

However to the extent that the White Paper emphasises that there will be a new focus on community participation, the fact is that the community is already consulted on strategic planning in their local area – draft LEPs for example are required by law to be publicly exhibited and submissions are required to be considered. So does the White Paper really herald the dawn of a new era?

The answer lies in the methods of engaging with the community. What we now know as community consultation on strategic planning generally consists of exhibition via a newspaper advertisement and a council website, and some limited notification via post. The language in the new system is changing to the more dynamic 'community participation', to encompass other more energetic and proactive forms of consultation, such as public workshops and broader consultation processes, the use of social media, 'citizen juries', door to door surveys, and other measures borrowed from other countries such as the United States and Canada.

Mandatory notification periods will still apply for draft strategic plans and some non-compliant development applications.

The keystones of the new community participation system will be a guiding Community Participation Charter (and Community Participation Plans), which the government is heralding as the first of its kind in Australia. Community consultation is to be consistent with the 'Community Participation Charter'.

Planning authorities will be required to prepare Community Participation Plans which must include a number of mandatory requirements and other forms of discretionary community participation.

Interestingly though, the draft legislation provides that the Community Participation Charter and the community participation plans are 'not mandatory' and proceedings cannot be

commenced to invalidate an instrument or a decision because of a breach of those provisions.

Code assessment

A NSW planning policy will require certain types of development to be 'code assessable', which will essentially entail building envelope controls being developed. The bill allows codes to be included in the 'development guide' provisions that form part of a local plan. These codes will also describe a series of performance outcomes for a given development type and identify any 'acceptable solutions' for achieving those performance outcomes – for example, setbacks and privacy controls.

If a development proposal adopts an acceptable solution, or meets the performance outcome via an alternative solution, the consent authority cannot refuse to grant development consent on grounds related to that 'aspect' of the development.

However as the Urban Taskforce has cautioned, it is an enormous task to develop envelopes for every site in the State and to anticipate the amalgamation of sites, particularly when comprehensive community consultation is required as a fundamental part of that process. It could well take many years before we see this component of the reform package actually commence.

Abolition of floor space ratios

The White Paper says that floor space ratios will no longer be used. Instead site density will be managed through building envelopes: 'a three dimensional space within which a building is to be contained'. It is intended that the building envelopes will be included in the 'development guides'. This means that they will not necessarily be rigidly applied.

Merit assessment

Development that has 'significant impacts that cannot be fully addressed by a code' will remain subject to a 'rigorous' merit assessment process (for example, pubs in residential areas).

Development proposals can also be made partially or wholly outside a code, with the non-complying portions (only) being subject to merit assessment (which is really very similar to the current DA assessment process under Part 4 of the *Environmental Planning and Assessment Act*.

Despite the strong language of the Green Paper, and the more muted tones of the White Paper, the bill does not require the abolition of development standards.

Transitional arrangements

The White Paper says that the new subregional delivery plans may not be delivered until two years after the new legislation commences (ie, around 2016).

To help manage this inevitable transitional period, an interim 'strategic compatibility certificate' regime is proposed. Where:

— a regional growth plan or a subregional delivery plan has been made; and

— the planning control provisions in the local plan have not been updated to give effect to the relevant plan, the Department of Planning and Infrastructure will be able to issue a 'strategic compatibility certificate' for development that is consistent with that plan.

This has the effect of overriding any prohibition in the local plan, and paving away for a development application to be lodged. The application would then still need to be assessed against the strategic compatibility certificate (among other things).

However, the usefulness of this mechanism appears to have been seriously undermined by two new proposals in the bill.

Firstly, strategic compatibility certificates can only be issued where the Department is satisfied that the proposed development is prohibited.

Secondly, strategic compatibility certificates can only be issued if the Department is satisfied that the proposed development will not have 'any significant adverse impact on likely future uses of the surrounding land'. This is a particularly subjective test and could include, for example, any increased traffic or economic impacts caused by a retail development.

Infrastructure reform

'Transformational reform to the organisation of government infrastructure processes' is promised – essentially to ensure that infrastructure is integrated with strategic planning, so that infrastructure needs and capacities are a key input into the making of strategic plans. If it can be effectively achieved, this will be a significant improvement on the current practice, where the individual government agencies plan their separate pieces of infrastructure on a network basis, often with little or no regard to other agencies or any overall strategy for the relevant area, nor considerations of cost or viability.

Development contributions

Reform of the development contribution system is also promised. The new system is promised to be simple, affordable and fair – yet the existing caps on local development contributions will be removed, and an additional regional infrastructure contribution will be imposed on most development (replacing the current SIC levy which somewhat unfairly targets only the developers in a handful of growth areas).

Key features to note in relation to the proposed contribution system are:

— There will be a tightening of the types of local infrastructure that contributions can be required for – limited to local roads and traffic management, local open space and embellishment, basic community facilities (land and capital), and capital costs of drainage
— Contributions will now need to be approved by the Minister and councils will need to report on their use of contribution funds and delivery of infrastructure
— Costs for each type of infrastructure will be standardised and benchmarked and councils will need to seek special approval to charge a contribution above the benchmark
— Greenfield infrastructure contributions will be based on recovering the full cost of infrastructure essential to support the new development. Given that

the infrastructure costs associated with greenfield development can often be prohibitive, it is hard to see how this could possibly meet the government's objective of ensuring that contributions are affordable and do not inhibit the supply of housing

- Most development will now also have to pay regional infrastructure contributions on top of local contributions – these will be charged and applied on a subregional basis. Again, this will be problematic unless total viability is a consideration in determining the quantums payable
- A biodiversity offset contribution will also apply to certain types of development
- Affordable housing contributions will be abolished (although existing schemes will continue under transitional provisions)
- Local contributions will remain discretionary – councils can choose whether or not to impose them. Where other forms of contribution apply (ie regional contributions), they will be mandatory
- Local and regional contributions can apply to complying development, if provided for in the local plan
- Works in kind should be broadly available for all types of contributions
- Greater flexibility will be provided to enable developers to pay contributions closer to the point of sale to improve financial feasibility of developments. The draft legislation includes a note suggesting that payment of contributions may be deferred up to the transfer of the land and enforcement mechanisms may be used, such as a statutory charge over the land, to ensure that contributions are paid prior to transfer of the land.

Planning Agreements (VPAs)

There is an intention to limit the use of planning agreements. The White Paper suggests that planning agreements will only be used for state significant development and in certain exceptional circumstances such as density bonus schemes, but the draft legislation does not limit the availability of planning agreements in this way. It would however limit the practical effectiveness of planning agreements by requiring that contributions provided under a planning agreement can only relate to:

(a) the provision of infrastructure that is expressly identified in a local infrastructure plan or growth infrastructure plan
(b) the provision of infrastructure that is identified in a Ministerial planning order where there is no local infrastructure plan applying to the land concerned or where there is no growth infrastructure plan applying to the land concerned
(c) the provision of affordable housing that is identified in a strategic plan, or
(d) the conservation or enhancement of the natural environment of the State.

This will make planning agreements less flexible than the works-in-kind option for payment of infrastructure contributions, where it is proposed that developers can offer alternative infrastructure solutions if they better suit the needs of growth development and are otherwise consistent with the applicable contribution plans.

Building regulation and certification

The reform package contains an overhaul of the building and subdivision certification requirements and procedures, to address long standing concerns arising from the current system. Whilst clarifying some aspects of the certification process, the changes threaten to

weigh the certification process down with a raft of additional paperwork and may make life harder for certifiers.

Some of the key changes include:

- Accredited building designers or architects will have to design or issue compliance certificates for the plans of complex buildings (such as townhouses, large retail shops and factories containing offices) and critical building services and elements, for compliance with Building Code requirements, planning approvals and other standards
- Detailed documentation will only be required at the construction certificate stage, rather than the development application stage (although in theory this applies now via the existing Regulations, but it is frequently ignored by councils, who want great detail at DA stage)
- The building certifier will prepare a compliance report setting out how the development will comply with BCA requirements and other standards
- Additional critical stage inspections will be required in relation to aspects of building work such as fire safety, structure and sound insulation
- A building manual incorporating the fire safety schedule will be prepared at the end of the project, and issued with the occupation certificate. This will be required to be updated with any changes to the building or use, and kept on the premises and available during working hours. Owners will have to comply with ongoing compliance requirements in the manual
- Stronger disciplinary controls will apply to certifiers.

The picture is not complete

Despite the wealth of new material now on the public record, key details on a number of important reforms remains unavailable. Some of this detail will ultimately be contained in regulations, or a new Standard Instrument. These documents do not need to be finalised until after legislation is passed by the parliament and drafts have been released so far. As a result, it is possible that key questions will remain unanswered for quite some time.

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