SUBMISSION

PRIMARY SCHOOLS FOR THE TWENTY FIRST CENTURY INQUIRY

Submitted by:

Concerned Strathfield Resident

To whom it may concern

Please find attached my submission into the inquiry of the Federal Government's Primary School for the 21st Century program with particular reference to:

1. The disregard for consultation and Council approval
2. The Role of the State Government

This submission concerns our personal experience as a neighbour of a school that has received BER funding for a project that has been poorly conceived and specifically avoids the consultation and planning processes afforded normal developments. It is important that this disregard is not allowed to continue unabated.

This submission refers to our experiences with BER funded project for the Santa Maria Del Monte School. Clearly these experiences are not uncommon and similar concerned residents are sharing similar experiences.

There are serious deficiencies with the legislation at the centre of BER funding and the broader community will be worse off. Regardless of the intent of the legislation, the reality is that a different outcome is occurring. We urge the committee to recommend the legislation is reviewed to strengthen the consolation mechanisms and return development control to the local councils.

Lastly we seek to ensure that the current sunset clause in the NBJP Act is enacted as was envisioned from the beginning.

Yours sincerely

An Overview of the legislation

Planning legislation in New South Wales has been enacted at several levels. The highest level is the Environmental Planning and Assessment Act 1979. This Act sets out the process for local government to prepare its own plans outlining the main matters that need to be considered in the assessment of all Development Applications. The **EP&A Act** is the instrument under which SEPP's, REP's, and Local Environmental Plans as well as Development Control Plans administered by local government are made.

Immediately below the EP&A Act in hierarchical order are the various State Environmental Planning Policies. The State Environmental Planning Policy (Infrastructure) 2007, which came into force in January 2008, is one of these policies. Below the SEPP's in order of hierarchy are the various Regional Planning Policies, followed in descending hierarchical order by Local Environmental Plans, then Development Control Plans and finally by Environmental Specifications which have an advisory rather than legally binding status.

A further planning instrument known at the **Nation Building and Jobs Plan Act** was introduced in 2009 to facilitate projects funded as part of the Federal Government's economic stimulus Building the Education Revolution program. School Infrastructure Projects funded under the BER program may be approved in one of three different ways:

1. They can be approved through the normal Council Development Application process.
2. Where an applicant can demonstrate the project may be at risk of failing to meet BER deadlines for completion when assessed under the Council DA process, assessment and approval may be obtained under the Nation Building and Jobs Plan Act as an alternative.
3. Approval may also be sought as a Complying Development under Clause 31A of the State Environmental Planning Policy (Infrastructure) 2007 where the applicant can demonstrate compliance with 5 limited requirements that define complying developments.

The **Infrastructure SEPP** came into force in January 2008. It was ostensibly enacted in order to assist in the delivery of infrastructure by introducing consistent planning provisions to improve efficiency and to provide greater ***"certainty"*** regarding the planning provisions applying to infrastructure projects in New South Wales. Why does this concept of ***"certainty"*** not also extend to residential neighbours of a school who bought in the expectation that the character of their neighbourhood would be preserved? Do we not have an equal claim to ***"certainty"***?

Under a normal Council Development Application, a rigorous set of guidelines would be applied to the assessment of the development proposal. In particular, Council is obliged under the Local Government Act to advertise the proposal and to invite public comment as part of the assessment process. Issues that would be critically assessed include bulk, size and scale of the proposed development, its impact on surrounding development types, traffic and parking impacts that would result from the development, the suitability of the site and the local road network that would service the site of the proposed development and the surrounding locality, preservation of significant flora and fauna, heritage issues, bushfire evacuation safety, and public safety generally to name just a few.

The views of affected neighbours of a proposed development would be taken into account as well, before approval for any development is granted.

Such approval may also include several conditions that must be met. Typically such conditions that may be applied are designed to reduce the negative impact of the proposed development. Where Councils are of the opinion that a proposed development fails to meet required standards, a development application may be refused.

An applicant under these circumstances has the right to appeal the decision to refuse consent, and can take the matter to the Land and Environment Court in the event that consent is refused.

An application for assessment of a **BER** funded school infrastructure project under the **Nation Building and Jobs Plan Act**, bypasses the Council DA process, and is assessed against a range of criteria by the **NBJP** taskforce.

Under this alternative, a local Council and neighbouring property owners are not consulted, and there is no opportunity for public input or comment in relation to the proposed development, nor is there any right of appeal by Council or the general public against consent granted under this legislation.

The **NBJP** taskforce ***does*** however have relatively broad terms of reference and ***may*** request detailed and specific additional information from an applicant to assist in their assessment of the proposal.

The third alternative for approval of a school infrastructure project is to obtain consent as a complying development under the provisions of **clause 31A** of the **State Environmental Planning Policy (Infrastructure) 2007**. Under **clause 31A** of the **Infrastructure SEPP** an applicant need only satisfy **5** minimum requirements for complying developments in order to obtain approval for a school infrastructure project. There is no provision for Council or public input into the assessment process. A private certifier need only verify compliance with the **5** minimum requirements listed under **clause 31A** and direct Council to give consent. There is no right of appeal by Council or the general public against consent granted under this legislation.

With respect to these various planning instruments, the provisions of higher order legislation ***would normally*** prevail over lower order legislation according to the hierarchy outlined above.

This means that the **EP&A Act** is the overarching legislation that sits above ***all other*** planning instruments, while **SEPP's** prevail over **REP's**, which in turn prevail over **LEP's**, **DCP's** and lastly **Environmental Specifications**.

As the overarching legislation, the **Environmental Planning and Assessment Act 1979** is the enabling legislation under which all other planning instruments are made. It is to this legislation that all other planning instruments must defer.

Inconsistencies and anomalies between Planning Instruments

In the course of our investigations we noted certain inconsistencies between the provisions of the **EP&A Act**, and the **Infrastructure SEPP**. The provisions of **Section 5** subclause **(c)** of the **EP&A Act** states that the objects of the Act are:

"to provide increased opportunity for public involvement and participation in environmental planning and assessment."

There is ***NO*** provision under **clause 31A** of the **Infrastructure SEPP** for such involvement and participation in environmental planning and assessment. The provisions of **Section 36** (**Inconsistency between instruments)** of the **EP&A Act** states that

"(1) In the event of an inconsistency between environmental planning instruments and unless otherwise provided:

> *(c) the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind."*

It is a legal convention, totally consistent with interpretation of the abovementioned clause that in the event of inconsistency between different levels of legislation, the provisions of higher order legislation ***will prevail*** over the provisions of lower order legislation, ***to the extent of such inconsistency***.

Under these circumstances the right of the public to ***increased involvement in the planning and assessment process*** as specified under **Section 5** of the **EP&A Act** should prevail over the limited provisions of **clause 31A** of the **Infrastructure SEPP** which effectively denies that right and opportunity. This is a crucial legal interpretation that could have serious ramifications for the legality of any school infrastructure project approved as a complying development under the current provisions of the **Infrastructure SEPP**. It is therefore incumbent on the government as the institution responsible for drafting and gazetting these planning laws, to provide a full and detailed explanation of these anomalies, and to take the necessary remedial action as prescribed in **clause 7(f)** of the **EP&A Act**, which requires that the Planning Minister:

"monitor progress and performance in environmental planning and assessment, and to initiate the taking of remedial action where necessary".

Inadequacies of the Nation Building and Jobs Plan Act

Our issues with the **NBJP** Act are two fold:

1. There are fundamental inadequacies with the **NBJP** Act as it currently stands and
2. The current Government's desire to retain the **NBJP** Act beyond the BER program and use this legislation to expedite construction of high-rise apartments and commercial developments .

With regard to point 1 above, the issues at stake is the erosion of our democratic rights to have a say about the character and amenity of our neighbourhoods and consistently apply DA processes.

In particular an application for assessment of a **BER** funded school infrastructure project under the **NBJP** Act, bypasses the Council DA process, and is assessed against a range of criteria by the **NBJP** taskforce.

Under this alternative, a local Council and neighbouring property owners are not consulted, and there is no opportunity for public input or comment in relation to the proposed development, nor is there any right of appeal by Council or the general public against consent granted under this legislation.

Due process and consultation has been replaced with expeditious and poorly considered developments. We request that this situation be redressed.

With regard to point 2 above I refer you to the Sydney Morning Herald article of 1 April 2010 by Kelsey Munro and Josephine Tovey and titled **"Premier's bid to grab planning powers"** which is provided as an appendix to this submission. In summary it states the Premier, Kristina Keneally, has ordered a review that will consider retaining the special approval authority set up under the Nation Building program, which denied local government a say in development approvals. Under the terms of reference, a panel of just two reviewers will consider ''the legal and economic benefits and consequences'' of applying the special planning powers to ''other significant projects'' in the state. The terms of reference make no mention of any impact on the public of removing councils from the planning process.

Clearly the NSW Labor is committed to an extension of these undemocratic laws despite earlier commitments to removing the Act after completion of the BER scheme. While Labor has always been left-wing in ideology, the current Labor Governments are clearly socialistic. Thus English common law concepts such as natural justice are considered subversive and contrary to the public interest.

We again request that public consultation and councils be included in these development plans.

Infrastructure Project 09/0101 EC Santa Sabina College

Having discussed general issues with the current legislation and its proposed extension to other development projects I now turn to the local BER project opposite my home at 6 Carrington Avenue Strathfield. The project in question is Infrastructure Project 09/0101 EC Santa Sabina College which was approved under the NBJP Act. This provides clear evidence of the issues we have raised above.

This $3m project involved the demolition of a single story building and part of an existing hall and the construction of a new 2 storey building comprising 6 classrooms and a new hall.

The speed with which this project was approved and the lack of consultation and environmental consideration is particularly alarming and also demonstrates the federal Government's willingness to throw significant sums of money at poorly considered projects. For example the architectural drawings are dated 18 August and the application was authorised on 11 September.

So with all these applications being submitted just what review can possibly be undertaken in less than one month?

The approval clearly states under "prior to commencement of work" that "**within 7 days of this authorisation or with 2 days prior to the commencement of work whichever is the sooner the proponent must notify council and occupiers of any land within 40 metres…."** This did not happen. We were notified on October 7th the day work was due to start in a letter that was undated.

The authorisation sets out "during work on site" section 14, the hours of operation. These have been totally ignored with trucks regularly arriving before 7am and on at least one occasion a driver arriving and sleeping in his truck outside the site.

Schedule 2 of the authorisation sets out the Conditions. These refer to the diagrams and other documents including Planning Assessment Report, Heritage Report, BCA Assessment, Hazardous Materials Report and Construction management Plan. To become even aware of these documents one has to access the authorisation. So far we have approached the Federal MP, the local State Member, and the council and to date we have not been able to obtain a copy of any of these documents.

There is clearly an issue of transparency here

Alarmingly there is no reference to a traffic management plan. This construction is 6 classrooms and hall that the school has said to us is available to the community. Strathfield residents already appreciate the traffic chaos around school drop off and pick up times. In our case Carrington Avenue becomes a parking station at these times and residents are seriously disrupted with through traffic restricted to one direction only.

So we have a situation where a larger hall is being erected and 6 classrooms added to a site which is removing car parking spaces to accommodate the building and there is no provision for additional car parking or a lay-by. Interestingly the SEPP review is recommending a traffic management plan for hall construction but this is both too late and not relevant to the **NBJP** Act.

Not only is there a lack of resident or council consultation it is clear consultation is being avoided at all costs. Again, **there is clearly an issue of transparency here.**

The following is an extract from the NBJP User Guide and I draw your attention to the statement "proponents are encouraged to…… undertake consultation with the community. When questioned the school principal said "with retrospect we should have consulted with us."

5.4 CONSULTATION AND NOTIFICATION

Consultation with and/or notification of local councils and relevant state agencies and the local community is required in relation to all projects seeking approval under the NBJP Act.

Proponents are encouraged, where possible to use existing planning legislation to seek the necessary approvals and undertake consultation with the community in accordance with existing protocols. However due to the tight timeframes for delivery stipulated by the Commonwealth in relation to stimulus package projects, approval under the NBJP Act will require not only a streamlined assessment process but also streamlined consultation and notification protocols.

On 15 October, only after consulting the office of the Federal Member did the school principal write to inform us that their BER application was approved and to explain what they were doing. Despite the NBJP Act's encouragement o consultation prior to the application, consultation was avoided.

Let me show you why. The picture below was taken from our second story bedroom window. There is no screening of the new structure. Put simply school students have uninterrupted and direct viewing access to my bedroom separated by only a two lane road. Knowing that would you consult with the residents?

Conclusion

Given the evidence we have presented there are some significant issues with the NBJP Act. Furthermore this application would have been best dealt with by Strathfield Council with complete transparency. The panic to get the money spent has resulted in poorly considered developments and the criteria that the NSW NBJP Taskforce claims to encourage have been subverted. Ultimately the real cost will be born by the community. It is important that this Act is not applied to further developments such as high rise apartment blocks etc.

There are serious deficiencies with the legislation at the centre of BER funding and the broader community will be worse off. Regardless of the intent of the legislation, the reality is that a different outcome is occurring.

We urge the committee to recommend the legislation is reviewed to strengthen the consultation mechanisms and return development control to the local councils.

APPENDIX

Premier's bid to grab planning powers

KELSEY MUNRO AND JOSEPHINE TOVEY (SYDNEY MORNING HERALD ARTICLE)

April 1, 2010

CONSTRUCTION of high-rise apartments and commercial developments could soon be expedited under the laws that allowed the rapid approval of federal stimulus projects.

The Premier, Kristina Keneally, has ordered a review that will consider retaining the special approval authority set up under the Nation Building program, which denied local government a say in development approvals.

The move has outraged councils, which surrendered their powers under what they considered to be emergency conditions, and which say too much authority has already been centralised by the state government.

The opposition planning spokesman, Brad Hazzard, called the review a ''rubber stamp'' designed simply to push the new powers through.

Under the terms of reference announced yesterday, a panel of just two reviewers will consider ''the legal and economic benefits and consequences'' of applying the special planning powers to ''other significant projects'' in the state.

The terms of reference make no mention of any impact on the public of removing councils from the planning process.

A spokesman for the acting Special Minister of State, John Hatzistergos, confirmed that all types of projects were on the table for consideration, including housing developments, supermarkets and shopping centres.

''The stimulus measures are proving to be an overwhelming success, as NSW leads the nation in its delivery,'' he said. ''We are seeing the green shoots of recovery and we want to build on that.''

Three weeks ago the government announced the creation of the Metropolitan Development Authority, which could compulsorily acquire private land, the latest in a series of planning powers which sidestep local government control.

''To have a review with just two panel members and not a planner to be seen should confirm the very real fear that Kristina Keneally is heading in a predetermined direction,'' Mr Hazzard said. ''It will mean that local communities are definitely cut out of the consultative process on a permanent basis.''

Under the Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009, the government won sweeping planning powers which applied to projects such as schools, infrastructure and public housing.

A new office, the NSW Co-ordinator General, was created to approve projects within the quick timeframes set down by the federal government.

Numerous projects, such as school buildings which contravened local planning guidelines, have been approved with minimal public consultation. The review will look at applying these principles to other projects.

The NSW Local Government Association supported the special approval process last year but its president, Genia McCaffery, opposes the possible extension of the ''emergency'' powers.

''We had an absolute commitment from then-premier Rees and then-planning minister Keneally that those powers would be simply for the Nation Building projects to deal with the economic crisis.

''I think the government is travelling a very dangerous path here, because there will be enormous community anger if they start giving this sort of unprecedented power to developers.''

Ms Keneally has appointed Dr Neil Shepherd, a bureaucrat from the state Planning Assessment Commission, as the chairman of the panel, alongside Dr Peter Abelson, an economist at the University of Sydney.

Developers welcomed the review as an opportunity to streamline the lengthy approval process. Aaron Gadiel, the head of the developer group Urban Taskforce, said: ''I believe it has been successful. Why can't those principles be applied equally to private sector projects that offer the same social good?''

The president of the Australian Local Government Association, Geoff Lake, said yesterday that councils would fight efforts to remove planning powers from local communities.

The review is calling for submissions by May 14 and will report to the Premier by July.