PLANNING BILL 2013

Preliminary analysis of amendments passed by the NSW Legislative Council on 27 November 2013

This analysis was prepared by the Nature Conservation Council of NSW, based on the [amendments](http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/33E72AD6EA1238B5CA257C0C0014134D/%24file/Schedule%20of%20Amendment.pdf) adopted by the NSW Legislative Council on 27 November, and referred to the Legislative Assembly for concurrence.

*Schedule of amendments adopted by the Legislative Council on 27 November 2013:*

**No. 1** Page 2, clause 1.2. Insert after line 7:

(2) Despite subsection (1), clause 11.29 commences on the date of assent to this Act.

***Comment:*** This provision has the effect of ensuring that clause11.29 (Repeal of SEPP provisions relating to mining) has effect immediately upon commencement of the Act (see amendment no. 45 below).

**No. 2** Page 4, clause 1.8. Insert after line 8:

(4) For the purposes of this Act, an ***affordable housing contribution*** is an affordable housing contribution set out in the contribution provisions of a local plan.

***Comment:*** Defines affordable housing contribution.

**No. 3** Page 5, clause 1.13 (b) (ii), lines 20 and 21. Omit all words on those lines.

***Comment:*** Removes reference to code assessed development.

**No. 4** Page 9, clause 2.4. Insert after line 38:

(4) The mandatory requirements for community participation referred to in section 2.5 are taken to include any other forms of community participation that are set out in a community participation plan and that are identified in that plan as mandatory requirements.

***Comment:*** This provision ensures that community participation plans are able to set mandatory requirements for public consultation, in addition to those set out in Part 1, Schedule 2 of the Act.

**No. 5** Page 9, clause 2.4. Insert after line 43:

(7) Planning authorities are to publish annual reports, in accordance with the regulations, on their implementation of community participation plans.

***Comment:*** This provision provides a public accountability mechanism for planning authorities.

**No. 6** Page 10, clause 2.8. Insert after line 27:

(c) in particular, to provide advice and make recommendations to the Minister on the adequacy of draft community participation plans and the implementation of the Community Participation Charter through the operation of those plans,

***Comment:*** This provision expands the role of the Community Participation Advisory Panel established under section 2.3 of the *Planning Administration Act 2013*.

**No. 7** Page 12, clause 3.5 (2) (e), lines 21 and 22. Omit “or development proposed for code

assessment”.

***Comment:*** Removes reference to code assessed development.

**No. 8** Page 12, clause 3.6. Insert after line 47:

(4) When making a decision under this section, the Minister is to have regard to the objects of this Act.

***Comment:*** Minister must have regard to the objects of the Act when making a state planning policy, regional growth plan or subregional delivery plan.

**No. 9** Page 13, clause 3.9, line 37. Omit “development assessment codes and”.

***Comment:*** Removes reference to code assessed development.

**No. 10** Page 13, clause 3.9, line 44. Omit “or biodiversity offset contributions,”. Insert instead

“biodiversity offset contributions or affordable housing contributions”.

***Comment:*** Makes provision for local plans to deal with affordable housing contributions.

**No. 11** Page 14, clause 3.10, line 5. Omit “or biodiversity offset”. Insert instead “, biodiversity

offset or affordable housing”.

***Comment:*** Makes provision for local plans to deal with affordable housing contributions.

**No. 12** Page 15, clause 3.13 (c), lines 21 and 22. Omit “and code assessed development”.

***Comment:*** Removes reference to code assessed development.

**No. 13** Page 15, clause 3.13 (k), line 37. Omit all words on that line. Insert instead:

(k) providing, maintaining and retaining affordable housing and encouraging housing choice,

***Comment:*** Replaces the previous clause, which stated that planning control provisions in local plans may be made for the purpose of ‘encouraging the provision of affordable housing and housing choice’.

**No. 14** Page 17, clause 3.17, lines 30–33. Omit all words on those lines. Insert instead:

(3) After reviewing the planning proposal, the Minister must determine whether the proposal should proceed (with or without variation).

***Comment:*** Limits Minister’s discretion in relation to exhibition of rezoning proposals.

**No. 15** Page 17, clause 3.17. Insert after line 35:

(a) the minimum period of public exhibition of the planning proposal (or a determination that no such public exhibition is required because of the minor nature of the proposal),

**Note.** Under Schedule 2, the mandatory period of public exhibition is 28 days if a determination is not made under paragraph (a).

***Comment:*** Limits Minister’s discretion in relation to exhibition of rezoning proposals.

**No. 16** Page 18, clause 3.18 (4), lines 22 and 23. Omit all words on those lines. Insert instead:

(4) Further public exhibition of a revised planning proposal is required

unless the Minister determines in the revised gateway determination

that further public exhibition is not required because of the minor

nature of the variation to the planning proposal.

***Comment:*** Limits Minister’s discretion in relation to exhibition of rezoning proposals.

**No. 17** Page 20, clause 3.24 (1). Insert after line 37:

(c) the objects of this Act.

***Comment:*** Requires planning authorities to have regard to the objects of the Act when preparing strategic plans.

**No. 18** Pages 20 and 21, clause 3.25, line 44 on page 20 to line 3 on page 21. Omit all words on those lines. Insert instead:

(1) The public exhibition of a draft strategic plan (or proposal for a strategic plan) is to be accompanied by such documents as are required by the regulations.

(2) If the draft is a principal regional growth plan or a principal subregional delivery plan, the public exhibition of the draft is to be accompanied by a strategic assessment statement.

**Note.** See Schedule 3 with respect to the preparation of strategic assessment statements.

***Comment:*** The requirement to prepare and exhibit a *strategic assessment statement* for relevant strategic plans is a significant improvement in the planning process. Amendment No.50 (below) sets out the matters that must be addressed in a strategic assessment statement, including an assessment of whether the intended outcomes *maintain or improve environmental values*.

**No. 19** Page 21, clause 3.25, lines 2 and 3. Omit “or proposal for a development assessment

code”.

***Comment:*** Removes reference to code assessed development.

**No. 20** Page 21, clause 3.27 (2), lines 30 and 31. Omit all words on those lines. Insert instead:

following if the proposed plan has been publicly exhibited in accordance with the requirements of Part 1 of Schedule 2:

***Comment:*** Establishes a minimum exhibition period (28 days) in the event that the Minister proposes to dispense with the conditions precedent for making a strategic plan.

**No. 21** Page 21, clause 3.27 (2) (b), lines 34 and 35. Omit “State, regional or subregional significance”. Insert instead “State or regional significance”.

***Comment:*** Removes the ability of the Minister to dispense with the conditions precedent for making a strategic plan to make provision for matters of ‘subregional significance’.

**No. 22** Page 23, clause 4.2, lines 22 and 23. Omit all words on those lines.

***Comment:*** Removes reference to code assessed development.

**No. 23** Page 23, clause 4.3, lines 31 and 32. Omit all words on those lines.

***Comment:*** Removes reference to code assessed development.

**No. 24** Page 26, Division 4.4, heading, line 7. Omit “**Code and merit**”. Insert instead “**Merit**”.

***Comment:*** Removes reference to code assessed development.

**No. 25** Page 27, clause 4.16. Omit the clause.

***Comment:*** Removes reference to code assessed development.

**No. 26** Pages 27 and 28, clause 4.17. Omit the clause.

***Comment:*** Removes reference to code assessed development.

**No. 27** Page 28, clause 4.18 (1), line 17. Omit “if it is not subject to code assessment under

section 4.17”.

***Comment:*** Removes reference to code assessed development.

**No. 28** Page 36, clause 4.41 (1) (c), line 44. Omit all words on that line.

***Comment:*** This provision removes a clause inserted at the request of the mining industry that would have had the effect of allowing any modification of an existing state significant development to be dealt with as a modification application, regardless of the scale or impact of the modification. If this provision had not been removed, it would have had serious consequences for communities affected by large scale mine expansion proposals. Under the amended provision, modification applications can only be made where the proposed development is ‘substantially the same’ as the development that was originally approved.

**No. 29** Page 39, clause 5.3 (1), lines 36 and 37. Omit “take into account the matters affecting or likely to affect the environment”. Insert instead “take into account **to the fullest extent possible all** matters affecting or likely to affect the environment”.

***Comment:*** This provision restores the language used in the *Environmental Planning and Assessment Act 1979*, which sets a clearer, higher standard for consideration of the environmental impacts of a proposed development.

**No. 30** Page 42, clause 5.9. Insert “**and other provisions**” after “**exemptions**” on line 17 and

insert after line 27:

(2) A determining authority is to make publicly available in accordance with the regulations any review or statement of environmental effects, prepared by or on behalf of the determining authority in relation to relevant development for which an environmental impact statement has not been obtained, as soon as practicable after it has been prepared and before the grant of any approval for the development.

***Comment:*** Requires public exhibition of any review or statement of environmental effects, in relation to a development for which a full environmental impact statement is not required.

**No. 31** Page 48, clause 5.23 (2), line 19. Insert “the Minister has first obtained and made publicly available advice from the Planning Assessment Commission about whether the Minister should make the declaration and” after “may only be made if”.

***Comment:*** Requires the Minister to obtain and exhibit advice from the PAC before making a declaration that a particular development is public priority infrastructure.

**No. 32** Page 49, clause 5.26. Insert after line 33:

(4) The provisions relating to public exhibition and the making of submissions under Part 1 of Schedule 2 apply to the public exhibition of the project definition report under subsection (1) (b). After the public exhibition of the project definition report, the proponent and the NSW Planning Director-General are to consider any submissions made during the public exhibition period.

***Comment:*** Extends the public participation provisions in relation to the project definition report for proposed public priority infrastructure.

**No. 33** Page 61, clause 7.1. Insert after line 4:

***affordable housing contribution*** means a contribution imposed under Division 7.5.

**No. 34** Page 68, clause 7.23. Insert after line 38:

(5) Payments from the Funds into which biodiversity offset contributions are paid are to be made, as far as practicable, so the amounts contributed in connection with development in a local government area are used on biodiversity offset measures in the same regional planning area.

***Comment:*** Limits the manner in which biodiversity offset contributions can be used.

**No. 35** Page 69, Part 7. Insert after line 9:

**Division 7.5 Affordable housing contributions**

[**Note:** inserts affordable housing provisions based on EPAA provisions.]

**No. 36** Page 69, clause 7.26 (1) (c), line 20. Omit “that is identified in a strategic plan”.

***Comment:*** Removes requirement that a planning agreement may only provide for affordable housing that is identified in a strategic plan.

**No. 37** Page 69, clause 7.27, line 41. Omit “or Division 7.4 (Biodiversity offset contributions)”.

Insert instead “, Division 7.4 (Biodiversity offset contributions) or Division 7.5 (Affordable housing contributions)”.

***Comment:*** Provides for planning agreements to limit or exclude affordable housing contributions.

**No. 38** Page 70, clause 7.27. Insert after line 7:

(d) a public authority is not to enter into a planning agreement excluding the application of Division 7.5 unless the planning authority is the Minister or does so with the approval of the Minister.

***Comment:*** Requires the Minister’s consent for any planning agreement that seeks to limit or exclude affordable housing contributions.

**No. 39** Page 70, clause 7.27, line 9. Omit “or 7.4”. Insert instead “, 7.4 or 7.5”.

***Comment:*** Prevents a planning authority from imposing affordable housing contributions where a planning agreement has been entered into that excludes the payment of such contributions.

**No. 40** Page 71, clause 7.31, line 5. Omit “and 7.4”. Insert instead “, 7.4 and 7.5”.

**No. 41** Page 81, clause 8.18 (1), lines 13–17. Omit all words on those lines. Insert instead:

(1) A civil action for loss or damage arising out of or in connection with defective building work or defective subdivision work cannot be brought more than 10 years after the date of completion of the work.

***Comment:*** Extends limitation period for civil actions in relation to defective residential development from 6 years to 10 years.

**No. 42** Page 81, clause 8.18 (4), line 35. Insert “or the *Home Building Act 1989*” after “the *Limitation Act 1969*”.

**No. 43** Page 117, clause 11.28. Insert after line 7:

(2) The Minister is to ensure that there is public participation in the conduct of the review.

***Comment:*** This provision has the effect requiring public participation in the review of the legislation required under section 11.28.

**No. 44** Page 117, clause 11.28, lines 8 and 11. Omit “5 years” wherever occurring. Insert instead “4 years”.

***Comment:*** This provision has the effect requiring a review of the Act within 4 years of its commencement.

**No. 45** Page 117. Insert after line 11:

**11.29 Repeal of SEPP provisions relating to mining**

(1) Clauses 12AA and 12AB of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* are repealed.

(2) A provision of a strategic plan (including a planning control provision of a local plan) cannot be made if it provides that the significance of a mining resource is the principal consideration of a consent authority when determining an application for development consent or if it provides for non-discretionary standards in the

determination of an application for development consent to carry out mining.

***Comment:*** This provision has the effect of repealing clauses 12AA (Economic significance of the resource) and 12AB (Non-discretionary standards for mining) of [State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007](http://www.legislation.nsw.gov.au/maintop/view/inforce/epi%2B65%2B2007%2Bcd%2B0%2BN), and seeks to prevent the introduction of similar provisions in future. This amendment has the effect of overturning the government’s recent decision to (a) making the economic significance of the resource the principal consideration in planning decisions about mining proposals, and (b) guarantee that mining proposals would not be refused due to air pollution, noise, vibration or groundwater impacts, where the proponent met the standards set out in the SEPP. This amendment is a significant victory for mine affected communities at risk from polluting, high impact mining development.

**No. 46** Page 118, Schedule 1, Dictionary. Insert after line 6:

***affordable housing contribution***—see section 1.8.

**No. 47** Page 119, Schedule 1, Dictionary, line 9. Omit all words on that line.

***Comment:*** Removes reference to code assessed development.

**No. 48** Page 119, Schedule 1, Dictionary. Insert after line 22:

***environmentally sensitive area*** means any of the following:

(a) land within a land use zone that is described as an

environment protection zone in the standard instrument for

planning control provisions (or an equivalent land use zone),

**Note.** Environment protection zones on the enactment of this Act are:

E1 National Parks and Nature Reserves; E2 Environmental

Conservation; E3 Environmental Management; E4 Environmental

Living.

(b) the coastal waters of the State,

(c) an aquatic reserve under the *Fisheries Management Act 1994*

or a marine park under the *Marine Parks Act 1997*,

(d) a wetland of international significance declared under the

Ramsar Convention on Wetlands,

(e) a World Heritage area declared under the World Heritage

Convention,

(f) land reserved under the *National Parks and Wildlife Act*

*1974* or land to which Part 11 of that Act applies,

(g) critical habitat,

(h) a wilderness area,

(i) any other land identified by the planning control provisions

of a local plan as an environmentally sensitive area, as an

area of high Aboriginal cultural significance or as an area of

high biodiversity significance.

***Comment:*** Inserts definition of environmentally sensitive area. This amendment has no immediate effect, as a corresponding amendment to prohibit the issuing of strategic compatibility certificates in environmentally sensitive areas was not passed. However, this definition may be used in regulations or strategic plans.

**No. 49** Page 126, Schedule 2, lines 15–22. Omit all words on those lines. Insert instead:

**2.5 Planning proposals for planning control or other provisions of**

**local plans subject to a gateway determination (other than**

**minor proposals that under the gateway determination are**

**excluded from public exhibition)**

28 days or, if a different period of public exhibition is specified in

the gateway determination for the proposal, the period so specified.

**Note.** Public exhibition of a planning proposal includes any neighbourhood

impact statement required to accompany the proposal.

**2.6 Draft planning control, code or guide provisions of local plans**

**not subject to a gateway determination**

28 days.

**Note.** Public exhibition of a draft includes any neighbourhood impact

statement required to accompany the draft.

***Comment:*** Establishes minimum exhibition periods for planning proposals and draft local plan provisions.

**No. 50** Page 132, Schedule 3. Insert after line 1:

**3.1 Strategic assessment statements**

A strategic assessment statement to accompany a draft strategic plan

(or proposal for a strategic plan) is to include the following:

(a) a statement of the intended outcomes of the proposed plan,

(b) a description of the credible evidence used to prepare the proposed plan (including any economic, environmental or social data collected for the purposes of the proposed plan),

(c) an assessment of any likely cumulative impacts of the proposed plan,

**(d) an assessment of whether the intended outcomes maintain or improve environmental values,**

(e) any other matter prescribed by the regulations.

***Comment:*** The requirement to prepare a strategic assessment statement for relevant strategic plans is a significant improvement in the planning process. This provision sets out the matters that must be addressed in a strategic assessment statement, including an assessment of whether the intended outcomes maintain or improve environmental values.

**No. 51** Page 181, Schedule 12, clause 12.6 (4), lines 13–16. Omit all words on those lines.

***Comment:*** Schedule 12, clause 12.6 provides for the provisions of existing State Environmental Planning Policies to be incorporated into the planning control provisions of local plans. This transitional clause has important implications for coastal wetlands, urban bushland, littoral rainforest and koala habitat. The amendment removes subclause 12.6(4), which would have allowed SEPP protections to be overridden by local plans (i.e. a local council would have been able to override protection for coastal wetlands).

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