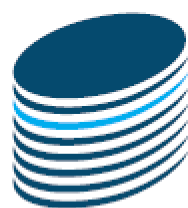
Kick Starting the Productivity Discussion – NSW Productivity Commission

DECEMBER 2019

COMMERCIAL AND ECONOMIC PLANNING ASSOCIATION INC



Commercial and Economic Planning Association Inc.

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Introduction

Sydney faces a housing affordability crisis. As the population continues to rise, and the number of dwellings continues to lag behind, housing will only continue to get more expensive. It is for this reason that the Commercial and Economic Planning Association Inc (CEPA) is opposed to policies that aggravate this crisis, rather than alleviate it.

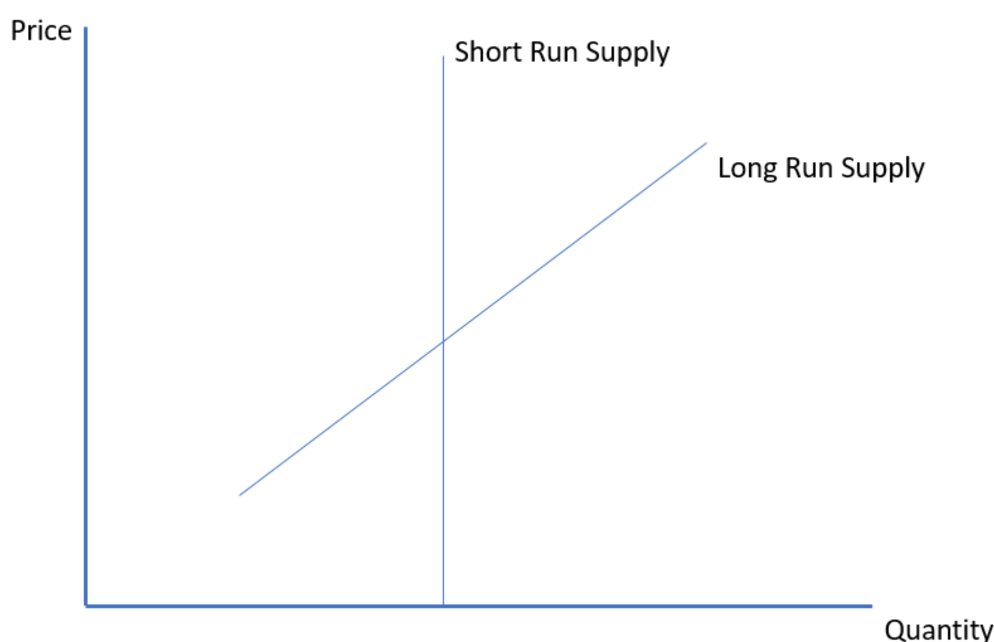
There are very few houses that are owner-built and therefore without some involvement from the development industry. The vast majority of people live in homes that were built by developers; without developers who are willing to take a risk, there would be an even greater housing crisis.

Between the 2011 and 2016 Censuses, the Greater Sydney area has experienced an increase of 432,317 people, or growth of around 9 per cent. At the same time, the number of dwellings has only increased by a little over 7 per cent. This mismatch is one of the prime causes of housing unaffordability today. Other causes of unaffordability include levies and charges, time delays and the increasing price of land.

At a time when interest rates are low, demand is outstripping supply, and prices are rising, this would normally be a signal to the market to provoke a supply response. However, as the housing market is not a pure market and is constrained by zoning and the development approval process, it is often the case that the market has moved on before the supply response is evident on the ground.

This is because housing, in the short-run, is relatively inelastic to prices. A developer (or for that matter, anyone) cannot just build a new dwelling overnight in response to prices. There is a lengthy process that must be followed before new supply can be added to the stock of housing, and the quantity is set regardless of the price. Figure 1 shows the short-run and long-run supply responses to price.

Figure 1 – Short-run and Long-run Supply Responses to Price



Over the long-run, supply does respond to price, but generally to a forecast of future prices, or to prices prevailing at the time of the planning proposal or development application. With delays of up to seven to ten years from a planning proposal to final completion, it is very likely that market conditions will have changed by the time the dwellings are finally built. The risk that the market could turn, and the fact that a developer is burning through money due to holding costs mean that there is not as much housing built as there would be in the absence of these risks.

The Greater Sydney Commission (GSC) is planning for the delivery of a minimum of 725,000 additional dwellings in the next 20 years across Greater Sydney. The GSC says that this will require sustained efforts by all Councils and a “longer-term outlook” and “capacity-based approach”, given the timescales involved with development.

The interplay of supply and demand sets prices in the market. However, the housing market is not a typical market, as it takes time for houses to be built and the planning system places restrictions on what can be built where. So price rises, which would induce an increase in supply in other markets, do not work in the same way in the housing market. Housing supply is relatively inelastic to prices in the short run, but over the long run does respond to prices. This lag is generally caused by the regulated nature of the housing market, including the need to often rezone a site and then obtain development approval, which in some cases can take seven to ten years. Low interest rates should be making the cost of capital, and therefore the cost of final production, cheaper. But, as a developer does not know what the prevailing market conditions and cost of capital will be when the building is complete (and they burn through capital while they await approval) there are fewer dwellings built than would be in a world without these planning restrictions, and at higher prices than would otherwise prevail.

But at the same time, low interest rates are inducing a demand response which is forcing the price of housing up. This increased demand, coupled with a slow supply response in the short run, means that prices will continue to rise. As supply can only catch up in the long run, the housing affordability crisis is further exacerbated.

Despite recent (largely cosmetic) changes to the Environmental Planning and Assessment Act 1979, the planning system remains complex and challenging, with too much power in the hands of councils and their officers. There are many examples of councils and council officers whose action and public statement show that are not aligned with state government policy on housing affordability, particularly on the economic reality of increasing supply. Further the management processes implemented by councils and the state departments does not have the same monitoring accountability and rigour that would typically be demanded and are an imperative in the private sector. The council and state led planning processes relied on by industry to enable supply of housing are not contained in a management system that ensures time-based outcomes. CEPA is concerned that this may continue to frustrate the government in implementing the plans.

CEPA members often encounter councils and council officers who place barriers in the way of sensible development, including those near transport hubs. There are also councils (such as Georges River, City of Sydney and most recently Parramatta) that impose, or plan to impose, taxes that transfer the stamp duty savings from first home buyers to councils, negating the assistance provided by the state government to first home buyers. We call upon the state government to address these kinds of policies.

Developers would like to be genuine partners with government, as it is the development sector that ultimately risks the capital and provides the ingenuity borne from the competitive tension contained in private enterprise that is required to implement the plans. Without the industry, the plans are merely pretty pieces of paper.

One of the main problems with the system is the agents within the system. The management paradigm is that workers will focus on what their own immediate outcome is. Unfortunately, outcomes among players do not align in the planning system. The outcomes for each of the players are as followers:

- Planners
    - to make a plan
    - to remain employed within the planning system (council, Department or private consultant)
    - to prevent or delay a development for whatever reason
- Developers
    - to make a profit by building a commercially/economically viable development
    - to build dwellings/commercial/office space
    - to maintain and expand employment.

As can be seen, there is a fundamental mismatch in the goals of the actors within the system, and this mismatch results in misunderstandings, delays and is a reason why the system is so adversarial. Planners do not appreciate that developers need to make a profit in order to build. An unviable development will just remain as a plan. Planners need to understand that they can be responsible for viability from the outset, and having them understanding this is fundamental to a more efficient planning system.

In short, it is vital that economics is brought into land use planning in NSW. The old adage is that failing to plan is planning to fail. But failure of the planning profession to understand that their decisions have both an economic basis and consequences is failing us all.

Planning in New South Wales effectively starts with the premise that anything a private land owner does on or to their land is illegal, unless it is sanctioned by the *Environmental Planning and Assessment Act 1979*. Local Environmental Plans can be, and on average are, older than 5 years. A lot of change happens to local land use needs in that period, and so a robust and efficient system to deal with rezonings needs to be instituted and maintained.

Land use planning first came into being to ensure that market failure was mitigated against. This included zoning to ensure that incompatible land uses were not placed adjacent to each other, and to ensure that one land owner's welfare was not unreasonably impinged upon by the actions of neighbouring land owners. This has expanded into an industry that basically has a bias against land owners doing what they reasonably want with their own land. We have gone from attempting to address market failure to a system that sets out to make the market fail.

This submission looks at:

- taxes and charges
- value capture
- the needlessly adversarial nature of the NSW planning system
- affordable housing
- acknowledging the role of the federal government in planning
- the role of the state in planning
- minimising complexity and red tape
- the cost of delays.

Taxes and Charges

There are many taxes and charges levied on development. CEPA considers that each of them, including 7.11 and 7.12 levies, lodgement fees, State Infrastructure Charges, land tax, stamp duty and rates should all be looked at holistically in a review of state taxes and charges on development. This section discusses the more macro tax, while subsequent sections discuss "value capture" taxes and affordable housing levies.

Stamp Duty and Land Tax

Stamp duty is a transaction tax that locks home owners in, and results in home buyers buying too much housing than their current needs would dictate. Stamp duty prevents home owners from downsizing to more appropriate housing. This creates large inefficiencies in the housing market and arguably keeps house prices higher than they would be in the absence of such a transaction tax. Stamp duty is also a tax that is paid at a time when arguably it is the least affordable – at a time when the buyer is undertaking a huge purchase. Stamp duty is also not paid by renters (although in some sense it is capitalised in the rent paid) nor by those who never move, and in this sense is a tax that is bad for both vertical and horizontal equity.

Stamp duty should be replaced by a broad-based land tax (with appropriate grandfathering). Land tax is a much more efficient tax and does not distort the decisions of buyers and sellers. It reduces the inefficiencies in the market by not discouraging turnover of stock to more appropriate users.

Levies and Rate Pegging

Levies are an unfair burden on new home buyers to provide infrastructure for current residents that should otherwise be paid out of rates.

It is fair and reasonable that a development mitigates the effects on its local community, including by providing local infrastructure such as parks, etc. However, it should not be up to new development to solve infrastructure backlogs for entire LGAs or across Sydney.

The goal of tax reform should be to broaden the base and lower the rate. However, as rate pegging means that councils tend to not be able to raise rates to provide new infrastructure for current and new residents, the burden has fallen to new home buyers, at a time when they can least afford it. This is then capitalised into the price of all homes, often resulting in a windfall gain for owners of established properties in an area, as levies reduce the competitive tension between new and established homes.

Removing rate pegging would ensure that new home buyers are not unfairly burdened. Councils that charge too much would be democratically removed by rate payers who feel they are over-taxed. Rate pegging is a paternalistic policy imposed by a government that does not believe that local democracy is able to decide important issues, such as rates. If planning powers can be devolved – an area that has way more potential to adversely affect the economy than rates – so too can the power to set rates.

Lodgement Fees

The Commercial and Economic Planning Association Inc (CEPA) is concerned that Councils, such as the City of Sydney, are using their powers to set fees to effectively prevent proponents from lodging planning proposals. CEPA considers that this is a perversion of the purpose of these fees, which should be a "fee for service", not a hidden tax. We consider that the State should prescribe fees, or the way in which they are set, to ensure the planning system remains as intended.

The manner in which Councils can set fees for requests for the preparation of a planning proposal is outline in Section 11 of the Environmental Planning And Assessment Regulation 2000.

The City of Sydney (and some other councils) sets a fee for “major applications” that is around 10 times the fee for “minor applications” for a request to prepare a planning proposal.

We understand that the City of Sydney is able to use its discretion to determine, before lodgement, whether a request to prepare a planning proposal will be major or minor. We consider that councils are using the “major application” fee as a quasi-value capture mechanism – or a discretionary tax – that is against the spirit of the regulation and counter to government policy of encouraging greater housing supply.

The scenario that faces our members is the following:
1. A proponent lodges an application to prepare a planning proposal; the council pre-determines that it is a major application and charges a fee of $140,530 (in the City of Sydney)
2. The application is rejected with the Council refusing to consider the making of the plan to the gateway
3. The proponent lodges an appeal with the Department – at a cost of $20,000
4. The appeal is upheld by the PAC and the Department issues gateway
5. Council refuses to become the RPA
6. The proponent is required to pay the Department $25,000 for the appointment of a new RPA and cover the costs of assessment
7. The total fees in this scenario is $185,000.

Of course, this brings with it the risk that, ultimately, the Minister will not make the plan in accordance with the proponent’s application. Therefore, the proponent is effectively risking the initial $140,530 – at Stage 1 – on a planning proposal that may not come to fruition. The $140,530 is not refundable, does not come with any guarantees, and comes with no obligation on the council (or Department) to a consider it in a timely way. On top of this, if the plan is made by the Minister, the proponent is still required to lodge a DA for assessment, which will attract further fees.

This fee system affects smaller developers, who are the major supplier of housing, the most.

With this in mind, why would a proponent seek the preparation of a planning proposal, particularly where it is marginal as to whether it is “minor” or “major”?

This is in contrast to DAs, that attract substantially lower fees for a detailed and comprehensive development application assessment. Such an assessment is far more detailed and cost intensive for Council than what CEPA considers could be fairly simple planning proposals. We therefore cannot understand how Council staff can justify a fee of $140,530 when a more intensive DA process is a fraction of the cost.

As it is rare for the Capital Investment Value for projects to be disclosed at the planning proposal stage, it is impossible for council to determine whether a development will be minor or major. Therefore, it is effectively a discretionary tax on development that council officers would rather did not to have proceed. Council officers therefore have a great deal of power to prevent development.

CEPA also considers the publishing of a prescribed fee is against the spirit of the regulation, which suggests an agreement of sorts over fees, not the blanket application of an arbitrary fee by Council.

Lodgement fees should be reviewed to prevent councils from effectively rejecting a request to prepare a planning proposal before it is even lodged.

CEPA considers this issue to be a major burden on smaller developers, and a hidden brake on the supply of housing. If proponents decide not the risk the fee, and decide not to lodge their application, this is housing supply that is lost that is not even known about. We are certain this happens across Sydney right now.

RECOMMENDATIONS

1. Undertake a comprehensive review of all levies, taxes and charges on property and development in NSW, with a focus on growth and efficiency.
2. Establish a set fee for planning proposal applications in Regulation that cannot be manipulated by local government.

Affordable Housing

The planning system appears to actively prevent affordable housing development from occurring efficiently.

CEPA members have been informed by the Registrar of Community Housing that there is no register of community housing, including no monitoring of whether those dwellings that have been handed over to councils are being used for community housing, including being rented out at 80 per cent of market rent.

Until a register of community housing, including reporting non-compliance has been established and the number of affordable dwellings has been audited, there should be a moratorium on SEPP 70. In any case, SEPP 70 should be abolished and replaced with an incentive-based system that could encourage developers to provide affordable housing in their developments without it resulting in an increase in costs across the rest of the development.

Our modelling, as discussed in this section, shows that SEPP 70 costs new home buyers up to $50,000 per dwelling, as the increased cost of providing the affordable housing has to be borne by the remaining market housing in a development. The government's own Housing Affordability Taskforce reported in 2012 that inclusionary zoning only works where the value of the property is very high (i.e. eastern suburbs and North Shore/Northern Beaches).

An alternative to SEPP 70 is the *Affordable Rental Housing SEPP* (ARHSEPP). This SEPP should be tweaked to increase the incentives, Site Compatibility Certificates (SCCs) should be used better and height/FSR bonuses should be used to create affordable housing. Indeed, SCCs allow affordable housing providers to purchase disused industrial land and add additional uses (such as apartments or boarding houses); in this way, the developer has access to land at prices that are well below those that would prevail if the land was zoned residential, and can pass on those savings in the form of rental subsidies to eligible tenants. Along with the ARHSEPP, the federal government's new NHIFIC should be leveraged to create more affordable housing, but SEPP 70 results in higher costs, while the ARHSEPP provides incentives.

Done with a mind to the economics of affordable housing, there could be a huge increase in affordable housing, without a cost to new home buyers, developers, affordable housing tenants or the state. The ARHSEPP could be used to encourage "build to rent", while at the same time it would provide large amounts of affordable housing.

Why SEPP 70 Makes The Planning System More Costly and Less Efficient

The Greater Sydney Commission has called for the dedication of 5-10 per cent of all new developments as affordable housing, which would then be leased by a Community Housing Provider at below-market rent. However, they have not put forward a scheme that would result in no impact on house prices.

SEPP 70 is a tax on development, which will only serve to make market housing less affordable, and the burden of which falls most on younger first home buyers.

Two years ago, the state government extended coverage of SEPP 70 to more LGAs. Last year, it extended the policy to apply across the whole state. In forming a view of how SEPP 70 would work in their LGA, Canada Bay Council's consultant has suggested a figure of $488.75/m^2 as the amount for the SEPP 70 tax. This is an exorbitant amount of money that would result in $39,100 increase in the cost of housing in the LGA. It would increase costs by as much in other LGAs that use the same pricing, and, as councils lack dedicated economic and policy experience (unlike state and federal

governments) councils tend to look to each other for policy ideas and so bad policies tend to propagate from council to council.

Number of Dwellings and Credibility of SEPP 70 Targets

The GSC has called for 10 per cent of dwellings constructed in the metropolitan area to be affordable over the next 30 years. Based on the housing targets in *A Metropolis of Three Cities*, this equates to between 36,250 and 72,500. Over 20 years (or 1,812 to 3,625 per year). This is a very small number of houses, given there are 1,855,734 private dwellings in the Greater Metropolitan Area[1]. Effectively these homes will go to the lucky few and government can say they have solved the housing affordability crisis. At 246 homes per year, with no increase in the stock, it will take around 750 years for affordable stock to be 10 per cent of the total stock.

The Impact of SEPP 70 on Housing Affordability

Sydney faces a housing affordability crisis. It is imperative, therefore, that policy makers improve the situation, rather than make it worse. The state government is trying, with support for first home buyers worth up to $50,000. However, modelling by CEPA indicates that the introduction of SEPP 70 at rates suggested by Canada Bay's consultant is likely to add at least $48,875 to a typical new apartment. While the state government is giving some level of support to new home owners, it would be clawing it back in SEPP 70 taxes.

SEPP 70 also has an impact on market rents. Modelling suggests that rents will rise by $49 per week, or $2,542 per year. This so-called affordable rental policy only leads to higher rents across the board for market renters.

There will also be an impact on supply, as the increase in price will have a chilling effect on the quantity supplied, meaning that it is likely that councils will fall short of their 30 year dwelling targets where SEPP 70 is imposed.

SEPP 70 Tax

It is clear that SEPP 70 has all of the hallmarks of a tax, and a poor tax at that.

There is a reason why taxes of this nature are reserved for the Commonwealth government under the constitution – this sort of tax is dangerous in the hands of those who do not understand its implications. Tax has implications for economic activity. It forms a deadweight loss – economic production that is lost to both suppliers and consumers, and creates inefficiencies. At its worst, a bad tax can increase risks on business and drive good businesses out of an industry or a geographic location.

Taxes do not simply raise revenue. In certain circumstances, not only might a tax not raise any revenue, but it may lower revenue in other areas. This might be the case if all developers decide not to do business in the applicant council areas as a result of the implementation of the proposed tax – it would lower statutory planning fee revenue, revenue from development levies and ultimately rates revenue. A bad tax might, then, be worse for the economy (and council) than no tax at all.

Not only is SEPP 70 a tax, it is also a retrospective tax, despite possibly being *prospective* in intent. This is because it affects developers and land owners who have already entered contracts or executed purchases and sales possibly long before the policy is to be implemented. SEPP 70 has real material implications for the feasibility of development in the council areas targeted. Indeed, with development being a risky enterprise to start with, they may result in the abandonment of projects,

[1] Census of Population and Housing 2016

jeopardising housing targets and affordability, and ultimately, the liveability of the entire Greater Sydney area.

Even if they are found not to be "taxes", the burden of these levies falls on new home buyers. The goal of most economists when discussing tax policy is to broaden the base and lower the rate; instead planners appear to have a goal of narrowing the base to only new home buyers and increasing the tax; and they have no idea how this will effect the economy.

Intergenerational Inequity

The burden of paying the SEPP 70 tax is likely to fall upon the young. Older residents of the councils with SEPP 70 provisions are unlikely to ever pay it. Indeed, as new homes set the benchmark for the market in established homes, older residents are likely to benefit, as the cost of SEPP 70 is capitalised into the price of new apartments, prices across the board will rise, meaning capital gains for those who already own established homes.

It is completely unfair that the younger purchasers should pay for affordable housing when it should be the responsibility of all. There are better models for improving affordable housing than it being paid for by such a small tax base.

It is the coming of the new serfdom, whereby the young are indentured to their landlords until they can afford a deposit to buy their freedom. We should therefore be concentrating on making *all* housing cheaper, rather than making it cheaper for the lucky few.

SEPP 70 as an Upfront Tax

Payment for SEPP 70 contributions would be due prior to issuance of a construction certificate. This means that a developer virtually needs to pay the tax upfront. City of Sydney Council allows a bank guarantee in lieu of full payment in advance. However, a bank guarantee requires the proponent to have all the money in an account against which the guarantee is issued. Therefore, the proponent is required to have the money upfront anyway. In addition, it is unlikely that a proponent would be able to obtain finance to pay contributions, so the proponent would need to find the equity capital prior to construction. This is particularly unfair on smaller developers who do not have the finances to pay the tax upfront and suggests a fundamental misunderstanding of the finance market on behalf of councils and state government.

As smaller developers have less access to finance, it is likely that SEPP 70 will ultimately lead to the oligopolisation of the industry. When smaller players are forced out, it will result in even higher prices, as the larger developers will not have to compete on price with smaller developers.

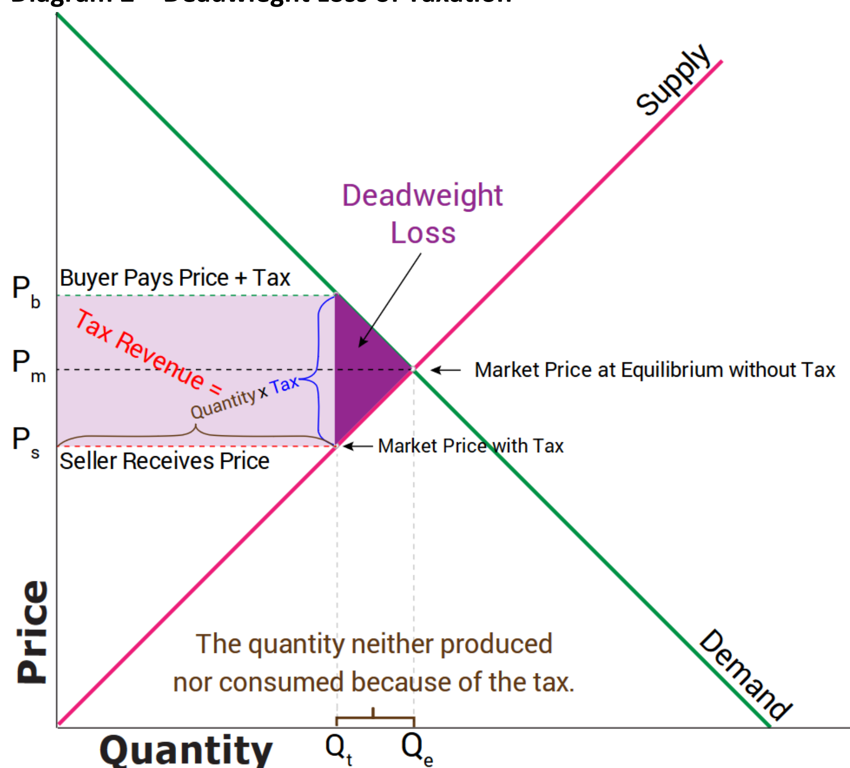
Deadweight Loss

The laws of economics apply to the housing market as much as to any other market. This includes what happens when a tax is applied to a good or service – a deadweight loss is created, which is borne by society at large.

Taxes lower the value of transactions to both buyers and sellers, in that, to some extent, the buyer pays more for the product and the supplier receives less. Some of that loss of value goes to the government (the reason it collects taxes). However, it has long been recognized that the loss of value to the market participants is greater than the gain to the government. Therefore, the economy as a whole loses some value from taxation, and this complete loss is referred to as the deadweight loss of taxation. Specifically, deadweight loss consists of the loss of consumer surplus for buyers plus the loss of producer surplus for sellers who do not participate in the market for reasons other than the price of the product or service, resulting in a loss of total surplus for the economy.

Diagram 2 shows why this deadweight loss occurs. When a market transaction is taxed, the buyer pays a higher price and the seller receives a lower price. This lowers demand, which shifts the buyer's equilibrium from the market price (P_m) to a higher price (P_b) at lower quantities; likewise, because the seller receives a lower price (P_s) for his product, less of it is supplied, which moves the seller's equilibrium down the supply curve, to a lower price and quantity. The amount the government receives equals the tax, which equals the buyer's price minus the seller's price, times the quantity of the transaction, whether for goods or services (tax revenue = tax × quantity).

Diagram 2 – Deadwieght Loss of Taxation



The area of the light purple rectangle in Diagram 2 is equal to the tax revenue collected by the government. The area of the dark purple triangle is equal to the economic welfare lost to taxation.

- P_b = Price buyers pay. Demand is reduced because buyers must pay a higher price because of the tax.
- P_m = Market price without taxes.
- P_s = Price sellers receive.
- Q_e = The quantity supplied without the tax.
- Q_t = The reduced quantity supplied because of the tax.

This loss of economic welfare consists of buyers who will no longer buy the product because the price is higher than their willingness-to-pay price, so they decide to do without. Likewise, some sellers will not produce a product because they are not receiving a high enough price to cover their economic costs. The benefit that these buyers and sellers would have added to the economy but for the tax is a deadweight loss of taxation. Because these buyers and sellers do not participate in the market, they do not contribute to the tax, which is why the government does not receive the portion consisting of the deadweight loss. Instead, the taxes are paid by the buyers and sellers who continue to participate in the market. The buyers pay part of the tax, in an economic sense, as a reduction in their consumer surplus, which is the difference between their willingness-to-pay price and the product price. Likewise, sellers pay part of the tax as a reduction in their producer surplus. This loss, however, goes to the government in the form of its tax, which makes sense, since only the buyers

that continue to buy the product and the sellers who continue to sell the product contribute to the tax. Thus, in terms of total surplus (consumer surplus + producer surplus), the deadweight loss equals the reduction in total surplus minus the tax revenue collected by the government.

The amount of the deadweight loss varies with both demand elasticity and supply elasticity. When either demand or supply is inelastic, then the deadweight loss of taxation is smaller, because the quantity bought or sold varies less with price. With perfect inelasticity, there is no deadweight loss. However, deadweight loss increases proportionately to the elasticity of either supply or demand. Who suffers the tax burden also depends on elasticity. When supply is inelastic or demand is elastic, then the seller suffers the major tax burden; when supply is elastic or demand is inelastic, then the buyer pays most of the tax. The effect of elasticity on the tax is no different from its effect on any other price change.

Society at large is made worse off by the amount of deadweight loss. In the housing market this means fewer dwellings built. Fewer dwellings means a larger gap between the rising population and the number of dwellings, which can only mean higher prices for housing. Indeed, taxing housing not only increases the price of the houses that are taxed, it increases the price of all housing.

Councils are the Least Fiscally Responsible

Local councils are the least fiscally responsible level of government. Indeed, Northern Beaches and Inner West Councils exist because their former constituent councils were deemed to be "not fit" for the future under the recent local government amalgamations. The City of Ryde was also deemed "not fit" and Randwick was earmarked as a council to be amalgamated. Trusting councils with hundreds of millions of dollars that would flow from SEPP 70, when they are not set up for it, is a recipe for disaster. Only state and federal governments, with fully established treasuries are in a position to handle such sums. Apart from DA approval, there should be no role for councils in affordable housing.

Perverse Outcomes

Under SEPP 70, councils could become the developer, owner and landlord for new affordable housing developments. SEPP 70 has the potential to pervert the planning process, as councils could find themselves in a conflict of interest scenario.

Councils would gain the benefits in terms of monetary contributions (which they would earn interest on) and in-kind contributions (which they would earn rental income on). This could corrupt the planning process and lead to poor planning outcomes.

It also makes this an important question: why should the dwellings be handed to councils for free when the recipient councils get the rental/interest income?

Retrospective Nature

While SEPP 70 may be *prospective* in intent, it is *retrospective* in effect. This is because it affects developers and land owners who have already entered contracts or executed purchases and sales possibly long before the policy is to be implemented. The policies have real material implications for the feasibility of development in the applicant LGAs. Indeed, with development being a risky enterprise to start with, they may result in the abandonment of projects, jeopardising housing targets and affordability, and ultimately, the liveability of the entire Greater Sydney area.

Taxation Incidence Versus Impact

While SEPP 70 may look like a tax on developers (the "impact" of the tax), the party that ultimately pays the tax (the "incidence") will depend on supply and demand elasticities in the individual

housing markets across the applicant LGAs. A tax imposes a burden on both the seller (in this case, developers) and the buyer (in this case, home buyers). Depending on elasticities, DPE has not modelled as part of the Explanation of Intended Effects, it is likely that new home buyers will pay a significant proportion (that is, the tax will be "passed on" to new home buyers). Elasticities are generally a function of market power, which is mostly with developers in a rising market. In any event, the retrospective nature of the tax means that for the foreseeable future (except for developments where the land component has not yet settled), the tax cannot be passed back to the original land owner in the form of lower prices for the land. The developer then really has only one way to pass the tax – on to the new home buyer. It appears that the tax will result in land owners paying no tax, developers paying some tax and new home buyers paying most of the tax.

Indeed, ultimately, new home buyers are a very narrow base. The GSC target of around 21,300 for the next five years across the five councils, and 73,848 over the next 30 equates to 2,462 dwellings per year (or the size of 25 medium-sized apartment developments) to 2036. Assuming this 2,462 is all that is produced, the buyers of these dwellings are a very small proportion of the overall population of the applicant LGAs. Instead of slugging the 2,462 new home buyers a year with the burden of funding all affordable housing in these areas (and assuaging the guilt of inner-city trendies who do not contribute by the fantasy of hitting the "greedy developers"), it would be fairer for the state to ensure that all tax payers pay their share.

Better Alternatives

Fund Affordable Housing Out of General Revenue

As discussed earlier in this submission, SEPP 70 is a way for those who are against development to have their consciences assuaged by syphoning off what they see as excess profits from developers into making housing more affordable for those who cannot afford it. This is wrong.

SEPP 70 makes the gap between the rich and poor wider, under the guise of improving affordability.

The tax base for SEPP 70 in the applicant councils is only as much as 2,462 households per year over the next 30 years (given the target for each applicant LGA is reached). This places an unfair burden on those new home buyers.

A better policy would be to raise the money required for affordable housing through a tax on all households in Sydney, or indeed NSW. The same amount of tax ($96 million per year over 30 years) could be raised with a $50 per year tax on all households in Greater Metropolitan Sydney. This could be given to housing associations on a competitive tendering basis to ensure value for money is obtained.

Allow Height/Density Increases to Offset SEPP 70

At the moment, SEPP 70 works just as a tax, without the ability of the developer to offset it against greater densities than would otherwise be allowed under the relevant planning scheme.

Minister Roberts' vision[2] was that a partnership be created between developers and the state, rather than the imposition of a tax. If developers are able to offset affordable housing contributions by building more market apartments (either through additional floors or additional FSR within existing height envelopes), affordable housing could be built more quickly (as developers are incentivised to build and sell as soon as possible), more cheaply, and more could be achieved.

[2] http://www.smh.com.au/nsw/more-density-around-rail-stations-and-new-schemes-for-renters-nsw-housing-plan-20170318-gv19u2.html

To reiterate, SEPP 70 does not do what the Planning Minister suggested in March 2017. SEPP 70 is a tax on development, which will only serve to make market housing less affordable, and the burden of which falls most on younger first home buyers.

Rental Model

SEPP 70 raises the question as to why developers should hand over their stock to councils for free in perpetuity, when it is the councils that will then get the benefit of owning and renting out these dwellings, albeit at a lower-than-market rent.

A better model, which would incentivise developers, would be along the lines of the National Rental Affordability Scheme (NRAS). NRAS looked to the private market to own and operate rental properties at lower than market rents in return for a subsidy over ten years. The owner could then sell the property, or roll it over for another ten years.

NRAS also helped community housing associations enter the market. Community housing associations are best placed to manage and operate affordable housing.

Negative Gearing and Commonwealth Rent Assistance

One may say that Australia already has an affordable housing policy: negative gearing and rent assistance. Negative gearing subsidises the investor in the early years while their returns are negative, but typically after about five years, returns turn positive. Negative gearing allows the investor to keep rents down, while Commonwealth Rent Assistance targets low and medium income earners and enables their rent to be subsidised. In this way, both the supply and demand sides are subsidised, and supply is able to match demand.

Make SEPP 70 a Levy on All s94 Payments

If SEPP 70 was a levy on all s94 payments, it would be spread across a region, rather than being a tax on individual developments. It would also reduce some of the issues identified in this submission around perverse incentives of councils. Councils could increase their s94 levies by a certain amount, and state government could impose a levy on councils against councils' s94 accounts, which could go to community housing providers on a tender basis.

Allow The Market to Increase Supply

SEPP 70 will reduce supply and even then make housing more expensive to buy and rent. A better alternative is to increase the supply of housing, some of which will continue to be bought to rent, and some of which will be bought to live in by the owner. A better way to increase supply is to broaden the zoning of land, so that fewer changes to planning instruments are required (which takes time and costs money) and incentivise councils to approve meritorious developments faster. In this way the supply curve shown in Diagram 1 can become less inelastic.

Conclusion

SEPP 70 raises the price of market housing for the benefit of only a select few low and middle income earners. CEPA modelling shows that the amount of tax is almost equivalent to the NSW government's recently introduced first home buyer incentives. The government would, therefore, be giving with one hand and taking with the other, in applicable LGAs. There are no silver bullets with regard to lowering prices and rents, as population growth in Sydney continues to outstrip housing supply. However, SEPP 70 makes it worse. CEPA strongly opposes the extension of SEPP 70 to the applicant councils, and indeed considers that it should be wound back altogether

Solving Sydney's housing affordability crisis requires sound economics acting in concert with sound policy and planning. Unfortunately, SEPP 70 provides none of these.

It is incredibly naive to think that a massive increase in taxes will have no effect on volumes of dwellings produced or to the prices of those developments or resulting rents. Adding nearly $50,000 to the typical market apartment is going to do lasting damage to housing supply in the five applicant councils. At a time when housing affordability is at crisis levels, it is unconscionable.

CEPA modelling suggests that the price of new housing will increase by around $50,000 in the applicant LGAs as a result of introducing SEPP 70. Indeed, it will also increase market rents by around $50 per week. Never has a housing affordability policy done so much to increase house prices and rents.

<u>RECOMMENDATIONS</u>

1. Abolish SEPP 70
2. Increase incentives in the ARHSEPP and provide mandatory timeframes in the SEPP for a planning authority to issue an SCC and subsequent DA.
3. Educate DPIE and council planning officers on why SCCs are an effective way for disused land to be used for affordable housing without the need for additional taxes or subsidies.

Value Capture

Councils are attempting to impose new taxes and charges on development under the guise of "value capture" when in fact they are taxes on value uplift from rezoning.

"Value Capture" or "Planning Gain"?

The Commonwealth government is currently grappling with the concept of value capture. They see it as an opportunity to pay for large transport infrastructure projects that would otherwise not be able to the built. However, they are taking it slowly as they are unsure of:

- what power they have to capture the value
- whether indeed there is any value to be captured
- if there is any value to be captured, how to value it
- how much of the value should be left on the table for those whose capital it is, and who have taken the initial risk
- what the effect of the capture would be on the market
- who really should bear the burden of new infrastructure, and
- whether it would be worth it in the end.

Some councils, such as the City of Parramatta Council, are so sure of themselves, though, that none of these questions are answered in their value capture policies. However, these issues are so fundamental to the question of value capture that policy work should not proceed until they have been answered.

That said, what councils imposing "value capture" policies on development are doing is in fact a tax on planning gain from changes to controls, rather than value capture.

Even though councils claim that the revenue raised from these planning gain policies are going to be used to fund local infrastructure and local betterment, the value arises because of the rezoning, not as a result of the new infrastructure. This is Council misinterpreting the intention of value capture – the value arises from the infrastructure, not the rezoning.

Councils therefore are either being disingenuous or misleading in misrepresenting the VPA policy as a value capture mechanism, and it is wrong to claim that the District Plans provide justification.

Purely changing the zoning of land without any accompanying investment in infrastructure is "planning gain", not "value capture". While a windfall of a sort does accrue as a result of rezoning, there is no justification as to why the council should be the authority that takes the lion-share of this. Indeed, it is the Minister's Local Environmental Plan that zones land, and it is the Minister who decides whether a planning proposal will be acceded to or not. If any level of government should be taking a portion of the planning gain, it is the state, not the council. CEPA considers that rezoning should only be included in value capture is when it is anchored with infrastructure investment that demonstrably adds value to private land.

The Effect on Housing Affordability

Sydney faces a housing affordability crisis. It is imperative, therefore, that policy makers improve the situation, rather than make it worse. The state government is trying, with support for first home buyers worth up to $50,000. However, modelling by CEPA indicates that the City of Parramatta Council's value capture policy (which is council policy) is likely to add at least $47,813 to a typical new apartment. While the state government is giving some level of support to new home owners, Parramatta Council would be taking it – and more – away.

It may come as a surprise to some planners, although it should not, that the laws of economics work New South Wales. The interplay of supply and demand sets prices in the market. However, the housing market is not a typical market, as it takes time for houses to be built. So price rises, which would induce an increase in supply in other markets, do not work in the same way in the housing market. Housing supply is relatively inelastic to prices in the short run, but over the long run does respond to prices. This lag is generally caused by the regulated nature of the housing market, including the need often to rezone a site and then obtain development approval, which in some cases can take seven to ten years. Low interest rates should be making the cost of capital, and therefore the cost of final production, cheaper. But, as a developer does not know what the prevailing market conditions and cost of capital will be when the building is complete (and they burn through capital while they await approval) there are fewer dwellings built than would be in a world without these planning restrictions, and at higher prices than would otherwise prevail.

But at the same time, low interest rates are inducing a demand response which is forcing the price of housing up. This increased demand, coupled with a slow supply response in the short run, means that prices will continue to rise. As supply can only catch up in the long run, the housing affordability crisis is further exacerbated.

Value Capture, in the Form of Planning Gain, Is A Tax

It is clear that council so-called value capture policies have all of the hallmarks of a tax, and a poor tax at that.

There is a reason why taxes of this nature are reserved for the Commonwealth government under the constitution – this sort of tax is dangerous in the hands of those who do not understand its implications. Tax has implications for economic activity. As shown in the previous section, taxes form a deadweight social loss – economic production that is lost to both suppliers and consumers, and creates inefficiencies. At its worst, a bad tax can increase risks on business and drive good businesses out of an industry or a geographic location.

Taxes do not simply raise revenue. In certain circumstances, not only might a tax not raise any revenue, but it may lower revenue in other areas. This might be the case if all developers decide not to do business in Parramatta as a result of the implementation of the proposed policies – it would lower statutory planning fee revenue, revenue from development levies and ultimately rates revenue. A bad tax might, then, be worse for the economy (and Council) than no tax at all.

Not only are the “value capture” policies a tax, they are also a retrospective tax, despite possibly being *prospective* in intent. This is because it affects developers and land owners who have already entered contracts or executed purchases and sales possibly long before the policy is to be implemented. The policies have real material implications for the feasibility of development in the Parramatta area. Indeed, with development being a risky enterprise to start with, they may result in the abandonment of projects, jeopardising housing targets and affordability, and ultimately, the liveability of the entire Greater Sydney area.

Even if they are found not to be “taxes”, the burden of these levies falls on new home buyers. Under the GSC target, around 1,050 dwellings will be produced each year to 2036. This is an incredibly narrow tax base and unfair at a time when they are financing the cost of a new home. There are 80,177 households in the Parramatta local government area. Spreading the burden for new infrastructure – which they will use – across all ratepayers would surely be a more fair and equitable way of financing much-needed community infrastructure.

Value and Value Capture
For a "value capture" concept to be considered, the basis of the value needs to be understood.

Sydney property prices have risen exponentially in recent years because of increased demand and a lagging supply response. As demand has risen, excess capacity in infrastructure has been eaten away to the point where investment in new infrastructure is necessary to restore the previous level of amenity.

Where infrastructure is to be built, this may further increase the value of property, but determining the exact effect of the infrastructure on prices as opposed to other factors that increase the value of land is problematic.

Increases (or decreases) in land price are difficult to calculate, especially as prices tend to become inflated by speculation in anticipation of a scheme. Also, the value of land may increase for reasons that are not due to a proposed scheme: it could be due to private investment (sometimes a new entertainment venue or new supermarket can lift values) and/or because of broad increases in land values across the city as a result of scarcity or population increases. Ultimately, any "value capture" scheme requires the determination of a pre-scheme "base value" which is likely to be affected by price expectations.

As the infrastructure is built, nearby residents receive a windfall to their property values. This would be captured by government through additional stamp duty (while there would be no increase in the rate of stamp duty, as the property is valued more there would be more stamp duty raised upon purchase) and/or capital gains tax. In these ways, value is already being captured by state and federal government.

The "base value" – before planning and pre-construction – may be subject to speculation. This may increase the amount that a vendor may accept at a minimum to sell their land to a developer. If the "base value" and the vendor's reserve price is higher, the developer would pay more in value capture tax than they would have had speculation not occurred. This early speculation may increase the value of the land long-before any infrastructure is built or masterplanning of the adjacent land, and leave very little left to "capture".

Indeed, much of the value may be speculated away long before planning/pre-construction, the opening of the project or project operation, possibly years before the land is purchased or the infrastructure is complete. If speculation means that the "base value" is equal to the final purchase price of the land, there is no value left to "capture". Where the windfall accrues entirely to the first seller, there is no value left to be captured from the subsequent owner. In this situation, any attempt at value capture will merely be a new tax which will negatively impact on housing affordability. The ability of a buyer of the property or developer to pass back to the vendor some or all of the value that will be captured will depend on the relative market power of buyers and sellers in the market.

All value capture mechanisms that seek to reappropriate to the government some of the "windfall" profit from the increase in land value will work the same way as a tax. In this way, the "incidence" (who the ultimate burden falls upon) of this kind of value capture scheme is likely to be shared between upstream vendors and downstream purchasers: when a value capture mechanism of this type is anticipated, it is likely that a developer will pass some of those costs onto home buyers and will also seek to pay less for the undeveloped land. The relative incidence of the scheme will depend on the market power of the parties. If land owners have a high degree of market power, or it is retrospective, the amount of "back shifting" may be low or impossible and the scheme may fall on the developer (and then new home buyers), which could increase the cost of housing in the area to

prices higher than would have existed without the value capture mechanism in place. A value capture scheme of this sort will also create a “deadweight social loss”, meaning that the economy will produce less housing, and at higher prices, than would be the case if the scheme did not exist. This is one of the reasons CEPA strongly opposes value capture mechanisms.

In any case, value capture policies risk stalling the entire market, as the residual values may be less than vendor expectations. As vendors await residual values to rise, an impasse may develop, whereby the vendor will not accept a lower price (their portion of the value capture being a lower price for their land) and the developer refuses to pay the full value that is to be captured. This may result in an area that would be primed for development failing to develop and lying fallow.

In devising a value capture scheme, CEPA is concerned that Council has not considered vendor behaviour, the behaviour of potential purchasers/developers, the other factors that determine the value of land and when the timing differences between when the book value of a property increases versus when that value is actually realised through sale of the property.

RECOMMENDATIONS

1. Councils should be prohibited from imposing value capture taxes on development
2. Council should be prohibited from charging ad valorem taxes on development

The Needlessly Adversarial Nature of Planning in NSW

CEPA is concerned about the current culture within the Department and councils. Our members have a general sense that the current culture within the Department is one that holds that planners know best and land owners should be treated with suspicion, despite these decisions being about *their* land.

CEPA members have very different experiences of planning system culture in other jurisdictions. NSW has the most adversarial system, where an "us" and "them" culture prevails. This is different to the experience of members with the Victorian planning system. In Victoria, the system encourages cooperation, and makes case managers responsible and accountable. New precincts are planned with direct involvement of land owners in Victoria.

NSW public servants appear to be reluctant to talk to proponents because – if the "wrong" outcome is delivered – they may be referred to the Independent Commission Against Corruption. This risk aversion to talking with and trusting a proponent can even result in assurances being made that are then reneged upon, which in itself may be corrupt. This risk aversion, and constant looking over ones shoulder just in case someone refers the officer to ICAC places a massive burden on efficiency in the planning system, as it leads to a culture of suspicion and lies.

Culture is an all-pervasive term. In this instance, it is about accountability, transparency and responsibility across the entire decision-making process. Those involved in the process need to be acutely aware of the consequences of their action and the economic impact it has on the state. As a result of risk aversion among planners at both council and Department levels, the Land and Environment Court has effectively become the de facto approval authority.

Precinct planning needs to be a proper partnership between the state, local council, developers and landowners, and the community. Precinct planning needs to be determined by economic, commercial and scientific inputs rather than reverse-engineered to get an outcome, rather than the outcome being.

There need to be forums where Department and council planners can meet informally with developers, so that both sides can get to know each other's points of view and to make the system less adversarial.

CEPA argues that the advent of the Greater Sydney Commission, rather than clearing away red tape, has actually become another layer, and another hold point that can help councils that do not want to progress a development to delay or kill it. Councils use vague directions from the Greater Sydney Commission as excuses not to progress planning proposals and DAs. Indeed, it is likely that there is collusion between council officers and GSC officers in ensuring some developments get stuck in the system. While this may seem like conspiracy theory, the delays outlined in the final section of this submission suggest a different story. The GSC should be responsible for making strategic plans, and should then have no role to play in planning proposals or DA approvals.

<u>RECOMMENDATIONS</u>

1. Acknowledge that the culture of planning in NSW needs to change to be more customer focussed
2. Implement a change to the culture to ensure that planning is less adversarial
3. Abolish the GSC or remove it from any role in planning proposals or DA approvals

Effective Monitoring

One way to reduce the adversarial nature of the planning system is to ensure that all planning proposals and DAs are independently monitored to ensure that time frames are being met and that they progress.

CEPA is very concerned that the very Departmental officers at DPIE that are meant to be monitored are also able to manipulate the monitoring system.

CEPA can separately share with the Productivity Commission evidence showing that the dates in the Gateway monitoring system can be changed so that it looks like the government/Department is meeting its requirements.

Effective independent monitoring:

- keeps everyone in the system honest with each other and promotes efficiency.
- is a powerful tool to government to ensure expensive and limited resources are applied effectively and efficiently to planning process blockages.
- is an important tool to minimise corruption risk in the planning process by ensuring transparency.

Leaving individual planning officers to their own devices is a recipe for inefficiency and poor planning outcomes.

RECOMMENDATIONS

1. Ensure there is effective external monitoring of planning proposals and DAs.

Acknowledging the Role of the Federal Government in Planning

The Commonwealth government is very involved in planning, even if it does not seem to be.

The Commonwealth is responsible for:

- Immigration levels and whether there are restrictions placed on where new migrants can live
- NewStart, AusStudy and other welfare payments that affect where people live and study
- Rent assistance, which subsidises market rent, leaving the state to be able to concentrate on ensuring an adequate supply of market housing
- Infrastructure funding, which shapes cities
- Affordable housing funding through programmes such as the NHIFIC
- Tax and spending policies
- First home owner grants and subsidies
- Environmental law and policies, such as the *Environment Protection and Biodiversity Conservation Act*, which interacts with the state planning laws, often leading to increased complexity (and sometimes resulting in the abandonment of projects)

The federal government therefore has a profound effect on the size of the population and the income levels of the population.

If the state government had control over immigration levels and the spatial distribution of the population, it could plan better. Unfortunately (or in actual fact fortunately) the state government can't tell people where to settle once they come to Australia, as we are not a command and control society. This means, regardless of whether they want it or not, Sydney will continue to be a great attractor of population, because, regardless of housing costs, it has an abundance of well-paying jobs and an enviable lifestyle.

Sydney's attractiveness means that the state government cannot at any time take its foot off the accelerator when it comes to housing supply. For at least the foreseeable future, there be new population ready to take up the new supply – even at prevailing, unaffordable, prices.

Many people who live in Sydney think that Sydney should be an open-air museum, with neighbourhoods that are immune from change and an idealised 1950s lifestyle that involves billycarts and quarter-acre blocks. In reality, this is a Sydney that has not really ever existed, as flats and apartments have always been the norm where land has been expensive (for example, the eastern suburbs was full of flats even in the 1960s).

It is time that the population of Sydney understood that growth can be a good thing, that with growth comes employment and lifestyle benefits. With more housing comes more affordable housing.

But at the very fundamental level, the population is determined by the Commonwealth government, and the federal government should therefore acknowledge that it is a partner in alleviating housing shortages and assisting with infrastructure deficits.

RECOMMENDATIONS

1. The Commonwealth government should acknowledge that it is a player in the planning space, due to its influence on population policy. The Commonwealth should therefore assist state government with growth infrastructure (such as trunk transport infrastructure) and housing policy to ensure that infrastructure bottlenecks and housing affordability do not affect productivity for the country as a whole.

Roles of the State and Councils in the Planning Process

Planning is too important to be in the hands of piecemeal, geographically small, inward-looking local governments. While it is important that decision are democratic and that locals get a say on local issues, there are many planning decisions in Sydney that have an impact beyond the local street or neighbourhood. It is decisions on these issues that should be made by state government, with a view to increase welfare for the entire city of Sydney and the state of NSW, not just to guard a patch for NIMBYs.

That said, the state government can get it wrong too. CEPA is concerned that precinct planning undertaken by state government should be consistent with the treatment of development applications and planning proposals outside of a precinct. For example, we note that in one recent Master Plan, a pipeline study claimed a 30 metre set back was required from the Sydney to Newcastle Liquids Pipeline, when a previous DA approved for the same pipeline for higher risk uses (education and child care) was approved without any set back requirements. The only answer from the Department for the inconsistency was that the land outside of the precinct was not included in the Master Plan study. Either the pipeline is so dangerous that a 30 metre set back is required for lower risk land uses for its entire length, or it is not. And if it is so dangerous as to require a 30 metre set back, then government needs to insist on the demolition of the building that now houses a university child care centre, lecture halls and library within 30 metres of the same pipe. When undertaking major precinct planning, it is important that the rules for the precinct are consistent with the rules outside of the precinct and with any precedent that has been set.

We consider that where there is a brownfields site and no current residents, or a major transformation is being contemplated, it is important that the site is not under-developed. If transport is the main concern, major sites may take 20 to 30 years to develop, during which transport solutions can be put in place. Indeed, we consider that it would be wasteful of government investment to under-develop major sites; Treasury should also be more involved in cost-benefit analysis of precincts to ensure necessary infrastructure is funded and built.

It is also important that apartment and commercial yields for master plans are justified. We can see no justification for under-developing major precincts close to the city, Parramatta and linked by (future) metro and light rail systems. It is particularly important that densities are viable to ensure a situation like at Rhodes does not happen, where the densities had to be increased by nearly 50 per cent to ensure it was viable and development occurred.

Zoning

CEPA considers that zones are too prescriptive, leading to a greater need for "spot rezonings". If more land had more permissiable uses (within reason to ensure that genuine land use conflicts were mitigated), this would result in cheaper land, a shorter development process and more housing supply.

CEPA is concerned about the recent rhetoric around spot rezonings. If developers and landowners are not meaningfully consulted during the updating of LEPs, then spot rezonings will continue to be required. The prevailing philosophy of planners at the moment appears to be that the state should be in charge of all strategic planning and that land users should be sidelined. This does nothing to foster innovation, nor does it allow for a full comprehension of what a land owner intends for the use of their site. It is planning without reference to landowners that effectively removes value from the land and decreases the efficiency of the planning process and ultimately of land use as a whole. Planners, in particular state and local government planners, do not have all of the answers – indeed, they tend not to understand issues of viability that land owners inherently are aware of.

Controls
Height and floor space ratios can be appropriate controls, but it makes very little sense to have both these controls operating together. This is because the mathematics of these controls can conflict. A site may be the perfect location for a slim tower development, but if the FSR and the height control conflict, even the most creative architect will not be able to get a tower to reach the height.

Controls should also not be prescriptive. While it may be necessary to control the land use outcomes for sensitive sites, or to maintain the character of some neighbourhoods, controls should be as unrestrictive as possible to ensure that sites are not under-developed. Once a site is developed, that is it for at least 50 years; under-development therefore has very long-term consequences that result in changes to the shape of cities.

CEPA is are concerned that the GSC, Department and councils have an attitude that less density is better. This attitude is worse when developers demonstrate that higher density in a location creates a better planning outcome, but planners are reluctant to take (or hostile towards) the advice of land owners on viability and density.

When a site is located in a CBD (such as Parramatta) or adjacent to a rail line, the default attitude should be to have as much density as possible, rather than finding reasons to scale it back. Less density means fewer houses, which means higher house prices. A recent RBA study showed that restrictive zoning practices are responsible for 70 per cent of housing unaffordability.

By having density in CBDs and at rail lines, the government can quarantine development away from suburban streets and better protect the amenity of R2 zones.

RECOMMENDATIONS
1. Ensure that zones have as wide permissible uses, and only restrict incompatible uses
2. When FSR and height restrictions are in place, ensure controls are consistent
3. Bias should be towards higher density near transport nodes and in CBDs.

The Failure of Regional Panels

Regional Planning Panels are failing to make merit-based decisions in accordance with the *Environmental Planning and Assessment Act 1979* (EP&A Act). CEPA considers that this is because panel members are not correctly qualified for what should be a quasi-judicial role and applicants are prevented from receiving natural justice.

Regional Planning Panels were established in 2009 to "to strengthen decision making on regionally significant development applications and other planning matters." Sydney Planning Panels were established on 21 November 2016, to determine "regionally significant" development applications, generally development with a capital investment value (CIV) over $30 million, within the Greater Sydney Region, other than City of Sydney.

The Planning Panels also undertake rezoning reviews, through which proponents can request a review if a council decides not to support a rezoning request or doesn't make a determination within 90 days, act as the Planning Proposal Authority when directed and provide advice on other planning and development matters.

It is the responsibility of the relevant local council to carry out a proper and professional assessment of a proposal for a Panel's determination. This will include the public exhibition of the application and assessment of submissions received.

The Panel process looks quasi-judicial but is far from this. In addition to their submissions, councils are able (and seemingly encouraged) to provide briefings to the Panels, which applicants are not generally able to respond to. We are aware of many examples of council officers briefing Panels in a biased manner when they are opposed to a development. This means that councils that want to stop a DA or planning proposal from proceeding have the power to deceive, obfuscate and informally direct the Panel.

CEPA considers that there should be reform to Panels in two ways – the membership and the way in which they interact with applicants.

Membership: A number of recent Panel decisions appear to have no basis in law. CEPA considers that this is because Panel members:

- do not understand the EP&A Act
- do not act in accordance with the EP&A Act
- place council policies above the EP&A Act, SEPPs and Policy Directions for Plan Making
- do not understand the administration of the legal system and that their decisions are part of the legal system.

CEPA rejects the Planning Institute of Australia's assertion that Planning Panels should be chaired by planners. We consider that Planning Panels should be quasi-judicial bodies, and as such, should be comprised of lawyers well versed in the EP&A Act and the administration of the law.

Requiring Panel members to be planning law experts will provide a stepping stone for some Panel members to the Land and Environment Court. At the moment there is no career path for planning law experts from practice to the bench, and this reform would improve this.

Panel Interaction With Applicants: Panel interaction with applicants is poor and on many occasions can be against the natural justice, and possibly corrupt. Apart from their formal submissions, councils should not be able to brief Panel members without either the applicant being present or the applicant being given a specific right of reply. CEPA considers that the ability for councils to brief Panels opens up the door to corruption or the perception of corruption and means some of the vital work of Panels happens behind closed doors.

CEPA recommends banning the ability of councils to brief Panel members. It should be no different to councils' inability to brief the Land and Environment Court. We consider that there should be a way for councils to put their comments before the Panel with the applicant having a right of reply. One way would for this to be submission-based, similar to a Scott Schedule for defective building. Councils would express their concern or support with an aspect of the application while the applicant would be able to further comment on council's comments.

Benefits for Government and Community: The government would benefit from thee reforms in the following ways:

- increased confidence in the Panel system
- increased certainty of outcome for both applicants and objectors
- better decisions that are less arbitrary due to less influence from council planners
- lower risk of corruption
- fewer matters in the Land and Environment Court
- a dedicated career path from Panels to the Land and Environment Court, allowing members to gain experience in a quasi-legal setting

RECOMMENDATIONS

1. The government should disband the current membership of all Panels and reconstitute them so that they act as proper quasi-judicial bodies
2. The government should change the EP&A Act and regulations to outlaw council officers briefing Panel members (much like council officers cannot brief a member of the Land and Environment Court), and institute a system whereby the applicant can respond to council comments with an application in writing similar to a Scott Schedule for building defects.

Minimising Complexity And Red Tape

The Planning System

In some respect, it is not the *Environmental Planning and Assessment Act (1979)* that is the problem, it is the system and how it is implemented that causes the problems. CEPA would like to see the Department return to a merit-based planning system, and to see it enforce both the law and the strategic directions of the state.

CEPA members report that there has been a noticeable change in the attitude of the Department, away from being facilitative to sometimes being hostile towards developers. The Department used to force councils to abide by their strategic directions, but now the GSC and Department side with councils, sometimes creating perverse outcomes. Councils have been allowed to interpret planning law and the strategic directions from the state in their own way, often resulting in lower densities than an area should have, or reducing viability such that the project falls through. There needs to be a way for a developer to bring the council to the Department if they are going against the strategic direction enshrined in state government policy.

The Planning Profession

While the planning system may be costly, slow and unwieldy, CEPA contends that those with their hands on the levers of the system also bear some of the blame. While CEPA acknowledges that there are many good planners who understand the limitations of the system and work with developers and communities for good outcomes, there are also many who believe that the planning system is their own private plaything.

We believe that the influence of the planning peak body, the Planning Institute of Australia, has a lot to answer for. While the users of the planning system benefit from simpler systems, the more complex the system, the more planners are required. Planners are also unlikely to go against what the "prevailing wisdom" in the industry is at any one time. As the industry is fairly small and mobile, it is a profession that is very susceptible to "groupthink", but also as a planner may rely on another planner for their next job, decisions are made that tend to be risk-averse, and risk-averse for a planner tends to mean:

- an outright hostility to development
- an outright hostility to the requirement for a development to make a profit to proceed
- rejection of a proposal (rezoning or development application)
- more reports for developers to include in ever earlier stages of development, seemingly with the purpose of waiting the developer out in the hope they will go away
- an attitude that if one developer goes broke over a development, that this is fine as another developer will come along and deliver the project at a lower price (because the site would be subsequently purchased at a firesale price)

Developers, especially smaller developers who are less sophisticated than larger developers, tend to suffer more from delays and the whims of council officers than larger developers. We understand that there are some times where council officers have back-briefed the Department to kill off a planning proposal.

Planners as a profession appear to have little respect for the idea of a "chain of command" within their organisations. There are many examples of when a junior planner in a council or the Department apparently does not want a development to proceed, but the proponent has received assurances from further up the line that the development will receive approval to proceed. This conflict of information, and lack of understanding that a junior planner should not be making policy by themselves, creates a large risk for proponents. When developers are led to believe that their

development will get approved, particularly when their planning proposal has a Gateway, it sets expectations for investors. If assurances are given but then reneged upon, this creates sovereign risk. Capital is footloose – if an investor decides to pull out of a project, it can scuttle a project, and the money is likely to leave NSW altogether, resulting in fewer jobs, less spending and a smaller economy than there would have been had the investment gone ahead.

Planners tend to have very little understanding – or even care for – economics and viability. Those that do tend to use economics as a straw man to reject a development. There are many planners encountered by CEPA members who seem to believe that developers should just build their development for free, and give their apartments away for free. This is not how markets work (or the way the real world works), and indeed, this is certainly not a way to encourage more development to happen. The planning system tends to be held up for days and weeks having these sorts of conversations that really do not belong in a business meeting. Unless planners are encouraged to think about their actions within the system and the implications their actions have on the viability of a development, the less efficient the system will be.

Planners are reluctant to take (or hostile towards) the advice of land owners on viability and density.

It is also important to understand the motivation of planners. For a planner, the outcome is the plan – a nice document with pretty colours. That is their job done. There is no need for them to engage with the concept of viability – surely someone will come along and build it! However, for a developer, their outcome is a dwelling for someone to purchase and live in. And for dwellings to be created, the development needs to be viable and profitable. This mismatch between motivations creates unnecessary tension within the system which creates inefficiencies by requiring unnecessary reports, unnecessary meetings and creates the opportunities for misunderstanding and suspiciousness that ultimately makes the planning system more costly.

Many of the problems associated with poor building standards could stem from the length of the planning approvals process. The planning approvals process, as has been said earlier, is long and expensive. In terms of expenses, it is not just the cost of reports that a proponent is required to submit (many of them are probably not needed, but are required by councils as excessive risk mitigation exercises) but also in terms of holding costs.

Many CEPA members have had the problem of an initial investor pulling out when the project has taken too long to come to fruition. This is investment money that is lost to NSW, probably permanently, as the footloose capital goes to find other projects – including inter-state and overseas – to get a similar return on investment. Often investors have pulled out after receiving assurances that their development is on track for approval (or at least moving through the system).

The amount of power in junior council officers' hands at the moment also creates a major corruption risk. While CEPA does not have hard evidence that this is manifesting itself in some decisions, anecdotal and circumstantial evidence suggests that this is not just a risk but a reality.

RECOMMENDATIONS

1. Return to a system of merit-based planning
2. Ensure that there is a chain of command and that where a planning officer defies the chain of command that results in delays, misinformation or bad faith, that the planner is held personally responsible for damages.

The Cost of Delays

Delays are a fundamental reason why housing affordability is so intractable in Sydney
CEPA represents small and medium-sized developers. Smaller developers are much more burdened by delays than larger developers, as larger developers have more resources to spread across more projects. Indeed, for some larger developers, delays may even be of benefit in the market by allowing them to land bank and restrict supply. Smaller developers are not, by their very nature and size, able to make markets like larger developers are. That is not to say that larger developers are not affected by holding costs, but that it is certainly much more burdensome for smaller developers than larger developers.

The Sydney market is now recovering from a downturn. But because development was delayed during the downturn, and developers found it hard to start new projects because of this, the next upswing in the market is starting at a higher price point than the previous upswing. This means that house prices are going to be even more unaffordable by the top of this cycle, which may be shorter and sharper as a result.

Delays don't just affect the developer, but they also have an effect on the whole of society. In this section we present a number of case studies where delays have occurred, for various reasons (none of which were the developer's making), that have led to lower housing supply for Sydney. This has a direct impact on house prices. These case studies represent a small proportion of all delays experienced.

Delays occur for a few reasons. One reason in particular is not government policy, but the practitioners. If the practitioners were empowered to make decisions, followed the law and were properly monitored, the system would go a long way to righting itself. Another major delaying factor is council involvement. In general, if a council officer is against a proposal (for whatever reason) they will seek to ensure that the project is delayed. This sounds like a conspiracy theory, but it is the reality. This is seen clearly in the projects shown in the case studies, and they are not isolated examples. Council officers have too much power to delay planning proposals (in particular) and also DAs. There needs to be a mechanism that forces planning proposals through the system in a timely manner.

Table 1 includes case studies of four developments from a member of CEPA. As can be seen, they represent around 1,000 apartments across three very different local government areas. Three of the four case studies have been endorsed by council and have been granted a Gateway. However, the advice that was given in each of these cases has now been overturned and the projects have been delayed. Also the excuse that another strategic planning process trumps the planning proposal already underway is not isolated to these examples.

These four cases studies alone represent $5 million in delay costs. This is money that could be better spent on building more apartments, employing more people, paying higher wages or paying down debt. Instead, developers are having to hire fewer people, at lower wages and then building sub-standard buildings.

Indeed it could be argued that the delays in the system also compromise building safety and quality. If a development is costing over $1 million in delays alone, something has to give in the development/building process. As the building is the last stage in the development process, increased (and unforeseen) costs leading up to the build could mean that savings need to be made on the building itself. While we are not saying this is the case in any of the developments that are listed here, it is a concern that CEPA members has about some developments.

Table 1: Case Studies in Planning Delays

	Parramatta	**West Ryde**	**Penrith**	**Castle Hill**
Type of Proposal	Planning Proposal	Planning Proposal	Planning Proposal	Planning Proposal
Council	City of Parramatta	City of Ryde	Penrith City Council	City of Parramatta
Current FSR	0.8:1	1.25:1	5:1	1.99:1
Current Height	11m	15.5m	No height Limit	28m
Current Zone	Zoned R4 – High Density Residential	B4 - Mixed Use	B4 - Mixed Use	Zoned R1 – General Residential
	6:1			3.78:1
Proposed FSR	70m	2.7:1	7.2:1	56m
Proposed Height	Remains unchanged		No height Limit	Remains unchanged
Proposed Zone		Remains unchanged	Remains unchanged	
	125 Units			238 Units
Proposed Apartment Yield		63 Units (3 of which will be given to Council to be used as affordable housing).	500+ Apartments, 2000sqm Retail, 2000sqm Commercial.	
Project History	The Planning Proposal has: • been endorsed by Council; • Has been granted Gateway by the DoPE; • Has Undergone a Design Competition; • Has agreed upon a VPA with Council; • Has been exhibited; • Has Submitted a DA; • And was recently recommended to proceed by Council Officers.	The Planning Proposal has: • been endorsed by Council; • Has been granted Gateway by the DoPE; • Has agreed upon a VPA with Council; • Has been exhibited; • Has prepared and attempted to submit a DA; • And was recently recommended to proceed by Council Officers.	The Planning Proposal has: • been endorsed by Council; • Has been granted Gateway by the DoPE; and • Has been exhibited.	The Planning Proposal has yet to endorsed by Council. We have submitted multiple variations of it in an attempt to appease Council.

	Parramatta	West Ryde	Penrith	Castle Hill
Where we are being delayed currently	Council Officers are recommending to Councillors that they refuse our Planning Proposal. This is despite the project being 4 years old, and having the support of Council staff for the entire process up until this last fortnight.	Council Officers are refusing to put our Planning Proposal to a Council meeting for finalisation. Their reason being the recommendation from the Greater Sydney Commission (GSC) to put a 1-year moratorium on all Planning Proposals. However, our Planning Proposal was ready to be put to Council for finalisation over 3 months before the recommendation from the GSC was announced. Additionally, Council's Planning Director has stated that even if the moratorium is lifted, the Planning Proposal will not proceed until they have Council endorse their new LEP.	Council Officers are now pushing back on the FSR that was originally endorsed and given gateway. Their justification for this is their concerns about urban design of the building. This is despite the site not having a height limit. Consequently they are forcing the proponent to wait until Council finish an internal Urban Design report (that has been underway for many years). Council Staff not meant to be involved in the process (DA Assessment Coordinator) has been attempting to hold up the Planning Proposal, using irrational arguments that are not inline with the Planning Proposal process. Council's traffic team are also holding up the Planning Proposal citing concerns over traffic generation. They have applied traffic growth rates that do not make sense, and have rejected Trip Generation Rates adopted by RMS.	Despite there being a new light rail stop planned (and committed to by the state government) only 300m away from the site, Council Officers refuse to recommend the site to be endorsed by Council, as they argue the Carlingford area does not have the capacity for increased dwellings. This is despite a precinct wide traffic study by well renowned firm, Cardno, that states the area has capacity for increase dwellings, and the resulting traffic generated. Council's Traffic Officer disagrees with the report stating that proposed new Light Rail would have low patronage, significantly below the figures expected by the State Government.

	Parramatta	West Ryde	Penrith	Castle Hill
Where we were delayed in the past	The proponent has been delayed by Council staff when negotiating the VPA. They held up the Planning Proposal until Council had created and endorsed and Planning Agreement Policy (the "value capture" policy referred to earlier in this submission). The led to a delay of many months. Council has failed to meet 2 deadlines to finalise the proposal, that were issued by the Department of Planning and Environment.	Council staff took enormous time (many months) in negotiating the VPA. Additionally, Council Staff refused to proceed the Planning Proposal unless the proponent agreed to a reduction in the FSR that was granted gateway and endorsed by Council. The proponent was assured if they agreed to the reduction, the Planning Proposal would be shortly finalised. This was agreed to in July 2018, with the hope the Planning Proposal would be put to Council shortly. It took 7 Months for the proponent to be given a date that the Planning Proposal would be put to Council. As explained above, a week later, they were told it was put on hold indefinitely. Council has failed to meet 4 deadlines to finalise the proposal, that were issued by the Department of Planning and Environment.	Earlier on in the process, prior to being endorsed by Council, Council Strategic Planning officers attempted to force the proponent to expensively relocate a drainage easement for their benefit, despite having no legal obligation to do so. They used this to hold up the process for many months. Following the Gateway and prior to exhibition, the proponent was asked to undertake additional urban design analysis. They engaged a respected Urban Designer that Council has a good relationship with, and his firm undertook a contextual urban design analysis. This report supported the density for the site. However, over 8 months later, Council is still unsure about Urban Design, and using this to hold up the proposal. The NSW State Emergency Services also held up the process by taking nearly a year to respond to the proposal at the gateway phase. Their subsequent report was riddled with errors, and demonstrated a fundamental lack of understanding about Planning Proposals. Council has failed to meet deadlines to finalise the proposal, that were issued by the Department of Planning and Environment.	Council originally stated that before the Planning Proposal can progress, a precinct wide traffic study must be completed. This delayed the Planning Proposal many months. Yet after the Study was completed, Council still refused to move the Planning Proposal forward.
Approx. cost of the delays	$1,620,000	$1,300,000	$600,000	$1,440,000

	Parramatta	West Ryde	Penrith	Castle Hill
When we originally began the projects / our first lodgement date	27/11/2015	11/02/2016	14/07/2017	3/07/2017
The duration it is MEANT to take	• 3 months from lodgement to Council Endorsement • 3 months for Department to Consider and Provide Gateway • 1 year from Gateway to Gazettal. **Total:** 1 year 6 months	• 3 months from lodgement to Council Endorsement • 3 months for Department to Consider and Provide Gateway • 1 year from Gateway to Gazettal. **Total:** 1 year 6 months	• 3 months from lodgement to Council Endorsement • 3 months for Department to Consider and Provide Gateway • 1 year from Gateway to Gazettal. **Total:** 1 year 6 months	• 3 months from lodgement to Council Endorsement • 3 months for Department to Consider and Provide Gateway • 1 year from Gateway to Gazettal. **Total:** 1 year 6 months
The duration is has ACTUALLY taken	**4 years**	**3 years, 9 months**	**2 years 4 months**	**2 years and 4 months**
Who is holding them up	City of Parramatta Council	City of Ryde Council Staff City of Ryde Mayor	Penrith City Council Council Officers	City of Parramatta Council
Assurances that turned out to be false		The proponent was assured by Council Officers if they agreed to a reduction in FSR, they would finalise our Planning Proposal shortly. For the next 6 months Council Officers made delay after delay, but assured the proponent the Planning Proposal would be put to Council for finalisation. 2 weeks prior to the date Council Officers said it would be put to Council, the proponent was told that it would be put on hold indefinitely.		The proponent was told once a precinct wide traffic study was needed to proceed. This was completed, yet the Proposal was not allowed to proceed.

Another example is that of a member with a development site in a major development precinct that is affected by contamination. This member began the development process in 2015 with the lodgement of a planning proposal. Over a year into the planning proposal process, and following the project receiving a Gateway, the Department of Planning and Environment (as it was then) began a strategic planning process for the whole precinct, that included this specific site, that delayed the project. The project is now on hold because a further strategic and infrastructure planning process from the Department has led to a recommendation that the entire precinct be on hold for at least thirty years. This is despite a metro and light rail coming through within the next five years. The reason given is the need to maintain employment land, but there are currently few jobs across the entire precinct and no jobs on the specific site in question. These sorts of delays, caused by government, do nothing to encourage investment in the sector nor the state. Indeed, with capital being footloose, it is likely that if the investors pull out of projects such as this, the investment dollars (and return in terms of dollars, housing, increased efficiency, etc) will be lost to NSW for ever.

Another CEPA member is having problems with a proposal at Regents Park. This project has had Gateway approval for three years and it has taken the Department two years to do a review.

There needs to be some way that developers can recoup the delay costs, particularly if the delays are for spurious reasons or reasons that turn out to be unlawful, not just for development applications but also for planning proposals (rezonings). Council officers should be personally responsible for the costs of delays. This stick would incentivise council officers to follow the law and to ensure that delays were kept to a minimum and for only good reason.

It is clear that councils cannot be trusted to development Sydney. Those councils that are recalcitrant need to be stripped of their planning powers.

RECOMMENDATIONS

1. Institute a system of private planning proposals, where the developer can take responsibility for leading and exhibiting the proposal, even though amendments to LEPs are usually “owned” by the council and “made” by the Minister. This would reduce the opportunity for council officers to game the system and cause delays.
2. Make council officers personally liable for delays over a certain threshold, where the delay can be proved to be for a spurious or illegal reason.
3. Strip planning powers from councils that have three projects that are delayed by over three years
4. Make assurances received during the planning process legally binding on councils and the department
5. Ensure that if a planning proposal pre-dates a strategic planning process, that the strategic planning process will not delay the pre-dated development.

Conclusion and Recommendations

As has been outlined, the system is not the main problem that leads to inefficiencies in the planning system – it is the actors within the system, especially those with agendas hostile to development and growth.

The system needs to be less adversarial. There needs to be more leadership. There needs to be more understanding of what it means to be an investor in NSW, and more empathy towards what can go wrong.

Productivity in the planning system in NSW could be vastly improved. CEPA suggests the following:

1. Undertake a comprehensive review of all levies, taxes and charges on property and development in NSW, with a focus on growth and efficiency.
2. Establish a set fee for planning proposal applications in Regulation that cannot be manipulated by local government.
3. Abolish SEPP 70
4. Increase incentives in the ARHSEPP and provide mandatory timeframes in the SEPP for a planning authority to issue an SCC and subsequent DA.
5. Educate DPIE and council planning officers on why SCCs are an effective way for disused land to be used for affordable housing without the need for additional taxes or subsidies.
6. Councils should be prohibited from imposing value capture taxes on development
7. Council should be prohibited from charging ad valorem taxes on development
8. Acknowledge that the culture of planning in NSW needs to change to be more customer focussed
9. Implement a change to the culture to ensure that planning is less adversarial
10. Abolish the GSC or remove it from any role in planning proposals or DA approvals
11. Ensure there is effective external monitoring of planning proposals and DAs.
12. Ensure that zones have as wide permissible uses, and only restrict incompatible uses
13. When FSR and height restrictions are in place, ensure controls are consistent
14. Bias should be towards higher density near transport nodes and in CBDs.
15. The government should disband the current membership of all Panels and reconstitute them so that they act as proper quasi-judicial bodies
16. The government should change the EP&A Act and regulations to outlaw council officers briefing Panel members (much like council officers cannot brief a member of the Land and Environment Court), and institute a system whereby the applicant can respond to council comments with an application in writing similar to a Scott Schedule for building defects.
17. Return to a system of merit-based planning
18. Ensure that there is a chain of command and that where a planning officer defies the chain of command that results in delays, misinformation or bad faith, that the planner is held personally responsible for damages.
19. Institute a system of private planning proposals, where the developer can take responsibility for leading and exhibiting the proposal, even though amendments to LEPs are usually “owned” by the council and “made” by the Minister. This would reduce the opportunity for council officers to game the system and cause delays.
20. Make council officers personally liable for delays over a certain threshold, where the delay can be proved to be for a spurious or illegal reason.
21. Strip planning powers from councils that have three projects that are delayed by over three years

22. Make assurances received during the planning process legally binding on councils and the department
23. Ensure that if a planning proposal pre-dates a strategic planning process, that the strategic planning process will not delay the pre-dated development.

Implementing these recommendations will go a long way to improving the planning system, making it less adversarial, more customer-focussed, quicker and easier to navigate.

Low levels of productivity caused by the planning system particularly affects smaller developers, who have fewer projects on at the same time, and are therefore less able to spread the costs of delays out. Smaller developers also have a smaller pipeline of work, so a delay with a project may mean needing to lay off workers, and then re-hire them once a proposal gets through the system. This is incredibly costly and add to the cost of housing.

Ultimately, housing in NSW and Sydney is much more expensive than it should be, and most of this can be put down to the lack of efficiency in the planning system.

The Commercial and Economic Planning Association Inc

The Commercial and Economic Planning Association was established in July 2017 to look after the interests of smaller developers, associated companies, and new home buyers.

Additional taxes, regulation and delays (particularly at the local government level) hurt smaller developers – and their customers – much more than they do larger developers. Small and medium developers, financiers, planners, architects and associated companies have a higher opportunity cost of capital and have fewer projects to spread additional costs around. Therefore, the Commercial and Economic Planning Association Inc has been established to represent the interests of smaller developers, to give voice to their concerns to state and local government, and to advocate in favour of sound economic and planning outcomes.