

newDEMOCRACY

NSW PLANNING REVIEW SUBMISSION REGARDING ISSUES PAPER

“All courses of action are risky, so prudence is not in avoiding danger (it's impossible), but calculating risk and acting decisively. Make mistakes of ambition and not mistakes of sloth. Develop the strength to do bold things, not the strength to suffer.”

— Niccolò Machiavelli, *The Prince*

“My view remains that we really do need to get legislation that is quite groundbreaking.”

— The Hon. Brad Hazzard, *Ministerial Planning Forum Feb 9th 2012*

Precis

The need for the planning review has arisen from the view that we ‘suffer’ our present planning system. Neither councils, developers, nor the community see a process which delivers simplicity, certainty, community acceptance, flexibility and timeliness in decision making.

To some extent this sufferance is the result of modern electoral processes: public institutions must abide by rigid rules in order to deliver fair decisions, and quite necessary expert appointments to planning bodies need a closer link to a well understood, transparent method of democratic oversight. The fact they may be appointed by elected representatives is not enough – as seen by the public distrust of the former Part 3A process.

The proposed remedy is to introduce an *additional*, democratic method that is simple and easily understood by the general public: and by engendering trust it directly drives timeliness of decisions. It is founded upon the best practice public engagement and decision making processes in use worldwide.

Taking some decisions from samples of the community directly is not “undemocratic”; it is *more* democratic because limited powers are passed to the citizenry (and not to a bureaucracy or unelected experts). This is restoring the demos – the common people - to democracy. It is considerably more democratic than the expert determinations made today, but does so in a way that retains this respected professional input of expertise in a complex area which is widely trusted by those operating within the field.

The method of choosing representatives by random selection is at the core of how democracy was originally conceived. Most modern electoral processes have lost sight of the integrity of this method.

Today, the criminal court jury remains as one of the lasting legacies of democratic invention. With a criminal jury, the community overwhelmingly trusts the decision as to guilt or innocence: the jury is not subject to political influence, careerism, monetary influence, factional favouritism or strategic bargaining. The jury can and does evaluate highly technical elements in their findings. And while it is true they are asked for a binary decision of whether guilt is proven or not proven (where a development or planning decision can be more nuanced), the core dissatisfaction with the planning system lies not in the nuance but in the substantive decisions it generates, how it generates them and how long it takes to reach a resolution.

As Sydney and major regional centres increase in density and complexity, citizens will likely find increasing demands for space in their community. The nature of brownfield development is often characterised by competing interests and thus the planning and approvals process will be required to deal with ever more complex and controversial proposals.

We ask the Commissioners to consider three scenarios as to what citizens will find most acceptable; if you were told that 50 randomly selected people from the community looked at a plan for your area, heard from a range of experts and then reached a consensus that a development should be approved or a density increased, would you trust that decision? Now consider if you were told the exact same plan or building had been approved on the basis of two expert reports or experts appointed by the Minister to the Planning Assessment Commission? Or as a third scenario, that the council had approved it after negotiating a Planning Agreement?

Citizens are likely to deliver greater community confidence in reaching planning decisions in a deliberative model; and they are likely to engender community support more quickly and with greater perceived integrity than through alternative conventional approaches for a major approval decision where this is still required.

1. Proposed Solution

This submission proposes that the Commissioners consider randomly selected citizen panels as a part of both strategic planning and D.A. determination, and embed it in legislation in order to enhance its legitimacy.

In practical terms this will involve:

- a. Delineating a series of five 'checkpoints' in the creation of planning instruments where a jury of randomly selected members of the community have substantive input into the LEP being drafted .

The community should determine the character of precincts through the planning controls of FSR, height, setback and open space within the context of state and federal government policies such as the National Urban Policy. Their decision should be binding at this early stage.

- b. Adding a similar, scalable jury structure to complement the expert determinations made by the Planning Assessment Commission and the Joint Regional Planning Panels for projects

meeting a criteria of state significance, where requested by Council or a developer. This demonstrates to the community that an impartial public voice was considered in the approval – even if the jury’s role is limited to an advisory function.

To ensure operational success, it is recommended that the government retains the expert practitioners groups found today in the JRPP and PAC processes and simply adds a component of community oversight drawn from the wider community. For the LEP process, citizens should be able to draw on this same pool of expertise on a needs basis.

This adds a complementary decision process using a randomly selected pool of citizens to reach a jury style decision. By hearing from a transparently representative segment of the community decision makers are empowered to proceed and are less likely to be restrained from aggressive partisan positions (for or against development) from a given quarter.

Traditional models of decision making and community engagement tend to reward those with a specific interest: i.e. the loudest voices dominate. To avoid this, we emphasise the value of random selection of local citizens to deliver the most representative sample possible of the community - a miniature population – in order to determine what everyday citizens would recommend given sufficient time and information.

2. Objective

Trust, transparency, certainty and timeliness are the key objectives this process will deliver.

We seek its application at the points least trusted by the community: in areas designed to make development criteria more straightforward for applicants but which in their present form have ultimately delayed decisions as community objections gain momentum and compel a political response. Delay results from hearing from a non-representative sample of the community at the wrong time – akin to having a jury comprised half of by the victim’s family and half from the defendant’s then wondering why commonality cannot be found.

One key finding drawn from the operation of over 1100 deliberative democracy processes worldwide is that they remove the community *perception* of dishonesty (and the feeling of external imposition of decisions by centralised government) from the approval process: they are no easier to fix than the Lotto draw so we trust the selection.

Looked at from a developer point of view, the key benefit of the design is to allow for *flexibility* that is difficult to regulate or institutionalise in decision making bodies for fear of perceptions of favourable treatment, and *certainty* deriving from an LEP that has far more substantive community input at the strategic planning stage thus is less likely to be challenged at the approval stage.

3. Core philosophy

Changes to density and later planning approval decisions (particularly those utilising a SEPP 1 Objection or a Planning Agreement) need to be made by those who visibly have nothing to gain from a development, while at the same time having the decision made with appropriate input from those with specialist expertise, and with an opportunity for those directly affected to be heard.

Citizens are capable of understanding the complex strategic planning requirements for population growth, housing supply (and consequently affordability), demographic change and integrated planning. However, to warrant people investing the time to undertake this detailed learning the necessary requirement is to afford those citizens' decision making authority.

Stratified random selection of citizens convened as a decision making group delivers a body which the community will tend to trust as they are "people like us" rather than experts assumed to be driven by a vested interest or individuals with political considerations impinging on their decision. A Citizens' Development Jury hears from relevant experts of their choosing before making a binding decision. It is important to emphasise that this Jury is not a self selected group of "do-gooders" or community activists – it is driven by pure random selection, with stratification used to ensure a mix of age and gender in the final jury. They are empanelled on a 'once only' basis to avoid their becoming targets for lobbying as representatives can be today.

Just as importantly, the Jury has access to a core group of expert practitioners (in person or via online technology) which they may choose to augment with other experts (some of whom may be put forward by council or developer). Today, a degree of public objection stems from a poor understanding of the impediments and constraints applied to governments and decision makers: this process aims to allow a sample of the community sufficient time so that nuances and detail can be explored.

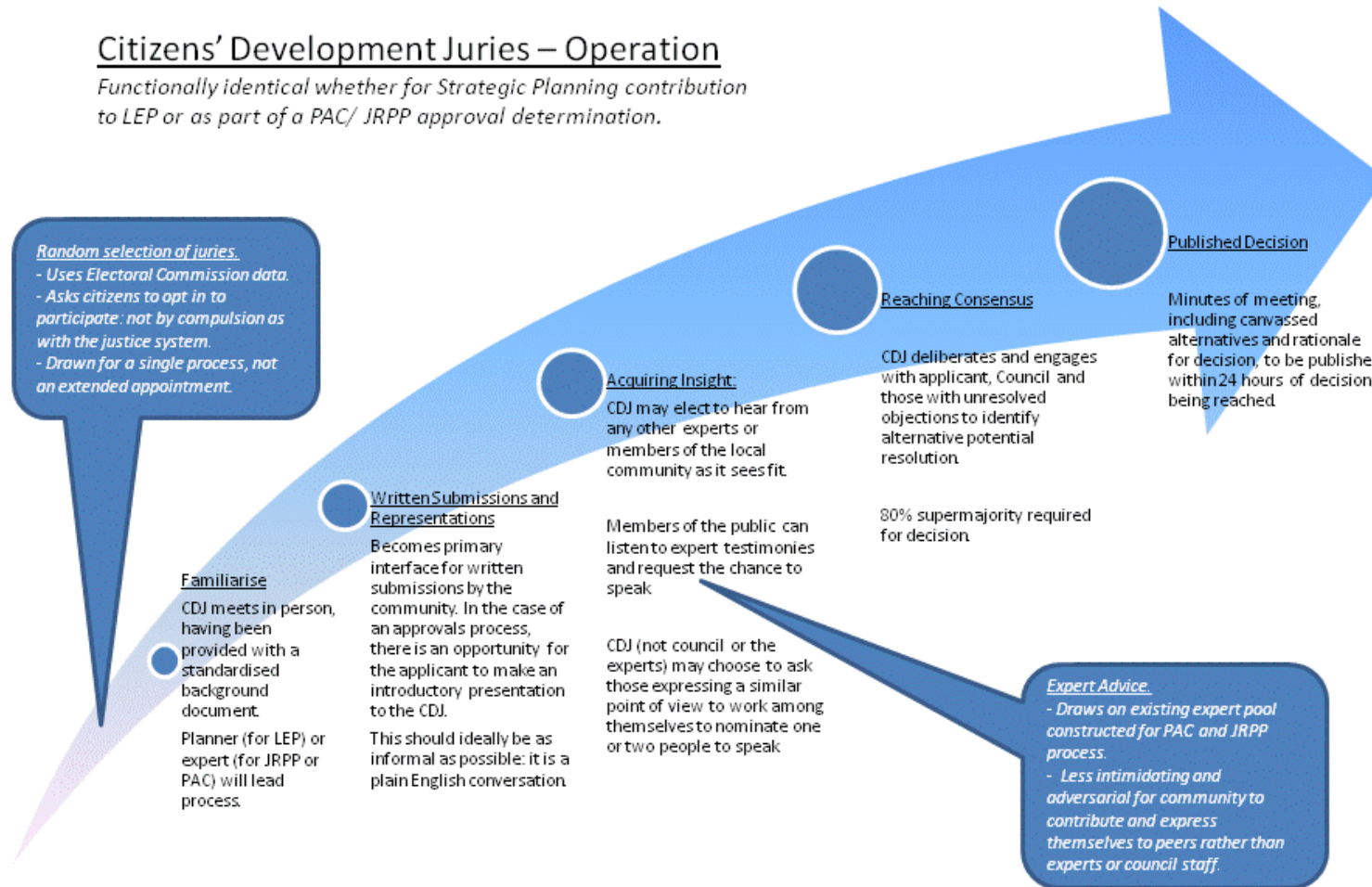
4. Process

- i. Jury size is scalable and flexible (matched to scale of project and thus cost impact). A standard jury for the strategic planning LEP phase is recommended to comprise 30-40 citizens, a state significant development referred to the JRPP or PAC would utilise a jury of 15-35 citizens, while a major cityscale (or highly contested) project would use a jury of 100-120 without any dramatic cost impact. This is not a one size fits all approach: it is a single model which scales to the impact of the task at hand while keeping the core philosophy consistent between planning and approvals.
- ii. Potential jurors are required to declare any conflict of interest; this may see citizens living in close proximity to a development or landholders seeking similar developments excluded.
- iii. The time required of the jury varies by complexity of the task at hand, but as a guide, proposed changes to planning controls (zoning) as part of the strategic planning/LEP process could be deliberated on with 4-5 in person meetings complemented by a private online discussion area for participants.

- iv. Expert testimonies are open to the public.
- v. The process is not bound by the rules of evidence and may inquire into and inform itself on any matter and in any manner it sees fit, subject to basic procedural fairness. It is worth noting that this is the antithesis of petition and 'opinion poll' responsiveness: rather than a large number of people making a decision based on a small amount of information, a sample of people are given access to all possible information and expert advice.
- vi. Expert guidance is provided to the Development Juries having access to a pool of solicitors and professional experts who are degree qualified in urban design, planning or architecture as found in the existing JRPP and PAC compositions.
- vii. Decisions are reached by supermajority rather than simple majority.
- viii. Written minutes and a record of voting will be made available within 24 hours of a Jury decision.

Citizens' Development Juries – Operation

Functionally identical whether for Strategic Planning contribution to LEP or as part of a PAC/ JRPP approval determination.



5. *Function*

- i. A forum for the community to be heard and have their concerns about strategic plans addressed without applying a political context. It's a group you can't credibly accuse of being biased or having a pre-determined outcome in mind.
- ii. A method of given the community meaningful input (via a binding decision) sufficiently early in the plan making process that objections are reduced at the application stage.
- iii. A high transparency, fast turnaround time process is made available for developers and Council through better planning and more trusted expert determinations of an approval when a decision moves beyond Council hands.
- iv. A less adversarial and reduced workload option for Council.
- v. Better development outcomes based on knowledge-assisted deliberation in contrast to rigid adherence and potentially politically-driven consent decisions which can be driven by a desire to appeal to the voters' superficial view of a development.

6. *Risks and Issues*

- i. Perception of Manipulation of the jury process: if the public perceive that it is planning authorities that select the juries – or if there is capacity for them to object to a juror – then a substantive part of the rationale is eroded. To address this, it is proposed that the Office of the Sheriff extends its current, trusted, role in jury selection to manage this component of the process.
- ii. The Jury 'Gets it Wrong': as with the justice system, there is the potential for a Citizens' Development Jury to generate a decision which professionals view as being in conflict with the evidence that was placed before them. Given the decision is proposed as binding only in the planning instrument process (see Section 12), this is best addressed by ensuring accurate and specific directions to the jury at the outset of the process. If the State has outlined that x thousand more dwellings must be accommodated, then the task for the jury is a question of "if and how" rather than "yes or no".

7. *Operating the Expert Group: Integration of Professional Expertise and Community Insight*

Achieving a balance between fee for service experts and knowledge within a community is a challenge to the current process – both in terms of perception and day to day operations. The requirement for expert input into planning and approvals decisions has also contributed to time, cost and distrust in the system as it presently stands: those aggrieved contend that one can find an expert willing to say anything to make their client happy (regardless of whether that expert is

retained by the applicant or an objector). Faced with conflicting reports, decisions are delayed and the cost is borne by the community.

At the same time, local knowledge has been challenging to integrate as the present system does not accord a formal role to this type of input. This process aims to give the community a role on an equal footing by allowing Resident Action Groups and citizens to speak to a group more likely to be seen as independent: a jury of their peers. At the same time, it should be noted that the 'protest power' of these groups is limited by the fact that those making the decision are not seeking re-election – the prospect of a negative campaign against the CDJ members is meaningless.

Case study example:

In 2003, Albury Council constructed a high-quality concrete footpath beside a busy section of road. The footpath could have gone on either side of the road, but the decision was taken to construct it on the side with a row of large trees, so that the trees could provide some shade for pedestrians. Local residents noted that the trees would drop a lot of fruit on the footpath, making it very slippery and treacherous for elderly people to use. Eventually, the council spent a similar amount building a second path on the other side of the road so people could walk safely.

The example highlights the value of local knowledge in planning: those who live in an area know the nuances of their area – right down to whether a footpath should not be placed under the trees. Cost and delay were added to the solution because the community were only engaged at the 'complain and object' stage.

8. *Applicability*

It is proposed that all LEPs are mandated to have input from Citizens' Development Juries at five checkpoints through their development at key milestone points – a task sometimes driven by consultants but which we suggest needs to be made a core component of planning. This avoids the community being asked to comment on a finished plan in the "*decide – announce – defend*" model of consultation.

While we have not specified exact points within the LEP process as our detailed expertise is not in the area of development, rather, it is in democratic innovation to deliver more trusted decisions. However, as a broad principle the strategic planning process should see the community clearly agree the character of precincts through the planning controls of FSR, height, setback and open space within the context of state and federal government requirements. With a supermajority of randomly selected citizens agreeing to this in the LEP this will provide greater certainty for those seeking approvals that fit within these requirements. Today, the community has a low level of input at this time so exercise its ability to object at the approval stage.

It is proposed that development applications would have input from a Citizens' Development Jury where they are referred to the PAC or JRPP for determination (accepting their likely modification by this review, we anticipate some form of expert determination body for state significant and strategic projects will be needed). This adds democratic imprimatur and community acceptance to

complement the expert advice embedded in the current decision making system to build a trusted and timely process.

9. Scalability to Regional Councils

The pool of citizens would be drawn from local government areas: people in Broken Hill will be the default option for making Broken Hill decisions. This is easily operable for the strategic planning process with software able to complete a random draw from the electoral roll.

Where a JRPP or PAC-referred proposal spans multiple affected LGAs, then it is a simple matter to draw the jury sample from across those LGAs.

Selection is a two step process: a wide pool of invitations on a random basis, with a secondary selection drawn from those who opt in. With existing, freely available software it is suggested that the Sheriff's Office has the capability to invite the initial sample – with positive responses then being managed by council. The random draw of people from this easily manageable list (of a few hundred respondents) can then be done by Council using freely available online random selection tools.

Where an applicant or Council requests a Development Jury, and the process is deemed sufficiently significant (by Councils or the Minister) to warrant the participation of citizens from multiple local government areas, then it should be considered appropriate to levy a fee sufficient to cover transport and accommodation costs.

10. Selection of Participants

For the LEP, invitations would be issued to a random sample of 2,000 citizens randomly drawn from the electoral roll in each local government area. Invitations will explain the process and ask the citizen to decide to opt in to be eligible for selection in the Citizens Development Jury. (*10% response rate required, 20% expected*).

From positive responses a process of stratified random selection is pursued. The sample is drawn electronically based on pre-agreed stratification goals: recommended as being age, rates status (mix of owners and renters) and residential location. The objective is to achieve a group descriptively representative of the community even if one subset of the community responds disproportionately to the initial invitation. This can be achieved with existing software tools.

For the JRPP and PAC style approval processes, it is recommended this be managed identically to the current process for jury duty as administered by the Sheriff's Office with citizens called for duty to avoid the risks of self selection.

11. Preparation and Information Process

Information and judgment are required to reach decisions. We recommend this process because the judgment of random samples (or mini-publics) has been shown to achieve very high levels of public

trust. It is thus imperative that the method of provision of information to the groups does not erode that trust.

Prior to the Citizens' Development Jury first meeting, a simple background document will be circulated to all those participating. This should explain the fundamentals of what is acceptable in the local government area and core planning principles.

At the meeting, they will receive the entirety of submissions made to the Committee. This is the baseline content for deliberation.

As the process scales up to larger, state significant projects, so the background reading will expand and this should be provided in advance of the initial gathering. Companies, interest groups, expert groups and citizens will ideally have made contributions as part of the Committee's call for submissions. However, throughout the meeting process the Jury is able to request a submission or an appearance from experts of their choosing, within an agreed budget limit.

12. What Does the Citizens' Development Jury Decide?

It is critically important that the limit of the group's decision-making authority is pre-agreed and clearly conveyed.

With regard to planning, it is proposed that the community's view is binding: if a supermajority of randomly selected group of citizens view a component of the LEP as drafted as inappropriate then it is required to be amended. Equally, if they advise that there is a method acceptable to the jury to reach a solution then this must be incorporated.

With regard to approval, it is proposed that the remit of the jury is advisory: they seek to reach agreement on whether a proposed development is a positive addition to their community, and thus warrants their approval, providing a complementary 'non advocate led' vehicle for community input to inform the JRPP or PAC process.

13. What Constitutes a Decision?

In order to shift the public mindset from adversarial, either/or contests and convey a message of broad based support for the recommendations, the Foundation suggests an 80% supermajority be required for a final decision from the group where a vote is required. In practice, these groups tend to reach consensus (or group consent) positions with minority voices explicitly included in any report; they rarely need to go to a vote.

14. Where Has This Worked?

Larger scale examples (better categorised as being in the planning sphere rather than approvals) are exemplified by the Dialogue with the City and the Road Train Summit in Western Australia. Both

examples serve as proof points of the capacity of citizens to understand and make tradeoffs in complex areas.

Deliberative designs utilising random selection and delegated decision making authority have now been successfully embedded in legislative frameworks, most recently with the State Legislature in Oregon in the United States who took a bi-partisan vote to approve this review process as a requirement for Citizens' Initiated Referenda following a successful 12 month pilot process.

15. Costing and Funding Outline

A shorter process is inherently more cost effective when cost of capital is allowed for: costs ultimately passed on to the community and contributing to issues of housing affordability.

It is proposed that a per diem allowance be made for those participating in the planning component to ensure their participation to the end of the process. At \$400 per member for 40 citizens this will add a \$16,000 cost to council's consultation budget – while other operational costs can be expected to be in the region of \$12,000. This is comparable with current consultation costs incurred which would be largely replaced by this process.

For regional councils, the use of technology to assist with expert appearances (and even participation of remote jurors) will aid in minimising travel costs. If a jury wishes to hear from an urban planner in New York to inform a decision then free technology such as Skype achieves this at essentially no cost.

16. Conclusion

What has been presented here is a concept which aims to restore trust and certainty in the process of development by removing the potential for perceptions of unfairness. We are confident that it will restore confidence to those wishing to undertake developments in NSW by providing a fast track system that can be executed with an increased level of confidence within the citizens that the integrity of the system is being enhanced with better planning and more transparently public support for approval decisions taken at a PAC/ JRPP level.

NSW needs great development which will come from flexibility and trusted decisions within a commercially realistic time frame. Our recommendation is that this is best achieved by the Planning Review:

- ✓ Requiring a jury style process to be operated at multiple points in council's strategic planning process in the creation of LEPs.
- ✓ Normalising random selection as a part of DA determination for state significant projects referred outside of Council as a means of getting a more representative community viewpoint and delivering a more widely trusted decision.
- ✓ Having this embedded in the legislation to enhance its legitimacy.

- ✓ Ensuring that the government, through the Department of Planning, makes available its pool of expertise drawn together for the JRPP and PAC to inform the community during the strategic planning phase.

We appreciate your consideration of this proposal.

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