Manufacturing certainty – the purpose of planning in New South Wales?

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Statement of authentication

The work presented in this thesis is, to the best of my knowledge and belief, original except as acknowledged in the text, I thereby declare that I have not submitted this material, either in full or in part, for a degree at this or any other institution.

David Fingland

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Manufacturing certainty – the purpose of planning in New South Wales?

List of contents i

List of figures v
List of tables v

Glossary and abbreviations vii

Summary xv

Introductory note xvii

PART ONE

1 Introduction

1.1 Brief introduction to certainty 1

1.2 An initial concept of certainty in land use planning 5

1.3 The basis for this research 6

1.4 The research questions 10

1.5 Methods employed 12

1.6 Structure of the document 18

2 Certainty in the literature

2.1 Introduction 25

2.2 The notion of certainty 25

2.3 Knowledge and belief 29

2.4 Contextual considerations 32

2.5 Sources of certainty in land use planning 35

2.6 Reform of planning systems 38

2.7 Discretion and certainty 42

2.8 Discretion as power 44

2.9 Certainty in planning theory 45

2.10 Certainty as positive planning outcome 48

2.11 Conclusions 51

3 Land use planning in New South Wales

3.1 Introduction 53

3.2 The development system and its players 55

3.3 Ideological context of planning in New South Wales 58

3.4 Aims of planning in New South Wales 63

3.5 The land use planning system 68

3.6 Components of the planning process 71

3.6.1 Environmental policy 71
3.6.2 The strategic plan 72
3.6.3 Assessment of development 76
3.6.4 Environmental considerations 81
3.6.5 Community involvement 82
3.6.6 The Land and Environment Court 84

3.7 Future change – a new planning system? 86

3.8 Certainty in the planning process and its improvement 91

3.9 Conclusions 95

PART TWO

4 Certainty in the strategic plan – confidence in its processes?

4.1 Introduction 99

4.2 Changing perspectives in strategic plans 103

4.3 Shifts in emphasis: changing the rules? 107

4.4 The concept of certainty in planning texts 110

4.4.1 Expression of notions of certainty in planning documents 110
4.4.2 Use of certainty as justification 119
4.4.3 Considerations of achievement – objectives and certainty 120

4.5 Basis of the plan 125

4.6 Confidence in forecasts 129

4.7 Considerations of balance 131

4.8 The plan as an end in itself 134

4.9 Conclusions 136

5 Confidence in the approval process – streamlined and consultative?

5.1 Introduction 141

5.2 Performance of the assessment process 144

5.2.1 Development assessment in New South Wales 144
5.2.2 Assessment outcomes 146
5.2.3 Time to achieve development approval 149
5.2.4 Reviews and appeals 152
5.2.5 The Minister and the Department 154
5.2.6 Implications 155

5.3 Simplification and confidence – consistency and conformity 157

5.4 Limits to rule making and the uses of discretion 158

5.5 Depoliticisation and the roles of the players 163

5.6 Accountability and involvement of the community 166

5.7 Flight of discretion to the centre 167

5.8 The Land and Environment Court and its influence 170

5.9 Conclusions 172

6 Policy implementation - aims and outcomes

6.1 Introduction 177

6.2 Translation of policy into outcomes 179

6.3 Intentions and outcomes 188

6.3.1 Intentions 188
6.3.2 Background 191
6.3.3 Centres hierarchy 192
6.3.4 Content of the centre 194
6.3.5 Compliance with DCP controls 196
6.3.6 Outcomes 200

6.4 Going beyond the plan 205

6.5 Monitoring and not knowing – the problem of verification 210

6.6 Conclusions 215

PART THREE

7 Certainty in land use planning in New South Wales

7.1	Introduction	219
7.2	Influences on certainty in a neoliberal planning system	221
7.3	The strategic plan	226
7.4	Assessment and determination	228
7.5	Intentions and outcomes – policy considerations	231
7.6	Addressing the research questions	233
7.7	Policy considerations in an uncertain context	235
7.8	Limitations of method	238
7.9	Conclusions	240

Bibliography and references 245

Appendices

A	Certainty in planning documents	295
B	Recommendations of the Independent Panel omitted from the Green and White papers	315
C	New provisions extending the administrative discretion available to the Minister for Planning included in the Planning Bill 2013	317
D	Final ethics approval	323

List of figures

Chapter Six

6.1	Site location: Wrights Road centre	190
6.2	Development Control Plan 1994 (redrawn from the original)	193
6.3	Full development of the centre	199

List of tables

Chapter One

1.1	List of interviewees	15
1.2	Structure of the document	20

Chapter Four

4.1	Use of key words in selected planning documents	113
4.2	Use of the word *ensure* in major planning documents	121

Chapter Five

5.1	Assessment outcomes – DAs and CDCs in New South Wales Councils 2012-2013	146
5.2	Statewide DA mean determination time by value 2012-2013	150
5.3	Metropolitan group averages: DA mean determination time by value 2012-2013 (days)	151

Chapter Six

6.1	Assessment/determination of selected development applications	182

Glossary and abbreviations

This section provides definitions of commonly used abbreviations and particular terms relating to the practice of land use planning in NSW as they are used in this document.

ABS	Australian Bureau of Statistics.
Accountability	The concern that where the basis of planning decision-making is about where the broader public interest is seen as lying in terms of future development (see section 79C of the Act), such judgements need ultimately to be made by those who are accountable to the community in some appropriate manner.
(the) Act	*NSW Environmental Planning and Assessment Act 1979,* possibly about to be superceded by the *Planning Act 2013*.
AHURI	Australian Housing and Urban Research Institute.
Assessment	Process usually undertaken by professional planning staff to determine the acceptability of a development application under the relevant provisions of the Act.
Barker Review	*Barker Review of Land Use Planning* (in the UK), *Interim Report; Analysis*. July 2006, *Final Report; Recommendations*, December 2006, HM Treasury.
BPN	Better Planning Network. A coalition of community groups in NSW aimed at monitoring the process of formulating the new Planning Act and influencing the outcome.
CBA	Cost Benefit Analysis – determination of the economic costs and benefits of alternative approaches in order to identify which represents the best economic value. Helpful in making a choice between alternatives but has limitations when used to justify the decision.
CBD	Central Business District – essentially the commercial core of the modern capitalist city.
CD	Collector district – area defined for the collection of census data.
CDC	Complying Development Certificate – combination of development consent and construction certificate in NSW for many types of minor or routine development which only have a minor impact.
Certainty	A quality of knowledge without doubt. A desirable quality of the land use planning system according to industry lobby groups and governments.
City/Region Shapers	Important areas which due to their scale, strategic location, function or opportunities for change, play a critical role in realising the vision/stated outcome for a region.
COAG	Council of Australian Governments.

Code assessment	Development assessment in the draft Planning Bill where a proposal considered to be consistent with strategic plans and development codes, would receive a streamlined assessment against relevant the development guideline.
Concurrence	Agreement to be obtained, usually from a State government department or authority, before the decision-maker can determine a development application.
Confidence	Assured expectation; the state of feeling certain.
Conformance	Consistent with.
Conformity	Action in accordance with an applicable standard or rule.
Consent authority	The planning authority assessing and determining a development application. These are now numerous in determining a proposal while the assessment is undertaken either by the Department or a local council.
(the) Court	The Land and Environment Court of NSW – a high level court comprising Judges and Commissioners specifically established to hear disputes about planning, development and the environment. Operates under its own legislation but also has an influence on the operation of the Act
CSP	Community Strategic Plan – a component of the Integrated Planning and Reporting Framework procedures introduced in 2009 under the provisions of the *Local Government Act 1993*.
DA	Development application – formal application by the owner of the land or someone with the owner's written permission to the responsible consent authority to undertake development on that land.
DAF	Development Assessment Forum – an independent advisory forum of government, industry and the professions aiming to promote leading practice in planning systems and development assessment.
DCP	Development Control Plan – accompanies the LEP providing a wide range of development control measures in greater detail. These must be consistent with the higher level documents but are not legally binding, merely advisory.
(the) Department	Department of Planning and Environment (the Department) with the responsibility of regulating environmental planning and assessment in NSW predominantly land use planning and development assessment. Also refers to previous incarnations of this Department with similar but different designations and responsibilities. Recently (2014) changed from the NSW Department of Planning and Infrastructure.
Determination	Decision-making in relation to development applications usually based on assessments undertaken by council professional staff under Part 4 of the Act but can be undertaken by others under delegation from the Minister.

Developmentalism	Belief in the theory of and necessity for development.
Director-General	Director-General of the NSW Department of Planning and Infrastructure, now NSW Department of Planning and Environment.
DGRs	Director-General's Requirements for the form and content of an EA.
DLG	Division of Local Government, NSW Department of Premier and Cabinet. Grouping for 2012-2013 is based on population figures released by the ABS as at 30 June 2012.
Doubt	Uncertainty as to the truth or reality of something or the wisdom of a course of action providing room for uncertainty.
DTLR	Department of Transport, Local Government and the Regions (UK); now the Department for Communities and Local Government (DCLG).
EA	Environmental Assessment – now widely used as a substitute term for EIS.
EIS	Environmental Impact Statement – formal analysis of the likely impacts of a proposed development including environmental, cultural, social, economic and other relevant qualities of life.
ELDP	Employment Lands Development Program.
Ensure	Guarantee, secure; make certain the occurrence of an event, outcome or situation. Pledge; warrant.
EPI	Environmental Planning Instrument defined in the Act as State Environmental Planning Policies (SEPPs), Regional Environmental Plans (REPs) (now superceded) and Local Environmental Plans (LEPs).
Equity	Fairness, impartiality, even-handed dealing.
ESD	Environmentally Sustainable Development, defined in a set of four guiding principles by the Commonwealth government in 1992. Since then this concept has been seriously diminished.
Euclid	A key legal decision by the US Supreme Court which effectively established the constitutionality of zoning ordinances in *Village of Euclid v Ambler Realty Co,* 272 US 365 (1926).
EZ	Enterprise Zone (UK) – area specified where a limited planning regime applied. Development within this area also attracted various financial and other subsidies.
Facilitation	Make easy; promote; help forward (action or result) – a word widely used in relation to the description and justification of land use planning within a modern economy.
Fairness	Impartiality according to the rules.

FBC	Form Based Code – prescriptive code defining what is required for a particular structure on a specific site using diagrams aimed at achieving a predictable physical result.
Flexibility	Readiness to yield to influence or persuasion in decision-making.
FSR	Floor Space Ratio – allowable building floor space as a ratio of the area of the site on which it is located.
GDT	Gross Determination Time – total elapsed time of the development assessment and determination process for a single application.
GEC	Global Economic Corridor – defined zone from Sydney Airport to Parramatta via Macquarie Park claimed to provide Australia's most valuable links to the world economy.
Governance	Concern with creating the conditions for ordered rule and collective action referring to a new process of governing; a changed condition of ordered rule; or the new method by which society is governed. Sometimes used as a synonym for government.
Green Paper	*A New planning System for NSW: Green Paper*, published by NSW government, July 2012.
GSP	Gross State Product – the financial contribution made by NSW to the national Gross Domestic Product (GDP).
HIA	Housing Industry Association – peak representative body and lobby organisation.
ICAC	NSW Independent Commission against Corruption.
IDO	Interim Development Order, usually before a zoning scheme is in operation, this provides that no development can take place without permission.
IHAP	Independent Hearing and Assessment Panel – an independent panel of specialists established by a council to undertake development determination within its jurisdiction.
Integrity	Soundness of moral principle; upright, honest and sincere.
IPART	Independent Pricing and Regulatory Tribunal.
IPRF	Integrated Planning and Reporting Framework for local councils of which the CSP is a part.
JRPP	Joint Regional Planning Panel – a panel made up of appointees of the Minister and council representatives undertaking determinations of planning applications on behalf of regional groups of councils based on assessments made by council staff.
Justification	The action of showing something to be just, right and proper.
Knowledge	Intellectual perception of fact or truth; clear and certain understanding or awareness.

LEC	Land and Environment Court of NSW (the Court).
Legitimacy	Conformity with the law, rule or principle; conformity with sound reasoning or logic.
LEP	Local Environmental Plan – the main statutory instrument under the Act for the regulation of land use and development within a specific local government area in NSW; now the Standard Instrument Local Environmental Plan (SI LEP).
LGA	Local Government Area.
LGNSW	Local Government NSW – the peak body for NSW local government representing all 152 NSW general purpose councils, special purpose county councils and the NSW Aboriginal Land Council.
LGPMC	Local Government and Planning Ministers Council.
LGSA	Local Government and Shires Association, now LGNSW.
Libertarian	Advocate of freedom (in a planning context from the attentions of government).
MDP	Metropolitan Development Program – the main process for tracking the supply of new housing sites including monthly approval and completion data for Sydney.
Merit assessment	Assessment of a development proposal complying with the requirements of section 79C of the Act and expected to be continued under similar requirements of section 4.18(2) of the draft Planning Bill 2013. This widely accepted definition is discussed in the text.
(the) Minister	NSW Minister for Planning and Infrastructure; now (April 2014) re-entitled Minister for Planning.
Monitoring	Observation, continuing review, testing at intervals for the purpose of knowledge, regulation and control.
NCP	National Competition Policy – introduced competition to the planning process enabling private practitioners to be accredited approval authorities for certain categories of development with impacts on public participation and accountability.
NSW	State of New South Wales.
OC (number)	*On Certainty* (über Gewissheit) – title of the compilation of a set of unfinished notes by Wittgenstein originally written in Germen; the number refers to a particular proposition listed by the subsequent editors in the published document.
OSL	Office of Strategic Lands – identifies, acquires and manages (on an interim basis) and transfers to other government agencies, land required for planning purposes in the Sydney region.

PAC	Planning Assessment Commission – a statutory body comprising nine members appointed by the Minister to provide a wide range of advice and determine State Significant Development and Infrastructure applications when required by the Minister.
Part 3A	Part 3A (Major Projects) of the Act (now replaced by the provisions of SRD SEPP for SSD and SSI) allowing the identification of an extended range of development projects subject to an expedited assessment regime.
PC	Productivity Commission – Australian government's independent research and advisory body on a range of economic, social and environmental issues.
PIA	Planning Institute of Australia – professional representative association of planners responsible for accreditation for membership (approximately 4,700 members, 1,200 in NSW).
Planning Review	A review of the existing planning system in NSW (2011-2013) undertaken by an independent panel made up of two senior bureaucrats with legal backgrounds and strong connections to previous State governments. The review completed and published an Issues Paper and two volumes of recommendations. The term is sometimes used to refer to the whole process of developing the new planning legislation.
Policy	A course of action adopted by government as advantageous or expedient. Alternatively defined as anything the government wishes to do.
PPP	Public-Private Partnership – essentially the private funding of public infrastructure.
Praxis	Synonym for purposeful human activity determined by a finality or a goal although its outcome is not always predictable.
PRP	Planning Reform Program 2004 instituted by the NSW State government to introduce improvements to existing procedures.
Reflexivity	Consideration of evidence that takes account of the effect of the personality or presence of the researcher on what is being researched.
Reform	Conversion into another and better form.
(the) Regulation	NSW Planning and Assessment Regulation 2000 providing additional operational details to support the provisions of the Act.
Rhetoric	The art of persuasive communication and eloquence originally designed to sway an audience by appealing to both reason and emotion; now usually used to mean artificial and insincere language.
Risk	Exposure to the possibility of adverse circumstances.

RPT	Rapid Policy Transfer – process in which knowledge about policies, procedures, institutions and ideas in one political setting is transferred to another and put into practice – a product of globalisation.
Rule	Principle, regulation or maxim governing conduct; a regulation governing individual and collective practice.
Section 79C	Section of the Act setting out those factors to be taken into account during the assessment of a development application to be determined under Part 4 of the Act.
Section 82A	Section of the Act allowing the applicant to request the relevant council to undertake a review of a determination.
Section 96	Section of the Act allowing modification of a consent to correct a minor error, misdescription or miscalculation following a request by the applicant.
SEE	Statement of Environmental Effects – consideration of the environmental impacts of a proposed development and the means necessary to ameliorate these to acceptable levels, normally included where necessary, with the DA.
SEPP	State Environmental Planning Policy – the mechanism for addressing matters regarded as state significant to be applied in local or regional plan-making and the development assessment process. These policies are made directly by the Minister but have quasi-legal weight.
SEPP 1 Objection	Policy allowing flexibility in the application of development standards by reference to compliance with the objective of a standard rather than its numerical value. Its use by councils is monitored by random audit; also included as Clause 4.6 of the SI LEP.
SI LEP	Standard Instrument Local Environmental Plan – plan complying with the requirements for form and content of Standard Instrument template introduced in 2006 in an attempt to simplify the plan-making system.
SMH	Sydney Morning Herald newspaper.
SOS	Save Our Suburbs – community group opposing residential densification of the suburbs of Sydney and other Australian cities.
Spot rezoning	Singling out a lot or a part of one resulting in an amendment to the SI LEP zoning – often the subject of controversy but necessary in many cases to facilitate development or redevelopment.
SPZ	Simplified Planning Zone (UK) - the extreme attempt at deregulation in the planning system aimed at reducing bureaucratic delay and encouraging investment.
SRD SEPP	State and Regional Development State Environmental Planning Policy.

SSD	State Significant Development – large proposals considered to be significant by the Minister and determined by the PAC or senior members of the Department.
SSI	State Significant Infrastructure – major infrastructure assessed by the Department and determined by the Minister, the PAC or senior departmental staff using procedures similar to those previously undertaken under Part 3A of the Act, now repealed.
Stakeholder	Person or organisation with an interest in something.
STC	Stop the Clock – time taken for applicants to respond to requests by councils or agencies for further information on a DA.
Strategic	Concerned with or involving careful planning towards an advantage; often considered to be a framework for more specific actions.
Sustainable	Able to be maintained at a certain rate or level of development.
Tautology	Immediate repetition of two different words with the same meaning.
UAP	Urban Activation Precinct – important area considered by the Minister to have social, economic or environmental significance for the community or have redevelopment potential on a scale for the implementation of the state's planning objectives. Essentially, the process of redevelopment achieved by upzoning intended to speed up implementation of urban regeneration. Recently renamed as Priority Precincts.
UDIA	Urban Development Institute of Australia; an industry lobby group.
UK	United Kingdom.
Upzoning	The rezoning of a defined area to allow a greater intensity of development usually used in order to encourage redevelopment of an existing urban area. This process is fundamental to the implementation of the Priority Precincts (UAPs).
VPA	Voluntary Planning Agreement setting out agreed commitments made by the developer in relation to a specific development.
White Paper	*A New Planning System for NSW: White Paper*, published by NSW government, April 2013.
WSEA	Western Sydney Employment Area – a defined area (10,000 hectares) proposed to be developed as the main source of employment in western Sydney predominantly catering for freight services and warehousing.
Zoning	A device responsible for the spatial allocation of land uses. Its application has a major influence of the value of the land and its variation (rezoning) can be controversial.

Summary

This dissertation provides a detailed analysis of the manner in which the notion of certainty is identified in the land use planning system in NSW as portrayed by the State government as a product of its processes. It focuses on three main components of the planning process where certainty is considered to be of benefit. These are the strategic plan, the assessment and determination of development applications and implementation where the stated intention of the plan is translated into outcome.

In the context of land use planning, the notion of certainty is vague depending on individual and group interest. The approach taken here therefore focuses on the feasible presence of those qualities in the planning system which could be expected to generate confidence in practical terms rather than merely as a rhetorical construct.

The method undertaken employs a mix of interviews with a range of participants, a series of case studies centred on the three main areas of interest and an analysis of the material prepared in the lead up to the publication of the recent Planning White Paper and the draft Bills.

The evidence indicates that at least two of the components of the planning system investigated here are not sufficiently robust or reliable to produce the confidence required to achieve the certainty claimed. These are the strategic plan and the outcomes of the process when compared with its stated aims. The third area, that related to the approvals process, is more questionable. Its output in terms of the rate of approval could be considered to be capable of providing confidence although the means employed to achieve this can be considered to be too compliant with the drive for developmentalism. The presence of certainty as an identifiable characteristic of the planning system cannot therefore be considered to be valid and the claims regularly made for it are more accurately seen as promotional rhetoric intended to justify the process itself and the need for change here defined as power used to reinforce the predictability of outcome.

Introductory note

This dissertation focuses on the practice of land use planning in New South Wales (NSW) as undertaken under the provisions of the *Environmental Planning and Assessment Act 1979* (the Act) and the *Environmental Planning and Assessment Regulation 2000* (the Regulation). This Act was originally expected to be superceded by the *Planning Act 2013*.

Where reference is made to *planning* in the document this refers to land use planning and its practice undertaken in NSW under the provisions of the Act. Extensive reference is also made to the changes proposed to be brought about by the provisions of the new Act based on the documents produced during the process initiated by the State government in 2011. These are based on the contents of the White Paper (NSW Government 2013b) and associated draft Bills published in April 2013 plus various published responses to these that followed including some changes made before the first reading in the Legislative Council (the Upper House of the NSW Parliament). This represents the completion of the processes considered in this document.

The material here was prepared on the assumption that the new Planning Act 2013 would become law in early 2014. In the event, this did not take place; the amendments introduced in the Legislative Council in late 2013 were considered to be unacceptable by the State government and the process subsequently stalled.

This was followed in April 2014 by the sudden resignation of the State Premier resulting in the introduction of a new cabinet including a change in the Minister of Planning and Infrastructure followed immediately by the removal of its Director-General and yet another change of name for the Department. This is now the Department of Planning and Environment which also includes the Division of Local Government, the Environment Protection Authority and the Office of Environment and Heritage. UrbanGrowth NSW and UrbanGrowth NSW Development Corporation are listed as related entities.

It is not clear at present what course will now be followed in relation to the new Act. The most likely is that due to the proximity of the next State election in 2015, the government will not wish to engage in a political contest over the fate of the Bills. It is now probable that the current Act will continue, perhaps amended using the existing powers of the Minister, to introduce some of the measures proposed rather than attempting to pass the amended Bills as a whole.

Reference is occasionally made here to spatial planning. This has a slightly different meaning, relating predominantly to European and British practice seen as something that

goes further than traditional planning in its aspirations as a mechanism for overseeing implementation of development by a diverse range of actors and ensuring that this is delivered in ways that meet the diverse and sometimes contradictory expectations of society (Haughton *et al* 2010). Its initiation and practice in Britain is particularly related to the Blair governments' planning aspirations but following the change of government in 2010, the emphasis has switched to a more localised approach with stronger central direction. While the term is sometimes used in connection with metropolitan plans in Australia, this does not imply similarity with the European model (Dodson 2009).

Land use planning is by its very nature multidisciplinary, encompassing a wide range of practices and activities but focusing on an orderly sequence of events expected to lead to the achievement of a stated goal or goals within a spatial context. In practice it is far from orderly and rarely follows the prescribed series of events. Planning is notoriously difficult to define. Planners think they know what it means; it is what they do (Hall and Tewdwr-Jones 2011). That is not very helpful as planning is ubiquitous; everyone does it in one way or another. This dissertation applies to a particular kind of planning, variously called urban and regional planning, town and country planning in Britain and land use planning in NSW. This distinguishes it from other forms of planning as it includes a spatial element organised around some form of distribution of land uses and a process which moves from the general to the highly specific usually in the form of useful items such as buildings and beneficial facilities such as parks and public spaces. In NSW the process is organised under the aegis of the Act but it requires the attention of several other State government departments and authorities, local governments, assorted groups and individuals with specific responsibilities and, perhaps now the most significant of all, the private sector in the form of property developers and building contractors. Implementation of the process therefore remains complex and often unpredictable.

This dissertation addresses the notion of certainty in the land use planning system in NSW. It focuses predominantly on the practice of the process – how it operates – rather than on the theory of planning which, due to the distinctly ill-disciplined character of its procedures and processes, is fairly limited. Certainty as a product of plan-making and development control is widely promoted by the State government and various property industry lobby groups as a desirable outcome achieved by its practice and improved by the changes routinely made to it under the rubric of reform. These claims are vague and unsubstantiated; nor is it explained how this particular quality is achieved. There is no clearly defined causal link between deliberate intention and outcome within the planning process, only belief and assertion.

Land use planning is a complex government activity whose range and ambition is wide, although becoming increasingly constrained of late. However, it still remains focused on such projects as the promotion (and achievement) of economic growth, and environmental and social well-being via support for sustainable development (NSW Government 2013b, 15). This alone, as only one of nine stated objectives, represents perhaps the most ambitious and far-reaching of all government's aspirations. This is to be pursued by a small cadre of planning professionals, mainly under state and local government control.

An investigation such as this one requires consideration of the potential sources of certainty within the planning process and its main constituent components. This is undertaken by examining those parts of the planning system where such a quality might be supposed to be generated and perceived as such by those groups with experience of its effects. A variety of issues relevant to the performance of the system, and the chosen components of it, are assessed to determine if the claims made for certainty have any validity based on stated intent and recognised outcome. This approach requires consideration of a wide range of issues all of which inevitably cannot be given detailed consideration in the space available. The intended effect is therefore cumulative although several themes predominate. These are introduced in the first chapter.

Any text printed in italics is either a specific piece of legislation referred to or a quotation followed by the source in brackets. Numbers in brackets in the text refer to a page number within the quoted source.

Some of the material in this dissertation was presented in three refereed papers given at national planning conferences in Melbourne 2011, Bendigo 2012 and Sydney 2013, respectively.

PART ONE

> *Only in the absence of certainty can we have open-mindedness, mental flexibility and willingness to contemplate alternative ideas.*
> (Burton 2008b, unpaginated).

1 Introduction

1.1 Brief introduction to certainty

Governments in New South Wales (NSW), both Labor and the Liberal/National party coalition, have promoted the land use planning system as a source of certainty, predominantly as a means of providing confidence to those taking decisions to invest in property development (NSW Government 2009, 2012c). The risk inherent in such an activity will be reduced to an acceptable level and the route necessary to achieve the required approval will be as uneventful as possible. The process undertaken will also be transparent so that both the proponent and the community potentially affected by the development will be aware of what has been proposed and the reasons for the decision taken in relation to it. While there is no explanation of the way that certainty is generated by the planning system, it is assumed that improving its predictability (making sure of the required outcome) and increasing its efficiency (providing a decision to approve the proposal as quickly as possible) can be achieved by continuing change – characterised as reform – culminating in the provision of a new NSW Planning Act. It is necessary therefore to believe in the system as a provider of confidence.

A good deal of the material produced as part of the development of the new planning system and its associated promotional material prepared by the present NSW Government uses the notion of certainty in the planning process as an aim of the changes proposed. The Green Paper (NSW Government 2012c), for example states that one of the objectives of the planning system will be the provision of predictability and certainty about how decisions are made for both investors and the community. This is expanded in the subsequent White Paper:

> *The key objective of the planning system is to promote and enable economic growth and positive development for the benefit of the entire community, while protecting the environment and enhancing people's way of life. It is about enabling development that is sustainable.*
>
> *To do this, the new planning system will be simpler, more* ***certain****, more strategic and performance based, working within a positive planning culture. Decision making under the new system will be transparent and accessible, with people, businesses and organisations having the choice to be fully engaged in the decisions that shape their local area and economies. Strategic planning will be fully integrated in land use planning decisions.*
> (NSW Government 2013b, 15, emphasis added)

In a recent promotional document aimed at communities, families and small businesses, certainty in the planning process is claimed to be capable of achievement by the delivery of a faster, more streamlined planning system for families, reducing assessment times for straightforward applications, thereby saving people time and money and restoring integrity and transparency to the planning process (NSW Department of Planning and Infrastructure 2013d). Claims such as this are frequently made in promotional literature published by the Department but are rarely found in formal planning documents such as the Sydney Metropolitan Plans where the proverbial *mums and dads* are routinely included in the claimed community beneficiaries of the changes proposed or the outcomes of the plans together with the investors in the resulting development.

At its simplest level, the certainty claimed for the plan will be achieved by indicating where development will be allowed and where it will not be. This it is claimed will reduce development risk and potential financial loss and encourage investment providing a balance between protection of the environment and development certainty (NSW Government 2010d). The integration of infrastructure planning and delivery, while focusing on development in the growth centres (beyond the current urban footprint) via consistent land releases, will also have the effect of creating certainty (Dodson 2009).

> *Better linking of land use planning and infrastructure provision will* ***reduce uncertainty*** *for infrastructure agencies, the private sector and the community. This will encourage informed decision-making and investment, promote the efficient use of both public and private resources and support continued economic growth in NSW. Increased* ***certainty*** *can be promoted in a range of ways from clear policy direction and strong governance arrangements to consistently applied funding assessment criteria.*
> (NSW Government 2010d, 218, emphasis added).

This clearly relates certainty – or rather its improvement – to undertaking standard planning procedures more effectively; doing things better while concentrating on the predominant objective of the investment of both public and private resources in the support of economic growth – a conventional justification for change.

> *The new planning system will see a shift to a performance-based system for development assessments that will be more easy-to-use* (sic) *and transparent while providing* ***certainty*** *for everyday applications such as family homes, extensions and small businesses.*
> (NSW Department of Planning and Infrastructure 2013e, 11, emphasis added)

In other documents which have had a considerable influence on planning reform, the notion of certainty is seen as closely related to consistency between the various levels in the hierarchy relating strategy to development control. Here, certainty is related entirely to process.

> *. . . consistency regarding the conditions under which development will proceed, the rate and scale at which it will take place, and the way planning principles and mechanisms will be applied.*
> (Australian Government Productivity Commission 2011, 362)

Certainty as a desirable objective of the operation of the planning system did not appear in the regular strategic plans for Sydney until the version of 2005 (NSW Department of Planning 2005) although it did receive a single mention in the previous edition (NSW Department of Urban Affairs and Planning 1998). It remained in favour in the version of 2010 concerning both strategy and process (NSW Department of Planning 2010b) but now appears to be less popular in the most recent draft where considerations of process predominate (NSW Government 2013b). Little can be discerned from these fluctuations except to ponder on the reason for the lack of its inclusion in such documents prior to the new millennium.

Consideration of certainty was also absent from the mainstream planning literature until quite recently. It is not included in some of the classic texts of the time (Altshuler 1965, McLoughlin 1969, Hall *et al* 1974, Harvey 1975, Sandercock 1977/1990, McKay and Cox 1979, Reade 1987) and only makes two brief appearances in the 559 pages of the 14th edition of Cullingworth and Nadin's, *Town and Country Planning in the UK* (2006); it was not mentioned at all in the 8th edition (1982). All these, with the exception of the penultimate, were written before the changes brought about following the predominance of globalisation and the apparently irresistible rise of the capitalist market exerted their influence on economic and planning policy (Harvey 2005) when governments were far more active in both the generation and control of development. Under these circumstances it could be surmised that there was no necessity to promote certainty as it was a taken-for-granted characteristic of the contemporary planning system; planning led, development followed.

> *. . . this **certainty**, based on the infallibility of the expert, reinforced the apolitical, technical nature of the process. The political environment was regarded as totally passive, indeed subservient to the advice of the planners and in practice, this was largely the case.*
> (Batty 1979, 29, emphasis added)

The association of certainty with planning can be considered to have effectively begun during the period of failed attempts by the various Thatcher/Major governments between 1979 and 1997 to shift the uniquely discretionary planning regime in Britain to one more acceptable to the market where there could be greater confidence that development would be approved, encouraging further investment in property (Allmendinger 1998). Refusal rates for all development applications in Britain were routinely around 20 percent and reached 41 percent in 1985 (Davies *et al* 1986). These potential changes encouraged

more detailed consideration of other, usually European planning systems, most of which were fundamentally different from the British version. These gave rise to a number of publications both at the time and as a later summing-up of the results of attempting to reorientate the British system (Davies 1980, 1988, Booth 1996, 2003, Tewdwr-Jones 2002). Inevitably, these concentrated on the processes of development control addressing, what was termed a key issue by Tewdwr-Jones; *the positioning of certainty with flexibility in planning policy formulation and syntax* (287). The attempts at change during this period appear to be more concerned with gaining greater central control over the operation of the system; if this increased the certainty subsequently generated that was also a benefit.

Central government inspired change came later in Australia, in 1995, but was all embracing. This was directed towards the reform of competition policy leading to the introduction of market legitimacy in all forms of commercial and public sector activity, essentially introducing corporatisation to government and signalling a shift to the principle of efficiency and economic growth (Hilmer 1993). National Competition Policy (NCP) has probably been the major influence on both microeconomic reform and the consolidation of neoliberal governance in Australia. *Ultimately, it may, if it hasn't already done so, presage the death of that ill-defined but essential political concept of public interest* (Gleeson and Low 2000b, 175).

In both cases, certainty is considered to be the outcome of the operation of a fixed set of rules while discretion (flexibility), which needs to be present to deal with unforeseen circumstances and local variations, is equated with uncertainty which, by definition, needs to be minimised if certainty is to be maintained or preferably increased. However, this assumes that certainty is the obverse of uncertainty, which is not the case. Certain is an ambiguous word. It can mean *sure* (free from doubt) but it can also mean *particular* (special; one considered apart from others). Uncertain does not have this ambiguity, *unsure,* is a near synonym and is always present (Lindley 2007). Certainty is an ambiguous notion needing to be created; uncertainty is ubiquitous.

Certainty is a curious and difficult concept, not one which would seem to be appropriate in the context of land use planning, which by its very nature operates in a context of uncertainty. Even so, governments here and in Britain promote planning as a means of providing confidence to the development industry via its processes which are claimed to create the necessary certainty required to support investment which might not otherwise eventuate. That outcome inevitably cannot be verified. However, its apparent opposite, uncertainty, defined as risk, is a key consideration in the development and management of the projects which this process, in government rhetoric, seeks to expedite.

> *Uncertainty is ubiquitous. Indeed we believe what we have apparently experienced, yet we construct flimsy accounts of the past, generated on the basis of the limited information we have, and believe them to be true. We believe we understand the past, which implies that the future should be knowable. But we revise the past in the light of what actually happened to produce an apparently robust illusion.*
> (Kahneman 2011, 201)

All this makes it difficult to accept the limits of our ability to forecast what the future will be like. This might be thought to be an impediment to any possibility of planning for a realisable future although it does not appear to influence attempts to do so.

1.2 An initial concept of certainty in land use planning

Conventional interpretations contend that while absolute certainty is impossible as it holds every thought in total context and continuously relates all knowledge together as a unified whole (Law 2007), it remains as a part of ordinary speech. The nearest it is possible to come to this state is the conviction concerning the true value of a proposition that is so thoroughly established that a denial would be absurd. In this case it would be foolish to reject the truth of such a statement that is virtually self evident. This is virtual certainty, the level of confidence which in ordinary speech is often confused with absolute certainty.

Moral certainty is a concept of intuitive probability (Bernstein 1998). It means a high level of probability, sufficient to justify action reached through thoughtful study tested against experience. It forms the basis for verdicts based on certainty beyond reasonable doubt. The legal degrees of certainty in relation to the standards of evidence ascend as follows: no credible evidence; some credible evidence; a preponderance of evidence; clear and convincing evidence; beyond reasonable doubt; and beyond any shadow of a doubt (Stein 2008). The latter is recognised as an impossible standard to meet while each one requires some interpretation of the evidence made available to reach a decision.

Translated into a planning context, a high degree of certainty could be expected to be achieved by the following regime:

> *A planning system which requires precise policies to be expressed in development plans, which requires the taking of decisions in the context of those plans to stick to their letter as well as to their spirit with only very little room for the making of exceptions and which allows considerable room for challenge via the courts of decisions taken by the system on the grounds that they have infringed the requirements of this regime, is a system which allows very little discretion – although at least in theory it generates a* ***considerable amount of certainty*** *about its decisions.*
> (Kitchen 2007, 8, emphasis added)

This kind of planning regime only occurs where a very high degree of control is required to achieve the necessary legal certainty characteristic of the prevailing statutory doctrine where property rights are protected under the civil code as in the Netherlands (Davies 1988). Here, as in France, the paramount aim of the planning system is certainty but it is also an outcome of a particular relationship between the individual and the state rather different from that prevailing in NSW. The practice is also cumbersome, slow, rigid and expensive (Booth 1996), characteristics unlikely to be found acceptable by the development industry or the government in NSW. However, this description would appear to be coming close to the kind of planning regime envisaged in the White Paper and the accompanying draft Bills (NSW Government 2013b, c, d). Certainty in this context might therefore be characterised as control of process and predictability of outcome.

1.3 The basis for this research

The role of land use planning has been questioned over at least three decades. Here, in common with many widely used words in the English language, plan is both a noun (a plan) and a verb (to plan) and one activity of planning is to make a plan prepared by planners as part of the planning process. While the recent flurry of activity in NSW could be interpreted as injecting new life into a somewhat jaded body, another prospect may be closer to reality. It might not be unreasonable to contemplate circumstances where, in compliance with currently fashionable ideology (Property Council of Australia 2011, NSW Treasury 2012), planning was considered to be merely a restraint on economic development requiring significant reform.

Since the capitalist market is responsible for virtually all development outcomes, the only remaining role for the planning system would be that of providing those services – plan-making and regulation of development – that the market is not capable of undertaking effectively. At the same time, the maintenance of such a residual role could continue to endow the development sector with an aura of legitimacy which has been considered to be essential (Reade 1987). This might be characterised as a scenario where it would seem unlikely that planning could survive except as some kind of regulatory gateway to inevitable development with little or no identifiable, beneficial societal outcome; no content, just process, a criticism originally applied to the so-called rational planning process, vestiges of which remain today (Scott and Roweis 1977, Camhis 1979, Thomas 1979, Taylor 1998).

A more ambitious purpose for planning has been defined as the means of providing necessary correctives to the failure of the market. The Barker Review of the UK planning system (Barker 2006b) however, took this further to describe a planning system which brings together notions such as sustainability, net welfare, balance between goals, and

accountability, all of which are difficult to perceive in the current prospects for the planning system in NSW.

> *By addressing deficiencies in the free market for land use and development, the planning system can work towards the delivery of sustainable development objectives that maximise net welfare to society. It does this by integrating, and, where necessary, balancing complex sets of competing economic, environmental or social goals within the framework of democratic accountability.*
> (Barker 2006a, 5)

Planning thus provides the framework for the delivery of those uses to which land should be put by private development; something that the competitive focus of the development sector is deemed to be either incapable of managing or reluctant to undertake. This notion might appear to suggest that where planning continues to lead, the market will follow. Unfortunately for this contention, the market can be considered in practice to determine the use of land in the sense that if capital does not like the plan, it does not happen; planning merely fiddles with the details (Pickvance 1982).

Reliance on the private sector brings with it other contradictions which appear either not to be considered or to be ignored by governments as they comply with the prevailing notions of contemporary governance. Private developers do not normally indulge in activities which are not ultimately profitable, although some unprofitable components of a particular project may be necessary. That is made clear in the failure of the supply of housing to reach some kind of balance with demand (Kelly *et al* 2011a, b, National Housing Supply Council 2011). If the planning system is intended to provide a corrective mechanism for this failure; it has failed to do so. The only reaction by government is to release further areas of land for housing development, sometimes outside that included in the current strategic plan (NSW Department of Planning and Infrastructure 2013a). This is unlikely to achieve anything other than produce more of the same kind of housing in the same range of prices; not addressing the problem but continuing to produce profits for developers and unearned gains for landowners. Housing, in common with land, is not a free market due to its unique characteristics and several groups in the community cannot enter that market without some kind of social support (Barker 2004). This appears to be a failure of all market-driven economies where governments are ideologically determined not to intervene directly even though their involvement outside the ambit of planning seriously distorts the market itself (Gurran *et al* 2008, Kelly *et al* 2011a, b).

The concept of certainty is used widely by governments as part of the justification for the regulation of land use and the improvement of the process of doing this by changing it.

> *The Department worked during 2008-09 to improve* ***certainty*** *in decision-making to ensure* [make certain] *that the planning process is clear and key issues are resolved as soon as possible.*
> (NSW Department of Planning 2009a, 23, emphasis added)

> *During 2009-10 the Department continued to implement improvements to the NSW planning system to streamline and strengthen decision-making and consulting, increase efficiency, and improve* ***certainty*** *and confidence.*
> (NSW Department of Planning 2010f, 13, emphasis added)

Here certainty is equated with clarity, resolution, efficiency and confidence, all rather abstract considerations. On the face of it, the connection between certainty and a process which is supposed to be concerned with a future of some kind appears to be unconvincing. However the use of the term, often in relation to justification, is so all pervading that those who promote the planning process using it – usually governments - must consider that there is some discernible connection or its continuing use has some other benefit. This notion is explored further later in this dissertation.

It might also be thought that planning as a continuing activity of the state operating within a specific ideological context requires a more stable kind of legitimation. Since the role of the state is constrained by its relationship to the prevailing economic/political system, any change in that system has the effect of modifying the role of the state and hence its relation to the planning system. It is not really sufficient for the State government to simply assert that the planning system supplies certainty and the changes to be undertaken will improve that quality if this is a key justification for its improvement. Any such assertion would need to be perceived by some or all of its recipients as justified by its aims, its processes, its operation and its outcomes as a product of public policy as a whole, or in those parts of the system which directly affect them. This is also explored further in this thesis.

There are three areas relating to the land use planning process where certainty may be identified. In such cases there must be a source for that notion as well as a recipient who is both influenced by its apparent presence and is likely to respond to it or be disappointed by its absence. There must also be a means of transmitting those characteristics creating and defining certainty from their source to the various recipients seeking or benefiting from it. Those benefiting are regularly claimed by government to include those seeking to invest in development and the community who can reasonably expect their existing rights to be protected (Booth 1996). These areas would appear to be in relation to the degree of confidence afforded to various elements of the process by participants in it or those knowingly affected by it – the users of the system.

Those groups expected to derive certainty, or at least a fluctuating degree of it, from the various components of the planning process are listed in brackets:

- certainty within the **contents** of the higher level plans, mainly strategic, including their basis and their propositions; the validity of their processes and the effectiveness of their proposed actions in achieving their aims (senior strategic planners; local authority planning managers; the interested community);

- confidence that a particular proposal will achieve the **necessary approval** within an acceptable timeframe and with a tolerable set of conditions when suitably reformed for this purpose (landowners; developers and associated professionals both within and peripheral to the process; members of the public directly affected and those experiencing the consequences of development); and

- certainty that the policies and proposals within the plan will **achieve the outcomes** anticipated as its purpose (senior strategic planners; senior local government planning managers; planning professionals; that part of the community experiencing the outcomes of the process). This is also the area where the general public would expect that their collective and individual rights were protected.

Each point of certainty is relevant to a different group or, in some cases to more than one. No single definition or perceived location of certainty is sufficient to understand how the planning process plays out across the whole system. The notion of certainty in the planning system is therefore played out by groups with differing perceptions and interests talking across each other in varying ways. The term certainty is used uncritically within differing contexts creating confusion. There is another complication here, in that certainty is a personal quality. Yet, at the same time there are inculcated views and beliefs sometimes called group certainties which often characterise particular sections of the community and influence their collective view of events. The more that society becomes fractured into disparate groups, the greater the range of diverging and often conflicting views and beliefs becomes (Bauman 2007).

This complexity is not necessarily useful in framing an overall concept of certainty which is not, in the context of land use planning practice, clearly defined. However, it might be seen as one of the following or a combination of a:

- rhetorical device of little real consequence or meaning, complying with the widely held view that much government material is promotional rather than explanatory in character (Fairclough 1993, 2003);

- statement of an established policy objective of the land use planning system – the aim is to achieve an objectively defined certainty as a result of the operation of the planning process as claimed by the NSW State government in its documentation; or

- quality to be sought within it as a result of its operation by further amendment to its processes and outcomes.

Certainty is addressed, but not defined in public planning documents and to a lesser extent in academic writings but does not appear in any relevant legislation as an object(ive). It remains ill-defined but might be considered as an ideal or benchmark in the formulation and implementation of public policy in that connection. If this is not the case, its continuing use can only be considered to be rhetorical.

1.4 The research questions

The notion of certainty inferred from its use in the promotion of the planning system differs from its classical definition. There have been many different conceptions of certainty. Each captures some part of our intuitive understanding of it but none appears to be free of problems.

> *It is commonly held that the individual's view of the world is a product of his or her's experience of it.* ***Absolute certainty*** *is the conviction that the outside world revealed by one's senses is real. But reality is more complex. The chair I can see in front of me is real enough but I cannot be sure it is there if I cannot see it, for example. Objectively, I cannot prove it is there if I close my eyes, but I know it is there; my knowledge of the outside world has the status of absoluteness.*
> (Berger and Zijderveld 2009, 26, emphasis added)

However, an individual's experience of the world relies on a mix of belief and reasoning. Many beliefs are the product of inferences drawn from particular instances (induction) or from general principles (deduction) or both. The boundaries between the two are not easy to detect and a wide range of biases are contained in both. These biases, perhaps better considered as common unconscious and inherent tendencies which plague many forms of human behaviour, have consequences for the decision-making central to land use planning. These are considered to be responsible for many of the routine errors which appear to be endemic in planning practice (Schönwandt 2008).

The very nature of planning, which is concerned about the future and is therefore intrinsically uncertain, negates any possibility of creating a recognisably philosophical concept of certainty as a whole. The idea of certainty being promoted must therefore be based on a different concept; one more closely related to the more mundane idea of the creation and maintenance of confidence in the processes and their outcomes for the multiple players within the system (Booth 1996, Tewdwr-Jones 2002).

However, recent discourse around the notion of certainty and its close relation, knowledge, in planning has seen a shift in their definitions as more closely related to social constructs rather than the logical impossibility of being in a state of doubt (Rydin 2007, Alexander 2008, Gunder and Hillier 2009). Certainty now requires social consensus where its central core is linked to the social order and the power structure existing at the time. It cannot claim constant validity as a permanent configuration beyond the limits of socio-historical conditions (Lin 2001).

This appears to be closer to the meanings used in common parlance; here the idea of levels of certainty (almost certain; absolutely certain, for example) pertain rather than the classical definition of an absolute condition which is either present, confirmed by established knowledge, or not when any doubt is present or justification absent.

The domain of inquiry of this dissertation is the land use planning system as conducted in NSW seeking to address the following research questions:

- What is the purpose of the notion of certainty in the land use planning process? Is it possible to identify different types of certainty?
- How is certainty characterised by its context within the domain of state/market relations and where is it located in the various components of the system?

The purpose of this thesis is two-fold:

- To provide a contribution to the understanding of the practice of land use planning within the prevailing political orthodoxy in NSW; and
- To explore the notion of certainty promoted as a quality of planning as either an objective of the process or a rhetorical device.

The main themes pursued to support these questions are:

- Increased control over the processes and outcomes of the land use planning system is achieved by shifting discretion to the centre while reducing the system to a reliance on pre-determined codes.
- Focus on the strategic plan is a means of achieving rigid codification of the operation of the system while its aims and focus are marginalised.
- Management of the assessment and determination processes is aimed at minimising obstruction and increasing predictability of outcome.

- Lack of interest or ability in improving translation of intention into outcome prevails – old fashioned nostalgia has no place in the total focus on economic growth.

The argument advanced here is that the planning system in NSW has been conditioned over at least the past decade to comply more effectively with the requirements of the prevailing neoliberal ideological orthodoxy where the related markets in land and property development are paramount (Gleeson and Low 2000b, McGuirk and O'Neill 2002). Government activity in these fields is therefore only required to focus on the provision of the necessary legislative framework and the establishment of processes which ease, as far as possible, the continuation of capital accumulation. All other outcomes of the planning and land conversion process are incidental with little attention needed to the satisfaction of public preferences except where this is necessary to support further growth in development.

In such circumstances, it is possible to conceptualise certainty in the planning system as a useful rhetorical construct which supports the relationship necessary between the State government and the private sector development industry. Planning is here a conduit bringing together government and capital in a neoliberal compact where both benefit from the arrangement but the gradual shift of power to the private sector and the abrogation of responsibility by government for those sectors in which the private sector has no interest, result in a number of problems which are currently being ignored. Such problems cannot be addressed in the absence of direct involvement by government.

However, public policy needs a degree of support from those who provide any government with its legitimacy within a democratic environment. The identification of certainty with the outcomes of the planning process therefore not only reinforces the idea of efficiency and effectiveness of government processes but also allows the benefits achieved to be claimed to extend to the whole community providing some level of justification for property development and the government's support for it. This would however appear to be difficult to achieve where an exclusive focus on facilitation of development (developmentalism) prevails.

1.5 Methods employed

The process initiated in June 2011 by the State government to undertake a review of the NSW planning system as the precursor to the preparation of a new Planning Act presented a rare opportunity to examine not only the issues raised during its preparation but also to identify the influences of the various groups with an interest in land use planning and the effect they have on the way that the components of the legislation are formulated to

reflect the ideological context. Prior to this a number of reports, relevant but not directly stimulated by the NSW process itself, were also produced, giving a particular perspective on planning as a government-sponsored activity in both Britain and Australia (Barker 2006b, Australian Government Productivity Commission 2011, COAG Reform Council 2012). The first two of these were the result of major investigations undertaken from a similar perspective and arriving, in some instances, at similar conclusions; the later report quoting the former with approval of selectively chosen responses while others were presumably found to be unacceptable or not relevant to the local situation.

A variety of methods of investigation have been used. An extensive literature review and analysis was undertaken aimed at identifying notions and potential sources of certainty and any objective definition of its meaning and purpose in the land use planning system. This covered a wide range of sources including certainty and its closely related philosophical subject, knowledge; recent investigations relating to decision-making and its associated assumptions, beliefs and biases; factors influencing the cultural and ideological context within which planning must operate; potential sources of certainty in the planning system; and the relationship between discretion and certainty, an issue which has exercised the interest of analysts for some time.

Relevant planning documents were analysed, focusing mainly on the various metropolitan plans for Sydney, particularly those prepared and published since 1995. The annual reports of the Department since 2005 were also assessed. This was a period when a concerted effort was initiated to reform the NSW planning system by introducing changes similar to those promoted in the recently completed process to develop and promulgate an entirely new planning Act. These documents provide an interesting perspective on the way the Department sees itself and attempts to promote its activities as essential to the achievement of the government's policy aims.

Assessment of the influence of various relevant studies, enquiries and submissions of government departments, lobby groups, stakeholders and professional organisations was undertaken. The routine process of attempting to influence government policy and actions can be divided into two types: official government investigations, sometimes undertaken by Commonwealth organisations or part of the Commonwealth Organisation of Australian Governments (COAG) processes together with submissions to those inquiries; and continuing and regular submissions by specific industry lobby groups on issues they consider to be in support of the agendas of those who fund them, mainly powerful development industry participants.

The material produced during the process of preparing the new Planning Act was critically examined. This included community and other stakeholder responses when invited to participate in defining the issues to be addressed and when responding to the various publications in the form of submissions by interested groups, organisations and individuals. This process was divided into two separate but linked activities producing a total of five separate reports leading to the publication of the draft (Exposure) Bills. The first group of three reports set out the issues to be addressed on the basis of a process of community meetings and submissions followed by an extensive set of recommendations for the scope and detail of the new Act. The second group, the Green and White Papers, was prepared entirely by the State government and departed substantially from the earlier recommendations injecting a more ideologically–based concept (Shoebridge 2013). Submissions to this stage of the process and responses on their publication provide a wide-ranging perspective on the character and aims of the new planning process and the varying responses to it from the community and other stakeholders. Community and local government pressure resulted in some amendments to the draft legislation.

A series of interviews was undertaken with a number of participants with varying roles in practice in Sydney mainly over a period of several months in 2011-2012 and early in 2013 to identify the character of contemporary planning and in particular to examine the values and principles (tacit knowledge) that they saw as influencing the way they went about what they did. All interviews lasted approximately one hour following a consistent set of questions amended where necessary to focus on the specific interests of each subject. All were recorded and transcribed in compliance with the ethical requirements of the investigation (Reference 5201100497). The results of these interviews are used throughout this document either in direct quotations where indicated or to inform the assessment and the associated commentary. The range of interviewees is set out in Table 1.1.

This group comprised two senior planners involved in the preparation of strategic planning policies in the Department; two from a major arm of the State government involved in development, UrbanGrowth NSW; three were senior planning consultants with previous experience in State and local government planning departments; one a Commissioner in the Land and Environment Court and one a current member of a Joint Regional Planning Panel, both in their present roles following extensive experience at senior level in local government. Three have long experience of property development at a senior level and one is the current CEO of an influential industry lobby group. The remaining group of twelve was made up of eight senior planners, three at Chief Planner level and three in charge of development control plus four more junior planners, three in development

control and all employed by local planning authorities of differing types and varied locations in Sydney.

Table 1.1 List of interviewees

Category	Number
State government	
Department of Planning and Infrastructure – Director of Strategy	1
– Senior Strategic Planner	1
Development authority – Senior Executive	2 (1 retired)
Joint Regional Planning Panel Member	1
Land and Environment Court Commissioner	1
Local government	
Council planner – Director City Planning	4
Council planner – Development Assessment Manager	3
Council planner – Senior Manager	3
Council planner - Junior	3
Private sector	
Development industry lobbyist - CEO	1
Property developer (housing) – medium/large company	1
Planning consultant – company owner	1
Planning consultant – senior employee	3
Total	**25**

These were chosen as representative of large growth councils on the periphery of the existing urban area, a major council with substantial potential for further growth and two councils within the existing development footprint, one small, one large. The councils were distributed across the metropolitan area.

Concerted efforts were made to arrange interviews with other representatives of the development industry including the preparation of a list of questions which was sent to a number of possible interviewees. Follow-up telephone calls failed to achieve a positive response. Interviews were not undertaken with community representatives as a large number of often detailed submissions was available as part of the process leading up to the new Planning Act. This gave a broader view of community response from those with an interest in the planning process than would have been possible using individual interviews.

Three case studies were undertaken: (1) into the use of words synonymous with certainty in planning documents; (2) an assessment of the performance of the assessment and

determination process based on data provided by councils and collated by the Department; and (3) the potential connection between planning intentions and outcomes at the local level. Each of these was developed to investigate the potential sources of certainty within the planning process and its means of propagation; the relationship between the social and ideological context and the content of planning as defined by both external influences and government inclinations; and the effectiveness of the process in delivering what it purports to be able to do in support of its ability to generate certainty via its processes.

The first of these examines the use of particular words in strategic planning documents which are synonyms for certainty in its absolute sense of guarantee. If these documents are to be considered to be an effective source of clarity and accuracy, a public document could reasonably be expected to set out its provisions, aims, actions and regulations unambiguously in the language used. It is unlikely to convey the necessary confidence in its propositions if it makes claims to achievements that are evidently not feasible or are beyond its powers. The documents prepared during the development of the new Act also make use of language in a manner that is essentially promotional rather than explanatory where little connection is made between the claimed problems identified in the existing process and the changes proposed.

The second case study provides an assessment of the council-based determination process focusing on rates of approval and the time taken to reach a decision; both issues used by various interests to justify changes to the planning system in the guise of improvement.

The third examines the process undertaken by local planners in attempting to manage the development of a neighbourhood centre in a suburban location, contrasting the eventual outcome with the initial stated intentions included in planning documents. This seeks to determine whether there can be any confidence in identifying a causal link between intention and outcome in that part of the planning process where results are clearly identifiable.

Case studies are conventionally open to criticism on the basis that it is unacceptable to generalise from a single example. However, this view is rejected by Flyvbjerg (2001, 71) and others who argue that in the study of human affairs, there exists only context-dependent knowledge, which rules out the possibility of epistemic theoretical construction.

> *Predictive theories and universals cannot be found in the study of human affairs. Concrete, context-dependent knowledge is therefore more valuable than the vain search for predictive theories and universals.*
> (Flyvbjerg 2001, 73)

The questions raised in this research are the result of an extended period spent working in urban planning, starting in the UK and gradually progressing to Australia almost three decades ago while working on a range of planning projects in varying cultural and statutory environments. This has taken place entirely outside the government bureaucracy but predominantly working on behalf of public authorities. These include many agencies of State and local government in NSW. In the absence of any socialisation in the culture of official planning, the manner in which the process is formulated and managed by the contemporary bureaucracy remains of presiding interest in relation to the management of land use as public policy. The issues raised and pursued in this dissertation are an outcome of that interest,

Personal experience provides the basis for the questions arising here but any sort of resolution must be based on a combination of empirical evidence and the conclusions of others as included in literature and interviews. Social investigation is not the same as a hard core scientific search for knowledge. Many of the sources derive from the insights and experiences of others rather than the results of properly constructed experiments which produce repeatable outcomes. This research is based on interpretation and is open to testing in relation to other interpretations and other investigations. Every interpretation must be built upon claims of validity as all interpretations are not equally good. This current interpretation may be superceded by a better one, where better is defined by the validity of the claims made (Flyvbjerg 2001, 130).

Given the impossibility of achieving value-free knowledge in such cases, it is necessary to be aware of the way that personal values or positionality may influence research design and findings. Since all research is affected by the social and political position of those undertaking it, making this position clear is one way of avoiding bias (Nagel 1989). This becomes increasingly complex when interviews make up an important part of the research evidence. The interview process is influenced by the interaction between the interviewer and the interviewee's socio-economic backgrounds, education levels, gender, biases, ethnicity, religious beliefs (or lack of) and cultural characteristics (Baxter and Eyles 1997) while within a professional or commercial context, the stance of the interviewees may be focused on status issues or protection of engrained values which influence and possibly bias their response.

Research of this kind is unavoidably partial (Armin and Thrift 2002) coming from a subjective position and providing an incomplete overview of the topic. The positionality of

the interviewer in these circumstances raises questions of the values that are brought to the research, the methods used and the inevitable interpretation required, based here on personal response to experience within the chosen field and the processes considered necessary within the particular environment in which it takes place. The focus here is gaining an understanding of the operations of the current planning system in NSW and their possible connection to the notion of certainty. Reactions to the responses of the interviewees provide both an improved understanding of institutional structures and practices uncovering common, consistent and embedded views on its values, practices and relationships and an influence on the interpretation of what has been said. Such insights require consideration of reflexivity where the views and values brought to the research by the individual researcher both directs and constrains its design and conduct.

1.6 Structure of the document

The document is divided into three parts. Following the introduction, the two other chapters of Part One establish the context, providing a summary of the treatment of certainty and its related constructs in the literature where relevant to the operation of planning, both in theory and practice followed by a characterisation of the land use planning system as it operates in NSW. Part Two contains the three central chapters of the dissertation focusing on those areas where certainty is likely to be found within the planning process as perceived or experienced by those within it and those affected by its application and subsequent results. Each is assessed on the basis of the various notions of certainty as an objectively based component of the planning system using the issues identified and investigated by the methods described in the previous section. Part Three provides an overview of the outcomes of this process and a conclusion addressing the research questions.

Part One

The two chapters in Part One provide a view of the context within which the idea of certainty in the land use planning system in NSW can be considered, culminating in the identification of the way that it is framed by its proponents.

Chapter Two: Certainty in the literature

Chapter Two introduces the notion of certainty and its relationship to the planning system as presented in the literature. This progresses from aspects of certainty as a philosophical construct to where it might be encountered as a characteristic of the planning system via consideration of some of its key notions, such as knowledge and belief and the context which has a major influence on its objectives and policies. The chapter concludes by identifying those characteristics which could be expected to provide justification for the

confidence in the processes and outcomes of planning necessary to establish certainty as an outcome of its operation.

Certainty remains a complex concept and when applied to land use planning is at some distance from its conventional definitions as perfect knowledge that is totally secure from error or the mental state of being without doubt. In any case, a world of certainty would be intolerable removing the doubt which provides the incentive for investigation and the search for knowledge. Even worse, the necessity to take risks would be removed and with it the drive for innovation and improvement. Such a state does not relate to any experience of the real world.

Those who use the term in relation to land use planning avoid attempting to define it – it is assumed that it means different things to different recipients of those parts of the system where it might be generated. Consideration of the literature provides an appropriate definition for its use in this thesis.

Chapter Three: Land use planning in New South Wales

Chapter Three considers the current operation of the land use planning system in NSW, including its ideological context and its aims as set out in State government documents and promotional material. It indicates the scope of the development system and the relatively limited, although significant, part played by planning in the whole process, The relationship of planning as a public policy operating within the prevailing political orthodoxy together with those influences which condition the characteristics of land use planning in NSW and the manner in which these condition the aims of planning in the state are identified. The final section provides an assessment of the implications of the proposed changes to the applicable legislation, now stalled, and identifies those factors where change might be capable of increasing any certainty located in the existing system.

Part Two

Each of the three chapters in Part Two examines one of those components of the planning system which could be considered to be capable of generating some degree of certainty. This is undertaken by considering each in relation to the factors included in Table 1.2.

Chapter Four: Certainty in the strategic plan – confidence in its processes

Chapter Four is made up of three main parts. The first provides an historic perspective of the strategic plans prepared for Sydney from 1995 noting their similarities and identifying those changes which assist in determining shifts in emphasis within the prevailing ideological context.

Table 1.2 Structure of the document

	Chapter Four **Basis of the planning strategy** (confidence in its processes)	**Chapter Five** **Confidence in the approval process** (streamlined and consultative)	**Chapter Six** **Achievement of aims and outcomes** (outcomes as synonyms for policy)	**Chapter Seven** **Certainty in land use planning in NSW** (rhetoric or policy?)
Rhetorical device (creative language use)	• Concept of certainty in planning texts • Ideological shifts in strategic plans • Veracity of the plan • Certainty as justification	• Process outcomes • Accountability of the process • Tension between regulation and discretion	• Assessment of strategic plans • Link between intentions and outcomes • Influences of the market • The plan as an end in itself.	• Content of planning • Accountability • Assessment of system change • Confidence as precursor of certainty
Established within policy (existing context)	• Policy contradictions • Confidence in forecasts • Notion of balance • Top-down emphasis	• Decisions by specialists • Balance or compliance in assessment • Influence of the Land and Environment Court • Limits of rule making	• Aims of planning • Long term targets • Policy and outcomes	• Economic and social context • Shifts in emphasis • Influences on the process
Quality to be sought in policy (policy aim)	• Evidence and the notion of interpretation • Uses of discretion	• Plan-led system • Depoliticisation and accountability	• Long term targets • Monitoring and not knowing • Exercise of power	• Planning aims • Legitimacy as a public process • Political nature of planning

This is followed in the second part by an examination of the way in which the notion of certainty is portrayed in the language of the principal planning documents and how this has changed over the period from 1995 to draft Metropolitan Strategy published in 2013. This focuses on the use of certainty and its closely related term, ensure, both of which are widely used.

The third part of the chapter examines some major components of the strategic plan and the processes undertaken to prepare them. This provides an assessment of the basic procedures necessary including consideration of the forecasts routinely used as the basis for the distribution of population and jobs; the notion of balance, considered to be a key determining factor in strategic planning provisions and the relationship between the plan and the process necessary to implement the strategic policies necessary to achieve the objectives of the plan.

Chapter Five: Confidence in the approval process – streamlined and consultative?

Chapter Five focuses on the performance of the current system of determination of development applications before considering the key issues which surround both the claims made for further change and the implications of the proposals under consideration for doing so.

Key issues include the drive for further simplification of planning procedures and controls, increasing discretion available to the Minister and senior Departmental bureaucrats while reducing local discretion by removing responsibility for determination from elected councillors and delegating these powers to a mix of council planners, unelected panels and the PAC in a process termed depoliticisation. This raises two related key issues fundamental to the justification of planning as public policy. The first is accountability and the effective involvement of the community in decision-making in the planning process and the concentration of power in these matters within the Department.

Chapter Six: Policy implementation - aims and outcomes

Chapter Six focuses on the relationship between intentions and outcomes; a key proposition relating to planning whereby policy intentions can be translated into outcomes which are aimed at the implementation of the policies being advanced by the State government or the local planning authority. In common with other public policy initiatives, it is often difficult to identify a causal link between intention and outcome and is particularly difficult in the case of planning. This is due to the wide range of policies being addressed, the difficulty of achieving clarity in their definition and the multitude of external

influences with can affect the eventual result. However, it remains an important justification of planning that its intentions can be considered to be achievable.

This chapter provides a detailed analysis of a relatively complex project managed via the conventional development process by the local planners which involved the three main supermarket operators in Australia acting as developers in their own right in an attempt to achieve an integrated local centre defined in a detailed DCP. This took place over an extended period of almost 20 years since the preparation of the original draft document until its ultimate phase started in 2014. This comprises a good example to analyse as there were few influences external to the site and the interested parties, councillors and the development control planners all remained much the same. Even so, the outcome was rather different from that originally envisaged.

The second part of the chapter is made up of the consideration of two separate factors closely associated with the issue of certainty in the implementation of policy in land use planning. The first assesses a planning initiative of the State government in attempting to respond to the low level of residential completions in the Sydney metropolitan area which focused on the release of land additional to that already zoned for development on the fringe. The second focuses on an area which would, if effectively undertaken, provide evidence for the effectiveness of planning policies in achieving their promoted aims; monitoring.

Part Three

The final part provides a summary of the findings of the research to determine if certainty can be identified in those components of the planning system assessed in Part Two rather than relying on belief in the State government's assertions concerning its presence.

Chapter Seven: Certainty in land use planning in New South Wales

This chapter brings the arguments advanced in the thesis together starting with a summary of the prevailing characteristics of the current planning system where those components which might be capable of generating the confidence necessary for certainty are identified, together with the existing shortcomings which might detract from that conclusion. This is followed by a summary of the key issues relating to the potential presence of certainty, defined as confidence in the processes and outcomes, of the three components where it might be considered to be of benefit.

The third part of the chapter addresses the research questions posited in Section 1.4 indicating where certainty might be identifiable in the current (and future) planning system in NSW and what it might constitute as a result of the research. Following consideration of

the limitations of the methods used, the conclusions are set out suggesting that any certainty decreed by its proponents must focus on the ability of that part of the system to deliver benefits to one or more particular groups.

2 Certainty in the literature

2.1 Introduction

This chapter draws together a wide variety of literature on certainty, mainly focusing on its application in relation to land use planning as seen from various perspectives. Some consideration of certainty *per se* is unavoidable however, due to its central position in traditional intellectual thought and its close relationship to a number of key concepts which remain crucial to the practice of planning, particularly those relating to knowledge and justification; cause and effect.

Certainty and its closely related concept of knowledge have been central to intellectual inquiry since at least the European Enlightenment and long before that the Ancient Greeks concerned themselves with the notion of true knowledge. Knowledge is not the same as unsupported belief, even if what is believed happens to be true; it was claimed by Plato to be true belief supported by credible justification (Law 2007). Knowledge is central to planning; at the same time knowledge is deemed to require certainty as a credible justification of it. Another philosophical concept central to planning is the notion of cause and effect – intent and outcome – which the more it is observed; the more elusive the connection between the two becomes (Hume 1777/2008).

A small number of sources directly address the notion of certainty from a number of perspectives, notably philosophy and neurology; a number of others deal with it in the context of a broader analysis of the influence of ideologically determined effects on the planning system. Some consider certainty in relationship to the planning system itself attempting to determine its location in strategic plans and more specifically in the development assessment process focusing on the perceived relationship between regulation and flexibility. Other sources provide post-structural perspectives in attempts to demythologise heavily used terms in spatial planning where the words themselves are ideologically loaded.

This review of the literature seeks to identify those themes within the relevant material that provide insights into the concept of certainty seeking an improved conceptual understanding of the role it plays in the NSW planning system.

2.2 The notion of certainty

The classical definition of certainty is perfect knowledge that is totally secure from error or the mental state of being without doubt (Law 2007). These are two different states of being. The first requires that no scepticism can occur; the generally accepted historic

philosophical statement of this condition (Quinton 1973). The second relates to a more human condition accepting that while an individual may be without doubt, the belief or knowledge that provides the basis for this certainty may be erroneous or mistaken.

This leads to the view that in real world situations the idea of certainty has failed (Peat 2002). The belief in total security from error is widely considered to be impossible while a complete lack of doubt is thought to be undesirable.

> *A world of* ***certainty*** *would not be tolerable. Where the laws of probability determine all things, nothing we do would have the slightest influence on the final outcome. It may or may not be a well-ordered or a chaotic world but everything would be pre-ordained and our actions would have no influence on the future for good or ill. Such a state does not exist in our experience of the world as it exists in reality.*
> (Bernstein 1998, emphasis added)

However in order to counter total rejection of certainty as an absurdity, several variants have been put forward allowing less extreme definitions of the concept to be considered. Wittgenstein in his book, *On Certainty*, originally a set of propositions (a total of 676 making up a work in progress) put together as a series of notes but not translated and edited until after his death, moves towards the consideration of the role that context plays in epistemology. This provides pointers towards an important distinction between belief and knowledge and bringing the concept of certainty closer to its recognition in the real world (Wittgenstein 1975). Even following translation and editing, this material remains difficult to grasp and requires further explanation (Moyal-Sharrock 2007).

The book's main theme is that there are some things which must be exempt from doubt in order for human practices to be possible – doubt itself being a practice. Its starting point is the *here is a hand* argument of the earlier philosopher GE Moore, used to examine the place of claims to know in our knowledge (Moore 1925, 1939). The act of showing his hand was claimed to be a display of knowledge by Moore. This was disputed at some length by Wittgenstein, who while not disputing the legitimacy of Moore's assurance, doubted his claim to knowledge.

Another important point is Wittgenstein's claim that all doubt is embedded in underlying beliefs and therefore that the most radical forms of doubt must be rejected since they form a contradiction within the system that expressed them. Wittgenstein subverts the traditional picture of basic beliefs. They are not indubitable or self-evident propositions but animal certainties that are nonreflective, nonpropositional attitudes. Thus to think of our basic certainties as propositions is a misleading result of putting them into words. *On Certainty* shows that there is such a thing as foundational certainty but it is not an epistemic assurance (Moyal-Sharrock 2007).

Wittgenstein adheres to the standard view of knowledge as justified true belief, a notion originally advanced by Plato in the *Thaetetus* (Law 2007). This sees not only the claim to knowledge but also the possession of knowledge as conceptually linked to justification. In the process of comparing and contrasting knowledge and certainty, he distinguishes objective from subjective certainty.

> *With the word **certain** we express complete conviction, the total absence of doubt, and thereby we seek to convince other people. That is subjective **certainty**.*
>
> *But when is something objectively **certain**? When a mistake is not possible. But what kind of possibility is that? Mustn't mistake be logically excluded?*
> (Wittgenstein 1975, OC 194, emphasis added)

Complete conviction, the total absence of doubt, suffices for someone to be subjectively certain, but there must be something beyond personal conviction if the certainty is to be shared by every reasonable person. If the claim to certainty is to be more than a subjective claim, the certainty needs to be established objectively.

> *Even if the most trustworthy of men assures me that he knows things are thus and so, this by itself cannot satisfy me that he does know. Only that he believes he knows. That is why Moore's assurance that he knows . . . does not interest us.*
> (Wittgenstein 1975, OC 137)

Objective certainty is seen as a kind of basic belief-in or trust; a kind of blind faith. This is not blind in the sense of being foolhardy or incapacitated but in the sense that it is not necessary to ask or need to see in order to trust. There is no moment of evaluation prefacing or accompanying the trust. Here, objective certainty is depicted by Wittgenstein as a kind of groundless, unreasoned, unreflective, non-propositional, unhesitating, unswerving and foundational trust. It is not the positive side of the coin of certainty; uncertainty or doubt being the negative. Here there is no possibility of hesitation or doubt (Moyal-Sharrock 2007). These are the embedded beliefs also identified by social theorists inculcated via processes of socialisation, education, experience and possibly, indoctrination (Berger and Luckmann 1966).

The lesson is not that we can never be certain of anything, but unquestioning certainty is tacit. The language of certainty on the other hand belongs to a situation where our certainty is called into question and we assert it against conceivable doubt (Lagerspetz 1998). Certainty should therefore be conceived of as something implied and contained in our language form, pattern of communication and way of life (Lin 2001).

> *The solid starting point of cognition and* ***certainty*** *is no longer to be set on any specific phase of our cognitive processes or any particular form of knowledge, What has been taken for granted, or the ultimate given, which has always consisted of immutable principles, a priori rationales, rules, sense-data, things-in-themselves and so on in classical epistemology, now is held to be something beyond cognitive systems, something that defines all the forms of our cognitive life. This fundamental change can be seen as a paradigm shift which brings us a new version of knowledge and* ***certainty****.*
> (Lin 2001, 21-22, emphasis added)

Lin (2001) seeks to establish the social genesis and function of the philosophical idea of certainty. He sees this version of certainty both originating from and mobilised in the complex social processes mediated through the formation of the ideological requirement of the interests of the dominant social groups. However, the rejection of the version of absolute certainty triggered by the efforts of Kuhn, Feyerabend, Derrida, Rorty, Bloor and Lyotard has, he claims, resulted in the key suppositions of established universally valid procedures of knowledge acquisition and justification coming under intense criticism.

> *Gone forever is the tenet that* ***certainty*** *is the hallmark of human knowledge and rational thought. The search for an absolute consensus has been replaced by challenges to the normal order and a new version of* ***certainty*** *is in the process of being developed . . . accepting variability, instability, contingency, transformability, creativity and novelty. In short, all the elements that were once taken to represent uncertainty have now become the integral components of a new version of* ***certainty,*** *an idea still at the formative stage.*
> (Lin 2001, 236, emphasis added)

Although this idea requires further development, it corresponds closely to a post-structuralist view which may not be widely accepted (Norris 1991). It does however raise critical questions about the source of knowledge and validation, method, system and reason, and particularly facts, language (the text) and interpretation, all of which resonate with the concerns and the methods of land use planning.

The conventional formulation of certainty is further usurped by the rapidly emerging science of neurology. This would appear to have major implications for the concept of certainty and the human sensation of knowing.

> *Despite how* ***certainty*** *feels, it is neither a conscious choice nor even a thought process.* ***Certainty*** *and similar states of knowing what we know arise out of brain mechanisms that, like love or anger, function independently of reason.*
> (Burton 2008, xiii, emphasis added)

This indicates that the feeling of knowing (belief?) cannot be trusted. The Theory of Cognitive Dissonance (Festinger 1957) goes on to suggest that the more commitment there is to a belief, the harder it is to relinquish, even in the face of overwhelming contradictory evidence. Instead of acknowledging an error of judgement and

abandoning the opinion, the tendency is to develop a new attitude or belief that will justify retaining it. There are many examples of consciously choosing a false belief because it feels correct even when a better alternative is known. It however, remains unclear why it is so difficult to relinquish unreasonable opinions even in the light of seemingly convincing contrary evidence (Burton 2008).

This suggests that the idea of certainty (knowing) should be approached much more circumspectly (sceptically). At the same time, learning to accommodate the ever present effects of uncertainty by the use of the methods available to analyse and rank opinion and action according to their likelihood of correctness could be an effective substitute for irrational belief. As a result, it tends to cast doubt on the idea of regulation as a possible source of certainty in the planning system and remains at the core of the recent changes (see Section 2.7).

2.3 Knowledge and belief

Rationality is a claimed quality of the planning process exercising the use of specialist knowledge and the ability to objectively weigh evidence as a prelude to effective decision-making. While initially an individual process, decisions are often made in a collective context where others may have to be convinced, based on a combination of knowledge and belief. However, this process is also heavily influenced by a combination of intuition and bias (Kahneman 2011).

> *The planning fallacy is only one of the manifestations of a pervasive optimistic bias. Most of us view the world as more benign than it really is, our own attributes as more favourable than they truly are, and the goals we adopt as more achievable than they are likely to be. We also exaggerate our ability to forecast the future which fosters optimistic overconfidence. In terms of its consequences for decisions, the optimistic bias may well be the most significant of the cognitive biases.*
> (Kahneman 2011, 255)

The playing out of many of these heuristics and biases can be seen in embedded beliefs which some empirical findings of cognitive psychology show as the basis for a whole series of unconscious and inherent tendencies brought to the practice of planning (Schönwandt 2008).

There is an extensive, often highly technical, literature orbiting around the consideration of decision-making in conditions of uncertainty focusing predominantly on risk and probability. Virtually all real-world decisions (with the notable exception of games of chance – gambling) involve uncertain prospects where probabilities are unknown. The classic theory derives beliefs about the likelihood of uncertain events from individual choices between prospects whose consequences are contingent on these events. However the theory does not consider probability judgements that would be useful in

explaining and predicting decisions under uncertainty (Fox and Tversky 1998). Other investigations include the consideration of the role of reasons and arguments for the making of decisions. Here, when faced with the need to choose, decision-makers often seek and construct reasons in order to resolve the conflict and justify their choice, to themselves and others. The role of reasons in decision-making relates to uncertainty, conflict, context effects and normative decision rules (Shaffir, Simonson and Tversky 1993). While making decisions on individual choices is complex and has been widely studied and there have been a number of studies of the decision-making process in a political context where the working out of power relationships and the resolution of conflict has added additional layers of complexity, these have tended to focus on the operation and results of the aims and activities of particular planning policies and planning authorities over specific time periods (Friend and Jessop 1969, McKay and Cox 1979, Ham and Hill 1985, DiGaetano and Klemanski 1999, Tewdwr-Jones 2002, Brash 2011) or in relation to specific development initiatives (Flyvbjerg 1998a).

Other investigations have included closer study of the way that planners go about their everyday activities, what they believe they bring to what they do and what are the priorities and aims of the planning process (Healey 1992, Hoch 2009). The professional rhetoric of planning continues to retain an attachment to claims of technical expertise while insisting that their training and background provides planners with a unique insight into those issues which allow them to reach appropriate decisions between competing interests in a complex world (Campbell and Marshall 1998). However, such choices have to be made within public sector institutions where the discretion of the decision-maker is constrained by a wide range of factors including the controlling legislation, strategic and local planning policy, relevant development controls, the prevailing culture of the institution, precedent and the need for consistency in addition to the merits of the proposal itself where such an assessment is required (Tait and Campbell 2000).

Two issues are also pertinent in relation to the notion of the planner as a neutral exponent of an understood public good (Howe 1994). The first is the question of the relationship between the personal views of the individual planner and that person's perception of the prevailing culture within their workplace (Thomas and Healey 1991). The second is the problem of conflicting loyalties or obligations between the perceived role of the planner as, for example the arbiter between the requirements of the law and those of the community or the individual (Tait and Campbell 2000). Planning actions of all kinds raise a wide range of issues about the values that are explicitly and implicitly at work and the idea of the value-free or value-neutral planner is neither an appropriate concept nor an accurate characterisation of how planners think or behave in practice. Planners appear to remain convinced of the value of their activities to the community at large while

recognising that they are predominantly benefiting private sector interests (Campbell and Marshall 1998). Paradoxically, they appear to have an ambivalent attitude towards the community preferring to maintain a suitable distance if possible, either because the process is difficult and possibly unpalatable or due to a curious impulse to retain a level of apparent neutrality (Tait and Campbell 2000). The idea of planners as adjudicators between conflicting interests seems to be widely accepted while the notion of planning as a means of achieving a socially beneficial outcome has diminished if not disappeared.

The majority of planners operate within the confines of development control undertaken by both the Department and local planning authorities in NSW. This has become a relatively straightforward process at the local level where the necessity to deal with complex decisions has been reduced to one of ensuring compliance where the exercise of professional judgement has now been reduced to one of determining if a proposal complies with a particular standard or not. This differentiates them from the small cadre of planners who generate policy and prepare strategic plans, now exclusively in the Department – there is now only limited room for local policy making in the Standard Instrument Local Environmental plan (SI LEP) outside the template. Plan and policy-making sees a much wider set of beliefs, intuitions and assumptions at work (Reade 1987, Schönwandt 2008, Allmendinger 2009).

The legitimacy of public action depends significantly on the acceptability of the knowledge used in developing and justifying it. The legitimacy of professionals who assist decision-makers hinges significantly in turn on their knowledge. Indeed the definition of a profession is a calling requiring advanced knowledge or training in some branch of learning or science (Shorter Oxford English Dictionary 2007). There exist multiple ways of knowing, each built on different assumptions and employing different methods and differing in their claims about what counts as knowledge. These range from a scientific, ostensively objective approach, to a qualitative, interpretive approach focusing on understandings and meanings, to experimental, holistic and pragmatic approaches (Innes and Booher 2010). Professionals and decision-makers often tacitly use one or more of these ways of knowing without conscious recognition that there is a choice.

Knowledge and its use is central in achieving change through planning (Sandercock 1998); the idea that knowledge in these matters is a preserve of the planner only appears to be a residual belief that some kind of special knowledge and their unique ability to manage complex and wide-ranging influences can be achieved by balancing competing views. The notion that the truth can be discerned from evidence is one embedded belief in planning as well as a number of other disciplines; as evidence is inevitably partial and requires interpretation, that relationship is by no means inevitable

(Rydin 2007). Evidence itself is never complete or value-free inevitably requiring interpretation.

There is therefore a tendency to resort to more subjective forms of measurement; degrees of belief and gut rules are applied even when it is assumed that measurement is being used (Bernstein 1998). Even these are abandoned and necessary processes either ignored or reduced to meaningless abstractions. The planning process is reduced to a simplistic amalgam of presumed facts and fashionable notions of little relevance.

2.4 Contextual considerations

Planners are unable to escape the influences of context on their thoughts and actions even if they would prefer to ignore them. This comprises both the social and political ideology of the time and the bureaucratic construct within which they operate, determined either entirely, or in part by the prevailing ideological orthodoxy. Here, in effect, the power structure essentially defines the aims and procedures of the planning process while more theoretically-inclined commentators ponder on the format and processes of an idealised system, better attuned to the prevailing social realities and values that planning is supposed to embody. Inevitably, these two formulations do not coincide and often seem to have little in common. This is an area that presents difficulties for any consideration of improvements to the planning system – is the concern related to what the realities are in the present or what they should be?

State regulation of the urban environment has been profoundly reconfigured over the past thirty years by the dominance of neoliberalist governance (Gleeson and Low 2000b, Brenner 2006, Harvey 2010). Increasing globalisation and intensified competition between states, cities and regions has resulted in state and local governments assuming direct roles in the promotion of capital accumulation on a large scale (Kipfler and Keil 2002). In Australia, governments have undertaken institutional transformation under the rubric of deregulation and/or reform (Searle and Cardew 2000). This involved partial dismantling of social and economic regulation at national levels in favour of weak governance regimes focusing on determining rules of exchange rather than setting standards (Peck and Theodore 2007).

There has also been a shift to a new form of state intervention, termed roll-out neoliberalism by Peck and Tickell (2002) where the neoliberal project has dismantled state institutions to a point where deregulatory marketisation has begun to produce adverse distributional consequences. The limits of deregulation have resulted in a revised version of neoliberalism which creates new modes of regulation to replace those removed (Peck and Tickell 2002). In this model, governments overtly favour state intervention and public

spending as long as it supports macro-economic management and capital accumulation. While the presumption of the 1980s was that the unfettered operation of market forces would alone be sufficient to the task of economic regulation, it became clear that recurrent failures in various markets even including those of finance and labour required responses beyond those of deregulation and marketisation.

These then stretched well beyond market-based forms of governance and regulation and became what has been termed the process of neoliberalisation (Peck and Tickell 2002). This refers to the process whereby transformations in state regulatory regimes across the capitalist world facilitated transformations within processes of capital accumulation, in particular the loosening or dismantling of the various institutional constraints on marketisation, commodification, the hyperexploitation of workers and the discretionary power of private capital (Brenner and Theodore 2002). At the national level, the taken-for-granted context for political debate and policy development now constitutes neoliberalised forms of macro-economic management based on low inflation, free trade, flexible job markets, regressive taxation, downsized government and central bank relative autonomy. The attention of policymakers has focused on the challenges of reproducing regimes of precarious work and mobilising the poor for low-wage employment.

None of this is uniformly applied as part of a coherent process of governance across space; it has rather been associated with intensifications of spatially uneven development which has produced new opportunities for, and challenges to, the neoliberal project. Its persistent market failures can be associated with a continuing process of learning, adjustment and reflexivity. Such regimes can therefore be characterised by the perpetual reanimation of restless terrains of regulatory restructuring (Peck and Tickell 2002).

The overall effect has been to hollow out the capacity of central government while forcing state governments to become increasingly entrepreneurial in pursuit of jobs and revenues; increasingly pro-business in terms of their expenditures; and increasingly orientated to the kind of planning that keeps property values high (Brenner and Theodore 2002).

The impacts of these fundamental changes have been conceptualised in relation to the loss of old ingrained certainties identified by social historians. These characterised an essentially monolithic society where tribal beliefs were predominantly static and conservative (Marwick 1982, Kynaston 2007) shifting to one where an individualised and fragmented society exists within an Age of Uncertainty. Here a set of seminal and closely interconnected changes has occurred to create a new setting for individual life pursuits, raising a series of challenges not previously encountered (Bauman 2007). These are

predominantly the outcomes of the era of connectivity, universal competition and the triumph of late capitalism; the shifts inevitably having implications for the social process of planning (Friedman 2006). Knowledge is of central relevance to planning and planners need to understand how the impacts of specific planning actions follow from the causal relationship between action and impact (Rydin 2007). Knowledge is not the same as information and data but is crucial in its support for the application of that information or data in the relationship between intention and outcome (Alexander 2008).

However, the notion of multiple sources of knowledge presents problems. The source of this knowledge is not solely the domain of the expert but rather derives from a variety of actors in a variety of circumstances and is frequently characterised separately as lay and expert knowledge (Innes and Booher 2010). It is necessary to test in some way the validity of this material to determine whether it deserves the status of knowledge requiring an entirely different and more open approach from those – planners or others – who may be responsible for the management of this process. Consensus has to be gained through mediation and negotiation between interests (Innes 2004). In theory, the idea of communicative practice is attractive as it removes the requirement of planners to search out a value-neutral expert role. The emphasis does not lie so much on what planners know, but rather on how they use and distribute their knowledge; less on their capacity to solve problems and more on the question of how debates may be initiated and managed on particular subjects (Tewdwr-Jones and Allmendinger 1998). This model therefore concerns itself with speech, listening and arguing (Schönwandt 2008).

There are obvious limits to this process however and its dangers have been well rehearsed, particularly in the ways that power relationships are embodied in the possession and use of knowledge (Lauria and Wagner 2006, Allmendinger 2009). In particular, the ability of planners to undertake such processes effectively must be in doubt; the potential for powerful interests to subvert the process is considerable and conflicts of interest may be difficult to manage while the generation of consensus under such circumstances could prove to be impossible (Flyvbjerg 1998b).

While multiple sources of knowledge may correspond, in part, to a postmodern interpretation of this planning construct, each cannot be considered to be equally valid. The process requires consensus which may not be the most effective means of ensuring that the most appropriate knowledge influences decision-making (Rydin 2007). Any such engagement requires the necessity to distinguish between knowledge and other bases for involvement and inevitably requires translation and some form of adjudication. Separate sources and forms of knowledge are not additive and any reduction to a standard base will not necessarily lead to resolution (Evans and Marvin 2006). If this requires the

generation of agreement between the various actors, it may be necessary to fall back on established values and perceptions either because there is no dispute over knowledge or there is no certain knowledge available (Innes 2004). In practice, most situations would fall between these two extremes.

Almost 15 years ago, Gleeson and Low (2000b) published an influential affirmation of planning's purpose with a clarion call to follow a revivified version of planning centred on the collective wisdom of the many groups, associations and cultures that form in a healthy democratic society. This was considered to be the Australian way but the task of mobilising that wisdom and facilitating convergence on public action was seen as extraordinarily difficult but necessary for planners to undertake. This was to be the antidote to government by autocracy and government by the market. However, this fails to take account of the increasingly fractured nature of society identified by Bauman (2007, 2008) and others where the notion of any kind of collectivism seems further away than ever.

Since then there has been little discernible debate about either the purpose of planning or its processes; the community seems to have little idea why planning is necessary, what benefits it brings and what it could be capable of achieving (Australian Government Productivity Commission 2011). Even the opportunity afforded to debate the key issues during the run-up to the development of the new Planning Act in NSW was lost in the focus entirely on process rather than on content which appears to have become only that determined by the property sector operating via the legislative power of government (Property Council of Australia 2011).

2.5 Sources of certainty in land use planning

There are three areas in the land use planning process where certainty has been claimed to be appreciated:

> *Controlling authorities wish to ensure that policy and plans could be implemented as individual decisions are made, often at a different level in the government apparatus* (decision-making certainty).
>
> *Developers looking for certainty to guide their actions and minimise their risk* (expectation certainty).
>
> *The general public as a means by which their collective and individual interests are protected* (community certainty).
> (Booth 1996, 9, bracketed text added)

It is therefore suggested that the three differing groups who use, or are affected by, the land use planning process – relevant bureaucrats, applicants for development approval and the community, whether directly affected by planning proposals or not – would seek to be confident in various ways about the operation of the planning system or parts of it.

The first two of these could be expected to be satisfied with a smoothly operating system which efficiently achieved their aims and reflected their particular interests. In the case of the community, it is much more difficult to determine what those interests might be. It is however possible to conceptualise this by the use of the simplification that the community's interests would be protected by the operation of a planning system that was both fair and transparent. It would also be necessary to define what such a system might comprise and how it was structured and operated or assess the existing processes to determine if they qualified for such a characterisation.

It then remains necessary to establish how the required level of confidence might be achieved to provide the certainty claimed and how that particular quality is transmitted to the recipient groups. The SI LEP in NSW contains requirements in the form of zonal definitions and related controls that provide a strategy of certainty at the local level by indicating what is and is not acceptable development. This provides the test of permissibility for the development proposal initiating the more detailed assessment process which is to follow undertaken by application of the relevant controls. There however remains considerable support for the notion that if a development is permissible under the relevant planning instrument, approval is unlikely to be refused unless there is serious non-compliance with the applicable controls. This is supported by the legal view that *planning decisions must generally reflect an assumption that, in some form development that is consistent with the zoning will be permitted* (BGP Properties Pty Ltd v Lake Macquarie City Council 2004 cited in Kelly and Smith 2007, 85)

> *Zoning is valuable in terms of the bankability of expectations of what can be developed in a particular location. Zoning is merely a means of achieving spatial planning objectives and enabling developers to obtain funding as easily as possible.*
> (Senior Departmental policy planner 2011)

Planning decisions also need to reflect the State-level planning agenda. While it provides some kind of certainty as far as the local planning authority is concerned, unless the plan has been vetted by the central authority for compliance – as is the case in NSW – tensions can still persist between these two bodies (Tewdwr-Jones 2002). This can arise in both directions where the State may resist an initiative of the local authority required to address a specific local issue or may be dissatisfied at the local response to State policy implementation. These differences can be overcome by strict enforcement of central policy but this can also be diluted by opposition on the basis of specific local conditions which are not capable of response to established policy initiatives. The extent to which a local planning authority wishes to defy central diktat will depend on the extent of local community support but such a stance also results in uncertainty. Strict adherence to

central requirements can also have unfortunate effects producing both monotony of outcome and a reduction in community acceptance of the planning process.

Developers perceive certainty from a different perspective. While they provide the majority of the physical context within which planning policies are intended to be played-out and gain significantly from the regulation of the land market achieved by institutionalised planning, they have only limited interest in the achievement of policy initiatives, particularly over the extended time period envisaged by the conventional strategic plan. Developers are concerned with investment and profit, achieved within a timeframe considerably shorter than is typical in the planning world (Booth 1996, Cullingworth and Nadin 2006, Ratcliffe, Stubbs and Keeping 2009). They need to move quickly; timing is therefore a key factor and undue delay in decision-making can become a key preoccupation. However, developers have many concerns outside the ambit of planning, particularly those relating to financial exposure and the possibility of encountering impediments not known at the start of the process (Newell and Steglick 2005). As self-interested players in the process, developers tend to require both certainty, defined as no impediment to their aspirations within the constraints of the process and flexibility to decide when and how they wish to proceed (Booth 1996, Steele and Ruming 2012). This is a stance that can only reinforce the suspicions of the community concerning developers' motives and operations.

The existence of land use zoning goes some way to protect the existing rights of the community. Their land values are unlikely to be degraded by the introduction of an adjacent intrusive use although continuing pressure for residential densification has the result of reducing this protection, particularly where so-called upzoning is undertaken to allow redevelopment to take place (Gurran 2007, Thompson 2007). Some may benefit but this may be at the expense of others if their views and ultimately their rights are ignored. This is a highly complex issue which is unlikely to reach any kind of resolution soon.

It seems likely that planning laws have some impact on citizens whether they are or have been directly affected by them or not. People's personal experience of planning controls is likely to have increased public expectation that commercial development or new infrastructure projects should be properly subject to rigorous planning procedures – much as a house extension may come under scrutiny (Cullingworth and Nadin 2006). This, in turn may have served to strengthen public expectation that individual choice or business interests should at times be subjected to the wider public interest. There is inevitable tension between developers and the community particularly in circumstances where government emphasises the need for increased development and community perceptions suggest that their concerns have little effect (Australian Government

Productivity Commission 2011). It seems inevitable that this public support will be closely linked to perceptions of government commitment towards citizen involvement in planning decisions. If public consultation exercises are seen as post hoc window dressing, public confidence in the system will obviously be eroded (Syms 2002, Kitchen 2007).

2.6 Reform of planning systems

A key component of the context within which planners work is the legislation which determines the aims and processes of the planning system itself and provides it with legislative power to act. Governments routinely claim that the changes to the planning system they are proposing will, *inter alia,* improve the certainty provided by it (NSW Government 2013b). Logically, this presupposes that the currently operating system already supplies some semblance of certainty although how this is done is not made clear. The literature provides some insights into the aims, means and particularly the outcomes of some of these attempts at reform. This is most clearly seen in several responses to various changes to the planning system in Britain.

Although some components of the planning systems are common to the processes applied in both Britain and NSW, there are fundamental differences; predominantly the nationalisation of development rights and the significantly greater influence of the local planning authorities in Britain while the land use zoning system forms a key component in NSW but is absent in the UK (Ward 2004, Gurran 2007). Continuing tensions between central and local governments however appear to be a feature of both (Rhodes 1992, Williams 2007).

The planning system in Britain has always been highly politically charged. As a result it has been subject to constant change on an ideological basis although there have been short periods of political consensus (McKay and Cox 1979, Cherry 1996). In contrast, the planning system in NSW has been relatively stable over the period up to about 2005 even when significant change, as in 1997-1998, was being introduced. Changes could be portrayed as essentially incremental reform rather than ideologically based.

Two main periods of change have been subjected to scrutiny in Britain: that during the various Thatcher governments (Thornley 1991) when ideologically charged attempts were repeatedly made to move towards a market-driven system often using powers outside the existing planning legislation and following that, the changes brought about as a result of the 1991 Act during the Major government. This introduced the plan-led system and the concept of planning obligations, marking a clear retreat from the excessive market emphasis of Thatcherite ideology (Ward 2004). Further changes were instituted during the

subsequent period of the Blair/Brown governments but these had a different focus which is less relevant to the changes taking place in NSW (Haughton *et al* 2010).

The period from 1980 saw the introduction of a number of initiatives including the rebirth of Urban Development Corporations which removed planning powers from the relevant local councils; private sector new towns potentially located within the established Green Belt; and perhaps the most radical, Simplified Planning Zones (SPZs), which suspended many of the normal planning regulations on a temporary basis in the areas to which they applied (Ambrose 1986, Allmendinger and Thomas 1998, Hall and Tewdwr-Jones 2011). For the first time, the government undertook a program of long term monitoring of the effects of the new zones (Allmendinger 1998). This was possibly unique in that the progress of a specific policy could be tracked and compared over its ten year life with a control made up of employment areas where normal procedures remained in place. This allowed detailed objective conclusions to be reached which indicated that initiatives of the kind undertaken were not effective in achieving economic growth as intended although some other benefits, such as local regeneration of degraded industrial areas were achieved (PACEC 1995, Symms and McIntosh 2004). Initiatives such as these remain of interest particularly as Enterprise Zones (EZs) have made a comeback in Britain (UK Department of Communities and Local Government 2012) and Zone B6 Enterprise Corridor, where limited controls would apply, remains in the NSW SI LEP (NSW Government 2013b).

While in retrospect the objectives of the simplification of planning controls attempted in Britain over this period may appear to be attempts at introducing greater levels of certainty into the planning system, their principal aim was to increase the efficiency of the administration of planning controls by the local authorities in order to create a more positive land use planning framework to facilitate greater private sector economic activity, investment and development (Lloyd 1987). These two aims however appear to have coalesced in NSW.

Another reason widely promoted for the easing of planning controls was that of their adverse effects on the development costs of the private property sector. However, subsequent research has shown that there is little evidence to support this claim. Problems for small firms in the process of establishment lie predominantly in the financial and marketing sectors (the property industry itself) with only a very small proportion of firms concerned with the problems associated with planning procedures and controls (Middleton 1985). Similar responses were obtained from surveys of NSW developers undertaken into relative risks encountered in property development (Newell and Steglick 2004).

The claimed quest for certainty in the UK planning system as a whole, rather than in the initiatives relating to simplification pursued during the Thatcher era, was initiated by the introduction of the so-called plan-led process in the Planning and Compensation Act 1991 (Cullingworth and Nadin 2006). This, at its simplest merely required the preparation of mandatory district-wide plans. Prior to this, the council could decide which areas within its jurisdiction were to be subject to a plan. Within the new plans, the local authorities were expected to prepare policies which clearly indicated those areas where development or redevelopment was desirable or possible and those areas where development should be avoided in order to protect the environment. In this way, certainty was conveyed more effectively within the plan-making process than was previously the case.

The related drive for consistency reduced the level of flexibility and discretion available to the local planning authorities (Tewdwr-Jones 2002). At the same time it increased the role of central government in using national planning policies to enforce compliance with the national agenda and curtailed to some extent the consideration of unique local circumstances. Certainty was seen to stem from greater clarity and consistency in the definition of planning requirements and the imposition of more rule-based policy-making by central government resulting in increased standardisation at the local level. However, the process of development control remained essentially the same; undertaken entirely on the merit (its overall worth) of the proposal even though the requirements of the plan would now form the initial consideration in the assessment process. Equally, the tension between the plan and the development control decision itself remained unresolved (Booth 2003).

The increased emphasis on the plan had a number of unforeseen results which created a new set of problems. The importance now applied to the plan inevitably increased its level of complexity (Tewdwr-Jones 2002, Ward 2004). Combined with the enhanced level of clarity and accuracy required, this ensured that the process necessary to prepare the plans became protracted and the results were subjected to a higher degree of scrutiny both by government and those with any interest in what they contained.

An interesting consequence of the change in emphasis introduced by the plan-led system was the necessity to remove certain semantic inexactitudes from local policies originally included to maintain the necessary flexibility including the words *normally, may, ought to* and *will consider*. At the same time, developers and communities required a higher level of certainty from the council about development proposals and locations which could be the subject of development (Tewdwr-Jones 2002). While local plans (SI LEPs) in NSW do not include any policies which diverge from those prescribed by the State government, the focus on the use of precise language with unambiguous meaning raises questions in

relation to the terms and qualifications still used in planning documents. This is examined in more detail in Section 4.4.

Another area of comparison relates to the idea of direct community participation in the development of public policy as heralded by the proposed introduction of a Community Participation Charter in NSW (NSW Government 2013b). This is a limited version of the Citizen's Charter introduced by the then British Prime Minister, John Major in July 1991 (HM Government 1991). It aimed to improve public services there by making administration accountable and citizen friendly; providing transparency and the right to information and adopting a stakeholder approach.

The overall cost of the operation of the charter was 18 million pounds over the first five years with no discernible rise in quality. It remained in limbo until after the election in 1997 when the new Labour government announced the creation of a People's Panel of 5,000 voters that would give instant verdicts on policies in a scheme intended to supersede the charter to be an integral part of the process of modernising government. It survived until 2000 when it closed at a cost of 1.4 million pounds (Hollingshead, 2005).

The Service Charter Initiative of the Commonwealth Government in 1997 is part of a commitment to improve the quality of service provided by agencies in Australia by moving government organisations away from bureaucratic processes to customer-focused outcomes (Gleeson and Low 2000b). Service charters are considered to be a powerful tool for fostering change requiring a focus on services delivered, measurement and assessment of performance and subsequent improvement. The charter acts as a surrogate for competition where none exists. Centrelink (central government authority providing a wide range of social support and assistance) is a well known outcome of this process although the shift to a delivery focus now permeates the whole of government's processes.

Some of the interest in the changes attempted and in some cases achieved in Britain relates to the effects of trying to introduce measures that have similarities to those already included in the NSW system such as zoning (Allmendinger 1998) and the hegemony of the plan (Tewdwr-Jones 2002). Some measures failed while others have focused on shifts in the practice of planning which are familiar to both regimes. These have included attempts to reduce discretion in efforts to strengthen central control and improve the certainty claimed to result from the application of regulation and consistency. Other initiatives undertaken in Britain and elsewhere, while not directly relevant to current circumstances in NSW remain of interest in that they allow the outcomes of rapid policy transfer, for

example (Tait and Jensen 2007, Minton 2009), to be identified prior to any consideration for possible introduction in the prevailing planning system.

2.7 Discretion and certainty

Booth (1996) argues that discretion is not the opposite of regulation. Discretion does not in itself lead to unbounded flexibility. It has the effect of reducing the rigidity of rules and regulations, but it is still necessary to have rules to ensure that discretion is not operated in an *ad hoc* or unregulated fashion. Therefore, discretion is an inherent and independent part of regulation; it is the area of judgement left over by a surrounding area of regulation (Dworkin 1977). Jowell (1973) views discretion in government as the room for decisional manoeuvre possessed by the decision-maker while Ham and Hill (1985) suggest that a public officer has discretion whenever the limits of his power make him free to make a choice among the public courses of action or inaction. Discretion therefore occurs within defined limits and those limits, in government activities, form applicable laws and policies.

The continuing debate around the character and emphasis of the existing – and desirable future – planning system appears to focus, at least in part, on a simplistic consideration of the distinction between regulation and discretion as practiced during the determination of development (Walton 1997). Here, regulation (the emphasis on predetermined rules) is equated with certainty and discretion (a focus on the merit of the proposal) with its lack, resulting in delay and lack of confidence in outcomes. Government inevitably favours regulation in its continuing promotion of certainty, preferring its predictable outcomes to one of possible surprise; the confidence of predictability.

If discretion remains an integral component of decision-making in the planning process, a system based solely (or heavily) on a reliance on codes would be an impossibility. The alternative would comprise the removal of any part of the system which provided the potential for flexibility, allowing only a legal basis for approval and determination of development proposals. Attempts to move in this direction can however be discerned in the draft Planning Bills.

Planning systems are typically divided into those described as regulatory and those termed discretionary. This is really convenient shorthand as each identifiable system contains elements of both in a variable mix and their basic characteristics are derived from the fundamental legal regime and in the majority of cases, the constitution of the state within which the system operates (Booth 1996). Within this mix, discretion (or flexibility) is sought to deal with uncertainty while prescription (or regulation) is included to provide a semblance of consistency.

Discretionary systems appear to be drawn towards greater regulation in a quest for certainty and regulatory systems seek ways around their inherent rigidity by a series of devices (Davies 1988, Needham 2007b). The agency discretion offered by British legislation is set within very wide limits but at the same time is subject to a series of limitations. These are generally external to the planning authorities themselves comprising the planning circulars (previously Planning Policy Statements and Guidance Notes but now reduced to the National Planning Policy Framework) from the government to which the authorities, as beneficiaries of discretionary power, were expected to conform and the constraints derived from case law.

These legal and policy changes have resulted in a shift of discretion creating an increase in administrative discretion at the expense of local political flexibility (Booth 2003). The existence of local plans and policies and national policy guidelines ensure that the individual's freedom in discretionary judgement is either removed, reduced or shifted. Planning officers can no longer rely on justifying their actions as professional judgement since professional discretion has been circumscribed by central government's legal and policy requirements (Tewdwr-Jones 2002). This does create greater accountability and provides less uncertainty for user groups, both objectives sought by the government.

However, the achievement of some kind of acceptable balance between formal plans and individual decisions within the planning process where the approach adopted rests on the notion of certainty still appears to be stimulating active research interest (Harris, Sartorio and Thomas 2013). This has been undertaken in response to the continuing accusation that the planning system in Britain – this time specifically in Wales - does not provide sufficient certainty of outcome for landowners and communities. This investigation concludes that any search for greater certainty is constrained by the continuing value placed on decision-maker discretion and flexibility. Thus any increase in planning process certainty can only be achieved by a corresponding reduction in the discretion it contains. This appears to be the direction being taken by the proposed planning system in NSW even though the discretion available at the local level is already severely circumscribed.

The key issue emerging here is therefore where discretion lies within the planning system and how it is used. Rather than representing a potential source of uncertainty, its application can exercise administrative power over planning processes and outcomes. This may be aimed at establishing specific controls capable of influencing the overall direction of the planning system in the achievement of its objectives and providing an enhanced level of certainty for those who benefit from it.

2.8 Discretion as power

A major case study undertaken in Aalborg, Denmark focuses on the use of discretionary power in a planning context described by its author as a metaphor of modern politics, modern administration and planning and of modernity itself (Flyvbjerg 1998a). Its basic idea was comprehensive, coherent and innovative and it was based on rational and democratic argument. However, when the idea met reality during its implementation, the exercise of power and rationality resulted in the fragmentation of the project which disintegrated into a large number of disjointed subprojects, many of which had unintended and undemocratic consequences

The intention, designed to substantially restructure and democratically improve the downtown environment of Aalborg was transformed by the operation of power into environmental degradation and social distortion. This was brought about, according to Flyvbjerg, by the activities of institutions who considered themselves as representing the public interest but were in fact deeply embedded in the hidden exercise of power and the protection of special interests. The description of what went wrong contains many elements familiar to those with experience of planning in practice.

According to Flyvbjerg, the problems with the project did not derive from Aalborg being especially plagued by corrupt policies or incompetent planning and administration; the literature is replete with examples of failed policies, confused administration and unbalanced planning. In this context, he goes on to expand Francis Bacon's famous insight that knowledge is power, by maintaining that power and knowledge cannot be separated; not only is knowledge power, but more important, power is knowledge.

> *Power determines what counts as knowledge, what kind of interpretation attains authority as the dominant interpretation. Power procures the knowledge which supports its purposes, while it ignores or suppresses that knowledge which does not serve it. Moreover, the relations between knowledge and power are decisive if one seeks to understand the kinds of processes affecting the dynamics of politics, administration and planning.*
> (Flyvbjerg 1998a, 226)

He concludes with a series of propositions beginning with a focus on the rationality of power and moving towards describing the power of rationality. The weakness of rationality - the basis of modernity - in the face of power, suggests a fundamental weakness in the operation of modern politics, administration and planning. The first step in moving beyond this modern weakness is to understand power which itself now appears to be a threat to democracy. The Aalborg project demonstrated that specific groups, even those delegated to protect constitutional principles, refused to follow and enforce them and many other actors who repeatedly, for personal and group advantage, violated the

principles of democratic behaviour that they were supposed to uphold as public servants, politicians and citizens within a long established democratic constitution. It concluded that political actors were expert in judging how far a democratic constitution can be bent and used, or simply ignored, in non-democratic ways.

2.9 Certainty in planning theory

The theoretical consideration of planning seems to have settled down into two schools: those that identify a typology of planning regimes or theories - actual or potential - which are subjected to post-positive analysis on the basis of purpose, role, orientation and other socially embedded themes (Schönwandt 2008, Allmendinger 2009) and those taking a post- structuralist perspective demonstrating the poverty of a spatial planning based on essentially ideological constructs (Gunder 2008, Gunder and Hillier 2009). Both conclude that planning needs to move away from its determined focus on idealised end-states to a more contingent process which accepts the all-pervading condition of uncertainty. Both of these however seem to accept the ever-widening gap between theory and practice, in some cases arguing that this is of little account as theorists do not need to merely theorise about what planners actually do but also to theorise about planning's implications for a wider society (Yiftachel 2006). This seems to be rather an odd suggestion as what planners are attempting to do is deal in one way or another with those issues within society which come within their ambit as defined by the legislation that gives them the power and authority to do so but also constrains their ability to address such issues.

Planning has been heavily influenced in NSW by neoliberal principles, although this has occurred via a combination of its liberal strand and the entrenched anti-planning conservatism which has been revitalised by increasing neoliberal political influence (Gleeson and Low 2000b). While such influences have prevailed over the following decade, essentially conservative authoritarian constructs are clearly visible in the emphasis on central control and the minimisation of discretion. This fusion is believed to now characterise neoliberalism but also to explain the contradictions and ambiguities that their combination brings (Allmendinger 2009). This relates particularly to the apparent contradiction between the liberal emphasis on a free-market orientation and the rule of law whereas authoritarian influences deplore most aspects of the postwar social democratic consensus and the welfare state which spawned the planning system, seeking to reinstate the power of the state to command and coerce those who would otherwise reform and destroy (Thornley 1993, 40).

However, it is not entirely clear that neoliberalism is a school of planning theory in itself (Allmendinger 2009) but might be more accurately characterised as a set of diffuse ideas applied to planning avoiding the more extreme notions of the libertarian school

associated with the Institute of Economic Affairs in London (Sorensen and Day 1981, Pennington 2002). This attempted to make a case for the virtual elimination of the planning system by substituting a property rights approach where the actions of government would be reduced to the setter of environmental standards and regulations within which the market could be allowed to operate. This argument is based on an assertion that over-regulation by government and pressures by special interest groups, identified as environmentalists, have created an artificial scarcity of land and resultant rising prices. Conventional planning is derided as unable to gather and interpret the information required to operate an efficient land-use planning system. Instead it is claimed that the constant feedback provided by changing relative prices in the market is needed to utilise dispersed knowledge and facilitate adjustment.

This remains contrary to the present centralising tendencies within the NSW system. Here, any revitalisation of government influence, perceived as signalling the emergence of a form of hybrid governance (O'Neill and McGuirk 2002, McGuirk 2005), could equally well be conceptualised as the use of central power to more effectively promote the aims of market-fetishism as the essential conservative authoritarianism of the state becomes subservient to the neoliberal agenda as its power is gradually subsumed by politically uncontrolled global interests (Bauman 2007, 2).

> *It is also the case that governments are not only centralising power but, in many areas, devolving it to major international commercial sectors pedalling an increasingly narrow agenda.*
> (Gleeson and Low 2000b, 210)

Elemental contradictions remain between these two ideological strands although in some areas the state continues to implement particular neoliberal strategies which appear to reinforce this perception. Depoliticisation, for example, is a particular neoliberal concern (Gough 2002) being actively implemented by the State government within the NSW planning system.

Planners have been criticised for claiming to address issues well beyond their remit where they have little expertise and others are much better equipped to do so (Taylor 1998, Ward 2004). This does not mean that theorists should not deal with the way planners perceive their overall tasks and how they deal with issues that directly affect their constituents (Healey 1992, Hillier 1995). As what they do, or rather attempt to do, will have some effect on society, however indirect and ineffectual that might be. That is a reasonable area for theoretical investigation. The real issue here is whether theory makes a worthwhile contribution when it raises whole areas of conjecture which have only a modicum of connection with the process they are considering.

It is contended that spatial planning is predicated on a fantasy that the discipline successfully provides the solutions necessary in order to provide certainty and harmony for the future of the built and natural environments (Gunder and Hillier 2009). Planners know intuitively that such solutions are unachievable, it is claimed, but they continue to believe that their objectives will be achieved over lengthy timeframes, so they carry-on planning. It could equally be argued that planners do not, on the whole view plans as unachievable – they provide a long term framework, however idealistic they might be, for policy and planning action.

It could also be equally argued that the reason why planners regularly amend their plans is not their intuition, but their inbuilt anxiety that what they are claiming is not doing what it claims to be doing or they need to better reflect the prevailing political orthodoxy. It is however doubtful that the initiative for change comes from the planners. It is common practice for incoming State governments, particularly if they have been out of office for a considerable time to prepare new plans of various sorts as one of their first actions. It is safer to amend the plan or produce a new one rather than effectively monitor the results of the previous one and confirming their fears, a point made forcefully by Reade (1987). It also gives the impression that progress is being made and a new, more relevant plan is being prepared to address continuing problems.

The original contention also ignores the realities of planning in an autocratic, ideologically-driven political context of the kind that Gleeson and Low (2000b) sought to reject. Examination of the trajectory of the regularly-produced strategic plans for Sydney for example, clearly indicates considerable inertia in the spatial proposals for development which have changed little in overall concept while the stated policy aims have responded to the ideological imperatives of prevailing market influences.

Gunder (2008) suggests that one of planning's fundamental purposes and key justifications is to provide the illusion of certainty in a risky and uncertain world. Christensen (1985; 1999) agrees while Silva (2002, 336) observes that:

> *dealing with uncertainty is a duty of planning. Basically all planning approaches in one way or another manage uncertainty about the future,*

and then goes on to assert (338) that regardless of reality, planners, managers and politicians persist in their efforts to impose certainty (administratively, bureaucratically, legally and politically) in an uncertain world. It might simply be easier to suggest that the words used in planning documents are essentially all-purpose terms, devoid of real meaning, which are intended to induce confidence in those with little experience of the

reality of planning. The imposition of certainty would appear in these circumstances to be a rather desperate response.

Confidence, rather than certainty, can be engendered by capable and effective government action in response to existing and potential problems. This would suggest a reorientation of the way in which the planning process currently operates towards one where the identification of existing problems and potential future uncertainties would provide the basis for the consideration of a realisable future environment. This would remove the necessity to resort to a claimed but unachievable utopian condition. However, such a process would tend to shift power away from the political hegemony.

2.10 Certainty as positive planning outcome

The Barker Review of the land use planning system prepared for the UK Treasury (Barker 2006a, b) provides an analysis of how the system there works, its efficiency and its impact on investment and innovation (The Interim Report) together with a detailed set of recommendations on how to improve the quality and efficiency of the system in the light of prevailing economic conditions (The Final Report). The remit was similar to the terms of reference for the later Performance Benchmarking Study of Planning undertaken by the Productivity Commission (Australian Productivity Commission 2011) although the conclusions were rather different. The reports make some remarkable comments on the importance of the land use planning system presumably reflecting the views of the government at the time. These include the conclusion that:

> *By addressing deficiencies in the free market for land use and development, the planning system can work towards the delivery of sustainable development objectives that maximise net welfare to society. It does this by integrating, and, where necessary, balancing complex sets of competing economic, environmental or social goals within the framework of democratic accountability.*
> (Barker 2006a, 5)

The review accepts that a plan-led approach is the most appropriate means of achieving these outcomes, although the system requires some improvement. While the reports discuss the planning system in some depth, there is no consideration of the process of preparing the plans themselves; it is presumably taken on trust that that process remains sound.

The plan-led system is claimed to bring many benefits. It provides business with a greater degree of certainty about likely development than would otherwise be the case and enables the community to engage in developing a vision of the future of their area. It also supports the coordination of investment and the realisation of positive spillovers (7).

There are however some reservations about such an approach. In an era of rapid economic and social change there are questions over whether plans could be better used as a guide to decision-making rather than a basis for it. There is also the potential for plan-making to be anti-competitive in that it is easier for firms with greater resources or close links to the authority to influence outcomes. Nor is it clear that plans necessarily deliver greater certainty. It has not ended planning by appeal (in the UK) and it is essential that there are robust and up-to-date development plans available although local authorities have had difficulties in delivering these in the past (19).

Better use is recommended of market signals. This principally refers to real knowledge and use of price differentials between land allocated to different uses, mainly residential and employment (23). Prices are claimed to contain information about demand for particular uses although this can change considerably over time. There are a number of ways in which prices could be better reflected in plan-making and development control. One method is that the price of land could be taken into account for different uses as a material consideration and a change of use only rejected when there is evidence that the social costs exceed this price discrepancy (24). While this type of formal system has its drawbacks, in particular the difficulty in determining the social value of land and the discount rate to be used, the insight that prices are important signals of demand is a critical one. This leads on to a crucial definition of the role of development assessment in the planning system which specifically relates to an important power still available to the decision-maker.

> *The planning system will rightly have a negative impact on investment in some circumstances due to its need to consider economic, environmental and social objectives. Turning down applications that will have a net cost to society is an important function of the planning system.*
> (Barker 2006a, 92)

In this case, the overall test for a development proposal would be the determination of its net worth to society defined as a positive contribution to community welfare.

Evans (2003) in a paper decrying the claimed lack of interest in economics shown by planners explores the relationship between the planners and the plan. This takes the view that planners are not fundamentally interested in the outcomes of their activities and contends that sustained efforts by economists to assist in the understanding of how planning in a market economy, by effecting a change, can cause other changes to take place, have been completely disregarded.

Part of the argument is based on the widely held assertion that the green belt around London and by inference around other urban areas is one of the great successes of the

post-war planning system in Britain (Moore 2014). In this context, the use of the word success is called into question as this appellation would be unlikely to be supported on the economists' measure of increasing public welfare (benefits exceeding costs). Economic studies indicate that the costs outweigh the benefits (Willis and Whitby 1985). This conclusion is of course based on the rather obvious fact that the development of land for an urban use, such as housing would result in a greater economic value than either leaving it in its present undeveloped state or using it for more compliant uses such as agriculture. There are also claims that the rigid maintenance of the green belt encourages unsustainable development as new suburbs developed to accommodate growth of well-established cities has to be undertaken well beyond the existing urban limits significantly increasing commuting distances and additional car-reliance (Llewelyn-Davies *et al* 1998).

Evans goes on to suggest that there is an alternative meaning of achievement in planning. This is the designation and maintenance of the Green Belts themselves – in some cases their subsequent extension – which was the aim and this has been successfully achieved. While this may not be considered to be tantamount to creating an increase in human welfare as the economists define the purpose of planning, the long standing nature of this policy and the seeming impossibility of amending it, apart from by extension, clearly benefits more than one interest group. On that basis, it might still be possible to suggest that it constitutes a policy achievement with widespread support; however it might be defined in the economists' lexicon. There may be subsequent arguments about whether this is the best or most effective use for a particular piece of land as it will in effect be preserved from development and maintained in its existing and possibly inappropriate use while also resulting in other undesirable effects. At the same time, it ensures that the interests of those currently living in the green belt will be protected.

The use of the term success therefore does not refer to the economists' definition and must mean something else. Evans argues that simply achieving the outcome of the policy in creating a green belt around London is the planners' definition of success even though that has not resulted in an increase in human welfare as determined by economic analysis. This also relates to an apparent reluctance on the part of planners in undertaking plausible assessments of the effect of alternatives prior to embarking on the preparation of their development plans or measuring the effects of their implementation in a realistic manner.

Restrictions on development within defined belts around established urban areas has gone well beyond the realm of a contested planning proposal to be included in the appropriate development plan; they are established facts of life in Britain which garner bipartisan political support. A number of attempts to diminish their influence have resulted

in failure due to well organised programs of resistance to any change led by those rural power groups who benefit from the continuance of the policy and the restrictions it entails (Hall and Tewdwr-Jones 2011). This can be considered to be success by restriction rather than generation; a use of an effective power still available to the planners.

Evans goes on to define planning as a political activity only implemented by planners and is therefore subject to political forces and political manipulation. Its aim is not the maximisation of economic welfare and the balancing of social costs and benefits but the satisfaction of the claims of particular interest groups. While welfare economics assumes that government decisions are disinterested and wholly intended to maximise net social benefits, public choice theory presumes that the decisions of politicians will primarily be determined by their wish to be re-elected. They will therefore give greater weight to the benefits and costs affecting their most vocal constituents and much less to others. A similar argument is applicable to government officials who are assumed under this theory to give preference to policies that maximise their own power and status (Poulton 1991, Webster 1998).

2.11 Conclusions

While the literature suggests that there are three parts of the planning process where certainty would be appreciated by its recipients (Booth 1996), it is less clear what this notion of certainty constitutes in practice and how it is generated, maintained or increased by its processes and efforts made to reform it.

Certainty in the land use planning system can be conceived as justification for its operation in much the same way that the public interest was used earlier; both notions are essentially vague and sufficiently flexible that they can be adjusted as necessary but remain both desirable and potentially beneficial. Certainty in this context equates to confidence in the practice of planning rather than its outcomes reflecting the shift from content to process. Here certainty requires justification dependent on knowledge claims; objective establishment beyond the realms of personal conviction. It might be found in:

- language contained in the form and pattern of communication focusing on clarity and accuracy;
- sources of knowledge and its validation;
- methods and systems employed in the planning process and their rationality, particularly focusing on those where effective outcomes are possible; and
- establishment of a causal link between intention and outcome.

Three related themes can also be identified arising from the literature which provide the basis for the identification of the certainty claimed to be achieved by the operation of the land use planning system in NSW:

- zoning as the regulation in the process creating certainty, effectively establishing the permissibility of the development proposal prior to its assessment on the basis of pre-determined policies and controls;

- conceptualisation of discretion within the planning system as an exercise of political power operated to consolidate the focus on facilitation of development; and

- confidence as efficiency of the planning system defined as greater central control.

This chapter has considered those theoretical factors relevant to certainty in land use planning in NSW. The following chapter provides an overview of the practice of planning in that State where the notion of certainty could be considered appropriate to its operations and outcomes. This considers a complex and sometimes opaque system (Gurran 2007) which has been in a state of flux over the last three years and so far a number of its central concerns remain unresolved. This can be considered to present difficulties for clear analysis but has resulted in some compensatory benefits. The extent of the changes to be introduced remains unclear but the process implemented to arrive at the proposals to do so has produced a wide range of public documents and responses to them which would not otherwise have been available. These have provided important inputs to this thesis.

3 Land use planning in New South Wales

3.1 Introduction

This chapter provides a characterisation of the land use planning system itself, focusing particularly on those components identified in Section 1.2 where the notion of certainty might be considered to be located or where its processes might be thought to be capable of generating that quality. As these involve consideration of major parts of the planning system it is also necessary to examine some of their other characteristics which might contribute to the creation of the certainty claimed or indeed constrain it from doing so. Put together, this provides a summary of the ideological and statutory context within which to consider the questions of interest to this research. The way that the notion of certainty might be considered to operate in these components of the system is explored in detail in Part Two.

The *Environmental Planning and Assessment Act* 1979 (the Act) brought some semblance of order into planning and development assessment in NSW. Prior to that, although metropolitan plans had been produced for Sydney since 1951, implementation proved to be weak and contentious and development approval remained in the hands of parochial local councils who operated largely without the benefit of any plan and with only a modicum of controls (Winston 1961, Stretton 1975, Sandercock 1990). Two other important events closely followed the promulgation of the Act. The *Land and Environment Court Act 1979* established the first such specialist environmental, superior court in the world and the old Planning and Environment Commission was changed from a statutory authority to a government department (the Department of Environment and Planning) in 1980, the precursor of the present (2014) Department of Planning and Environment.

These three events could be seen collectively as the start of the kind of management of land use and the process of development control that would be recognised today.

Traditionally, land use planning has been characterised as comprising two stages:

- Preparation of plans and policies aimed at achieving a defined future state different from that which applies now or which would occur in the absence of the planned actions. This is expressed by some form of legally enforceable controls on the use of land, in this case by land zoning contained within a local plan.

- Assessment of development proposals against specified controls to achieve an acceptable outcome (by the application of conditions or modification) preferably with a causal relationship to the aims of the plan (Gurran 2007, 240).

Land use planning can also be defined in two separate components: content and process, in other words, what planning is trying to achieve and how that is to be done (Bracken 1981/2009) or as both service-based and product-based activities (Carmona and Sieh 2008). Distinctions of this kind assist in characterising the planning process particularly in the way that it is organised and implemented in NSW.

The Act has survived, heavily amended, until now but was intended to be superceded by a new Planning Act. The process followed to undertake this provides an opportunity to identify both the influences that have helped to shape the new draft legislation and the responses of the State government to accommodate them at the same time as attempting to impose its own ideological frame on the legislation. It is also possible to view the trajectory of the Act over the previous 30 years, particularly during the period from about 2005 when the land use planning process was subject to virtually continuous change. These changes were undertaken for many of the same reasons given for the necessity for new legislation but these were inevitably undertaken in an *ad hoc* manner resulting in greater complexity and ultimately, increased opacity.

> *Arguably, the fundamentals of planning are changing, as contemporary planning systems aim for simplification, integration, efficiency,* ***certainty*** *and fast-tracking. To achieve these goals, planning systems in Australia have been subjected to programs of reform which have inevitably resulted in legislative and regulatory reform – that is changes to the statutory basis of planning. Transformation of planning systems – and more specifically, planning laws – will continue as governments use planning to achieve objectives primarily focused on economic growth and the attraction of investment.*
> (Williams 2007, 112, emphasis added)

This period has also coincided with the regular production of Metropolitan Plans for Sydney providing an opportunity to identify both the changing and static components of the strategic content of the planning process in response to the ideological constructs of the time and their specific implications for it. At the same time, the format of all existing LEPs has been amended in an attempt to comply with the simplified version contained in the prescribed template.

The replacement of the old Act and the process of doing so, has now reached the White Paper stage when the intentions of the government for the new legislation have been made clear (NSW Government 2013b). The paper and the first drafts of the Bills have been the subject of a high level of comment but resulting in only a small number of amendments prior to their consideration in parliament (Hazzard 2013e). This description of the land use planning system in NSW therefore covers the period when the operation of the Act determined the processes undertaken over its lifetime but focusing predominantly on the last eight to ten years of its life. The anticipated effects of the changes envisaged in

the new legislation are also considered. Much of the opinion regarding the relationship between local planning authorities and the Department and the effects of the changes implemented since 2005 included in this chapter and later in the document is derived from a series of interviews with practicising planners.

3.2 The development system and its players

The NSW property development and construction industry is a major component of the State's economy. It contributed $44.2 billion (11%) to NSW gross state product (gsp) in 2009-2010 as the second largest sector contributor. It also contributes 366,000 (11.6%) jobs to state employment and is the largest employer. The total added value contribution to the NSW economy is $40.8 billion with employment for over 462,000 when flow-on effects to other sectors are included (AEC Group 2012). These totals fluctuate and could have decreased somewhat over the last few years due to a marked decline in construction activity which only now appears to be recovering.

The statutory responsibility for the management of property development in relation to the use of land falls on the planning community using the powers provided by the relevant legislation. However, this only comprises a relatively small although significant part of the overall development process. Qualified planners make up a tiny proportion of the professional bureaucratic community in NSW totalling 1,345 out of a total of 2,609 working in public sector-based planning (Planning Institute of Australia 2012) within a State full-time bureaucracy totalling 317,314 in 2011. The staff including those in the Building Professionals Board of the Department, both permanent and temporary, fulltime and part time in 2011, totalled 561 (NSW Department of Planning and Infrastructure 2011). This makes up 0.18 percent of the NSW State bureaucracy. There was a total of 3,335 planners in NSW identified by the Australian Department of Education, Employment and Workplace Relations (www.joboutlook.gov.au) in 2012 but the definition of planning and planners may differ from that used by the State. Their numbers may be small but their role is clearly considered to be significant given the effort being undertaken to develop the new Planning Act in NSW.

The development system can be conceptualised in an urban context as the process which ultimately produces additions to, and renewals of, the built environment. This comprises a set of elements which are connected by a series of linkages. In many cases these carry flows of money, political influence or other forms of interaction between pairs of these elements. The relationships producing the flows, which are often stronger in one direction than the other, may be statutory, contractual or informal (Ambrose 1986, Brett 1997, Harvard 2008). The majority of the elements fall within three fields which can be conveniently considered to be the state, the finance industry and the

development/construction industry but another three important areas fall outside these providing a complex set of links with a whole range of elements within each. These are: (1) the general public, the majority of whom have no direct contact with the planning process but live with its results; (2) pressure groups, both semi-permanent and informal; and (3) the contemporary ideological context which influences all government policies and practices and in this case determines the character of planning as a process and the outcomes desired of it. The latter is captured by the state, its policies and controls.

The public has links with the development system in three principal ways as:

- the user of its product although any direct influence on equitable access to it or its form and quality is limited;
- an influence on its processes via the democratic operations of the state, now marginalised to the freedom to comment after the event and limited right to appeal against its decisions; and
- a significant provider of development funding distributed mainly by the banks but lacking any influence over what is actually provided.

Public access to the development system is effectively restricted to lobbying undertaken by community and industry groups ranging from well-resourced organisations, now termed stakeholders, with easy access to influential bureaucrats to loosely organised resident groups usually relying on a few individuals and funded by donations but open to the inevitable accusation that they are unrepresentative. Industry lobbying has a long history of peddling myths about the malign influence of planning which sometimes appears to be repeated unchallenged in official documents (Booth 2003, NSW Treasury 2013). The access of developers using political donations to potentially influence decisions is now illegal in NSW although it continues to be of ongoing interest to the Independent Commission against Corruption (ICAC).

The provision of finance for development is dominated by the banks and to a lesser extent by the pension funds, a number of which are owned and operated by the banks (Millington 2000). At the same time as providing the finance required to initiate development, the banks are also the predominant providers of finance for purchase of the results of the development process. The absence of virtually any alternative supplier or tenure of housing, for example, in effect places funding organisations, notably the banks, in an oligopolistic position where their profit interests have a major influence on development outcomes. In such circumstances, those who have the power to condition the nature of housing investment are having a more significant impact on social issues and urban development than the planners (Rowley and Phibbs 2012).

The NSW Treasury has a profound influence on the development system by the fiscal policies it adopts, in particular in relation to taxes and charges affecting land and property which are crucial to the economy of the State. It also controls State funding of local councils (grants and contributions), forcing councils to depend on local rates (taxes) which are capped and user charges and fees. The effects of fiscal policy on the workings of the development system are highly significant but particularly complex; its mix of aims varying in tune with the political complexion of the Commonwealth and NSW State governments as well as the fiscal policies of the nominally independent Reserve Bank of Australia (Gurran *et al* 2012).

The NSW Department of Planning and Environment (previously Planning and Infrastructure prior to April 2014) is the department most directly concerned with the workings of the land use component of the property system. The ebb and flow of its intervention in the workings of market forces and thus its changing capacity to affect development outcomes is a major consideration. A number of other State government departments and authorities have responsibilities within the general ambit of land use planning and environmental management often leading to unnecessary complexity and delay (Gurran 2007). The mix of responsibilities has shifted with each new attempt at reform but continues to spawn ever more attachments such as the Planning Assessment Commission (PAC) and the Joint Regional Planning Panels (JRPPs) at the same time as attempting to streamline the assessment process.

Although the planning system appears to play a relatively small, although significant part, in the property development process (Newell and Steglick 2005) a large number of players are involved or have some relationship with its working-out. These can be divided into six identifiable groups with a particular interest in the planning process, each potentially desiring a different kind of certainty:

- participants within the process – directing, managing and operating it;
- organisations or individuals who, of necessity, make use of it to achieve an anticipated outcome;
- those on the periphery of the process who become involved intermittently to benefit from its workings;
- groups and individuals who wish to see amendments to its aims and processes;
- members of the community who are directly or indirectly affected by its processes and outcomes; and

- members of the community with little or no knowledge of planning as a bureaucratic process but who are indirectly affected by its outcomes.

There are obvious and perhaps crucial differences between the groups who are considered to benefit in different ways from the certainty claimed for the practice of planning. The most significant of these is between those who operate within its ambit and benefit directly or indirectly from it and the public who may have generalised concerns about their local environment, its future and their part in it but have little knowledge of or contact with the planning process. The necessity for planning to take account of these differences has had a significant effect on the relationship between its processes and the community. This has often resulted in acceptance of the involvement of the community in the planning process only in symbolic terms, something to be carefully controlled rather than actively encouraged (Gleeson and Low 2000b, Cullingworth and Nadin 2006).

Each of the main identified groups relates to a different kind of certainty, depending on their own interests or expectations. This is particularly clear in those groups with a direct relationship with the system even if their reaction to it is more complex. In the case of those with only a peripheral relationship to planning, it is more difficult to assess what kind of response they could be expected to make, if any. These could be expected to be more closely related to experience of the planning system itself or generalised responses to government activity relating to its validity and credibility. This relates to considerations of message and communication via the media.

Governments define certainty almost exclusively in relation to the provision of sufficient confidence to landowners, developers, and sometimes the community, that they will invest in development in order to achieve economic development and legitimate the planning process as a suitable means of doing this. This focuses predominantly on the provision of an effective and efficient process which provides rapid approval for development complying with a set of pre-determined rules. The role of the community, however peripheral, in validating planning has been considered in the past to be an important component in the justification of a government-initiated process which facilitates the accumulation of private capital as its principal objective (Reade 1987). This justification now seems to have limited relevance to concerns about the operation of the planning system.

3.3 Ideological context of planning in New South Wales

Planning as public policy inevitably operates within the prevailing political orthodoxy of the time. This can be conveniently encapsulated as a particular form of neoliberalism. The all-pervading concept of corporatisation characterises the way that governments now

operate within the neoliberal construct (Gleeson and Low 2000b). The planning process is being brought into line with the prevailing tendencies of governance within the neoliberal state.

The implicit goal at the metropolitan level appears to be the mobilisation of city space as an arena both for market-orientated economic growth and for elite consumption practices (Hackworth 2007). As a result, planning practice has become estranged from theory and divorced from any broad sense of the public interest. Planning and urban design have become tuned to economic and political constraints rather than being committed to change through progressive visions (Bunker and Searle 2007, 2009). Public-private partnerships have become the standard vehicle for achieving change, replacing the strategic role of planning with piecemeal deal making (Ernst and Young 2008, NSW Treasury 2009). Planning has become increasingly geared to the needs of producers and the wants of consumers and less concerned with overarching notions of rationality or criteria of public good.

In response to these influences, the characteristics of land use planning in NSW now include:

- obsession with global competitiveness and place competition;
- scepticism about sustainability;
- inability or reluctance to consider or discuss strategic alternatives;
- centralisation of decision-making – possibly contrary to basic neoliberal precepts but symptomatic of the anti-planning instincts of its conservative ideological strand;
- reinforcement of top-down processes of plan-making and development control emphasising the role of central/state government power even though this would again appear to contradict a principal tenet of neoliberal governance, that of smaller and less interfering government except when supporting neoliberal notions;
- development assessment undertaken by legally binding codification of controls and removal of discretion in decision-making;
- gentrification as a substitute for planned redevelopment of obsolete urban fabric;
- depoliticisation of non-market coordination and state regulation realised by the reduction in the consideration of community input and the preference for decision-making by contracted experts;

- use of seemingly neutral coded formats to undermine the basic social-democratic underpinning of the ethical and political dimensions of planning threatening its accountability;
- shifting political discretion away from local government and increasing the administrative discretion available to the Minister;
- use of technical documents to sell government policies using commercial techniques including slogans and marketing devices; and
- shifting responsibility for decision-making from local councils by the use of rigid templates.

  (Based on Gleeson and Low 2000b, Gough 2002, Cahill 2009, Allmendinger 2009)

These can all be framed within the construct of what might be considered to be neoliberal principles of planning where the focus is the hegemony of the market with a competitive state within an authoritarian setting, a minimal role for planners in decision-making, the orientation of planning on continuation of the market mechanism and where public interest is characterised as the market (Connell cited in Allmendinger 2009). A process focusing predominantly on the generation of economic growth inevitably moves power towards the source of responsibility for its generation, in this case the State government. Suppression of the role of local participants – councils and the community – inevitably follows based on the necessity to reduce developer uncertainty.

It can be argued however that the current planning system in NSW remains at some distance from the neoliberal ideal as, for example, its operation remains based on an increasingly strong central core where decisions are still made by State bureaucrats who in practice control the use of land essentially to the benefit of the market rather than allowing the free market to decide how this was to be achieved. Such a circumstance is acceptable in a neoliberal regime as this decision-making is orientated towards the consolidation of its notions, corresponding to its characterisation as a mix of free market and authoritarian tendencies. This might be considered to be pragmatic recognition that it is more effective to influence those with legitimate power to exercise it to advance the prevailing ideology, recognising the undoubted limitations of the market in this respect.

A more ideologically-pure construct would require abandoning zoning provisions, removing many existing planning restrictions and no longer relying on strategic and other plans. Private covenants would be required to replace conventional planning approval, insurance would be necessary for all private buildings to cover claims against the creation of negative externalities, while direct bureaucratic control would be still required in relation

to politically sensitive proposals in rural or environmentally sensitive locations (Jones 1982, Pennington 2002). None of these accurately characterises any component of the NSW system but describes, with some variations and a less than complete application, the current planning regime in Houston, Texas (Fisher 1989, Vojnovic 2003). Its claimed benefits are widely promoted by its proponents but its reliance on the peculiarities of the available state laws and the powers available to various authorities only relevant to the Texan system of governance indicate that this model is not widely applicable elsewhere. It is also unlikely that the radical restructuring necessary to achieve such a planning regime could ever be implemented as it would remove the protections enjoyed by influential groups under the present system.

While it has been challenged as a result of massive market failure in recent years, the core ideas of neoliberalism, its supports and the assumptions attached to it are far from reaching their demise (Peck, Theodore and Brenner 2012). Its central ideas of individualism, market-first, property rights and small government relate it to other liberal ideologies and ensure that it will remain a powerful force that will shape urban life in the future (Hackworth 2009). A system where any failures, however catastrophic, can be blamed on those who seek to control its excesses while at the same time, benefiting elite groups will be difficult to eliminate or even adjust.

Whatever the internal contradictions affecting its beliefs and its profound fundamental flaws, the continuation of government policy generated and implemented by a bureaucratic cadre inculcated with notions such as the perfection of the market (NSW Treasury 2013) and hence the need to seek and perpetuate small government, creates a tension between planning as a regulator of the market at the same time as a promoter of economic growth via the processes of that market. It is not possible to reconcile these two notions (Harvey 2005). One will need to give way to the other unless the control of the system can be orientated towards the facilitation of the development believed to generate growth.

The implementation of neoliberal-based prescriptions has been variable rather than comprising a clearly thought-out overall strategy. One area which has exercised considerable activity is in the application of the principles of competition policy which is seen as one of the core concerns of neoliberal governance. The principal recommendations of what is known as the Hilmer Report, included bringing all commercial activity in Australia within the scope of the Trade Practices Act; prevention of those enterprises with natural monopoly power from abusing it; removal or critical review of impediments to competition to ensure that their costs were exceeded by public benefits and expanding the role of the Trade Practices Commission (Hilmer 1993).

Gleeson and Low consider that the consequences of the implementation of this report's recommendations comprise nothing less than a major revision of Australian democracy. This view is based on the definition of market legitimacy depending on the principle of *consumer sovereignty*: firms competing to serve consumers of goods and services while that of the state depends on democratic choice through political processes. The proposals in the report effectively now ensure that the principles of the market are to govern the activities of the state (Gleeson and Low 2000b). The underlying definition of the public interest is considered to be consumer sovereignty achieved by efficiency and economic growth (Hilmer 1993). Planning in the public interest may now become defined in terms of contribution to competitiveness as much as to social, heritage or environmental factors (Dore 1997). This is now to be applied universally, including within government.

The processes of planning have been refocused to date, although not transformed, in a mainly haphazard series of changes which have taken place since 2005 although some of these represented the continuation of processes initiated earlier. In particular, two slowly emerging but familiar trends can be recognised which have taken place over many years. These are the continuing concentration of power for planning matters within the Department and its predecessors with a subsequent reduction in the discretion afforded to local councils and a continuing apparent lack of interest within the Department in strategic plans as a key component of the planning process in contrast to an emphasis on major development projects and their assessment. Both of these are symptomatic of an increased emphasis on short-termism and the simplification of approval procedures for the projects which have now become the focus of the planning system.

> *. . . you know, there's a lot of us in here who think that the Department should be largely strategic with some functionality around the big important stuff . . . the grunt should be here in strategic planning about real places . . . but what happened over the preceding 10 or 15 years was that it became reversed, there was the little hangover of strategic; a huge area was massively populated by experts doing a damn good job processing refineries and coal mines and all that, we didn't know what was happening here, we didn't understand the processes necessarily either because they were being built, delivered, finessed, changed, improved upon, run-again and so many of us on this side actually couldn't have answered a question about it.*
> (Senior Department strategic planner 2011)

The preparation and publication of a substantial number of submissions to the NSW Planning Review (Property Council of Australia 2011, Planning Institute of Australia 2011, NSW Treasury 2012) together with a number of other, although not directly related reports (Australian Government Productivity Commission 2011, Property Council of Australia 2012a), has provided an opportunity to look at a range of divergent views on the character of land use planning in a modern economy. The subsequent publication of the

Green and White Papers has also provided an indication of the weight assigned to the various views expressed by government together with those of the organisations and individuals who responded to the proposals set out in those documents.

The issues which seem to energise the authors from their varying perspectives (Recsei 2012, Housing Industry Association 2012, Urban Taskforce Australia 2013) relate to certainty; transparency; complexity (reduction of); competing public interests; reduction of discretion (flexibility); accountability and efficiency (speed of decision-making). Much attention is given to an improved focus on the importance of the strategic plan as a source of certainty (Planning Institute of Australia 2013b) with some claims that it should be legally enforceable; coupled with improved community consultation at this level seen as a means of improving the resulting efficiency of the system by removing subsequent sources of conflict – the top-down approach.

In general, the majority of the associated reports influencing change (Australian Government Productivity Commission 2011, Property Council of Australia 2012) follow the overall tenets of neoliberal governance, supporting a planning system which processes development applications effectively and rapidly while leaving all aspects of the kind of development control attributable to the requirements of the plan to the market. The submissions of the professional bodies claim that the culture of planning practice has deteriorated with an over-emphasis on process and a loss of vision requiring a refocus on strategy and the depoliticisation of decision-making (Planning Institute of Australia 2013b). These views appear to have gone some way in influencing the current proposals for change.

3.4 Aims of planning in New South Wales

The content of planning, as distinct from its processes, is conventionally found in its stated aims, usually in the form of objectives. Traditionally, these have focused on societal improvement loosely identifying the current government's prevailing ideological concerns and intentions. The planners' role was to formulate policies and actions aimed at achieving these aims using the means available to them rather than defining what was to be achieved; that was for the politicians to decide. It might therefore be supposed that the clearest and possibly, most succinct contemporary definition of the aims of planning would be found in those set out in the White Paper and the draft Bills recently made public. This cannot rely merely on an examination of the objectives that the new Planning Act will promote as stated in the White Paper and repeated in the Bills, but will need to consider whether the powers to be made available through the new Act will be capable of achieving the claimed outcomes. It is irrational to pursue aims which cannot be achieved by the means available.

The objectives to be promoted by the new Planning Act comprise a mix of statements essentially setting out the job description for planning with imprecations to carry these activities out more effectively than at present by timely delivery of opportunities for employment and housing; coordination, planning, delivery and integration of infrastructure; and efficient and timely assessment of development. These responsibilities will be shared by all levels of government operating under the overall aim of achieving economic growth and environmental and social wellbeing achieved by the delivery of sustainable development and the provision of early opportunities for community participation (NSW Government 2013b, 15). The balance is clearly focused on process; content is defined by vague terms such as wellbeing.

These may be considered tantamount to the aims of the Act. It can however be presumed that the purpose of the new Act is encapsulated in the single key objective in the White Paper (15). This focuses on the achievement of sustainable development from which all the other benefits are deemed to flow, predominantly to the economy but at the same time protecting the environment and enhancing *people's way of life;* another vague concept.

However, sustainable development, as defined in the White Paper (NSW Government 2013b, 16), is to be achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development – the business triple bottom line. Crucially the economic component of this definition is the promotion of the development of the economy and the wellbeing of all communities by facilitating housing, business and employment and other forms of activity and improving productivity. The social component is seen as merely facilitating housing that meets the needs of the whole community, creating a high quality built environment that promotes the health of all communities and ensuring accessibility to services and employment opportunities. This has little recognisable connection to any accepted definition of sustainable development relating more to the recent shift to one combining economic sustainability with the environment.

There is little consideration of the intended aims of planning in the White Paper. What there is comprises a list of ten principles of the proposed strategic planning framework (NSW Government 2013b, 63). Two of these focus on strategic planning outcomes which might reasonably be considered to correspond to the aims of the process. The remaining eight principles are focused on the processes of strategic planning. Those relating to outcomes – what the strategic planning framework is focused on are merely a repeat of the key objective quoted previously.

> *Strategic plans should promote the state's economy and productivity through facilitating the delivery of housing, retail, commercial and industrial development and other forms of economic activity, by way of sustainable development - Strategic planning should integrate economic, environmental and social considerations in decision-making to enable development that is sustainable.*
>
> *Strategic plans are to be integrated with the provision of infrastructure - All strategic plans are to be prepared with an understanding of existing and approved infrastructure priorities and infrastructure plans should be informed by strategic plans.*
> (NSW Government 2013b, 63)

The second of these merely points out one of the continuing failures of the development process in NSW. It is the failure of government policy making and development coordination rather than that of strategic planning *per se.*

The first however states clearly, perhaps directly for the first time, that the principal aim of planning in NSW is to assist the economy. This will be done by the effective management of the property industry. Planning has always been orientated towards that end but now there is little pretence that this is directly aimed at the achievement of any kind of community or social benefit. The product, it is claimed will be sustainable because economic, environmental and social factors have been considered in the procedures relating to its generation, assessment and implementation. This will, by definition, be beneficial to all as claimed in the single key objective noted previously.

There are three fundamental and long running problems with the operation of the land use planning system which have either resisted attempts to overcome them or have been imposed on it by a changing ideological context. These are:

- The Department's relative weakness within the NSW State bureaucracy and its inability to prioritise the activities of the relevant spending departments.
  (Bunker and Searle 2007, 2009)

- Weak linkages between the three main components of the development process where the Department has an interest – the Department itself; local planning authorities; and the development sector which emphasise the difficulties in effectively translating central policy aims into relevant outcomes.
  (Troy 1998, Williams 2007)

- Virtually total reliance on the private sector to implement the outcomes of the planning process allowing market influences inevitably to predominate.
  (Reade 1987, Bunker 2013)

Each of these has a negative impact on the perception of any confidence in the planning system which might be considered to be a synonym for certainty.

While the Department claims to be the lead agency in advising the Minister on strategic land use planning; major development and infrastructure projects; and diverse housing and employment opportunities (Department of Planning and Infrastructure 2011a, 6), the planning agency, does not have the central function of coordinating everyone else in the State government. The Department is not structured to be the central controller of urban development and its implementation, whatever it might attempt to suggest. It has the power to make plans and manage the control of development as well as other functions such as the acquisition of land for specific purposes but does not have the authority to control other, more powerful government agencies. This is a major problem which has plagued implementation over the life of the planning system, inevitable since planning claims such a wide remit while lacking any commensurate ability to direct the necessary investment. The activities and achievements of the Department can only be realistically considered within such a constraint.

While it is claimed that the planning system determines all land use, the whole of the development value accrues to the developer/landowner – this suggests that it is not planning that determines the pattern of development at all, but that on the contrary it is the market – but its extent is not known (Pickvance 1982, Reade 1987). There is clearly a symbiotic relationship between planning and capital in that planning removes a major area of risk from development by providing a framework which applies to all wishing to develop while the development industry provides the physical environment which justifies the activities of government. But capital always has the advantage whatever controls are applied in that it can have a significant influence on the nature and substance of those controls and whatever the plan proposes. If there is no benefit to the developer or the risk is considered to be too great, nothing will happen. Even so government continues to support planning as an assumed manager of private sector development.

Policy instruments available to planners to effect change are in practice, limited. The first, statutory control over the development of land is essentially negative; it is efficient in preventing what might be considered to be undesirable, but is powerless in itself to achieve what might be considered to be desirable (Booth 1996).

> *If the planning powers involved in plan preparation and plan implementation (development control) are essentially powers to prevent rather than powers to initiate then the actual development which does take place depends on the initiators of development or developers . . . and not solely on the preventers of development, the physical planners.*
> (Pickvance quoted in Taylor 1998, 103)

The second is the influence that planners can exert to change the planning process itself by persuasion or by making explicit the potentials and possibilities enhanced by that change or the undesirable consequences of continuing with current procedures. The third is by direct manipulation of public investment particularly that relating to the development of infrastructure. However, the power to exercise these functions is usually in the hands of other, often more powerful, parts of the government bureaucracy. Constant imprecations by the Department to better integrate infrastructure and development indicate that this is a long term concern which still requires attention. Common purpose across all the dispersed agencies of government with an interest in urban development is however unlikely to be ever effectively achieved.

Urban policy is one component of public policy generally. Whatever it may think and claim about its own pretentions and abilities, the planning profession is not in its own special category of public policy activity (Planning Institute of Australia 2010, 2013a). The narrowness of the powers given to land use planning agencies and the meagre resources available are illustrative of their relative influence within urban policy-making in NSW. Economic policy tools, particularly in that key area of planning interest, housing, are much more significant than the allocation of land for those uses in the plan and have a far greater impact on how effective such provision is (Gurran *et al* 2012).

However, claims made for the achievements of the Department are sometimes unreliable. This can be gained from the language used in its annual reports; documents required by legislation. These would be expected to accurately reflect the activities of the Department over the previous year without resort to hyperbole although it could be expected that these would be presented in the best possible light. In the section entitled *Boosting housing supply,* it is claimed that the Department:

> ***Achieved*** *the highest rate of home approvals and completions in a decade with home completions up 35 percent and approvals up 17 percent in Sydney*; and
>
> ***Made*** *NSW the leading state for housing activity, with NSW growing its housing market faster than all other states.*
> (NSW Department of Planning and Infrastructure 2013e, 6, emphasis added)

While the Department has been given specific responsibility for housing supply, it has neither *achieved* nor *made* the claimed outcomes. That occurred predominantly as a product of the market and ultimately the finance industry; the Department did not even process most of the development applications. It may have been responsible for facilitating the process in a general sense, but most of the bureaucratic effort will have been expended by various local governments. These claims could be seen as a symptom

of believing that the preparation of a policy or a plan results in inevitable and hoped-for outcomes.

Similar claims are made in other recent annual reports produced by the Department. The use of language is more restrained here perhaps illustrating the relative weakness of the mechanisms available to achieve the stated aims (NSW Department of Planning and Infrastructure 2011a, 3). These include under the heading *Delivering housing and jobs,* facilitate; encourage; made recommendations; generating capacity and coordinated; all suggesting the limitations of any powers available even though the heading might suggest otherwise. Policy is encapsulated as facilitation and delivery by the establishment of housing targets which the local authorities will be held responsible for achieving (NSW Government 2013b, 70).

It could be argued that the apparent presence of certainty within planning is seen by current governments as a justification of planning in much the same way as its supposed ability to improve the urban environment for the public good was used in the past (Campbell and Fainstein 2011). This justification could more simply and possibly more plausibly be seen as reflecting the changing context within which planning, as a government activity operates. While an emphasis on economic development might be considered acceptable as an aim of land use planning, the promotion of certainty in the propositions included in the plan and the effectiveness of the actions necessary to achieve them might be considered to be more justified in guiding developers decisions and ensuring the general public that their rights are protected. The certainty that a view will not be obscured, land values will not be eroded or a fragile environment not despoiled is still an important consideration. One problem for the planning authority is the means of delivering the degree of certainty that users of the system as well as those affected by its decisions, require.

3.5 The land use planning system

Land use planning in NSW is characterised by two sets of intertwined tensions; those between the State and local governments within the planning process; and those between planning, comprising both State and local interests, and the third dimension of the process, the private sector development industry (Searle 2007, Gleeson, Dodson and Spiller 2010). The first of these is essentially internal as local government in Australia has no standing separate from that of the State, only that determined by the State. It occurs as a result of a fractured relationship where local government is considered to be parochial, highly politicised and lacking in strategic concerns or understanding while the State government is accused of generating policy independent of consultation with little regard for local conditions (Searle 2003, 2005). The other relationship, often equally fraught, is

between the local councils and their communities which is sometimes played out within the planning process but is not fundamentally related to its operation (Stein 1998, Gleeson and Low 2000b). There appears to be little prospect of improvement in these relationships in the absence of a major reform of governmental arrangements and responsibilities.

The hegemony of the strategic plan and the restrictive nature of the template-based local plans (SI LEPs) appear to result in problems; the process seemingly designed to provide rigid control rather than facilitating any attempt to address planning issues (Ruming 2011b). Difficulties appear to relate to the basis of many of the policies generated by the Department which while appearing to address a specific problem either create another one elsewhere or are effectively impossible to implement. In such cases, those preparing these initiatives have very limited experience of the issues relating to implementation which, in any case is not their responsibility; that lies with local government on the whole, who then have to struggle with the consequences.

> *The changing nature of the process interpreted by the Department is actually the opposite of the innovation which you would want to see in the response to the issues . . . so you're saying (1) it's not helpful and (2) it's positively unhelpful. They are only interested in trying to force it into the standard template.*
> (Local government senior planner 2011)

Overcoming the void between the strategy and the SI LEP, which provides the statutory force available to councils, requires considerable initiative on the part of local government which is often not supported by the State government. This problem is particularly acute in the older developed urban areas where significant redevelopment will be necessary to accommodate the increased population and job numbers required by the strategic plan at the same time as replacing a good deal of urban fabric rapidly reaching obsolescence (Bunker and Searle 2009). This cannot be effectively undertaken using existing planning powers and would require decisive State government intervention on a considerable scale rather than relying on a combination of upzoning and exhortation. A number of the relevant issues, such as the reform of the *Strata Title Act 1973*, for example, are outside the ambit of planning but would have an important impact on the ability to effect the changes necessary (Easthope and Randolph 2008, Easthope, Randolph and Judd 2012).

In circumstances where implementation of planning outcomes is crucially dependent on the private sector, combined with calls for greater efficiency in purely economic terms, planners find themselves in situations merely requiring them to determine compliance of development proposals with a range of predetermined controls having a minimal relationship with policy aims. Apart from the facilitation of development, the purpose of planning as public policy is not easy to identify.

> *I think they* [the Department] *are much too process driven in terms of both the approval and the strategic and assessment process. They are not driven by outcomes.*
> (Planning consultant 2011)

Additionally, this relationship makes it difficult to reject development which might be considered to impose a net social cost on the community which, for example, the Barker Review of the British planning system indicated should be seen to be one of the key roles of planning (Barker 2006b). Very few assessments are undertaken on such a basis in NSW except perhaps in highly charged examples such as when large-scale open cut mining is proposed in a sensitive location (Planning Assessment Commission 2013). Even here, this only appears to occur when the PAC is called on to adjudicate between the claims of two opposing power groups. However vague notions such as the public interest remain as a consideration to be taken into account during determination of development applications under Part 4 of the Act where it remains a category of inclusion or a general sentiment rather than a specific consideration (Stein 2008). It still seems to appear rarely when reasons have to be found for refusing a major proposal.

The Act comprises 13 parts which have been amended and expanded over the years. The key sections in relation to plan-making and development assessment include the definition of the functions and responsibilities of the bodies responsible for planning, the processes and requirements of the planning instruments and the form and content of development assessment including environmental impact assessment.

The Act is supported by the *Environmental Planning and Assessment Regulation 2000* which includes additional operational details relating to its provisions. There are several other pieces of legislation with relevance for land use planning in NSW relating to plan-making and development assessment. These relate mainly to environmental and heritage issues under the jurisdiction of other State departments and agencies.

Three types of statutory plans could be produced under the Act: state environmental planning policies (SEPPs), regional environmental plans (REPs) and local environmental plans (LEPs), known collectively as environmental planning instruments (EPIs). These derive from strategic planning activity, undertaken predominantly by State government and to a limited extent by local government authorities containing both policy and planning controls and taking the form and function of statutory instruments used as part of development control. Some SEPPs and REPs (now superceded) provide strategic content with guidance for the production of the more specific local plans, both LEPs and their associated development control plans (DCPs). In terms of development assessment and control, the provisions of SEPPs and REPs override the controls contained in LEPs; those in

the DCPs are advisory only, lacking statutory weight. They have however been interpreted in a rigid fashion by some councils following the example set by the Land and Environment Court until the original intention of separation was reinforced by an amendment to the Act in 2012 (NSW Department of Planning and Infrastructure 2013g).

The policy and procedural context is further complicated in NSW by the use of Ministerial Directions made under the Act, departmental practice notes and circulars and specific planning guidelines including policy direction and advice concerning various codes which need to be taken into account during planning decision-making through statutory obligation via the provisions of an EPI.

Local Environmental Plans (now SI LEPs) are the main statutory instrument for the regulation of land use and development within a specific local government area. These set out where particular activities should occur within this area and specify the objectives, standards and criteria for the assessment of development and determine its acceptability. The introduction of the legislative capacity to produce standardised local and other EPIs (standard instruments) in 2005 provided direct State government control over the detailed form and content of LEPs and direct ministerial intervention in LEPs is now universal, aimed at the achievement of consistency both in relation to State policy and between different LEPs by attempting to make their provisions less likely to provoke a challenge in the Court (Ruming 2011b). However, the standard instrument has its drawbacks.

> *The focus on consistency rather than flexibility to accommodate local differences indicates that the LEP is merely seen as the legal instrument to permit economic development to take place and little else.*
> (Local government senior planner 2011)

The preparation of the SI LEP is the responsibility of the relevant planning authority which is normally the council for the local government area to which the proposed instrument is to apply but can also be the Minister or any other person or body directed by the Minister to do so. The authority, prior to the making of the instrument is required to prepare a document that explains its intended effect and sets out the justification for making it, termed the planning proposal in the Act.

3.6 Components of the planning system

3.6.1 Environmental planning policy

Policy is currently expressed in SEPPs which provide a legally enforceable mechanism for addressing matters considered to be of State-wide significance applicable to plan-making and to the development assessment process. These provide direct state intervention in the operation of the system allowing specific issues to be addressed as they arise, or appear to

require attention or the need to change procedural requirements without the need to amend the Act becomes necessary. This level of administrative discretion is appealing to governments (Tewdwr-Jones 2002) and has allowed a multitude of changes to be made in a somewhat *ad hoc* manner, in some cases creating confusion when it was necessary to determine which policy was the more significant in specific cases. SEPPs originally prevailed over REPs, which have now been either discontinued or subsumed into the higher tier of policy and still prevail over LEPs in the event of inconsistency. All SEPPs remain a relevant consideration when new EPIs are made or when developments are assessed under section 79C of the Act.

The proposed changes to the planning system as set out in the White Paper (NSW Government 2013b) envisage a recalibration of policy content by the preparation of what are to be termed NSW Planning Policies, a comprehensive, yet succinct suite of policies to guide planning across the State. These will supercede the current SEPPs and other policy aims in place, setting out objectives, policy directions and delivery obligations to guide the preparation of the subsequent hierarchy of lower level plans. The document will incorporate, where applicable and relevant, the strategic elements of existing SEPPs, section 117 Directions and other provisions under various instruments. While this follows the model established by the recently instituted *National Planning Policy Framework* in England (Department for Communities and Local Government 2012a), early indications are that it could be more useful than the series of motherhood statements purporting to provide a framework for sustainable development as contained in that document. However, succinctness requires accuracy and clarity of expression.

The clear elucidation of policy remains a key consideration if the planning system is to generate the confidence required of it. This becomes more significant if the drive for simplification and efficiency which is evident in the changes proposed results in an intensification of concern for the meaning of the policy statements and the accuracy of the language used to define them. A persistent difficulty has occurred in the translation of policy aims into specific physical outcomes within the planning hierarchy; it is not clear if the changes envisaged in the new legislation will improve the relationship between intent and outcome even though this remains an important potential source of certainty in the planning system. This is considered in more detail in Chapter Six.

3.6.2 The Strategic plan

The regularly produced metropolitan plans for Sydney would appear to occupy a central place in the planning system in NSW; however such a plan does not achieve a place in *Part 3: Environmental Planning Instruments* in the Act which according to section 24(2) are

restricted to SEPPs made by the Governor under Division 2 and LEPs made by the Minister (or delegate) under Division 4.

Yet, the Metropolitan Plan is intended to provide a framework for public policy to guide and constrain planning decisions made by local government. This ensures that decisions made by local authorities give due reference to wider metropolitan interests as well as local concerns. At the same time its purpose is to provide an overall basis for the provision of urban infrastructure by government agencies and the private sector and the development of land in a predictable manner (Murphy 2007). Its lack of statutory significance also recognises its weaknesses in the provision of the level of detail required to manage the complexities entailed in the development of a major city and its inability to respond adequately to local differences. This should be the responsibility of the SI LEP but the obsession with consistency has reduced its ability to achieve this in any effective manner (Ruming 2011a).

Prior to 1995, Metropolitan Plans were essentially guides for development setting out long term generalised distributions of land uses focusing mainly on employment locations. These are not specifically focused on centres, existing or projected, and the objective is to achieve an equitable distribution of employment and job variety across the region. Employment is still considered at this period to be focused on manufacturing (McGuirk and O'Neill 2002, McGuirk 2005). However, while the policy seeks to achieve early employment growth in newly developing areas, there is no attempt to restrict or constrain further growth of the CBD, quite the opposite. Neither has there been any real commitment to investment in the vast area opening up for development to the west and south west of Parramatta apart from some improvement of infrastructure and reliance on one-off projects such as Badgerys Creek airport.

The method used to determine those areas where future development could take place is simple, identifying those locations free of what were termed primary constraints and then considering two basic alternative strategies: concentration or dispersal within essentially the same general location (NSW Department of Environment and Planning 1988, 33). The only real differences relate to the reduced use of land by the former and the overall notion that concentration is more efficient (less costly?) than dispersal (continuation of the existing pattern of development), provision of service infrastructure would be less costly and its environmental impact would be less, effectively consolidating the obsession with the compact city (Bunker and Searle 2007, 2009). The issue of most concern relating to the concentrated option was seen as the need to maintain the necessary supply of land for development which would inevitably be more costly than that accommodating the more dispersed strategy.

> *The planning system must clearly identify appropriate locations for specific development and speedily expedite approval to achieve the right outcomes because planning must efficiently funnel development into the right place.* (Department senior policy planner 2011)

Correctness of outcome is expanded here to include the most appropriate location for the intended development. The responsibility for this is split three ways: the strategic plan and the zoning instrument determine location while the private sector effectively determines the volume and character of the development via the market in the short term. If the development is not viable at this location, it does not eventuate. It is not clear in such circumstances how the planner can be confident about *the right place* unless the plan is closely aligned with market requirements. At the same time, an appropriate fit between the development envisaged and the conditions prevailing on the site and its surroundings needs to be determined.

The 1995 strategy introduced what the document describes as *whole-of-government integrated urban management* seen as a corporate plan of the whole government claimed to be acting via new processes, accountable action plans for all State agencies involved in urban development and stronger links with local government and the community. It also placed an emphasis on process as well as outcome (NSW Department of Planning 1995).

Although this plan represents the first concerted effort to include a corporate approach with recognition of a greatly increased role for the private sector, it retains a set of basic goals which could reasonably be considered to characterise the values of the previous era, particularly those of equity and environmental quality, the former defined in terms of fairness and equality of opportunity and the latter retaining a focus on the principles of ESD (Commonwealth of Australia 1992). The goal of efficiency is also equated with effective provision of land uses and related infrastructure rather than speed of decision-making. Each of these would become redefined in future to reflect the changing ideological context of the plan. This is examined in more detail in Chapter Four.

The Metropolitan Plan of 2005 was the first of a trio of plans culminating in the current draft of 2013 which clearly establishes a focus on economic growth and competitiveness and the start of an obsession with global status demonstrating its compliance with some key neoliberal principles (NSW Government 2005). The focus is firmly on private enterprise as the main economic driver and even the goal of fairness is defined merely as easy accessibility to employment locations. There are no objectives or actions relating to issues of equity or sustainability even though fairness and protection of the environment, which might be considered to be one component, albeit a weak one, of sustainability, are

included as key aims. Community consultation appears to be considered but only in a cursory manner (Bunker 2007).

The plan introduced the concept of a focus of employment growth in centres including 28 existing locations and eight termed emerging strategic centres. These were anticipated to accommodate an increase of some 278,000 jobs by 2031, 60,000 (21 percent) of which would be located in the CBD. Some of the centres nominated would be expected to accommodate very large percentage increases.

As a central plank of the plan, this strategy created a number of problems, in particular the maintenance of a balance between continuing job growth in the CBD, which is an objective of the plan, in order to maintain or preferably improve international competitiveness and generating new job opportunities in centres where employment increases remain stubbornly difficult to achieve. There are also contradictions in the planning strategy which were not to be adequately addressed in the later versions. In particular there is a serious mismatch between the focus on nodal job growth and the provision of a supporting transport infrastructure. The effect of this failure has, in part, resulted in the continuing focus on CBD growth and the related reduction in growth in other centres, now apart from that in Parramatta, Liverpool and Penrith (NSW Government 2013a).

The notion of certainty was hardly present explicitly in the Sydney Metropolitan Plans until the 2005 version where it is used to support the policies and actions being proposed as a means of achieving the stated objectives of the plan (NSW Department of Planning 2005). The message is simply that if the aim or objective set out is achieved by the proposed policy or action, subsequently the degree of certainty experienced by developers, the community or a particular group within it will increase (Bunker and Searle 2007). These are in all cases expectations that this response will occur as no attempt is made to demonstrate a causal relationship between a currently less certain circumstance and the proposal attempting to improve it. The increased protection of environmental assets for example is claimed to give potential investors greater confidence (certainty) to invest in rural development. The mere production of the plan itself is considered to be capable of creating certainty. The plan implies a kind of commitment but the outcome cannot be guaranteed.

The following Metropolitan Plan published in 2010 (NSW Department of Planning 2010b) is equally optimistic in its ability to produce certainty although the most recent draft version of 2013 (NSW Government 2013a) has become much more reticent. This could be the

result of a considerably reduced level of scope and confidence exhibited as a whole by this version.

The strategic (metropolitan) plan is considered to be the means of providing the policy and spatial framework for the future development of Sydney together with the relevant SEPPs providing the overall policy context. This is made more complex by the necessity for councils to prepare a Community Strategic Plan (CSP) as part of the management and reporting procedures required in the *Local Government Act 1993.* These are part of a suite of documents produced by all councils and sometimes called the Shire Plan or a local strategy. These cannot depart in any significant way from the policies and proposals in the Sydney Metropolitan Plan and it appears likely that they will now be merged into the new planning framework although this remains vague at present (NSW Government 2013b). While planners in local government prepare specific strategies for residential and employment land in their area for example, these must comply with the policy requirements of the strategic plan and the long term development targets contained in the Metropolitan Development Program (MDP). They are also consistent with the distribution of land use zones included in the SI LEP and contain virtually no independent local policy content. The notion of certainty within the context of the strategic plan is considered in more detail in Chapter Four.

3.6.3 Assessment of development

Historically, the State government has delegated the responsibility for the assessment and determination of development proposals, with some exceptions, to local government. Following the initiation of the *Planning Reform Program* (NSW Department of Infrastructure, Planning and Natural Resources 2004) responsibility has been divided between the State, in the form of the Minister for Planning (now also including Environment since early 2014) to assess those proposals considered to be of state-wide significance while the remainder are assessed by the local councils. This has inevitably resulted in tension between the councils and the community on the one hand, especially in circumstances where councils have to respond to central policy initiatives which can be seen as overriding local prerogatives and with the State government on the other, over the perceived removal of councillors' responsibilities under the rubric of depoliticisation (NSW Government 2012b) and the continuing shift of discretionary power to the Minister (The Law Society of NSW 2012, 2013).

One of the aims of the changes has been to simplify the system to increase its efficiency. However, the results of the changes implemented over the period from the perspective of 2005, would suggest that the system as a whole has become more rather than less complex (Ruming 2011a, b). This may not necessarily be the case for an individual seeking approval for a relatively simple development but rather the fact that more planning

activity has to take place. Certain parts of it may be simpler, particularly in those areas where policy was previously added in an *ad hoc* fashion but there are more separate activities going on presided over by more, often anonymous, groups and individuals, sometimes operating on a privatised basis. Inevitably, more planners or more individuals acting within the planning system are required. Despite reform initiatives, the planning system remains fragmented and complex (Gurran 2007).

The most significant of the changes and modifications to the planning process relate to:

- Introduction and expansion of the role of private sector certifiers of some development proposals and subsequent building work – in some cases, councils also provide these services on a fee-paying basis.
  (Williams 2007, Building Professionals Board 2011)

- Introduction of the standard instrument LEP (SI LEP) including significant reduction in the number of zones, and standardisation of zone objectives, descriptions and definitions of development type. This is claimed to have reduced the number of LEPs from about 5,500 to some 200; reduced the number of land use zones from 3,100 to less than 50 (ultimately to 34); and reduced the number of development definitions from 1,700 to about 300. In practice, the local planning authorities had considerable difficulties in achieving the necessary accreditation from the Department.
  (Ruming 2011a, NSW Department of Planning and Infrastructure 2011c)

- Extensive application of delegated responsibility to notionally independent groups of specialists and planning professionals within local government authorities.
  (NSW Department of Planning and Infrastructure 2012b)

- Establishment of the Planning Assessment Commission (PAC) as a statutory body with wide powers to determine State significant development, review any aspect of such development and provide independent expert advice on planning matters when requested by the Minister.
  (NSW Planning Assessment Commission 2009)

- Introduction of the *Gateway* process in relation to the preparation of SI LEPs where an initial assessment by the Minister of the suitability/viability of the *planning proposal* is undertaken. If the proposal is allowed to proceed, the Minister has wide discretion over the subsequent processes including the level of community consultation required, if any. *Pre-Gateway* reviews were subsequently introduced allowing the proponent to seek a reconsideration of a council decision by the PAC.
  (NSW Department of Planning and Infrastructure 2012b)

- Creation of Joint Regional Planning panels (JRPPs) to determine regionally significant development applications based on the assessments undertaken by council planning staff.
  (NSW Department of Planning 2009c)

- Establishment of UrbanGrowth NSW as a government initiative specifically to drive development investment by actively addressing market failures and regulatory barriers inhibiting the delivery of housing. This operates under different legislation but is intimately involved in the delivery of planning outcomes.
  (NSW Department of Premier and Cabinet 2013)

Heavy reliance on delegation of powers does not necessarily improve community confidence in the veracity of the procedures involved when the membership of groups with considerable administrative discretion is made up of individuals with close links to the present and previous State governments including a former long standing Director-General of the Department of Planning.

> *Transparency is an interesting issue which only came to prominence because some developments were assessed under Part 3A* [now repealed] *which were not considered to be necessary by the community. So we now have the PAC which is perceived as providing a level of separation from the Minister, or at least sold as such. But look who is on the PAC.*
> (Planning consultant 2012)

The planning reforms enacted in NSW over the past few years have sought to achieve consistency in planning policy formation across the authorities responsible for plan-making and development control in order to increase certainty within plans and policies (NSW Department of Planning 2009a, 2010f). Overall, policies have been formulated at State level and implemented in general conformity with these requirements by local governments across the State. There have been some isolated attempts to resist locally controversial policies, particularly in locations where proposed development intensification has been fought on amenity/heritage grounds. In the event, such revolts have been effectively put down by the exercise of the power of the State (Ruming and Houston 2013). As a consequence, there is little policy-making at a local level if this is counter to or is inconsistent with State priorities. The introduction of standard templates for LEPs and DCPs has further diminished any opportunities for local variation.

> *Legal input has not been about identifying substantive issues but a proof-reading service so that the documents are appeal-proof which in theory removes risk from the councils. But the rewriting has been done by people with little or no knowledge of planning. As the achievement of a perfect product is impossible, another level of interpretation is introduced which is of no assistance in the production of useful and attractive places.*
> (Local government chief planner 2012)

Proposed development (DAs and CDCs) is assessed under Part 4 of the Act on the basis of six different types, two of which (exempt development and prohibited development) are inevitably excluded from formal consideration. The remainder are divided between those assessments undertaken by local planning authorities, making up the majority and the larger and more complex proposals normally assessed and determined by the Department. The main channel for assessment, based on consideration of the so-called merit of the application involves assessment by council planners while determination is undertaken by a variety of groups. Code-based assessment is not currently included in these categories, suggesting that all proposals not covered by the other categories are assessed on a merit basis. This assumption is examined in more detail in Chapter Five.

There were 90,310 development determinations (DAs, s96 modifications and CDCs) completed in NSW in 2012-2013 (NSW Department of Planning and Infrastructure 2014). Council staff determined 77.8 percent and councillors 2.9 percent of DAs and CDCs; panels, either IHAPs or JRPPs, determined 172 (0.2 percent) of the total applications. On this basis, the decision-making process can hardly be considered to be beset by political considerations at the local level.

> *Assessment is very regimented, with process and time limits in addition to the rules. The emphasis is simply on getting the DA determined as soon as possible which can lead to problems; mistakes are made in rushing things; some issues may be overlooked.*
> (Local government junior planner 2012)

> *The emphasis is on speed of processing* [of DAs] *and the preparation of statistics to prove it.*
> (Local government DA manager 2011)

Local councils provide a very high approval rate using a process mainly relying on delegated powers where the professional officers determine the majority of applications; in many authorities the councillors have no direct role in this process. Panels are also widely used covering all Sydney councils either established by the councils themselves or in regional groupings established by the Department. Overall, the perception, widely reported that the process of obtaining a development approval in NSW is fraught with uncertainty (Urban Taskforce Australia 2010b, Planning Institute of Australia 2013b) cannot be supported by this evidence. Indeed it would be very unlikely that the current rate of approval which has remained stable since the annual data were first published in 2005 could be increased at all by changes to the process (Gurran *et al* 2012). It might be possible to improve other aspects of the system such as achieving a reduction in the average time needed to reach a decision. However, such a focus would introduce other problems which could have a negative effect on the process. While recognising that

councils will be tempted to manipulate the data to support their claims for efficiency, it is difficult to refute community perceptions that the planning system is predominantly focused on the facilitation of property development (Better Planning Network 2013). Indeed, a zonal system of development control can be considered to be specifically orientated towards that end.

The list of matters which need to be considered by consent authorities when assessing developments under Part 4 contains a wide range of considerations including the provisions of all relevant planning instruments, any development control plan, the likely impacts of the development including environmental impacts for both the natural and built environment, social and economic impacts, site suitability, public submissions and finally the public interest. The relative balance to be assigned to each of these considerations is left open, probably wisely as this would be a highly contentious area. Each however needs to be formally considered. Neither is there guidance on whether consent should be denied if any or all of these factors is negative; the proposal must only be considered overall. Equally, the notion of any trade-off between potentially positive and negative effects to arrive at a decision based on the consideration of net benefits is not included.

On the face of it this is not helpful although it provides a list of issues to be considered while the determination is effectively left to those with the responsibility to take that decision based on professional advice. The responsibility is theirs based on the consideration of all the relevant factors together rather than the result of a tick-the-box exercise. This view is possibly confirmed by inclusion of the public interest test where it is left to the decision-makers to determine what that comprises, effectively summing up the rest of the assessment (Farrier and Stein 2006). This could be the heading under which the notion of sustainability might be considered as it is not included elsewhere.

> *Rules are there to set standards but I tend to look at the bigger picture . . . if a commercial development has fifty controls to comply with and out of those fifty, it doesn't comply with one of them, I tend to look at it compared against all of them and look at the end result and way it would end up . . . would making it comply in that one; will it make it a better development or not?*
> (Local government DA manager 2011)

The description of the NSW development assessment and determination process as essentially merit-based (NSW Government 2013b) rather than based on the consideration of codes requires some further consideration. This assertion appears to be based on the assumption that merit-based assessment is flexible and therefore discretionary while that based on codes is predictable and as a result provides the certainty of outcome required. This is an oversimplification of the assessment process as undertaken by planners within a

council environment where the majority of determinations are made. This process is analysed in more detail in Chapter Five.

3.6.4 Environmental considerations

There are two main components to the consideration of environmental issues in the land use planning process. The first relates to the inclusion of specific environmental issues in both plans and the assessment of development proposals and the second relates to environmental management systems focusing on the protection of environmental resources in compliance with requirements for sustainability and the principles of ESD as originally defined by the Commonwealth government (Commonwealth of Australia 1992).

The assessment of all development proposals is required to address environmental issues. In the majority of cases the preparation of an environmental statement (SEE) to satisfy the requirements of section 79C of the Act is sufficient although in some cases this may involve the completion of substantial technical investigations and occasionally development being assessed under Parts 4, 5 and 5.1 may require an EA, often still called an EIS, to be undertaken.

Large projects, usually small in number, whose scale, significance, or potential impacts indicate that they are of regional or State importance are routinely assessed by the Department and determined by the Minister, the PAC or senior departmental staff (NSW Department of Planning and Infrastructure 2011d, e). These have been divided into two main categories (State significant development (SSD) and State significant infrastructure (SSI)) plus those considered by the Minister to be critical public infrastructure essential to the State for economic, environmental or social reasons. The assessment pathway for SSD projects largely reflects the current process used by councils when assessing development applications under Part 4 of the Act while those projects complying with SSI criteria are assessed and determined by a process similar to that under Part 5.

The form and content of the environmental assessment (EA) prepared in accordance with the Director-General's Requirements (DGRs) follows those set out in Schedule 2 of the Regulation (NSW Department of Planning and Infrastructure 2012c). This must include, *inter alia*, the objectives and justification of the proposal, analysis of any feasible alternatives and impacts of the proposal and measures included to mitigate these effects. These requirements are interesting because they both comply with similar assessment processes undertaken yet differ from them in some important ways. Differences relate to the need to consider alternatives which in some circumstances can be quite complex and the preparation of a justification based on the evidence produced. This is perhaps the only occasion when a clear indication of the net benefits of the proposal needs to be made

within the planning system. This is undertaken in other planning regimes using a series of rational trade-offs between the environmental, social and economic costs and benefits of the proposal rather than assuming that it is acceptable if its inevitable impacts can be mitigated to levels which are currently considered to be acceptable (Cullingworth and Nadin 2006). Taken together these may still impose a net cost on the community.

Submissions can be made by objectors during the exhibition period although the opportunities for community involvement in the process are fairly limited. Responses to submissions are required if the issue raised has not been adequately addressed in the EIS. Amendments to the proposal may be required if considered necessary in response to the submissions. Otherwise following determination, neither proponents nor objectors have any right to merit appeal in relation to SSI because it is development that is permissible without consent. Judicial review of a decision concerning an SSI application is available where there is an alleged breach of the Act.

Much of the material relating to these assessments is made available on the Department's web site in all its bewildering bulk and complexity, including the decision documents, during and at the conclusion of the process. However, there is little difference between the procedure now involved and that derided in the previous Part 3A process. Community involvement is limited and the internal decision-making process remains opaque. Some of the more potentially controversial developments especially those relating to large scale housing has been returned to the councils for assessment, but the decision-making in many of these is undertaken by the regional panels (NSW Department of Planning and Infrastructure 2011f).

3.6.5 Community involvement

It is often stated that the power allowing planning decisions to be taken which are ultimately about where the broader interest lies comes with the necessity of accountability of those who are responsible to the community at large and not to unelected individuals with no legitimacy (Booth 1996). There appears to be a profound contradiction between this view and the circumstances now pertaining in NSW. Here, the removal of locally elected community representatives from any responsibility for the determination of planning applications, apparently widely accepted (and promoted) by planners and the community, is being implemented in parallel with the claimed refocusing of the planning system on community participation (NSW Government 2013b). In theory, the inclusion of community-elected representatives should create a more effective process of community participation rather than seeking a more diffuse involvement although in some cases councillors' knowledge of planning may leave a lot to be desired (Rowley and Phibbs 2012).

There is also a contradiction where the planning process is heavily orientated towards the attraction and facilitation of investment and community involvement is inevitably seen by powerful forces as an impediment which, at best, needs to be accommodated and at worst, removed (Property Council of Australia 2013, Urban Taskforce Australia 2013). Under such circumstances it is perceived entirely as a negative reaction to what is required to achieve the benefits of development while the vague considerations of the legitimacy of their actions conferred by the involvement and possible acceptance by the community are discounted or ignored.

The role of the community in the planning process is ambivalent. While the community is central to the justification of planning, it is seen merely as an unavoidable impediment by the development industry. There will always be a group, however small, in opposition to any development which is in any way considered to be controversial. The passive approach pursued by many councils produces its own problems.

> *The community fails to respond to opportunities to comment on the policies and controls in the LEP and DCP which remain as distant concepts but often become engaged too late when the plan allows the development.*
> (Local government DA manager 2011)

Opportunities for community engagement exist in both plan-making and the development assessment process usually as the consequence of statutory requirements. However, except in limited involvement in workshops and occasional focus groups during the processes leading to the preparation of LEPs, consultation is generally restricted to involvement after the event when written responses to the exhibition of plans or development proposals are accepted, to which the consent authority has to respond following consideration. Appeals against the decision in a particular case are also possible, where the authority can reconsider and overturn the original decision or an appeal can be made to the Land and Environment Court. Appeals of this kind are almost exclusively made by developers against a refusal by a local council (NSW Land and Environment Court 2011). Concerns about community involvement in the planning process are however longstanding.

> *Public participation, it has frequently been argued, is an almost meaningless phrase, or one with misleading connotations. For all the legislative provisions and the attempts of many planning officers to engender debate about local issues, the consultation procedures often seem to have the effect of absorbing rather than transmitting, local opinion about developments.*
> (Ambrose 1986, 73)

The ability of third parties – those not directly involved in the development application – to influence the proceedings is strictly limited in NSW. The availability and application of third

party appeal rights are considered to be antipathetic to the notion of efficiency by property groups leading to delays, inflated costs and an increasingly adversarial nature of planning (Property Council of Australia 2011). However, third party appeals are an intrinsic part of a democratically based planning system supporting claims of acting in the interests of the public rather than particular power groups. In addition, they represent a participatory form of democracy, allowing various public interests to be voiced and tested; the outcome creating the certainty required of the process (Willey 2006). There are no signs that the extent of appeal rights of this kind is likely to be expanded in the near future (NSW Government 2013).

3.6.6 The Land and Environment Court

Ultimately the final decision in a disputed planning matter can be taken within the jurisdiction of the NSW Land and Environment Court. Here, the Court has developed a set of, what it calls principles (42 so far) which are references to particular cases which assist the Judges and Commissioners in reaching their decisions. These are based essentially on the consideration of a mix of statute and precedent operating within the rules of the Court (Moore 2009). This is the operation of the law with all its discretionary procedures; there is no appeal against the decision except on a principle of law and the Court is taking over the role of the original consent authority. While these principles, if that's what they are, might be considered to be merely of assistance to the Commissioners, another interpretation could suggest that their use is providing a kind of parallel process of assessment enshrining the Court's interpretation of case law which has, in some cases been found to be both interpretively questionable and inconsistent with planning policy (Kelly and Smith 2008).

The influence of the Land and Environment Court on the operation of the land use planning system has been considerable and not always beneficial in terms of the reduction of complexity particularly in the relationship to differing interpretations of policy intentions. This is clearly illustrated in the consideration of the relative weight to be assigned to controls included in the LEP and those in the DCP and the interpretation of the wording applied to zone objectives.

In the mid-1980s the State government encouraged councils to simplify their LEPs by moving detailed planning controls into DCPs, documents which have persuasive rather than legal force (Kelly and Smith 2008). This was intended to result in a move to much more flexible planning expected to encourage development while improving the process of assessment and determination (NSW Department of Planning 1987). At the same time, a Ministerial determination under former section 71 of the Act required councils not only to specify the intent of the LEP but the objectives of each zone (NSW Department of

Environment and Planning 1983, NSW Department of Planning 1989) leading to further complexity in the definition of permissibility and inevitably attracting the interest of the Court. This led to unforeseen complications.

The DCP became a powerful tool in the development assessment process – a good deal more so than the intention of the original change of emphasis. It is widely believed in the local government planning community that the Court tended to treat DCP controls as of equal weight to those in the LEP indicating that the councils could also apply such a system. In practice, these appear to have been applied as such where possible. It took until late 2012 before the State government confirmed the original intention by an amendment to the Act to clarify the differential status of the two documents (NSW Department of Planning and Infrastructure 2013g).

Earlier, the Court weakened the direct connection between the proposal and the zonal objective by the use of vaguer justifications such as *not incompatible* or *not inconsistent.* Proposals were not therefore tested for positive compatibility but by using weaker language giving the appearance of favouring the proposal while diminishing the use of objectives (Kelly and Smith 2008). A positive test was therefore not to be used and one of whether or not a proposal was not fundamentally inconsistent was substituted.

While this practice was discontinued (Kelly and Smith 2008), it illustrates the importance of semantic exactness and the necessity for precise terms and accurately defined criteria to be available for use by decision-makers, effectively minimising the necessity for interpretation. This becomes a key point when the notion of certainty might be associated with the language of public planning documents. The need for clear expression of meaning in the language of planning documents is considered in greater detail in Chapter Four.

The activities of the Court cannot be disassociated from those of the planning system. Yet so far there appears to be no prospect of reform of the *Land and Environment Court Act 1979,* with the exception of some minor additions via the new Planning Act, even though its involvement in the process would appear to introduce an area of discretion which the current planning reforms are attempting to minimise. At the same time, the Court introduces its own version of certainty – the end of the line.

> *There is something that nobody has spoken about reforming that needs to be reformed as well . . . untouched in all this is the arbiter of the system, the Court. You can have the world's best planning system, but if it's the moment it's gazetted it will be interpreted by the lawyers and whoever else and the risk-averse nature of the legal profession will drag you back down the path that we've gone and ended up in today.*
> (State government senior development bureaucrat 2013)

3.7 Future change – a new planning system?

The Planning White Paper published in April 2013 claims to be instituting major transformative changes to land use planning in NSW with the aim of producing a simpler, strategic, more certain system, focusing on improving outcomes while placing people and their choices at the heart of planning decisions (NSW Government 2013b). Five fundamental reforms are indicated:

- Promoting a new culture of cooperation and community participation, the delivery of positive and pragmatic outcomes and a commitment to ongoing education and innovation (34).
- Incorporation of community participation at the start of the planning process and on an ongoing basis to set the vision and ground rules for local areas undertaken via a Community Participation Plan prepared by each planning authority on the basis of the Community Planning Charter (44).
- Major shift to *evidence-based*, whole of government strategic planning in the development of plans, community and stakeholder engagement and decision-making. This provides the basis for a hierarchy of plans and policies with clear links to the succeeding levels of planning (60).
- Transformation of development assessment to a performance based system where decisions are made faster and more transparent with no less rigour using five assessment tracks depending on the level of impact of the proposed development (114).
- Integration of the provision of infrastructure by inclusion of contestability assessments in Growth Infrastructure Plans (152).
  (NSW Government 2013b)

The process undertaken in NSW to achieve a new planning system followed what might be considered a somewhat disjointed course (now stalled) in which a distinct change of ideological direction occurred when the State government published its response in the Green Paper to the recommendations of the Independent Panel (Shoebridge 2013). It is a normal part of a responsible process that a number of recommendations made in its early stages can be considered and then rejected or only partially accepted by the potential legislator. However if those which received little or no consideration in the subsequent documents but which could be considered to be central to at least one of the stated objectives of the new legislation - re-establishing community confidence in the planning

system - this might suggest that the overall purpose of the new process had a different aim from that considered appropriate by the panel.

A series of provisions recommended by the Independent Panel were omitted from the Green Paper and were not included in the subsequent White Paper. Some of those rejected focus on the improvement of existing procedures; others appear to contradict or dilute some of the stated aims of the government (depoliticisation, appeal rights); others seek to increase the accountability of those who make decisions within the planning system and separate administrative and legislative power; while one (the proposed name of the new Act) was perhaps only symbolic. These omissions are listed in Appendix B.

One area illustrative of the divergence of views between the Independent Panel undertaking the Planning System Review (NSW Government 2012b) and the proposals in the White Paper (NSW Government 2013b) relates to what the panel describe as best practice guidelines for plan development. Here, the use of an existing top-down process was noted as a reason for change to a more community-focused basis for plan-making.

> *A wide-spread community complaint was that past and current plan development processes were usually top-down. As we observed in the prologue to Volume 1, strategic planning is to be a bottom up process. A similar position must also apply to development of Local Land Use Plans and Development Control Plans.*
> (NSW Government 2012b, Volume 2, 74)

The provisions of the draft Bill not only include the retention of such a process but reinforce the top-down approach. This appears to support the views of the planners' representatives that the culture of planning has lost its visionary content and was totally focused on process (Planning Institute of Australia 2013b) as well as the submissions of the industry lobby groups (Property Council of Australia 2013, Urban Taskforce Australia 2013b) for a greater focus on strategy. The interest of the property industry in strategic considerations could be seen as something of a paradox given its focus on more short-term issues; it would however comply with a view that greater control over the process would be to its advantage. None of this would appear to be making any attempt to recreate confidence that the community might have in the planning system; quite the reverse.

The aim of much of these recommendations was to reinforce the accountability of those who are responsible for decision-making within the planning process. While the subsequent provisions of the draft legislation (NSW Government 2013c, d) increase the discretionary powers of the Minister (see Appendix C), there is no corresponding increase in the necessary checks and balances applied to his/her actions.

Much debate has however focused on the proposed emphasis on strategy and its requirement for community involvement at this stage and throughout the whole litany of

plan-making. This refocusing of the system was strongly promoted by the planners' professional body (Planning Institute of Australia 2013b) who argue that the necessary vision was missing from the planning process which had also become over-politicised – shorthand for the involvement of locally elected representatives in the process. Inevitably this position was rejected by the representatives of the local planning authorities (Local Government NSW 2013). However, the argument is essentially irrelevant as the Minister's ability to delegate powers of determination have been widely used to shift responsibility away from councillors, a move which appears to be popular even if it raises questions about the legitimacy of planning as a public activity undertaken on behalf of the community in a democratic context (Reade 1987, Tewdwr-Jones 1995, 1999).

It however remains doubtful that the community can be persuaded to become involved in the generation of planning policy at the strategic level where the issues are somewhat abstract and some understanding of the processes involved is required – a widespread response from the community to the White Paper.

> *Many community members will not engage with the planning process at higher levels and will only focus on plans that directly affect them or when a proposal is sufficiently concrete to enable its potential impact to be recognised – often at the specific development application stage.*
> (Australian Government Productivity Commission 2011, XXXVII)

This possibility is not helped by the weak provisions in the proposed *Community Participation Charter* and the subsequent plan to be prepared by each local planning authority (NSW Government 2013b). As this is a central prop of the new planning regime, it will need to be seen to work even though it is possible to suggest that it could be taken over by the two extremes of the stakeholder spectrum inhabited by industry proponents of development-at-any-price and those community groups committed to virtually no development at all. Alternatively, the process will be cautiously and closely managed by the Department ready to absorb comment rather than be influenced by it.

The White Paper presages the introduction of additional planning bodies which will now comprise:

- the Planning Ministerial Corporation – otherwise the Department of Planning and Environment;
- the Planning Assessment Commission, nominally independent of government but made up of individuals appointed by the Minister;
- a Joint Regional Planning Panel, six in NSW currently known as JRPPs with the majority of members appointed by the Minister;

- a Subregional Planning Board, made up of State and local government appointees with an appointed independent chair overseen by the Chief Executive Officers Group, only covering high growth areas;
- a planning committee or panel established by the Minister or the Director-General; and
- an independent hearing and assessment panel (IHAP) of a council.
  (NSW Government 2013b)

The powers and activities of the Land and Environment Court will however remain unchanged. Local councils are not included as planning bodies even though they will remain responsible for the preparation of the local plans which carry statutory weight and continue as consent authorities where particular powers of delegation apply (NSW Government 2013b).

At first sight, the proposals set out in the White Paper appear to be contradictory if they are perceived as a considered and consistent response to the prevailing principles of neoliberal governance. The heavily promoted emphasis on the strategic plan and the related focus on community consultation as the centre of the planning system (NSW Government 2013b) would appear to be misaligned with the attempt to simplify both the land use zones and the assessment and determination process. This might be simplistically considered to reflect the somewhat ill-disciplined collection of neoliberal nostrums which influence government policies and procedures and can be readily remodelled to more accurately reflect local considerations (Allmendinger 2009). The governing aim of the proposals however, remains the facilitation of private sector development.

The idea of the continuation of reliance on long term planning and the claim to be placing the community at the centre of the process would appear to be an anathema to the proponents of a neoliberal agenda. The shift in the engagement of the community away from where its real interests lie cannot be disguised by the claim for increased significance and could well be perceived as a cynical attempt to reduce any potential for interference in the regular flow of development approvals deemed to be necessary to provide support for economic growth. The majority of those likely to be affected locally by development proposals will probably not be interested in the reasons for it and the controls which have allowed it to go ahead when these were established at a higher level in the proposed planning hierarchy.

If the planning system in NSW is conceptualised as essentially neoliberal in its aims and content, it can be characterised as:

- a combination of a market-orientated competitive state (liberalism) and an authoritarian strong state (conservative) where state policies are orientated towards neoliberal interests and principles;
- almost total reliance on the private sector to produce the future urban environment, in practice determining the distribution of land uses which, by definition must be acceptable to the market otherwise development would be much less likely to take place. Plans therefore incorporate a pattern of development that would have generally occurred in much the same way anyway;
- centrally concerned with depoliticising economy and society by weakening or removing historically accumulated forms of socialisation; existing forms of non-market coordination (community involvement) and state regulation will need to be abandoned;
- government's role focused on providing statutory legitimacy and agency provision of a level playing field for developers;
- planners' role in making decisions is minimised; their focus is on the facilitation of the continuation of the market mechanism by undertaking the assessment and determination process as efficiently and effectively as possible and removing any barriers to market functions; and
- public interest conceptualised as the market.

The coincidence of public plans and private interests combined with a shared focus on short-termism suggests that any added emphasis on the strategic plan with its implied vision for the future may become increasingly irrelevant. The community appears to have little meaningful involvement in this process (Australian Government Productivity Commission 2011, Law Society of NSW 2012).

If this is a reasonably accurate characterisation of the emerging planning regime as envisaged by the proposals elaborated in the White Paper and more significantly, those included in the draft legislation, they do not comply with the claims made for them in the associated promotional material or in the relevant documents themselves. Inevitably such an interpretation is based on the assumption that the proposed future planning system comprises a reasonably consistent reflection of the prevailing ideological influences rather than merely an unstructured response to widely differing beliefs that might otherwise be inferred.

3.8 Certainty in the planning process and its improvement

There are distinctions to be made between the claims for certainty in the planning process, together with the means by which it could be generated and improved, and where its presence in the routine practices and outcomes of planning might be observed. Both these versions of certainty remain vague and elusive.

State government claims surrounding the start of a process to recalibrate (reform?) a major piece of state legislation, which in theory, would be of considerable interest to the community, can be expected to contain a degree of hyperbole. Even so, planning appears at Goal 29 in the NSW State Plan 2021, published in October 2011, possibly indicating its perceived level of significance to the State government.

> *A NSW planning system resulting from extensive community and stakeholder engagement will provide* ***certainty*** *and confidence on planning issues. A system that is modern, transparent and provides clarity for investors will make NSW competitive again.*
> (NSW Government 2011, 56, emphasis added)

Prior to that, the achievement of certainty and its improvement became the mantra of government. Statements included in publications of the NSW Department of Planning claim that:

- an efficient and transparent planning system will provide **certainty**;
  (NSW Department of Planning 2009a, 1, emphasis added)

- streamlining and strengthening decision-making and consultation will increase efficiency and improve **certainty** and confidence; and
  (NSW Department of Planning 2009a, 23, emphasis added)

- **certainty** in decision-making will ensure [make certain?] that the planning process is clear and key issues are resolved as soon as possible.
  (NSW Department of Planning 2010f, 13, emphasis added)

These relate predominantly to process rather than policy and focus on the efficiency of development control suggesting that the responsibility for the improvement of certainty lies with the Department via its assessment of SSDs and the local councils in their role in determining DAs. These procedures have been the subject of ongoing review and change, arguably as planning fundamentals also change to reflect the prevailing political certainties aiming at simplification, efficiency, integration and fast-tracking, each relating to process.

But the pursuit of economic growth without defining what kind of growth is desirable is fraught with danger; any kind of growth currently appears to be considered beneficial within a relatively loosely defined set of controls. The argument that an increase in the certainty provided by the planning system will have a direct effect on the volume of development has not been substantiated and appears to be counter-intuitive. First because any increase in the certainty claimed for the system can only be marginal and in any case developers are not convinced that it exists in the system at all (Ruming 2011b). Second, as the role of developers is to develop in order to make a profit for their investors, their activities would be undertaken whatever the form of planning control which might apply. In theory, these would be maximised under prevailing economic circumstances if planning controls did not exist. However, developers also benefit from a planning system which brings a degree of stability to the land market and at the same time provides an aura of respectability and acceptability to their profit-making in the social arena (Reade 1987).

The managerial restructuring of government undertaken over the last two decades has aimed at depoliticising decisions by making them seem to be a matter of operational management undertaken by disinterested specialists. The dispersal of state (local government) functions to a range of extra-governmental groups makes this evident; a process which is deemed to be continued in the White Paper, apparently to general approbation (Planning Institute of Australia 2013b). The pursuit of process over substance (content) implies the reduction of social and political issues to technical and procedural matters, sometimes translated into problems that need to be managed (Imrie 1999). While any further reduction in the consideration of social improvement might be deprecated by some, a focus of attention on clearly identified problems, including those within society, might result in real progress rather than continuing a focus on an unattainable future condition of a kind also included in the White Paper proposals. However, this does not appear to be an aim pursued by the provisions of the new Act.

So far, the creation of certainty in the land use planning system is conventionally considered to be a product of regulation (Walton 1997, Dawkins 1998); abide by the rules and the applicant will be allowed to proceed with the development proposed following an appropriate process. It is therefore firmly concentrated on the assessment and determination process. This is a very limited view of the claimed benefits of the planning system and the reasons why various governments continue to amend it in a concerted attempt to improve the certainty it is claimed to create. If this quality is to be generated to provide the confidence assumed to be required by developers to proceed with their proposals generally in line with broad brush plans, this is either not considered by them to be an effective means of doing so or the message is not being heard. Some developers,

or perhaps only their industry advocates, still insist that there is no certainty to be found in the development process, only regulation (Urban Taskforce Australia 2010) which suggests the opposite of the claims made for it. Playing by the rules also requires development that fails the test to be rejected; a *certain* outcome which would not be acceptable to the proponent. The data regularly provided by the Department however suggests that rejection is a rare event (NSW Department of Planning and Infrastructure 2014).

It then follows that even major changes to the planning system as it stands would not be capable of achieving anything beyond an insignificant increase in the approval rate. If this is the case, particularly as the main source of demands for greater certainty comes from the industry lobby groups, it would appear that the objective of the pressure to reform the planning system may have a different focus.

This substantial divergence could be explained by widely differing perspectives on the nature of the development process itself rather than the planning approval process which only makes up a part of it. It is considered that there are three sources within the planning system where certainty is likely to be appreciated (Booth 1996): an efficient and transparent planning system as a means of achieving its aims by effectively implementing planning policy; development control where developers can be confident of achieving an approval expeditiously; and a system where the rights of the community are not sacrificed in the course of continuing development. In addition to these, there needs to be confidence on the part of the decision-makers that the processes undertaken to develop the strategic plan which will provide the basis for the land use planning system are both rigorous and reliable, effectively representing their intentions.

The necessary reform of the planning system, pursued by the present State government since 2011, can be perceived as providing an ideal opportunity to remould its processes to more effectively comply with neoliberal ideology. This perception might be on firmer ground if the previous governments had not been pursuing similar changes characterised as improving the efficiency of the system and apparently seeking greater control over its processes and outcomes. These changes have been promoted by State governments of both political persuasions as seeking to improve the certainty generated by the system for both investors and the community. Equally, the notion of a more ideologically acceptable planning process with greater centralised control of the initiatives of the local level of government also remains relatively weak given the already high level of control exercised by the Minister. It clearly portends the continuation of a shift in a particular direction rather than any transformative change.

The idea of improving certainty expresses a particular view of what certainty comprises in the context of land use planning. This can only exist where the view prevails that certainty comes in degrees; but it also relates closely to other factors such as knowledge and truth which are considered to be absolute. Certainty in this context can therefore be conceptualised as:

- relative rather than absolute;
- conventionally used as a synonym for confidence which can constantly change, both rapidly and in extent;
- variable, its degree experienced by the recipient claimed to be capable of adjustment by changes to the planning process by such measures as simplification and clarification;
- capable of perception in different forms determined by the values and motivations of the recipient groups; and
- most easily expressed within a codified system where outcomes are clearly identified and options or variations limited.

So far, assertions based on the meaning of certainty in the official planning literature appear to be either anecdotal or incidental rather than systemic (NSW Department of Planning and Infrastructure 2013d). The implication that a definitive statement that a particular policy or action will achieve certainty or a change to an established policy will increase (or decrease) the current level of certainty seems to be too flimsy to attribute that ability to a particular approach or policy change. It would seem from this that politicians, predominantly the responsible minister, attribute certainty, while the responsible bureaucrats have to find the appropriate means of articulating the procedures for achieving it.

There have been multiple attempts by governments of various kinds to circumvent the requirements of existing planning legislation in order to avoid real or perceived obstructions to their desire to undertake potentially controversial development or reduce anticipated delay in approval (Allmendinger 1998, Booth 2003, Ward 2004). Governments have also, either in compliance with their own ideological impulses or under the influence of powerful industry lobby groups, sought, as they see it, to improve the efficiency of the land use planning system by reducing the effect of those factors which introduce a level of uncertainty into the outcomes of the development assessment process or prolong it.

This has been attempted by the introduction of wholesale changes to the planning system principally aimed at the substitution of any remaining discretion by sets of predetermined rules. This is based on notions of reducing regulation and perceived bureaucratic interference where a simplified planning regime and, in some cases tax advantages will encourage economic development (Tewdwr-Jones 2002). This has orientated the planning system on refocusing on the role of the plan, a process which is currently being played out in the NSW Planning Review. It remains questionable that this relates to the achievement of a strongly held notion of certainty or its improvement. It is probably closer to a perceived improvement in the efficiency of the system in expediting development and increasing the control exercised over any impediments to continuing property development. An interesting paradox remains however between the notion of reducing regulation as an objective and the achievement of certainty by the application of rules which implies the opposite. It must therefore be supposed that the rules contain a simplification of the regulation that previously applied rather than merely acting as a substitute for it.

3.9 Conclusions

The NSW government continues to emphasise the notion of certainty in the changes proposed for the planning system. In a promotional document intended for widespread distribution, certainty in the planning process is one of the three defined characteristics of the new planning system joining community participation in decision-making and an emphasis on local issues, clearly aiming for acceptance by the community.

> *We will deliver faster, more streamlined planning for families and restore integrity and transparency into* [sic] *the planning process. We will reduce assessment times for straightforward applications saving people time and money.*
> (NSW Department of Planning and Infrastructure 2013d, unpaginated)

This overview of land use planning in NSW indicates that if an effective and efficient operation of its processes is to be achieved, it would need to comprise a transparent, predictable and reliable system providing confidence for both investors and the community. Although not stated by those proposing change, a more effective system would also provide confidence in the process itself, particularly when government seeks confirmation that its policies can achieve their stated aims. If the present planning system is performing as badly as portrayed in government literature as a reason for change, it will be necessary to revive the community's belief in its efficacy and fairness – its legitimacy (NSW Department of Planning and Infrastructure 2013d). This will be difficult to achieve where the emphasis appears to be merely on the facilitation of development while other processes, including the checks and balances considered necessary to manage this are

perceived to be weak and ineffectual (Better Planning Network 2013, The Law Society of NSW 2012, 2013).

Particular considerations relating to the direction being taken by the new legislation suggest a number of areas which warrant attention in later chapters:

- characterisation of the planning process as two components: content and process, provides an appropriate means of identifying its purpose and aims as public policy;
- redefinition of the relationship between codification and discretion and its purpose in the control of development;
- continuing emphasis on consistency and conformity suggests that increased control over the process and its outcomes is a major objective of the changes proposed;
- void between policy intent and outcome resulting from the assessment process can be viewed as being addressed by a reduction in policy content;
- necessity for precision in the formulation and written expression of development controls; and
- removal of future areas with development potential (Urban Activation Precincts) from council control further consolidating central influence and control.

While some of the problems associated with the Act can be expected to be at least reduced in significance if not entirely eradicated by the new legislation, many remain and unless there are further changes made to the new Act, several new difficulties will be introduced. These have implications for the claims of improved transparency and certainty being made and particularly for the legitimacy of the planning process as perceived by the community. All this may however be considered to be of only minor concern within the continuing reconfiguration of the planning system as a whole.

The practice of planning in NSW has become increasingly a process explicitly aimed at support for the development industry and by implication at the marginalisation of community influence on the process. As a result, it is now difficult to identify where planners can exercise their apparent prerogative to adjudicate between various knowledges when the process is deliberately focused towards a specific outcome to support those whose activities produce the physical outcomes deemed to be desirable. Planning is, in this scenario, merely a process destined to produce a product or an approximation of it as designated by the market which claims to be providing what that market demands, needs or requires. In practice, large gaps remain in the supply resulting from this process, clearly exemplified by the serious mismatch in the housing market which

will not be addressed until the public sector becomes seriously engaged in provision rather than merely continuing to release land for development and imploring the industry to get on with it.

All this suggests that ideally land use planning in NSW requires a stronger justification than merely the facilitation of development, even if that has been assessed by application of a limited definition of sustainability (NSW Government 2013b, 16). However, its close association with property interests has turned it into an indispensible activity. Planning is now institutionally embedded with so many legal and institutional systems such as housing finance and retail investment that it commands support not because it promotes collective change but precisely because it does not (Allmendinger 2001). This makes it difficult to reform as its processes inevitably benefit self-interested groups in the community, either those benefiting from the development it stimulates or those benefiting from the restrictions it imposes.

This chapter has provided an overview of the land use planning system in NSW reflecting its response to the context within it must operate, the forces influencing those changes and the implications of the current proposals for reform if these are eventually implemented.

The following three chapters each deal in more detail with those parts of the process where certainty might be considered to be located; the strategic plan, the development assessment and determination process and the extent to which the outcomes of the process can be considered to be a direct reflection of its aims; policy implementation as a physical artefact. These seek to provide a response to the research questions posited in Section 1.4.

PART TWO

4 Certainty in the strategic plan – confidence in its processes?

4.1 Introduction

This is the first of three chapters which seek to identify the manner in which certainty is identified in the land use planning system in NSW. This chapter focuses on the strategic plan, a component of that system which is envisaged in the new legislation to be a key part of the revised process to be eventually implemented. This would place the strategic plan – collectively made up of the Regional Growth Plan and where required, the Subregional Delivery Plan – at the peak of the proposed pyramid of plans where it would set out a high level vision for each defined region, establish objectives and planning policies relating to housing, employment, the environment and infrastructure and identify key city/region shapers of state and regional significance (NSW Government 2013b, 65).

This chapter comprises three main sections. The first considers the changing characteristics of the strategic plans for Sydney since 1995 when the idea of certainty began to occur regularly in their texts followed by an assessment of its frequency and the meaning attached to its use in the language of official planning documents to date. This is followed by the consideration of various components contributing to the preparation and operation of the strategic plan where the confidence there might be in its processes could result in any certainty that might be identified. The conclusion provides a summary of those characteristics of the strategic plan which have an influence on the generation of certainty within it.

Certainty in the strategic plan can be considered to be generated by the confidence felt in the various processes involved and the outcomes achieved in those groups involved or affected by them. These comprise those defining and operating the system, the planners responsible for making the decisions; developers and organisations seeking to invest in property; and the community who could be considered to wish that its rights were protected. Each of these groups would view the concept of certainty in a different way although each of their perceptions is intertwined within the aims, operations and outcomes of the planning system itself. The first two of these groups can be expected to have reasonably clearly defined expectations of this process but from differing perspectives and the community, while accepting the need to manage the development process, would wish to see that it was operated in a fair, equitable and transparent manner.

The notion of certainty in the planning system can be conceptualised in relation to both legitimation and justification. These would see the use of certainty as:

- an attempt to justify planning to satisfy the demands of property interests while maintaining some semblance of control over their activities. It is also a vaguely defined notion of exemplary flexibility, eminently suitable for promotional purposes;
- confidence that could be applied to the methods used to develop plans and policies creating an effective and reliable process; and
- justifying its application in the extent to which the outcomes of the planning process comply with what it is aiming to achieve.
  (Based on Reade 1987, Booth 1996, 2003, Tewdwr-Jones 2002, Allmendinger 2009)

However, those who promote the notion of certainty in the planning system – the NSW State government and the development industry lobby groups – contend that the current process is deficient in its provision of this quality and that this can only be increased when the changes currently proposed are implemented. This can be considered to be essentially an attempt to justify change and acceptance of the direction to be taken in the new legislation. At the same time, the notion of certainty as a characteristic of the planning system can be considered to be justification for its processes and its outcomes.

Whatever the rationale for change, its aims will need to be acceptable to the prevailing political orthodoxy and comply with what is believed to be technically feasible. While constrained by contextual concerns, outcomes promoted in the plans and policies must at least have a reasonable chance of achievement based on the resources available and the persistence of their application. That would at least provide some confidence in the validity of the plan.

However, it might be considered to be counter-intuitive to assign the notion of certainty to long term strategic plans especially if these are not statutorily enforceable. These can be seen as either realisable or alternatively, the product of fantasy.

> *I think there is long term **certainty**, there's long term guidance which provides a degree of **certainty** in the strategic plans, in the Metropolitan plan or strategy. When we got down to the sub-regional level, I think there was an enormous amount of **certainty** there because it provided, on a local government basis, an idea of the sort of task in terms of housing and jobs each council was being asked to contribute to the growth of the city, it identified industrial land by name and categorised those lands as being so important strategically they should not be lost to other uses, others for reason of locality, size, fragmentation or whatever maybe could be considered….it went down to a quite detailed level providing a lot of **certainty**.*
> (Senior Department strategic planner 2011, emphasis added)

While this suggests that certainty can be conceived in varying degrees it also defines an important role for the strategic plan as a source of the housing and job targets which each local planning authority needs to achieve. It also seems to define an essentially static, unchangeable concept built on two seemingly simple tasks.

Strategic plans are however conventionally reviewed and/or amended at intervals of about five years or when there is a change of State government. This is considered to be necessary to remain up-to-date and adapt to or accommodate the inevitable changes that have taken place in the intervening period. This constant imperative has also been interpreted as the planner's response to their intuition that the planned end-state set out in the relevant documents will never be achieved and regular preparation of new versions is necessary to maintain theirs and the public's faith in the ultimate success of planning (Gunder and Hillier 2009).

> *Fundamentally, we contend, spatial planning is predicated on a fantasy that the discipline successfully provides the solutions necessary in order to provide* ***certainty*** *and harmony for the future of our built and natural environments. Planners know instinctively that such solutions are but unachievable fantasies – why else do they constantly have to revise their plans? But they continue in the belief that the plans will succeed in achieving their objectives over the five, twenty or fifty year timeframe of the plan period.*
> (Gunder and Hillier 2009, 31, emphasis added)

This contention must however be conditioned by the manner in which the content of contemporary strategic land use plans is construed – what do they mean and/or imply? Land use planning is not imbued with powers capable of producing a harmonious future for the population and past failures have not enhanced its reputation with the small proportion of the community who are aware of its presence as a government activity (Bunker 2013). The community's concerns focus on much more fundamental issues (Mackay 2008). It is stretching the ability of the planning system a long way, as a creature with limited powers provided by legislation, *to envisage it as providing, even the appearance of future certainty in a complex, unstable, dynamic and inherently uncertain world* (Gunder and Hillier 2009, 23).

In Sydney, the Metropolitan Strategy is conventionally a framework for future development containing a (very) broad land use plan and a set of generalised policies and actions intended to guide this development over the plan period, usually 25 years but recently reduced to 20 (NSW Government 2013a). The approach taken is simple, based on population projections which are used to determine the spatial demand for land for housing and employment purposes based on a straightforward set of assumptions inevitably based on the current distribution of land uses and transport links and other

infrastructure. Policies included are usually orientated towards the achievement of the development process with only limited attention given to the achievement of social improvement or change; state-wide policy is included separately in the SEPPs which also apply, where relevant to the strategy.

However, if the 25-year old Metropolitan Strategy of 1988 (NSW Department of Environment and Planning 1988) is reviewed, a rather different picture emerges. It is clear that while some aspects have changed by the original end date of that plan (2013), many remain familiar today with little change in intent and policy action. No changes occurring within the perspective of the strategy relating to its basic concerns and provisions can be considered to represent major differences. The earlier strategy introduced or continued many of the fundamentals that remain unchanged today – focus on overall residential density intensification; concentration of greenfield growth in the NW and SW Growth Centres, reduction of car dependency and higher density development at transport nodes, are all familiar examples. Each of these has remained as a key anchor point for subsequent Metropolitan plans. In contrast, the other main component of the strategic plan, its content, has now gradually lost any real ambition, becoming essentially marginalised.

> *Any strategic planning appears to be fundamentally short-term, becoming so broad because of the political necessity for flexibility.*
> (Planning consultant 2011)

> *The broader view of strategic thinking is completely absent.*
> (Local government chief planner 2012)

The 1988 Strategy was promoted as a framework for planning and decision-making for the period when the population of the Sydney region would reach 4.5 million which was expected to occur around the year 2011 - the population actually reached 4,284,200 by then (NSW Department of Planning and Infrastructure 2013j). A key consideration here is that if the whole process is to be driven by the need to accommodate prevailing population pressure, there are few options available to the planners due to previous decisions made which have introduced significant inertia into the system; it is very difficult to depart from a continuation of existing land use policy while locational demand is also driven by the market. One of the few options available are changes to residential density to accommodate more residents on the same area of land but this takes a long time to have an overall impact and brings with it other concerns and potential problems. Once the emphasis has shifted to only the single aim of *predict and accommodate* with little emphasis on other concerns traditional to the idea of planning, the sole purpose of the strategic plan becomes the preparation of the framework for future development (Bunker 2009). There is then little concern for its potential relationship with an identified future state;

the market will determine what that will be. It is also significant that no serious consideration is given to alternative patterns of future development except in terms of housing distribution and density changes within a defined footprint (The Centre for International Economics 2010, 2012).

If recent strategic plans have been essentially static over lengthy periods except where additional land is required to accommodate the population increase assumed and the location of that land is effectively determined by earlier decisions, any changes between the respective plans can be considered to be predictable, delivering a semblance of certainty over the long term. In such a scenario there is little need for concerns about future change; these will not in any case be addressed by the land use planning system if the facilitation of development remains its central concern. This however needs to comply with the requirements of the private development sector.

While it might be possible to argue that the strategic plan in the case of Sydney provides a version of certainty (its relative unchangeability), this is more a product of its deficiencies. This chapter demonstrates that while the notion of certainty, and words synonymous with it, appear in planning documents on multiple occasions it is predominantly as a claim for that quality as justification rather than any objective demonstration of its existence. The contention advanced here suggests that not only has the physical planning content of the strategic plans been essentially static for a considerable period but its policy aims have become increasingly limited in scope and ambition and its processes may not be capable of inspiring the necessary confidence. This may suit the requirements of the prevailing ideology but cannot be considered to be appropriate as the centrepiece of an effective planning system aimed at providing certainty of outcome.

4.2 Changing perspectives in strategic plans

The period from 1995 has seen fluctuating political fortunes in NSW although it has also experienced the continuing introduction of the prevailing ideological orthodoxy of neoliberal governance throughout that period (Pusey 2010). The first and the latest of the five strategic plans considered here were prepared under Liberal coalition administrations while the central three were produced under Labor governments.

The first two plans (1995 and 1998) covered Sydney and the four adjacent major urban areas intending to guide the shape of the whole region (NSW Department of Planning 1995, NSW Department of Urban Affairs and Planning 1998). The three following (2005, 2010 and the 2013 draft) restricted their remit, if not their prolixity, to the Sydney basin and its immediate surroundings; the other urban areas were to be considered elsewhere (NSW Department of Planning 2005, NSW Government 2010d 2013a).

The first of these plans marked a distinct shift from the approaches characterising the previous attempts by introducing *whole-of-government integrated urban management*. It therefore can be considered as representing the start of a progression to the kind of approach which has produced the present draft plan under the influence of the prevailing political ideology of the period which has gradually become more clearly identifiable in its aims and overall purpose.

The 1995 plan introduced three key themes which saw a shift from previous ones:

- an emphasis on process defined as mechanisms by which efficient and effective decision-making can be delivered over the long term;
- management by whole-of-government rather than by a single agency; and
- recognition of the whole region, including Newcastle and Wollongong.
  (NSW Department of Planning 1995, 11)

It also established four goals: equity, efficiency, environmental quality and liveability as a framework of values for the strategy which might be considered to characterise those of a previous era, particularly those of equity (fairness and equality of opportunity) and environmental quality (focus on the principles of ESD), The goal of efficiency was also equated with effective provision of land uses and related infrastructure rather than speed of decision-making. Each of these would become redefined in future to reflect the changing ideological context.

Three principles were considered to encompass and underpin the way that the vision and goals would be achieved. These were intended to guide the process and mechanisms of integrated urban management and lay the groundwork for a variety of more detailed strategic policies and actions:

- more compact cities improving access between jobs, housing and services and providing equity in access opportunities;
- an ecologically sustainable region by integrating growth and environmental protection and pollution control; and
- effective strategy implementation achieved by integrating all the disparate elements necessary.
  (NSW Department of Planning 1995, 15)

Both the basic goals and the key principles are not defined in any way which would allow their achievement to be measured or identified. They remain therefore mere statements which have limited meaning. It is also doubtful that efficiency stated as a goal can be considered to be an end in itself rather than a desirable characteristic. It is also unclear what the connection between at least two of the principles and the goals is. In addition, no clear justification or argument is advanced for the notion of a higher density urban environment; its benefits seem to rest on unstated assumptions (Troy 2013a, Bunker 2014).

Experience since the introduction of the strategies outlined in the plan has indicated that the Department has been faced with the problem that while broad economic policy has been reasonably successful in growing the economy and increasing the number of jobs overall it has had problems with their location (NSW Department of Planning 1995, 131). This appears to remain a prevailing difficulty where job growth occurs persistently in a dispersed manner often spread out in much smaller centres than envisaged. If this continues it presents a major problem for a plan structured around the concentration of jobs in a number of large centres (NSW Government 2013a, 14). This plan therefore includes the first appearance of a policy focus on employment growth in a number of particular centres. The aim is to support employment clusters where half the workforce is already located and, at the same time assist in the reduction of car dependency.

The new planning strategy published three years later (NSW Department of Urban Affairs and Planning 1998) returned to a blueprint approach which claims within its 30 pages to provide an agenda for the establishment of a better lifestyle and increased job opportunities within enhanced communities for people across NSW. However it also provides responses to a small number of simplistically defined problems which it seeks to address while it avoids promising outcomes that it cannot deliver or promoting particular ideologies or themes which have only a peripheral relevance to achieving improvements on the ground.

It was continued to be believed that the managed availability of land for employment purposes would automatically lead to benefits for the economy. It does also continue to focus on attempting to deal with identified problems using measures predominantly orientated towards social and environmental improvement (NSW Department of Urban Affairs and Planning 1998). There is as yet little concern with ensuring that the private sector needs a necessary degree of confidence in order to invest in property development.

The following plans from 2005 to date however consolidate a focus on economic growth achieved essentially by the provision of additional land zoned for employment purposes,

generally in existing centres but also now including the notion of employment clustering in specialist locations often around universities or major hospitals. At the same time those objectives focusing on social improvement and environmental protection gradually diminish in ambition, possibly a reflection of the inability of planning to accomplish any feasible reforms by relying on the management of land uses to achieve them but more likely reflecting the lack of interest in such matters in the prevailing political ideology.

Employment location remains at the centre of strategic planning considerations but raises contradictions which appear difficult to resolve, effectively compromising centres policy and an overall strategy focusing on the consolidation of a multi-centred metropolis (NSW Government 2005). This also has implications for transport infrastructure investment where current commitments further increase the attractiveness of the CBD as an employment location while failing to invest in the more flexible transport provision needed to support job growth in the areas to the west of Parramatta where employment is widely dispersed rather than concentrating in a number of specific locations. Such a strategy, to be successful, would require substantial investment in appropriate transport infrastructure.

The strategy for dispersal of employment to centres would appear to be a positive step but would require energetic action on the part of government to achieve the outcomes indicated. The importance of specialised centres was recognised for the first time although the passing-on of the responsibility for the achievement of the stated employment targets to local government clearly illustrates the weakness of statements of this kind when these authorities have no influence on job generation and location except by zoning land and hoping for the private sector to respond. All the time, the State government simply exhorts potential employers to locate in pre-determined locations or generally responds to their more specific requirements.

The Strategy's current target of at least 625,000 (over 31,000 per year) new jobs across Sydney by 2031 with at least 50 percent located in western Sydney to support population growth is seen as the most important element in driving economic growth. This total is distributed across each of the defined subregions maintaining a steady relationship over time between future population estimates and job generation (NSW Government 2013a, 44). These however remain essentially as targets. The ambition of this aim is put into stark perspective by the current rate of job growth in western Sydney which has averaged a third of that for the rest of the city over the last five years (SGS Economics and Planning cited in Wade and Cormack 2014).

The implications of this are not addressed in the current draft Metropolitan Plan (NSW Government 2013a). There is little change expected in the relative distribution of jobs

located in centres over the period from 2011 to 2031. The proportion of centre jobs located in the CBD is expected to fall from 48.2 percent to 45.4 percent while that for the so-called Regional Cities (Parramatta, Liverpool and Penrith) all located in western Sydney would increase marginally from 10.6 percent to 11.1 percent. The proportions of jobs in both groups of smaller centres, characterised as Major and Specialist, are expected to remain static. There is therefore little expected shift in the relative proportions of jobs in centres to mirror the parallel growth in population. Any such increase will need to be located in specific centres, mainly in a gigantic area of currently undeveloped land (some 10,000 hectares), the Western Sydney Employment Area (WSEA). Part of this contains the proposed location of the second Sydney airport originally promised for commissioning in 1998/99 in the 1995 Sydney Strategic Plan (NSW Department of Planning 1995). This now looks increasingly likely to proceed following two decades of hesitation by the Commonwealth government.

4.3 Shifts in emphasis: changing the rules?

The strategic plan produced as a key part of the planning process remains essentially a product of a comprehensive, end-state mind-set aimed at a preconceived outcome by a specified year although the process is resolutely aimed at the production of development whose main objective is support for the economy which is neither long term in focus nor generally spatially-dependent. This apparent contradiction will be reinforced in the new Planning Act (NSW Government 2013b).

In addition the White Paper makes a number of claims for the new planning system which are either not justified by the changes proposed or over which there must be considerable doubt about their ability to deliver what is promised (NSW Government 2013b). Community participation is claimed to be at the centre of the reformed planning system while the new focus on strategic planning will be the basis for balanced planning decisions. State-wide policy will be reconfigured into a concise document at the peak of the hierarchy of plans, all of which including the new local plan, are curiously considered to be strategic in the draft Bill (section 1.6(1)).

> *People from all walks of life will now contribute to shaping their community through groundbreaking arrangements for community participation. A significant and representative proportion of the community will participate in the development of long term strategic plans for their area. The planning system can move from combative to collaborative.*
> (NSW Government 2013b, 25)

The reliance on a heavily top-down process suggests an increase in rigidity in the system with control being exercised to minimise any obstructions to the approval process. It also reinforces the hegemony of the new Regional Growth Plans and the Subregional Delivery

Plans - collectively the strategy, which effectively minimises any ability to make decisions further down the hierarchy and places a heavier responsibility on the high level plans to be able to deal with the greater complexity and detail required as a result.

Overall, the proposals do not represent any kind of fundamental (transformative) change as claimed. All the major features of the existing system are still there while the relative emphasis on each is shifted somewhat. There is some importation of features mainly derived from the British planning system, most of which have not been very successful in achieving their aims in the past (Taylor 1998, Tewdwr-Jones 2002, Ward 2004). These include an increased focus on the plan; a citizen's charter relating to community participation; centralising state level planning policy in a single document and the continuation of a version of a specific zone with few planning controls. Otherwise the changes proposed merely clean out some of the accretions of the past in an effort to simplify the operation of the process. While a clearer and more transparent system is desirable, it is doubtful that the results of its implementation can produce much real improvement in its ability to achieve its objectives as stated in the White Paper by the implementation of the provisions in the proposed legislation.

Other changes recommended are mainly concerned with varying perceptions of the weaknesses of the current system and are aimed at achieving the standard objectives of reducing bureaucratic red tape and producing a more efficient means of supporting the property industry. It appears to be assumed that achieving this will automatically result in an improvement in the community's quality of life without any further corresponding effort. It also remains to be seen if the simplifications proposed in the approval process will have any effect on the total volume of development as there are far more potent influences such as the availability of investment capital and the conditions on which that is made available, that determine activity in the property market (Newell and Steglick 2005).

The most fundamental aspect of the proposed amended planning system is the apparent increased focus on strategy. There will be a strategic component in the plans at all levels within the hierarchy. This, it is claimed will mean that more decisions regarding land use, zoning and development control will be made in the strategic stages of the planning process, *improving transparency and certainty for proponents and the community* (NSW Government 2013b, 61). This will inevitably place considerable pressure on the high level plans which will be required to provide sufficient detail to cover a number of the new local plans lower in the hierarchy. Consistency between vertical layers in the planning system might be considered to be beneficial but consistency between plans at the same level in the hierarchy is much less so, effectively extinguishing the possibility of reflecting local

differences and valuable characteristics to be retained. Alternatively it places added responsibility on the high level plan to effectively respond to local differences.

There is continuing tension between the development industry and the community which has to countenance unwanted and perhaps unwarranted changes to its local environment. This will not be overcome by pressuring the community to become involved in what will possibly be seen as an arms-length process, little understood and appreciated (The Law Society of NSW 2012). At the same time the ability to be involved in development assessment processes relating to proposals which directly affect the local environment is minimised by controls preordained by decisions taken at the strategic plan level. This is unlikely to improve the community's confidence in the system. Any failure to engage the community in the proposed early process could cast doubt on the validity of the process as a whole, much to its detriment.

The proposed shift of community participation to the strategic plan stage with a consequent reduction in the objections allowed to local development, in effect comprises the marginalisation of community involvement by further increases in the power of the Minister and the interests of the development lobby (Better Planning Network 2013). The so-called Community Participation Charter is weak with specific consultation requirements not prescribed (Shoebridge 2013, 4). The difficulty in engaging the community at this stage has been widely recognised (Urban Taskforce Australia 2013); its effective implementation will require both substantial effort and resources. Even then, it is unlikely that the general public can actively engage in the discussion of the visionary concepts so beloved of planning's professional proponents (Planning Institute of Australia 2012, 2013b). An outcome of this process can be expected to be the diminution of public involvement in the process where it actually affects it with a subsequent reduction in the validity and justification of the process.

Any confidence can be expected to be further undermined by the discretion allowed in the Bill for the Minister to make plans overriding local and subregional plans (section 3.14) without any requirement to consult and no requirement to have regard to the relevant strategic planning. Under section 3.8, local and subregional plans must *give effect* to the relevant regional plan. The hierarchy of plans is therefore a fixed system in which the lower level plans cannot be adjusted to reflect local conditions even if these have been considered in error by those higher up.

The Minister also has very wide discretion to amend local plans. This can be done without compliance with the procedural requirements of the legislation to prepare and give effect to the plans above them in the hierarchy. This might be considered to be returning to the

circumstances applying previously only to Part 3A when the extent of the discretionary powers resulted in accusations of corruption in decision-making (O'Farrell 2011).

The Law Society of NSW (2013) has identified at least 15 sections of the Planning Bill (see Appendix C) which provide the Minister with a wide range of discretion not currently available. Four of these apply to Part 3 Strategic Planning. This is considered by the Law Society to seriously undercut the requirement for certainty and transparency claimed for the new planning system in the White Paper. In addition, a number of other provisions in the legislation provide for either the Minister or another consent authority to not be bound by the planning legislation. The implications of this are considered in more detail in Section 5.7.

4.4 The concept of certainty in planning texts

4.4.1 Expression of notions of certainty in planning documents

Any focus on certainty within the strategic plan can be seen as a response to the demands of the property industry resulting in what was characterised as an economic development plan by default inevitably raising questions about any balance with other considerations (Bunker, Holloway and Randolph 2005). This certainty is provided by a single blueprint for the distribution of population based on the so-called rational-comprehensive model (Bunker 2008). Population is distributed by local council area but its effects are unknown.

> *This blueprint* [the distribution of population and job targets for all major centres] *drives each plan. In Sydney, the population totals for each sub-region are being allocated to council areas, which then have to produce zoning configurations which can accommodate them. The environmental impact, traffic generation, necessary infrastructure provision, design challenges, heritage protection and social effects are unknown until detailed planning takes place.*
> (Bunker 2008, 39, bracketed text added)

This would appear to be a recipe for uncertainty. It was written about the 2005 Metropolitan Strategy but little seems to have changed since then. Employment distribution is much more difficult to allocate resulting in demands from the property industry to concentrate employment in various established centres and ensuring a sufficient supply of employment land for business parks, lower density manufacturing, distribution, storage and bulk retailing (Property Council of Australia 2002). This appears to be an unstable concept of certainty which is unlikely to instil much confidence in the content of the strategic plan.

Two other kinds of certainty can be conceptualised within or as a product of the operations of the planning system focusing on the strategic plan. These are first the certainty endowed by the statutory nature of the plan itself; in this case, the SI LEP in

response to the requirements of the overall strategy and the Metropolitan Development Program (MDP). Here compliance with its objectives and controls can be expected to result in the approval of a development proposal. Second this relates to the notions attaching to the aims and the process of formulation of the plan itself where the concept of certainty is much more diffuse and unstable. Most claims for any increase in certainty appear to be based on improved application of the standard procedures and practices of the planning process which is then claimed to achieve the necessary increase in confidence. Little is said about the process employed to formulate these plans; it appears to be accepted that those procedures remain valid.

Content, in this context, relates to the knowledge encapsulated and expressed in planning. This is also of two kinds: that which can be expressed in language and second, that which is tacit, unarticulated. The latter is usually exercised unconsciously within the values and practices brought to bear on the exercise of plan- and policy-making, internal to the exercise of planning (Schönwandt 2008). This cannot be exchanged through acts of communication but is reflected in those ideas and values traditionally seen as influencing the mechanisms necessary for the achievement of the outcomes of planning practice. This process is normally hidden from those whose confidence is desired (Schönwandt 2008). The principal means of communicating knowledge – the content of planning – is therefore that which can be encapsulated in language.

It is possible to trace the use of the notion of certainty in the language of publicly available planning documents both in the way it is directly articulated, predominantly within statements of aims and objectives in the strategic plans and in the claims for improvement included within the annual reports of the Department. This does not have to be restricted to the words *certainty* or *certain* but can include the use of other words closely related to the definition of that quality and widely used in planning documents. In this case the word *ensure* and its use within these documents is also assessed. It is also possible to identify how claims for certainty and its increase have changed, if at all, over time.

However, it is necessary to define what these words mean in the context of their use in various planning documents. A difficulty arises here because the conventional definition of certainty as discussed in Section 2.2 could not realistically apply to the processes of land use planning yet is still regularly applied to it by government and property industry lobby groups. A more realistic use relates to that of certainty in common parlance where degrees of certainty are often applied – *that will provide some certainty*, for example. Such a modification would not be acceptable to language purists but appears to be widely used and understood in everyday life. Certainty can therefore be available in

degrees depending on the perceived veracity of the evidence and/or the extent of the belief.

The use of such words generally focuses on statements when the necessity to express what is intended by the policies, actions and programs described therein, is required. Strategic plans, while remaining generalised contain a whole range of statements which are intended to characterise and identify the aims of the plan and what outcomes are sought by their implementation. These are usually set out as objectives with attached actions purporting to indicate how the objectives are to be achieved. Other uses occur in claims made in relation to the activities of the Department over the previous year as a form of self-justification and possibly self-deception (NSW Department of Planning 2005-2008, 2009a, 2010f, NSW Department of Planning and Infrastructure 2011a, 2012d, 2013e). They also provide an insight into the way that certainty is perceived by the Department.

As a significant public document it might be reasonable to expect that the provisions, aims, actions and regulations set out in the strategic plan are accurately described in the language used. This must define the purpose, propositions and claims made in clear and unambiguous terms. If planning policy is to be based on evidence as indicated in the White Paper (60), the language used providing the basis for the application of the legislation and the public policy aims established in response to it, needs to be able to clearly define and justify what is intended, why it is being proposed and what the anticipated outcomes will be. It is part of the justification of planning that there should be a causal relationship between intention and outcome. This particular notion is addressed in more detail in Chapter Six.

The process undertaken over the last three years has also presented a rare opportunity to examine the language used in the documents prepared as a prelude to the preparation of new planning legislation in NSW. In addition to five individual reports each seeking community and stakeholder comment and providing response to the issues raised, a significant volume of other material in the form of explanatory and overtly promotional leaflets have been prepared by the responsible Minister and the Department. These inevitably seek to convince those who would be unlikely to read the main documents that the proposals were in their best interests and would overcome the claimed deficiencies in the existing planning system. The notion of certainty is often attached to these claims, sometimes at its centre, if the material is aimed specifically at the community (NSW Department of Planning and Infrastructure 2013d).

The future use of the strategic plan as the peak document in the hierarchy of plans places an increased level of responsibility on the wording within it which will cause problems for those plans which rely on it if it is semantically inexact requiring reinterpretation and

debate. Particular attention will need to be given to accuracy and clarity of language in these documents (Tewdwr-Jones 2002).

Table 4.1 provides a summary of the use of the words *certainty* and *ensure* in a sample of NSW planning documents. That text which includes a reference to certainty in the documents is set out in detail in Appendix A. Examples of the use of *ensure* are provided later in this chapter.

Table 4.1 Use of key words in selected planning documents

Document		Key word		Pages[1]	Pages per use[2]
		Certainty	*Ensure*[3]		
Sydney Metropolitan Plans					
Cities for the 21st Century	1995	nil	15	80	5.3
Shaping our Cities[4]	1998	1	10	22	2.2
Sydney City of Cities	2005	23	149	236	1.6
Sydney Metropolitan Strategy	2010	20	199	220	1.1
Draft Metro Strategy for Sydney	2013	2	49	115	2.3
Planning System Review Documents					
Issues Paper	2011	9	16	120	7.5
Planning System Review Vol 1	2012	11	52	153	2.9
Vol 2	2012	1	38	145	3.8
Green Paper	2012	34	41	92	2.2
White Paper	2013	29	92	209	2.3
Annual Reports of the Department of Planning (and Infrastructure)					
	2005-2006	4	24	42	1.7
	2006-2007	4	31	61	2.0
	2007-2008	2	29	87	3.0
	2008-2009	7	34	112	3.3
	2009-2010	13	52	190	3.6
	2010-2011	3	31	192	6.2
	2011-2012	3	23	208	9.0
	2012-2013	2	38	187	4.9

Note 1: Total number of pages in the main document excluding summaries, obvious repetitions and pages with graphics but no text.
2: Number of pages per single use of the word ensure. Higher numbers indicate lower usage.
3: Definitions of ensure in the Shorter Oxford English Dictionary 6th edition include:
- promise to a person;
- pledge, guarantee, warrant;
- secure, make safe;
- insure
- make certain the occurrence of an outcome; and
- secure a thing for a person.

4: Accompanied by Shaping Western Sydney in a similar format – not included in the table.

The use of certainty and its associated text inevitably increases in parallel with the substantial expansion of the documents themselves, initiated by the 2005 version of the strategic plan. There is also an increased intensity of use of these two words which appears to have fallen away somewhat in the most recent draft. This appears to be the result of a changed structure for the document which has the effect of reducing the repetition common in the earlier versions. A wide search was made for alternative/opposing terms in planning documents. As no identifiable pattern or tendency was discernible, this was not pursued any further.

There is no pattern discernible in the annual reports. However, in both document types the generation of certainty or its improvement is, in virtually all cases, to be the outcome of the changes anticipated to result from the implementation of the policies and actions included in that particular version of the plan.

The use of the word certainty in the main planning documents such as strategic plans has fluctuated over the last two decades. In general its use has been associated with claims that any proposal for change in the processes of land use planning will increase that characteristic. There is usually no indication how this will be achieved apart from the implementation of the change desired which is justified on the resulting improvement in the operation of the system, or a part of it. No consideration is given for its claimed absence in the current procedures and no link established between present ineffectiveness and the proposed change required to improve it. It appears to be assumed that an increase in certainty is desirable without defining what that entails and why it is necessary to do so. The need to change for whatever reason is justified on the need to increase certainty without defining what certainty is in this context.

Claims containing the notion of certainty are used sparingly in strategic plans. However, the use of other closely related words with a similar meaning is widespread. This is particularly the case with *ensure*, which when used in documents of this kind, comprises a guarantee or a promise, a much more definitive statement of certainty than that used in common parlance which demonstrates various degrees of variation where qualification is commonplace.

It is possible to track the use of the words *certainty* and *ensure* (defined in the Shorter Oxford English Dictionary as *make certain the occurrence of an outcome* or a *guarantee*) in various planning documents over time to identify how they are used and how that use and meaning has changed. Three groups of documents have been reviewed: Metropolitan Plans for Sydney 1995 to 2013; the five documents produced during the

Planning System Review from 2011 to 2013 and the Annual Reports of the Department from 2005/2006 to 2012/2013.

Metropolitan plans for Sydney

There has been a change in the use of certainty in the various Metropolitan Plans. Its single use in the 1995 plan (NSW Department of Planning 1995) suggests that certainty characterised by regulation and clear direction will be attractive to investors but makes no claim for its existence in any specific component of the plan.

> *Investors will be attracted by readily accessible information on development sites and a regulatory regime characterised by* ***certainty*** *and clear direction.*
> (18, emphasis added)

The 1998 plan (NSW Department of Urban Affairs and Planning 1998) which covered the whole region from Wollongong to Newcastle in 30 pages expanded this reliance on the aim of the approval process undertaken in an open manner to provide the certainty required to encourage investment but went no further to claim its existence within the existing system.

> *The NSW planning system aims to provide* ***certainty*** *for businesses, facilitate innovation, and readily adapt to economic change with consistency and transparency.*
> (20, emphasis added)

The 2005 plan (NSW Department of Planning 2005) considerably expanded its content to 236 pages at the same time as its use of certainty where its application becomes more specific including claims that various procedures will provide certainty or increase the extent of that quality already available. Improvement of certainty is also included as an aim of the plan and the planning system although it is not clear how targets can provide certainty as claimed.

> *Targets interpret the Metropolitan Strategy vision for Sydney's sustainable growth. Targets provide clear and accountable direction, and* ***certainty*** *for private and public investment, by signalling the government's commitment and clarifying the basis for planning and decision-making.*
> (208, emphasis added).

The 2010 plan (NSW Government 2010d) continued the emphasis on procedural improvement as a source of certainty. Better decisions will result from improving the operation of the processes including better procedures/coordination/data availability allowing simplification and the streamlining of the development process. Changes including provision of targets and guidance will assist planning aims.

> *Establishing targets at the project planning stage to achieve environmental benefits through every stage, increasing* ***certainty*** *throughout the process (by integrating environmental targets in infrastructure and land use planning).*
> (183, emphasis added).

The draft 2013 plan (NSW Government 2013a) reduces the use of certainty to the level applying in 1995 although the use of its alternative *ensure* continues at a similar level to that in the more recent versions. Changes to the planning system proposed in the new legislation, rather than those in the plan itself will streamline planning processes and achieve improvements in productivity.

> *The plan will be delivered via the new planning system which will achieve a high level of business competitiveness by streamlining planning processes, improving community participation and giving people more* ***certainty*** *about changes to their area.*
> (22, emphasis added).

Some strategic plans indicate that processes and procedures need to improve with exhortations for better performance but the majority of the 49 occasions on which certainty is claimed in the plans produced between 1995 and 2013 associate the better performance claimed to be achieved by what is proposed in the plan with the delivery of that outcome for everyone associated with or affected by the planning system. In effect, all of these promote the notion that simply by operating the planning system better than at present, the renewed confidence produced will provide the necessary certainty. No attempt is made to demonstrate any plausible link between an improvement in the operation of the planning system and this claimed increase in confidence.

Planning system review documents

There is a clear difference in the use of the word certainty between those reports prepared by the Independent Panel made up of two individuals with strong legal backgrounds working within the constraints of published terms of reference and the subsequent government responses to their recommendations in the form of the Green and White Papers.

The recommendations of the Independent Panel were provided in two volumes (NSW Government 2012b). Half of the occasions (6 out of 12) in which certainty is used are direct quotations from submissions made to the review by interest groups mainly representing the development industry. It is assumed that the authors of the review accept the relevance of the statements made. Otherwise, certainty is used sparingly without hyperbole.

> *The processes in any new planning system, particularly those for determination of project proposals, should be undertaken in a fashion that eliminates unnecessary delays and provides clarity and* ***certainty*** *of outcome to both the project proponents and the community within which the project is proposed to be located – whether or not the proposal is approved or is rejected.*
> (Volume 1, 37, emphasis added)

> *This raises the issues of flexibility in assessing the merits of particular proposals versus the ability to predict outcomes with* ***certainty****, based on the relevant council's Development Control Plan's controls.*
> (Volume 1, 78, emphasis added)

The use of certainty in the Green Paper (NSW Government 2012c) increases substantially in comparison to that in the review documents (34 uses in 92 pages compared to 12 uses in 298 pages). The manner in which the word is used is also different. Here, the argument resorts to the standard two-fold justification for change: (1) the deficiencies of the existing system do not supply the necessary level of certainty (9 occasions) and (2) procedures to be introduced will create or improve existing certainty (18 occasions). Any link between the claimed failures of the existing system and the means proposed to improve the process is left unsaid.

> *At present, there are many layers in the development process. This process is unwieldy, extremely slow and costly and often does not lead to better outcomes. The many layers of assessment and determination are very confusing for the community and provide very little* ***certainty*** *for applicants.*
> (51, emphasis added)

> *The major changes proposed to the planning system relating to infrastructure include: Growth Infrastructure Plans to link strategic planning with infrastructure planning and provision, hence strengthening* ***certainty*** *and accountability for delivery; and Public Priority Infrastructure to streamline assessment for major infrastructure delivery and provide upfront* ***certainty*** *accounting for increasing public private delivery models.*
> (65, emphasis added)

The text of the Green Paper also departs in a number of ways from the recommendations of the Independent Panel. In the main, these are omissions of what is proposed but include some contradictions and some rejections as outlined in Section 3.7. The provisions rejected are mainly focused on improving the accountability of the decision-makers and introducing appropriate checks and balances on the discretionary powers available to the Minister. These were intended to move towards improving public confidence in the integrity of the processes of land use planning which was claimed to be one of the reasons why reform was required.

The subsequent White Paper (NSW Government 2013b) expands and elaborates the changes set out in the Green Paper promoting them using similar claims for failure and

presenting the notion of certainty as the outcome of the procedures to be introduced in the new legislation.

Annual Reports of the NSW Department of Planning

Eight annual reports of the Department have been reviewed in relation to the use of certainty. While these vary in number of occasions in which these words are used, their use coincides with the way in which that quality has been ascribed to those activities that the Department wishes to promote as a success. As might be expected for a document intended to present these in the best possible light, each statement constitutes a claim for improvement over previous efforts or that the changes implemented or being considered will bring about future improvement.

> *This* (the Metropolitan Strategy) *will provide longer term* ***certainty*** *for development decisions and infrastructure investment.*
> (2005-2006, 14, emphasis added)
>
> (Exempt and complying codes) *contribute to jobs and economic growth by ensuring* ***certainty*** *of outcome and shortening development determination times for homeowners, industry and small business owners.*
> (2009-2010, 21, emphasis added).
>
> *The department has an important role undertaking medium and long-term planning for our cities and regions. This planning creates* ***certainty*** *for investors and the community about where new development will be supported and how infrastructure will support this growth.*
> (2011-2012, 54, emphasis added)

Planning circulars prepared by the Department are routinely used to advise councils and the public about various changes introduced in the planning system as authorised by the Director-General. These changes are often justified in the standard introduction whatever the content of the circular:

> *. . . changes have been put in place to improve plan-making processes under Part 3 of the Environmental Planning and Assessment Act 1979 (the Act). These changes come into effect on . . . and will increase transparency, provide greater* ***certainty,*** *and increase councils' roles and responsibilities in plan making by . . .*
> (Department of Planning and Infrastructure 2012b, emphasis added).

The increase in the use of certainty in these documents, which only started in 1995 and appeared to reach a peak in the 2005 and 2010 versions of the Metropolitan strategy, can be seen as a response to a perceived need to justify planning to property interests when it becomes no longer possible to direct the actions of capital to achieve long held nostrums of public benefit but are expected to lower any barriers to corporate action. The constant emphasis in the moves to reform the planning system in NSW by focusing predominantly on improving ease of approval is a case in point. The disjunction within the Planning Review process also illustrates this. The early documents produced by individuals with a

legal background included few references to certainty and made no claims for it as a reason for change while the following Green Paper, composed entirely by a mix of government bureaucrats and representatives of a number of interest groups (their names are included in the document) immediately introduces its use as a means of justification.

4.4.2 Use of certainty as justification

It is inevitable that documents prepared in relation to a review of the planning system as a whole as part of a process to prepare new legislation will include a focus on the failings of the existing system combined with claims for the improvement to be brought about by the proposed changes. Technical issues to be addressed by the new legislation merge with the promotional requirement to provide a justification for the proposed changes where fact and prediction become indistinguishable.

> *The principles driving the reform of the NSW planning system are* [inter alia]: *robust and evidence based strategic planning will provide the foundation for* ***certainty*** *and integrity in decision making.*
> (NSW Government 2012c, 18, emphasis added)

Certainty is not clearly defined in planning documents although it can be inferred that it is a desirable quality which stems from the aims and processes of the plan and it can be improved by change or the introduction of new measures. It is also perceived as a feature necessary to characterise the State government's aim of achieving improvements by convincing investors of its commitment to particular courses of action.

> *Targets interpret the Metropolitan Strategy vision for Sydney's sustainable growth. Targets provide clear and accountable direction and* ***certainty*** *for private and public investment by signalling the government's commitment and clarifying the basis for planning and decision-making.*
> (NSW Department of Planning 2005, 208, emphasis added)

Certainty is unlikely to be created if the conditions consistent with such a characteristic do not already exist; the introduction of a new measure or improvement of an existing provision will increase what is already generated by the particular component of the system.

The use of particular language in relation to certainty has changed over the period since 1995 where the notion has shifted from a definition of a desirable aim of the planning process to one of justification for change where components of the existing procedures lack that quality but the changes to be introduced by further reform of the process will achieve it. At the same time, claims are still attached to the ability of planning action to achieve desirable outcomes even though these are now described in vague terms, whose achievement, or lack of it, would be difficult to identify. However, many of these claims remain couched in language indicating absolute certainty in their achievement.

4.4.3 Considerations of achievement – objectives and certainty

The word *ensure* is included on 452 occasions in the five strategic planning documents. This might appear to be excessive especially as it has a definitive meaning presenting a clear and unequivocal commitment, coming closer to the concept of absolute certainty than the rather looser use of the word certainty itself now implies. It is without qualification; a guarantee that the action or outcome as described will eventuate and the objective achieved. There is no reservation; an absolute commitment is made. There are therefore numerous occasions where words synonymous with guarantee are regularly used in the text of planning documents.

Ensure can be used in circumstances where its meanings may be guaranteed and is sometimes used in this way. Otherwise it can be used indirectly: *it is important to ensure that,* for example. However, in many cases, the guarantee is used directly to, in effect, express certainty as in:

> ***. . . ensure*** *that development achieves vibrant and well-connected communities with good amenity, not just density.*
> (NSW Department of Planning 2010a, 7, emphasis added).

In order to identify its pattern of use over time and determine the number of guarantees, pledges and promises (alternative definitions of ensure in the dictionary), included in previous and current Australian strategic plans, a word count for ensure was undertaken. The results are shown in Table 4.2.

This reveals that most current strategic plans prepared in Australia use the word *ensure* to a remarkable extent ranging from one use per 1.8 pages in Adelaide to one per 1.1 pages in Sydney. Its use in similar plans in Sydney has massively increased from one use per 25 pages in 1968 to one per 1.1 pages in 2010. Neither does this appear to be an Australian phenomenon – a peculiar local use of the language – the word appears in the recent London Plan, for example once per 1.4 pages, similar to Sydney reducing from once per 1.1 pages in the draft version.

There is clearly a place for statements of certainty (in this definition of ensure) in strategic documents if this is an accurate representation of the genre. Alternatively, the excessive use of this word may be attributable to semantic slackness on the part of the writers and editors of the document. However, many of the uses of the word are attached to objective statements and planning commitments in the document and the community is perhaps entitled to expect that these outcomes as promised are guaranteed, particularly if an increased level of importance is to be placed on high level plans as a source of certainty.

Table 4.2 Use of the word *ensure* in major planning documents

Planning document	Date	Pages[1]	Use[2]	Pages per use[3]
Sydney Region Outline Plan	1968	100	4	25
Sydney into its Third Century	1988	48	22	2.2
Cities for the 21st Century	1995	80	15	5.3
Shaping our Cities	1998	22	10	2.2
Sydney City of Cities	2005	236	149	1.6
Sydney Metropolitan Strategy	2010	220	199	1.1
Sydney Metro Discussion Paper	2012	36	15	2.4
NSW Planning Green Paper	2012	96	41	2.3
NSW Planning White Paper	2013	214	92	2.3
NSW Long Term Transport Plan	2012	387	122	3.1
Draft Metro Strategy for Sydney to 2031	2013	115	49	2.3
Melbourne 2030	2002	175	108	1.6
PlanMelbourne Metropolitan Strategy	2013	190	116	1.6
SE Queensland Regional Plan	2009	156	125	1.2
Adelaide 30-Year Plan	2010	212	121	1.8
London Draft Replacement Plan	2009	176	154	1.1
The London Plan	2011	295	208	1.4

Note 1: Total number of pages in the main document excluding summaries, obvious repetitions and pages with graphics but no text.
2: Use of the word *ensure* within the main text.
3: One use per x pages of the document.

A more detailed assessment of the use of ensure was undertaken for the summary chapter of the *Metropolitan Plan for Sydney 2036* which is entitled *Strategic Directions, Objectives and Actions* (NSW Department of Planning 2010b, 233). The chapter covers 11 pages and contains 27 instances of the use of the word. As its title suggests, it contains a listing of the objectives (54 in total) developed for the plan divided into a number of categories, each one supported by a series of actions (140) whose successful implementation, it is suggested, will result in the achievement of the relevant objective. As outcomes, if they could be identified as a direct result of the actions described, are not monitored, their effectiveness will never be known.

A number of the objectives as well as the proposed actions contain the word *ensure*, used in a variety of ways with differing emphases and meanings. In practice, however the objectives are little more than statements of general policy providing nothing that would allow subsequent monitoring of their achievement or failure to be measured in any meaningful way. If the objectives are intended to be a detailed working out of the goals

expressed as Strategic Directions in the plan, they still fail to provide any means by which their effectiveness can be demonstrated. Many of the listed actions are vague indications of what should or might be undertaken. Examples include:

> *Objective H1: To **ensure** equity, liveability and social inclusion are integrated into plan-making and planning decision-making.*
>
> *Action H1.1: Incorporate equity, liveability and social inclusion as a strategic direction in Subregional Strategies to **ensure** they can be implemented at the local level and in council LEPs.*
>
> *Action H1.4: **Ensure** the special needs of particular groups are considered in plan making and planning decision-making.*
> (NSW Department of Planning 2010a, 242, emphasis added)

The issues of equity, liveability and social inclusion are major concerns, originally fundamental to the justification of planning. The wording of the objective and its associated actions simply passes on the necessity, first to define what these issues mean in operational terms and second, how they can be addressed in a realistic and meaningful way. That responsibility falls upon the local planning authorities to determine how these difficult and complex issues are dealt with within the SI LEP. In any case, any improvement of such socially-centred concerns can hardly be expected to be capable of achievement merely by the control of the use of land and the relatively limited resources available to local governments.

Nine of the stated objectives guarantee specific outcomes. None of these can be termed objectives in the classic planning sense (NSW Government 2010d, 234-243). The majority comprise basic statements of what land-use planning purports or aspires to do. This includes facilitating the supply of land to accommodate demand for residential and employment use, the required level of accessibility to centres and the delivery of appropriate social infrastructure and services at effective locations.

Other objectives which include the certainty contained in the use of *ensure* are administrative, anticipating the delivery of the planning outcomes via the activities of the local planning authorities under close supervision or have only limited connections to the planning process in relation to their support of major events at iconic locations, for example (NSW Government 2010d, 234).

There are actions attached to each of these objectives which also include the word *ensure*. These are aimed at seeking the achievement of, or movement towards achieving the outcomes set out in the objective. By their wording they are guaranteeing that this will occur.

The Introduction to the Implementation chapter of the *Sydney Metropolitan Strategy 2036* contains the following:

> *The Metropolitan Plan provides the vision and spatial context for whole of Government decisions to:*
>
> - ***ensure*** *NSW Government investment priorities are targeted to achieving the strategic functions of the plan.*
>
> - ***ensure*** *strategic directions are reflected in local plans via the planning system and in partnership with local councils (via Subregional Strategies and the planning system).*
>
> (NSW Department of Planning 2010d, 214, emphasis added)

The first is probably more like wishful thinking rather than a guarantee and the second merely confirms the power relationship between State and local governments in NSW.

Here strategic documents which, by definition are wide-ranging and more-generalised than the specific local planning instruments intended to set out standards for development, are repeatedly using a word which expresses absolute certainty providing a guarantee that the action or outcome stated will occur without any reservation. In documents where the word *ensure* is frequently used, it is difficult not to conclude that its use has become a habit among its authors; otherwise it might be necessary to think that they believe that each of their policies and programs will achieve their claimed outcomes.

A comparison with other planning documents raises some questions. Recent strategic planning documents also feature the extensive use of the term *ensure*, but in a rather more appropriate way. These documents contain imprecations such as:

> *The Minister must* ***ensure*** *that the provisions of this policy are reviewed.*
> (NSW Department of Planning 2010e, 7, emphasis added)

The notion of certainty, either directly expressed or in terms synonymous of it, is widely used in planning documents which are attempting, at least in part, to promote a positive message that the future of the city is in reliable hands and the means of its improvement are available if the initiatives set out in them are implemented. It might however be reasonable to suggest that the widespread use of words with absolute meanings indicating that a significant number of the policies and actions set out in these plans will unfailingly result in the achievement of the outcomes desired may be the product of misunderstanding what is being written. This is unfortunate if the text of these documents is the principal means of communicating a clear and unambiguous message of confidence in the veracity of the planning process.

Alternatively, the meaning of the term in public parlance might be considered to differ from its regular definition in the dictionary. Another possible interpretation of its regular use

is that the word *ensure* has become one of a number of words and expressions used as part of the process of promoting State government policy. It is suitably consoling and seemingly positive, making it appropriate for use in the sense of marketing or promoting a product. It can be used in a manner where it appears to be definitive when required but is considered to be semantically flexible and therefore useful for inclusion in policy statements and proposed actions which by their nature are uncertain of achievement (Fairclough 1992). This is not likely to create the desired level of certainty. Indeed, the Minister for Planning and Infrastructure in announcing the major overhaul of NSW planning legislation in July 2011 claimed that:

> *It* [the reform of the planning system] *will* ***ensure*** *NSW residents and businesses get the* ***certainty*** *which will bring jobs and new housing.*
> (Hazzard 2011, emphasis added)

Clearly no effort has been made to minimise the hyperbole attaching to the ability of the reformed planning system to achieve outstanding outcomes including the ability of the personal notion of certainty in the reformed planning system to deliver both jobs and new housing.

It might therefore be considered facile to derive anything of significance from the wording of planning documents given that the use of ill-defined notions and vague assumptions appears to be endemic in the way that the scope and purpose of planning has been categorised over the years. However if planning is to be promoted as a source of certainty, that can only be found by reference to the validity of the aims and policies set out in the relevant documents and, in particular to the accuracy of the words setting out what is proposed to achieve its aims. This relates not only to the perhaps misguided application of words which, when correctly used, have meanings which denote outcomes which cannot be achieved by the actions indicated or at all by any of the powers available to planners.

However, it is difficult to explain the widespread use of *ensure* unless it has an agreed and understood purpose. Here the wording could be considered to be deliberate rather than a misuse of the language, attempting to convince the reader that the operation of the planning system has the power to achieve the stated outcomes using the policies and actions available. At the same time, insufficient consideration is given to the definition of appropriate and realisable objectives. Many appear to be statements of political correctness or unachievable outcomes which have little relationship with the powers available in the process of the control of land use. Alternatively, the use of clearly defined and achievable objectives in planning may be becoming increasingly irrelevant.

4.5 Basis of the plan

There is a limited literature on the practice of preparing strategic land use plans as opposed to that attempting to indicate how that should preferably be accomplished. Even this is now rather out-dated, seeming to describe principles and procedures which were essentially theoretical rather than applicable to circumstances in the real world (Chapin 1970, Bracken 1981/2007, Bruton and Nicholson 1987). Even recent material on planning practice only provides the step-by-step models of an idealised practice setting out the key components of plan-making activities (Kitchen 2007). The classic texts of systems planning (McLoughlin 1969, Chadwick 1971) promote processes and procedures hardly recognisable in planning departments today. There have been more recent deliberations on strategic plans in Australia (Bunker 2008, 2013, Bunker and Searle 2007, 2009, Troy 2013, Searle 2014) but these have consisted more of dissections after the event rather than considerations of the process of preparing the plan and its limitations, although these have also been touched upon.

The process of strategic plan-making is rarely described, perhaps because it might appear to be simplistic, based predominantly on extrapolation of past trends within an assumed but unverified context, enveloped in a plethora of aims which have little prospect of achievement. Indeed there appears to be little direct connection between the subsequent plan and the means of their achievement even, if in some cases, this was at all possible (Bunker 2011, 2013). This overlay of goals, objectives, aims and so on, has become increasingly speculative in recent attempts, even though the basic aim remains to indicate some kind of future urbanisation of people, jobs and connections orientated across the most acceptable (least sensitive) environment. Planning aims are firmly fixed on the facilitation of development, its key objective (NSW Government 2013b, 15).

Development is now location-focused rather than addressing specific issues. There are City Shapers where opportunities for growth and change are situated, Urban Activation Precincts intended to accelerate the pace of urban renewal, a Global Economic Corridor and growth corridors such as Parramatta Road. At the same time there is no recognition in the draft Metropolitan Strategy (NSW Government 2013a) of the existence of urban deprivation and social exclusion where disadvantage has become suburbanised in the middle and outer areas of Sydney. Here extensive suburbs have in excess of 80 percent of their population living in highly disadvantaged CDs (Pinnegar and Randolph 2013).

Not only is there no response to such problems in the Strategic Plan there is no recognition that these circumstances exist. This is in stark contrast to the London Plan, for example which not only provides detailed evidence on poverty and disadvantage in that city but

includes policies aimed at ensuring (sic) equal life chances for all (Greater London Authority 2011). In Sydney, urban renewal initiatives are undertaken predominantly outside the strategic plan, within identified precincts, a number of which comprise centres with good quality but low density residential areas where the process of upzoning is being used to redevelop the area when the market decides that is appropriate and likely to be profitable. Few of these precincts are located in an area of disadvantage.

> *Planning is needed to assist the development process although development is dominated by the private sector so planners are there to* ***ensure*** *that it is done correctly.*
> (Senior departmental policy planner 2011, emphasis added)

The strategic plan's fundamental processes are straightforward, based on population projections, which over the long period usually chosen, can only ever be little more than speculation. Everything else is based on those extrapolations (Bunker 2013). They are converted into long term requirements for dwellings based on a wide range of assumptions while the area of land required for employment in the long term is even more difficult to estimate given the inevitable shifts in job demand and locational requirements, in part influenced by factors which are not yet known. Yet the plan then goes on to distribute these over the existing and future urbanised area based on some notion of suitability of location or some currently fashionable idea such as commercial and industrial clustering which may or may not have relevance in the future.

> *The employment figures we derive from the population analysis, our demographic analysis because you want to achieve a level of employment everywhere so that gives your aspirational job figure based on the opportunity within that local government area to actually accommodate those jobs either in terms of industrial lands, business parks . . . so using those spatial proxies if you like, bearing in mind that the economy will do what it will do, we still try and deliver an aspirational target per local government for jobs and that at least guides them along the lines of, no we cannot get rid of this land for this purpose, we need to have this land for a business park because we need to find 3,000 more jobs by 2031. It's this trend based but well-informed projection work through strategic planning documents where we try and achieve a level of* ***certainty****.*
> (Senior departmental policy planner 2011, emphasis added)

It is however very difficult to change the direction of the plan or even adjust it following earlier commitment often determined by existing and proposed transport infrastructure. Major infrastructure, for example is often promoted by commercial interests and then accepted by government even though its compliance with the requirements of the plan may be tenuous at best. Infrastructure NSW was set up in 2011 ostensively to prepare the State Infrastructure Strategy 2012-2032 (Infrastructure NSW, undated). This is a good example of the close links between business and the State government where the preparation of the strategy was overseen by a board chaired by a former State Premier with close links to business made up of six senior industry representatives and four State

government bureaucrats. The document was based on a long series of reports prepared by consultants but its relationship to policy is difficult to discern.

This situation becomes more complex by the uncoordinated intervention of the Commonwealth government in the provision of significant infrastructure. At worst, the development of new railway infrastructure, heavily promoted by the State government as suitable for private investment, directly contradicts the requirements for a multi-centred city as set out in the current strategic plan. This failing appears to be tacitly accepted by the repetition of the aim of improving coordination between land use and infrastructure provision which has appeared as an objective of each Metropolitan plan (NSW Department of Planning 2005, NSW Government 2010d, 2013a).

While the general idea that policies need to be generated to address particular problems remains in a limited form, the technical difficulties in developing such policies on the basis of partial knowledge within a constantly changing environment remain insurmountable. What remains therefore is a relatively simple process where dwelling and job targets are developed for each local government area based on population estimates for a specified time in the future distributed on the basis of some broad assumptions about the capacity of the existing developed area to accommodate an increased population while the residue is accommodated on greenfield sites (Pinnegar and Randolph 2013). If the demand for development of peripheral sites remains weak, the only option the planners have is to allow higher residential densities via a process of redevelopment within the existing development footprint even if this encourages a form of residential development disliked by a considerable proportion of the community (Kelly *et al* 2011b). Even so this remains an outcome heavily promoted by the development industry lobby (Urban Taskforce Australia 2013b).

Producing a realisable distribution of this kind either requires an immense base load of survey work in order to determine the possible carrying capacity of those parts of the city already developed within an assumed structure of centres and communications or the application of what might be termed heroic assumptions. The maintenance of a population/employment relationship based on the existing one for a defined area for example can create problems if existing employment areas are the only locations available to accommodate the necessary increase to achieve the balance with the increasing population. This also ignores the future structure of employment demand and its locational requirements as well as the nature of the workforce and its distribution.

In effect the Department sets out a framework which is to be effectively implemented by others. It suggests what these other authorities and interests should do but cannot enforce

any action. This even includes the local councils who are instructed by the Minister to take account of the population and job forecasts provided for them and of course operate the planning system devised by the Department and the Department of Local Government. While the councils cannot ignore these requirements, the long term forecasts remain theoretical in that they cannot directly initiate development if it is not going to occur; development will continue as the economy decides, the forecasts will be revised every five years and the previous predictions may therefore never be achieved. It is not clear what is gained by such a process except in the short term and even that may be difficult to influence in any realistic manner (Bunker 2013).

That part of the system not involving plan-making is about attempting to achieve inevitability, predictability and certainty of outcome. There is little scope for change, innovation or experiment. It is possible to contend that it might be designed to perpetuate the ordinary – that which has already been experienced. The more restrictive it becomes, the possibility of change is further diminished. What change has occurred has been driven by economic and social influences relating to the effects of the fracturing of the job market and the commodification of housing (Gleeson and Low 2000b).

In practice, the planning system can only exercise direct influence over the private sector by refusing to allow it to develop in particular locations in an indirect effort to locate such development in a preferred area. If the promotion of development is the prime objective of the planning system such an approach cannot be expected to be effective. In circumstances where the locational priorities of the development industry are in opposition to those of the plan this creates difficulties for one that attempts to organise the structure of the urban area where employment is focused on particular nodes or centres each connected by an efficient transport system. Where the market in land is essentially free, rules that only determine what that land can be used for, will not have a great deal of influence over location unless it coincides with the requirements of the development industry responding to market interests.

Previous strategies, from at least that in 1995 (NSW Department of Planning 1995) have overtly recognised the tri-partite nature of the responsibility for implementation of the Strategic Plan. Except for two factors in this relationship, little has changed. These are the increased control exercised by the State government over the activities of local planning authorities and the gradual withdrawal of that government from direct involvement in the provision of development except as a small part of the commercial housing market via Landcom (now UrbanGrowth NSW) and as the provider of some supporting infrastructure. The principal activities of government have become focused on the facilitation of private development ensuring that any influence can only realistically be exercised when it meets

the requirements of the development industry. There is no evidence available that these changes will lead to a more successful delivery of the aims of the strategy than occurred previously.

> *At the moment the gap between aspiration and reality is filled by the clumsy device of producing another plan in the same idiom.*
> (Bunker 2014, 9)

4.6 Confidence in forecasts

The generation of strategic plans relies on long term forecasts of the population that a defined area will be expected to accommodate at a specific time in the future. There is however a fundamental objection to forecasting – it is quite doubtful that the future can be known. Forecasts are not predictions since they do not rest on knowledge of likely changes in the pattern of cause and effect. They are merely extrapolations, resting on an assumption of the continuation of existing trends providing a range of possibilities based on further assumptions.

The point here is that our current view of the future, particularly with, say a 25 year horizon is inevitably wrong. If implementation of the plan based on this idea of the future then requires the provision of expensive infrastructure in the wrong place or the policies included in the plan require restrictions on a certain type of development when the future demand for that kind of growth becomes significant, the plan itself can become damaging – an inefficient use of resources unless it is carefully monitored and its provisions amended as a result. It is not clear, under these circumstances what the purpose of long term, strategic plans is.

The Reserve Bank has published for the first time estimates of the range of confidence intervals, in practice the errors, relating to its forecasts of inflation and GDP growth in its regular Statement on Monetary Policy based on work by Tulip and Wallace (Reserve Bank of Australia 2013). This was undertaken by applying the range of actual forecast errors for the period between 1993 and 2011 to the future estimates for the period up to the end of 2015. It is worth considering these results for two reasons. First, strategic planning is dependent on similar but much longer term forecasts and errors similar to these could be relevant and second, they illustrate the high level of uncertainty that needs to be ascribed to such attempts to foresee the future even over the short term.

The study indicated that if similar errors apply to the current forecasts as previously, there is a 70 percent probability that growth in real gross domestic product (GDP) over the year to the end of 2014 will lie between 1.5 percent and 4.4 percent. Similarly underlying inflation will lie between 1.6 percent and 3.2 percent. This indicates the extent of inaccuracy of

economic and probably many other projections suggesting that the use of such as the basis for the construction of a whole series of assumptions on which long term planning policy is deemed to be based ought to be approached with a high degree of scepticism. At least a range of alternative trajectories needs to be considered so that the range of error can be addressed. It may also be foolish to suggest that a plan based on forecasts of this kind can contain anything considered to be certain.

While demographic forecasts are based on less volatile factors, they are also subject to a variety of social and political influences which are not amenable to prediction. Social changes, themselves influenced by economic effects, such as the recent although minor change to average household size in large areas of Sydney - a key strategic assumption - which saw a slight increase for the first time in decades (ABS 2011). Instead of attempting to predict future conditions of this kind which will inevitably be wrong, it would appear to be more effective to accept the inevitability of uncertainty and redesign the planning process to allow policies and actions to change to reflect unpredictable future circumstances. There is no place for the creation of a view of the future based on a partial and incomplete understanding of the present and the reasons for its reality. However, such a flexible response to the future does not seem to coincide with the apparent need for certainty which can, of course relate to an inevitably inaccurate description of it which is of little concern to the interests desiring to initiate development in the present.

All forecasting is subject to inherent problems. Forecasts start from a static sectoral base and attempt to predict the future of a dynamic system; a wide range of simplifying assumptions is therefore required to deal with the inter-relationships between housing, employment and migration which can have substantial impacts on the dynamic of the local planning process (Bracken 1981, Ballard and Norris 1983). Available data are highly variable in quality and frequently reflect general, national needs rather than more local sensitivities often requiring adjustments sometimes undertaken without a reliable empirical foundation. The basis for the information of greatest use for the kind of demographic and other estimates used in strategic planning is the census which is subjected to sophisticated analysis by the ABS. This can provide a detailed examination of the relevant data but long term projections also need the inclusion of assumptions on the rate of immigration which can be variable and highly sensitive to government policy. Recent estimates by the bureau assume a long-term average net gain at roughly the current levels, simply an extrapolation which cannot be considered to be reliable (Colebatch 2013).

The effect of the variable quality of the data or, in some cases its absence, on the robustness of the forecasts is not always understood or may be conveniently forgotten. The development of conventional forecasting methods in urban planning has been

dominated by supply considerations, that is the estimation of population (people), employment need (workforce) and housing need (households) rarely in relation to systematic attempts to forecast the demand side where labour demand, for example refers to the requirements of employers for workforce (job availability) and housing (provision of dwellings). These latter elements are much more difficult to estimate requiring considerably greater effort and resources and perhaps, more significantly, requires the planners to develop a much clearer perspective on the driving forces of the development process, which they have tended to take for granted. Failure to effectively encompass both sides within a forecasting exercise will reveal its inadequacies when the assumptions on which it is based are seen to be at variance with reality (Bracken 1981).

The first step in enhancing the quality of forecasting activity in urban planning would appear to be a careful and explicit assessment of the extent of control it is possible to exercise over the development process – in terms of promotion or restraint. Forecasting of events should reflect the probability of success in using powers and the exercise of influence over events which will normally be only partially under direct or even indirect control.

The reason why planning seeks to aim for a future desirable state, while central to the concept of planning, is more probably due to its inability to predict with any degree of accuracy what that state would be without its intervention. Prevailing conditions are indeed only perceived (knowable) through the fog of uncertainty (Kahneman 2011).

4.7 Considerations of balance

The notion of balance has been a component of land use planning since the idea of a socially balanced community was central to its ethical and practical concerns now much reduced. Balance in this context now comprises two different but linked ideas relating to the notion of balanced growth. The first, often found in council plans complying with the requirements of the *Local Government Act 1993*, the Community Strategic Plan (CSP), expresses the need to balance the release of land for development with market demand in the relevant area to achieve a level of growth required to satisfy the targets imposed by the Department. The second seeks to reflect the balance of new development between greenfield areas and urban redevelopment.

> *As a general policy, the Strategy's approach to balanced growth means housing renewals and developments will reflect market demand, development feasibility and infrastructure, transport and services provisions.*
> (NSW Government 2013a, 10)

This policy aims to take advantage of, and build on, the existing city structure to guide growth in the future. *It will make the best use of public assets such as transport and*

infrastructure and make Sydney more sustainable and efficient (NSW Government 2013a, 10). This shifts the focus of land release policy more towards urban renewal reflecting a continuing lack of demand on the urban periphery. This is claimed to be in response to community feedback which indicated that many wished to see new housing located within existing urban areas. This would appear to be contradictory where the preferred housing form remains the single standalone house (NSW Department of Planning and Infrastructure 2014). It does however suggest that acceptance of apartment living has been traded-off for location and a closer relationship between employment and residence.

Balanced growth is the apparent sobriquet for what are essentially the physical development policies of the latest Sydney draft Metropolitan strategy. Here land releases and development initiatives within the established urban area will be more closely attuned to market demands concentrating on centre development for housing and employment close to transport nodes to stimulate investment in those places ready for development.

> *Growth will be encouraged within the Metropolitan Urban Area to reflect market demand.*
> (NSW Government 2013a, 12)

This will be accomplished by establishing those circumstances needed to unlock the potential for further development. These policies are also designed to promote investment in industrial and commercial developments with the intention of providing opportunities for employment locations to be located closer to residential areas.

However, this assessment is only based at a strategic level on cost benefit analysis which identifies the most effective of a number of approaches based on the parameters included (The Centre for International Economics 2010, 2012) but does not attempt to provide a market analysis of the feasibility of developing what will inevitably be higher density housing in a variety of centres where demand will be localised.

However, metropolitan strategies have always attracted a degree of scepticism in relation to their ability for implementation and the realism of the proposals contained within them (Bunker and Holloway 2006). In part this is the result of beliefs that planners do not have the capacity to bring about the kind of changes in cities necessary to achieve their stated aims (Paterson 2000) and political considerations that any such plan will be overturned by the incoming government (Malkin 2006). If that is the case, the effectiveness of strategic plans is dependent on the long term stability of government and a continuing political support for their aims and content.

Despite the regular production of metropolitan strategies, there has been little examination of how successful they have been in guiding urban growth and change (Bunker 2013). Bunker considers this to be curious given the many features common to the plans for each of the state capitals, notably the orthodoxy of compactness. The process however appears to have produced plans considered by him to be messy, inefficient, partial and uneven, while the response to these deficiencies is usually the preparation of another plan, although this response is also regularly stimulated by a change of state government.

If the strategic plan, however defined, now becomes the central focus of the planning system as proposed, it will be perceived as the kernel from which all else develops rather than an input, albeit an important one, to the process. Such a key responsibility suggests that the strategic plan will need to be considerably more effective in providing a framework for future development than its predecessors appear to have been.

> *A key focus of the Metropolitan Strategy for Sydney is delivery to achieve growth. Where previous strategies have failed to achieve their aims, this Strategy will be delivered through strong cross-agency and private sector collaboration and cooperation with local government.*
> (NSW Government 2013a, 9)

The achievement of the housing and job targets in the strategy are a major responsibility of the local councils in their attempt to achieve the required balance. However in the absence of accurate knowledge of the impacts and costs of development and the demand for the zoned uses in the area, it is by no means certain that the anticipated development will take place (Rowley and Phibbs 2012). It is assumed that by setting aside the requisite areas of land within a particular pattern the required outcomes will be achieved; where other supporting provision is necessary, it is assumed that this will be made available.

In practice, this process is even less specific and more approximate than it might appear. The targets for additional dwellings to be achieved within each LGA are a minimum requirement, not a ceiling (Roseth and Sussex 2014, 29). The responsible council is also required by the Department to rezone enough land to ensure that the net additional dwellings are actually built. This necessitates the zoning of land for significantly more dwellings than required to meet the target because a range of factors such as diverse ownership patterns, owner preferences and economic factors have a major influence on the take-up rate of zoned land which can range between 30 percent and 80 percent (Roseth and Sussex 2014, 30). Such an approach inevitably leaves extensive areas of land zoned and possibly serviced for housing but undeveloped for long periods. It is haphazard and economically inefficient if sites are serviced yet remain undeveloped for many years.

This would appear to be leading to a future urban form where land is not developed uniformly but large areas remain vacant while local clusters could contain development of a kind not generally attractive to the community as a result of residential intensification.

This illustrates the inadequacies of the SI LEP when used as a means of planning future development. These are even more constrained when job targets have to be accommodated. Here, the only recourse is to zone a sufficient area for employment use. The area of land required is based on assumptions about the future relationship between population and employment structure and type which can have little empirical basis. But here the plan requires the local planning authority to effectively sterilise an area of land in order to protect it from development for any use apart from employment purposes, potentially leaving further areas zoned but vacant if they are not attractive to the market. However, this is considered to be an effective process clearly defining the task which each local government is being asked to contribute to the future growth of the city.

While demonstrating the fragility of the targets which provide the basis for the preparation of the statutory planning documents by local councils, this also identifies the manner in which certainty is perceived in this context as a variable notion; there is an amount of certainty but that amount is not defined, it appears to be merely a vague feeling of knowing which cannot be confirmed.

4.8 The plan as an end in itself

The direction of the planning system is determined by the Department in compliance with the political orthodoxy of the day. This is undertaken using the strategic plan, its associated policies and management of the preparation and application of the statutory controls operated by the local councils. This process is operated with some degree of separation from the development industry which is effectively responsible for the delivery of the outcomes of the process although its representatives inevitably exercise considerable influence over all its aspects. These relationships are complex, sometimes unhealthy and often the cause of tension, feigned or real.

The strategic plan reaches a satisfactory outcome once it is signed-off by the Minister and published – the planners in the Department will have done their job. The plan is highly generalised about implementation as in essence its only purpose, as it remains without legal weight, is to provide the basis for the preparation of zoning plans by indicating the population and job targets for each local government area. Its stated aims, in the form of guiding principles and objectives are now so emasculated that they comprise little more than window dressing and a clear link from policy to outcome is difficult to discern (NSW Government 2013a).

Targets included in the plan can sometimes result in curious problems arising from what appears to be a lack of appreciation of the processes involved in development and redevelopment. The most obvious relates to the requirements imposed on those councils which are effectively fully developed to accommodate their contribution to the desired intensification of development required by the strategy. This presents some difficulties in the case of housing but more serious ones affect attempts to increase provision for employment growth. In circumstances where there may be a small number of locations for these uses such as a well-established local industrial complex or a commercial/retail centre of the kind familiar across the whole urban area and few if any opportunities to develop a new employment zone of any significance.

> *Policy incompetencies abound particularly in relation to job locations and targets in more-or-less fully developed areas requiring redevelopment of relatively high density employment areas – lack of appreciation of on-the-ground realities.*
> (Local authority chief planner 2011)

However, the targets provide the basis for the preparation of SI LEPs and DCPs (collectively the local plan) – which themselves provide the fundamental inputs to the heavily constrained zoning plans and the predetermined development controls within the standard template. The role of the local authority planners is therefore of two types: first, developing the plans and the controls, the preparation of which is intermittent; and second, the continuous assessment and approval of development proposals. In part, the planners receive satisfaction from the completion and sign-off of the LEP and for them that completes the process. They have successfully completed their assignment; others will undertake the task of development assessment and, more significantly, the developers now take over and, if sensible, will construct what they find to be profitable. Inevitably their proposals will comply with the requirements included in the pre-determined controls; it would be either foolish or brave to do otherwise.

While this is inevitably a simplified version of the planning process from strategic plan to the physical outcome on the ground, the planners have not given much consideration to the detailed process of implementation or the kind of issues that are of concern to the developer. The relationship between land use planning and property development is addressed in the literature but usually from the developers perspective (Guy and Henneberry 2002; Ratcliffe, Stubbs and Keeping 2009) while the planners' perspective tends to focus on the more theoretical question of the nature of land development and the rights of land ownership. This is probably not surprising given the ingrained belief of planners that planning leads while the market follows; a conceit that might be difficult to maintain in the current development climate. However, planners continue to make difficulties for themselves and for developers. It is somehow ironic that while relying heavily

on the private sector to accomplish the requirements of the plan, very few planners in the Department or, more surprisingly in local government seem to have experience of how private sector development operates (Cullingworth and Nadin 2006, Kitchen 2007).

The literature suggests that developers appreciate some degree of certainty in relation to what they are expected to produce in response to the requirements of the planning process but due to the competitive nature of property development, prefer circumstances where they have some freedom to manoeuvre indicating that what might be termed absolute certainty (a high level of probability) is not necessarily a desirable state (Booth 1996, Steele and Ruming 2012).

> *The development industry itself is its own worst enemy when it comes to* ***certainty****, because it argues for it on one hand and then requests flexibility on the other. That I don't think paints the industry in a very good light, it makes it difficult for Planning* [the Department] *as owners of the system to kind of arbitrate that against the community's view of the world who want things set fairly solid for a long period of time. And so, Planning finds itself in this really interesting and often awkward space of arbitrating how much* ***certainty*** *is required and how much flexibility is required and try to balance those two.*
> (State government senior development bureaucrat 2013, emphasis added)

This could be expected to be the normal response to circumstances where there is limited, nondescript or unreliable guidance from the planners. Developers prefer to know what is required rather than being subjected to constant and sometimes illogical demands for change resulting in inevitable dissension, delay and usually unnecessary cost. Such circumstances are common as the responsibility for completion is now the developer's and the planner's role is one merely of ensuring compliance. At the same time few planners have either the skills or the confidence to advance a development concept which might not necessarily be acceptable initially but for which plausible arguments must be established and maintained if the desired outcome is to be achieved (Kitchen 2007).

4.9 Conclusions

The strategic plan attempts to create a plausible construct of a future based on the control of the use of land and its arrangement and rearrangement set out in broad terms based on some kind of framework, but generally constrained by the location of existing infrastructure and particular concentrations and intensities of uses. This prescriptive map is based on a set of interconnecting assumptions about future circumstances and social conditions which can only be little more than educated guesses but these and their related policies are expected to be implemented by a group of local authorities who need to translate these aims into controls applying to development proposed for their areas. Even here the scope of these controls is closely controlled by the Department.

The strategic plan provides, in one sense a legally contrived form of certainty which can in practice only be appreciated by the local governments who have the statutory power to enforce their defined development standards. However, that notion of certainty is severely limited, applying in effect only to the requirements set out in the targets for dwelling construction and job growth derived from the projections in the plan. The subsequent achievement of any associated policies in the plan has to be taken at face-value.

There are problems associated with the uncertainty inherent in the traditional plan-making process and the methods used which have a tendency to be obscured by the use of a standards-based approach and simplistic assumptions in forecasts of future conditions. Plans attempt to reduce levels of uncertainty but planning in a democratic society cannot be rigidly applied and the application of flexible policies is difficult given the prevailing ideological context.

Those factors which have an influence on the notion of certainty in the strategic plan can be summarised as follows:

- If the Metropolitan Strategic Plan is essentially static in character with little potential for real change apart from that required to accommodate population demand, it cannot be considered to be suitable as a rehabilitated vision for the future as promoted in the White Paper. However, the difficulty inherent in attempting to change it to any great extent could be seen as one form of certainty.

- The proposed increased emphasis on strategy is not consistent with a focus on developmentalism – the major objective of the plan - which is essentially short-term; the hierarchical nature of the system of plans will in practice operate contrary to the necessary rapid decision-making required to bring development opportunities to fruition.

- The linkage of community participation with the top level of the hierarchy of plans while appearing to facilitate such input will, coupled with the virtual removal of the involvement of locally-elected council representatives, have the effect of marginalising such input.

- The increased discretion to be made available to the Minister will allow provisions within strategic (and other plans in the hierarchy) to be amended or overruled with no checks and balances to determine the legitimacy of such changes. These powers would also apply to the other components of the planning system considered in the following chapters.

- The language and intention of certainty as used in strategic plans has shifted from a definition of a desirable aim which the mechanisms proposed would achieve to one of a justification for change emphasising increased control of predictability of outcome. This could be characterised as a policy aim.

- The processes in the strategic plan and those relied upon to achieve the necessary outcomes as the basis on which it is constructed is flawed and there is little evidence that the provisions of such plans to date have resulted in the effective control of growth of Australia's capital cities (Bunker 2013).

- Heavy reliance on ambitious top-down population and employment targets in the absence of reliable knowledge on the extent and costs of infrastructure provision (Bunker 2013) relating to the large scale redevelopment required for the necessary densification of the existing urban area can be a serious weakness in the implementation of the plan.

- Rezoning as a mechanism for redevelopment where problems of site amalgamation and unpredictable patterns of development take-up prevail and little allowance is made for inherent and future demand at the price point in the particular location result in haphazard and unpredictable outcomes which planning authorities have little ability to control.

- The achievement of the housing and job targets specified in the strategic plan necessitates the zoning and rezoning of sufficient land to accommodate these requirements but in many cases significantly more land has to be made available for such development in order to cope with the vagaries of the property market. This represents a haphazard process where little control can be exercised in practice ensuring that the overall outcome will be inefficient and unpredictable.

- Connections with the other two components of the planning system considered here are weak, further compromising any certainty that might be identified in each.

The renewed interest in the strategic plan as envisaged in the White Paper (NSW Government 2013b) appears anachronistic both in relation to its well-known limitations and its apparent lack of relevance to the key aims of the planning system which are essentially short-term requiring an ability to make rapid decisions in pursuit of development opportunities. The proposed hierarchical system of decision-making would appear to be antipathetic to the requirement to improve the ability of the system to facilitate property development. However, this may be of little concern where the operation of the system can be appropriately managed by the use of the new discretionary powers expected to

be made available to the Minister. The consolidation of power would appear to be a more accurate characterisation of the proposed changes set out in the White Paper and the draft Bills than any imperative to improve confidence in the system for those who, in theory, provide its legitimacy. The use of discretion in these circumstances is unpredictable achieving little connection with any notion of certainty.

5 Confidence in the approval process – streamlined and consultative?

5.1 Introduction

The legal status of the local plan (the current SI LEP) together with the requirements of the Act for development assessment tends to identify these as the most effective and reliable source of certainty in the planning process. They therefore attract the greatest focus when planning is promoted as providing this quality and the most attention when reforms are considered necessary to improve it (NSW Government 2013b, 114). The process of determination is also where the community comes closest to the planning process and where that process becomes potentially contentious.

The approval process is often perceived as an impediment to economic growth (NSW Treasury 2012) and is an obvious target for industry lobby groups who wish to remove any residual uncertainties at that stage of the procedure (Urban Taskforce Australia 2012b). This raises some interesting questions relating to the purpose and effectiveness of the process, particularly in relation to claims that there is a weak relationship between policy intention and development outcomes. These include the apparent contradiction between the demand for a more streamlined system of approval and the results of the process as reported by the Department.

The high level of consent here might indicate that too many poorly performing proposals are gaining approval and the purpose of the system needs to be more clearly defined. There is also a long-standing question about the effectiveness of mainly physically defined controls used in the assessment of proposals in translating relevant planning policy into development on the ground. This has never been satisfactorily answered; the ultimate quality of the outcome, often relying on prescriptions of good design which are difficult to apply or the complete removal of aesthetic issues from any consideration of quality in the assessment process appear to be the options.

Although not apparently verified by the changes proposed in the new Planning Act in NSW, planning can be seen as having shifted its interest from the conduct of long-term strategies based on the idea of a public interest to more *ad hoc* professional activities where planners basically become moderators between the divergent interests of stakeholders and the facilitators of development (Schönwandt 2008). Planning is therefore essentially reduced to communication where the economic interests of investors and developers are seen as the point of departure, not as a particular issue among others to be modified and weighed in the balance with a more general notion of the public

interest. The public, in this model, can only comment but not have a substantial influence on the planning and development process itself.

This chapter therefore investigates the performance of the assessment/determination component of the planning process, predominantly in relation to the rate of approval of development applications and its speed in reaching its conclusions. These can be expected to be those factors which potentially produce the certainty in the process which the State government seeks to create and developers expect to experience. It is based on reports published annually by the Department using data provided by the relevant planning authorities, the most reliable material available. These data exclude only those determinations made by the Department and the PAC which make up less than one percent of the total. These however include major, potentially controversial developments which may result in fraught, contested processes with a high profile where the operation of ministerial discretion may be visible when the rules are changed to achieve the required outcome (Hazzard 2013f).

The reformulation of the determination process in an apparent effort to achieve a more efficient and predictable system, which appears to be one of the principal objectives of the new Act, is claimed to be capable of creating certainty for both developers and the community. However, the current system and that originally intended to replace it but subsequently amended in the light of intensive opposition from councils and the community (Minister for Planning and Infrastructure 2013c), still retains a number of features which might be considered to be contradictory. The most significant of these relate to the continuing drive to improve the determination process by various means and the contention that the key processes undertaken are based on merit. These it is claimed need to be replaced by a focus on code assessment to improve certainty and predictability of outcome (NSW Government 2013b, 119). Consideration of these and other relevant issues suggests that both the process itself and the changes proposed are more concerned with exercising greater control over the system ultimately to the benefit of the development industry. This might be considered to be tantamount to improving the predictability of the system at least for those considering investing in property development. Given the current performance of the system, this could be little more than marginal.

Three assumptions are routinely made about planning and the development control process. The first relates to the extent that planning should be concerned only with matters of land use and the location of development to the exclusion, for example, of matters of social and environmental impact or urban quality and design (Stein 1995). Consideration of these and other potentially relevant issues has fluctuated over the years and the residue

of these concerns remains in the form of statutory policy instruments, State Environmental Planning Policies (SEPPs) in NSW, probably to be replaced by what has been termed *NSW Planning Policies* during the Planning Review (NSW Government 2013b, 68).

A second assumption is that planning in general and development assessment in particular should be non-political, its decisions made according to objective, technical criteria, a notion that still appears to concern planning's professional body (Planning Institute of Australia 2013b) which discerns tension between the control planners and the local elected representatives.

The third is that decision-making in planning is, and should be, hierarchical in character; that each stage from the State Plan through regional strategies and SI LEPs to development control, involves a progressive refinement in detail of decisions made further up the pyramid. Development assessment becomes merely a tool for implementation of planning proposals – the top-down approach. This latter assumption finds clear expression in the current responses to the NSW Planning Review (NSW Government 2013b, 64) and can be characterised as a concern for regulation over flexibility. Each of these can be challenged as other assumptions emerge in response to the controlling verities of current governance.

These assumptions need to be examined in the context of the notion of discretion in the planning system which can be conceptualised as the degree of flexibility available to the decision-maker beyond mere reliance on a prescribed set of rules which determine the outcome. Booth (1996) argues that discretion is not the opposite of regulation. Discretion does not in itself lead to unbounded flexibility. Inevitably it reduces the rigidity of rules and regulations, but it is necessary to have rules to ensure that discretion is not operated in an *ad-hoc* or unregulated fashion. Therefore, discretion is an inherent and independent part of regulation; it is the area of judgement left over by a surrounding area of regulation (Dworkin 1977). Jowell (1973, 187) views discretion in government as the *room for decisional manoeuvre possessed by the decision-maker* while Ham and Hill (1985, 4) suggest that *a public officer has discretion whenever the limits of his power make him* [sic] *free to make a choice among the public courses of action or inaction.* Discretion therefore occurs within defined limits and these limits, in government activities provide the basis for laws and policies. However, it is the government that determines where those limits lie.

A central claim for certainty in the planning system lies in the confidence derived from the assessment and determination process where compliance with the requirements of the SI LEP, its zoning provisions and development controls, will be unlikely to lead to a refusal to

proceed with the proposal. This chapter examines the performance of the system both in relation to the rate of approval and the form of the assessment process undertaken, currently considered to be based on the merit of the proposal. The proposed changes included in the draft Bills are intended to improve the performance of the determination process, in part by instituting a highly codified process to supercede the current system.

5.2 Performance of the assessment process

5.2.1 Development assessment in New South Wales

One of the objectives of the recent reform of the planning system is the simplification of the assessment and determination processes of development applications. This has focused predominantly on attempts to achieve greater control over any discretion available to local decision-makers by the increased use of pre-determined rules intended to introduce a higher level of consistency and the removal of the majority of small applications from the formal process by allowing certification if the proposal complies with a set of defined criteria. Determination of the majority of DAs is now made by delegation to council planners and in a small number of cases to specialist panels, also with delegated powers. These changes have had the effect of making planning more diverse and possibly more complex while clarifying some of the procedures around the various approval pathways.

> *Assessment has been pushed both ways; the big developments to the Department and the minor ones to the certifiers – essentially out of the system altogether.*
> (Local government chief planner 2011)

This would appear to be a sensible response to a requirement to improve the efficiency of the system. A multitude of small developments, many relating to simple residential improvements or extensions merely clogs up the process to no great purpose while diverting resources from more complex and potentially contentious applications. Neither is there much of a case against large developments of significance and possibly wide spread impacts being assessed and determined by the State government assuming that the necessary procedures are applied and the process is reasonably transparent.

While the real power of planning conventionally lies in its ability to deny development on a particular piece of land, this is in effect compromised by the developmentalist nature of decision-making under the zonal system where, if a development is permissible – it complies with a legal definition in the statutory instrument – approval, while not guaranteed can reasonably be expected to be achieved. The removal of detail from the LEP to the DCP, the separation of which was recently reinforced by the State government (NSW Department of Planning and Infrastructure 2013g) provides controls with only persuasive force, further strengthening the focus on developmentalism.

The ongoing process of reform has ironically resulted in an increased number of channels along which development proposals are assessed and determined. The responsibility for assessment lies predominantly with council planning staff although Department staff are also responsible for many large developments, which although small in number are inevitably more extensive and complex and sometimes controversial. The increasing number of paths reflects the diverse number of individuals and groups responsible for determination of the proposal following consideration of the assessment. These are made up at present of:

- Council planners with delegated powers.
- Independent panels of specialists established by the responsible council to determine all relevant applications.
- Joint Regional Planning Panels established by the Department including independent specialists and a minority of council senior staff where the development is considered to be of regional significance complying with specific criteria.
- Council elected representatives who now undertake only a small proportion of total determinations based on the recommendations of staff assessments.
- The Planning Assessment Commission established by the Minister determining several development types, dealing with various planning matters or carrying out public hearings at the request of the Minister. This is intended to deal with potentially controversial proposals while retaining some distance from the Minister.
- The Minister and/or senior Department planners with delegated powers determining integrated and designated development or proposals called in by the Minister.

Certification of small proposals is undertaken by private or council certifiers if the proposal is classified as complying development.

The new legislation does not propose to reduce the number of determination pathways; rather it seeks to achieve a shift to a performance based system that is claimed to be simpler providing predictability and certainty (NSW Government 2013b, 114). The so-called merit assessment process, currently complying with the requirements of section 79C of the Act, will remain but will be gradually superceded by a mix of complying and code based assessment. This remains an intention but it is not known whether the government will persist with this provision in any new legislation.

5.2.2 Assessment outcomes

Total determinations have seen a slow but steady decline since 2006-2007 (111,915) to 2012-2013 (90,310) with the merit assessment of applications declining from 88 percent to 75 percent as a proportion of DAs and CDCs while complying CDCs have increased from 12 percent to 25 percent as a proportion of DAs and CDCs (NSW Department of Planning and Infrastructure 2014). This would seem to suggest that at least part of the aims of planning reform – streamlining and efficiency – is being achieved (NSW Department of Planning and Infrastructure 2013f) as an increasing proportion of applications is gradually removed from the formal process of assessment. However, these claimed improvements relate to small, mainly domestic scale developments, the majority of which would have little interest to industry lobby groups (96.5 percent of all DAs were valued at less than $1 million and 80 percent less than $290,000) but these changes allow the State government to boast about its achievements in relation to the proverbial mums and dads.

The average proportion of DAs and CDCs determined by elected representatives (councillors) was 2.9 percent across the State with 46 councils where this dropped to two percent or less. The proportion of DAs determined by councillors varied widely from 30.4 percent in Botany Bay to zero in Penrith where all applications were determined by an independent panel. The ten councils with the highest proportion of councillor-determined applications – averaging 18.2 percent were all located in the inner and inner west Sydney Metropolitan area with the exception of Parramatta and again with that exception, all would be considered established communities with moderate levels of continuing development. Assessment outcomes in 2012-2013 are summarised in Table 5.1.

Table 5.1 Assessment outcomes – DAs and CDCs in New South Wales councils 2012-2013

Determination body	Time[1]	Approvals		Refusals		Percentage[2]
		Total	%	Total	%	
Council staff	59	58,166	98.1	1,127	1.9	77.8
Councillors	175	2,020	91.1	197	8.9	2.9
Private certifiers	-	14,273	100.0	nil		18.7
IHAP or JRPP	146	148	86.0	24	14.0	0.2
Others	248	243	90.7	26	9.3	0.4
Total	**-**	**74,850**	**98.2**	**1,374**	**1.8**	**100.0**

Note 1: Mean Gross Determination Time in days.
2: Percentage of all determinations of DAs and CDCs.
Source: NSW Department of Planning and Infrastructure 2014, Tables 4.2 and 4.3.

Refusal rates were lowest (1.9 percent) where council staff had the responsibility for determination; 8.9 percent for determinations by elected representatives and 14 percent for the independent panels.

If the private certifiers are removed from these data - they are not part of the council-based determination process in any case - the refusal rate is 2.2 percent, 99.3 percent are determined by a combination of elected representatives and planning staff and the remaining 0.7 percent by the panels (IHAPs and JRPPs).

There are two notable characteristics of the approval process undertaken in NSW. These are (1) the consistently high level of approval under each of these streams and (2) the stability of these results since data became available in 2005-2006 during a period when changes had been implemented, justified in part, on the claim of improving control over the process to increase predictability of outcome. The steep rise in the use of CDCs, applications which would be expected to achieve 100 percent approval, does not appear to have influenced the overall approval rate. The largely codified assessment system in NSW which produces the high rates of approval relies on the predictability provided by the zoning plan and its related controls. There must however be some concerns about the quality of these proposals and their relationship to relevant planning policy when controls are expressed exclusively in numerical terms. The significance of a particular height limit in a commercial centre, for example, could be expected to be difficult to justify objectively, although not impossible.

> *In the case of planning, for example, authorities can undoubtedly influence the design quality of development, but are reliant on others to produce it. Attributing particular outcomes solely to planning actions therefore remains difficult.*
> (Carmona and Sieh 2008, 231)

These data raise questions about the logic of the constant demand from the development lobby groups for the universal use of panels if certainty of approval is their major consideration. It also suggests that the claims made by developers that uncertainty is a major factor in the lack of housing supply is a case of special-pleading and the State government's recent efforts to increase supply by further rezoning of land are possibly misguided (see Section 6.4). Alternatively, it might be argued that the development industry represented by the lobby groups is mainly interested in those projects which are assessed predominantly by the panels, the PAC or the Department and its main interest lies in speed and predictability of approval. However, such an explanation lacks plausibility. While JRPPs may be less politicised (parochial and unpredictable) they are, on average, considerably slower in reaching decisions than the council staff (Rowley and Phibbs 2012). In part, that may reflect the type and relative complexity of the proposals

determined by each of these groups. In any case, responsibility for determination by elected representatives has been virtually removed.

A high rate of approval is intrinsic to zoning as the means of managing the use of land. However, the benefits and defects of this procedure are not widely discussed in the literature (Roseth and Sussex 2014) although the performance of the planning system as a whole has received some attention (Oliveira and Pinho 2010, Gurran *et al* 2012). Such a method is a fact-of-life in NSW and any change is unlikely. The system, as the centrepiece of the regulation of land use, demonstrates several irregularities in NSW. It is essentially codified, in that pre-determined rules are applied and if the application complies with these, the development is approved. The rate of approval is remarkably high as a result which should raise a number of concerns.

The assessment procedure is described as based predominantly (77% in 2011) on the basis of merit (NSW Government 2013b, 121). Such an approach would require the overall net worth of a proposal to be determined where the costs and benefits to society are assessed to reach a decision on its overall value. The process undertaken in NSW does not do this. It seeks to determine if the proposal complies with a set of individual rules (codes). If it complies, it is acceptable even though, taken together, the overall impact of the development could still be negative.

A system which does not rely on codes, although it requires compliance with established policy and the requirements of any relevant plan – not zoned however – is that operated in Britain where the merit of each application is determined during the process (Tewdwr-Jones 2002, Barker 2006). This regularly achieves lower approval rates than in NSW. This might imply that the routine application there is of a lower standard (quality) than in NSW or that the process of assessment is more demanding. Government pressure to approve all acceptable proposals could be expected to be similar under each planning regime.

The discrepancy in the rates of refusal – that in NSW has not varied to any great extent since reliable data were first made available in 2005, while that in England fluctuates but is normally now between 12 and 15 percent – is a result of the zone-based process in NSW where the rules are known to all applicants in advance and the process is orientated towards approval. The basis for each process is different but the high level of approval which is routine in NSW raises questions about the quality achieved particularly as the controls applied to the assessment process are not demanding and are becoming less so as the drive for consistency and increased simplicity is applied across the State.

> *It is difficult to understand the excessive consistency if the LEP is more than simply the legal instrument controlling the development approval process in the hierarchy of plans; if this was logical, it would comprise the means by which local differences are accommodated – yet another confirmation that government sees the planning process only in relation to support for economic development.*
> (Local authority chief planner 2011)

As approval rates are high in NSW across each individual component of the approval process, it must be supposed that there are very few which might be considered to fall into the category defined by the Barker Review as resulting in an overall net cost to the community and therefore a candidate for refusal (Barker 2006a, 92). The acceptability of the development proposal is defined in NSW by the standards set out in those controls being applied. These may accurately reflect the requirements of section 79C of the Act but often have little relationship either with central policy or community benefit as a whole. The process of development approval is considered in greater detail in Chapter Six.

5.2.3 Time to achieve development approval

In addition to the approval rate, the other area of the determination process which exercises the interest of the property industry lobby groups is the speed with which an approval can be obtained (Property Council of Australia 2012c).

Table 5.2 provides a summary of mean gross and net determination times for DAs by value of the proposed development. Two other important considerations are those factors which make up the difference between the total time taken from lodgement to determination (gross) and the actual time required to complete the process without any necessity to seek additional input (net). In broad terms stop-the-clock relates to the inadequacy of the application where some necessary material is absent and referral time can be considered to be that relating to the bureaucratic complexity of the process itself. Neither of these applies to all DAs; there is therefore no direct relationship between the times shown in the columns in the table.

The effect of sub-standard applications can be significant, often doubling the time necessary for assessment. The statewide mean gross processing time for DAs with stop-the-clock time included was 106 days compared to 47 days with no such inclusion. In 2012-2013, 36 percent of DAs included a requirement for stop-the-clock. The pre-lodgement period which is not included in these data is therefore important, at least from the perspective of the applicant.

Table 5.2 Statewide DA mean determination time by value 2012-2013

Value (dollars)	Mean determination time (days)		Stop-the-clock time[3]	Referral time[4]
	Gross[1]	Net[2]		
Under 100k	57	39	52	41
100k to ½ million	67	45	49	41
½ million to 1 million	118	71	73	57
Under 1 million	64	42	52	42
1 million to 5 million	172	97	113	94
5 million to 20 million	232	119	154	107
20 million +	232	135	109	126
30 million +	249	140	123	142
50 million +	220	140	91	119

Note 1: Average time (days) to determine the application from lodgement to determination with no days excluded.
2: Average time (days) to determine the application from lodgement to determination with stop-the-clock time and referral time deducted.
3: Time (days) during which additional information on the application is sought and received from the applicant. This may be sought by the council and/or the referral authority. Only when applied to the determination.
4: Time (days) during which the application is referred to a State government agency before determination by council. Only when applied to the determination.
Source: NSW Department of Planning and Infrastructure 2014, Table 3.7.

The majority of development applications determined by councils (96.5% of DAs and 98.9% CDCs) was valued at less than one million dollars. Only 2,065 determinations therefore are for developments with a capital value in excess of that figure. Residential development made up 69 percent of all applications (39,153) determined in 2012-2013 with an additional 4.5 percent (2,578) relating to subdivision only.

Mean determination times for the majority of applications, including most residential development range between 42 and 64 working days (2 to 3 months); 28,455 were processed in a shorter time. These times have changed little since the data were first collected. Larger developments are inevitably more complex and potentially controversial; determination times are therefore longer but are also much more likely to be extended by the necessity for referral time but are probably less liable to require additional material and the necessity to stop the clock. These data suggest that speeding up the determination of the majority of development applications could only be achieved by removing more of them from the formal processes of assessment and determination. This is, in effect, what the proposed changes to the planning legislation are attempting to do by

further codification. It is a matter of judgement whether the institution of the measures necessary to achieve this is worthwhile given the current performance of the system.

Determination times in the metropolitan area indicate a similar pattern for both developed inner areas and fringe greenfield locations. These are shown in Table 5.3. The determination times quoted by the Department however need to be approached with some care. They do not include, for example the pre-acceptance period – the time taken in initial discussions with the relevant planning authority prior to lodgement of the application - when sometimes lengthy discussion and negotiation can take place while the proposal may be amended several times during this period to reflect the concerns of the authority. This would however be more likely to apply to more complex and costly developments which make up a small but perhaps significant proportion of the total. These would be predominantly assessed and determined by the Department.

Table 5.3 Metropolitan group averages; DA mean determination time in days by value 2012-2013

Value (dollars)	Metro area developed[1]		Metro area fringe[2]	
	Gross[3]	Net[4]	Gross[3]	Net[4]
Under 100k	56	42	61	41
100k to ½ million	77	54	67	44
Under 1 million	69	49	66	43
1 million to 5 million	186	120	191	82
5 million to 20 million	212	137	274	82
20 million +	194	142	316	104

Note 1: Average time (days) for all councils in DLG Group 3.
2: Average time (days) for all councils in DLG Group 7.
3: Average time (days) to determine the application from lodgement to determination with no days excluded.
4: Average time (days) to determine the application from lodgement to determination with stop-the-clock time and referral time deducted.
Source: NSW Department of Planning and Infrastructure 2014, Tables 3-29 and 3-30.

The pre-acceptance period, if protracted, can also be the responsibility of the proponent in failing to respond to applicable controls or in seeking a development as an ambit claim which would not normally be acceptable. Alternatively, the application could be incompetent and require substantial improvement before it could even be accepted for assessment. The alternative to this is a refusal within the 40-day period; again the responsibility for this lies predominantly with the proponent.

> *There's no* ***certainty*** *in some areas of development; in others there's a bit more* ***certainty*** *to it, it really depends across different sectors.....if you are doing residential development on the outer ring of the Metropolitan area there's a bit more* ***certainty*** *to it because those councils know they're handling the development, you know how to deal with them and how to negotiate with them; if you are doing it in the middle ring of councils in Sydney, there's a lot more uncertainty to it.....there's other issues and community angst about developments. I'd say across the board it's depending on the market segment and the locality where you're dealing with it that's to say there will be* ***certainty*** *for that process.* (Planning consultant 2012, emphasis added)

This view relates the notion of certainty essentially to competence of application and process; those determining authorities dealing with planning applications are likely to provide a more efficient service if they are experienced in those issues associated with large developments on the periphery where fewer impediments are anticipated. Differing levels of certainty are associated with confidence relating to its contemporary definition discussed in Section 2.2.

Growth councils routinely deal with a large number of applications, the majority of which are located in greenfield locations or relate to existing urban areas subject to high development pressures while smaller councils in fully developed areas may not be well equipped to undertake the more detailed and complex assessments necessary there. As the proportion of applications shifts increasingly to redevelopment this could become an increasing problem affecting the average times for determination as such proposals are inevitably more controversial. While problems of this kind may be experienced by applicants, any impacts on timing would be included in the available data.

5.2.4 Reviews and appeals

An applicant dissatisfied with a decision made by council on a development application or an application to modify a consent (section 96) can, under certain circumstances ask for the decision to be reviewed by the council under section 82A of the Act. Following commencement of the *Planning Appeals Amendment Act 2010,* section 82A was expanded and now includes three classes of internal review: DAs rejected due to inadequate information when lodged with council; reviews of DA determinations (section 82A); and reviews of modification determinations (section 96AB). A consent authority may also modify a consent following application by the applicant in accordance with the regulations or to correct a minor error (section 96). The scope of these reviews is relatively limited and does not apply to several types of development.

Alternatively, the applicant can appeal against a council decision to the Court under the *Land and Environment Court Act 1979* on the grounds of refusal, disputed conditions of consent or failure to determine the application within the deemed refusal period. Very few

DAs and section 96 applications are contested through the formal review or appeal process, generally less than one percent (427 reviews and 344 appeals) of DA determinations. Some 66 percent section 82A appeals were approved on review, 20 percent refused and 13 percent withdrawn or cancelled in 2012-2013 (NSW Department of Planning and Infrastructure 2014). Just over one percent was rejected on review. An approved section 82A review means that the council changed its original determination in favour of the applicant's review application.

The outcomes of an appeal to the Court are more varied; while the majority are brought by developers, a very small number of Class 1 legal appeals (two in 2012-2013) are brought by a third party or objector (The Land and Environment Court of NSW 2013). Some 25 percent of developer appeals (342 in total) were upheld, 18 percent upheld with amended plans and 18 percent with consent orders while 38 percent were withdrawn or dismissed in the same year. Both appeals brought by a third party or objector (two in total) were upheld.

The scope of third party appeals is limited to designated development applications and must be made within 28 days of determination. There are no proposals to expand its availability in the draft Bills (NSW Government 2013c, d). The availability and application of these rights are considered to be antipathetic to the notion of efficiency by property groups leading to delays, inflated costs and an increasingly adversarial nature of planning (Property Council of Australia 2013). Third party rights are normally deemed to be protected by the ability of the issues raised by such objectors to be considered during the assessment process (Stein 2008). However, the ability to overturn unmeritorious decisions by this means can be considered to help participants maintain their faith in the system by promoting certainty even though it may have some effect on the speed of the approval process (ICAC 2013).

Moreover, third party appeals are an intrinsic part of a democratically based planning system supporting claims of acting in the interests of the public rather than particular power groups. In addition, they represent a participatory form of democracy, allowing various public interests to be voiced and tested; the outcome creating the certainty required of the process (Willey 2006). There are no signs that the extent of appeal rights of this kind is likely to be expanded in the near future (NSW Government 2013b).

> *The limited availability of third party appeals under the EP&A Act means that an important check on executive government is absent. Third party appeal rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed.*
> (ICAC 2012, 22)

This argument was rejected by the Independent Panel on the grounds of increased costs and the delays inherent in such procedures (NSW Government 2012b, 105).

5.2.5 The Minister and the Department

Major projects or development proposed on significant sites which may be more likely to have significant economic, social or environmental implications were, until recently, assessed under Part 3A of the Act. This has now been replaced by new procedures for the assessment and determination of projects considered to be of State significance. This process commenced on 1 October 2011 and gives the nominally independent PAC an expanded determination role. A number of residential projects previously dealt with by the State government have also been returned to local government for assessment (NSW Department of Planning and Infrastructure 2011f). The absence of community involvement is maintained except for those directly affected by the proposal and the decision-making process remains opaque even though the voluminous material produced as part of the assessment process is made available to the public on the internet.

The Department made recommendations on 430 major developments in 2012-2013. Large projects of this nature are only rarely refused at a late stage as the process is intended to identify early those where difficulties might be encountered. In such cases, additional investigations are required or the proposal is amended to deal with specific problems that have been identified. The focus is on the details as it is unusual for a project of some significance to reach an advanced stage of assessment and still be refused unless political considerations intervene.

The Minister also gave the PAC power to determine project applications, concept plans and modifications in 2011, as part of the transitional arrangements associated with the repeal of Part 3A of the Act (NSW Department of Planning and Infrastructure 2011d, e). The PAC has a delegation to make decisions on major project applications and modifications submitted by a private proponent that results in 25 or more objections, where the local council objects or there has been a reportable political donation in relation to the application or to a previous related application. The PAC determined 81 such applications in 2012-2013 with residential, retail and commercial development in the Sydney Metropolitan area (34.6%) and major resource developments (27.2%) predominating. Other matters dealt with related mainly to rezoning and VPAs. However, problems appear to persist.

> *It has been clear for several years that public confidence in the integrity of the processes for making land use decisions, particularly concerning major projects, has been seriously eroded. In part this has arisen because of the perceptions (whether well-founded or not) of inappropriate linkage between financial political contributions made by development proponents and decisions made about development proposals.*
> (NSW Government 2012b, 5)

While this criticism of the operation of the planning system made by the Independent Panel was intended to provide a justification for change, it also suggests that the kernel of the problem lies within the Department relating to the operation of the previous Part 3A determination process. In the event, this approach has been rebadged and a slightly amended procedure is now in place while the lack of public confidence has become increasingly focused on the local councils.

There are rare examples where major projects, usually resource developments, are refused following concerted efforts by local objectors even when these proposals are considered to be of considerable importance to the economy of the State. A recent case involved a proposed major extension of Warkworth open-cut coal mine near Bulga in the Upper Hunter Valley (Hagemann 2014, Hannam 2014). This followed a complex and protracted process with the interests of two powerful groups playing out in public.

5.2.6 Implications

Given the performance of the present planning system, measured by the rate of approval of development and the time taken to do so, it is difficult to accept the continuing claims made by property industry lobbyists for its poor performance based on lack of predictability and unacceptably slow procedures (Urban Taskforce Australia 2010, Property Council of Australia 2012) culminating in the claim made by Treasury that it represents a drag on the state economy (NSW Treasury 2012). Perhaps, even more unfortunate for a rational approach to the role of planning in the economy is the uncritical repetition of such claims by those undertaking the Planning System Review as representing one of the three imperatives for reform (NSW Government 2012b). Much of the material prepared by the lobby groups portrays a system out of control, where gaining an approval for even the smallest extension to a dwelling is bedevilled by incomprehensible rules and regulations and achieving a suitable outcome takes an unacceptable time with an eventual approval which includes irrelevant and onerous conditions. None of the data regularly made available by the Department support these conclusions although such a characterisation still appears in important State government publications such as the Green Paper.

> *At present there are many layers in the development process. This process is unwieldy, extremely slow and costly and often does not lead to better outcomes. The many layers of assessment and determination are very confusing for the community and provide very little* ***certainty*** *for applicants.*
> (NSW Government 2012c, 51, emphasis added)

A formal process is required ultimately to achieve development which is deemed to satisfy the aims of the plan. This needs a set of requirements comprising as far as possible controls expressed in numerical terms (codification) as well as objectives which attempt to express the purpose of the controls themselves (flexibility). The use of the former can in most cases result in a yes/no response but the latter requires a degree of interpretation relying on the extent of discretion available to the decision-maker. Questions arise here both in relation to the relevance and validity of the numerically-expressed controls in achieving the requirements of the plan and its associated policies and the presumably low level of discretion required in the decision-making process. This would appear to have become one with a high level of codification where any flexibility can only be exercised via negotiation and adjustment. It is also possible that policy achievement is now so marginalised that the only aim is development *per se* where any proposal which can be shown to comply with the zone objectives and the applicable controls will be approved with relatively minor adjustment if necessary. At the same time, the zone objectives have become undemanding and essentially benign.

Another important implication of the current operation of the determination process is that its ability to achieve policy outcomes merely by the application of physical limits on the development types acceptable in a specific location is ineffective. This would appear to represent something of a gulf between policy intention and development outcome and a clear link between planning action and effect is difficult to discern. The positive response would be that the system works effectively as each initially non-complying proposal is amended during assessment to achieve an acceptable level of compliance with the relevant controls. This theme is worked through in more detail in Chapter Six.

Large projects of State significance represent a different set of issues where perhaps unduly complex processes introduce uncertainty suggesting that some components not covered by the Act but relevant to its procedures, need to be reconsidered. The judgement in the LEC, acting as the re-determining authority in the Warkworth case, took the view that the negative impacts of the proposal were more significant than the economic benefits and therefore refused the application. The role of the Minister in effectively changing the rules by which decisions are reached in such cases is an example of the use of discretionary power to ensure that proposals of this kind will be approved even if the evidence appears to support refusal (Hagemann 2014, Hannam 2014).

5.3 Simplification and confidence – consistency and conformity

In attempting to accommodate increasingly complex development problems, the tendency has usually been for a system which relies on codification to become more elaborate. Rules have proliferated, becoming so all-embracing and, on occasions contradictory, that in practice they have become increasingly difficult to apply. This has led to concerted efforts from developers and planners to simplify the system and return it to its basics (Urban Taskforce Australia 2010a). There are some problems with such an approach.

It is difficult to envisage how a rule could be developed to accommodate every possible eventuality or how that rule might be interpreted. It is also difficult to reconcile the increasing complexities that planning, in theory, is concerned to address (Planning Institute of Australia 2010, 2013a) with the continuing drive towards simplification and predictability within the process of planning.

Cullingworth and Caves noted that zoning ordinances in the US have moved far from the simple tool that they were at the time of Euclid when the legal basis for zoning was established by the Supreme Court.

> *It is abundantly clear that zoning is not the rigid simple system of land use regulation that it is supposed to be . . . it is not simple: it is increasingly complex.* (Cullingworth and Caves 2009, 123)

They go on to note that zoning ordinances are now so complex that they are a source of uncertainty. If the rules are not clear for their users, they cannot be responsible for a particular outcome. The outcome of a sustained process of simplification will inevitably be the neglect of many of the considerations which continue to be claimed to be central to the concerns of planning which, at least in part, justify its operation (Planning Institute of Australia 2013a). This may be of little concern where the content of planning is effectively minimised and its processes focused solely on the facilitation of development.

The White Paper (NSW Government 2013b) promotes a process which places increased responsibilities on the strategic plan as the source of certainty in the planning process at the same time as claiming to have simplified the system making it clearer overall, easier to understand and operate as well as being more transparent while maintaining two approval streams: one codified and one on merit. However, the NSW Government is proposing to maximise the proportion of complying development by introducing a mechanism for considering variations from standards for otherwise compliant development.

Two changes to the system: further reduction in the number of zones from 35 to 13; and a significant shift to code assessment of development with a corresponding reduction of merit based assessment from the present 77 percent to 20 percent in five years time, were included in the White Paper (NSW Government 2013b), justified on the basis of simplifying the system and increasing confidence in it. Both these have since been abandoned following council and community lobbying. The overall aim of simplification however, remains the same.

The original inclusion of both these provisions appears problematic and the reasons advanced for doing so not convincing. It can be argued that these changes would have resulted in a new and different set of problems emerging which would have done nothing to improve confidence in the system. The complexities of urban life cannot be adequately described in simplistic definitions of uses and the proposed separation of use and intensity of development would introduce added complexity to the zonal system which is widely recognised as a blunt instrument for the establishment of new development (Gurran 2007, Cullingworth and Caves 2009). The logic of shifting to code assessment when a high level of approval is now obtained using what is deemed to be merit-based assessment is difficult to discern except as an exercise in further control from the centre.

5.4 Limits to rule making and the uses of discretion

Stein (2008, 127) makes it clear that the introduction of a system of development control implies flexibility with respect to the dictates of the plan. As the plan is then not conclusive in its own right, this means that the final decision is recognised to be a matter of discretion rather than a fixed set of rules for the use of the land. Thus some of the power in the zoning provisions is shifted to a discretionary decision. This characterises the dual nature of the process in which overall permissibility (the use of the land) is confirmed by the zoning description while the acceptability of the proposal (the intensity of that use) is subject to the more specific controls included in the SI LEP and the applicable DCP.

The effectiveness of the rules in the form of the controls applied during the assessment of development applications is an important consideration in the translation of policy into acceptable development on the ground. However, it is not clear to what extent rule-making is possible for something as inherently uncertain as planning and how accurately a system of codes dealing with the form of the physical development being addressed in the process is able to translate the aim into a realisable outcome.

The two key fundamentals of the planning process in NSW are zoning as a description of current and future use of land and the definition of specific planning controls which together are intended to be the means of translating central policy into local

development outcomes. These are central to the playing out of the tension between regulation – commonly equated with certainty – and discretion.

The use of a system of zones created using a planning instrument is adequate as a description of the prevailing character of an area where it is unlikely that its character will change in future. Zoning descriptions for established areas are merely a simple explanation of the status quo, not a prescription for the future. They therefore introduce problems when existing areas are designated for change or where undeveloped areas are subject to development pressures. There is always reluctance to move away from the existing zoning regime particularly as this weakens one of the attractions of the system to the community – its rigidity and the relative difficulty of instigating change (Rowley and Phibbs 2012, 45). Here, certainty is equated with stability and resistance to change.

> *The purpose of zoning is to invest an area or a district with a* ***certain*** [particular] *predominant character and to protect it from avoidable invasion or erosion of that character.*
> (Stein 2008, 32, emphasis added)

The inherent rigidity of the zoning system has been addressed over the years by the proliferation of zonal definitions intended to deal with the necessity to accommodate mixed use development of many different shades. This is claimed to have reached 3,100 separate definitions in NSW by 2005 at the start of the reform process leading, in part, to the introduction of the SI LEP (NSW Department of Planning 2008b). The result, broadly welcomed on the grounds of consistency but resulting in further difficulties, was the reduction in zone descriptions to 35. However, this does not resolve the old problem of lack of flexibility and the monotony it can produce, possibly requiring an increased reliance on other procedures such as the preparation of more detailed masterplans for new areas and spot rezoning in those already developed.

> *The law has viewed the device of zoning as the ultimate end product of the planning process, inherently directed to the betterment of an entire community and therefore conferring no concomitant rights on any individual to challenge the zoning choices or to have his or her particular needs met. Accordingly, there is no common law duty to accord a hearing, in line with the rules of natural justice, to an owner to argue the case for a particular zoning during the planning process.*
> (Stein 2008, 36)

This concept of zoning was therefore seen as a matter of community interest conferring no specific rights on an owner to appeal when the authority refused to amend a zone or create a spot rezoning. The decision to rezone is the responsibility of the planning authority, as the representative of the public interest and is not open to appeal. However, this power was significantly reduced in 2012 by the introduction of a new review system aimed at overcoming council resistance to both spot rezoning and other LEP amendments in order

to expedite development. This is termed the *Gateway* process, subsequently reinforced by the *Pre-gateway* process, which permits a merit review of the council's decision, inevitably drawing criticism from some environmental and community groups.

Zoning and the legal weight it carries is considered by many practicising planners to be an effective source of certainty in the planning system.

> *I don't really see in terms of the concept of* ***certainty*** *from a land use planning perspective that there's more* ***certainty*** *through the template LEPs. The land is zoned whether it's an old system LEP, an IDO or a standard template LEP; it really makes no difference but the zoning system delivers* ***certainty****.*
> (Planning consultant 2012, emphasis added)

In part, this is due to its relative simplicity and, in its basic form, the ease with which it is understood. The difficulty in its amendment is also seen as an advantage. Its drawbacks are however illustrated in circumstances where zoning attempts to provide a response to the complexities of the urban environment (Cullingworth and Caves 2009). Attempting to cope with the complexity inherent in the real world also creates problems for the definition of appropriate controls relating to the details of development considered acceptable within each zone. Continuing simplification in pursuit of efficiency cannot be expected to result in any greater effectiveness in the translation of policy into relevant outcome.

There are several weaknesses in any reliance on a codified process:

- Society and the issues within land use planning are far too complex to be amenable to the reductionism necessary to derive a set of measures to be applied to every possible circumstance. The developments may be the same, but the sites proposed to accommodate them are not.
- The controls are unlikely to accurately reflect the outcomes desired by the relevant policy.
- Codes are not necessarily objective means of achieving implied results. Subjectivity and interpretation are required in order to adequately and effectively define them.
- Experience of regimes where strict planning codes apply, such as that in the Netherlands indicates that reliance on such an approach creates problems for the planning authorities by restricting their own freedom of action to such an extent that various provisions are regularly ignored and apparent difficulties are circumvented. While intended to produce a high level of certainty, such circumstances would appear to result in problems by removing the flexibility required by decision-makers.

- The application of a strict legal interpretation of planning controls is unrealistic as this relies on notions of certainty and consistency, neither of which strictly applies – this is the reason that the controls included in the DCP are not legally enforceable. (Derived from Davies 1988, Booth 1996, 2003, Needham 2007b, Allmendinger 2009, Cullingworth and Caves 2009).

Discretion does not imply that decisions can be made in an arbitrary fashion and are in practice constrained or defined by the limits available to the decision-maker (Booth 1996). This is particularly relevant in the case of the delegation of powers which results in the transfer of at least some discretionary responsibility where the applicable parameters are defined. Equally, the translation of policy into a set of rules capable of regular and accurate application is fraught with difficulties particularly where a rule cannot be satisfied by either a yes or no response. The result is a continuing drive for simplification and rigid consistency which removes any need for discretion.

This eliminates the need for the decision-makers to be held to account. Law based systems inevitably tend to see the judicial process as the chief means of accountability; discretionary ones focus on administrative procedures. But all systems of development control have some form of accountability and subsequent redress for the aggrieved (Booth 1996). However, in most systems the test is one of the legality of the action within the bounds of the applicable discretion. Transparency in the way the procedures operate to account for possible illegalities is clearly of some importance together with confidence that the accountability of the decision-maker will be properly tested (Stein 2008). This is a concept which appears to be of limited importance in the NSW planning system where discretionary power is conditional on legal provisions.

The use of discretion does not avoid bad decision-making especially in circumstances where the pursuit of goals by any means available may allow the judgement of officials on actions to overrule existing rules. However, the exercise of discretion in the planning system should operate within limits, sometimes defined by planners themselves and the culture within which they operate. There are also wider political, social and economic forces that constrain all these activities. The boundaries of discretion are sometimes created by unambiguous rules and the culture of planning but these boundaries are often not sharply drawn. These are considered in more detail in Section 5.7.

The impossibility of providing a rule for every circumstance introduces the need for flexibility and making the areas of choice clear from the beginning. Recognition of where discretionary action is possible and indeed necessary begins to make any system of

development determination more transparent (Booth 1996). It helps to distinguish between those things that need to be certain and those where areas of doubt and uncertainty exist. In any case there will always be some degree of discretion in the approvals system whether this is undertaken by elected representatives, planning professionals with delegated powers or so-called independent panels – someone always has to decide and that decision will normally be taken based on an interpretation of the available evidence (Tewdwr-Jones 2002). The criteria to be used may however be partial, the evidence inaccurate and the interpretation biased or incompetent. While the process may be as deliberate as possible, the determining authority will always prefer to retain some room for manoeuvre while the reasons for each decision need to be made clear.

Section 79C of the Act contains, at least in theory, an outline of the criteria against which an application can be judged. The Act and the SI LEP provide a clear definition of rights but also gives rise to the possibility of challenge and to the right of redress. Here there is a premium on certainty; the certainty of knowing in advance what is acceptable and the certainty of obtaining a favourable decision if all the regulations are met.

Plans which are specific about what is acceptable within strictly defined areas such as those in NSW create problems in that there is an inevitable tension between regulatory control and forward planning which is difficult to reconcile. Zoning plans identify existing rights and thereby frame the *status quo* while at the same time attempt to identify a program for future change. This becomes an increasing problem when areas of existing development require regeneration either due to the obsolescence of the urban fabric or changes in urban policy which necessitate, for example, increases in residential density providing opportunities for new development. So-called upzoning is a relatively crude tool which fails to distinguish between those who will benefit and those who will experience loss (Gurran 2007). The apparently arbitrary nature of these decisions illustrates the essentially political character of the process and its outcomes, intended or not.

It remains a simple and predictable step from the single aim of promoting and facilitating development as an economic imperative to one of establishing sufficient control over the process of managing the system to achieve predictability of outcome and ease of accomplishment. In this case, discretion represents the application of power.

> *Power does not limit itself to defining a specific kind of knowledge, conception or discourse of reality. Rather power defines physical, economic, ecological and social reality itself. Power is more concerned with defining a specific reality than with understanding what reality is. This power seeks change, not knowledge.*
> (Flyvbjerg 1998a, 36)

Safeguards are therefore necessary to ensure that discretion is properly exercised but these may be weak or inconsistently applied. Many issues raised in planning applications will not be addressed in policy (Booth 1996). Attempts to develop policies to cover every eventuality will result in an increasingly inflexible planning system becoming ever less able to adapt to changing circumstances with a greater potential for conflict between policies with increasing confusion and uncertainty. Alternatively, the policy content of planning will be minimised in an emphasis on the facilitation of development and the associated focus on process.

Certainty of process is also a key consideration so that decision-making is transparent and can be undertaken in public. Power to take decisions and the discretion available to circumvent certainty raises a series of related issues – accountability, flexibility, acceptability and consistency. These are addressed in the following sections.

5.5 Depoliticisation and the roles of the players

The removal of local elected representatives from their previous role in the decision-making process associated with development assessment and the related minimisation of community involvement appears to be widely accepted by those closely involved in the process (Planning Institute of Australia 2012, 2013b). It removes some area of uncertainty assuming that an increasingly codified basis for assessment and the use of unelected so-called specialists to reach decisions in the public interest are acceptable. This also raises the question about the definition of those issues which need to be considered as part of the process of approval and the weight to be applied to each. The legal view would seem to wish to restrict these to issues strictly related to planning (Stein 1995) although how this can be justified if social and environmental considerations are excluded is not clear. It can be argued that the exclusion of elected representatives removes the consideration of their constituents' interests which is their responsibility to protect. The brief statements allowed at panel hearings cannot be considered to be an adequate substitute.

It is intended by government and apparently accepted by the community that the anticipated lack of parochialism and the supposed non-political nature of the deliberations of a small group of specialists will generate the required level of confidence in the approval system (Planning Institute of Australia 2012, 2013b). This overlooks the fact that, apart from the power delegated to them by the Minister, they have no accountability for the decisions they make on behalf of the community which are, in themselves, highly political. The belief that their accountability stems from the delegation of power and responsibility by the Minister appears to be stretching the concept of accountability a long way. Panel members would appear to be accountable only to the

Minister. However, control by personal contract to the Department remains a key ingredient of this process ensuring that their independence may be a misnomer.

> *While the committee supports the concept of an independent and expert panel for local level development, it considers that depending on their constitution, the Planning Assessment Commission (PAC) and the Joint Regional Planning Panels (JRPPs) can be seen to be highly politicised. It is unclear what the system for transparency and accountability will be if decisions are to be made by a panel of experts.*
> (The Law Society of NSW 2012, 5)

Such specialists can reasonably be expected to have confidence in what they are doing is contributing to the proper functioning of the planning process; a belief coinciding with their notion of professional status. Their experience will however temper any view that their activities create certainty for others but they can be expected to be confident (certain of) their own capacities and professionalism. However, discretion will always be required where expert decision-making is necessary; local political considerations may be absent, but certainty may not correspondingly be increased.

Committees and the PAC advising the Minister include administrators and members of the development industry whose views are both predictable and self-serving but exist in a policy vacuum where consistent aims are absent while reform focuses on efficiency and streamlining (Mant 2009). There seems to be little consideration of the concept of separation of powers – failure to separate executive, legislative and arbitral powers – the managing and rule-making functions are not separated from the function of exercising development control over individual developments.

Councillors, in theory should have a dual role in relation to development issues, now much curtailed. They must deal objectively with a proposal based on the detailed report and recommendations of council's technical staff and the various public submissions (93.5% of determinations by councillors confirmed staff recommendations in 2012-2013) (NSW Department of Planning and Infrastructure 2014) but, at the same time, they must look after the interests of their constituents – that is their democratic responsibility which has been denigrated using the term parochialism whether it is justified or not. The interests of local constituents cannot be effectively protected by expert panels particularly when dealing with issues not directly covered by planning legislation even though this might contradict one legal view that only planning issues should be considered during assessment (Stein 1995).

The issue of the political nature of planning and how this is played out in practice is one of a series of long standing concerns that has exercised a wide range of views culminating in the current drive to remove any taint of politics from at least one part of the process;

determination of development applications (Planning Institute of Australia 2012). This, it is claimed will increase the perception of the integrity of decisions, provide greater confidence in the objectivity of assessments and reduce the angst which has apparently riddled the system recently (Property Council of Australia 2013). This will be achieved by effectively removing the responsibility for determination of applications from elected local representatives and transferring it to the professional council planners and nominally independent panels of contracted specialists (NSW Government 2013b).

The justification for this change, which appears to be broadly accepted, is based on flimsy grounds:

- land use planning as exercised by the state is a highly political activity whether undertaken, in part or not, by politically-motivated members of the community who can legitimately claim to represent those who will be affected by the decisions taken;
- planners have always in one sense depoliticised the planning activities of the state by casting them in technical terms and legitimated the defining ideology by bolstering justification originally in the name of the public interest using arguments ostensively based on scientific rationalism (Fainstein and Fainstein 1982, Reade 1987);
- in essence, decisions which have political ramifications should not, on this basis be taken by those with only administrative responsibility; and
- if depoliticising the planning process is the aim, removing responsibility from community representatives at the local level is only one part; the other components of the system, particularly its legal powers and its centralised plan-making remain highly politicised with an increasing level of administrative discretion being made available to the Minister.

In practice, it is doubtful that the political character of planning can be removed as it relies on the power of the State to intervene in the land market where its results are contested; as a result it remains, in essence a highly political activity. Those operating as substitutes for elected representatives under delegated powers are acting as quasi-politicians but lacking their legitimacy. However, if Gough's contention (2002) that the process of depoliticisation with a much wider agenda is aimed predominantly at the weakening or removal of historically accumulated forms of socialisation requiring the abandonment of existing forms of non-market coordination and state regulation (Clarke 1988, Bonefeld 1993) is accurate, the notion of both land use planning and community involvement starts to become redundant. This process would however appear to be underway in the contention that removing responsibility for decision-making from elected

representatives is all that is required to depoliticise the planning system (NSW Government 2013b).

Planning has long since consolidated its position as a legitimate activity of government (Reade 1987). This role is rarely questioned; it being considered to be self-evident that planning ought to be there as a necessary addition to the powers of the complex modern state. It has survived many vicissitudes and several attempts to remould it and remains under considerable pressure to shape its activities into merely those required of neoliberal governance although its very existence contradicts the more extreme dogmas of that construct. However, the gradual weakening of the ambition of land use planning within the bureaucracy over recent years has increased the scope for the private sector to influence the policies and plans within the Metropolitan strategy (Bunker 2007), and now the detailed scope and provisions of the new Planning Act, ensuring that it will be impossible to produce outcomes that go anywhere near to achieving the kind of society envisaged in the stated aims of both, even ones as limited as these now are.

5.6 Accountability and involvement of the community

The State government and the planner's representatives claim that the active involvement of the community is a key feature of an acceptable and effective planning system (Planning Institute of Australia 2013a, NSW Government 2013b).

> *PIA considers that the success or failure of a planning system, the cornerstone of which is strategic planning, is fundamentally dependent on the quality and effectiveness of community engagement in the formulation of strategic plans at all levels.*
> (Planning Institute of Australia 2012, 6)

> *A NSW planning system resulting from extensive community and stakeholder engagement will provide* ***certainty*** *and confidence on planning issues. A system that is modern, transparent and provides clarity for investors will make NSW competitive again.*
> (NSW government 2011, 56, emphasis added)

However, in practice community involvement is limited and claims that the new procedures to be introduced in the forthcoming Act will increase this, do not appear to have been accepted by community interest groups (Better Planning Network 2013). Where discretionary decision-making exists, those who are permitted to make such decisions need to be held to account as a necessary part of the system. This usually takes place via a variety of mechanisms. The use of the Court is one procedure; another provides statutory processes for community involvement within local plan-making and development assessment although these are often seen as ineffective, characterised as the ability to comment after the event.

The proposed shift of community participation to the strategic plan stage with a consequent reduction in the objections allowed to local development has obvious flaws and may be unworkable, comprising in effect, the residualisation of community involvement by further increases in the power of the Minister and the interests of the development lobby (Better Planning Network 2013, Shoebridge 2013). The so-called Community Participation Charter is weak with specific consultation requirements not prescribed but only set out in community participation plans which are non-mandatory. The difficulty in engaging the community at this stage has been widely recognised; its effective implementation will require both substantial effort and resources. Even then, it is unlikely that the general public can actively engage in the discussion of the visionary concepts so beloved of planning's professional proponents (The Law Society of NSW 2013). The outcome of this process will be the diminution of public involvement in the process where it actually affects it with a subsequent reduction in the validity and justification of the process.

In a democratic society, the community is entitled in theory to believe that its acceptance of the role the government plays in the formulation of policy that directly affects its rights by intervening in the way in which privately owned land is used and developed should be subject to its approval. This cannot reasonably be achieved via the normal procedure of regular voting for political representatives as government policy making is not usually identified separately from all other policy issues at such a time. In order to legitimate planning activity some kind of justification is necessary and is often achieved by a process of community involvement in the planning process. The symbolic role of this is rarely discussed and such involvement now only seems to be considered to be necessary in order to further streamline the subsequent approval of development. The community needs to have confidence (certainty) in the planning process which can only be achieved if it has a real and influential role in it.

It seems likely that the existence of planning laws has some impact on citizens whether they are or have been directly affected by them or not (Stein 2008). Personal experience of planning controls is likely to have increased public expectation that commercial development or new infrastructure projects should be properly subject to rigorous planning procedures – much as a house extension will come under scrutiny (Cullingworth and Nadin 2006). This, in turn may have served to strengthen public expectation that individual choice or business interests should at times be subjected to the wider public interest.

5.7 Flight of discretion to the centre

Some level of discretion is unavoidable within the decision-making relevant to land use planning. The key issues however are its scope and where it can be applied, who is

responsible and the process by which such decisions are held to account. It is therefore closely related to the notion of accountability.

Certainty is often equated with regulation on the basis that once the rules are established and known, the process of development approval becomes straightforward increasing its dependability in producing a predictable outcome. Inevitably this is highly dependent on the form of the regulation and the manner in which it is implemented (Booth 1996).

Discretion is not arbitrary: it has to be granted and can be taken away. Granting discretion recognises the limits of rule-making in specific cases and changing circumstances. Positive discretion relates to circumstances in which a particular goal in a specific case or policy area can be pursued by an official in a way that promotes that goal. Discretion is useful in complex situations, such as developing strategic plans where setting out a rule on how to proceed may be counterproductive (Titmuss 1971, Goodin 1988, Hawkins 1995). The problems encountered in land-use planning are often complex, requiring the consideration of multiple facets where the use of rules is not appropriate or helpful. In such circumstances, positive discretion is required and is widely used (Jowell 1973, Tewdwr-Jones 2002).

Negative discretion occurs in the administrative parts of planning such as development control but it is most significant where priorities and policies are set in circumstances where only a few issues can be properly addressed due to a lack of available resources or political preference.

Recent legal and policy changes have resulted in a shift creating an increase in administrative discretion at the expense of that in local political decision-making. State-wide policy requirements ensure that the planner's freedom in discretionary judgement is constrained although not eliminated. The use of planners' discretion is considered in more detail in Chapter Six.

This situation will not be improved by the passing of the Planning Bill where section 10.12 significantly restricts the ability of the community to challenge plans and some decisions even in the case of legal error. In addition, the number and breadth of Ministerial discretions undercut the requirements of both certainty and transparency within the planning system. Aims demonstrated by the clauses in the draft Act can be interpreted as consolidating discretionary power in the hands of the Minister severely limiting the claim to be a focus on certainty (Law Society of NSW 2013). This very wide discretion allows the Minister to bypass procedural requirements including those for community participation. In addition, a number of other provisions in the legislation would confer specific exemptions and discretions on the Minister or another consent authority.

This is further undermined by the discretion allowed in the Bill for the Minister to make plans overriding local and subregional plans (section 3.14) without any requirement to consult and no requirement to have regard to relevant strategic plans. Under section 3.8, local and subregional plans must *give effect* to the relevant regional plan. The hierarchy of plans is therefore a fixed system in which the lower level plans cannot be adjusted to reflect local conditions even if these have been considered in error by those higher up. This can be done without compliance with the procedural requirements of the legislation to prepare and give effect to the plans above them in the hierarchy. This might be considered to be returning to the circumstances applying previously only to Part 3A when the extent of the discretionary powers resulted in accusations of corruption in decision-making. The new provisions in the draft Bill to extend the administrative discretion available to the Minister are listed in Appendix C.

The purpose of these provisions can be seen as further concentration of power with the Minister where additional discretion will be made available to allow the planning process to be effectively orientated in a particular direction as determined by the Minister. This might be considered to be the achievement of certainty by discretionary means if this is strictly applied to benefit one group or another. The overall direction appears to be authoritarian control over any divergence from the direction to be determined by government and thereby eliminating any consideration of the public interest in the outcomes of the planning process. This proposed level of control would not be required unless a focus on a particular purpose for the planning system was not under consideration.

Although the previous Minister, following considerable pressure from the community has indicated a willingness to make some late changes to the Planning Bill, the provisions relating to his discretionary powers remain (Hazzard 2013). Here, certainty appears to be equated with the operation of the Minister's discretion – a curious notion.

The lack of separation of powers between the legal and administrative components of planning decision-making was considered by the Planning Review to present a serious challenge to the independence and transparency of the process particularly in relation to the major projects assessed and determined by the Minister and senior bureaucrats within the Department (NSW Government 2012b). This recommended the establishment of a Planning Commission under a separate Act to be chaired by a judge of the Court. This would have a wide range of functions but its processes were to be distinctly different from those of the Court; essentially inquisitorial rather than adversarial. This recommendation

which would have effectively reduced the discretionary power of the Minister did not progress into the subsequent Green Paper (NSW Government 2012c).

5.8 The Land and Environment Court and its influence

The role of the Court is seen by its proponents as a source of certainty as it is effectively the end of the process and its considerations stand. At the same time its interpretation of some of the policy aims of the Act has been contrary to its intentions creating both misunderstanding and uncertainty which has required statutory amendment to clarify.

> *Processes are there to achieve a certain aim; if you want a different process, you need to change it – it is not flexible and it cannot be adjusted to suit a different outcome. The process is set by the law; it does not allow flexibility. It is to the benefit of the community that such processes are in place and are properly implemented.*
>
> *The rules of the Court do not relate to the consideration of outcomes – lawyers are not outcome driven – the focus is on the words on the page which say whether you can do it or not.*
> (Commissioner of the Land and Environment Court 2011)

Both these presuppose that all aims and outcomes of the planning process must be clearly and unambiguously known and defined in advance; a clearly unachievable and certainly undesirable condition that, if taken at face value, removes all flexibility to adapt to unknown future circumstances. Alternatively, it would mean that the necessary processes are in a constant state of flux in order to achieve changing aims; otherwise the situation becomes static, gradually being overtaken by events. This appears to encapsulate the conundrum resulting from the essentially parallel process of assessment undertaken by the Court contrasting the certainty achieved by a strict reliance on established and unchanging rules and the necessity for flexibility to deal with future uncertainty.

It is an interesting paradox that those with a legal focus operating in the field of land use planning generally seek to minimise the role of discretion (NSW Law Society 2012) yet the ultimate stage in any planning dispute is the Court where the exercise of administrative discretion is undertaken in reaching the final decision. The interpretation of evidence is central to this exercise as clearly decisions cannot be taken on a simple yes/no basis as there would be little need for the ministrations of the Court itself. However, the normal rules of evidence do not apply in the non-legal cases decided by the Court and hearsay and anecdote can be considered in reaching a decision although this is still bound by the legal doctrines of fairness and process.

There is some kind of certainty here simply because the Court's decisions are final in all but a few legal cases. However, this is limited due in part to a substantial shift to a process of arbitration where outcomes are inevitably uncertain. At the same time the procedures of

the court focus predominantly on appeals by developers against State government or local council decisions.

The Court would appear to have experienced difficulties when coping with some parts of the planning system (Kelly and Smith 2008). These have included, *inter alia,* the interpretation of zone objectives and the relative significance of the development controls included in the two parts of the local plan; in both cases providing particular views of these provisions which in addition to distorting their original intention as envisaged in the legislation and influencing the way in which development control has operated, might be considered to be beyond the Court's remit. Alternatively, it could be argued that if the intentions and wording of the particular policies were clearer in the legislation, there would be no necessity for legal interpretation.

Kelly and Smith conclude that zone objectives;

> *represent a key aspect of NSW planning law that has undergone unpredictable judicial scrutiny. It provides a useful example of legal magnification of an issue that was never intended to reach such confusion and distortion. Whilst sound judgements arose towards the end, they followed 10 years of cheerless case law that served to collapse the original planning policy.*
> (Kelly and Smith 2008, 97)

This inevitably leaves the question open in relation to the Court's possible response to the operation of the new policies to be included in the forthcoming Planning Act.

The *Environmental Planning and Assessment Amendment Bill 2012* has introduced a seemingly contradictory note into the planning system. According to the Minister, the controls in DCPs have grown and become ever more complex and prescriptive making it more difficult for proposals to comply with them (NSW Department of Planning and Infrastructure 2013g). These changes have led to greater complexity, greater prescription and increased inflexibility, it is claimed. The bill is intended to ensure that consent authorities adopt a more flexible performance-based approach to the assessment of development. It makes it clear that DCPs are guidelines and have a lower status than LEPs and SEPPs in the assessment process and are necessary to implement planning instruments rather than the other way around.

The bill provides that where a development application does not comply with a standard, the consent authority must apply the DCP flexibly and allow alternative solutions to address those aspects of the proposal. The consent authority may consider the provisions of the DCP only in connection with the assessment of the particular application and is not to have regard to how the provisions in the DCP have been applied previously or might be applied in the future.

This amendment seems to be in response to the view that councils following the example set previously by the Court have been using DCP controls in a rigid fashion without the degree of flexibility originally intended; a not unexpected outcome within a legal context. It might therefore be seen as attempting to restore an area of discretion to the decision-maker when DCP controls are considered. It also appears to be removing the tests of consistency and precedence from the operations of the Court. On the face of it, it would appear to contradict the shift to greater codification of controls as predicated in the White Paper (NSW Government 2013b). On the other hand, it could be interpreted as a further attempt to simplify the system by streamlining the approval process at the same time as allowing a greater degree of flexibility to the development industry while removing some of the discretion available to the Court. It can therefore appear to be interpreted in a way that satisfies most opinions on the subject.

It can also be interpreted as promoting a somewhat restricted notion that DCP controls can be treated flexibly suggesting that discretion survives to a limited extent within the assessment process, perhaps providing the basis for negotiation between applicant and the planners but providing greater opportunities for subordinate controls in the statutory documents to be ignored. Inevitably, changes of this kind can only be seen as of benefit to the development industry.

Ultimately, the influence of the Court on the planning system in NSW has been considerable. It has introduced a degree of discipline into its procedures although this can be considered to have been achieved by an increase in complexity in circumstances where the legal context emphasises preference for clearly-defined rules rather than local discretion.

5.9 Conclusions

It can be argued that the assessment and approval of development is the principal opportunity for the community to engage with the planning process. While claims for an increased focus on community involvement are regularly made (NSW Government 2013b), continuing changes to procedures and in particular the reforms included in the draft Planning Bill could be characterised as a procedure aimed at marginalising the input of the community and shifting the emphasis of any input to industry lobby groups and relevant professional organisations focusing on abstract issues of little interest to the majority of those potentially affected by its results.

Each of the three assumptions about that part of the planning process concerned with the determination of development addressed in this chapter can be considered to be

founded on a particular interpretation which may be difficult to substantiate. The notion of a limitation on the considerations to be taken into account during assessment to those considered to be strictly planning issues exemplifies an essentially legalistic approach. It may be difficult to reach agreement on the issues which are specifically of concern for land use planning particularly as a list of such considerations is included in section 79C of the Act containing both social and environmental concerns in addition to the public interest. No attempt is made to define what constraints are placed on considerations of the latter.

Views on the depoliticisation of the planning system may be less divisive but appear to be based more on pervasive myth than objective consideration of planning as an essentially political activity where decisions are routinely made in the public interest which influence who gains and who loses. At the same time, the operation of the revised system using disinterested experts can itself be considered to be highly political in nature (NSW Law Society 2012) while the continuing reduction in local discretion resulting in the removal of elected representatives from the process can be interpreted as reducing the legitimacy of planning as a public process. Finally, the administrative discretion available to the Minister is in the process of being strengthened confirming the continuing political character of the planning process.

The refocusing of the land use planning system on a rigidly hierarchical top-down process as included in the draft Planning Bill continues the shift of discretion away from the local level to the centre. This effectively confirms the lack of confidence claimed to be felt by the community as a reason for reorientating the planning system instead of re-establishing its confidence in it. The two factors which have contributed to the overall lack of confidence in the planning system have been effectively reinforced. These are:

- the overconcentration of power with the Minister and the planning bureaucracy compounded by the lack of any checks and balances on available administrative discretion (The Law Society of NSW 2013); and

- the widely held perception that the system is heavily orientated towards satisfying the demands of the property industry while those of the community are overlooked or ignored (Better Planning Network 2013).

The process of reconfiguring the planning system over the past three years can be characterised as an exercise of power where a number of recommendations made in the Planning Review (NSW Government 2012b) which would have addressed some of its deficiencies, particularly those associated with accountability and justification, have been ignored in a determined drive established in the Green Paper to achieve a more rigid and

predictable system and consolidate discretionary power with the Minister and the planning bureaucracy (NSW Government 2012c).

Those factors which have an influence on the notion of certainty in the process of assessment and determination can be summarised as follows:

- The zoning process which is the essential link between policy and outcome is considered by many planners to be the most reliable source of certainty within the planning system. This view obscures its inadequacies when used as a positive means of managing future land use and its development for urban uses.

- The process of zoning is organised to achieve a high level of approval of development proposals by defining what is an acceptable use on a particular area of land and what is not. Other pre-determined controls determine the intensity of that use by the application of mainly numerically defined limits. The definition of the applicable rules is a powerful influence on the performance of the process.

- The high level of approval achieved by the existing system could be considered to be a source of confidence that any development that complied with the stated controls would be considered to be acceptable. However, one of the objectives of the proposed changes to the legislation was the achievement of simplified and speedier assessment processes. The relevant provisions in the draft Bill have been diluted somewhat following opposition although this intention appears to persist.

- The predominant means of assessment of DAs is based on compliance with a pre-defined set of criteria. This does not provide a measure of the net worth (merit) of a proposal but indicates that it can be considered to be acceptable as long as it complies.

- Continuing simplification of the process and the applicable controls within a context of developmentalism is not compatible with the achievement of the stated objectives of the reformed planning system or the enhancement of quality standards.

- Lack of flexibility in the definition of assessment criteria in order to achieve consistency and predictability is not conducive to good decision-making especially in complex situations or where specialist panels are used. Flexibility has benefits for both developers and planning authorities who wish to retain some room for manoeuvre.

Problems, relating to recovery of confidence in the process focus particularly on the lack of oversight of the powers available to the Minister and the very limited access to appeal processes available to the community, particularly third parties. Some degree of certainty

can be considered to exist in the operation of the assessment and determination process based on the availability of detailed evidence even though a concerted attempt has been made to discredit it by interested parties with the supporting evidence apparently ignored. This also appears to comply with the view of the planners themselves (Planning Institute of Australia 2012, 2013b) although for different reasons.

While the Department publishes the relevant data on a regular basis, it appears to be a paradox that a major aim of the planning reforms is to *improve its predictability and certainty by simplifying its procedures* (NSW Government 2013b, 114). If this is to be judged by the rate of approval of development applications there is little improvement possible and the effect of the proposed changes will be marginal at best.

6 Policy implementation - aims and outcomes

6.1 Introduction

This chapter focuses on the notion of intentions and outcomes; the relation between the two complying with one of the defining justifications of planning where certainty in its processes might be established. In the real world, the identification of the effects of a single planning policy is impossible to untangle from other policy initiatives pursued by others for similar or opposing reasons. However, if the focus is much more specific, it is possible to identify the outcome of a particular initiative included in a planning document when that entails the development of a clearly defined facility where the process of translating the original aim into a physical artefact can be determined. This provides some indication of any concept of certainty that could be applied to the ability of the planning process to achieve a pre-determined outcome.

The translation of policy into specific outcomes is potentially the most significant part of the planning system where certainty could be identified both in its process and its products. The two previous components of the system – the strategic plan and the determination process - need to combine to achieve what the planning system is aiming to produce as its outcomes. This is now firmly focused, at least in urban areas, on the physical provision of development undertaken predominantly by the private sector. This part of the process is the mechanism for the implementation of what the aims of planning are considered to be; its content.

Plan and policy-making in a social context is unable to identify singular objectives capable of precise achievement. Planning traditionally has multiple objectives, the achievement of which is difficult – probably impossible - to measure (Roger Tym & Partners 2002c). One reaction to this is the reduction in ambition of the claims made for planning outcomes which coincides with the ideological focus predominantly on economic development while any other benefits can be considered to be residual, flowing from the claimed resulting growth.

There is usually a distinction between what is intended to happen by someone in a given situation and what actually happens in practice. The concept of policy must, in the broadest sense embrace both the intention of achievement and the outcome of a particular intention. If the outcome of a policy is different in some way from the aims of the policy maker and implementers, it is likely that there are other influences, possibly more powerful that are affecting the situation. It is also possible that the processes and actions engaged to achieve the required outcome are insufficient or unable to bring it about.

Changes could also have occurred between the formulation of the policy and its implementation.

The degree of control available can be expected to vary considerably in different circumstances even when its practice is operating in a well-defined statutory context. The degree of control that can be exercised can vary over time and by location and be modified by political considerations and the extent to which the support and resources of the private sector can be marshalled. There will inevitably be conflicting motives and priorities. The community may react by resisting the change anticipated to be brought about by the policy or may respond positively but in unexpected ways. This reaction may not only reduce the intended effect but give rise to a range of unanticipated outcomes. Some of these may take a considerable time to eventuate.

The analysis of policy can be broadly undertaken at three levels:

- intentions of the policy or the policy-maker which may not be expressed as explicit objectives remaining covert, for instance in a highly political situation;
- reasons for the policy and the decisions taken to proceed including the methods undertaken to achieve approval to go ahead; and
- what happens (or does not happen) as a result of implementation over a period of time.

While it will be clear that what is intended will frequently differ from what happens, some other differences may be discernible. There may be differences between what actually happens and how this is perceived by the various actors affected by the policy. These differences (tensions) can be characterised as the discrepancy between the actual; the perceived; the expected and the ideal.

The mere availability of statutory planning powers does not by itself ensure the effective implementation of any policy. It takes far more than the formulation of an apparent answer to any public problem on paper to achieve a useful outcome. There are additional tasks, including communicating the policy to those involved and convincing them that it is a valid approach; setting down the legal and statutory boundaries and securing and allocating the necessary resources (Quade 1975, Tewdwr-Jones 2002).

The generation of policy within the planning system is seen as a means of achieving its objectives; the source of the actions needing to be implemented to do so. They relate the aims of the plan to the desired outcomes, often set out in detail in the Metropolitan Plans for Sydney (NSW Government 2013a). A high degree of emphasis has been placed on this

in the past (NSW Government 2010d) but it might be difficult to generate much confidence in the achievement of effective outcomes when regular reporting of the performance measures listed in the strategy (248-251) is currently absent and any related claims have to be taken on trust.

This chapter is divided into two main sections. The first comprises a detailed examination in the form of a case study of a recent development of a district centre in suburban Sydney which due to the manner in which it was managed by the responsible council over a period of 15 years, provides an insight into the processes undertaken and the exercise of power by those interests with the responsibility for its implementation. It is also a rare example of a development where the council attempted to exercise control over its incremental growth using its conventional planning powers based on an initial concept.

The second examines two areas closely associated with planning policy implementation; one from each end of the planning process. The first considers recent initiatives by the State government attempting to stimulate housing supply via an accelerated release of land for development and the introduction of Urban Activation Precincts (UAPs) and the second reviews the process of monitoring land use planning's achievements which should provide valid evidence for the certainty it may generate.

6.2 Translation of policy into outcomes

It is a long standing criticism of the planning process that the connection between policy and its practical outcome is difficult to identify (Reade 1987). This might be considered to be a serious flaw as an important purpose of planning is claimed to be the achievement of a predetermined outcome sometimes considered to be of a kind beneficial to the community. If this link cannot be discerned or its results are difficult to predict, the process would appear to have lost some part of its justification (Hall and Tewdwr-Jones 2011). There is also the curious conundrum which applies to the manner in which planning policy is nowadays translated into physical outcomes by an almost exclusive reliance on the capitalist market in the form of the commercial property industry. This is the predominant means for planning to achieve its aims (Barker 2006b, Australian Productivity Commission 2011). As the powers available to the planners are essentially restrictive and regulatory rather than generators of development, this presents serious problems except where they coincide with the demands of the market place (Taylor 2005, Cullingworth and Nadin 2006). Planning therefore, by definition must align itself with developer's interests if it is to attempt to achieve its aims (Pickvance 1982, Healey *et al* 1995). At the same time these aims are necessarily conditioned by reliance on those interests.

This case study comprises two parts. The first considers the overall process of assessment and determination using five examples to provide indicators of how these operate in practice. The second provides an investigation of the effectiveness of the process in translating a clearly defined intention into a specific outcome making use of three of the examples which have formed the main component in the development of the Wrights Road Centre in The Hills LGA in Sydney. The selected applications are:

- A – Supermarket and retail shopping centre, Wrights Road, Kellyville, Coles Myer Property Developments Ltd (Baulkham Hills Shire Council 2002b).
- B – Retail development including a supermarket and associated works, Windsor Road, Baulkham Hills, TPG NSW Ltd for Fabcot Pty Ltd (Woolworths) (The Hills Shire Council 2011a/Sydney West Joint Regional Planning Panel).
- C – Six storey apartment building, Donald Street, Carlingford, Joe Aflak (The Hills Shire Council 2011b/Sydney West Joint Regional Planning Panel).
- D – Supermarket and associated works, Wrights Road, Kellyville, Aldi Foods Pty Ltd (Development Assessment Unit, The Hills Shire Council 2013d).
- E – Alterations and additions to an existing shopping centre including additional retail space, liquor shop and mechanical repairs tenancy, Wrights Road, Kellyville, Coles Group Property Developments Ltd (The Hills Shire Council 2011a/Sydney West Joint Regional Planning Panel).

Three of the applications chosen (A, D and E) relate to the development over an extended period (2000-2014, but not yet completed) of a local centre to serve the needs of a rapidly expanding, generally low density residential area located close to the southern edge of the North West Growth Centre in Sydney. The two others comprise a smaller centre proposed for a site approximately two kilometres to the west (B) and an apartment block constructed as part of the revitalisation of a low density residential area adjacent to an existing rail station (C). Three of these are complete (A, C and D), one is about to start construction (E) and one application was rejected (B).

These examples have been chosen so that certain characteristics can be identified while minimising some of the effects of those factors external to relevant planning issues where differing influences would apply. All five of these examples were assessed by the same council and determined either by that council (councillors (A) or the planners using delegated powers (D)) or the same Regional Panel made up of a consistent group of specialists (B, C and E). As far as possible this avoids the influence of a changing cultural environment within the responsible council and minimises the impact of individual views in

those circumstances when discretion is required. With one exception, each of these assessments was undertaken under the supervision of the same senior council planner.

The planning report routinely prepared by council planners takes on a regular form, occasionally adjusted to accommodate issues specific to the particular application. The report focuses predominantly on three areas: compliance with the applicable statutory requirements, responses to the issues raised in public submissions and a listing of the intended conditions to be applied to the construction and operation of the development. The latter are standardised depending on the type of development under consideration but may include a number of additional controls intended to improve compliance where problems might exist. The key area is compliance with SI LEP and DCP objectives and associated controls.

The process of assessment is codified in that the level of achievement for each criterion relevant to the development is determined by the established controls and the application is considered to be acceptable if these are achieved. The controls determine the boundary between acceptability and rejection. The process is one of compliance with the codes; no attempt is made to determine overall merit in terms of its benefit (or otherwise) to the community, or the economy. A summary of the main components of each of the chosen applications is contained in Table 6.1.

Permissibility can normally be determined simply on a yes/no basis. The proposal complies with the zone description of the acceptable land use in the SI LEP or it does not. Consistency with the zone objectives is also easily achieved as these are routinely defined as provision for the use for which the zone is intended plus some vague aims such as the encouragement of job opportunities relating to the proposed use. A wide range of specific uses may be considered to be appropriate under the overall heading while others in the zone table may not be acceptable. No properly formulated application could be expected to fail these tests unless some other circumstances applied. The following objectives apply to Zone B2 Local Centre, for example.

> *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
>
> *To encourage employment opportunities in accessible locations.*
>
> *To maximise public transport patronage and encourage walking and cycling.* (The Hills Shire Council 2012e, 23)

Table 6.1 Assessment/determination of selected development applications

Development application	A Supermarket and retail shopping centre, Wrights Road, Kellyville	B Retail development including supermarket, Windsor Road, Baulkham Hills	C Six storey apartment building, Donald Street, Carlingford	D Supermarket and associated works, Wrights Road, Kellyville	E Alterations and additions to supermarket, Wrights Road, Kellyville
Determination authority	Baulkham Hills Shire Council	Sydney West Joint Regional Planning Panel	Sydney West Joint Regional Planning Panel	The Hills Shire Council Development Assessment Unit	Sydney West Joint Regional Planning Panel
Date of determination	22 October 2002	10 November 2011	10 November 2011	19 March 2013	28 August 2013
Planning context	Baulkham Hills LEP 1991, DCP 6, draft amendments to DCP 6, Wrights Road District Centre	Baulkham Hills LEP 2005, Draft LEP 2010, DCP Part C, Section 8 Business, DCP Part E, Section 17, Balmoral Road.	Baulkham Hills LEP 2005, DCP part E Section 22, Carlingford Precinct, LEP 2005 (Amendment 20) Carlingford Precinct, SEPP 65 Design Quality.	The Hills LEP 2012, DCP Part B Section 6, Business, Part C Section 1, Parking, Section 2, Signage, Part C Section 3, Landscaping.	The Hills LEP 2012, DCP Part B Section 6, Business, Part C Section 1, Parking, Section 2, Signage, Part C, Section 3, Landscaping.
Zoning	General Business 3(a)	B1 Neighbourhood Centre	Residential 2(a1) under Baulkham Hills LEP 2005 and Residential R4 under The Hills LEP 2010.	B2 Local Centre	B2 Local Centre
Zone objectives	Provision of retail, business, entertainment and community uses to serve the needs of the local community.	Provision of small-scale retail, business, and community uses to serve the needs of those who work in the surrounding neighbourhood. Promotion of commercial activities in locations encouraging walking and cycling.	Provision for the housing needs of the community within a high density residential environment proving a variety of housing types.	Provision of retail, business, entertainment and community uses to serve the needs of those who work in and visit the centre. Encourage employment in accessible locations.	Provision of retail, business, entertainment and community uses to serve the needs of those who work in and visit the centre. Encourage employment in accessible locations.

Table 6.1 Development assessment/determination of selected applications - continued

Development application	A Supermarket and retail shopping centre, Wrights Road, Kellyville	B Retail development including supermarket, Windsor Road, Baulkham Hills	C Six storey apartment building, Donald Street, Carlingford	D Supermarket and associated works, Wrights Road, Kellyville	E Alterations and additions to supermarket, Wrights Road, Kellyville
Compliance with LEP/DCP requirements	Development permissible and considered to be consistent with DCP 6 except in a minor exceedance of the maximum floorspace provision for the whole site required to remain in the adopted retail hierarchy. Not considered significant.	This proposal has a history of refusals due to lack of consistency with various LEP provisions and its environmental impacts. Location, access, scale and zoning were also problems.	Development permissible. Compliance with the desired built form controls (FSR and building height) achieved but four other controls fail with one minor amendment required under SEPP 1.	Development permissible. Two objectives of the relevant DCP are referred to in relation to the justification for a minor encroachment on a boundary setback. The necessary variation is considered to be acceptable.	Development permissible and considered to be consistent with the objectives of Zone B2. Compliance with other provisions of the DCP was considered to be satisfactory although a number of failures to achieve some were noted and accepted.
Submissions	Three received including one from the adjacent supermarket owner, one from a local resident and one in favour. The main issue was truck access over adjacent land owned by a competitor.	Submissions are referred to as attached to the JRPP Planning Report dated 10 November 2011 but are not included. These are indicated to be from local property owners and in one case from a retail competitor. There were three in favour.	Four received from two notifications, all relating to the anticipated impacts of densification. Responses dismissive of claims solely on the basis of compliance with the approved Precinct Plan.	One received raising issues relating to operational and environmental management. Conditions amended to reflect these.	A total of 21 issues/objections received in 11 submissions mainly relating to annoyance experienced by adjacent residents. These were considered to be addressed by the inclusion of specific conditions.
Approval conditions	94 conditions mainly relating to construction and operational matters.	91 draft conditions mainly relating to construction and operational matters.	109 conditions mainly relating to construction matters.	70 conditions relating to construction and operational matters.	79 conditions relating to construction and operational matters.

Table 6.1 Development assessment/determination of selected applications - continued

Development application	A Supermarket and retail shopping centre, Wrights Road, Kellyville	B Retail development including supermarket, Windsor Road, Baulkham Hills	C Six storey apartment building, Donald Street, Carlingford	D Supermarket and associated works, Wrights Road, Kellyville	E Alterations and additions to supermarket, Wrights Road, Kellyville
Recommendation/ determination	Approval subject to conditions	Refusal by a majority of 3: 1 of the panel.	Approval subject to conditions,	Approval subject to conditions	Approval subject to conditions
Reasons for recommendation	Considered to be consistent with the existing retail and commercial centre hierarchy and the underlying intent of the zone objectives in the promotion of a wider range of retail opportunities in the area.	Inconsistent with Zone B1 objectives in draft The Hills LEP 2010. Size and built form not consistent with that required for a neighbourhood centre. Not considered to be meeting the daily convenience needs of local residents.	Compliance with the built form controls in BHDCP Part E Section 22 – Carlingford Precinct and provisions other relevant statutory documents including SEPP 65 – Design Quality of Residential Flat Development.	Compliance with all relevant provisions of BHDCP Part B Section 6 – Business and specific issues relating to parking and signage. Anticipated that the development will provide a service to residents contributing to the vibrancy of the area.	Consistency with the objectives of Zone B2 under the Hills LEP 2012 and compliance with the provisions of THDCP Part B Section 6 – Business with some minor exceedances and specific issues relating to parking, signage and landscaping.
Notes	One of two simultaneous applications for supermarket developments on adjacent lots forming part of the Wrights Road Centre. Problems resulted from the necessity to gain access for both trucks and cars across the land owned by the other.	Proposal for a supermarket-based centre on a difficult site considered not to comply with the requirements for a neighbourhood centre encouraging the creation of local identity.	One of a number of high density residential developments responding to the provisions of a precinct plan located adjacent to an existing rail station and a substantial commercial centre.	Small supermarket and car park proposed as the third phase of the Wrights Road Centre. No consideration appears to have been given to DCP objectives or the excision of this development from the remainder of the centre compromising its contribution to an integrated whole.	Final phase of development of the centre considered to comply with the requirements of the specific DCP objectives for it but providing a reduced level of choice in comparison to other similar centres.

The principal standards applying to development of this kind are height of buildings and floor space ratio, both included on respective maps for the whole LGA. Other controls in the SI LEP relate to the preservation of vegetation and the avoidance of detrimental effects of earthworks. Design excellence is also considered with various definitions of suitability with reference to the applicable section of the DCP.

More detailed controls included in the DCP have been applied in the past with the same weight as those in the SI LEP mainly in response to the requirement for consistency applied by the LEC. An amendment to the Act in 2012 now requires the consent authority to apply the DCP flexibly and allow alternatives where necessary to address a development application which does not comply with a standard (NSW Department of Planning and Infrastructure 2013g). This has the effect of lessening the ability of councils to influence the form and quality of the development intended to achieve planning outcomes.

In four of the development examples summarised in Table 6.1, planning concepts prepared by council containing draft layouts and detailed controls in the form of a DCP provided the basis for their assessment. These are examples A, D and E making up major components of the Wrights Road Centre and C, an apartment building forming a small component of the long term redevelopment of the Carlingford Precinct. Each included specific objectives and detailed development controls tailored for the particular development initiative. In circumstances where the developer wishes to amend the concept, this can result in difficulties for the assessor as the detailed controls in the DCP essentially determine the nature of the overall concept and the intent of the development.

In the case of the Wrights Road Centre, the DCP provides these objectives:

> *To enhance the amenity and vitality of the Wrights Road, Kellyville Local Town Centre by providing high levels of civic amenity and a centre that provides a positive contribution to the local area.*
>
> *To create a sense of place and identity through quality built form that takes advantage of the proximity of, and integrates with, adjoining retail development, community facilities, open space, vegetation, pedestrian and cycleway linkages.* (The Hills Shire Council 2012c, 19)

The wording used here presents problems for assessment. Consideration of the proposal requires a decision to be made based on knowledge and opinion which goes well beyond simple compliance with a specific requirement necessitating the operation of discretion in determining if the application will result in such vague outcomes as a sense of place and high quality built form. These are difficult decisions to make particularly if the assessor is unconvinced and needs to present a reason for refusal. There is no means of

developing an objective case for this unless the controls are defined in terms which can be more clearly adjudicated. In reality, this would require such a concept to be defined in some detail so that any shortcomings of the applicant's proposal can be easily identified. In practice, the response, especially in circumstances where compliance with other controls is found to be acceptable, appears to confirm that the proposal also complies with these objectives. The compliance tables in each of the examples examined here, with the exception of the one application rejected, conclude that each is consistent with all statutory requirements including zone and specific project objectives without explaining the basis for that decision. This appears to require a high level of discretionary decision-making by the responsible planner.

Issues concerning the consideration of DCP controls are examined in more detail in Section 6.3.5, specifically in relation to the development of the Wrights Road Centre.

Based on a detailed assessment of this sample of documents prepared by the local government planners with recommendations supported in three out of the five cases where there was an involvement of the panel, the following characteristics can be identified.

- The process itself can be considered to be a source of some certainty if the rules are obeyed. This stems from the prior knowledge of the applicable codes available to the applicant and the weakness of the detailed provisions in the DCP.
- There is inconsistency in these examples in undertaking the assessments with a tendency to focus on what are both considered to be the key requirements of the process and those where decisions can be most easily justified.
- The use of discretion by the assessor is complex and variable. This is necessary when compliance with statutory requirements particularly with objectives or vaguely defined controls is necessary. It appears to be normal for the application to be considered to comply with all statutory requirements without the need to provide supporting evidence and in the case of DCP controls, concluding that consistency is achieved using reasons which do not always appear to be convincing or avoiding such consideration altogether. There is no consideration, for example, of the specific controls in section 2.29 of Part B section 6 of The Hills DCP 2011 in two of the three Assessment Reports (A and D) examined here while the third (E), the most recent one, includes the dubious responses noted above.

- Complex arguments have to be used occasionally to justify failure to achieve some requirements and allow apparent failure to comply to be accepted. This is particularly the case with parking provision related to retail development which might be considered to be an important issue in determining the application.

- There is an insistent focus on details of the proposal in order to comply with the numerical requirements of the DCP controls which appear to be considered to represent the primary measure of compliance. It is also necessary to include the ability to allow some degree of flexibility when dealing with numerical provisions even though this is limited in scope.

- Related failure to clearly justify decisions relating to compliance with policy or plan aims and objectives – predominant compliance with numerical controls appears to lead to an assumption of policy achievement.

- Greater detail together with its supporting justification is included in the assessment when the recommendation is to refuse. In one case examined here (B), the issue of permissibility was not straightforward and some rezoning or a land swap would have been necessary. Such a development would then have complied with the zone description but the development was refused as it was considered to be not appropriate for its role in the retail hierarchy. This decision, made by the panel on the recommendation of the planners would appear to be in contradiction with the view propagated by government that planners should not interfere with commercial considerations of development (NSW Treasury 2012). The main concern however was the predominance of the supermarket (90 percent of floorspace) and the lack of non-commercial public space was inappropriate for a neighbourhood centre.

- Council responses tend to be dismissive of public submissions raising issues of detail when the proposal is considered to be in compliance with a previously approved plan or DCP even when the requirements are essentially numerical.

- There is some emphasis on those controls easy to justify but which have little relationship to policy direction. It is not easy to identify any consideration of a relationship between policy and the approved proposal and the reasons for that approval. This might be considered to stem from either a lack of policy content in contemporary plans, particularly where these relate to the content of the SI LEP or a belief that the process is not capable of achieving anything beyond its stated objective of facilitating development.

This examination of a small number of planning decisions indicates that here the objectives applied to development applications in the SI LEP provide little connection between policy and outcome and reliance on the more detailed provisions of the DCP is not necessarily a reliable basis for the control of development to translate a particular intention into a specific outcome. The process cannot be characterised as rigorous, suggesting that the observation by a member of a regional panel has some validity.

> *Local plans are considered to be weak with little recognition of policy intent, uncertain translation of policy into physical space on the ground and unjustified claims for mediocre planning proposals.*
> (Member of a Joint Regional Planning Panel 2012)

This is considered in more detail in the following section based on three of the applications summarised previously.

6.3 Intentions and outcomes

6.3.1 Intentions

The policy component in the Wrights Road case study and the reasons for it are relatively straightforward involving the provision of necessary services (social and commercial) required to support the growing population in the catchment area at an accessible location in order to contribute to an orderly, efficient and attractive urban environment. The focus is therefore on what occurs as a result of its implementation. Policy intent is stated in a simplified version in the zone objective in the land use table for Zone B2 Local Centre in The Hills LEP 2012, (23). A wide range of uses are permitted with consent in this zone including child care centres, commercial premises, community facilities, multi-dwelling housing, registered clubs, respite day centres, service stations and tourist and visitor accommodation.

This is an occasion when the physical outcome of the planning process can be identified on the ground and comparisons made between what was considered to be desirable at the outset and what eventuated following implementation. Unlike policy outcomes where there are difficulties related to isolating the effects of a single initiative within the complexity and potential contradictions of urban policy implementation, here it is possible to identify both the aim and the outcome and determine their relationship.

In specific cases, this can be examined in order to determine the validity of the claims for certainty attached to the achievement of a pre-determined outcome; what is defined in the plan will be achieved on the ground. Alternatively, any claim for certainty at this stage of the planning process might only relate to the achievement of an approval for a proposal which may only bear a distant relationship to the intention of the plan. The result of this assessment can provide an indication of the validity of any link between intention

and achievement allowing a judgement to be made on the effectiveness of the planning process in achieving what it set out to do. This is further complicated when the implementation process becomes protracted resulting not only in amendments to the applicable planning procedures but changes to the planning staff responsible and those making the necessary decisions within the responsible council.

The project analysed here comprises the Wrights Road Centre, located close to the geographic centre of an almost completed, low density residential area immediately to the west of the centre of Castle Hill. This is an established area, formerly close to the north-western boundary of the Sydney Metropolitan Area but now located towards the southern edge of the NW Growth Centre, some 30 kilometres from Sydney CBD. It is an early example of recent greenfield development which, with some changes has set the pattern for the extensive urban growth taking place on Sydney's fringe. While this example is essentially local and the factors relating to its outcome quite specific, the principle embodied in the expectation that the stated intention for future development should be reasonably accurately translated into the physical provision. The location of the site is shown in Figure 6.1.

The site comprises three equally sized, separately owned blocks of land making up a total area of just over six hectares, approximately five of which were available for development. Wrights Road provides the main frontage and access is also available from York Road, newly constructed along the western perimeter of the site as part of the development. There is no access available from the other two sides. Issues relating to access proved to be a problem during approval and implementation and contributed to delays in completing the development of the centre.

Two thirds of the site was developed between 2002 and 2003 while the remaining third along the eastern boundary remained vacant. This was bought from Council in 2008 for development but was subsequently subdivided into two lots in 2012 and approval given for a small supermarket located on the Wrights Road frontage which was completed in 2014. The remainder of the site has been approved for the extension of one of the existing supermarkets together with some additional retail floorspace but construction is yet to start. This would complete the development of the centre.

There are four main issues which have had an influence on the outcome of this development:

- Apparent confusion over the status of the centre resulting from continuing changes in the definition of the retail hierarchy in Sydney which has had some influence on the content of the centre.

Figure 6.1: Site location, Wrights Road centre

- Inability or lack of interest of the council in locating any of the range of social facilities in its control which were originally intended to create the core of the centre and provide some necessary variety of content.

- Apparent lack of compliance with the design-related requirements set out in the relevant DCP.
- Failure to consolidate the three separate blocks of land and establish control over the whole site rather than deal with each separate land owner in an attempt to achieve a coherent centre out of four opportunistic proposals.

Each of these relates to the day-to-day practicalities of planning; an area which tends to be overlooked, although a deeper understanding of what the practitioners actually do, and why, might be expected to provide a clearer perspective on realities within a rapidly changing context.

6.3.2 Background

The population of the surrounding area, Kellyville, was 20,341 at the 2011 census, some 12 percent of the total population of The Hills LGA and growing rapidly over the previous twenty years. The population is dominated by couple families with children (65.7 percent). The area would be considered to be prosperous with high proportions of professionals and managers within the workforce and a correspondingly low level of unemployment. The environment is that of a low density residential suburb with a high proportion of detached houses (96.1 percent), some 26.9 percent of these were owned outright and 57.8 percent owned with a mortgage; only 14 percent were rented.

The need for a Kellyville District Centre was first identified in a Retail Development Strategy prepared for the release area in 1989 (Department of Planning 1989 cited in Baulkham Hills Shire Council 1994). This centre was expected to comprise 15,000-20,000 square metres of retail and services floorspace including a range of retail facilities, banks, a medical centre, service station and recreational facilities. This is the initial prescription for the centre at Wrights Road prior to the identification of a location for the development.

The council commissioned a study in 1997 of retail and commercial centres for the whole shire (now The Hills Shire). This has provided the basis for centre development pursued to date although not without changes to the strategy recommended in the report (Leyshon Consulting 1997). The subsequent period has seen the consolidation of Castle Hill Centre (Castle Towers), currently awaiting long delayed, substantial expansion, and the development of Rouse Hill Centre as the two major centres in the area.

More detailed proposals for the centre appeared initially in two draft DCPs for the President Road and Victoria Road Neighbourhoods respectively (Baulkham Hills Shire Council 1994a, b). Here it was designated as the Kellyville District Centre located on the southern boundary of the proposed President Road Neighbourhood fronting Wrights Road.

Public open space and Town Centre Density housing are shown immediately to the south along the northern boundary of Victoria Road neighbourhood separated by Wrights Road.

A design framework was included showing the general arrangement with the commercial section and its associated parking and access arrangements much as has been implemented. Immediately to the east a square is proposed providing a central space for community and additional retail facilities located to the north and south. There is a bushland strip to the east of the site separating it from Green Road, a busy arterial. The text indicates that the core of the centre should focus on the public square and the public facilities providing a civic space and a focus for the development. Community facilities would have included a long day care centre, youth centre and possibly a community health centre (Baulkham Hills Shire Council 1993). The Wrights Road Centre maintains its place in Council's DCP to this day with its original objectives and development controls intact (The Hills Shire Council 2012), the design framework has not survived beyond the first attempt in 1994. The original is shown in Figure 6.2.

The development controls proposed for the centre in the current DCP (The Hills Shire Council 2012), following the requirements of the earlier versions, insist that development here should demonstrate high quality civic amenity and urban design with its identity enhanced by gateway architectural elements, feature tree plantings and high quality landscaping.

6.3.3 Centres hierarchy

The Wrights Road centre is described as a Town Centre in the hierarchy included in the *Draft Local Development Strategy* and is shown as of similar significance to the existing centres at Baulkham Hills, North Rocks and Carlingford (Baulkham Hills Shire Council 2008). Each of these comprises an internal self-contained mall focusing on one or both of the main supermarkets with a significant number of specialist shops, cafes and social and community facilities. Each has multi-storey covered car parking.

The typology of centres provided in this strategy is based on that in the 2005 Metropolitan Strategy listing the features generally considered to be necessary for a centre at that level in the hierarchy. This was later expanded in the 2010 version (NSW Government 2010d). A Town Centre is expected to be located at a transport node and contain at least:

- services and facilities including Council branch library, banks, post office, private recreation such as a gym, community centre;
- medium and higher density housing including seniors living and affordable housing;

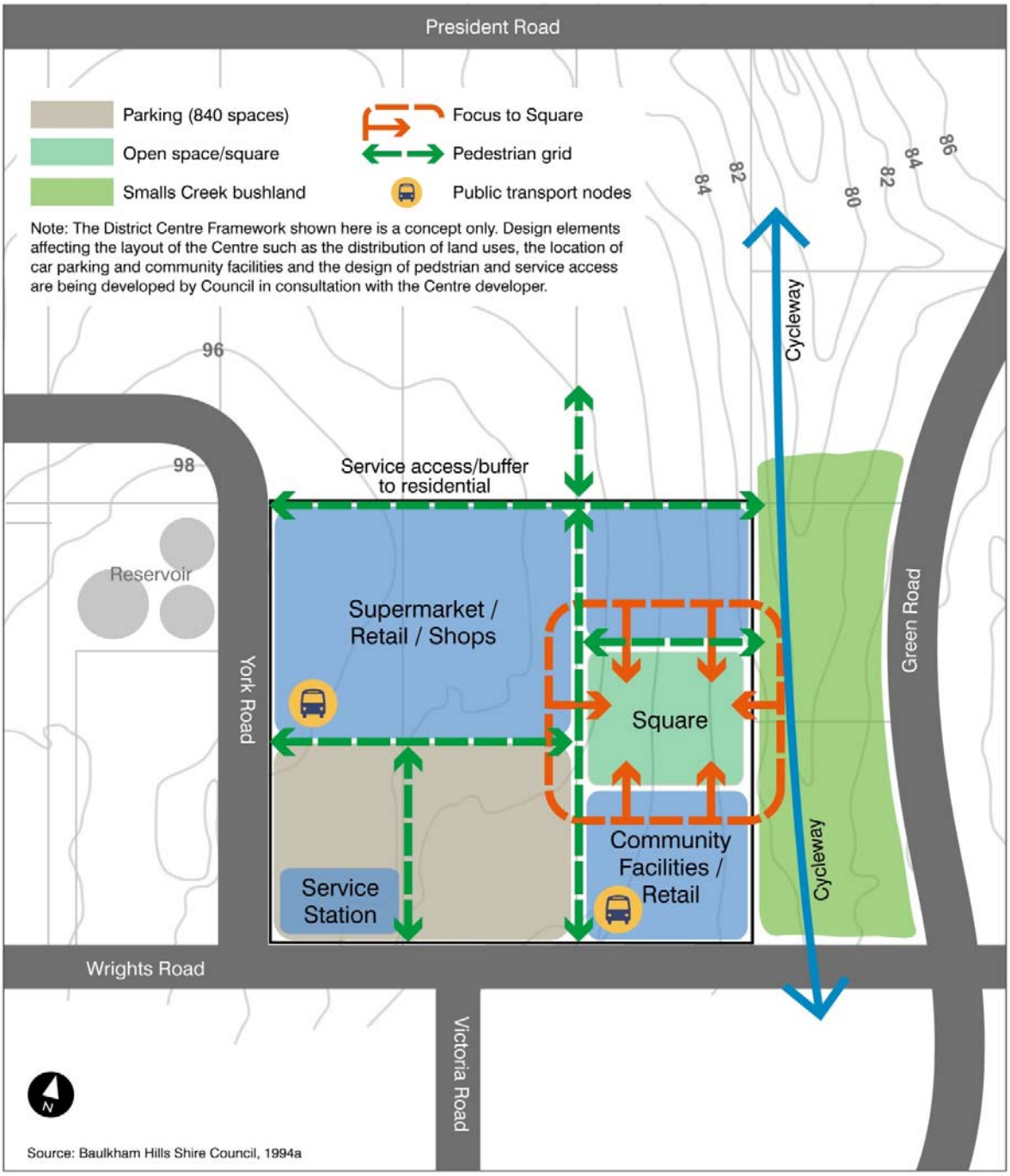

Figure 6.2: Development control plan framework 1994 (redrawn from the original)

- pedestrian accessible and convenient car parking; and
- schools and medical practitioners within the vicinity of the centre.

  (NSW Department of Planning 2005, 301, NSW Government 2010d, 259)

The current draft Metropolitan Strategy for Sydney includes a revised set of criteria for centres which simplifies the previous more extensive hierarchy (NSW Government 2013a). A Town Centre now comprises a much larger compliment of commercial premises and

services including supermarkets, a variety of specialist shops, restaurants, schools, community facilities such as a local library and medical services. It also includes medium and high density housing with a capacity of some 9,500 dwellings within its defined catchment and is served by heavy rail and/or strategic bus and local bus networks. Ideal elements include a town square, a main street, sport facilities and reasonable access to parkland.

A Town Centre is defined as the largest and most significant of the three contained under the heading of Local Centres in the hierarchy; the others are Village Centre and Neighbourhood Centre. None of the descriptions applying to these centres adequately covers the location and content of the Wrights Road Centre as developed to date and expected on completion. In this respect it does not fit into any relevant type of centre set out in the hierarchy for reasons which are related to its floor space content and lack of variety of provision.

Prior to considering the issues to be dealt with during the delayed completion of the development, two further retail studies were commissioned by council, one dealing specifically with the Wrights Road Centre (Hill PDA 2007). This concluded that although the centre appeared to be trading well, it was considered to be unusual as the existing supermarkets were capturing a larger than normal share of total food and grocery expenditure due to a lack of local (on site) specialist competition; a shortage estimated to be of some 6,000 square metres. The report recommended that in order to protect the economic viability of the centre in the light of the expanding scale and strength of retail in surrounding centres, consideration should be given to the provision of a discount department store and an additional ten speciality shops. This report was only concerned with the retail issues relating to the centre, not the centre as a whole.

Confusion relating to the kind of centre appropriate for the location and particularly its content as specified in the retail hierarchy can create problems in defining the kind of development ultimately approved. However, this appears to have been determined by what the retail market is willing to provide in its standard format. Once any social content was removed from the centre by the council, its content was essentially determined by the retail market with little input from the planners. This is part of the process that is the subject of this case study.

6.3.4 Content of the centre

The necessary content for a development considered to be appropriate for a Village Centre includes a similar range of facilities on a somewhat reduced scale and a smaller service catchment with access to transport expected to rely on strategic bus networks as

a minimum rather than a heavy rail connection (Baulkham Hills Shire Council 2008). There remains some confusion here as the Wrights Road Centre is still classified as a Town Centre by Council with its related zone objectives while the most recent definition of criteria for centre types does not list those centres to which these definitions refer (NSW Government 2013a). However, given the characteristics of the site and its location, those applying to a Village Centre are the most appropriate. Such a centre is described as a group of commercial premises (being retail premises, office premises and business premises) for daily shopping and services with a mix of uses and good links with the surrounding neighbourhood (NSW Government 2013a).

The early DCP for the President Road Neighbourhood includes a section on the provision of community facilities for the whole area, the majority of which would have been located at the centre (Baulkham Hills Shire Council 1994a). Although, the framework for the proposed centre shown in Figure 6.2 suggests that a substantial part of development would provide space for community facilities combined with retail provision providing the basis for a public square, the discussion on any commitment to provision by council and other responsible authorities is absent.

> *The District Centre* [Wrights Road] *may be developed in different ownerships, but development is required to take place in the context of one overall development plan.*
> (Baulkham Hills Shire Council 1994a, 48)
>
> *Design elements affecting the layout of the Centre, such as the distribution of land uses, the location of car parking and community facilities and the design of pedestrian and service access are being developed by Council in consultation with the Centre developer.*
> (Baulkham Hills Shire Council 1994a, 49)

These statements indicate that at this stage, the development of the centre was expected to be undertaken as a single coordinated project and that consultations with a potential developer were then underway.

The initial stages of the development completed in 2003, do not include any of the community facilities originally considered with the minor exception of a medical practice which leases one of the limited number of shop units. None of the facilities which were the responsibility of Council to provide, fund and manage have been provided on the site and the range of commercial developments was limited to two competing supermarkets and a small range of specialist shops and takeaways. While some facilities were developed in more widespread locations, others, particularly the branch library and child-minding facilities did not eventuate; reasons for this are not clear but suggest changing priorities or over-ambitious expectations for the original concept. No community facilities,

with the exception of a small outdoor playground are proposed in the forthcoming completion of the Centre.

The use of advisory development controls with no effective legal weight and the inclusion of development concepts in DCPs which are equally lacking in authority illustrate the weakness of the powers available to councils to indicate a preferred response to an identified opportunity and to manage the subsequent development when it departs from the original intention. None of this is conducive to the certainty that the stated intention would be achieved in practice.

6.3.5 Compliance with DCP controls

Development of the site for retail purposes was permissible under the applicable Local Environmental Plan (Baulkham Hills Shire Council 1991) and was also subject to the provisions of *Development Control Plan Number 6 – Wrights Road District Centre* during assessment and approval of the initial stages of the development. Relevant controls were also included in the DCP of 2009 and remain in the current DCP as the site was subject at that time to an application which would complete the development of the centre (The Hills Shire Council 2012). The application for the second of the existing developments on site was considered at a Council meeting on 22 October 2002 where approval was recommended subject to conditions (Baulkham Hills Shire Council 2002).

The objectives applicable to the development required the provision of high levels of civic amenity and a centre that makes a positive contribution to the local area, to create a sense of place and identity through quality built form that takes advantage of the proximity of, and integrates with, adjoining retail development, community facilities, open space, vegetation, pedestrian and cycleway linkages. The manner in which these vaguely worded controls was dealt with in the lengthy process of assessment during which the lower status of DCP controls was emphasised (NSW Department of Planning and Infrastructure 2013g) suggests that the inclusion of detailed proposals in documents which councils have little power to enforce may not be an effective means of achieving specific outcomes.

Specific controls in the relevant DCPs required, *inter alia,* that:

> *(a) Development shall demonstrate high quality civic amenity and urban design that will promote a vibrant centre with a sense of identity. The identity of the site shall be enhanced through gateway, architectural elements, feature tree plantings and high quality landscaping.*
>
> *(d) A central space should be incorporated into the design to encourage social interaction and form a link between, and through, the development and the natural setting of the adjoining reserve and public areas.*

> *(e) Convenient and direct pedestrian linkages shall be provided without conflict with vehicles, enabling high levels of accessibility within the precinct and the surrounding area.*
>
> *(h) The bulk of parking should be provided in a basement car park. Some at-grade parking that provides convenient access for patrons and does not detract from the streetscape is acceptable.*
>
> (The Hills Shire Council 2012c, 19)

These objectives and controls have remained virtually unchanged since the beginning of the planning process and appeared in embryo form in the draft President Road Neighbourhood DCP (Baulkham Hills Shire Council 1994a, 48). There is however a minor rewording to recognise the earlier phases of development already on the site in the later versions.

The assessment of the two initial applications focused on a number of basic concerns, notably car parking provision (number of spaces provided), noise impacts and right of carriageway over the adjacent site developed by a commercial competitor in order to achieve truck delivery access to the rear of the development. There was no indication that the controls listed in the DCP and referred to as issues for consideration in the report to Council were considered at all; they are not mentioned in the document recommending approval. The drawings attached to the application which provided the basis for the approval indicated little response to the requirements of the controls and in one case at least, car parking, ignored them. All the parking approved is located on the surface. However, this is an example of a provision which does not reflect the reality of property development where the cost of underground parking for a relatively small development would have adversely affected its viability.

The third stage of development involved the construction of a small supermarket and its associated parking on part of the eastern lot fronting Wrights Road. The report of the council's Development Assessment Unit (The Hills Shire Council 2013c, 56) considered that this complied satisfactorily with the requirements of the DCP. Reasons for this conclusion are not given.

The fourth and final stage of development comprising an extension of one of the existing supermarkets plus additional retail space and freestanding liquor shop was considered at a JRPP meeting based on an assessment by council planners (The Hills Shire Council 2013a). This contains a listing of the long standing DCP controls (Attachment 14, Item 2.29) together with the reasons why it is considered that the proposal complies in all cases. It is a common practice for a developer to prepare a compliance table as part of the standard Statement of Environmental Effects (SEE) attached to the DA (Milestone (Aust) P/L 2012) to

assist the planner who undertakes the assessment and prepares the necessary documentation. Inevitably, this can be relied upon to present as positive a view of the proposal as possible. In this case, some of this material is repeated word-for-word in the assessment report. This is a good example of one of the few areas remaining where discretion is required in the assessment process and opinion rather than calculation or measurement of compliance applies. According to the opinions included in the assessment table, the proposal complies with each of the development controls. The completed development is shown in Figure 6.3.

This procedure is reinforced by additional claims made in the text of the SEE that assert that the proposal which would now effect the completion of the development of the site is configured in a way that achieves compliance with the original site specific objectives. Many of these (nine claims are promoted) are, at least debateable, tending to suggest benefits which are difficult to envisage or which are included for other reasons, such as the amelioration of the acoustic impacts on the adjacent housing area.

> *Provide an enhanced gateway entry to the site incorporating a new 1st Choice Liquor Store building along the Wrights Road frontage, feature new plantings and high quality landscaping.*
> (Milestone (Aust) P/L 2012, 31)

The notion of a large and bulky structure (1,270 square metres in area) as providing a suitable gateway to the development would seem to suggest a new approach to the high quality civic amenity and urban design considered to be required in the development controls (The Hills Shire Council 2012c,19). However, the recommendation to approve in the document and the subsequent approval by the JRPP suggests that such considerations were not of consequence to either the planning authority or the panel.

An earlier decision by the same panel provides an interesting perspective on decision-making within this context and an apparent lack of consistency. This relates to another application (B) for a proposed supermarket and associated works by one of the operators at Wrights Road Centre for a site approximately two kilometres to the west. This is a questionable location adjacent to a restricted access four lane distributor with a large golf course immediately to the west.

As a result, the application has had an eventful life during its passage through the determination process where it has been refused on a number of grounds requiring significant changes. A majority of the panel refused the application on 10 November 2011 due to its inadequacy as a neighbourhood centre.

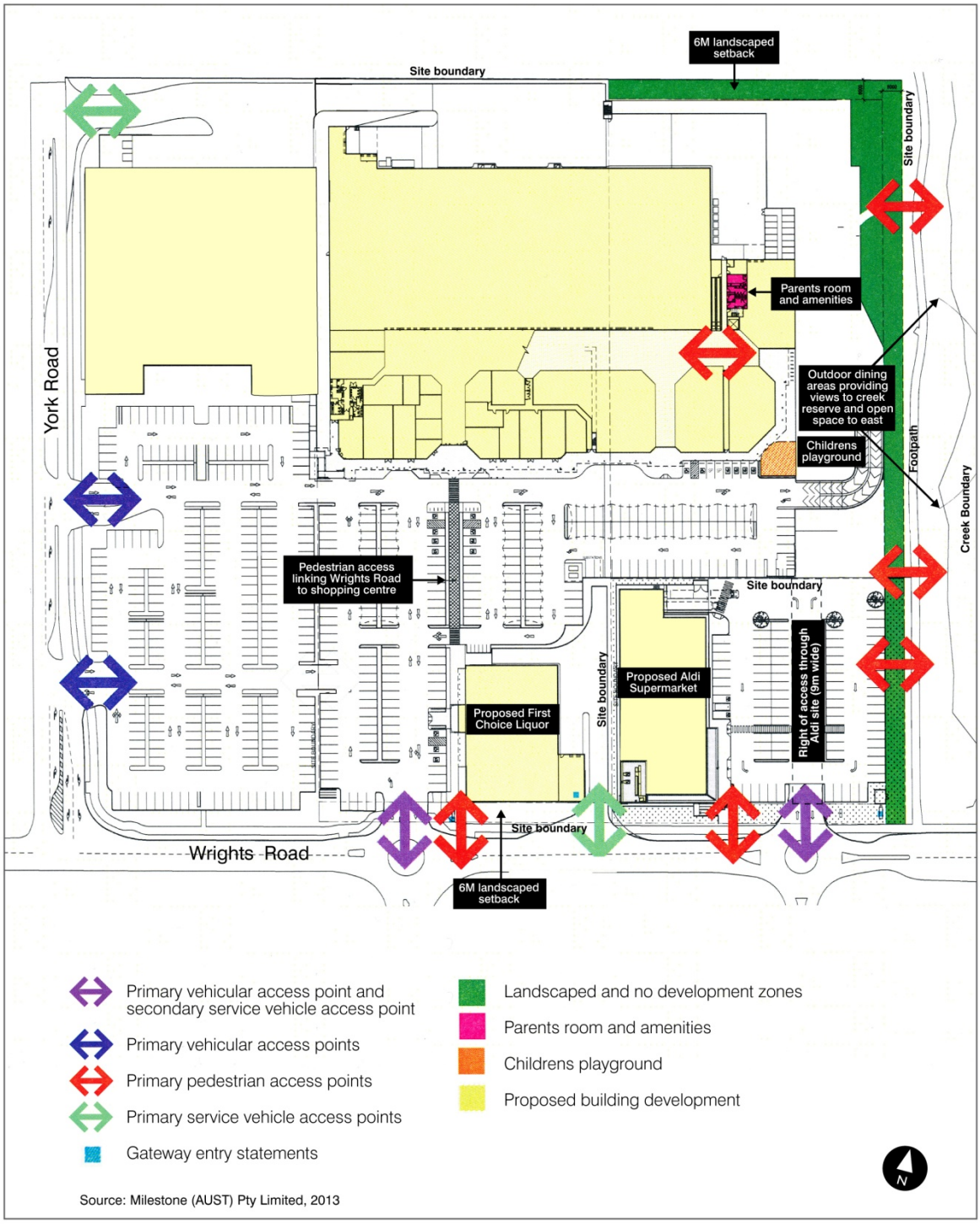

Figure 6.3: Full development of the centre

The remaining panel member sought to defer the application believing that:

> *the proposal meets the needs for retail facilities in the locality; and will not affect adversely Council's proposed centres hierarchy, in particularly the role of Kellyville Retail Centre* [Wrights Road]*; but finds the design disappointing because of* ***the lack of courtyard space and facilities to serve neighbourhood social functions.*** (Sydney West JRPP meeting minutes 10.11.2011, emphasis and bracket added)

This decision is clearly inconsistent with that reached by the same panel when approving the final stage of the Wrights Road Centre (E) where little attempt appears to have been made to achieve either the central open space and the social facilities included in the initial concept shown in Figure 6.2.

The manner in which the applicable DCPs have been applied during the assessment of the various individual components of the development at Wrights Road can be described at best as haphazard. Although these have remained unchanged in the applicable documentation over a long period they received no serious consideration during the initial stages and were only considered at all during the final assessment of Stage 4 once they had been listed in the applicant's documentation. By this time, it was accepted that their requirements had been achieved. The applicability of these controls was not tested in the Court throughout the determination process.

6.3.6 Outcomes

The physical layout of the centre is vaguely recognisable as an approximation of that originally proposed although a small public space, intended mainly for children is now the substitute for the square originally proposed as the centrepiece of the development aimed at encouraging community interaction. The remainder of that area will accommodate further car parking. All the social facilities are still missing and the retail mix is heavily slanted towards the supermarkets. It can also be argued that the resulting environment falls short of the quality required while the surface car parking appears to have been accepted by those who assessed the development although it does not comply with the original control which required it to be mainly located below ground level.

Two fundamental requirements for developments of this kind – separation of truck access and customer car parking and pedestrian movement segregated as far as possible from car movements – have become problems resulting from *ad-hoc* solutions with resulting poor circulation. It also resulted, in part, in an extended development period.

Truck access to the site has been a protracted problem resulting finally in a workable but hardly satisfactory solution which has been the subject of long-running conflict between the two adjacent supermarket operators. Pre-development access to the site was only available from Wrights Road along the southern perimeter. A new road (York Road) was constructed as part of the first development along the western perimeter of the western lot to allow service traffic to be segregated and provide access to the loading bay at the rear of the initial building. Additional access was therefore available along the western side of the site but traffic, both trucks and cars, would need to cross the initial lot to gain

access to the other two or a further access would be necessary, this time for cars only, from Wrights Road. While the first two approvals occurred simultaneously, legal access across the western lot only became available as a right of carriageway following the intervention of the Court.

This issue was reignited several years later when an application was submitted to extend the central supermarket into the eastern lot following its sub-division and rezoning. The existing arrangement between the two competing supermarket operators did not allow for access to the eastern lot with the inevitable increase in truck traffic required to service the extended development proposed (The Hills Shire Council 2013a). The necessary amendments including an additional secondary access seems to have resulted in an unnecessarily elaborate access system which does not effectively segregate service provision from day-to-day customer parking. All this seems to have resulted from an initial mistake which was compounded by the *ad-hoc* development of the site and the gaming of the process by competitors with little interest in cooperation.

The poor coordination of site movements has resulted in the unsatisfactory proliferation of access points to the site including four, two of which are new roundabouts in the 250 metres of Wrights Road from Green Road to York Road. One of these is a shared service vehicle access across the parking area of the small supermarket. There are also three access points, one for trucks and two for customer parking, from York Road; a total of six for the centre.

There are no obvious, external factors, separate from the development itself which can be seen as influencing the final form and character of this development. Little change occurred in the external environment which could have significantly affected the outcome, except the removal of the specifically social content which was the responsibility of council. This reappeared in a dilute form as some meeting rooms in the sports facility on the adjacent site although this makes no contribution to the diversity of uses on the site itself as originally envisaged or the objective of social interaction. The results can be considered to be the working out of a combination of commercial imperatives and the operation of those powers, perhaps in a timid way, available to the planners and the local council members. The final outcome can be considered as a combination of a number of factors.

The domination of the development by supermarket has also produced some unintended and possibly unfortunate consequences. In addition to a paucity of on-site social/retail provision – no bank, no post office, no branch library as originally intended – this has resulted in a reduction of choice for the community inevitably pointing to an undesirable

move towards supermarket hegemony at the expense of variety and public choice. An assessment of this development in 2007, when the first two stages were in operation indicated that there was an imbalance, with the supermarket supply exceeding demand by at least 1,000 square metres while supply of speciality provision was seriously lagging behind demand by some 6,400 square metres, reducing to about 4,000 square metres if supermarket over-provision was taken into account (Hill PDA 2007). The undersupply in 2007 was estimated at the equivalent of 35-40 shops excluding non-retail services such as banks, travel agents and estate agents.

The same report suggests that the centre has the least number of specialist shops and the lowest proportion of speciality stores to total retail floor space of any double supermarket based centre in Sydney at 18 percent compared to an average of 54 percent at comparable centres (Hill PDA 2007, 37). The final stage of development will maintain this imbalance. This includes the extension of one of the existing supermarkets with additional specialist retail provision of 12 units plus a mini major (a large non-supermarket retail outlet) and a large freestanding liquor store to join the third smaller supermarket recently completed along the frontage of Wrights Road. The undersupply of specialist retail provision at the Wrights Road centre is perhaps the most serious failure relating to the outcome of the process applied there. In retrospect this would not be unexpected given that the development was dominated by three supermarket operators who would naturally be pursuing their own commercial interests. The result inevitably reduces the choice available to the users of the centre and possibly reduces its long term attraction as similar provision increases at alternative locations.

Floorspace demand for the Wrights Road trade area for supermarket provision has been predicted to fall from 2007 by almost 20 percent by 2021 while that for specialist provision was expected to increase by over 300 percent (Hill PDA 2007, 37). While the supermarkets on the site are currently benefiting from the lack of specialist provision and may be capable of adjusting somewhat to such change if it comes about, the sole focus on a specific form of retail provision may present difficulties for the future of the centre. More recent investigations have indicated that the continuing growth of the dominating supermarket duopoly has had an undesirable impact on the independent specialist retail sector seriously diminishing choice for the consumer (O'Neill 2014) while they continue their efforts to dominate retail expenditure by competing with the 24-hour convenience stores (Cummins and Sprague 2014).

This outcome suggests that there is a need to review retail planning policies in NSW which to date have focused on the limitations imposed by planning restrictions on new entrants to the market in the drive to introduce competition issues into these policies (Baker and

Wood 2010, NSW Treasury 2012). The example described here, which started with a number of advantages, has seen the retail component dominate a centre which should have been able to exhibit a range of other facilities as initially proposed, more appropriately contributing to the form and purpose of a community-based space rather than one totally committed to consumption. At the same time, the main supermarket duopoly has been enabled to subject the local community to its version of what the retail market will provide, although their co-location may merely produce a minor decrease in average costs to the consumer (Australian Productivity Commission 2011). This might be considered to be the working out of the policy outcomes corresponding to the imprecation of planning not to interfere in the competitive processes central to the retail oligarchy (NSW Treasury 2012). This does not appear to be the outcome of good public policy making.

Overall the outcome at Wrights Road was not the routine result of the planning process where a developer would be responsible, following approval, for the completion of the development, more or less in compliance with the requirements of the consent. It is a development which required a much more closely managed and directed process undertaken by the council planners themselves, initiated by a broadly sketched concept of what was required. The final outcome will have a vague resemblance to the original although there is considerably more commercial development and its associated car parking and virtually none of the open space and the variety of provision that would have contributed to a more vibrant and attractive centre. The commercial success of the development has no doubt stimulated the expansion of floorspace currently underway and would suggest that the supermarket operators have achieved what they set out to do.

Certainty in the implementation of planning policy, in this case the provision of a particular urban artefact, is a difficult concept as the outcome can be influenced to a considerable degree by forces able to subvert the process of approval to more effectively promote their own interests. This variation of, or shift from the original intention for a centre can be more pronounced in circumstances where the aim is either vague or does not correspond with the requirements of those who are to implement the concept. At the same time, overall retail and centres policy seeks to limit any interference by planning authorities which can be considered to be a restriction on retail development and competition (Australian Government Productivity Commission 2011b, NSW Treasury 2012). Commercial interests can therefore dominate in relation to the form and content of centre development while the planning authority is restricted to the consideration of the compliance of the proposal with applicable parking standards, building height and floor

space ratios. In such circumstances, the achievement of certainty via the exercise of the planning process remains an unreliable notion.

The example examined here is not representative of the development routinely assessed by council planners and the responsible panels but it does raise questions about the way in which performance in these areas could be improved. However, this presents some problems. It is unrealistic to suppose that council planners can operate independently of the prevailing emphasis on the rapid and positive approval of development aimed at benefiting the economy as clearly set out in the objectives contained in State government documents. If they do reject or seek to significantly amend development proposals, even with the support of their councillors, they will be brought back into line by the imposition of administrators as at Warringah and Ku-ring-gai councils or the investigation of the validity of their key documents as undertaken recently by the PAC at Sutherland council (Roseth and Sussex 2014).

Governance in NSW is distinctly neoliberal in character as set out earlier in the discussion of the context of planning (Section 3.3), and planning is undertaken by the Department as an agent of the State government. The objectives and policies which also characterise planning practice will then be a reflection of the controlling political ideology. This is clearly demonstrated in the provisions of the draft Bills whose future still remains unclear. There has been a progressive weakening of the powers available to planners over the last 10-15 years which according to the Bills can be expected to continue, even if the means of doing so are rather different. Here, the achievement of stronger measures made available to planners to control development when the context has moved in the opposite direction would appear to be illusory.

Policy changes are unlikely unless they further entrench neoliberal constructs, essentially minimising the influence of the local planners and simplifying the system by the application of pre-determined codes. The prevailing ideology is unlikely to countenance any return to local discretion although, in theory improvements are still possible particularly the introduction of a number of the recommendations of the Independent Panel to provide greater oversight and accountability of the Minister and senior Department bureaucrats and the availability of meaningful and effective community consultation. Neither of these possibilities seems to be likely.

Approached from a perspective of what might be termed traditional planning – original intention translated into recognisable outcome – it would be reasonable to be concerned about the outcome of the development at Wrights Road which has failed to achieve many of its original objectives. However, within a neoliberal context to which planning can

now be considered to be wedded, the outcome could be seen to be successful although such a conclusion would be tempered by the excessive time required to reach completion and the drawbacks in the ultimate development resulting from gaming of the process by the competing supermarket operators and the errors perpetuated by the planners. However, these faults might be considered to be minor given the commercial success of the development as a whole, comprising a beneficial outcome from a neoliberal growth-obsessed perspective.

However, if the focus is now set entirely on the benefits of the development to the economy, this argument is difficult to substantiate. The dominance of supermarket floorspace on the site benefits the three main players at the expense of a more varied cohort of commercial operators who would also make their contribution to the economy while creating a more attractive shopping experience. Yet market dominance appears to be the corporate objective, reducing variety and choice, further illustrating the effects of the economic fetish of the market central to the neoliberal stance (Kruger 2012). It also exemplifies the way that commercial influences play an important role in planning outcomes.

6.4 Going beyond the plan

The second part of this chapter examines two areas reflecting closely on the notion of certainty in the implementation of policy in the land use planning system at a wider level. First a recent State government response to the low level of residential completions experienced, particularly in Sydney, over the last few years which could be considered as lacking confidence in the outcomes of the established planning process to deliver the required number of dwellings. This focused predominantly on the identification of additional land suitable for residential development outside that already included for release within the strategy while a second initiative focused on residential density intensification adjacent to public transport nodes within the developed area termed Urban Activation Precincts (UAPs). While both these approaches rely on rezoning, the first is essentially *ad hoc* while urban intensification is part of the means of achieving the targets of the strategic plan which have failed to do so to date. Both are however constrained by the limitations of zoning in the management of future urban development.

The Minister considered it necessary to attempt to stimulate housing development by seeking bids from landowners and residential developers to identify areas of land, currently not zoned for housing, which should be rezoned and subsequently developed ahead of areas already set aside for future development under the strategic plan for Sydney (Hazzard 2013c). In the event, the results of this *ad hoc* attempt to stimulate development produced little real benefit in the short term mainly comprising a group of attachments

around the fringe of the existing Growth Centres (NSW Department of Planning and Infrastructure 2013a).

It can be assumed on this basis that not only the private sector-based housing market can be considered to have failed but that the conventional strategic process of planning for the future provision of housing as proclaimed in the strategic planning documents has also failed to rescue the market when it is expected to do so – a residual purpose of planning. Perhaps this initiative is an attempt to achieve this but it could also be seen as compromising the planning system and its well-established process at the same time casting doubt on its ability to achieve its residential targets using the means available.

It also indicates that the only time when the State government will actively respond in an apparently significant way to planning issues is when there appears to be a crisis in the housing market. There are thousands of hectares already available, suitably zoned on the fringe of the existing urban area; much of this is serviced now or soon will be. Some of this is in the process of development but its apparently slow take-up rate suggests that demand is currently low at the prices on offer. On this basis the rezoning of additional areas of land for housing, much of it beyond the currently defined planned edge of the city would appear to be futile, particularly as this is scattered, some of it has already been rejected by councils following detailed investigations (Moore 2012), much is isolated from existing and planned facilities and its development will require considerable refocusing of existing service infrastructure planning.

Little account seems to have been taken of demand in the areas rezoned or under consideration for development. As the majority of new housing over the past ten years has been built within the existing urban footprint (72 percent) and it seems likely that this will continue to be the emphasis for some time (NSW Government 2013a), such initiatives outside the strategic planning process could be seen as ineffective particularly if infrastructure resources are diverted to service them. This can be seen as an example of the working out of the discretionary power available to the Minister to initiate planning-based activity outside its strategic framework. At the same time, the provision of more zoned land does nothing to address other, more significant reasons for housing market failure (Gurran *et al* 2012).

The present State government would appear to be seeking to implement the initiatives of the private sector as an alternative to attempting to more effectively implement the processes of strategic planning, preferring an *ad hoc* approach determined by the development industry itself. This is disguised by the building industry as a failure on the part of government to make enough suitably zoned land available for development, an

argument presumably accepted by government. The approach set out by the private sector has been adopted by the State government including concepts such as UAPs which while included in the current draft strategic plan can be seen to bypass council interest and responsibilities in a continuing attempt to overcome the perceived barriers to development erected by planning.

A total of 43 sites was nominated prior to the deadline; of these 12 were considered by the Department to be inadequate. The remaining 31 sites have been evaluated and final recommendations considered by the State Cabinet. A total of 10,137 hectares, making up the 29 candidate sites located in or close to the Sydney Metropolitan area was considered for further assessment (Hazzard 2013b, c). This does not, of course, provide any guarantee that these proposals will proceed any further as lack of available land and enthusiastic land owners is not a significant reason for market failure. There are much more complex reasons for that.

The result of the evaluation of the candidate sites was announced in March 2013 (NSW Department of Planning and Infrastructure 2013a). In addition to these new sites, two other initiatives were announced.

- Immediate support for further progress on seven sites with the potential for in excess of 15,000 dwellings.
- Further investigation of the longer term potential of 13 other sites for approximately 30,000 dwellings.

The other initiatives include the impending rezoning of five new precincts within the existing North West and South West Growth Centres expected to be capable of accommodating some 30,000 dwellings; eight sites deemed suitable for urban renewal (UAPs), where an additional 30,000 dwellings are thought to be possible; and a further eight development sites focused on the stations proposed along the North West Rail Link. The latter, based on draft structure plans for these areas indicate that more than 27,000 new dwellings could be accommodated over the next 25 years (Hazzard 2013a).

A high proportion of this new growth would require redevelopment of well established low density residential areas to accommodate medium and in limited cases, high density development. Much of these areas has a long expected life span in its current state and is unlikely to be available for the necessary site amalgamation for many years (Easthope and Randolph 2008). While some of the areas adjacent to the rail stations will be relatively easy to develop as a number are currently undeveloped, other redevelopment generated by extensive rezoning can be expected to be scattered and uncoordinated as

site amalgamation will prove to be difficult and hold-outs will inevitably occur (Hill PDA/Cox Richardson 2013). Large areas will be rezoned mainly for apartment development sometimes in high-rise blocks. While a number of these are located within walking distance of newly developed train stations, it is not clear if the demand for apartments within traditionally low density areas is sufficient to justify the scale of development contemplated. Neither is it clear that the capacity exists within social facilities and particularly open space provision to accommodate the increase in demand generated within already fully developed areas.

The promotion of this form of development has been advanced for several years by property lobby groups and the process advocated has now progressed to a significant extent in the use of upzoning, a process which provides considerable benefits to land owners and property developers while substantially reducing their risks.

> *The private sector should also be encouraged to identify additional opportunities and petition for a major site, centre, corridor or transit mode to be activated for urban renewal.*
> (Property Council of Australia 2009, 8)

Given the continuing efforts of lobby groups, it is arguable that the continuing increase in predictability of the approvals process is not the focus of their interests given the current low rate of refusal. The developers supporting such groups would appear to favour the kind of development of their own choosing as exemplified in various recent publications (Urban Taskforce Australia 2014b, 2014c). These suggest that a solution to the need to house the predicted population influx over the next 50 years is to build 5,000 new residential towers adjacent to railway stations across Sydney. There is no discussion of the related need for investment in the public transport system or the huge associated costs that would be required to support such development.

A slightly less ambitious version of this scenario is already established as the UAPs, confirming that the satisfaction of commercial interests can be expected to have a greater influence on the future of the city than anything the community might wish to see. This process, which is also ambitious and long-term, is managed by UrbanGrowth NSW, an agency of the State government, which will be responsible for dealing with ownership issues, rezoning and master planning where the aim is to maximise the resale value of surplus government land. This is intended *to boost economic activity through the delivery of opportunities, leveraging private sector investment to increase the supply of housing and infrastructure* (www.urbangrowthnsw.com.au/work/urban-transformation-projects.aspx). Much of the intended development/redevelopment included in these

initiatives has little direct relationship with the strategic plan and implementation will be the responsibility of the private sector.

This would appear to be an uncertain and potentially haphazard means of undertaking complex urban redevelopment. In the absence of any desire by government to be directly involved apart from identifying areas considered to be suitable for change, preparing a master plan and rezoning them to facilitate redevelopment, relying on the private sector to achieve anything more than physical development must be considered to be optimistic and potentially destabilising the established processes of planning.

The methods to be pursued to achieve policy implementation, now reduced to housing and job targets by LGA constitutes an indirect approach where outcomes are subject to market factors and cannot guarantee achievement when rezoning and the release of land for development are the only initiatives available to planning. The effectiveness of such a process is reliant on factors over which the State government has little influence. It is highly dependent on demand for, or acceptance of, apartment/flat living often in areas where this would be new and the capacity of the designated areas to accommodate the necessary density increase is unknown. The concentration of such development adjacent to new train stations also suggests unverified confidence in the ability of the transport infrastructure to accommodate the increased demand.

Heavy reliance on untried procedures and a lack of knowledge of the carrying capacity of the areas designated for intensification and its supporting infrastructure in circumstances where an alternative does not appear to be available if these do not achieve their targets, cannot create confidence in the ability of the planning process to deliver on its aims. Additionally, a lack of experience in the management of complex urban redevelopment does not engender certainty in the achievement of its aspirations when reliance is placed on weak mechanisms of management and the interest of the market.

> *Australia has little experience of the complexities of widespread redevelopment processes such as those that have taken place in Europe, and has adopted a supply led capacity approach to planning urban growth and change.*
> (Bunker 2008, 38)

Overall, this would not appear to be a satisfactory means of achieving an orderly program of development/redevelopment and thereby creating confidence in its outcomes indicating a failure (lack of certainty) in the planning system to translate intention into outcome.

6.5 Monitoring and not knowing – the problem of verification

Effective monitoring would enable the certainty claimed for the planning system and its components to be supported if it confirmed a causal relationship between its aims and the specific outcomes achieved. However, there are problems associated with monitoring that have not been resolved.

Those involved in public policy making and administration have a tendency to resist monitoring of the results of their actions (Roger Tym & Partners 2002a). Few public policies achieve exactly the outcomes envisaged by those who promote them and many produce results which are embarrassing often because the context in which they operate is complex and changing and often only partially understood. As a result, policy makers and their advisors prefer to concentrate on devising new policies rather than studying the consequences of existing ones. Planners are particularly prone to this temptation, derived most probably from the breadth of their ambitions. The more things that planning seeks to influence all at once, the more difficult it becomes to assess the effects produced (Reade 1987). Even so, Reade expressed the view that it was impossible to legitimise the practice of land use planning as a socially acceptable procedure without the serious application of monitoring its effects. Given the difficulties of doing so, this presents a dilemma that has been effectively ignored.

Monitoring in planning has always been something of a problem. It is routine and repetitive, something that is the antithesis of the apparently forward-looking nature of the ethos of planning promoted by the profession (Planning Institute of Australia 2012, 2013a, b); it is also potentially dangerous in that, if objectively used, it might reveal outcomes that are not welcome. However, this seems contrary to the notion of the very idea of effective policy-making and planning and suggests something of a malaise at its heart or perhaps an understandable lack of self-confidence. It has also had an influence on the kind of monitoring that is now undertaken.

The much more difficult task of measuring the degree to which the objectives of the strategic plan have been achieved is addressed in the draft Metropolitan Strategy (NSW Government 2013a, 107). This is still predominantly focused on counting what of relevance can be counted by the councils and assembled for publication by the Department; some for no apparent purpose only indicating that development activity has actually taken place. Measures to be used to assess progress are listed together. Some targets are merely an increase on the previous year which is unlikely to indicate if the measures are working effectively or could be improved. In some cases the measure is not capable of determining whether the objective is in the process of being achieved. The achievement

of the objective, for example, of *delivering well-designed and active centres that attract investment and growth* (108) will be determined by two measures: *the number of centres identified for growth* and *the proportion of population living and working within 30 minutes by public transport of a city or major centre.* Neither of these would provide a measure of achievement, particularly as the second relates only to the top level of centres excluding some of those that are intended to be the focus of future growth.

Effective and appropriate monitoring of the policies and actions included in the plan is crucial in any form of planning within an uncertain context. Effectiveness is not measured merely by an increase in numbers; such an increase could have occurred independently of the policy or action. If the proposed monitoring is to be taken seriously as feedback to the planning process, its measures need to be well focused, specific and relevant.

In theory, effective monitoring requires three functions to be fulfilled:

- Some clearly specified intentions must be set out which the plan or policy is expected to attain. These must be in a form capable of measurement.
- The circumstances which the plan or policy addresses must be capable of observation in some way.
- There must be a facility for communicating information about the difference between what is intended in the policy or plan and what is observed by decision-makers. (Bracken 1981, 84-88)

In practice, monitoring implies the regular, deliberate and systematic collection and analysis of information. The credibility of strategic planning as a concept can be considered to be conditional on the effectiveness of its monitoring. The demands of effective monitoring are considerable and it is rarely carried out as necessary either as demonstration of the ability of planning to achieve its objectives or as a means of learning how best to adapt policy to accommodate changing circumstances.

These conditions can never be met in practice. However, monitoring remains a key concept in any adaptive process but is not likely to reveal much of direct benefit in the assessment of policy effectiveness unless it is closely related to the implementation of the policy itself. Many of the traditional monitoring indicators used by planners such as population and employment change have proved inadequate as meaningful measures making it impossible to distinguish policy effects from other components of change (Reade 1987). Yet these remain the foundation on which plans are constructed and policy implemented.

There are major difficulties in the operation of an effective and honest policy monitoring program. There is an inevitable reluctance on the part of organisations to commit to policies and then support a monitoring program that may reveal their own failure. There are however more fundamental problems relating to the understanding of the nature and role of policy definition and the importance of wording in the proper facilitation of opportunities for monitoring.

Monitoring is currently undertaken by local councils in NSW. This takes a number of forms:

- Local governments have to report on their planning and development activities on a monthly basis to both the Department and the Department of Local Government. These reports contain basic statistics on housing completions; development approvals; times necessary to deliver approvals and so on, which are aggregated on an annual basis in order to assess the performance of each council against criteria set by the Department (NSW Department of Planning and Infrastructure 2014);
- The councils assess themselves on the basis of the extent to which they have achieved what they claimed they would under a wide range of headings set out in their previous management plans, now renamed as their Community Strategic Plans. These aims are relatively vague and are usually assessed as either achieved or not without any further detail;
- Most councils also undertake or commission others to complete annual limited community surveys of opinion on their performance under various headings over the previous year. In general, these result in responses that satisfy the councillors' perceptions of what they are doing but otherwise have few useful attributes.

The majority of councils undertake the minimum assessment of the effectiveness of their activities sufficient to satisfy the Department's requirements for monitoring. These mainly relate to the collection of data deemed necessary to achieve acceptable levels of efficiency in the operation of the development assessment process, mainly in relation to the speed with which applications are dealt with (NSW Department of Planning and Infrastructure 2014). The Department appears to do little monitoring of the effectiveness of its strategic objectives except on rare occasions to make unreliable claims for the success of its activities (NSW Department of Planning 2010c). These cannot be considered to be anything like the objective assessments necessary for effective monitoring.

While the Department collects and regularly publishes detailed reports on the development approvals process operated by the local councils it is not clear how this is used to improve any certainty to be found in the planning system. It supplies the only reasonably reliable data available on the operation of the determination process

undertaken by the councils but signally fails to attempt to effectively monitor its own activities. It does however produce an Annual Report as required by State legislation which is used predominantly to justify its activities over the year but without any real monitoring data apart from extensive anecdotes about the Department's perceived achievements (NSW Department of Planning and Infrastructure 2011a, 2012d, 2013e).

The White Paper includes a provision for mandatory performance monitoring. This requires the development of performance measures which will be assessed annually against planning targets (NSW Government 2013b, 40). The text indicates that this will comprise little more than is currently required of councils in terms of what can be counted as outcomes of development activity (dwellings and jobs) including the delivery of infrastructure, and the area of environmental land protected. It also states that councils and state agencies will be held accountable for delivering plans through ongoing monitoring and reporting of both results and processes.

The performance of each plan will be monitored quarterly against the objectives of the plan as established through the hierarchy with formal reporting annually by the relevant planning authority. This appears to be little different from the present reporting regime which focuses essentially on those deliverables that are easy to count providing the data necessary for the Department's annual report of the performance of local planning authorities. It also suggests that when the current LEPs are amended to comply with the new requirements for Local Plans, their objectives might be simplified in order to reduce the subsequent burden imposed by the requirement for monitoring as indicated in the White Paper.

It seems clear that based on this definition of the role of monitoring, the purposes of the planning process are merely the facilitation of dwelling construction and the apparent validation of claims for job creation as a means of ensuring that the local planning authorities are adequately performing their role in authorising the private sector in carrying out the aims of the strategic plan by supporting the economy of the State. Any other outcomes of the process will simply flow from this, determined by the ideological imperatives of government. These could also be considered to be another means of maintaining central control over the activities of local government in the land use planning process.

A review of the research literature on the monitoring of the effects of planning in the UK reached a number of conclusions. It is likely that these would also apply to circumstances in NSW:

- little reliable data is available;
- it is difficult to distinguish the impact of planning from those of many other influences;
- the benefits of planning are especially difficult to identify;
- there are social and economic costs and benefits derived from planning aside from the economic ones and these are very important but even more difficult to quantify; and
- it is also difficult – probably impossible – to identify the consequences of individual planning decisions or plan allocations.
  (Roger Tym & Partners 2002c, 36)

This perhaps suggests that the approach to monitoring proposed in the White Paper is a pragmatic response to its limitations. Such findings do not indicate that monitoring of land use policy effects should not be undertaken and some of the measures proposed as part of the Monitoring and Evaluation Plan included in the draft Metropolitan Strategy for Sydney (NSW Government 2013a, 107) are worthwhile, while others which merely report an increase over the previous year, for example, have little relevance to policy effectiveness but simply indicate that the Department is doing its job. Effective auditing of internal processes of assessment and subsequent outcomes achieved would provide a more effective means of determining the efficiency of council procedures than merely counting residential completions.

The process of understanding the direct effects of planning is only effective in identifying issues which can be monitored by counting numbers (houses constructed; jobs created) but much less good at ascertaining policy outcomes particularly in relation to the protection of the positives of existing assets. An assumption of causal linkage is also required between the activities of the land use planning system and the production of housing which may be difficult to substantiate. However, the connection is central to State government promotion of its activities in support of housing market activity and these outcomes are easy to measure. If certainty in the planning system is only conditional on the achievement of specified housing and job targets, current monitoring procedures could be considered to be sufficient to do so. If however, these are considered to be ineffective in the measurement of the performance of the system in delivering its overall aims, it would be difficult to sustain a claim for certainty in its operation.

6.6 Conclusions

If the effectiveness of land use planning is to be assessed on the outcomes of its processes, there must be a causal link between policy objectives however stated and implemented and those outcomes which are direct reflections of the aims of the policy. Alternatively, such a justification is probably not required if these activities have been legitimated by portraying them as promoting widely held economic beliefs supported by powerful elite groups. It is widely accepted that it is very difficult to establish any plausible link in circumstances where multiple outcomes are sought and even if carried out effectively, the results could be unpredictable, casting doubt on the role of planning as a whole (Reade 1987, Taylor 1998). As a result, the serious monitoring of the effects of planning has rarely been attempted. That currently undertaken by counting dwellings produced and jobs generated would only be considered appropriate where the aims of the planning process merely focus on those outcomes which have become the centre of planning's concerns.

This presents problems for planners when questions are asked about the purpose and effect of planning when a valid justification of their activities is required. It is also possible that this inability to mount an objective case for planning and its aims has resulted in a reduction in its stated ambitions as seen in the draft Metropolitan Plan for Sydney (NSW Government 2013a) where the sole objective with any social content is to be achieved by the proposed removal of barriers (beneficial in itself) but with no attached positive initiatives. There must be no impediment to economic growth.

If planning is only justifiable on the basis that it organises and manages the supply of development that is better than it would be in its absence, the example described in this chapter could reasonably be considered to be so similar to that which the unaided private sector would have produced that it would be difficult to distinguish between them. This may therefore be deemed to be a failure in this justification of the value of planning but not all such developments are failures of this kind. However, consideration of the way in which this development was handled in circumstances where many of the potential difficulties associated with projects such as this were absent, suggest that some of the fundamentals of good management were overlooked and too many simple mistakes made. Arguably, this is a problem that could be overcome by undertaking the procedures available more effectively. However, the means available to the planners at Wrights Road appear to be weak and any commitment to achieving the kind of centre corresponding to that originally conceived disappeared with the inability to include the necessary non-commercial components which was a decision of the planning authority.

If planners wish to continue to be considered to be effective in the management of urban development as the mechanism for producing a better product, they will need to be more closely attuned to understanding the development process while not relying on the use of relatively weak planning controls to achieve their preferred outcome. It is not unreasonable to expect that a proposal in a public document which has been the subject of community consideration should be capable of translation into a reasonably accurate version on the ground. However, this would require a more proactive approach than currently seems to be possible.

The pragmatic response to an apparent failure to translate aim into outcome is to reduce the scope of the intent, particularly in the area of social and environmental policy. This however, equates to a continuing diminution of the content of planning in favour of process. It is also a clear example of the way in which powerful commercial interests can achieve an outcome orientated exclusively to benefit them while council can be considered to have failed in its responsibility to deliver those community facilities for which it was responsible.

Those factors which have an influence on the notion of certainty in planning policy implementation can be summarised as follows:

- Procedures necessary to achieve planning outcomes are heavily reliant on interests over which planning agencies have little direct influence. These are subject to powerful forces which do not necessarily coincide with the requirements of established planning policy. The private sector therefore has the ability to influence the contents of plans and the kind of development resulting from their implementation.

- The ability of local planning authorities to exercise direct control over development is determined by the controls included in the statutory documents they prepare. These have been substantially weakened by the recent confirmation by the Minister that the controls within the DCP, which contains the majority of the detail relating to specific developments, are not legally enforceable, merely advisory. Councils are not permitted to transfer these into the SI LEP which contains the principal controls.

- While seeking to achieve a more detailed framework using the process of land use zoning, the resulting plans fail to address many of the requirements of the private development sector which is relied on to implement the proposals aimed at satisfying its criteria for viable development (Rowley and Phibbs 2012).

- Procedures used in the determination of development applications are orientated towards approval where standard zone objectives are anodyne and controls routinely focus on numerically defined criteria which have only a limited relationship to policy achievement. In circumstances where discretion is required, there appears to be a tendency to assume compliance even where the evidence appears unconvincing.

- The level of confidence of the Minister in the planning system's ability to manage development to achieve planning targets might be confirmed by the recent attempt to stimulate additional housing development by seeking bids from land owners and developers to determine areas suitable for such development but not currently appropriately zoned and a reliance on untried and inefficient processes to undertake urban redevelopment.

- The inability of monitoring to determine any link between intention and outcome beyond that which can be accurately measured such as housing completions presents problems for the establishment of causality and certainty of achievement.

The concept of land use planning practice as a means of translating its intention of achieving an improved outcome into a superior artefact on the ground, particularly in circumstances where powerful commercial forces are at play, is hardly likely to generate confidence in those directly involved that some notion of certainty is thereby created. Perhaps the only certainty here is that it is very difficult to achieve a particular outcome using the powers and methods available to local authority planners if this departs from what the private sector is willing to provide. However, this kind of certainty is no doubt not what its proponents were seeking by exercising, in this case, their commercial market power, which planning was originally intended to control but is now expected to support. At the same time, some degree of certainty can be expected overall from a process of consent which delivers a high rate of approval even though this is coupled with its lack in producing what is claimed to be desirable in terms of policy outcomes.

PART THREE

7 Certainty in land use planning in New South Wales

7.1 Introduction

The research questions addressed in this thesis focus on the purpose of the notion of certainty promoted predominantly by the State government and how that notion is characterised within the land use planning system in NSW. The key proposition advanced here is that certainty is used as justification for increased control over the planning process to create greater predictability by removing or minimising impediments to the facilitation of property development. Based on its regular repetition in the main planning documents and in associated promotional material attempting to justify change, the notion of certainty must be considered to be an important aim of the planning system and a key determinant of the need for change. However, its use remains ambiguous and its meaning within the processes of planning is unclear although its usage is often equated with confidence. It therefore comprises a valid subject for research focusing on a clearer identification of its purpose and effect, increasing understanding of an important area of public interest with implications for both planning policy and theory.

Certainty itself is a difficult construct but well adapted to rhetorical use in relation to a process little understood by the public and often the subject of controversy as reported in the media. The idea of a variable certainty, one level in several in a hierarchy would fit closely with a contemporary philosophical definition based on social consensus and the legal concept applied to the interpretation of evidence. Its usage is also reflected in common parlance where *almost certain* and *absolutely certain* are widely used and understood. It therefore comes in various forms closely related to the level of confidence felt or experienced in relation to planning and its processes.

This final chapter begins with a review of the material focusing on the contentions advanced in the first two chapters of the thesis and considering a range of findings relating to the current and proposed characteristics of the planning system operating in NSW as outlined in Chapter Three. The remainder is taken up with a response to the research questions posed in Chapter One organised around the three related components of the planning system where certainty could be appreciated. Here there are a number of overlapping considerations where the key issues are inevitably interconnected.

The official planning literature includes a considerable number of claims that particular aspirations of, and activities included in the planning system (see Appendix A) create or

will lead to some degree of certainty under particular conditions and the changes proposed would enhance this. Such claims may not be possible to support in practice. It would be futile to attempt to seek the presence of certainty *per se* within those components where it might be found. It is more effective to review and assess those characteristics of the planning system which might be considered to be capable of generating certainty for those individuals and groups who could be expected to perceive and respond to its presence. Those factors in each of the three components considered here to be influential in the notion of certainty within the planning system are listed in the conclusions to Chapters Four to Six.

The concept of certainty is now regularly used in promotional material produced by the Department in an attempt to gain support for the new legislation (NSW Department of Planning and Infrastructure 2013). This includes assertions relating to the claims for improvement to be brought about by the changes proposed, some of which appear difficult to justify when judged against the relevant provisions of the draft Bills which would bring them into effect. There is little to support such claims and no effort is made to substantiate the earlier assertions for improvement routinely made in the planning documents (see Appendix A) although some of these are more specific, relating to the contention that improving the operation of the processes in the planning system will lead to better outcomes and greater confidence in those who use and benefit from it. This assertion is then taken further to suggest that these improvements will lead to greater investment in property development; another contention that is difficult to substantiate requiring a belief in a causal relationship between improved processes within a bureaucratic context and decisions within the property market based on an entirely different set of factors centred on the management of risk (Newell and Steglick 2005, Ratcliffe, Stubbs and Keeping 2009).

However, such considerations also rest on claims made for the efficacy of the land use planning system as justification for its promotion of commercial interests by facilitating investment and growth (NSW Government 2013b, 7). Where the overall objective of the planning system is the promotion of property development, it is also expected to protect and promote the interests of the community as a responsible authority operating in a democratic context although this is now reduced to the vague notion of a liveable city (NSW Government 2013b, 7). This dual responsibility, essentially contradictory in practice, is impossible to maintain; one component will necessarily predominate while claiming to protect the interests of the other.

This thesis provides an assessment of each of those components of the planning system where certainty – not clearly defined however – is claimed to be of benefit. The literature

here does not assert that certainty is generated by those processes undertaken in each of these but indicates that the quality of certainty would be appreciated as a result of their proper and effective operation within the land use planning system (Booth 1996). This relies on an assumption that the planning system and its main components are rational in construction and practice and its outcomes are predictable and effective.

The consolidation of power at the centre (see Section 5.7) where a considerable increase in the administrative discretion to be made available to the Minister in the new legislation can be expected, paradoxically, to increase the certainty that the overall process of planning in NSW will further the effective and efficient delivery of property development as its main objective. This requires the removal of any remaining impediments to development deriving from the operation of the planning system while maintaining and promoting those of its characteristics that are of benefit to the property sector. At the same time, the introduction of any procedures which might constrain development activity will need to be avoided or resisted.

An increase in discretion, however it is used, requires an increased focus on the notion of accountability unless the power embodied in that discretion is to be exercised without constraint. The extent of the discretionary powers to be made available in the new Act (see Appendix C) indicates that these boundaries are wide-spread if they exist at all. None of this can be expected to generate certainty about planning, its aims and outcomes, among the community.

7.2 Influences on certainty in a neoliberal planning system

Superficially, the idea of neoliberal planning appears to be an oxymoron. The ideas that make up at least one definition of neoliberalism, whether they are liberal or conservative in character are hostile to planning *per se* and where planning is already established in the neoliberal world, it will be operated to support the market rather than supplant it (Allmendinger 2009). The emphasis of all proposed changes to the legislation governing the aims and processes of planning will therefore be orientated towards this end. In one sense, this has been the case for many years. Academic commentators (Pickvance 1982, Reade 1987) have noted the symbiotic relationship between planning and capital comprising an implicit corporatist bargain encapsulated in the simplification that if the industry does not like the plan, it will not be implemented. Planning authorities are free to make plans which are not attractive to the market but, ultimately it is counter-productive to do so.

The sobriquet, neoliberal planning, has been applied to land use planning in a more or less wholesale manner. This reflects the impulse of receptive governments to take aspects of

neoliberal thinking, often heavily influenced by industry lobbies, and use it as a basis to restructure all aspects of land use and planning controls, the institutions within which it operated, the processes it followed and the outcomes that were expected. Every aspect has been affected. While neoliberal thinking challenges the very notion of planning, there remains something of a gap between theory, policy and outcome. This often occurred because the methods tried did to produce the expected results. But application has been variable and, for example, NSW did not advance down the same track as the UK (see Section 2.6). Its steady progress has moved inexorably to one of focus on the facilitation of property development by simplification of control and emphasis on the effectiveness of process and predictability of outcome.

The neoliberal context within which planning operates and influences the configuration of its procedures and practices, emphasises certainty in one key area and seeks to further increase it. This is the certainty (confidence) that each development proposal, if it reasonably complies with the applicable controls, will achieve approval. This aim already appears to have been achieved (see Table 5.1) and further advances in this direction would need to rely on increasing the ease of attaining approval. This could be achieved by simplifying the assessment process and specifying the maximum times allowed to reach a decision. This objective is clearly seen in the provisions of the draft Bills based on the arguments promoted earlier in the White Paper.

There is however, a limit to the extent of such changes if the planning system is to retain any legitimacy as the regulator of development; an important consideration if planning is to continue to effectively facilitate property development. This may however to be of little concern within an authoritarian context where community interests are sidelined.

It remains difficult to consider a theoretical basis for neoliberal planning, assuming that it is possible to accurately characterise such a concept when its disparate parts often fail to constitute a coherent whole. The association of neoliberal ideas with planning is inevitably tendentious – it can only be seen as a means of advancing neoliberal aims, focusing on economic growth at the expense of everything else while claiming that the resulting benefits can be suitably dispersed via the market to achieve the objectives of planning. However, the concept of neoliberalism has been very effective in influencing planning thought. In part, this has resulted from the acknowledged failure of government intervention to deal with those problems that planning sought to eradicate, perversely creating new ones. But the problems resulting from capitalism itself, such as poverty are not addressed by market-intervention and are portrayed as bureaucratic issues distracting attention from the inequities resulting from a reliance on market capitalism. Neoliberal

planning is more appropriately characterised as an ideology where basic sentiments of planning such as *public good* and *community interest* have no place (Allmendinger 2001). Certainty, or at least a reasonable expectation of its presence, can be expected to be feasible in circumstances where the known rules are consistently applied and all decisions are made within a transparent process by duly elected representatives of the affected community following an open process. This would mean retreating to the kind of planning existing before the start of the changes instituted from 2005 while still removing some of the weaknesses existing at that time and not addressed since. This would necessitate abandoning the current emphasis on process and returning to a recognition that the confidence of the community is a key component of any certainty there might be in public policy; an unlikely prospect within the present political context.

Shortcomings within the present system would seriously detract from any confidence there might be in any certainty to be found in its content and processes. These are either accepted as inevitable in the kind of processes necessary in the control of property development or they cast doubt on claims for certainty within them. There are also contradictions identifiable in its processes, both established and proposed, and some fundamental problems remain in the existing system which are inconsistent with the claimed qualities of the planning system. Some of these characteristics are undesirable if the planning process or some of its components are expected to generate certainty. These include:

- The claimed focus on the strategic plan as the source of the policies and controls to be included in the plans lower in the hierarchy would create a rigid and cumbersome process contrasting with the need for rapid decision-making to allow the expeditious facilitation of development opportunities which is claimed to be the main purpose of land use planning in NSW (NSW Government 2013b).

- Lack of confidence in the processes undertaken in the preparation of strategic plans in NSW characterised by Bunker (2008, 2013) and others as relying on simple extrapolation of key data, unsubstantiated propositions based on a single projection of total future population, spatial allocation of that population in ignorance of its feasibility or its impacts and reliance on imported concepts assumed to be valid, practical and acceptable (Troy 2013).

- The attempted focus on overall codification (NSW Government 2013b) claimed to provide certainty yet an allied parallel emphasis on simplification – probably not justified by the proposals themselves – within an increasingly complex context which would be a source of future conflict, or at least confusion.

- While the planners' interests are effectively determined by the State which provides the majority with their employment and supports their claim to professional status, the State benefits from the illusion that planning is essentially a technical process (Booth 1996) undertaken by disinterested professionals rather than one determined by political or commercial considerations.

- The practice of zoning, widely considered by planners to be an important source of certainty, is political in nature as it determines who gains from the process and who loses (Reade 1987, Gleeson and Low 2000b, Cullingworth and Caves 2009), particularly during the process of upzoning, now widely used to achieve urban redevelopment. The effective imposition of rezoning by the Department in these cases also has the effect of strengthening its role in intervening in an *ad hoc* manner at the expense of local considerations.

- Attempts to increase the efficiency of the planning process by the removal of impediments to a predictable and rapid outcome (NSW Government 2013b, 27) placing a heavy reliance on the content of policy and control documents to provide clarity and consistency in the way that their requirements are expressed in attempts to deal with complex situations.

- An unbalanced approach to the so-called depoliticisation of the planning system – shorthand for the removal of community representation (Planning Institute of Australia, NSW Division 2011) – while retaining a highly politicised process with little separation between administrative and political structures and no oversight of the Minister's use of discretionary powers where the requisite checks and balances should apply (The Law Society of NSW 2013), leading to the loss of the necessary accountability for its use.

Such characteristics in combination can be considered to be authoritarian in concept with some pretence of community involvement while real influence is exercised by the development industry with the consolidation and strengthening of discretionary power in the Department allowing any residual community interest to be over-ridden. None of these proposed changes can be considered to be aimed at generating certainty except in those relating to the interests of the property industry.

The notion of increasing certainty via the exercise of discretion is not one that has exercised much attention so far, it being seen as counter-intuitive. It depends however, where the discretion is exercised within the planning process and who can exercise it. Discretion in this context is defined as the liberty of making a decision when an

appropriate rule is absent, although the scope of that decision is constrained by defined limits and it remains accountable within those limits. Where these no longer exist, it is probable that it will be used predominantly to promote development in compliance with the aims of planning advanced in the White Paper.

Mechanisms that exist for taking decisions can be divided into administrative and political channels (Booth 1996). This distinction is very blurred in the NSW system but not in the claims requiring so-called depoliticisation to be undertaken but within the processes carried out in the Department. In practice, much decision-making, often taking place under delegation is undertaken by technical services of one kind or another who see their competence as narrowly focused on professional issues.

Planner's competence is gained through training and experience, applying practice in compliance with notions of professionalism often focusing on precedence and the drive for consistency. On the other hand, political decision-making is now seen as taking decisions to reflect the interests of a particular clientele or an electorate. Ethical considerations apart from some reliance on the perception of a quasi-professional ethos appear to be absent.

In circumstances where this clientele is the property sector working to benefit the economy as claimed, the exercise of decision-making needs to be carefully controlled, particularly if these activities can benefit from legislative change at the behest of those making administrative decisions using discretionary powers. Often it is difficult to separate professional and political judgements and complex relationships develop between politicians, professionals and administrators involving the exercise of power in the process of decision-making (Booth 1996, Flyvbjerg 1998a, Tewdwr-Jones 2009).

If the focus is solely on the facilitation of development, there are incentives for the removal of any impediment to the process, exemplified in the claims of the lobby groups. The minimisation or eventual removal of any constraint on further development activity, notably that applied by the approval process itself and the negative reactions of the community is seen as beneficial to the economy of the State and is therefore justified. The aim is a higher level of predictability of outcome achieved by further control of the planning system to be accomplished by the introduction of the proposed changes. These are justified on the basis of the certainty it is claimed they will bring, as demonstrated in Section 4.4. However, the evidence presented in Chapters Four to Six shows that the validity of the claims advanced is insufficient to establish the necessary level of confidence in the processes and outcomes of the planning system in order to achieve some degree of certainty. This is summarised in the following three sections.

7.3 The strategic plan

The language used in high level plans is of considerable importance particularly when it sets the pattern for the more specific plans below it in the formal hierarchy. These are usually straightforward statements of the way the claimed certainty in the planning system is conceptualised – if a particular action is undertaken or if a particular policy is introduced, the following will definitely occur (NSW Government 2013a, 18). This action or policy is therefore justified as beneficial in improving the required outcome and ultimately justifying the process and activity of planning. A number of these do however comprise either statements of the obvious or unsubstantiated assertions claiming that certainty will without doubt be achieved (NSW Government 2013b, 99). These do not always specifically apply to claims of certainty and other words with a similar meaning are more regularly used with the same intent.

There is a difference here if the modern definition of certainty as a variable construct is accepted. The term ensure is much more frequently used in the same documents even though its meaning represents an absolute; it is a guarantee, a pledge, there are no variations that can be applied. The objectives of the plan will be achieved; that is guaranteed. This goes much further than the routine use of certain in the official literature but appears only rarely in promotional material. It is a more definitive term to use without the apparent flexibility of words such as certain or certainty, conveying a belief in the effectiveness of the actions in an absolute sense. Applied to the etiolated objectives and limited actions now included in strategic plans in NSW, any confidence generated here would however be misplaced.

The recent draft Metropolitan Strategy (NSW Government 2013a) employs ensure at the same rate as both the Green and White Papers (see Table 4.1). The latter clearly comply with the concept of promotion where a promotional message can be understood as simultaneously representing, advocating and anticipating whatever it is to which it refers (Wernick 1991), in this case, the land use planning system.

Policy documents tend towards report rather than exposition portraying particular policies as made inevitable by the way the world now is (Graham 2001). The implication is that certain good things will occur if the inevitable policies are implemented (new opportunities will open up) and certain bad things will happen if they are not (we will not be able to compete). All these legitimation strategies involve some form of moral evaluation in the sense of reference to value systems. Being world leaders, competing, encouraging imagination and innovation are all desirable in the system of values being invoked (Fairclough 2003).

This would suggest that the wording is significant and deliberate otherwise its widespread and persistent use is difficult to explain unless it has an agreed and understood purpose (see Section 4.4). This could imply that the planning system, particularly when reconfigured as proposed, has the power to achieve the stated outcomes using the processes and actions set out in the various documents. The language is an important means of transmitting that necessary message of confidence even if only to a limited number of recipients including politicians, the planners themselves, some developers and their agents and those who report and comment on the publication and content of important public documents in the media. These are the groups who would respond to the idea of certainty of process with some confidence in the effectiveness of their activities within it.

Such language suggests that certainty already exists as established policy within the planning system as much is made of its beneficial presence in planning documentation in its ability to improve those conditions considered necessary for additional property investment. However, in practice, it is difficult to accept that the strategic plan, the processes used to prepare it and its essentially contradictory future status in relation to the drive towards the more effective facilitation of development, indicate that any notion of certainty is present within this component of the planning system.

The contemporary emphasis on promotion rather than explanation and justification places increased importance on the use of language to convey a particular message which attempts to suggest that benefits will be achieved by change while obscuring the reasons for the changes themselves. This research shows that the mix of changes proposed in the White Paper includes a number of contradictions that cast doubt on the ability of the proposals to achieve their stated aims. In particular, the emphasis on the strategic plan as the centre of the planning system is contrary to the facilitation of property development as its principal objective. This, together with the proposed shift of community involvement to the highest level in the hierarchy of plan-making reinforces the top-down process so derided by the Independent Panel (see Section 3.7).

However, given the limitations of the strategic plan and the contradictions resulting from its enhanced role in the future planning system, any confidence in its processes might be considered to be misguided. Long term plans tend to be either distrusted or denigrated by politicians (Malkin 2006) while developers with short term interests could be expected to have little interest in them. The only group with direct concerns about these plans are the planners themselves (Planning Institute of Australia 2012, 2013b) although, even here this interest may be merely theoretical for those more involved in its processes than in its plan-making component. A more convincing argument for change consistent with the

evidence is as an attempt to gain a more effective way of exercising control over the process itself by increasing its predictability of outcome and ease of achievement. This is confirmed by the increase in the administrative discretion to be made available to the Minister to override many of the provisions of the new Act (see Appendix C) and the refusal to introduce any oversight of its use as proposed by the Independent Panel (see Appendix B). The use of these new powers would have an influence on the operation of the whole planning system.

7.4 Assessment and determination

Certainty is conventionally considered to relate to knowing what is required to proceed positively through the process (Booth 1996), how the application needs to respond to the applicable controls implied by the zoning definition and the physical requirements contained in the local planning instruments plus any relevant requirements in the policy SEPPs. In circumstances where these are all known in advance and compliance will inevitably lead to an approval, this process is not very demanding and progress is determined to a great extent by the nature of the controls applied to the application. Such a system, focused on the notion of developmentalism, results in the high and stable rate of approval which is what it is designed to achieve. It therefore comprises part of the planning system where certainty could be discerned and clearly characterised as a reliable outcome of the process.

Based on the detailed data published by the Department (see Section 5.2) on the performance of the council-based assessment and determination process, there would appear, at first sight, to be little justification for any lack of certainty in its ability to achieve a high level of approval suggesting that any reasonably well considered proposal complying with the applicable controls will be found to be acceptable. This however does not explain the continuing emphasis on further simplification and streamlining of the approval processes which are a central concern of the White Paper (NSW Government 2013b). While a high level of approval of development applications has been achieved for a considerable proportion of applications via this process, the remainder (less than one percent), mainly large developments, are determined by the Department where few are similarly refused. However, these are considered in a number of cases to have raised concerns about the means used to achieve approval (NSW Government 2012b, 5). Demands for a further increase in approval rates would appear to be perverse under these circumstances although the changes envisaged in the White Paper are claimed to be intended to achieve *a simpler system which provides predictability and certainty* (NSW Government 2013b, 114). That description could well be considered to characterise the system already in place.

The planning process is capable of producing some version of certainty for both property developers and the bureaucrats operating the system. Both have knowledge of how the process works in practice and their views are conditioned by their experience and expectations. These groups together with the community come together within the context of determining the acceptability of development proposals. The relationship between codification (regulation) and discretion (flexibility) is played out in the assessment and determination process. In practice, neither of these is what it is portrayed to be but both are fundamental to the identification of the certainty there may be in the planning system and what that might comprise (see Sections 5.4 and 5.7).

A key concept concerning certainty in the operation of the planning system suggests that within the decision-making central to the planning process, regulation and flexibility are both part of a single process. If certainty is to be increased, the extent or degree of flexibility available will be correspondingly reduced. Any increase in certainty therefore requires greater predictability of outcome achieved by increased control over the process and, in practice, a reduction in the discretion available to the decision-maker. There is however a limit to how far such a shift can be taken both in terms of the interests of those most affected by this part of the process – applicants for development approval – and the practical necessity to retain some area of flexibility to accommodate circumstances not covered by established policy or applicable controls. Flexibility is crucial to developers in order to cope with risk and unforeseen circumstances; knowledge of the limits is desirable but so is room for manoeuvre. Codification cannot cover every eventuality. Consideration of the details of routine development assessment (Sections 6.2 and 6.3) shows that the discretion of the planner is still necessary when compliance with specific controls such as those included in DCPs is required even if the reasons for the decision are not, in this case, provided.

An exclusive focus on either of these characteristics of decision-making in the planning process is not possible; discretion has been reduced in some parts of the system but is in the process of expansion in others. The main issue here is not the idea of certainty defined and achieved by pre-determined rules. These will always fail to address the needs of proponents and decision-makers; but rather the extent of discretion within the system and where that discretion is located (see Section 5.4). Its power to adjust the operations of the system and potentially override important sections of it to focus its outcomes in a particular direction can be used to reinforce the predictability of its decisions. Here flexibility produces a greater level of certainty if it is used in a consistent manner to achieve its desired outcomes.

At its simplest, improvement of certainty in the planning system is achieved by increasing the predictability of development approval, possibly by simplifying its procedures and reducing the extent and detail of the issues to be considered during assessment (see Section 5.3). The removal of all potential impediments to any kind of development considered to be viable by the market would also be considered to be a means of improving certainty for its proponent. It would however have the effect of reducing the validity of any remaining claims for planning as a benefit to the community in the protection of its interests.

It is not clear what benefits are derived from the achievement of a higher level of certainty in the existing system. Reactions from developers both in interviews and as reported in the literature (Needham 2005, Steele and Ruming 2012) provide unexpected views on the performance of the determination process which might be considered counter-intuitive but in reality are a reflection of their own specific interests. At the same time, the Department continues to persist in amending the system when it is providing the required level of development approval which in practice would be difficult to improve. Developers prefer a system where the limits are known (certainty provided by explicit controls) and where flexibility (for them) is also available. While this requirement can be seen as both unachievable and unacceptable to decision-makers, it can be considered the ideal process from a developer's perspective.

Regulation has limits except where any other considerations are discarded. It can determine the allowable use of land although this needs to be carefully defined while the drive for simplification indicates that some flexibility needs to remain to deal with issues not addressed at a higher level in the hierarchy. Attempts in the draft Bill to remove any such possibility will have the effect of placing a heavy responsibility on the relevant strategic plan which may result in future difficulties (Tewdwr-Jones 2009). The benefits of discretion which enable changing circumstances to be reflected in rapid decision-making are not possible in the fixed procedures attached to zoning where the necessary changes can only be determined by higher level plans. If rapid decision-making is necessary to respond to development opportunity, flexibility is essential. Its removal sits uneasily with a focus on developmentalism.

Discretion or rather its implied flexibility can be seen to be both a characteristic to be kept under control in order to achieve greater predictability of outcome and also a benefit where it can be used to bend or amend the rules to further reinforce control over the planning system to achieve even greater predictability of approval (Allmendinger 2001). However, given the current performance of the system overall in approving development proposals, it remains difficult to understand why such measures are necessary and what

effect the proposed increases in administrative discretion available to the Minister would have. The lack of accountability for the use of these powers – they would be within the Minister's legal remit – could result in further loss of any confidence that the community might have in the operation of the planning system.

Whatever the outcome of the current system of development determination in NSW, it is achieved by a process which is organised to produce a high success rate. The proponent is given a road map on how to successfully navigate through the process and what is required of the development. If compliance with some basic controls over use and the physical form of the proposal is ignored, the applicant must be considered to be acting irrationally or is confident that sufficient leverage is available to increase the possible return from the site using various means not conventionally included in the normal planning process. These are rare but often occur as part of large, complex and protracted developments with a high profile (Hasham 2013). Such developments are effectively removed from the normal planning system and decisions are often taken via a process of negotiation based on non-planning considerations. It is recognised (NSW Government 2012b) that this kind of development process has a considerable impact on the response of the community to the planning system as a whole.

At the same time the rules applied to the consideration of acceptability of a particular proposal are undemanding. Here simple definitions of use are applied together with numerical controls which can only have a limited connection with the achievement of a desirable outcome. Decisions need to be seen to be based on technical grounds rather than political considerations (depoliticisation) and some distance needs to be maintained from the providers of development (the industry) in order to continue to project a semblance of independence. In practice, this creates problems for the planners to maintain any perceived distinction between the two as their activities may be seen to coincide with the interests of those who profit from a State licensed process if they are merely a facilitator of that development (Reade 1987). Where the facilitation of development is the sole focus of the planning system, the maintenance of this distinction is even more important although increasingly difficult to achieve.

7.5 Intentions and outcomes – policy considerations

The operation of the planning system is most clearly seen in the process employed to translate intention into outcome; implementation. It is also where decisions are made based on the application of existing policy and pre-conceived rules and where various influences and pressures are played-out. Its results have provided the basis for consideration of certainty in relation to outcomes where a high level of consent is achieved indicating that confidence would be generated by this knowledge. If the

planning process is expected to produce an outcome beyond that of simple certification of private sector property initiatives, it is necessary to achieve a plausible link between intention and outcome; essentially the content rather than the process. The operation of the process is necessary to reach this outcome but is increasingly the subject of pressures of all kinds usually the result of influences applied by commercial interests and the gradual diminution of the powers available to the consent authority implemented by the State government. A further variable here is the rigour with which the assessment is undertaken within a context focused on facilitation of development.

The outcomes of a particular development undertaken over a number of years provides detailed evidence (see Section 6.3) that even in circumstances where the consent authority prepared an initial design concept and detailed development controls, the result can depart to a considerable extent from that envisaged, failing to deliver the range of commercial content complying with that in the established retail hierarchy or achieve many of the design-related objectives set out in the DCP. The resulting development remains beneficial to its operators, based on commercial considerations, but fails to provide many of the non-commercial facilities normally expected in such a development.

This raises questions concerning the ability of planning to effectively accommodate the needs of the development industry, the ability of the statutory powers available to the planning authorities to manage development pressures in an overall environment focused exclusively on developmentalism and the ability of powerful interests to subvert the process to their own benefit. If the focus of land use policy and the only remaining outcome of the related planning process is the promotion of property development as a support for the economy, an area of certainty would appear to exist in the relationship claimed for such link. However, in this case this was not the original intention.

Difficulties in achieving development aims can be attributed to the limitations of a reliance on the zoning system particularly as a means of stimulating urban redevelopment (see Section 6.6). This is intended to be undertaken on a large scale to accommodate future population growth by residential density intensification adjacent to existing and proposed rail stations in locations known as Urban Activation Precincts (UAPs). The means employed is upzoning which is intended to stimulate land owners and private developers to provide the high density building forms considered to be necessary. This process and the continuing growth of more conventional housing on the periphery of the existing urban footprint will constitute the means of implementing the housing targets assigned to each LGA originating in the strategic plan.

Sorting out the problems associated with land ownership, initiating the process of rezoning and preparing master plans is the extent of involvement of the State government using UrbanGrowth NSW as its overall development manager. The relevant councils remain responsible for the assessment and determination of the resulting development proposals in combination with the other relevant consent authorities. This is an uncertain and potentially haphazard means of undertaking highly complex programs of urban redevelopment; one of the most complex and demanding components of planning implementation. The effectiveness of such a process is reliant on factors over which the State government has little influence. There can be little confidence in the ability of such initiatives to achieve the targets set out in the strategic plan in an efficient and orderly manner. The interests responsible for implementation of the proposals have little incentive to achieve these targets nor the State government any other means of doing so.

7.6 Addressing the research questions

The questions posed in this thesis focus on the determination of the purpose of certainty in land use planning in NSW, the different kinds of certainty there may be and how these can be characterised within the system, now considered to be neoliberal, at least in its aims. These questions are pursued using a number of themes as a means of explaining how continuing claims for certainty can be related to the overall objectives of the planning process and its role within the realm of the contemporary capitalist state.

The thesis establishes that the conventional use of the notion of certainty and terms with similar meaning and intent in the documents regularly published by the State government, while appearing to attribute that characteristic to the planning system is more accurately applied to the justification of its aims and, more specifically of any initiative for change to reinforce that objective. This can be argued as the need for the justification necessary to legitimate the support that the planning process provides to the private sector as the State government relies on the exercise of private interest to achieve the development necessary to confirm its own effectiveness as the manager of the economy. This close association creates difficult problems for the achievement of planning outcomes when commercial interests determine both what their aims are and how their implementation will be undertaken. The manner in which certainty is promoted also corresponds with the characterisation of public documents as essentially promotional with little explanation for the policy or change being advocated. These are needed *to create the best planning system in Australia* or are inevitable if *Sydney is to remain internationally competitive;* both claims made in State government documents for the need for change (NSW Department of Planning 2005, NSW Department of Planning 2010).

The thesis demonstrates that certainty cannot be considered to be a specific and identifiable quality associated with land use planning. In practice, this would require a high level of belief or a complete lack of doubt concerning the operation of a complex process where its actions remain incapable of consistently achieving the outcomes ascribed for it. In response to this shortcoming and consistent with the political context within which it must work, the aims of land use planning (content) have been weakened to a focus on developmentalism while any consideration of change (reform) has focused on process to support that emphasis (see Section 3.7).

The achievement of certainty in the recipient relating to a complex process where outcomes may not be predictable is most effectively determined by the confidence that would be generated by the effective operation of a consistent, reliable and robust system where decisions are based on relevant evidence and reasons for those decisions are made available. Ready access to appeal processes to remedy errors or biased decisions would also be required to generate such a response. The detailed investigation undertaken here of the three major components of the planning system is unable to identify characteristics which would comply with the requirements for a system which would produce the necessary level of confidence. Inadequacies identified in each indicate that neither would they be capable of generating confidence in its processes and outcomes to create the kind of certainty claimed in the official literature.

The thesis then goes on to argue that such a conclusion indicates that the continuing use of certainty to characterise numerous components of the planning system has another purpose beyond merely that of a rhetorical device where its vagueness is ideal for promotional purposes focusing on the justification for change. The key consideration here is the purpose of the changes that the use of the notion of certainty is attempting to promote.

The most significant of these argues that further consolidation of the power and influence of the Minister and Department bureaucrats over the planning system is the aim of the changes envisaged. Proposals in the White Paper and the draft Bills include provisions clearly supporting such a contention.

The cumulative effect of these is to achieve a planning system where change justified on the basis of increasing certainty will result in a simplified system where greater control can be exercised by the Department to increase the predictability of development approval by removing or minimising the potential for impediments to further property development. The question arising then is whether the manner in which neoliberal precepts have been, and are continuing to be, brought together in NSW is to supplement and assist the market

(its liberal emphasis) or continue to protect its centralising direction (its conservative emphasis) which characterises it at present and would be reinforced by the proposed changes. The changes proposed, but not as yet implemented, are orientated towards consolidation of power with the Minister and Departmental bureaucrats with clear intent to ease the passage of development applications through the determination process by the removal or minimisation of potential obstruction and delay. This is intended to facilitate development to the benefit of the capital market; a deeply embedded neoliberal principle. Thus a semblance of an operational planning system is retained in which the notion of a property industry legitimated by government is maintained while the market can provide those components of future development which allow the State's claims for continuing progress to be justified.

The thesis also identifies contradictions in the provisions included in the draft legislation which do not, on the face of it, align with the objectives stated for the changes. This is explained as a means of satisfying some of the participants in the process – the planners – even though their inclusion – the emphasis on strategy – will have little effect on the future operation of the system and can be effectively controlled using the new powers to be made available to the Minister. Those benefiting from the changes promoted by the application of the notion of certainty are the developers who can expect a simplified process providing some additional predictability of outcome and perhaps an easier passage through the process, although the effects of these changes may be difficult to identify in practice.

The continuing dissemination of the idea of certainty associated with the operations and outcomes of the land use planning system and in particular in relation to the introduction of legal provisions aimed at more effective compliance with neoliberal aims of the prevailing political ideology promotes this vague notion as a beneficial characteristic capable of providing benefits for all. The characteristic of certainty – being certain – is also potentially a restrictive or even dogmatic concept. There is no necessity to pursue alternatives to those being proposed; there is no other option. However, certainty is also associated with consoling notions of confidence expressing qualities assumed to be positive.

7.7 Policy considerations within an uncertain context

Although remaining steadfastly focused on the facilitation of development, the eventual formulation of the NSW planning system remains uncertain. The State government has not, so far, been successful in its attempt to consolidate its version of a neoliberal planning regime initiated in 2011. The necessary provisions passed the lower house (Legislative Assembly) of the State parliament where the government had a large majority but failed

to gain approval in the upper house (Legislative Council) even following the removal of some of its more controversial inclusions. It remains unclear whether a further attempt will be made to introduce the revised legislation. Opposition to the proposed changes remains, suggesting that other means may be required to satisfy the industry groups who are energetically pursuing their own interests.

Neoliberal principles and practices are now so embedded in political and bureaucratic thinking that even in circumstances where it might be possible to attempt to focus on notions such as sustainable development as often promoted as an objective of planning policy (NSW Government 2013a), there seems to be little evidence that there has been any disruption of the political priority to privilege economic growth (Haughton *et al* 2010). Rather than challenging neoliberalism then, Haughton and his colleagues (230) claim that planning appears to be implicated in helping to rationalise it by providing a set of principles and practices for mitigating, obfuscating or palliating some of the externalities associated with promoting high economic growth above other aspects of societal well-being. In these circumstances, the planning system itself is being used to stifle every attempt to shift away from its concerted focus on economic growth.

Planning is an important prop for the development industry establishing and maintaining a symbiotic relationship between state government policy and capital growth. It is therefore necessary for planning to encourage investment. This requires it to operate within the market system serving capital, a potentially contradictory stance to the often expressed values of equality and social justice meant to apply to planning. Either, planners can attempt to achieve some planning gains by actively working with capitalist land developers or adopt a much more positive, proactive planning approach which will inevitably need to offer strong opposition to market forces (Evans 1997). There are few means of challenging these forces and the planning process is not orientated towards this possibility nor are planners in any position to do so. Planning then inevitably becomes a component of a regime of neoliberal governance as it is impossible to operate effectively outside its legal framework which supplies the necessary powers and any constraints it can apply.

The need to identify realistic improvements to the current practice of planning in NSW presents some difficulties, mainly due to the definition of the starting point and whether the suggested changes relate to what might be considered to be possible in reality and what is only possible in theory. If the current process of land use planning in NSW is characterised as essentially neoliberal as described in Chapter Three, any changes would be radically different from those which would be seen as necessary to correct or ameliorate its existing shortcomings. This produces two very different possibilities, both of which are problematic.

The first accepts the nature of the current procedures and their basis and seeks to identify improvements which would focus on the principal objective of developmentalism while recognising those other characteristics of the established system. This could be expected to seek to continue or even accelerate the moves to marginalise the community from the process and reduce the influence of the planners.

The alternative would see a return to the kind of planning, with all its faults, which operated prior to the changes instituting the current set of planning verities. This would allow the strengthening of the powers available to the planners with more readily enforceable controls. The first of these would probably be unacceptable to a significant proportion of the concerned community; the second, can be reasonably considered to be impossible.

A compromise between these two positions would involve the introduction of some measures which reinforced the influence of the planners within the present system and allowed the local planning authorities greater local discretion. It would also be necessary to remove some of the powers available to the Minister, particular those of delegation, in addition to establishing legal oversight of the activities of the Department. Such proposals remain in the area of the improbable, requiring reorientation of the existing system and having implications for other parts of the government apparatus where governance issues would need to be addressed particularly in the role of local government.

Policy initiatives relating to established public processes of the State government can only be advanced and implemented by that government. While local councils are often considered to be the means by which the planning aims and policies of the State are to be implemented, this can be considered to be merely a mechanism where any independence available to the councils as planning authorities has been gradually eroded while the agenda is set by the State and is now more frequently implemented by its own departments and agencies.

Other factors militate against any change which could influence, directly or indirectly, the outcome of the planning process. While ignored by the industry's vocal representatives probably in order not to prejudice their continuing pressure for further lessening of controls on development, the current high rate of approvals (see Table 5.1) has at least two implications. First, it demonstrates the compliance of the existing system with the stated requirement to expedite development while continuing to assist this by providing legal justification for doing so. Second, it makes any proposal to tighten controls on development with its inevitable increase in refusals, very difficult, if not impossible, to justify.

There are two possible areas where improvements to policy and practice might be contemplated. The first focuses on addressing the shortcomings of both the existing system

and the currently proposed but not yet implemented changes included in the draft Bills. Many of these are considered in some detail in Sections 3.6 and 3.7 of the thesis. A number can be considered to be designed to increase control over the system by consolidating power at the centre while minimising any impediment to its emphasis on the facilitation of development. There are several here which would not be effective as part of an efficient planning system, particularly the reliance on a heavily top-down process while seeking to expedite rapid decision-making in the short term. These are contradictory and require reconsideration.

A second area of potential comprises further consideration of those provisions recommended in the review undertaken by the Independent Panel which were either rejected or ignored by the State government in the Green and White Papers. These are listed in Appendix B. In particular, they relate to the introduction of a Planning Commission providing effective oversight of the activities of the Minister and the Department, the maintenance of the right of elected councillors to make determinations and the expansion of third party appeal rights, measures aimed at improving community confidence in the planning process; a stated aim of the planning review.

These could be included in any reconsideration of the stalled Bills prior to a further attempt in parliament to achieve a new Planning Act. If the legislation is not reintroduced following the 2015 State election, it is probable that various *ad hoc* changes will be introduced which will, in effect reflect the aims of the White Paper.

7.8 Limitations of method

Investigation of a broad range of issues such as those assessed here inevitably raises particular considerations relating to the methods employed where their limitations may have an influence on the findings, while at the same time presenting opportunities for future research. As noted in Section 1.5, the range of interviewees representing private sector interests was more limited than anticipated due to an unexpected reluctance of those approached to be involved in the interview program. This inevitably gave added prominence to the results of the views of those interviewees from the private sector including the planning consultants who worked within and predominantly for development organisations. The availability of a substantial volume of printed material produced in response to the Planning Review, leading to the preparation of the White Paper, in part compensated for this lack of appropriate candidates. Thirty percent of submissions to the White Paper came from private sector interests compared to 20 percent from local government and 40 percent from community groups when those from individuals were excluded (NSW Department of Planning and Infrastructure 2013b).

The State government's current failure to achieve its legislative changes leaves an uncertain environment for development investment. It remains unclear what the government intends to do regarding the stalled bills leaving the existing Act in place without indicating whether it will continue to pursue the changes originally proposed. Problems appear to remain with some of the small number of high profile projects which are assessed by the Department and the PAC while the processes of assessment and determination of the majority of DAs proceed as before. This would indicate that further research into the views and requirements of the private sector would be beneficial at present particularly focusing on those areas where development could be more effectively managed without eliminating all public sector interest in their outcomes.

There are at least two other areas of considerable academic and practical interest stemming directly from this research which warrant further attention. These reflect directly on the effectiveness of the land use planning system linking to other areas of ongoing interest in this issue particularly in relation to its performance in delivering its targets and how this can be improved.

A part of the planning system identified in this research but which receives little attention is the quality issue related to the output of the approval process. This is a difficult and potentially contentious area but one which will become increasingly significant as the higher density development envisaged as necessary and relentlessly pursued in the promotional material relating to the early development of the UAPs. This will require greatly increased consideration if the necessary standards are to be achieved. Relationships between buildings will need greater consideration than now, placing considerable demands on the planners to determine if these and other factors are appropriately resolved. These are concerns normally outside the skills available within local councils but cannot be left entirely to those with commercial interests in the outcome.

The development of the UAPs will be an important component of the achievement of the targets set out in the strategic plan. Given the difficulties associated with urban redevelopment, the lack of overall control that can be exercised by the State government and the paucity of experience in local councils of the management of the most complex of all urban planning initiatives, a detailed understanding of the process undertaken by one of the initial examples would provide a beneficial insight into long term development and the implementation of development of a kind where there is little experience in NSW.

7.9 Conclusions

This search for the concept of certainty in the neoliberal context of land use planning in NSW has focused predominantly on its use as a rhetorical device suitable for promotional purposes as this is the manner in which it is used in State government documents. Such usage is often considered to be devoid of real meaning stressing its promotional rather than its explanatory purpose. Other definitions are less convincing, comprising the notion of certainty as an established policy objective of the land use planning system or a quality to be sought by the changes being promoted. These are both concepts which the regular use of the term in the official literature could support.

While the use of language in numerous official planning documents stresses that the aim of the reform of the system is to achieve an improved level of certainty for all those involved, there is no direct statement that the creation of certainty or its improvement is an objective of the reform of the planning system *per se.* Each of the 29 occasions on which a reference is made to certainty in the White Paper (NSW Government 2013b) is related to a claim that a specific change proposed will bring about certainty or increase that related to a particular component of the system or its processes (see Appendix A). There is no mention of certainty in the statement of the Objects of the Act in Item 5 of the draft Bill (NSW Government 2013c) although claims are occasionally made in some of the metropolitan plans for Sydney that the NSW planning system aims to provide certainty but this focuses again on various provisions in the plan. The clearest statement of the objectives of the new planning system is in the White Paper (NSW Government 2013b. 15).

Here the objective states that the result of the changes proposed will be a process providing more certainty than before. This is a claimed justification for change not an aim of the reform itself as policy; the objective is change which it is claimed will result in additional certainty as set out in Section 4.4 of this thesis. If the policy aim is a more certain planning system, it is necessary to accept that its achievement in each of the individual claims made for its creation or improvement will collectively result in a more certain outcome. It is nowhere to be found as a stated aim of the reform of the planning system.

It is possible to disinter the idea of certainty within the strategic plan from the rhetoric focused on it both in its textual context and in its use as justification for change. The latter relates solely to the promotional needs regularly embedded in contemporary official documents where justification for policy and related action is attempted by the use of the term as a synonym for confidence in its aims and processes. This usage can be seen in Appendix A which contains both claims for its presence in specific components of the

planning system and for its increase following the introduction of the changes (improvements?) proposed.

It might be more credible to argue that the repetition of the idea of certainty in the planning process indicates that its achievement and strengthening could be considered to be a policy aim of the State government. Such an objective is only indirectly stated in the official literature and claims for its presence are associated with the justification for changes to the planning process now proposed or to provide greater confidence in the policies set out in the strategic plan. There appears to be no attempt to achieve certainty except that which can be perceived within the drive to achieve greater control over the system as an aim for increased predictability of outcome focusing on developmentalism. This could be considered to be a form of certainty of particular interest to the development industry.

A conclusion that certainty might be discernible as an outcome of one of the three components of the planning system where its presence was considered to be of benefit, itself creates problems which require some further consideration. Confidence in only one part of the system based on its outcomes rather than the validity of its processes may appear to be a weak and possibly unsustainable reaction. However, this outcome is to the benefit of that group whose activities enable urban development to take place and in whose interest the planning system is orientated. This suggests that this system is now only operating to satisfy those interests claimed ultimately to be to the benefit of the whole community via its contribution to the economy of the State. It already provides benefits to the development industry but unless the State government is willing to intervene directly in the interests of the community, there can only be a limited expectation that any other benefits will accrue from its activities.

The reality of planning in the contemporary state can be defined as one where general public policy exists to assist capitalist accumulation while the welfare of the community can only be protected and possibly enhanced by carefully targeted interventions by government. This suggests that the community can be detached from any consideration of benefits claimed to accrue from the planning system but does not remove its interests from expecting protection from the adverse effects of those groups who benefit from its outcomes.

Overall, certainty can be considered to be a feeble quality in relation to land use planning where its basis, founded on values which are debateable at best, data which are partial and requiring interpretation and aims which are rarely achieved and virtually impossible to validate as an outcome of its operation, can be considered to be the results of the

effective management of the use of land. This cannot be expected to generate much confidence in its overall effectiveness. So any certainty decreed by its proponents must focus on its ability to deliver an anticipated outcome which is of benefit to particular individuals or groups in society. Given, the current emphasis on the facilitation of development, it would appear to be inevitable that the determination process would comprise the one component of the planning system where the idea of certainty can be considered. However, doubts about the rigour and objectivity of the process indicate that any such consideration may itself be fragile.

Beyond its use as rhetoric supporting various contentions and providing apparently convincing reasons for change, the existence of certainty in land use planning can only be conceptualised as a vague notion relating to the confidence that individuals or groups related to its processes and outcomes may experience from time to time. The way in which this might be translated into the idea of certainty will inevitably be affected by changing conditions and the relationship of the individual to the planning system. Few can be expected to reflect seriously on the process of planning and its effect on public policy action and most of these would undertake this within an academic context with its own benefits and constraints.

It is clear that certainty would be appreciated within the three components of the land use planning system if there was the necessary level of confidence in their processes and outcomes to achieve that response on a consistent basis in those groups within or affected by it. The findings of the research summarised here cannot support the contention that certainty either exists within its current operation or would be generated following the implementation of the proposed changes. Neither can it be considered to be a policy aim. Its regular use provides a rhetorical justification for change where this is focused on the achievement of greater control over the planning system where the increased administrative discretion available to the Minister can be used to remove or minimise obstructions to predictability of outcome and ease of achievement. This is clearly in alignment with the principal objective of the planning system to facilitate private sector development.

Ultimately, considerations of the presence of certainty must focus on the ability of the current planning system, or a reformed version of it, to achieve its stated targets when implementation of the development required to accommodate them remains entirely in the hands of the private sector. The only recourse available to the State government through the planning system is the upzoning of land to stimulate urban redevelopment in locations where due to their good locational characteristics, land values will be at their

highest. Ironically, this reliance on the private sector can only result in uncertainty of outcome.

Certainty however remains difficult to define, especially within the processes of such an uncertain activity as land use planning. It is perhaps even more difficult to identify it. Claims for its presence are presumably considered to represent some value or virtue to be identified within its processes and outcomes by those who promote it. The generation of certainty and preferably its improvement is therefore considered to represent some kind of benefit and its increase is sought. However, certainty is such an unaccountable characteristic, often ephemeral in nature that it would seem to be a weak justification for a government promoted and managed activity. In purely promotional terms, its vagueness could be considered however to be an advantage.

Even so, the notion of certainty is still regularly advanced by the Department in its justification for various components of the land use planning system, particularly in relation to any changes being promoted. A media release from the Minister for Planning (Goward 2014), dated 21 November 2014 – a year after the draft legislation stalled in the State parliament - entitled, *Simpler planning means more certainty,* confirms its continuing use to justify changes, characterised as reform. These improvements will, it is suggested, *ensure certainty* for both communities and industry across the state. This tautology appears to be difficult to eradicate in the processes and outcomes of the land use planning system in NSW.

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Appendix A Certainty in planning documents

This appendix lists in detail each occasion when certainty and its increase are included in the text of recent planning documents published by the NSW Government, the NSW Department of Planning and Environment and its predecessor organisations. These include the five metropolitan plans for Sydney from 1995 to the present draft of 2013, the five main documents published as part of the preparation of the anticipated Planning Act 2013 and the eight annual reports of the Department from 2005-2006 to the present. In addition, the number of uses of the closely related word, *ensure* is indicated together with its frequency of use as a factor – the smaller the factor the more frequently the word is used. Page numbers in the documents are given in brackets.

Metropolitan Plans for Sydney 1995 to 2013

A **Cities for the 21st Century: Building a Better Future 1995** (**1 use**)
(45 uses of ensure in 136 pages; factor of 3.02)

- Investors will be attracted by readily accessible information on development sites and a regulatory regime characterised by **certainty** and clear direction (18).

Implications
Better availability of data and certain regulation will attract investment.

B **Shaping our Cities: The Planning Strategy for the Greater Metropolitan region of Sydney, Newcastle, Wollongong and the Central Coast 1998** (**5 uses**)
(8 uses of ensure in 30 pages; factor of 3.75)

A similar volume entitled, **Shaping Western Sydney: The Planning Strategy for Western Sydney 1998** was published at the same time but has not been included here as it covers some of the same area.

- Greater **certainty** for conservation and planned development will be provided by regional biodiversity surveys and assessments which will provide reliable information to base land use decisions (14).

- The NSW planning system aims to provide **certainty** for businesses, facilitate innovation, and readily adapt to economic change with consistency and transparency (20).

- Accordingly, this strategy is focused on an integrated approval process that enhances **certainty** for investment and is responsive to business opportunities (20).

- Innovative approaches to economic development are being pursued. For example, the Steel River Eco-Industrial Zone at Newcastle will encourage investment in large-scale industrial development by establishing environmentally sustainable parameters up-front to provide greater **certainty** and efficiency (20).

- Investment in centres, from major CBDs to neighbourhood shopping centres, will be provided with greater **certainty** through tighter land use location policies and supported by urban enhancements and transport improvements (21).

Implications
Better data will result in improved decisions (1 occasion).

An objective of the planning system is to provide certainty for business using a consistent approval process undertaken in an open manner (4 occasions).

C Metropolitan Strategy; City of Cities, A Plan for the Future of Sydney 2005 (**21 uses plus 2 repetitions**)
(149 uses of ensure in 236 pages; factor of 1.58)

- Economy and Employment – The other actions nominated here – including the review of demand and supply, subregional planning to confirm the status of local government lands and actions around the lands of State significance – will improve **certainty** in the employment lands market and ensure that delivery is timely and consistent with strategic directions (65).

- The strategy for Centres and Corridors addresses, *inter alia*, improved governance by clarifying the State government's strategic directions with regard to the future location of jobs and housing providing more **certainty** for infrastructure agencies and providing opportunities to make better use of investments in infrastructure in the strategic centres and corridors (82).

- This (location of retail and office activity in identified or designated retail zones) will provide **certainty** for investors in office and retail in centres and ensure that *ad hoc* out of centre development does not have extra cost impacts for government and the community (105).

- While it is important to guide development to respond appropriately to the character of an area and ensure amenity, it is also important that these misalignments of policy (relating to DCP controls) are eliminated to provide **certainty** to the development industry, community and the government (151).

- It (the strategy for environment and resources) addresses economic competitiveness by protecting the city's natural features that attract international business and support many livelihoods and industries, and by providing **certainty** to rural industries to reinvest in their businesses (202).

- It (the strategy for environment and resources) addresses fairness by considering the range of community interests and development rights, and ensuring a balance between environmental protection and developer **certainty** (202).

- Initiative E4.3: Provide greater **certainty** to encourage investment in resource lands (203).

- Importantly, many of the actions identified to protect Sydney's natural environment have the dual benefit of streamlining development processes, providing greater **certainty** for development along with avoidance of financial risk (203).

- Viable rural industries require land and ongoing capital investments to maintain product quality and returns on investment. Rural businesses need **certainty** that their land will be maintained for continued use, not as future urban development (205).

- The performance of LEPs will be assessed against sustainability criteria providing **certainty** that local plans are consistent with requirements for housing, employment, urban form, open space, infrastructure and environment (208).

- Targets interpret the Metropolitan Strategy vision for Sydney's sustainable growth. Targets provide clear and accountable direction, and **certainty** for private and public investment, by signalling the government's commitment and clarifying the basis for planning and decision-making (208).

- A key objective of the Metropolitan Strategy is to protect Sydney's natural environment from the impacts of growth for dual benefit: our waterways, biodiversity, clean air and heritage are protected; and development processes are streamlined with greater **certainty** (210).

- Undertaking strategic assessment early in the planning process will also streamline development assessment processes, providing greater **certainty** for development and avoidance of financial risk (212).

- LEP achievement of biodiversity certification will **ensure** Sydney's biodiversity is maintained or improved, while development processes are streamlined with greater **certainty** (212).

- Working with local indigenous communities to identify places of regional Aboriginal cultural heritage significance will not only provide better cultural heritage outcomes but will also provide greater **certainty** for developers (215).

- Similar to the biodiversity certification process, the proposed reform (Heritage Permits) will provide greater **certainty** and efficiency for the consideration of development applications by landowners (215).

- This (definition of new release areas) will provide **certainty** for other non-urban land uses and in turn provide incentives for local rural industries to reinvest in their businesses and infrastructure keeping jobs in the area and minimising negative environmental impacts from ageing infrastructure (217).

- BASIX is providing **certainty** for the sustainable technologies industry (219).

- A strategic assessment of (rural) lands early in the planning process will allow landowners to plan and invest with greater **certainty** (224).

- Objective E4.3: Provide greater **certainty** to encourage investment in resource lands (225).

- The Metropolitan Strategy will inform infrastructure investment priorities in the State Infrastructure Strategy and will create **certainty** for private investment (249).

Implications
Not only is the use of the word increased but its application has become more specific including claims that various procedures will provide certainty or increase the extent of that quality already available.

Better decisions will result from improving the operation of the processes allowing simplification and the streamlining of the development process (18 occasions).

Assertion that the improvements of the system included in the plan will encourage greater investment (3 occasions).

D Metropolitan Plan for Sydney 2036, 2010 (20 uses)
(199 uses of ensure in 220 pages; factor of 1.11)

- Challenges facing Sydney - Long-term and infrastructure planning and delivery must be better integrated to improve **certainty** for government agencies, the private sector and the community (5).
- The NSW and Federal governments are also working together to identify and progress a suite of improvements to the Northern Sydney Freight Corridor to provide greater access and **certainty** for freight trains on this key interstate connection which is shared with passenger trains (95).
- Protecting key corridors is a critical part of the planning process to provide **certainty** and prevent development for other uses (102).
- The Affordable Rental Housing SEPP and Exempt and Complying Development Codes also assist in meeting Sydney's housing needs by expanding opportunities to develop affordable medium density housing in accessible locations and by improving investment **certainty** and reducing delay in the development of quality low and medium density housing (112).
- It (containing Sydney's urban footprint) also provides **certainty** to stakeholders about where future urban development will occur and protects resource and agricultural lands (160).
- Sydney's urban footprint will be contained by focusing land release in the Growth Centres and providing greater **certainty** around land release programs (160).
- It (proposed agricultural policy) would provide guidance for decision-makers on all aspects of the food system. It will aim to guide land use planning to provide greater **certainty** for the growth of agriculture in Sydney (164).
- Agricultural activities and resource lands need a secure planning framework that provides greater **certainty** and encourages investment (165).
- The Sustainability Guidelines aim to provide greater **certainty** for proponents and Department of Planning during the project assessment (177).

- Establishing targets at the project planning stage to achieve environmental benefits through every stage, increasing **certainty** throughout the process (by integrating environmental targets in infrastructure and land use planning) (183).

- The mechanism (Biodiversity Certification) aims to provide for better conservation outcomes whilst increasing **certainty** for development (190).

- This (preparation of criteria) will provide clarity and **certainty** for the community and proponents regarding the assessment of major developments and their potential social impacts (201).

- Aboriginal heritage issues can therefore be considered early in the planning process, providing greater **certainty** and efficiency when assessing development applications (210).

- The Metropolitan Plan provides the vision and spatial context for whole of government decisions to, *inter alia*, communicate the government's objectives for the medium and long-term growth of Sydney to boost **certainty,** reduce investment risk and inform the community (214).

- Better linking of land use planning and infrastructure provision will reduce uncertainty for infrastructure agencies, the private sector and the community. This will encourage informed decision-making and investment, promote the efficient use of both public and private resources and support continued economic growth in NSW. Increased **certainty** can be promoted in a range of ways from clear policy direction and strong governance arrangements to consistently applied funding assessment criteria (218).

- Land use and budgetary process need to be strongly interlinked based on, *inter alia,* the principle of providing more **certainty** for investors, agencies and the community (220).

- Priority tasks to support centralised infrastructure capability include the preparation of strategic infrastructure plans which will integrate infrastructure and strategic land use planning, land release and housing and demographic forecasts to better plan and deliver infrastructure and improve accountability and **certainty** around infrastructure processes similar to models adopted in other jurisdictions (221).

- Criteria for consistent land release will aim*, inter alia,* to provide **certainty** about delivery of dwellings in the short term (228).

- A ministerial direction will be created to clarify that greenfield sites must be released for future development by government through the annual land supply assessment. This is intended to provide greater procedural **certainty** (228).

- Capital city strategic planning systems should, *inter alia*, provide effective implementation arrangements and supporting mechanisms including evaluation and review cycles that support the need for balance between flexibility and **certainty** including trigger points that identify the need for change in policy settings (246).

Implications
Better decisions will result from improving the operation of the processes including better procedures/coordination/data availability allowing simplification and the streamlining of the development process (13 occasions).

Specific improvements will provide greater confidence (1 occasion).

Improved procedures are still necessary (2 occasions).

Changes including provision of targets and guidance will assist planning aims (2 occasions).

Assertion that the improvements of the system included in the plan will encourage greater investment (2 occasions).

E **Draft Metropolitan Strategy for Sydney 2013** (**3 uses**)
(49 uses of ensure in 115 pages; factor of 2.35)

- The plan will be delivered via the new planning system which will achieve a high level of business competitiveness by streamlining planning processes, improving community participation and giving people more **certainty** about changes to their area (22).

- Achieve productivity outcomes through investment in critical and enabling infrastructure (Objective 16). Growth Infrastructure Plans will link infrastructure decisions to the role the area will play in Sydney's growth and development trends and other operational considerations. A robust list of infrastructure priorities will be derived from this evidence base to create an infrastructure pipeline and provide **certainty** and transparency for infrastructure providers, the development industry, local councils and the community (54).

- Delivery plan for the strategy. The strategy for Sydney seeks to deliver a strong, global, liveable local Sydney. It seeks to provide **certainty** and direction through a clear vision and defined outcomes, and embeds appropriate flexibility within its various delivery tools (100).

Implications
Assertion that changes to the planning system proposed, rather than those in the plan itself will streamline planning processes and achieve improvements in productivity (2 occasions).

Assertion that the plan will deliver its aims even though these remain vague and ill-defined (1 occasion).

Planning System Review documents

F The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review 2012 Volume 1 – Major Issues (11 uses)
(52 uses of ensure in 153 pages: factor of 2.94)

- An enabling planning system requires the consideration of projects within reasonable and certain time frames, **certainty** of process, a whole of government approach to development that is state significant, and a hierarchy of plans that allow the NSW Government to ensure that planning decisions are made consistently and in the best interests of NSW (**NSW Minerals Council**) (32).

- The processes in any new planning system, particularly those for determination of project proposals, should be undertaken in a fashion that eliminates unnecessary delays and provides clarity and **certainty** of outcome to both the project proponents and the community within which the project is proposed to be located – whether or not the proposal is approved or is rejected (37).

- *The DAF stresses the need for planning systems to be underpinned by objective rules and tests against which applications can be transparently assessed and determined to offer **certainty** to proponents and the community generally* (Property Council of Australia) (60).

- Currently, the extent to which such proposed changes (relating to matters in section 79C of the Act) are taken into account is determined by considering the extent to which there is clarity or **certainty** of the terms of the proposed changes and the likely timeframe before they may be reasonably expected to come into effect. This is commonly known as the imminence and **certainty** test (76).

- This raises the issues of flexibility in assessing the merits of particular proposals versus the ability to predict outcomes with **certainty**, based on the relevant council's Development Control Plan's controls (78).

- *Standardisation of planning instruments will reduce subjectivity, assessment time and compliance costs, improve project affordability, increase investment **certainty** and reduce government implementation costs. It will also ensure that political influence is focused on the plan-making stages and not the assessment and determination process* (Urban Development Institute of Australia) (90).

- *The DAF stresses the need for planning systems to be underpinned by objective rules and tests against which applications can be transparently assessed and determined to offer **certainty** to proponents and the community generally* (Property Council of Australia) (93).

- *Appeal/review rights are necessary in a public law statute such as the Planning Act in order to ensure integrity**, certainty** and public confidence in the planning system There should be a correlation between an appeal right and the risk of a decision undermining the integrity**, certainty** and public confidence in the planning system* (NSW Division of the Planning Institute of Australia) (102).

- *A sound, accessible and user friendly on-line planning system will reduce conflict, provide* ***certainty*** *and reduce costs to developers through clear objectives and policies and through fewer community objections* (Spatial Industries Business Association) (123).

Implications
The majority of occasions on which certainty is used are direct quotations from submissions made to the review by interest groups mainly representing the development industry. It is assumed that the authors of the review accept the relevance of the statements made. One of these is repeated word-for-word under different headings in the document.

Definitions of what improvements are required and necessary to produce a more effective and efficient system reflecting the interests of the promoting groups (6 occasions).

Consideration of detailed issues needs to be consistent and any proposed changes and need to be brought into effect within a defined timeframe (1 occasion).

Appeal and review rights are necessary to achieve public confidence in the planning system (1 occasion).

G The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review 2012 Volume 2 – Minor Issues (1 use)
(38 uses of ensure in 145 pages: factor of 3.81)

- This change (restriction to minor changes) will address the valid concern that a small minority of certifiers permit variations that are otherwise impermissible. Restating the test in a more restricted fashion should provide greater **certainty** for ensuring compliance (128)**.**

Implications
Compliance issues need to be more effectively addressed.

H Green Paper: A New Planning System for NSW 2012 (34 uses)
(41 uses of ensure in 92 pages: factor of 2.24)

- Growth Infrastructure Plans will link strategic planning with infrastructure planning and provision, hence strengthening **certainty** and accountability for delivery (6).

- The new planning system will streamline the delivery of major infrastructure projects through a new process for Public Priority Infrastructure which will involve the community early in the planning process and providing upfront **certainty** that the project will proceed (6).

- Submissions called for an Act that is clearer and more user friendly, and which delivers **certainty** and transparency (14).

- *In order to improve awareness and transparency and **certainty** to the community and industry, consultation with the local community, stakeholders and industry should be conducted during the strategic planning and plan making stage with issues identified and resolved, including economic benefits, necessity and viability* (Urban Development Institute of Australia) (15).

- To meet these challenges the planning system will need to be [*inter alia*]: **certain** – provide predictability and **certainty** about how decisions are made for both investors and the community (17).

- The principles driving the reform of the NSW planning system are [*inter alia*]: robust and evidence based strategic planning will provide the foundation for **certainty** and integrity in decision making (18).

- The new strategic focus will mean more decisions regarding land use, zoning and development control will be made in the strategic stages of the planning process, improving transparency and **certainty** for proponents and the community (27).

- The key benefits of the new subregional planning approach is (sic) that the NSW government will work together with local councils to ensure that key strategic planning objectives and key local matters are reflected in statutory planning controls effective immediately upon approval of the Subregional Delivery Plans. This will provide greater **certainty** for the community and investors regarding how an area will grow over time (36).

- Notable reforms have included the introduction of a gateway process to improve upfront **certainty** regarding Local Environmental Plans preparation (sic) and amendment and the imposition of statutory timeframes (38).

- Suburban Character Zone to give greater **certainty** in areas where the local community want to preserve local character (42).

- There is a need for a new zone that gives greater **certainty** about what can and cannot be developed in an area the local community want to preserve because of the importance of the urban character (42).

- The process of identifying future urban release areas will also provide greater **certainty** for industry and the community about where growth is likely to occur (43).

- The introduction of a Suburban Character Zone can give greater **certainty** about what can and cannot be developed in an area that has been designated for preservation (43).

- *Development assessment should generally be led by strategic planning, not lead it. This creates **certainty** and consistency at the assessment stage for developers and communities* (Planning Institute of Australia) (45).

- The key ideas (for development assessment and compliance) are aimed at providing **certainty** and clarity to the system so that an applicant knows what the assessment path will be, what the requirements for lodgement and assessment will be and who will determine the application (45).

- *We need a system that allows State and local government the ability to plan ahead for their share of a larger Australia and a larger NSW and to be able to deliver on those plans. And we understand that constraining, or limiting politics, is important in providing this* ***certainty*** (Barry O'Farrell 2010) (48).

- At present, there are many layers in the development process. This process is unwieldy, extremely slow and costly and often does not lead to better outcomes. The many layers of assessment and determination are very confusing for the community and provide very little **certainty** for applicants (51).

- The CUB site is one of the most important urban renewal sites in Australia, yet has been frustrated by overlapping and duplicative assessment procedures, lack of cooperation between state and local government, and a lack of **certainty** of process and outcome for investors (54).

- The new planning system will align planning and infrastructure delivery to provide **certainty** to the community, development industry and infrastructure agencies (65).

- The major changes proposed to the planning system relating to infrastructure include: Growth Infrastructure Plans to link strategic planning with infrastructure planning and provision, hence strengthening **certainty** and accountability for delivery; and Public Priority Infrastructure to streamline assessment for major infrastructure delivery and provide upfront **certainty** accounting for increasing public private delivery models (65).

- The Growth Infrastructure Plan will provide a single, evidence based capital program facilitating private sector contestability and improving **certainty** and accountability for infrastructure delivery (69).

- Another key problem is one of information availability and **certainty** for the community, development industry and local councils, which has increased uncertainty for housing development (69).

- Developers, infrastructure agencies and councils need, and have sought, high quality, up to date information about planning status, progress with development activity and necessary infrastructure within a development area. This provides **certainty** and consistency and allows efficient planning, priority setting and infrastructure investment (69).

- The Growth Infrastructure Program will provide increased transparency about the growth infrastructure pipeline, allowing increased **certainty** for industry, councils, and the community (71).

- To address this issue (corridor reservation) corridors for major strategic infrastructure will be identified in regional strategic planning processes and reflected in the relevant spatial plans, in particular, Local Land Use Plans, to provide **certainly** for infrastructure development and mitigate risks of encroachment from incompatible development (71).

- The large number of policy changes (relating to development levies) may have reduced investment **certainty** (Independent Pricing and Regulatory Tribunal) (72).

- The current system does not fully account for private sector participation in the delivery of infrastructure as there is not (sic) up front **certainty** at the pre-tendering stage (77).

- The proposed new approach for Public Priority Infrastructure will provide for [*inter alia*] early **certainty** for the community, industry, planning, financing and land acquisition that the project will proceed (78).

- Public Priority Infrastructure will provide early **certainty** to the community and industry (78).

- Currently a project cannot be approved for delivery until all elements of the project's environmental impact assessment and management is resolved in fine detail. The new framework will provide for early **certainty**, community participation and private sector involvement throughout (79).

- It (PPI) will be aligned to existing government planning and treasury gateway processes and will be structured to provide greater **certainty** and clarity. Engagement will be commenced earlier and will be more focused to enhance project outcomes. This will result in a more inclusive approach that retains transparency, **certainty** and focuses on cost effectiveness (80).

- In addition, in order to avoid duplicative processes, the CEO's group would need to ensure all agencies interest (sic) and requirements are addressed at the relevant strategic level so as to prevent concurrence and referral at the development application stage and increase **certainty** (83).

Implications

Selective quotes from other sources are made to support the contentions advanced in the document. These are based on material from submissions to the earlier review with one from a speech by the previous State Premier which claims that the constraint of politics will assist the creation of certainty (4 occasions).

The deficiencies of the existing system do not supply the necessary level of certainty (9 occasions).

The new planning system will need to display characteristics of clarity, transparency, and predictability using robust and evidence-based procedures (3 occasions).

Procedures to be introduced will create or improve existing certainty (18 occasions).

New procedures to be introduced are justified on the basis of the certainty generated by the improvements claimed (4 occasions).

I Green Paper: A New Planning System for NSW Feedback Summary (9 uses)
(59 uses of ensure in 52 pages: factor of 0.88)

- The LGSA submission noted that councils have invested considerable time and resources in developing their standard template LEPs, and want to have **certainty** that the move to the new land use plans will recognise the work and validate the content of existing LEPs;……(19).

- AMP argued Enterprise Zones could only possibly apply within existing or planned centres and to promote otherwise would put the integrity of the system and investment confidence and **certainty** at risk (21).

- The LGSA does not support the power of the Director General to support a rezoning via Strategic Compatibility Certificate or the role of the JRPP to override zonings and development standards and warns against establishing numerous opportunities to overturn local plans that will undermine confidence and **certainty** in the strategy planning framework (25).

- Santos generally supports the proposed initiatives to improve the state significant development framework as it argues that it is critical that these projects, which contribute demonstrable economic, social and environmental benefits, are dealt with in an efficient and effective manner under a framework which promotes investment **certainty** for NSW (26).

- Many submissions also addressed the need for **certainty** and confidence during the transitional period (41).

- We urge the government to implement appropriate transitional provisions to guarantee investment **certainty** (41).

- It is essential that investment **certainty** and confidence be maintained during this process by ensuring an operational system and equally that this transition phase is not overly protracted (41).

- Overall support for **certainty**, transparency and simplicity as essential components to deliver an efficient and viable planning system (53).

- Support for the strategic planning focus as it means more decisions regarding land use, zoning and development control affecting the various business sectors will be made in the strategic stages of the planning process, improving transparency and **certainty** for proponents and the community (53).

Implications
Overall an emphasis on the requirements of business relating to something now called investment certainty which has become closely associated with the notion of confidence, seemingly of considerable significance to business interests (4 occasions).

J White Paper: A New Planning System for NSW 2013 (**29 uses**)
(92 uses of ensure in 209 pages: factor of 2.27)

- The reforms enable a shift to early community engagement in setting the ground rules when plans are being made and a strategic planning approach based on evidence and research to provide greater **certainty** to all participants (13).

- The transitional arrangements will provide all users of the planning system with the confidence and **certainty** to continue with their investment in New South Wales (20).

- More effort will be directed at agreeing on the big picture upfront, about how an area will change or grow over time, and developing Regional, Subregional and Local Plans that will provide sound guidance and greater **certainty** for government. Industry and the community (26).

- New tools for rezoning will now be available and will directly translate to Local Plans. This will unblock housing and employment supply in the areas where it is most needed. Strategic plans will drive greater **certainty** and predictability for assessing future developments and planning for national, state and local infrastructure (26).

- New merit assessment processes will benefit from greater **certainty** about what needs to be considered. This will speed up processes and provide greater predictability for planning and delivery of major projects (27).

- Less red tape will make it easier to do business because of a strong strategic context with consistent planning policies and plans will provide **certainty** for the community and business (29).

- The direction set in Chapter 5 Strategic Planning Framework outlines the hierarchy of strategic plans within the new planning system. This explains how each level feeds down to the lower levels and then supports the delivery of development outcomes that will in turn provide **certainty** and direction (38).

- The **certainty** to know they are working with relevant and community aligned planning policies will enable a culture of planners who are accountable to their communities for the decisions they make and how they consult with the communities they are planning for (38).

- The crucial part of developing ePlanning services will be to provide legal **certainty** for these planning services (56).

- Robust strategic planning will mean that development that is consistent with the strategy of an area will be subject to streamlined assessment. This should improve confidence and **certainty** in planning in New South Wales, enabling development in areas suitable for development while protecting those which are not (61).

- The Gateway acts as an early checkpoint to ensure that proposals are justified and consistent with agreed policies, and provides upfront **certainty** that outcomes can be achieved (66).

- These plans (Subregional Delivery Plans) will identify key precincts and sites of interest to the state and region for direct rezoning to achieve the vision and policies set in Regional Growth Plans. This process also involves setting mandatory development parameters to shape subsequent development, including building envelopes and identifying exempt, complying and code assessable development for the precinct within the subregion. This new mechanism will result in substantial cost and time savings, increase **certainty** for businesses and the community and unlock housing and employment supply in areas where it is most needed (81).

- These transitional arrangements will provide all users of the planning system with the confidence and **certainty** to continue with their investment in New South Wales (92).

- The purpose of form based codes is to realise the vision for an area with greater **certainty** (99).

- The community, business and industry will benefit from this approach (removal of unnecessary referrals, concurrences and other planning related approvals) because of increased **certainty** and predictability on the matters to be addressed and information sought (106).

- More upfront information will provide greater **certainty** to industry and the community (108).

- This (performance based development assessment) will make for a simpler system and provide predictability and **certainty**, generating savings to the community and business estimated at some $174 million per year (114).

- Encouraging predictable and speedy assessments by encouraging (sic) **certainty** across NSW by applying clear and consistent criteria throughout the state (119).

- By its very nature.....complying development can be inflexible. Quite minor variations shift otherwise suitable proposals into longer and more complex assessment tracks, often resulting in less **certainty** and greater delay (128).

- This (complying development) is a win-win for industry and communities. Industry gets greater **certainty** that if it designs development to meet community expectations it will be approved through a quicker and more straightforward assessment. Communities, on the other hand, have the **certainty** that they will get the type of development they sought as part of the strategic development process (131).

- However, industry can still proposed innovative solutions to meet the agreed performance criteria with **certainty** that the other aspects of the development that meet the acceptable solutions are not revisited in the assessment (132).

- To provide **certainty** to assessment authorities and communities, where an applicant fails to provide additional information within 120 days, the application will be taken to have lapsed (141).

- This important change (introduction of Growth Infrastructure Plans) will strengthen budget decisions for prioritising infrastructure funding and lead to greater **certainty** for the community and the private sector in relation to infrastructure delivery (157).

- It (the new infrastructure contribution system) will mean that, through standardisation, there will be increased **certainty** and consistency on contribution amounts and what infrastructure will be delivered for growing communities (163).

- The Contributions Taskforce will refine the list of essential local infrastructure to provide **certainty**. IPART will benchmark the costs of infrastructure on the essential list (165).

- Planning approvals will be released more quickly and will be less costly. There will be greater **certainty** and less duplication of responsibilities (186).

- Consistent development consent conditions across the state will enable better compliance with conditions, faster determination of development proposals and **certainty** in the matters that need to be satisfied (187).

- To improve compliance **certainty** and flexibility……..(188).

- There is limited **certainty** for owners and occupiers, the builder, certifying authorities, the consent authority, financiers or conveyancers as to whether an occupation certificate can be issued (196).

Implications

The deficiencies of the existing system do not supply the necessary level of certainty (2 occasions).

Procedures to be introduced will create or improve existing certainty (17 occasions).

New procedures to be introduced are justified on the basis of the certainty generated by the improvements claimed (10 occasions).

K White Paper Feedback Report 2013 (4 uses)

(23 uses of ensure in 26 pages: factor of 1.13)

- Everyone will have a say, there will be greater **certainty** in the planning process and power is being returned to local communities to set the ground rules and vision for future developers in their area (5).

- This (extension of the time period to spend the revenue collected from local infrastructure contributions) will improve **certainty** and transparency and **ensure** infrastructure is delivered to growing communities in a timely manner (27).

- It is intended that the transitional arrangements will provide all users of the planning system with the confidence and **certainty** to continue with their investment in the State (31).

- The key aim of the savings and transitional provisions is to provide **certainty** for all users of the planning system and minimise any additional costs to users of the system that flow from the change in legislation (32).

Implications
Even the summary of the responses to the White Paper (just under 5,000) cannot resist a rhetorical attempt at justification which is repeated as a key contention for the planning changes in much of the promotional material. It is, of course not true that everyone will have their say (one occasion).

The amendments introduced to the bill will produce the certainty as originally claimed (2 occasions)

NSW Department of Planning (and Infrastructure) Annual Reports 2005-2006 to 2012-2013

L ***2005-2006*** (**4 uses**)
(24 uses of ensure in 42 pages; factor of 1.75). Appendices and Financials excluded in all cases.

- This (the Metropolitan Strategy) will provide longer term **certainty** for development decisions and infrastructure investment (14).
- The development of regional strategies will deliver significant planning, economic and environmental benefits. These include increasing **certainty** for the development industry and investors in the regions (16).
- The concept plan approval provides long-term planning **certainty** for the major urban renewal site (28).
- This (the LEP Review Panel) provides **certainty** for investors at an early stage of the process (31).

M ***2006-2007*** (**4 uses**)
(31 uses of ensure in 61 pages: factor of 1.97)

- Relationship with the State Plan will provide stakeholder **certainty** through a targeted and streamlined assessment process for major projects (30)
- Case Study – the concept plan provided a broad overview of the site's development. The Minister's approval offered planning **certainty** for the developer (36).
- Challenges and resolutions – the Adaptive Reuse Guideline – celebrate recent achievements through case studies and promote **certainty** and consistency in the development approvals process (38).
- *Ad hoc* spot rezonings are expensive to assess and crowd the planning system with multiple planning policy documents for any local area, reducing **certainty** and consistency for community and developers (39)

N ***2007-2008*** (**2 uses**)
(29 uses of ensure in 87 pages: factor of 3.00)

- The PEP panel continues to deliver substantial benefits in terms of upfront **certainty** in the LEP rezoning process. During the year, the panel made 230 decisions on LEPs (11).

- Critical infrastructure declarations – provisions…..provide **certainty** in the delivery of these projects (44).

O ***2008-2009*** (**7 uses**)
(34 uses of ensure in 112 pages: factor of 3.29)

- Minister's Foreword – Transparency, Efficiency, **Certainty**. Decisions at the most appropriate level. Creating Australia's best planning system (1).

- **…..**the NSW government took strong steps to use one of the most effective tools at our disposal to stimulate jobs and economic investment; an efficient and transparent planning system, providing **certainty** and delivering decisions at the most appropriate level (1)

- Furthermore planning must be able to provide long-term **certainty** to **ensure** our cities and regions grow in an orderly and sustainable way (3).

- **Certainty** in decision-making – the Department worked during 2008-09 to improve certainty in decision-making, to **ensure** the planning process is clear and key issues are resolved as soon as practicable (23).

- Concerns were raised during 2008-09 regarding consistency and **certainty** in the way such contributions (developer) were being levied (25).

- …..was largely due to an increased focus by the Minister and the Department to determine existing proposals in a timely manner and to secure investment **certainty** during a period of economic uncertainty (31).

P ***2009-2010*** (**13 uses**)
(52 uses of ensure in 190 pages: factor of 3.65)

- Minister's Foreword – Transparency, Efficiency, **Certainty**. Decisions at the most appropriate level. Creating Australia's best planning system (1) - same as the previous year.

- Introduced the new Gateway local plan-making system which has brought greater rigour and **certainty** to the creation of new LEPs (5).

- Introduced the new Gateway local plan-making system which has helped bring greater rigour and upfront **certainty** to the creation of new LEPs, while at the same time driving down processing times (5).

- The Department has done a lot to simplify the planning system and provide greater **certainty** in delivering important outcomes for NSW (5).

- During 2009-10, the Department continued to implement improvements to the NSW planning system to streamline and strengthen decision-making and consultation, increase efficiency and improve **certainty** and confidence (13).

- This (activity centres policy) can bring significant benefits in urban growth together with more **certainty** for public and private investment (14).

- Extending the lapsing period saves time and money and provides greater **certainty** (subheading) (16)

- The extension of the lapsing period provides more **certainty** for industry and families in the current economic climate (16).

- In the best planning system in Australia, decisions are transparent, efficient, provide **certainty** and are made at their most appropriate level. The system must also be accessible so people can easily understand how to use it (slogan heading) (16).

- Within their regions the panels also provide consistent decision-making across council areas, combining state expertise with local knowledge, managing the assessment process to reduce delays and providing greater **certainty**, clarity and transparency (19).

- (Exempt and complying codes) contribute to jobs and economic growth by ensuring **certainty** of outcome and shortening development determination times for homeowners, industry and small business owners (21).

- The overarching principles for expansion (the codes) continue to bring **certainty** for home and business owners, timelines with recommended 10-day approval times for complying development certificates, simplicity in the application process, consistency across the state and cost savings to improve housing affordability and support business (21).

- The government introduced performance benchmarks for processing major project applications under Part 3A of the EP&A Act in February 2009. These aim to speed up planning assessments to drive investment, support job creation and provide **certainty** for business (27).

Q ***2010-2011*** (**3 uses**)
(31 uses of ensure in 192 pages: factor of 6.19)

- Performance benchmarks were introduced for processing major project applications in February 2009 to speed up planning assessments, drive investment, support job creation and provide **certainty** for business (37).

- The changes (small-scale wind and solar energy systems) to the state planning policy for infrastructure cut red tape and provided increased **certainty** and consistency but also protects neighbourhood amenity (54).

- Another significant challenge was to implement the Commonwealth Premises Standards within the NSW planning and certification systems to **ensure** the objectives of the standards (equitable access to buildings for people with a disability and **certainty** for building developers, managers and certifiers) were achieved (70).

R ***2011-2012*** (**3 uses**)
(23 uses of ensure in 208 pages: factor of 9.04)

- Case Study, Jerberra Estate. The rezoning will also provide significant social and economic benefits including the provision of **certainty** for landowners and the broader community on the future uses of the lands and resolution of the status of numerous unauthorised structures (17).

- New council-wide LEPs were approved for Gundagai, Boorowa and Bombala, which create greater **certainty** for these council areas and update and modernise their planning controls (20).

- The department has an important role undertaking medium and long-term planning for our cities and regions. This planning creates **certainty** for investors and the community about where new development will be supported and how infrastructure will support this growth (54).

S ***2012-2013*** (**2 uses**)
(38 uses of ensure in 187 pages: factor of 4.92)

- The new system will be easier to understand and will provide **certainty** for all users of the system, whether they be major investors or families undertaking home renovation (9).

- The new planning system will see a shift to a performance based system for development assessments that will be more easy-to-use (sic) and transparent while providing **certainty** for everyday applications such as family homes, extensions and small businesses (11).

Implications
As might be expected for documents intended to present the activities of the Department in the best possible light, each of these statements constitutes a claim for improvement over previous efforts or that the changes implemented or being considered will bring about future improvement.

Appendix B Recommendations of the Independent Panel omitted from the Green and White papers

This appendix lists those recommendations of the Independent Panel undertaking the Planning Review which were not included in either the Green or White papers which provided the basis for the draft Planning Bills. The number in brackets denotes the location in the respective reports of each of the provisions subsequently rejected.

The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review Volume 1 – Main Issues (**NSW Government 2012b**)

- The title of the proposed legislation is the *Sustainable Planning Act* (6).
- A Planning Advisory Board would be set up to oversee the planning process (43, 136).
- A Planning Commission would deal with all major and/or controversial developments (63, 120). This would replace the existing PAC and its role and powers would be expanded taking over those currently undertaken by the PAC under delegation from the Minister but acting independently of the Department preferably under its own legislation (the Planning Commission Act) providing greater transparency and accountability.
- A Public Benefit Test would be established as part of the assessment process (83).
- The right of elected councillors to make decisions in determination of development would be maintained (93). The concept of decision-making by independent panels is supported but should not be mandatory.
- Independent process for State Significant Development should be established (95).

Volume 2 – Other Issues

- Statutory provision would be made available permitting a consent authority to impose a development consent founded on the public interest even without an immediate nexus or connection with the proposed development (16, 79).
- Reasons would need to be given for all decisions and made public (35).
- The roles of the Minister, Director-General and the Department would require changes resulting from the introduction of the Planning Commission (41). While many of the existing responsibilities would remain, the Minister would not make decisions about whether any project should be approved, with the exception of those projects declared by the Minister to be State Significant Infrastructure. Decision making at the State level would be undertaken by the Planning Commission. The Minister's existing powers to intervene, generally, in the planning powers of a council would remain (42).
- The restoration of public confidence in the planning system is considered to be a key aim implemented by responding to specific ICAC recommendations to the Planning Review. These include ensuring that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective (59).

- Third party appeal rights would be available for any objector who can demonstrate a direct adverse effect by the granting of a dispensation from an existing development standard (66).
- Alternative decision-making and community consultation processes would be available if so required (67).
- Strategic planning together with the development of Local Land Use Plans and Development Control Plans is to be a bottom-up process (74).
- Public interest should not be confined by close definition (80).
- Preamble to the Act would contain a definition of sustainable development. This would be essentially the same as that in the *Protection of the Environment Operations Act 1995* (81, 98).
- Consistency would be removed as a design criterion in assessments (100).

Appendix C New provisions extending the administrative discretion available to the Minister for Planning included in the Planning Bill 2013

> *The Minister has very wide discretion to amend local plans by an instrument published on the NSW legislation website. This very wide discretion allows the Minister to by-pass procedural requirements including requirements for community participation.*
> (The Law Society of NSW 2013, 6)

The following provisions are included in the draft Bill.

Ministerial discretion

Part 3 Strategic planning

Division 3.2 NSW Planning policies, regional growth plans and subregional delivery plans

Section 3.7(2)	The Minister may make a NSW planning policy, regional growth plan or subregional delivery plan as submitted or with such modifications as the Minister considers appropriate.

Division 3.3 Local plans – general

Section 3.12(1)	The Minister may amend or replace provisions of local plans.
Section 3.13(4)	The Minister may make modifications as he/she considers appropriate to a local plan submitted to the Minister.
Section 3.14	The Minister may amend or replace any provisions of a local plan without compliance with the requirements of the planning legislation relating to the conditions precedent to doing so in order to deal with matters that give effect to strategic plans or infrastructure plans that are of State, regional or sub-regional significance or to rezone land or make other changes (sub clause (e)).

Division 3.4 Local plans – planning control provisions

Section 3.21(4)	The Minister may, at any time, alter a gateway determination.
Section 3.24(1)	The Minister may make planning control provisions of a local plan in terms the Minister considers are appropriate.

Part 4 Determination (other than infrastructure), assessment and consent

Division 4.4 Code and merit assessment

Section 4.20(3)	Subsection (2) requiring a consent authority to not determine an EIS assessment application if submissions had been made during the period of public exhibition, until the expiry of the period of 21 days following the date on which copy of submissions is forwarded to the Director-General, does not apply if the consent authority is the Minister or the Director-General.

Division 4.6 State significant development – additional provisions

Section 4.29(3)	Any development for which consent is granted (or purports to be granted) by the Minister as State significant development is taken to be State significant development, and to have been such development for the purposes of any application or other matter under this Part in relation to the development.
Section 4.30(4)	Development consent may be granted for State significant development despite the development being partly prohibited by the planning control provisions of the local plan.
Section 4.30(6)	The Minister may also grant development consent for State significant development with such modifications of the proposed development as the Minister may determine.
Section 4.30(7)	The Minister may impose such conditions on the State significant development as the Minister determines despite any restriction in this Part on the kinds of conditions that may be imposed.

Part 5 Infrastructure and environmental impact assessment

Division 5.2 State infrastructure development

Section 5.16(3)	State infrastructure development may be approved under this Division with such modifications of the development or on such conditions as the Minister may determine.

Division 5.3 Public priority infrastructure

Section 5.25(2)	The Minister may, by an instrument published on the NSW legislation website, make or amend the planning control provisions of a local plan so that the local plan reflects the land use authorised by this section or to change land use and development controls for land in the vicinity.

Part 6 Concurrences, consultation and other legislative approvals

Division 6.2 Concurrences, consultation and other legislative approvals – general provisions

Section 6.9	The Minister may amend a local plan for the purpose of removing consultation concurrence and other legislative provisions for the purpose of facilitating the carrying out of any particular development or any particular kind of development to remove the requirement for consultation or concurrence.

Part 7 Infrastructure and other contributions

Division 7.5 Planning agreements

Section 7.35 (i)	The Minister may determine: (a) the procedures to be followed in negotiating a planning agreement, or (b) the publication of those procedures, or (c) other standard requirements with respect to planning agreements.

Ancillary provisions

Clause 10.39	Enforcement by order of the Court. The effect of this provision is to fetter the discretion of the Court.
Clause 11.1	Regulations – miscellaneous Regulations may be made, in particular, for or with respect to the following: (a) exempting specified or classes or persons, premises or other matters from any specified provision of the planning legislation; (b) any function conferred by the planning legislation on any person.

Appendix D: Final ethics approval

MACQUARIE UNIVERSITY

DAVID FINGLAND <david.fingland@students.mq.edu.au>

Final Approval- Ethics application reference-5201100497

1 message

Ethics Secretariat <ethics.secretariat@mq.edu.au> **Wed, Jun 8, 2011 at 12:27 PM**
To: kristian.ruming@mq.edu.au
Cc: david.fingland@students.mq.edu.au

Dear Dr Ruming

Re: "Discretion and the Role of Certainity in Land Use Planning" (Ref: 5201100497)

The above application was reviewed by the Human Research Ethics Committee. Final Approval of the above application is granted, effective 08 June 2011, and you may now commence your research. This approval is subject to the below mentioned condition:

1. Please inform your Supervisor of the location of the interviews (if in participants' homes) and also carry a mobile phone.

The following personnel are authorised to conduct this research:

Dr Kristian Ruming- Chief Investigator/Supervisor
Mr David Fingland- Co-Investigator

NB. STUDENTS: IT IS YOUR RESPONSIBILITY TO KEEP A COPY OF THIS APPROVAL EMAIL TO SUBMIT WITH YOUR THESIS.

Please note the following standard requirements of approval:

1. The approval of this project is conditional upon your continuing compliance with the National Statement on Ethical Conduct in Human Research (2007).

2. Approval will be for a period of five (5) years subject to the provision of annual reports. Your first progress report is due on 08 June 2012.

If you complete the work earlier than you had planned you must submit a Final Report as soon as the work is completed. If the project has been discontinued or not commenced for any reason, you are also required to submit a Final Report for the project.

Progress reports and Final Reports are available at the following website:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms

3. If the project has run for more than five (5) years you cannot renew approval for the project. You will need to complete and submit a Final Report and submit a new application for the project. (The five year limit on renewal of approvals allows the Committee to fully re-review research in an environment where legislation, guidelines and requirements are continually changing, for example, new child protection and privacy laws).

4. All amendments to the project must be reviewed and approved by the Committee before implementation. Please complete and submit a Request for Amendment Form available at the following website:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms

5. Please notify the Committee immediately in the event of any adverse effects on participants or of any unforeseen events that affect the continued ethical acceptability of the project.

6. At all times you are responsible for the ethical conduct of your research in accordance with the guidelines established by the University. This information is available at the following websites:

http://www.mq.edu.au/policy/

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/policy

If you will be applying for or have applied for internal or external funding for the above project it is your responsibility to provide the Macquarie University's Research Grants Management Assistant with a copy of this email as soon as possible. Internal and External funding agencies will not be informed that you have final approval for your project and funds will not be released until the Research Grants Management Assistant has received a copy of this email.

If you need to provide a hard copy letter of Final Approval to an external organisation as evidence that you have Final Approval, please do not hesitate to contact the Ethics Secretariat at the address below.

Please retain a copy of this email as this is your official notification of final ethics approval.

Yours sincerely
Dr Karolyn White
Director of Research Ethics
Chair, Human Research Ethics Committee