Beyond Development Control Creating a Planning Framework for Sustainability

Karla Sperling

PhD Candate. Faculty of Law at the University of Wollongong

Abstract

Planning law in NSW provides the decision making framework for development control, environmental impact assessment (EIA) and landuse planning. It is often assumed that ecologically sustainable outcomes will be achieved within the current statutory planning framework. This paper challenges that assumption.

Planning directly contributes to the continuation of activities which are unsustainable. Some specific examples are provided in the paper. Planning codes for medium density development perpetuate car dependency. Threatened species law does not mandate decisions which protect habitat. EIA does not identify environmental assets, other than in the context of development proposals. The planning mechanism for dealing with the declining Koala population in NSW is presented as a case study.

A major aspect of planning is the mitigation of environmental impacts which may be insignificant or irrelevant in sustainability terms. By focussing on these issues, this article argues that the planning process directs attention away from finding solutions to sustainability questions such as climate change and the maintenance of biodiversity.

The form of action advocated in this article is the redesign of urban planning law, to facilitate a shift from planning for development, to planning for sustainability. This would require fundamental changes in the statutory planning framework and the paper contains a practical model for the way such a planning process could operate to:

place responsibility for the formulation of sustainability plans in institutions which are capable of carrying out bioregional planning

incorporate mechanisms for meaningful community participation as part of the sustainability planning process.

impose new constraints and duties on decision makers (in particular, to comply with the precautionary principle)

Introduction

Planning in NSW is characterised by the dominant belief amongst planners, industry and landholders that the planning system is a development control or "approvals" system which exists in order to provide a framework for the development of land. Land is regarded as a commodity which is delivered to the market through the planning pipeline. Environmental protection, though recognised as an important element of the planning system, is inevitably regarded as less important than the facilitation of land development. Typically, it is assumed that the environment may be adequately protected by the imposition of conditions of development consent during the EIA process.

Following a pathway to sustainability will require changes in the ethical basis of planning and the statutory planning framework. The initial question which must be asked during the planning process is what are we planning for? The answer which must surely be delivered by the process is the creation of sustainable communities.

Which Sustainability?

The notion of sustainability as a process is central to the approach adopted in this article[1]. Once this approach is accepted, the importance of law becomes apparent, as it is law which provides the procedural framework (or rules) under which decisions are made.

Although it is recognised that an academic debate exists in relation to 'strong' sustainability and 'weak' sustainability, this article does not attempt to provide a definition of these terms. It is assumed in the paper that 'weak' sustainability is better than no sustainability although 'strong' sustainability is the ideal.

The other aspect of sustainability theory which is critical in the planning context is the importance of identifying and dealing with threats to sustainability (such as biodiversity loss and climate change). This article is concerned with the creation of a planning framework which deals with sustainability threats, as distinct from activities which may cause localised and shortlived environmental impacts (and may attract substantial public and media attention).[2] It is activities in the latter category which tend to be the subject of consideration under existing planning law.

The Distinction Between Planning for Development and Planning for Sustainability

Planning under the *Environmental Planning and Assessment Act* 1979 (the *EPAAct*) is divided into strategic planning or

land use planning, and development control or EIA. This paper provides some specific examples of the operation of the planning process which illustrate how planning for development, rather than sustainability, is carried out under NSW law. The paper also considers the capacity of urban consolidation policies to achieve sustainable outcomes.

Sustainability is barely mentioned within the body of NSW planning law.[3] ESD principles are marginalised in particular laws which deal with specific issues such as threatened species. It is hardly surprising therefore that actual planning decisions and instruments largely fail to advance the cause of sustainability. The focus on better environmental management, through conditions of consent tacked on to development proposals at the conclusion of the planning process, means that sustainability questions are either overlooked or confused with environmental 'problems'.

The tension between development control and sustainability is highlighted by the decision of the Land and Environment Court in *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1994) 81 LGERA 143. Greenpeace argued that the atmospheric impact of carbon dioxide emissions and Australia's ratification of the *Framework Convention on Climate Change* precluded the granting of development consent for a coal fired power station. Pearlman J. rejected this argument and concluded that "the application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues" (at 154)

The fundamental issue which must be addressed through planning is how to deal with the problem of unsustainable human activities. This paper argues that achieving sustainable outcomes requires an approach to planning which is fundamentally different from development control.

The Compatibility of Sustainability, Land Use Planning and Zoning

Zoning is the key land use planning technique in NSW. It is the mechanism whereby land is divided into different spatial categories and displayed on a colour coded map for a particular area. The map is attached to a plan which contains a list of permissible uses for that land, as itemised in the land use (zoning) table.

It is often assumed that planning for sustainability can be achieved through restrictive zoning such as environmental protection zones to protect natural habitat (biodiversity) or mixed use zones to encourage development which reduces travel requirements and car dependency. But the segregation of land use through zoning has been described as the law and the market together helping to produce impersonal privatised spaces to maximise exchange value and has been identified as a factor in the creation of cities which are not sustainable:

> ...few important political issues are formed around how we relate to the natural environment because we have separated our land uses...By reserving a geographical space for one function, we create places to be used. As soon as we finish the activity we leave... There is no reason to care about the place as a place. It is simply the repository of a function.[4]

Yet zoning is one of the few available proactive planning tools. Once land is zoned for development an expectation arises that approval for this form of development will be granted. It seems to be a planning convention that if land is zoned to allow for particular uses, even if consent is required, the zoning of the land creates an expectation that consent for such permissible uses will be granted[5] Although it is possible for land zoned for development to be rezoned for environmental protection purposes without compensation for the landholder, the imposition of a more restrictive zoning would be likely to be strongly opposed by landholders unless accompanied by some form of compensation.[6]

It is therefore crucial that planning for sustainability within a planning system which relies upon zoning, occurs at the strategic planning or land use decision making phase of the process.[7]

The Ineffectiveness of Simple Formulas for Increasing Density through Urban Consolidation

The adoption of urban consolidation policies and their implementation through planning instruments during the 1980's has been a major focus of planning in NSW since that period. Urban consolidation means an increase in the average density of people or dwellings per hectare of land. It was originally intended as a method of achieving more efficient provision of services and greater housing choice. Later, it became a major policy vehicle for achieving environmental goals in urban planning.

It is often assumed that urban consolidation has environmental benefits and it is therefore relied upon as the best method for achieving sustainable urban development.[8] Yet is apparent that it has been hailed as the 'quick fix' solution for achieving ecologically sustainable urban development, without a proper examination of the claim. The available evidence suggests that reliance upon urban consolidation alone, as a mechanism for implementing sustainability, is simplistic.

The focus on increasing density, particularly on the urban fringe through the simple formula of urban consolidation, as the primary mechanism for achieving sustainability, has been questioned.[9] Hans Westerman supports the idea of the consolidated city as a sustainable city but he recognises that urban consolidation is about change in values and life style - and this cannot be imposed simply by planning decree. He also believes that regional interests may need to prevail over local interests (in relation to the responsibility for planning and managing new rail transport infrastructure, for example).[10] This aspect of urban consolidation has implications beyond the scope of planning instruments and requires an examination of the

adequacy of the institutional frameworks for planning.

Although urban consolidation policy is capable of facilitating sustainability, it's success will depend on a number of other factors such as design and siting requirements. The House of Representatives Standing Committee for Long Term Strategies was supportive of "the then fashionable concept" at the beginning of its inquiry into urban consolidation but recognised that paradoxically, lower density housing may be capable of solving environmental problems (other than transport) because many problems are simply caused by the way people conduct their lives. The Report concluded that it "was no panacea."[11]

A major focus of urban consolidation has been increasing density in fringe development through smaller lot sizes, increasing the level of multi unit housing construction and reducing the proportion of detached housing. The other aspect of urban consolidation is encouraging multi unit housing and redevelopment to increase densities in established urban areas.

The planning framework for medium density development in NSW was studied by the Department of Planning in 1993. The study found that "that the simple density calculation is often rendered redundant as other standards such as setbacks (front, side and rear) landscaping, common open space and building envelope requirements cause a lower density to be achieved".[12] Of crucial importance was the absence of any mention of energy efficiency standards in the codes. Equally important was the imposition of parking requirements. The study found that the parking requirements for each Council varied between 1 and 2 spaces per dwelling and were generally in excess of Roads and Traffic Authority standards. Of greater concern was the finding that "none of the 10 codes examined makes allowances for reductions in the code requirements where sites are close to good public transport. Further, none of the sampled codes allow for any use of the street for parking, as suggested in the Australian Model Code for Residential Development."[13]

The planning process for implementing urban consolidation policy has perpetuated the unsustainable urban forms which planners claim the policy was designed to overcome. Unless it incorporates specific provision for requirements such as mandatory energy efficient design and reductions in car dependency, the process will continue to fail to advance the cause of sustainability.

Applying the Precautionary Principle to Facilitate the Maintenance of Biodiversity

> *Greater Sydney abundantly justifies its name by becoming greater still. Bricks and mortar spring up miraculously and cover regions which but yesterday were virgin bush land.*
>
> Sydney Morning Herald editorial 3 July 1928[14]

This philosophy is still the driving force behind much of the urban development which is carried out in New South Wales. It is leading to the loss of irreplaceable coastal ecosystems and prime agricultural land, rising greenhouse gas emissions and air pollution.

One of the key aspects of planning for sustainability is implementation of the precautionary principle, which is starting to find it's way into NSW environmental law.[15] It has been considered by the NSW Land and Environment Court in several cases. Most notably, in *Leatch v National Parks and Wildlife Service and Shoalhaven City Council* (1993) 81 LGERA 270, the Court held that the principle should be applied during consideration of the impact of a development proposal on endangered species habitat.

A precautionary approach to biodiversity conservation requires the protection of habitat in advance of the formulation of development proposals. This article argues that neither the crisis management approach which often characterises legislative attempts which focus on endangered species, nor the EIA process which regards biodiversity as a factor to be taken into account by the decision maker prior to project approval, is sufficient.

It is dangerous to restrict the scope of nature conservation legislation to endangered species rather than biodiversity generally because "it allows the community to think that the problem can be solved by exceptional measures in exceptional circumstances".[16] Comprehensive protection of vegetation is essential, with the role of endangered species legislation as merely a "valuable adjunct" because:

> ...it is simply irrational, not to mention very difficult, to allow habitat destruction to the point that species are rare or endangered and then seek to protect them to the point that they cease to have that classification.[17]

Yet NSW still has no comprehensive legal regime for the protection of native vegetation.[18]

The Failure of Traditional Forms of EIA : the Case of the Disappearing Koalas

Australia's national icon, the Koala, is in danger of extinction in NSW. Earlier this century, the Koala was extremely common in NSW but it is estimated that there may now be only afew thousand Koalas left. If we cant get the planning right to save the Koala, despite the Koala being worth millions of dollars to the tourism industry, it suggests there is little hope of protecting the less cuddly species.

The main reason why Koalas are in such trouble is that their preferred habitat is similar to the preferred habitat of humans, which is temperate coastal areas. When new urban areas are built in Koala habitat, there is a massive initial disruption due to vegetation clearance. The survivors are much more susceptible to disease through stress caused by coping with habitat loss.

Most are finished off later by dog attacks and collisions with cars. If Koalas are to survive in NSW, they will therefore need large areas of their own habitat, free from people, dogs and cars.

The planning system does contain a mechanism which is intended to reverse the declining trend in the Koala population. State Environmental Planning Policy (SEPP) No 44 - Koala Habitat Protection provides that certain development or rezoning of land which has been identified as 'core Koala habitat' shall comply with various procedural requirements. Part 2 is headed DEVELOPMENT CONTROL OF KOALA HABITATS and clause 9(1) merely specifies that a plan of management must be prepared prior to a council granting development consent in relation to land containing such habitat. There is nothing in the SEPP which makes the retention of Koala habitat mandatory.

It should be noted however that councils are encouraged under Part 4, Clause 15 (b) (i) to carry out proactive planning exercises in order to identify habitat in advance of development and include such land within an environmental protection zone. This is the appropriate planning approach because it contains a process for dealing with the systemic nature of habitat destruction. But it is optional. The alternative option is to "identify land that is core Koala habitat and apply special provisions to control the development of that land". This alternative fails to understand the necessity of protecting habitat from disturbance and is an example of the traditional belief that the environment is able to be adequately protected by imposing conditions of development consent during the EIA process.

The case of the disappearing Koala is a perfect illustration of the way EIA seeks to respond to environmental 'problems'. EIA does not place limits on the discretion of decision-makers during their consideration of unsustainable activities, with the result that approvals for such activities continue to be granted. There is no recognition within EIA that the real problem is the human problem of habitat destruction.

If biodiversity is to be maintained, the planning system needs to incorporate a presumption against development which impacts on Koala habitat, or any threatened species habitat, (perhaps any native habitat at all). If a person wishes to carry out such development, then in accordance with the precautionary principle, the onus must be upon them to demonstrate that their proposal will not result in a detrimental effect on the species, habitat or ecosystem.[19]

The Threatened Species Conservation Act

The *Threatened Species Conservation Act* 1995 (*TSC Act*) incorporated major amendments to the *EPAAct* which were designed to integrate threatened species conservation within the development control process. The Act provides that consent authorities must seek the concurrence of the Director-General of the National Parks and Wildlife Service prior to granting planning consents or approvals which relate to land declared as critical threatened species habitat or where there is likely to be a significant effect on threatened species, populations or ecologically communities or their habitat.

If the Act is to succeed in achieving its objective of preventing species extinctions, it is essential that in exercising her discretion, the Director General does not merely regard her role as a rubber stamp for approving development proposals.[20] A precautionary approach means that the onus be placed upon the proponent to demonstrate that the proposal would not impact upon threatened species habitat. Any proponent who is incapable of satisfying the Director General that their proposal has a benign effect on threatened species habitat, should be denied concurrence.[21]

In particular, The Director General must not adopt the traditional approach which is the focus of the criticisms contained in this paper. If she accepts the view that all impacts of development are capable of being managed through the planning "approvals" process, with the associated belief that the conditions of consent mechanism is capable of protecting the environment from any risk posed by development, the Act will not succeed.

It should also be noted however, that the *TSC Act* attempts to achieve the identification of critical habitat through the land use planning process in advance of development.[22] This provision has a much greater chance of successfully preventing biodiversity loss than the consideration of threatened species during the EIA process. It is an example of proactive planning for sustainability which is the form of planning advocated in this article.

Community Participation in Decision Making

Designing better processes for community participation in decision making is a major aspect of the task of planning for sustainability. It is especially important that these processes operate at the local level. Yet the approach in NSW in recent years has been to remove the existing avenues for participation rather than create better ones.

An example is State Environmental Planning Policy No. 47 Moore Park Showground. The effect of SEPP 47 was to allow the development of the historic Sydney Showground by Fox Sudios Australia Pty Ltd. In *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1996) 92 LGERA 283, the Land and Environment Court (Pearlman CJ) upheld the Minster's actions. The Court held that a spot-rezoning without public participation to allow the development of particular land through the SEPP mechanism was permissable where the development was of State significance. This case has been described as an example of the State government seeking to "manufacture planning outcomes via direct involvement in the decision making process."[23] This decision suggests that the SEPP process may itself be operating as a barrier to sustainability, by removing opportunities for public participation in planning.

Other recent examples of intervention in the planning process by the NSW goverment have resulted in the removal of opportunities for community participation and review of planning decisions. Special legislation has been passed to override or avoid decisions of the Land and Environment Court which have been perceived as contrary to government policy.[24] Planning for sustainability requires public interest considerations to prevail over private use rights. Unless planning law provides a mechanism for this to occur, planning decisions will not result in a movement towards sustainability.

Creating a Pathway to Sustainability through a Reformulation of Planning Law

Planning for sustainability does not demand a process in which sustainability can be proven or pronounced upon. Our state of knowledge is such that although we know (or should be expected to know) when our actions result in outcomes which are unsustainable, we have no way of understanding whether our behaviour is truly sustainable. Such knowledge can only be acquired over many generations, as evidenced by the knowledge of Australia's indigenous people, which was built up over thousands of years.

No decision maker is capable of determining whether sustainability has or has not been achieved, particularly in relation to individual projects. The planning process must be seen as a pathway - with sustainability as the ultimate destination. The planning processes which are formulated below are designed to operate as part of a system which contributes to the movement of planning in this direction.

Step 1 Preparation of local and regional sustainability plans

Objective: The design of a plan which identifies sustainability threats and incorporates traditional land use planning matters, catchment plans, air quality improvement plans etc.

Process: Involvement of the community, industry and government in the coordination, formulation and implementation of plans by regional bodies such as Voluntary Regional Organisations of Councils or catchment management committees

Goal: A commitment by all sections of the community to work towards the creation of a sustainable community

Step 2 Consideration of proposals for development or land use change

Objective: An assessment and determination of the contribution of proposals to achieving the goal of the sustainability plan

Process: Onus on the proponent to demonstrate the compliance of development proposals with elements of sustainability planning, such as

- The proposal will result in an increase rather than a decrease in biological diversity;
- the proposal meets energy efficiency criteria;
- the proposal seeks to reduce car dependency;
- there has been public participation in the formulation of the proposal;
- other elements which may vary depending on local and regional circumstances

Goal: Formulation and assessment of development proposals and land use change in meeting the elements of sustainability planning.

Conclusion

The *Integrated Development Assessment White Paper and Exposure Draft Bill* which was released by the NSW Government in February 1997, proposed the removal of public participation and the democratic role of local government in relation to the assessment of whole classes of development. By expanding the power of the Minister for Planning to assess and approve development of State and Regional significance, the proposal if passed into law, has the potential to seriously restrict community participation in planning. The White Paper, when considered in the context of the planning decisions reviewed in this article, confirms that a lack of political will to create a planning framework for sustainability exists in NSW.

ENDNOTES

* This article is a modified v rsion of a paper presented by the author at Pathways to Sustainability - Local Inititatives for Cities and Towns, Newcastle, June 1-5 1997

1 This approach was used by Dovers S. & Handmer J. in "Uncertainty, sustainability and change", Global Environmental Change, vol 2, no. 4. where th y regard sustainability as the ability of a system to respond to change and sustainable development as a pathway which maintains or nhances this attribut of the system, while answering present human needs.

2 This distinction is stressed by Michael Common in Sustainability and Policy , Cambridge University Press, Melbourne, 1995

3 Other than in Sched 2, Clause 8 of the Environmental Planning and Assessment Regulation which provides that an Environmental Impact Statement (EIS) must contain a justification for projects in terms of Ecologically Sustainable Development. This provision has no application during the development control process in relation to projects where an EIS is not required, even though such projects, particularly if cumulative impacts are tak n into account, can threaten sustainability.

4 E Fowler, Building Cities That Work, 1992, McGill Queens University Press at p. 185

5 Anderw Kelly and David Farrier, "Local Government and Biodiversity Conservation", (1996) 13 EPLJ 374 at pp380-381 refer to this as the "culture of consent in local government" which assumes that "if land is zoned to make a particular type of development permissible with consent, approval will be given, subject to conditions. The primary issue will be what conditions should be attached."

6 See for xampl the views of Mr Peter Loftus, the managing director of Ardel Ltd. This company was the proponent of a housing proj ct which it proposed to locate in bushland which included endangered species habitat. Consent was rejected by the local council and the Land and Environment Court (in Ardel Ltd v Warringah Council (unreported) Land and Environment Court, Pearlman J. 3 May 1996.) The bushland had been previously rezoned residential by the Council. Mr Loftus, quoted by Murray Hogarth in "Sydney's Kakadu 'under threat from housing project' ", Sydn y Morning H rald, March 8 1997 said : "I guess the option was for the council not to rezone the land originally".

7 See for xampl , the approach adopted by the Queensland Johnstone Shire Council in its strategic plan which requires:

- assessment of the capacity of the resources concerned to cope with change arising from development
- placing constraints on development and use of resources in accordance with the capacity of the resources of the area to cope with the effects of furth r use and development
- identification of management mechanisms needed to ensure that the capacities of resources are not exceeded.

(Source: Resource Assessment Commission Coastal Zone Inquiry Draft Report , 1992 at p. 142)

8 See for example Laura Stocker and Peter Newman, "Urban Design and Transport Options: Strategies to Decrease Greenhouse Gas Emissions", in WJ Bourna, GI Pearman and MR Manning, 1996, Greenhouse Coping with Climate Change, CSIRO. Stocker and Newman claim (at p. 530) that urban consolidation has been successful in increasing the proportion of housing being built in established areas and conclude that urban consolidation may th refore b a reason why the rate of growth in urban car use slowed between 1981-1991.

9 See for xample Patrick Troy,1996,The Perils of Urban Consolidation.

10 Hans West rman, 1993, "Realising the Consolidated City" in Spirited Cities: Urban Planning, Traffic and Environmental Management in the Nin ties, Robert Fr estone (ed), The Federation Press, pp 280 -295 at 285

11 Parliament of the Commonwealth of Australia, 1992, Patterns of Urban Settlement: Consolidating the Future? AGPS, Canberra , p. 3.

12 Scott Carver Pty Ltd, December 1993, Review of Medium/High Density Residential Controls, Report for the Department of Planning Urban Consolidation and Design Branch

13 infra p. 20

14 Quoted by Leonie Sandercock,1975, Cities for Sale - Property Politcs and Urban Planning in Australia, Melbourne University Press, M lbourne at p. 86

15 Section 77 C (g) of the EPAAct requires the Director-General of the National Parks and Wildlife Service to apply the principle in deciding wh th r she ought to grant concurrence in relation to development proposals which relate to land declared as critical threatened species habitat or wher there is lik ly to b a significant effect on threatened species, populations or ecological communities or their habitat.

16 David Farrier, "The Endangered Fauna (Interim Protection) Act 1991: What is NOT in the Act", The Endangered Fauna Act in Action, Environmental D f nders Office, 1992, at p. 27. Although Jeff Smith in "Skinning Cats, Putting Tigers in Tanks and Bringing Up Baby: A Critique of the Threatened Species Conservation Act 1995 (NSW)", (1997) 14 EPLJ 17, regards the NSW Act as biodiversity legislation despite it's focus on threat ned species.

17 Bradsen J "Biodiversity Legislation: Species, Vegetation, Habitat" (1992) EPLJ 175 at p. 180

18 The NSW government attempted to impose limited clearing controls in 1995 with the introduction of SEPP 46- Protection and Management of Native Vegetation but this measure did not implement the precautionary principle and it was substantially amended after intense lobbying by land user groups. It is anticipated that vegetation legislation will be introduced into the NSW parliament during the latter half of 1997.

19 For a discussion of the 'reverse onus' interpretation of the precautionary principle which is the approach advocated in this article, see Warwick Gullett "Environmental Protection and the "Precautionary Principle": A Response to Scientific Uncertainty in Environmental Management" (1997) 14 EPLJ 52 at p.59

20 James Prest (1995) Licensed to Kill: Endangered Fauna licensing Under the National Parks & Wildlife Act 1974 (NSW) between 1991-1995, Australian Centre for Environmental Law, ANU, Canberra, reviewed the administration of the Endangered Fauna (Interim Protection) Act, 1991, which was the predecessor of the TSCAct. Prest found that it became routine practice for the Director-General to grant licences which had the effect of allowing the destruction of ndangered species habitat. This practice appears to be continuing under the administration of the TSC Act. In On The Brink - Your Bush, Their Habitat, Our Act - Is the Threatened Species Conservation Act working? Proceedings of the Conference held at The University of Sydney, Mallett Street Campus, Camperdown, May 1 and 2, 1997, Nature Conservation Council, Katherine Wells reported (at p.156) that the Director-General had granted 7 concurrences. In no case had a concurrence application been refused.

21 Although if th Director General takes a more limited view of the application of the precautionary principle, there may be little scope for litigation to chall ng h r decision. David Mossop in "The Potential Use of the Precautionary Principle in Domestic Litigation" AELN No. 1 1997 pp 22 -27 at p. 26 argues that "the generality (and uncertainty as to the precise content) of the principle means that it provides a framework for policy dev lopment rather than a guide to environmental decision making at an operational level".

22 By the insertion of s. 34 A EPAAct

23 Peter Williams, "Out-Foxing the People? Recent State Involvement in the Planning System", Urban Policy and Research Vol 15 No 2 1997 pp129- 136 at p. 135

24 See State Environmental Planning (Permissable Mining) Act 1996 and Port Kembla Development (Special Provisions) Act 1997