An Overview of the Coastal Management in the Planning System of New South Wales (NSW), Australia, at the Local Government Level: Is an Environmental Statutory Shift in Planning Law Overdue?

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This paper follows how local governance in New South Wales (NSW), Australia, has dealt with land-use control in protecting – or ignoring – a fragile coastline. By looking throughout the history from colonialism to modern-day local government, and the emergence of 'local environmentalism' and 'ecological sustainable development', it raises issues concerning the position of local councils in battling coastal erosion and related concerns. While many councils now have solid expertise in this area, there is need for a more regional approach and re-checking poor decisions. Nevertheless, local government is the key statutory authority here being located at the environmental forefront.

Keywords: *Coastal management, planning, zoning, history, expanding townships, New South Wales, Australia.*

BACKGROUND TO COASTAL DEVELOPMENT REGULATION

In exploring coastal management, this paper focuses on New South Wales (NSW), the most highly populated of Australia's six states. It is where Great Britain first settled Sydney Cove as a penal colony. The township of Sydney eventually became Australia's most densely occupied city. It was to expand not only alongside subsequent transport lines but also nearby the harbour and beaches. Being on the coast, or more precisely within a drowned river valley, Sydney initially did not attract appreciation of its spectacular landscape. Powell (1976, 14) refers to the 'massive monotony' of 'coastal districts' derided by early settlers. Throughout the continent, coastal landscapes were granted official names such as Cape Desolation, Cape Catastrophe and Desperation Bay. The visual perspective was tainted by fear rather than enjoyment.

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Retaining coastal beauty was scarcely an issue for the British settlers. Upon commencement of a starving prison settlement in 1788, interest was directed to more fertile land to feed the colony. Parramatta, now Sydney's second commercial centre at about sixteen miles west from Sydney Cove, attracted attention and became 'the first planned town in Australia' (Jervis, 1956, 11). In the early 1800s, free settlement arose along the North Western edge of the Sydney Basin for agricultural purposes along the Nepean/Hawkesbury River (Powell, 2000). Food was also forwarded from penal Van Diemen's Land (later Tasmania), colonised in 1803 and part of NSW until 1825. Outside Sydney, significant rural towns arose which became municipal centres, including Port Macquarie at the mouth of the Hastings River on the NSW mid-north coast, also a penal settlement (Wright, 2011; Proudfoot, 2000). By that stage, coastlines were mainly known for whaling and shipwrecks. Of course, perspectives over 200 years have changed radically. Port Macquarie is now a popular hub for tourists and new residents seeking the sun.

NSW was to move beyond its 'colonial vision' to 'national' development after Federation in 1901 (Heathcote, 1972, 88, 91; see also Frawley, 1994), when Australian colonies became states. Economic prosperity depended on farming and agriculture to feed a growing population. Parallel to the NSW coastline, major towns – which are now the headquarters of local councils such as Grafton, Taree, Nowra and Bega – were located upon coastal rivers but several miles from the sea. The rivers provided navigation to serve the new inhabitants by taking their farming produce to Sydney. Seaside villages and hamlets were also established based on fishing and holiday shacks on sandy soils. Stories prevail of allotments being cheap to purchase or prizes in hotel raffles. This situation scarcely exists today. The inland 'central' townships, however, have tended to diminish economically especially due to highway bypasses and loss of agricultural demands. On the other hand, coastal villages have grown substantially into 'sea change' townships (Green, 2010; Burnsley and Murphy, 2004). They are becoming not only enclaves for retired (or overtired) citizens who have fled the metropolis but more recently younger people looking for cheaper housing and improved lifestyles (Stokes, 2008).

A ready example is the Shoalhaven local government area which is only about 160 kilometres south of Sydney. The Council boasts its area as 'blessed with perhaps the most scenically beautiful landscapes on the east coast of Australia'.[1] The State Government refers to 'a majestic stretch of coastline endowed with beaches, bays, interesting country towns, great food and wine and many natural attractions'.[2] The key European settler was Alexander Berry, a wealthy landholder and member of the then unicameral NSW Legislative Council who used convict and freehold labour to serve his sweeping estate (Bridges, 1992; Larcombe, 1976; Wilcox, 1967). Perhaps less well known is Berry's severe antagonism towards local government, especially its own property tax. For most current citizens he is remembered by the picturesque inland Shoalhaven township of 'Berry', popular with tourists and day-trippers seeking gifts and cappuccinos. In contrast, its much larger sibling – i.e. Nowra - appears

down at heal with a bleak central townscape (Stetner-Houweling *et al*, 2000, 244). Agriculture has diminished while manufacture is falling away. Burnsley and Murphy (2004) point to the high level of youth unemployment in Shoalhaven with special issues relating to indigenous Australians (Elliott-Farrelly, 2005; Capp *et al*, 2001). Notwithstanding this, there are now expanding seaside townships in Shoalhaven, such as Mollymook and Culburra Beach, and within other local government areas. This prods the question of how the planning system is dealing with controversial matters affecting the coastline such as erosion and rising sea levels as a result of global warming.

THE EARLY NSW PLANNING SYSTEM

The Australian planning systems – i.e. within each of the State jurisdictions - derive directly from the UK. They are based on restriction of land-uses under delineated zones. The first British effort was the *Housing, Town Planning, etc Act 1909* which, despite its limitations and emphasis on housing (Booth and Huxley, 2012; Herbert-Young, 1988; Sutcliffe, 1988), introduced a heavy emphasis on the intangible notion of enhancing amenity (Kelly and Little, 2011; Smith, 1974; Minister of Local Government and Planning to Parliament by Command of His Majesty, 1951). The Bill was presented by the President of the Local Government Board, who promised an urban landscape of, inter alia, 'the town pleasant, the city dignified and the suburb salubrious'.[3] The focus was on cities and townships rather than coastal land. The 1909 Act led to a series of statutes until the *Town and Country Planning Act 1932*, which Australian jurisdictions virtually copied (Fogg, 1985; Colmon, 1971). The chief aim was to separate conflicting land-uses, such as heavy industry from urban residential areas. Although the British system was to undergo substantial change in 1947, Australian Parliaments remained steadfast in adhering to the previous strict chess board zoning patterns (Ledgar, 1976). The ongoing emphasis has been on granting permission to non-prohibited proposals with minimal attention to ongoing management and land beyond the development site.

At that stage, planning in the UK centred upon urban improvement and expansion, limiting regulation of rural areas for aesthetics purposes, preventing erratic building outside townships and avoiding ribbon development along country roads (Green, 1971). Otherwise, planners paid marginal attention to the use of rural lands, including coastal landscapes other than ports, promenades and the spectacular. By the 1960s, most rural areas were officially featured as uncoloured 'white lands' with scant planning mechanisms (Green, 1971). As late as 1981, Ratcliffe (1981, 277) pointed out that UK rural planning 'remained a much neglected aspect'. NSW was to follow this 'hands-off' approach without question.

Even though Australia's planning frameworks have since become more sophisticated, they still rely on the fundamental zoning tool to separate out incompatible

land-uses. Apart from the primitive residential proclamation districts that emerged in 1919 (Proudfoot, 1992; Wilcox, 1967), NSW had to wait until 1945 when Part XIIA was inserted into the *Local Government Act 1919* (NSW) (LG Act 1919), with the British names of 'Planning Scheme Ordinances' (PSOs) and Interim Development Orders (IDOs). Municipal interest, however, was generally slow. When PSOs were being prepared or ignored, standardised IDOs were launched by the Minister. For instance, Shoalhaven Shire accepted its first IDO in 1964 while Eurobodalla Shire to the south had to wait until 1966 (NSW Planning & Environment Commission, 1975/1976). Whilst amendments were made to both instruments, full revision of Eurobodalla IDO was delayed until 1976 due to numerous objections (NSW Planning & Environment Commission, 1975/1976; NSW Planning & Environment Commission, 1976/1977). But there was negligible attention to the speciality of coastal lands in either of these plans and others along the coast until a push for rural councils by the State Government during the late 1970s.

It took until 1976 when the then planning agency, the NSW Planning and Environment Commission, introduced a policy for rezoning 'non-urban' lands. The previous emphasis was on urban and township lands with an 'absence of any stated overall policy' across 'left over' land under PSOs and IDOs (NSW Planning and Environment Commission, 1976, 1-2). A new Circular distributed to all councils demanded a fresh series of zones, including a variety of 'Rural' and 'Rural 1 and Rural Environmental Protection 7' zones. While none of these related to coastlines in a broader sense, the document enabled designation of lands for, *inter alia*, Rural Environmental Protection 'Wetlands', 'Estuarine Wetlands', 'Escarpment' and 'Foreshore Protection'. The latter related 'particularly to the coastline, associated dune formation and headland' with the NSW coast seen as 'one of our most significant assets' (NSW Planning and Environment Commission, 1976, 7). This raises questions on the extent to which the policy was followed. It appears that its muscle was dissipated as interested councils devised their own PSOs to encourage coastal development. Arguably, the policy's heaviest impact was on council owned or other public lands under council management (now called 'community lands'[4]). This was convenient to private landholders. As a result, wider environmental conservation potential arose only if a council was brave and wealthy enough to rezone privately owned land. In many cases, however, councils defied this. Rural zones became rebadged for coastal urban or village uses leading to potential ecological damage. This meant that development often occurred at the expense of environmental conservation (Gleeson, 1998, 6; see also Stein, 1988).

ARRIVAL OF SPECIALIST ENVIRONMENTAL LAW

When the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) replaced Part XIIA LG Act 1919 (which was later overhauled by the *Local Government Act 1993* (NSW), it was a landmark statute at that time. It still exists. The EPA Act was a direct result of the wider modern environmentalism movement, or Heathcote's 'ecological vision' (Heathcote, 1972, 95; see also Frawley, 1994). It related to various environmental movements relating to, for example, conserving local landscapes. A crucial historical ingredient was the pivotal 'Green Ban' pressure group (see Sandercock, 1978; Jakubowicz, 1984; Roddewig, 1978). It can be argued, however, that the emphasis was on *urban* aspects of the environment supported by a middle class citizenry. Argument for conserving the *natural* environment arose in limited circumstances.

Some councils were nevertheless keen to protect their coastlines. Their reasons were not totally based on conserving headlands and beaches for recreational and scenic protection; some councils north of Sydney such as Gosford and Byron Bay had already experienced severe coastal property damage via storm surges. The 'Rural Environmental Protection 7' zones, mentioned earlier, were often revised to reflect growing awareness of coastal damage together with a gradual emergence of municipal environmental scientists or broad minded planners and engineers who sought to enter the conservation sphere. This is demonstrated by Knox and Francis (1997) in their study of environmental protection zones within four council areas, namely – running north to south – Byron, Tweed, Eurobodalla and Bega Valley. Their study revealed a degree of flexibility between the provisions, unlike today as will be observed.

Both the terminology and provisions of the new EPA Act pushed for environmental protection including patches of land along the coast. Certain State Environmental Planning Policies (SEPPs) – i.e. statutory instruments dealing with matters of state or regional significance – served to conserve certain mapped areas, namely SEPP no 14 - Coastal Wetlands gazetted in 1985 and SEPP no 26 – Littoral Rainforest introduced in 1988. A crucial element of these particular regulatory SEPPs is that they were introduced overnight without any opportunity for private landholders to object. An interesting judgement regarding SEPP 14 was made in 1990 by the Land and Environment Court (LEC) in *Myall Koala and Environment Support Group v Great Lakes Shire Council* (unreported, LEC, 17 Oct 1990) (see Simington, 2011; Pearson, 1994). This was a rare situation where a third party could challenge the decision on its merits due to provisions in the particular SEPP. The local community group was successful for various reasons including the discordance between building a boat ramp, including major loss of vegetation, and failure to meet the aims of SEPP no 14. The author, who served as an expert witness in the case, recalls the Council's disappointment in failing to serve both local fisherfolk and visitors. In contrast, other members of the community had sought to stop the destruction of coastal vegetation and save a colony of koalas. Another interesting point is that the

specialist LEC, dealing with limited merits appeals and broad judicial review powers, was another product of modern environmentalism established under the *Land and Environment Court Act 1979* (NSW).

In addition to the above, another 'environmental' statute was the *Coastal Protection Act 1979* (NSW), which added an additional regulatory tool within the 'coastal zone'. This was a response to visible and predicted coastal erosion. Yet two immediate issues are worthy of note (Simington, 2011). Firstly, the area it covers is geographically limited, being originally restricted to one kilometre inland from the coast in addition to, for example, estuaries, lagoons and the blurred edge of coastal rivers. This has since been extended to three kilometres. Secondly, at a broader level, more attention must be paid to integration between agencies and ongoing 'management efforts' (Ransom, 1987, 21). A good example in Sydney is the work of the Sydney Coastal Council Group, which not only aims to improve integration between Sydney's coastal councils but serves as an advocate for coastal management.[5]

AUSTRALIA CONFRONTING SUSTAINABILITY

In 1993, Beder pinpointed to 'Ecological Sustainable Development' (ESD) as the second wave of modern environmentalism in Australia. The nation's injection of 'ecological' into ESD was somewhat unique (Harding, 1998). The notion was a direct product of the UN Convention on Biological Convention made at the 1992 Rio Earth Summit (UNCED).[6] Another significant instrument was the 'UN Framework on Climate Change' which promoted debate on, *inter alia*, coastal damage. In addition, two further global agreements included the 'Rio Declaration on Environment and Development' and 'Agenda 21'. Of particular interest for local government was clause 28.1 of Agenda 21, which enlivened local governance to uphold sustainability. It referred to promoting actions under the umbrella of 'Local Agenda 21' (see cl 28.2). Of course, local government itself was not a party to any of these instruments. Indeed, it has generally been identified as a latecomer in following and implementing sustainability (Otto-Zimmerman, 1994; see also Voisey et al, 1996). These instruments are scarcely binding on local government. The same situation relates to the Kyoto Protocol. Instead, local governance has had to rely on tightly interpreted legislation, eager individual councils, enthusiastic communities and individual champions to demand improved environmental management. The planning system in NSW provides only one ingredient in the entanglement of law and policy. But according to Allas (2001), LEPs and local councils are essential to achieve ESD (see also Wild River, 2003). Coastal management is a ready example.

The planning system introduced SEPP 71 – Coastal Protection in 2002, which has been described as 'lay[ing] down a clear development assessment framework for the coastal zone' by 'impos[ing] significant controls on inappropriate development' (Lipman and Stokes, 2011, 183). This was a far more strategic instrument

than the earlier SEPPs mentioned earlier. Importantly, Thom (2004, 6) depicts it as part of 'another milestone' for NSW coastal management during the early years of the century. He also provides a useful list and discussion of government moves in coastal management relating to beaches, frontal dunes, sea cliffs and headlands (see also Hebert and Taplin, 2006). Thom was the chairperson of the sadly now defunct Coastal Council. Since then, major advisory documents have arisen beyond local government, including Gurran *et al's* (2008) paper for the National Sea Taskforce and the former Commonwealth Department of Climate Change report on *Climate Change Risks to Australia's Coast: A First Pass National Assessment* (2009). More recently, the Commonwealth's Australia's Climate Commission has been disbanded. Back in 1997, the NSW Government produced its NSW Coastal Policy 1997 which not only adopted the principles of ESD but guides relevant authorities, including local councils More recently, an academic critique (O'Donnell and Gates, 2013) exhibits how change in law and policy has been confusing and fragmented (see also Lipman and Stokes, 2011; Forbes, 2009). At the Federal level, the Australian Commonwealth's Department of Department of Climate Change issued *Climate Change Risks to Australia's Coast: a First Pass National Assessment* in 2009.

Pursuant to changes to the Coastal Protection Act, each beachside council must prepare a 'Coastal Zone Management Plan' (see s 55B). In addition, the Coastal Council has also been replaced by the NSW Coastal Panel with appointed expert members (including Thom) decided upon by State and local governments. The Panel appears to have a role in not only providing advice to governments but also serving as a regulatory authority over coastal protection works (see s 13; see also O'Donnell and Gates, 2013). Its first decision in 2013 involved a proposal to build a sea wall to protect a resort owned by a group of landholders at Old Bar on the mid-north coast. The project was rejected for several reasons, including impact on adjacent lands and the beach itself.[7] The ongoing relationship between councils and the Panel remains to be seen. It is likely, however, that many councils will be relieved not to the decision-maker.

THE MODERN LOCAL ENVIRONMENT PLAN

More attention is currently being given to local government. Some councils were ahead of the game in designing LEPs with their own specialist coastal oriented architecture. In 2006, the State Government demanded that all 152 local councils adhere to a standard instrument (*Standard Instrument (Local Environmental Plans) Order*, s 33A EPA Act, generally known as the 'LEP template'; see Lyster *et al*, 2012; Taylor, 2011; Woolf, 2011). Critics have questioned the LEP template as choking flexibility in plan making (Kelly and Smith, 2008; Mant, 2006). An example is the former Warringah LEP 2000, where the local area covers a substantial part of northern Sydney's coastline. This innovative LEP was based on a place-based approach

with emphases on locality statements rather than the conventional zoning chess board model derived from Britain (Untaro, 2002; Mant, 2000). The Warringah LEP 2000 has since been crumpled away to meet the ordinary.

The LEP Template depends heavily on zoning. Importantly, it also provides compulsory measures for 'Development with the coastal zone' under cl 5.5. This section refers to the principles of ESD in its objective in addition to further aims from the NSW Coastal Policy. These contain an array of aims including, for example (under cl 5.5(1)(b)):

- protect, enhance, maintain and restore the coastal environment, its associated ecosystems, ecological process and biological diversity and its water quality);
- protect amenity and scenic quality; and
- protect and preserve native coastal vegetation.

The provisions demonstrate the difficulties in integrating different perspectives, such as amenity and ecological conservation. Some members of the community might prefer to see dwellings overlooking the beach – especially if it is their own - whilst at a broader level, citizens may be concerned that endangered flora may be lost or, far more likely, access to a beach that, notwithstanding any erosion, is still spacious enough to be enjoyed.

There are further matters that an authority must merely take into account. For example, it must consider 'how biodiversity and ecosystems, including … native vegetation and existing wildlife corridors … can be conserved' (cl 5.5(2)(e)(i)). Another situation is that the authority must deliberate upon 'the cumulative impacts of the proposed development' (cl 5.2). Failure to meet such requirements prevents the development from being approved. Yet application of such provisions can be disappointing. They may lead to little more than *considering* the fragility of local landscapes, such as beach destruction. Even a worthwhile report on predicted damage may have little bearing on the ultimate decision. But this does not mean that approval is automatic. Should a council make a determination that is fundamentally flawed because particular matters have not been taken into account, a citizen might argue under judicial review that the decision was manifestly unreasonable.[8] Accordingly, at the local level, hard decisions must often be made.

A stronger approach is located under cl 5.5(3) where the decision-making authority *must be satisfied* that certain criteria are met. This represents a 'judicial precedent' clause: i.e. where the decision-maker must be convinced that the relevant fact or facts exist before it is enlivened to determine the decision. Factors under this clause include, *inter alia*:

- if effluent from the development is disposed of by a non-reticulated system, it will not have a negative effect on the water quality of the sea, or any beach, estuary, coastal lake, coastal creek or other similar body of water, or a rock platform, and

- the development will not (i) be significantly affected by coastal hazards, or (ii) have a significant impact on coastal hazards, or (iii) increase the risk of coastal hazards in relation to any other land (see cll 5.5(3)(b),(c)).

While these later clauses might appear fierce, their implementation demands sufficient expertise and resources in addition to tackling cross-boundary issues.

CONCLUSION

As time moves forward there is greater evidence of coastal damage as a result of climate change. We have travelled a long journey since colonial Australia. Local government now lies at the forefront. The NSW Government has already pushed this with the former NSW Minister for Resources, Chris Hartcher, stating that 'councils will have the freedom to consider local conditions when determining future [coastal] hazards'. He went further in promising that the Government will '[m]ake it easier for coastal landholders to install temporary works to reduce the impacts of erosion on their properties' (2012). But there are some major problems here for local government. First, councils are resource poor and may not be able to employ or hire sufficient experts. Secondly, councils must work together. This already exists in various places using conferences and voluntary regional organisations. Finally, global issues may need to override local political matters. We need more than reports that gather dust. Should local politicians fail, State Government must step in. But before then, provided there is sufficient transparency, community participation and sufficient opportunity to challenge local decisions, the citizenry must rely on high-quality plan-making by their own local councils. One suggestion might be the appointment of a 'coastal management independent Ombudsman' to examine substandard procedures and poorly written local plans and policies.

NOTES

1. Shoalhaven.nsw.gov.au/DiscoverShoalhaven/RelocatingtotheShoalhaven.aspx; accessed 15 August 2013.
2. http://www.visitnsw.com/destinations/south-coast/jervis-bay-and-shoalhaven?gelid=CMqk4My4xLco5pgodRjQAzg, accessed 15 August 2013.
3. Parliamentary Debates, UK House of Commons, Hansard, 960-61, 12 May 1908.
4. Ch 6, *Local Government Act 1993* (NSW).
5. See www.sydneycoastalcouncils.com.au.
6. i.e. the 'United Nations Conference on Environment and Development', Rio de Janeiro, Brazil, June 1992.
7. See NSW Coastal Panel, Media Release, NSW Coastal Panel declines Old Bar

Seawall Proposal, 7 August 2013.

8. See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

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