

Mr Sam Haddad
Director General
Department of Planning and Infrastructure
GPO Box 39
SYDNEY NSW 2001

18 October 2013

Your Ref: 13/17182
Our Ref: Z11/0032

Dear Mr Haddad

RE: *Planning Bill 2013 and Planning Administration Bill 2013*

I refer to your letter of 11 October 2013 and ongoing discussions with staff from the Department and the Minister for Planning and Infrastructure's office.

The Commission has reviewed the latest versions of the *Planning Bill 2013* and *Planning Administration Bill 2013*. The Commission supports the following changes to the proposed legislation:

- the possibility for a development to be subject to different assessment tracks has been withdrawn. This will reduce the complexity of the proposed system.
- the restoration of judicial review rights and the extension of judicial review rights to the making of strategic plans. I note, however, that the scope for merit appeals continues to be limited.
- stricter requirements concerning access to the 'code assessment' route (a new assessment process not requiring public consultation). I note the Department's advice that development standards will include requirements relating to building heights, bulk and scale (key determinants of financial value). An application will only be subject to 'code assessment' if it meets all of the specified development standards for the development. This means any proposed variations to development

standards will trigger a full merit assessment of a development and community consultation.

The proposed scheme will also rest on strategic plans, regulations and codes. The Commission cannot comment on these documents as they have not yet been drafted. The precise contents of these documents will be of crucial importance to the corruption vulnerability of the proposed system given the Department's advice that some of the Commission's concerns will be addressed via these documents.

The Department has advised that the proposal to consolidate land use zones will be abandoned. If implemented, this will facilitate a more considered approach to appropriate land uses and the creation of in-depth zone objectives, which will be used as criteria in the assessment process.

Similarly, the development assessment codes that will be contained in local plans have not been drafted. These codes may contain both development standards and performance criteria. I understand that it is the intent of the Department that some performance criteria will be focused on outcomes as opposed to prescriptive controls. A key challenge in the drafting of local plans will be to ensure that the performance criteria against which certain developments may be measured are objective, measurable and provide for independently verifiable limits of impact. If this is not achieved, the new system will become highly discretionary and unreasonable departures from stated requirements will be encouraged. A distinction should be drawn between flexible ways of achieving an outcome and flexible criteria.

In the same way, when considering the 'merit assessment' category of development, consideration needs to be given to whether the set of assessment criteria are sufficiently robust to be capable of independent verification. The Commission's position has consistently been that high levels of discretion coupled with criteria open to varying interpretations can provide a convenient cloak for corrupt conduct. On the face of clause 4.18 the proposed assessment criteria in this regard appears no more robust than the current system, although some of the key documents that will support assessments have not been drafted.

Another key issue concerning the implementation of the new system is the required skill level of decision-makers. The drafting and application of development assessment codes that include criteria that are outcomes based, but nonetheless objectively measurable, will require a sophisticated understanding of issues such as design fundamentals and context. I note the Department's advice that it intends to play a proactive role in providing guidance in this regard.

Thank you for providing the Commission with an opportunity to comment on the proposed changes to the Bills.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Ipp', written in a cursive style.

The Hon David Ipp AO QC
Commissioner