

## **Ministerial Planning Panels - Taking the "Local" out of Local Planning**

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### **ABSTRACT**

To cater for Sydney's growing population over the next 25 years, the NSW Government has required councils to plan for new medium density housing. Ku-ring-gai Council developed a strategy that will provide additional dwellings with retail, commercial and community facilities appropriate for the increased population (108,000 in 2005 to around 127,000 in 2030). The first stage of the strategy, focusing on new apartments or townhouses along major road and rail corridors, was approved in 2004.

Planning for Ku-ring-gai's six major centres (Gordon, St Ives, Turramurra, Lindfield, Pymble and Roseville), was completed in 2007. In addition to providing greater residential choice, retail and commercial growth, the NSW Government has required efficient use of infrastructure and services and economic feasibility of new developments. Council's plans focused on new residential developments in mixed use zones within existing business zones that are centred on transport infrastructure.

Council's planning used high standards of urban design that allow for improvement in liveability in keeping with the opportunities and constraints of each centre. Physical features, heritage, retail demand, public domain, open-space planning, public transport, traffic and parking, community services and infrastructure demand have been considered in the planning.

Sounds like an ordinary run of the mill planning process? That's certainly where we left this audience two years ago when our Deputy Mayor and my predecessor addressed the 2007 conference. However, that's when things also went array. The Minister for Planning appointed a Planning Panel to review Council's work. The Council took the Minister for Planning to court, and ultimately lost. Council staff, caught in the middle, was on the one hand assisting Council in its case against the Minister but on the other hand had recommended the planning process on behalf of the Panel. And the community would say they were left out of the process, except that they had to pay for the planning process twice plus the court action and live with the results. So much for local planning.

**KEYWORDS:** Urban consolidation, metropolitan strategy, planning panel, section 118.

## 1. INTRODUCTION

At the ICTC conference in Auckland in July 2007, my predecessor at Ku-ring-gai Council Mr Steven Head and the then Deputy Mayor Dr Anita Andrew gave the first instalment in the story of how Council and the community of Ku-ring-gai planned to respond to metropolitan Sydney's growth towards the year 2031. This paper and presentation provided a perspective that both the elected arm of Council and Council staff were relatively happy with the planning process and its intended outcomes for this local government area (LGA). Both were probably glad that the process was over, for change in Ku-ring-gai never comes easily. Ku-ring-gai Council submitted its draft local environmental plan to the Department of Planning in December 2006, and at the time of the Auckland conference, reasonably expected that plan to be made by the Minister for Planning shortly thereafter.

Just over two years later plans for Ku-ring-gai's town centres have again been submitted to the Department of Planning, and again the planning authority eagerly awaits the outcome of the Department and the Minister's review of the plan. This time, however, the planning authority is not Ku-ring-gai Council, but rather the Ku-ring-gai Planning Panel.

The Ku-ring-gai Planning Panel was appointed by the former Minister for Planning, the Hon. Frank Sartor, to effectively review and update Council's work. The then Minister took the view that the performance of the Council "in dealing with planning and development matters" was, in his opinion, "unsatisfactory" (Sartor, F. 2007a). After giving Council the opportunity to explain its "unsatisfactory" behaviour, the Minister appointed the Ku-ring-gai Planning Panel on 17 December 2007, to take effect from 21 January 2008<sup>1</sup>. The Minister subsequently suspended that panel and immediately reappointed another panel with largely the same membership to overcome some minor administrative and procedural matters. This new panel commenced operations on 29 February 2008.

So the story I have to complete is not quite the story that Mr Head and the Deputy Mayor told in July 2007. They would have left the Auckland conference hoping for gazettal of the plan they described so enthusiastically. This paper is a story; it is a collection of anecdotes, asides and observations from someone who played a central role in the process, though it was just one role of many. These views will not necessarily be shared by others who took a different role in the process, though these alternate views are certainly no less important, particularly as time passes. What they are is experiences, much like a social history, of the role of one planning panel, at one point in time, from one perspective, in a complex and often highly charged environment, in what is an otherwise quiet and conservative corner of Sydney.

These experiences and anecdotes are not to be reflected in official reports, official correspondence or media releases. Nor are they contained in the numerous complaints to the NSW Ombudsman and various Ministers that the process has generated over the past two years. So in many respects, they would not necessarily be part of the history of the Ku-ring-gai Planning Panel unless someone writes them down. That is the purpose of this paper. So

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<sup>1</sup> New South Wales Government Gazette - Special Supplement No 183 dated 17 December 2007.

for this reason I must emphatically state that these are my own views, and not the views of my employer, the elected representatives, or a good number of the citizens of Ku-ring-gai.

## **2. BACKGROUND**

### **2.1 Characteristics of Ku-ring-gai**

The Ku-ring-gai LGA is located approximately sixteen kilometres north from the Sydney CBD and is on average 152 metres above sea level. Ku-ring-gai covers approximately 84 square kilometres or 8,446 hectares made up of nine suburbs.

Ku-ring-gai lies within a landscape defined by incised ridgelines bounded by Garigal National Park in the east, Lane Cove National Park in the west and Ku-ring-gai Chase National Park in the north. Significant areas of urban bushland include areas of high conservation status. Of the developed area, 95% is occupied by low-density housing with only 5% of land use in the area designated as business and other usage. The North Shore rail-line and Pacific Highway run along a central ridge, which varies in width from 0.8 to 3.2 kilometres. This ridge falls away into smooth, steep slopes in the northern section and abrupt, rocky slopes and gullies in the east and west. Natural vegetation includes critically endangered ecological communities (Sydney Blue Gum High Forest and Sydney Turpentine Ironbark Forest).

### **2.2 A Series of Planning Interventions**

In the past decade there have been a number of State Government interventions in planning matters in Ku-ring-gai.

A number of Ku-ring-gai sites were specifically targeted in *State Environmental Planning Policy No 53—Metropolitan Residential Development* as “Minister’s sites”. This policy established planning controls above those contained in Council’s ordinary statutory controls and made the Minister for Planning the consent authority.

Council planning controls (known as LEP 194 and 200) were gazetted in 2004. The then Assisting Minister for Planning amended the plans Council had prepared and exhibited to allow five story development on sites of more than 2,000 square metres. Council’s plans had essentially been for a combination of two and a half, three and a half and four and a half storeys. LEP 194 and 200 provided a yield of in excess of 6,500 dwellings, of which more than 5,000 have been approved.

On 28 May, 2004 the Minister for Planning, directed Council a direction under Section 55 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) to deliver plans to the Department for additional housing in and around its six key commercial centres and to provide for additional retail and commercial demand to cater for the needs of the local population, by 31 December, 2006. Lands to be rezoned included all commercial, retail, council lands used as car parks and existing medium density zones within the town centre zones. Council was required to demonstrate that the planning controls will give economic incentive for redevelopment.

It was the former Minister for Planning's dissatisfaction with the plan Council submitted to satisfy the abovementioned section 55 direction that eventually lead to the Ku-ring-gai Planning Panel being installed.

### **2.3 A Growing Metropolitan Area**

Sydney's population of 4.1 million grows on average by about 780 people a week. Based on these estimates of population growth and assuming the growing trends towards smaller households, this equates to a need for 640,000 new dwellings in the next 25-30 years or an additional 23,500 homes each year.

Urban consolidation is targeted to provide 60-70% of the new required housing, with urban land releases in green field areas providing the remaining 30-40%. This will significantly alter the way the city looks and functions, with the bulk of "brownfields" sites having been redeveloped in earlier phases of urban consolidation. To meet housing and employment targets, Sydney's local councils are required to deliver new Local Environment Plans (LEPs) over the next five years or so. Ku-ring-gai's share of this growth is a minimum of 10,000 additional dwellings, of which some 5,022 have been approved since the baseline year of 2004.

### **2.4 A National Housing Crisis – Rising Demand and Falling Supply**

At a recent national housing forum, the Head of Economic Analysis Department at the Reserve Bank of Australia (Reserve Bank of Australia, 2009) Mr. Tony Richards made a number of observations that should be of concern to many Australians:

*".... population estimates that came out last week showed growth of 2.1 per cent over the year to the March quarter ....., which of itself would imply demand for around 165,000 new dwellings a year, which is well above the construction level of recent years....."*

*However, there is a wide range of evidence that the supply side has not been all that responsive in recent years. Here I am thinking more of the problems that have been with us for some time, rather than the current shortage of financing for apartment building and land development, which will hopefully ease as conditions continue to normalise in financial markets.*

*In particular, even if one discounts some of the reports from the housing and land development industry groups, it is clear there have been problems in recent years in land zoning, and in the development and building approvals processes....."*

Richards goes on to state:

*"Factors that boost the cost of new land on the fringe and reduce new supply must inevitably impact on the broader cost of housing in our cities. But zoning and development approval issues are also very important closer to our city centres. Here, the Bank's liaison program has indicated that the stock of remaining available new 'brownfield' sites for housing may be relatively limited compared with the past. Given that some increase in density is inevitable as the populations of our cities grow, this will put greater focus on the replacement of existing housing with higher density housing. Of course, this process is frequently unpopular with existing residents, so*

*there are all sorts of difficult issues for state governments and local councils to deal with.....”.*

While of no surprise to those involved in planning and urban development, these observations lie at the heart of the fight for Ku-ring-gai's town centres. The message is clear, however, rising house prices because of supply side restrictions are not good for housing affordability and not good for the national economy.

### **3. PLANNING PANELS**

#### **3.1 The Use of Independent Panels or Specialist Advisors**

Planning panels are nothing new. In New South Wales the Minister for Planning or the Director General of the Department of Planning has often used independent panels or a specialist advisor to undertake reviews into particular planning issues over a number of years. Recent examples include, but are not limited to the:

- review of certain planning matters in Cowra Shire, panel report and recommendations: 6 April 2006;
- review of Queanbeyan land releases, panel report and recommendations: 1 September 2006;
- review of sensitive urban lands on South Coast, panel report and recommendations: 20 October 2006;
- Central West rural lands inquiry, panel report and recommendations: 22 August 2007; and
- strategic inquiry into potential coal mining impacts in the Wyong LGA, panel report and recommendations: July 2008.

With the exception of the Cowra review, it could be said that a good number of these “strategic” reviews are beyond the capability, interest and/or responsibility of a single local authority. In this respect the State was well placed to take on a strategic, administrative and leadership role. In the case of Cowra, specific procedural and administrative recommendations were made following a separate review by the Department of Local Government. This led to the Council remaining as the planning authority after the final report of the review was delivered (Sartor, F. 2006).

#### **3.2 Planning Administrators**

Similarly, while the EP&A Act has for a long time allowed for the appointment of a planning administrator to perform all or part of a council's functions (Department of Planning, 2007), it is not something that many local communities have ever experienced. Many would rightly argue that this is simply a reflection of the majority of councils acting responsibly and within the law. However the appointment of an external administrator is not new in local government, as is evidenced across many local government areas where the dismissal of a council has occurred by order of the Minister for Local Government. In these cases it is suggested that this course of action is far more significant due to matters such as corruption or maladministration of the Council than the reasons which might have caused the Minister for Planning to form his particular views about performance, and then appoint a planning panel, at Ku-ring-gai.

A new provision was included in the EP&A Act in 2006 to also allow the Minister for Planning to appoint a planning assessment panel to undertake a council's consent authority role or to prepare environmental planning instruments:

***118 Appointment of planning administrator, planning assessment panel or regional panel***<sup>2</sup>

- (1) *The Minister may appoint a planning administrator, a planning assessment panel or a regional panel (or all of them) to exercise functions of a council if:*
- (a) *the Minister is of the opinion that the council has failed to comply with its obligations under the planning legislation, or*
  - (b) *the Minister is of the opinion that the performance of a council in dealing with planning and development matters (or any particular class of such matters) is unsatisfactory because of the manner in which the council has dealt with those matters, the time taken or in any other respect, or*
  - (c) *the council agrees to the appointment, or*
  - (d) *a report referred to in section 74C of the Independent Commission Against Corruption Act 1988 recommends that consideration be given to the appointment because of serious corrupt conduct by any of the councillors in connection with the exercise or purported exercise of functions conferred or imposed on the council by or under this Act (New South Wales Government, 2009(a)).*

**3.3 The Ku-ring-gai Planning Panel and other Section 118 Panels**

The Ku-ring-gai Planning Panel was appointed under the terms of the new section 118(b), that is, due to the unsatisfactory performance of a council in dealing with planning and development matters (Sartor, F. 2008a).

The specific terms of reference for the Ku-ring-gai Planning Panel are:

***4 Appointment of Panel to exercise the Council's planning functions***<sup>3</sup>

- (1) *The Panel is appointed to exercise all functions of the Council:*
- (a) *as a consent authority under Part 4 of the Act, but only in relation to:*
    - (i) *the assessment and determination of any development application for development with an estimated cost of more than \$30,000,000, and*
    - (ii) *the assessment and determination of any development application that has not been determined within 90 days after the date on which it was lodged, and*
  - (b) *in relation to the making of environmental planning instruments under Part 3 of the Act, but only in relation to:*
    - (i) *the control of dual occupancy, and*
    - (ii) *the control of development within the Ku-ring-gai town centres.*

Ku-ring-gai was not the first council in NSW to get a section 118 panel. There are two other

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<sup>2</sup>Environmental Planning and Assessment Act 1979 No 203

<sup>3</sup>Environmental Planning and Assessment (Ku-ring-gai Planning Panel) Order 2008, 3 March 2008 Special Supplement 1419 New South Wales Government Gazette No. 28, Page 3

such panels in place in NSW at the time of writing.

Wagga Wagga City Council in the south west of New South Wales was the first Council to get a section 118 panel. Its panel was appointed following a request from the Minister for Local Government. An earlier Department of Local Government (DLG) section 430 report on the Council’s operations had recommended the Minister for Local Government consider appointing a planning panel or administrator (Department of Local Government, 2007).

Burwood Council in Sydney has a similar planning panel to Ku-ring-gai, to deal with its single town centre. The reasons for appointing a panel in this case were relevant to section 118(c), that is, because the council agreed to the appointment. Specifically, the reasons for appointment of the Burwood Panel are:

- o Burwood Town Centre has been identified as the Major Centre for the Inner West subregion under the Metropolitan Strategy: City of Cities, making it a place of particular planning importance to the State;
- o Council has agreed to the appointment of Panel in recognition of Burwood Town Centre’s significance in achieving State planning objectives and to assist councillors who may have conflicts of interests in dealing with planning matters in the area; and
- o to facilitate the progression of the draft Burwood Town Centre LEP and ensure the plan is consistent with the planning outcomes identified in the Metropolitan Strategy: City of Cities (Department of Planning, 2007b).

Where Ku-ring-gai distinguishes itself from both Burwood and Wagga is that Burwood invited the Minister to appoint a panel. For Wagga Council, despite apparently serious findings against in a section 430 report, a planning panel was a means for the Council to remain in place while it addressed the findings of the DLG review. Wagga retained a sufficiently constructive relationship with both the Minister for Planning and the Department to retain some influence on the makeup of the Panel, when it successfully requested the appointment of an Albury Council planner to the panel (Sartor, F. 2007b). Ku-ring-gai on the other hand chose at first to challenge the appointment of the panel, and then to resist the process. Consequently the councillors at Ku-ring-gai have found themselves left out of the process. This is not to say that the relationship was always necessarily going to be acrimonious, though it did reflect the testy nature of the relationship between the former Minister and Council’s Mayor of the time (Ku-ring-gai Council, 2008).

**3.4 The Power of Section 118 Planning Panels**

The powers available to a planning panel are quite extensive<sup>4</sup>, and they vary slightly for planning administrators, planning assessment panels or regional panels. A full discussion of panel powers is outside the scope of this paper. For this reason I will focus on the specific powers which might lead to a challenging relationship between planning panels and elected representatives.

***118 Appointment of planning administrator, planning assessment panel or regional panel***

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<sup>4</sup> See Section 118, Environmental Planning and Assessment Act 1979 No 203.

- (3) *A planning assessment panel or regional panel may be appointed to exercise only all or any particular function or class of functions of the council:*
  - (a) *as a consent authority, or*
  - (b) *in relation to making of environmental planning instruments under Part 3 or under Division 1 of Part 2 of Chapter 6 of the Local Government Act 1993, or*
  - (c) *in relation to the preparation, making and approval of development control plans, or*
  - (d) *in relation to the preparation and approval of contributions plans.*
- (4) *A planning assessment panel or regional panel may not exercise the functions of a council for a continuous period of more than 5 years.*

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**118AA Planning assessment panels**

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- (3) *A planning assessment panel is a statutory body representing the Crown and has the status, privileges and immunities of the Crown.*
- (8) *A planning assessment panel is, in the exercise of its functions, subject to the control and direction of the Minister.*

**118AB Functions of planning administrators or panels**

- (1) *During the period of appointment, the planning administrator, planning assessment panel or regional panel:*
  - (b) *is, in the exercise of those functions, taken to be the council, and*
  - (c) *is to exercise those functions to the exclusion of the council except to the extent that the order of appointment provides otherwise, and*

**118AC Costs of planning administrator or planning assessment panel**

- (1) *A council, the functions of which are exercised by a planning administrator or planning assessment panel, is to pay to the Director-General out of the council's consolidated fund, the remuneration and costs and expenses of the planning administrator or planning assessment panel.*

**118AD Council to assist planning administrator or panel**

- (1) *A council must, if directed to do so by the Minister, provide any of the following with such staff, facilities and documents as are specified in the direction:*
  - (a) *a planning administrator, planning assessment panel or regional panel appointed to exercise functions of the council,*
  - (b) *a staff member of any such planning administrator, planning assessment panel or regional panel,*
  - (c) *a member of any such panel.*
- (2) *A member of a council, or a member of staff of a council, must not obstruct any of the persons in subsection (1) (a)–(c) in the exercise of his or her functions under this Division.*

*Maximum penalty: 10 penalty units.*

*(2A) The general manager of a council must carry out any reasonable direction of the planning administrator or planning assessment panel relating to functions of the council being exercised by the planning administrator or panel.*

*Maximum penalty: 10 penalty units.*

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### **118AF Regulations**

*The regulations may make provision for or with respect to the appointment and functions of a planning administrator, planning assessment panel or regional panel and, in particular, for or with respect to:*

- (a) the accommodation, if any, to be provided at the offices of the council for the planning administrator, planning assessment panel or regional panel and any other persons assisting the planning administrator, planning assessment panel or regional panel in the exercise of the planning administrator's, planning assessment panel's or regional panel's functions, and*
- (b) the appointment of staff by the planning administrator, planning assessment panel or regional panel to assist in the exercise of the planning administrator's, planning assessment panel's or regional panel's functions.*

So in summary, in the case of the Ku-ring-gai Planning Panel:

- it was appointed by the Minister against the Council's wishes;
- Council chose to challenge the appointment of the panel;
- it was appointed to deal with all development applications in excess of \$30 million or over 90 days old;
- it was appointed to prepare a local environmental plan for Council's six town centres and dual occupancy across the local government area;
- Council is not represented on the panel;
- has been appointed for up to five years;
- is subject to the control and direction of the Minister;
- is taken to be the council in the exercise of its functions to the exclusion of elected councillors;
- the Council must pay the panel's costs and house them if required;
- Council staff are effectively seconded to work for the panel, to the exclusion of the Council; and
- it is an offence to obstruct the panel.

As you might appreciate, this is not a script for a constructive relationship between an elected body which remained in place for the life of the panel. The relationship was even further tested by the general local government election in September 2008 and a by-election in May 2009. The types of matters that the planning panel was appointed to deal with are just the type of matters that might form the core of an election or re-election campaign for any local politician, let alone opportunity provided to rail against the very appointment of the panel to take over a local authorities powers as a matter of principle.

Both authorities remain in place at the time of writing.

### **3.5 Joint Regional Planning Panels**

Until mid 2009 very few communities in NSW would have experienced the level of Ministerial intervention in their planning processes that Ku-ring-gai has experienced. More recently however, all Council's in NSW now have part of their functions carried out by Joint Regional Planning Panels (Regional Panels) which commenced on 1 July 2009. Because of the types of development dealt with by regional panels, many councils will not yet have had direct experience with such a panel. Regional Panels will make decisions on regionally significant developments, which include:

- Designated development
- Development with a capital investment value (CIV) over \$10 million
- The following development with a CIV over \$5 million
- Certain public and private infrastructure
- Crown development
- Development where council is the proponent or has a conflict of interest
- Ecotourism
- Subdivision of land into more than 250 lots
- Certain coastal developments previously assessed as Major Projects to be determined by the Minister under the EP&A Act (NSW Government, 2009a)<sup>5</sup>.

Again, whether right or wrong, many of these matters are considered by many local politicians to be the domain of local communities. The counter argument is one of depoliticising the planning process, and thereby removing some of the supply side constraints identified at the beginning of this paper, and removing avenues for corrupt behaviour, brought home all too clearly with the recent ICAC inquiry and subsequent dismissal of Wollongong Council on the south coast of NSW.

### **3.6 Can Planning Panels and Elected Representative Co-exist?**

The answer to the question "Can planning panels and elected representatives co-exist?" has to be yes.....because they have to. At one level panels seek to bridge the gap between local and State interests and in doing so provide an intermediate path through which the ideas of both levels of government can be realised. This proposition, however, is certainly not borne out in the case of Ku-ring-gai Council and the Ku-ring-gai Planning Panel, though it need not have been the case.

We will have to wait for more of their meetings before we can judge just how well Regional Panels and elected representatives really do co-exist. At least the arrangements for Regional

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<sup>5</sup>There are some exclusions to the role of Regional Panels. Regional Panels will not determine proposals for the above classes of regional development if they are:

- Development that are Major Projects to be determined by the Minister (that is, under Part 3A of the EP&A Act);
- Complying development;
- Development that does not require consent (including exempt development and development to which Part 5 applies);
- Development where the consent authority is not the council (including where the Minister is the consent authority); or
- Development within the City of Sydney local government area.

Panels include two representatives (out of five) from the local authority where a matter is being considered.

The outcomes of the first Regional Panel meeting (Southern Region Joint Regional Planning Panel, 2009) were described by that panel in the following terms:

*Today's meeting was also the first meeting of any such joint regional planning panel (JRPP) in NSW, following their introduction on July 1.*

*The Southern Region JRPP met in Wollongong and approved proposals for two new buildings at the University of Wollongong's Innovation Campus at Fairy Meadow.*

*"This is a historic step for the planning system in this State," Southern Region JRPP chair Pam Allan said today.*

*"The regional panel allows independent planning and local experts to make decisions on regionally-significant development proposals, after considering community input," Ms Allan said.*

*All development applications presented to JRPPs are assessed by local councils, typically following a public exhibition period.*

*The panels consist of members appointed by NSW Government and local councils and provide independent, merit-based decision-making and advice to the Minister for Planning.*

What the media release neglects to say is that Wollongong Council is under an administrator for the next few years.

#### **4. THE RELATIONSHIP BETWEEN KU-RING-GAI COUNCIL AND THE KU-RING-GAI PLANNING PANEL**

##### **4.1 Political Perceptions and Performance**

While the Minister published reasons for appointing the Ku-ring-gai Planning Panel (Sartor, F. 2008b), the Council would say that the Department of Planning never did enough analysis of the draft planning instrument it had prepared and submitted to actually justify some of the reasons given for appointing the panel. One reason for appointing the panel that is of particular interest, in that the fundamental argument between Council and the Department of Planning has always been dwelling numbers, is:

***(f)(ii) Whether council has complied with endorsed strategies and policies concerning planning and development matters:***

*Although Council agreed with Hornsby Council, under the Metropolitan Strategy, to a number of new dwellings being constructed in the Ku-ring-gai local government area over the next 24 years, the amount of housing which could be constructed under the draft Town Centres LEP and DCP would not contribute sufficiently to this number. The Department has requested Council to amend the LEP and DCP to address this*

*shortfall. The Council has not done so.*

It was not until 22 September 2009, only a month ago, that the Department of Planning issued a new planning circular (Department of Planning, 2009) advising of a new Ministerial Direction requiring planning proposals (formerly draft LEPs) to “implement the vision, land use strategy, policies, outcomes and actions of the Metropolitan Strategy”. The Direction took effect from the 1 October 2009, and nearly four years after Metro Strategy was released and two years after the Minister decided to put a panel in place at Ku-ring-gai.

The Department of Planning will not make the same mistake again with respect to dwelling numbers at Ku-ring-gai, with the Minister for Planning recently announcing that the dwelling yields built into current draft planning controls will be independently reviewed before considering the draft LEP.

Even under the current approvals regime Council, at the time of writing, remains the planning authority for the purposes of a Development Control Plan (DCP), which will add detail to the broad statutory controls established by the planning panel. Back in 2007 when the Minister formed the view that Council’s DCP was unsatisfactory, the power existed to intervene specifically in Council’s DCP if that was the major issue<sup>6</sup>.

#### **4.2 Ku-ring-gai Council v Minister for Planning & Ku-ring-gai Council Planning Panel**

Almost immediately upon appointment of the Planning Panel, Council initiated class 4 proceedings in the NSW Land and Environment Court<sup>7</sup> challenging its appointment by the Minister’s. Council ultimately lost the court action on all grounds though, depending on your perspective, was successful in a subsequent appeal as to costs, wherein his Honour Justice Biscoe concluded:

*“I have held that the Minister should pay the council’s costs to 29 February 2008<sup>8</sup> and the council should pay the Minister’s costs thereafter. I consider that they are likely to substantially offset each other and that it is therefore appropriate to make no order as to the costs of the proceedings.....”*(Biscoe, 2008).

The detail of the court action is largely beyond the scope of this paper, though ultimately cost the ratepayers in the order of \$500,000 and consumed nearly six months of officers and many others time. The costs of the State would also have been substantial. There are very few who would argue, with the benefit of hindsight, that the legal challenge was worth it, and it certainly did not set the groundwork for a trusting, cooperative relationship going forward.

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<sup>6</sup> Section 74F, EP & A Act Minister may direct councils with respect to development control plans

- (1) *The Minister may, subject to the regulations (if any), direct a council to make, amend or revoke a development control plan in the time and manner specified in the direction.*
- (2) *A council to which a direction is given under this section must comply with the direction in accordance with its terms.*
- (3) *If a council fails to comply with a direction of the Minister under this section, the Minister may make, amend or revoke the development control plan as if the Minister were the council.*

<sup>7</sup> Ku-ring-gai Council v Minister for Planning & Anor - NSW LEC: 40042 of 2008

<sup>8</sup> 28 February 2008 is the date the Minister for Planning repealed the *Environmental Planning and Assessment (Ku-ring-gai Council Planning Panel) Order 2007* and abolished the Ku-ring-gai Council Planning Panel established pursuant to that Order, and gazetted the *Environmental Planning and Assessment (Ku-ring-gai Planning Panel) Order 2008* and established the Ku-ring-gai Planning Panel.

What any review of the proceedings will not reveal, however, is the difficult position in which Council staff found themselves even before the planning panel commenced work. At the same time they were preparing evidence and swearing affidavits on behalf of Council for the Class 4 proceedings, they were simultaneously working with the newly appointed panel on the town centres LEP.

#### **4.3 The “Ku-ring-gai” Clause**

Aside from putting all of Council’s planning staff in an awfully conflicted position for the whole of the period of the court action, a situation which was effectively to continue for the ensuing twenty months until today, the court action by Council against the Minister gave rise to some changes to section 118 of the EP&A Act. These changes effectively prohibit other local authorities appealing the appointment of a planning administrator or planning assessment panel, or the conferral of functions on a regional panel:

##### ***118AG Protection for exercise of certain functions by Minister<sup>9</sup>***

- (1) *This section applies to any function (a protected function) conferred or imposed on the Minister (including a delegate of the Minister) relating to the appointment of a planning administrator or planning assessment panel, or the conferral of functions on a regional panel, under this Division.*
- (2) *The exercise by the Minister of any protected function may not be:*
  - (a) *challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings, or*
  - (b) *restrained, removed or otherwise affected by any proceedings.*
- (3) *Without limiting subsection (2), that subsection applies whether or not the proceedings relate to any question involving compliance or non-compliance, by the Minister (including a delegate of the Minister), with the provisions of this Division or the rules of natural justice (procedural fairness).*
- (4) *Accordingly, no court of law or administrative review body has jurisdiction or power to consider any question involving compliance or non-compliance, by the Minister (including a delegate of the Minister), with those provisions or with those rules so far as they apply to the exercise of any protected function.*
- (5) *This section has effect despite any provision of this Act or other legislation or any other law (whether written or unwritten).*
- (6) *In this section:*

***exercise*** of functions includes:

- (a) *the purported exercise of functions, and*
- (b) *the non-exercise or improper exercise of functions, and*
- (c) *the proposed, apprehended or threatened exercise of functions.*

***proceedings*** includes:

- (a) *proceedings for an order under section 124, and*
- (b) *proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, and*
- (c) *without limiting paragraph (b), proceedings in the exercise of the inherent jurisdiction of the Supreme Court or the jurisdiction conferred by section 23*

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<sup>9</sup> Section 118AG, Environmental Planning and Assessment Act 1979 No 203.

#### **4.4 Wearing “Two hats”**

For most of the last two years a number of councillors have accused the staff of “wearing two hats”. While the staff may have been answering to two masters, to extend the metaphor, the reality is that the councillors are probably only wearing half a hat. That this misunderstanding still continues today does not help the management of relationships between the two bodies. If the elected representatives have trouble understanding their new roles, though some may intentionally choose not to for political reasons, imagine how difficult it is for the community, the majority of whom rarely get involved in local issues anyway, to understand the finer nuances of the relationship.

While the community and the elected councillors may not appreciate it or even be aware of it, many of the strategic objectives of the Council’s own earlier planning process, as well as some sound new initiatives, made their way into the planning panel’s draft LEP. Despite the apparent conflict of having council staff working directly with the Planning Panel, some real benefits are reflected in the final draft LEP that may not have occurred had the panel simply engaged its own consultants to do the work, as the legislation allows them to do.

#### **4.5 Enlisting the Assistance of Community Leaders**

On a number of occasions the Chair of the Planning Panel had cause to ask the former Mayor to “show some leadership” on the issues confronting Council in relation to development of Ku-ring-gai’s town centres. The Chair of the Panel was presumably attempting to garner some support for a moderate voice in helping the residents of Ku-ring-gai learn more about and then deal with the issues of change confronting them. Without putting words in the mouths of either party, I am sure that the former Mayor was of the view that her brand of “passive resistance” was showing local leadership, though simply not the type sought by the planning panel.

Similar requests are understood to have been made with other key members of community groups in the LGA, though with the same outcome.

#### **4.6 Paying the Bills**

Where a panel chooses to utilise the human resources of a council, they are somewhat beholden to that council in that that do not have the powers conferred under section 337 of the *Local Government Act 1993*<sup>10</sup>, specifically in relation to the “voting of money for expenditure on its works, services or operations”. While this did not become an issue in the case of Ku-ring-gai, which voted additional funds for consultant studies to be carried out on behalf of the panel, it could well become an issue in the future. In many cases these studies, particularly where they related to matters of economic viability or feasibility, were subsequently not made available to the councillors, despite being commissioned by council staff, remembering here that in the exercise of its functions a panel is “taken to be the council”, and is to exercise its functions “to the exclusion of the council”<sup>11</sup>.

Notwithstanding that Council never actually moved to restrict the flow of resources to the

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<sup>10</sup>Section 377 General power of the council to delegate, *Local Government Act 1993 No 30*

<sup>11</sup> Section 118AB (1)(b) and (c), *Environmental Planning and Assessment Act 1979 No 203*.

planning panel, it did regularly, through letters to the Minister, Council's website, and media releases to the local press, remind everyone listening of the costs of hosting a panel:

*"I would like to bring to your attention a growing concern within the Ku-ring-gai community about the excessive cost of the Ku-ring-gai Planning Panel compared to the token amount of time they spend making decisions.*

*The last Ku-ring-gai Planning Panel meeting on 8 April only lasted four minutes. Two Panel members were present, one of them the Alternate, Vince Berkhout, earned \$800 for four minutes of decision-making time. Three out of four previously scheduled meetings were cancelled due to lack of business. The previous time the Panel met, on 25 February, there were also only two members present, and for that meeting the Alternate received \$800 for 39 minutes of decision-making time.*

*Regular Panel members receive around \$1,700 a month and the Panel chair just under \$2,000 a month. This adds up to around \$20,000 so far this year for just 43 minutes of formal meeting time. When you consider that two of the regular Panel members have not even attended a single formal meeting so far this year, residents are certainly not getting value for their money.*

*Although the panel members are pleasant and talented people, it is clear that Ku-ring-gai does not need them." (Malicki, 2009).*

It is not unreasonable to suggest that the only reason council voted funds for the panel to do its work was the knowledge that if it did not, it would by default extend the period the panel was in place.

#### **4.7 Community Response**

As might be expected from a highly articulate, highly educated, well off, and conservative community, the response to the imposition of a planning panel was swift and well orchestrated. Ku-ring-gai has a long proud history of resistance to higher density development and State Government intervention in planning matters, which it took the trouble to self publish as part of its centenary celebrations<sup>12</sup>. This anti-interventionist/anti-development tendency quickly re-emerged as the Planning Panel went about its business.

The community is characterised by a well organised network of local lobby groups who eventually came together as the "Ku-ring-gai Residents Alliance" (KRA) under the banner "NOT SO HIGH in Ku-ring-gai"<sup>13</sup> following a fairly rowdy public meeting in May 2009<sup>14</sup> where the Planning Panel adopted its final plans. The "NOT SO HIGH" campaign became the centre piece of the "Death of Democracy" rally<sup>15</sup> held on 27 September 2009. This rally brought together twenty eight resident action groups from across NSW to protest the increasing concentration of planning power, with prominent residents or ex-residents such as Catriona Rowntree, Jono Coleman, Eric Clapton, Rod Quantock and Michael Caton as speakers.

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<sup>12</sup> Curby, P and MacLeod, V, 2006. Under the Canopy – a Centenary History of Ku-ring-gai Council. Ku-ring-gai Council

<sup>13</sup> <http://www.notesohigh.org.au>

<sup>14</sup> <http://www.youtube.com/watch?v=EnSuyMzcQRU>

<sup>15</sup> <http://player.video.news.com.au/dailytelegraph/#1277324028>

## 4.8 Passive Resistance

12 months of what might politely be described as “passive resistance” followed Council’s defeat against the Minister in court. Arguably, public exhibition of the panel’s draft LEP in November 2008 saw Council start to take a more active approach to resistance. The turning point was coincidentally not long after the general local government election in September the same year. A further point at which resistance “stepped up” was a well attended public meeting where the Planning Panel adopted its final LEP for submission to the Minister for Planning in May 2009. Following that meeting Council attracted significant public criticism for not taking a more active position against what by then was coined in the press as the “Death of Democracy” movement.

Notwithstanding the Panel is “taken to be the council”, and is to exercise its functions “to the exclusion of the council”<sup>16</sup>, Council:

- conducted its own public notification of both the exhibition of the draft LEP and key meetings held by the Panel, despite extensive advertising by the Panel itself;
- lodged its own objection to the Panel’s draft LEP;
- had its own review of dwelling yields carried out;
- supported the Ku-ring-gai Residents Alliance with its “Not so High Ku-ring-gai Campaign” by paying for and installing banners (Ku-ring-gai Council, 2009); and
- continued to run a media campaign against the panel.

## 5. CONCLUSIONS

Some would argue that relative to many other states, New South Wales has had a relatively decentralised planning system for many years. This was arguably the intent behind the EP&A Act, and goes to the very heart of a participatory planning process. If this proposition is accepted, then the current move to create “Australia’s best planning system” (New South Wales Government, 2009b), including the implementation of planning panels in their various guises, could be said to be code for the State clawing back planning power from local government. Certainly, successive metropolitan strategies in Sydney have not been achieved, but only in part, because of this decentralised planning control. Local interest seldom sits comfortably with the broader goals of metropolitan planning, at least not for all stakeholders. Successive State Governments must also accept considerable responsibility for lack of commitment to metropolitan planning.

Turning specifically to planning panels, for the immediate future communities across New South Wales will have to learn to work with Joint Regional Planning Panels. Nevertheless, from time to time there may also exist a requirement for the State to make further use of section 118 planning panels. Local communities across NSW are not on board with regional panels and, depending on the decisions that such panels make, may well remain so. Either way, the use of a section 118 panel at Ku-ring-gai clearly demonstrates that without the concurrence of the local planning authority, and the support of the local community, a reasonable working relationship is not guaranteed.

In the nearly two years since the Ku-ring-gai Planning Panel has been in place, Council staff have found themselves working for two masters with different agendas. This has led to strained relationships between then key stakeholders, particularly panel members, councillors,

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<sup>16</sup> Section 118AB (1)(b) and (c), *Environmental Planning and Assessment Act 1979 No 203*.

and the community, with the staff in the middle. Fortunately, the relationship between Council staff and the Department has been very productive over the last two years.

Planning matters will always be contentious. State interests will not always align with local self interest, and local politicians will always feel compelled to represent the people who voted for them. Do not expect them to take a “leadership” role in the development of a vision with which they do not agree, by a mechanism that they are philosophically opposed to, leave them on the sidelines thinking that they are the local planning authority, and then be surprised when they undertake passive, or even active, resistance. That is what their community expects them to do

Time will tell whether Burwood Council and Wagga Wagga Councils come to reflect positively or negatively on their experiences with section 118 planning panels, and the pressures that were brought to bear on them to accept such panels. In the case of Ku-ring-gai the lesson is simple, unless a council has demonstrated complete incompetence, corruption, or dysfunctionality, and thereby warrants dismissal, do not expect them to happily co-exist with a planning panel for a prolonged period of time. This was certainly not demonstrated in the case of Ku-ring-gai at the time the panel was appointed. And think twice before co-opting the staff to work with the panel to the exclusion of an elected council under such circumstances.

So with Metro Strategy looking for an additional 640,000 dwellings to cater for Sydney’s population growth to the year 2031, of which 60-70% will be in existing built up areas, I hope the arguments about the remaining 630,000 are not so intense as those in respect of Ku-ring-gai’s 10,000.

## **ACKNOWLEDGEMENTS**

I would like to acknowledge the assistance of Ms Elizabeth Crouch, Chair of the Ku-ring-gai Planning Panel, Mr John McKee, General Manager Ku-ring-gai Council, and Mr Peter Davies, Manager Corporate Planning and Sustainability, all who read early versions of this paper and provided valuable input.

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