

31 December 2008

Mr Michael Whittaker  
General Manager  
City of Ryde  
Locked Bag 2069  
North Ryde NSW 1670

Dear Mr Whittaker,

## Re: Draft Ryde Local Environmental Plan 2008

The Urban Taskforce represents Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with government and the community.

The Urban Taskforce has reviewed the *Draft Ryde Local Environmental Plan 2008* ("the plan") and identified some issues of concern.

Our concerns are generally outlined below and **a summary of the changes we have requested is included as an attachment to this letter.**

### 1. The plan's aims are not sufficiently clear and should refer to ecologically sustainable development

The Urban Taskforce is concerned with the language used to articulate the aims of the plan.

The wording of the aims is of legal significance. Section 25(3) of the *Environmental Planning and Assessment Act 1979* ("the Act") says that when a provision in a local environment plan is genuinely capable of different interpretations, the interpretation which best meets the aims stated in the plan is preferred.<sup>1</sup> For this reason, it is important that the aims of the plan are well written and understandable.

Unfortunately in several instances the wording used in the plan is vague and subjective. We ask council to use expressions that already exist in law where there are well-established legal interpretations.

For instance, one aim of the plan is

to encourage the management of development of land to provide a range of land uses, employment activities and housing types *that respond to the welfare of the citizens of Ryde* (emphasis added).<sup>2</sup>

The italicised phrase is ambiguous at best and is open to a variety of meanings. "Development" is not normally understood to "respond" to someone's "welfare". Development does respond to the needs and aspirations of residents, employees and visitors to an area, however it is not clear that "welfare" is the same as "needs and aspirations".

Additionally the reference to the "citizens of Ryde" is reminiscent of the words of F.J. Popper:

The basic purpose of zoning was to keep Them where They belonged – Out. If They had already gotten in, then its purpose was to confine Them to limited areas. The exact identity of Them varied a bit around the country.<sup>3</sup>

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<sup>1</sup> See, for example, *Jim Rannard & Associates Pty Ltd v North Sydney Municipal Council* (1992) 75 LGRA 274.

<sup>2</sup> Cl 1.2(2)(b).

<sup>3</sup> Peter Hall, *Cities of Tomorrow* (1988) 60.

We appreciate that Council does not intend to be discriminatory, however to others it may appear that plan excludes people who are either:

- not Australian citizens, or
- not residents of Ryde,

from the benefits of local development.

The Ryde community gains substantially from a workforce that commutes into Ryde from outside the area. The needs and aspirations of these businesspeople and employees should be factored into future development of the area. Similarly, Ryde businesses are dependent on visitors to the area for their trade. It would be appropriate for development to also respond to *their* needs and aspirations. Local residents frequently entertain visitors in their homes and those visitors should not be excluded from the benefits of development adapted to their requirements. Finally Ryde, along with the rest of Sydney, has a responsibility to provide homes for future residents. These homes are needed because of both population growth, increased rates of divorce, postponement of marriage and the longer lives we all now enjoy.

In short **the aims of the plan should not refer to development “that responds to the welfare of the citizens of Ryde”. Instead the aim should refer to development “that responds to the needs and aspirations of Ryde’s residents, future residents, workers and visitors”.**

Clause 1.2(2)(d) could also prove to be problematic. This clause refers to

the management of development of Ryde to create a *better environment* (emphasis added).

The phrase “better environment” suggests that development that maintains the current environmental amenity of Ryde will not satisfy the requirements of the plan. A better environment is clearly desirable but there is likely to be profound disagreement as to what the phrase means in different contexts. For example, some people may interpret a “better environment” to be one that provides for less residential density, while others might argue that a “better environment” is one that provides more housing choice.

It would be far better to delete this vague aim and replace it with a phrase that has a much clearer meaning: “to promote the ecologically sustainable development of the City of Ryde”. This would simplify the aims whilst ensuring consistency with well-established terminology.<sup>4</sup>

**Three loosely worded aims, 1.2(2)(c)-(d) should be replaced with one meaningful and legally defined aim: “To promote ecologically sustainable development in the City of Ryde”.**

## **2. The low-density residential zone objectives seek to freeze the “character” of an area, even when separate provisions already ensure its continued status as low density.**

The standard “R2 Low Density Residential” zone objectives make it very clear that the zone provides for “a low density residential environment”. An additional Council objective for the zone says that the zone is

[t]o ensure that that the general low density nature of the zone is retained and that dual occupancy (attached) and multi-dwelling housing (attached) do not significantly alter the character of a location or neighbourhood.

If “character” means low density, then the objective does not add anything to the standard objective, which already provides for a low density environment. In interpreting statutory documents (such as this plan) the judiciary will assume that additional words have been inserted for a reason. The courts will prefer an interpretation that gives a phrase a different meaning from an apparently similar provision in the same document. In this case, the judiciary is likely to regard “character” as meaning something other than “low density”. This additional objective makes it quite possible that development might have to be refused because of

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<sup>4</sup> The *Environmental Planning and Assessment Act 1979* already defines the phrase “ecologically sustainable development” to mean all of the things set out in section 6(2) of the *Protection of the Environment Administration Act 1991*. Section 11 of the *Interpretation Act 1987* makes clear that when the phrase “ecologically sustainable development” is used in a local environment plan, it has the same meaning as in the Act.

colour schemes, architectural styles and building structure even when such development might be otherwise permissible under the local environment plan and development control plan.

Localities should be able to change and evolve, both physically and culturally, without a disproportionate emphasis being given to what exists now at the expense of what a locality might be like in the future. Successful places have evolved into their current state over a period of time. Inflexible planning controls are a recipe for artificially contrived places. For these reasons the plan should not attempt to freeze the current character of an area. An attempt to create a static environment may lead an area to degrade, particularly if the original rationale for a locality's character loses relevance.

**The objectives for low density residential zones should not make reference to the character of a location or neighbourhood, as the existing standard zone objective already ensures that the area will remain low density.**

### **3. A consent authority will have to determine what the community needs are for each development application**

In the low density residential zone an additional zone objective is

[t]o ensure that land uses are compatible with the character of the area and responsive to community needs.

This reference to "character" is again problematic for the same reasons outlined above.

Additionally a "land use" must also be "responsive" to "community needs" to satisfy the zone objective. The language used here is problematic: "land use" cannot be "responsive". On the other hand it is possible for a development to respond to community needs, however such an objective will create major problems.

What are the community's needs? Who the community in a particular case, the residents of a particular street? The whole local government area? The residents of the metropolitan area or the state? How will the community's needs be established – by survey, by politicians or via objections?

Consent authorities are already required to address social, economic and environmental considerations in their decision-making process.<sup>5</sup> It is unclear why further prescription requiring consideration of the community's needs is necessary. In any event, Council should consider the community's needs when it prepares the local environment plan. If a development is consistent with the local environment plan, a consent authority should be entitled to expect that it is consistent with the community's needs.

**The zone objectives for low density residential zones should not refer to "community needs".**

### **4. De facto buffer zone to be introduced around apartment development sites**

The opportunity to develop apartments in medium and high density residential zones is reduced by a zone objective which says developments should

encourage revitalisation, rehabilitation and redevelopment of residential areas while ensuring development types do not adversely affect the amenity of the locality.

Apartment developments create the opportunity for new high amenity homes, often rich with natural light and equipped with suitable areas of open space. However, the residents of low density residential housing near apartment development sites would often prefer that the new homes were never built and complain about "loss of amenity". Often the claim is misconceived, but where there is a loss of "amenity", the loss is usually minor and well justified by the additional amenity created by fostering a new compact pedestrian-friendly community.

This objective empowers landholders whose property might be located near proposed apartment developments to extort developers into buying them out. If a developer does not pay an overblown price for the property concerned, the landholder can lodge an objection

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<sup>5</sup> See section 79C of the *Environmental Planning and Assessment Act 1979*.

and the consent authority may feel obliged to reject an otherwise compliant development application on the grounds that the amenity of the nearby property will be reduced.

In effect, this introduces the sort of buffer zone requirements that exist for mines to apartment development. It is routine for mining operators to pay many times the market value to nearby landholders in order to secure a buffer zone around their very noisy and polluting operations. Apartment development bears absolutely no relationship to any aspect of heavy industry, nor is the development of apartments anywhere near as profitable as operating a mine.

This objective will significantly increase the cost of development, sterilise opportunities to meet Sydney's future housing needs and give nearby landholders a right to veto nearby apartment construction.

**Objectives which guarantee the existing "amenity" for everyone should be removed from the medium and high density residential zones.**

#### **5. Inappropriate guarantee of amenity to local residents in the neighbourhood zone**

Council has inserted an additional objective in the neighbourhood zone:

To ensure that the development does not have an adverse impact on the amenity of local residents.

This objective is not required. It raises the same issues regarding "amenity" that arise in relation to the zone objectives in the medium and high density residential zones. To the extent that it deals with "impacts" rather than "amenity", it merely replicates section 79C(1)(b) of the Act which requires consideration of

the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality ...

It is not the purpose of a local environment plan to re-enact existing provisions of the Act. Attempting to do so may have unintended legal consequences.

**Council's objective that development in the neighbourhood centre zone must have no impact on local residents should be deleted.**

#### **6. Residential uses have not been permitted in the commercial core zone**

Council has not permitted residential development in the commercial core zone. It is widely accepted that density and land use mix are crucial to the success of a centre.

Many successful centres include a mix of uses, including retail, office, entertainment and residential apartments all coexisting. These different uses can work together to make a centre attractive and successful at all times of the day and week. Centres where residential uses are not permitted can be lifeless, cold and uninviting places outside of business hours.

Furthermore it is well understood that

land use patterns have a significant influence on how well public transport services can be delivered and utilised.<sup>6</sup>

By introducing more land use flexibility in the vicinity of new transport infrastructure, the infrastructure itself benefits in terms of patronage and therefore viability. Without an appropriate mix of complementary land uses, people will be less inclined to use public transport, as their ability to access a variety of destinations will be limited.<sup>7</sup>

Research consistently shows that population density has a significant impact on the use of public transport. For instance, it was found that every 10-percent increase in population density

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<sup>6</sup> Alford, G., 2006, Integrating Public Transport and Land use Planning – Perspectives from Victoria. *Australian Planner*, Vol. 43, No. 3, pp. 6-7.

<sup>7</sup> Cervero, R., Ferrell, C., and Murphy, S. 2002, Transit-Oriented development and Joint Development in the United States: A Literature Review. Transit Cooperative Research Program. Research results digest. October 2002—Number 52 [[http://onlinepubs.trb.org/Onlinepubs/tcrp/tcrp\\_rrd\\_52.pdf](http://onlinepubs.trb.org/Onlinepubs/tcrp/tcrp_rrd_52.pdf), accessed 7 April, 2008]

was associated with about a 6-percent increase in patronage at transit stations.<sup>8</sup> If this argument is accepted, then caution must be exercised when drafting a local environment plan that actively seeks to ban town centre residential opportunities.

**Residential uses, including residential flats and shop top housing, should be permitted within the commercial core zone.**

**7. Subjective requirements for “high-quality” and “well-designed” developments sound good but are not defined**

Council has inserted an additional objective in the commercial core and business park zones:

To ensure that the zone is characterised by high-quality well-designed buildings ...

The phrases “high-quality” and “well-designed”. These phrases sound good, but they are entirely subjective. They should never appear in a statutory plan unless they are given a specific meaning. Subjective words such as “high quality” and “well-designed” mean different things in the hands of different decision-makers – it is a recipe for confusion, legal disputation and inconsistency.

If there is a desire to prohibit a particular class of buildings then the plan should clearly say so. Such rules allow developers to make acquisition decisions and prepare development applications with some confidence about an outcome.

The objectives do not merely summarise the specific controls for a zone. They are actually an additional mechanism of development control that can be used to block development that would otherwise be permissible. That is, the development can comply with all other statutory rules, but nonetheless be rejected because, in the opinion of a particular decision-maker, it is not a “well-designed” or “high quality” development.

For example, a consent authority could seek to refuse a development application from a major fast food chain because the facility may not be considered a “high-quality” development. It is worth noting that a court is likely to find the phrase “high quality” means something different from “well-designed” because both phrases are included in the plan. The rules of statutory interpretation will suggest that they mean different things.

Given the politicisation of the local development assessment process, this is a significant disincentive to invest in these kinds of developments in the commercial core and business park zones of Ryde.

**Subjective terminology such as “high-quality” or “well-designed” should be removed from the local environment plan.** If design standards are thought to be necessary by Council, they should be included in the development control plan.

**8. Developments that are not related to scientific research and development will be treated less favourably in the commercial core and business park zones**

Council has inserted an additional objective in the commercial core and business park zones:

To encourage industries involved in scientific research and development.

This objective has presumably been inserted because significant commercial core and business park zones are located in Macquarie Park and the draft Inner North Subregional Strategy has described Macquarie Park as a specialised centre due to the presence of Macquarie University.

The Urban Taskforce has criticised the decision to create a sub-species of strategic centres as “specialised centres”. Developers do not need the Department of Planning to tell us that university related developments might be a good idea in Macquarie Park. Government officials were already aware of the presence of Macquarie University prior to the designation of

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<sup>8</sup> Parsons, Brinckerhoff, Quade and Douglas et al. 1995 in Cervero, R., Ferrell, C., and Murphy, S. 2002, Transit-Oriented development and Joint Development in the United States: A Literature Review. Transit Cooperative Research Program. Research results digest. October 2002—Number 52 [http://onlinepubs.trb.org/Onlinepubs/tcrp/tcrp\_rrd\_52.pdf, accessed 7 April, 2008]

Macquarie Park as a specialised centre. While this suggests that identifying Macquarie Park as a university-related specialised centre is not be useful if local councils seek to translate the specialisation of a centre into a statutory plan, the designation could be actively harmful. We have previously been advised by the Department of Planning that this would not occur. We are disappointed to discover that Ryde Council is proposing that very thing by including the above zone objective.

A local environment plan is a legal document prohibiting and permitting activities. It can do nothing to “encourage” a particular class of development, except when it does so by disadvantaging other forms of development. This is well understood by consent authorities who frequently use the word “encourage” to signal that a particular form of development will be swiftly approved, while other forms of development are likely to find approval difficult.

Clause 2.3(2) of the Standard Instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* requires that this zone objective be considered when development applications in the commercial core zone are considered by consent authorities. If this zone objective stands we anticipate that developments will be refused because they do not involve scientific research and development. This will be a loss to the community of Ryde, the broader Sydney community and the state as a whole, because it may prevent Macquarie Park from reaching its full potential. It may undermine the substantial investment the state has made in this locality as transport hub. The reality is that Macquarie Park is best developed by allowing the market to determine the kinds of businesses that are located there – with appropriate controls over building form.

**The commercial core and business park zone objectives “encouraging” developments connected with scientific research should be deleted.**

The business park zone includes an additional provision which says it is a zone objective

[t]o provide a zone with strong links with Macquarie University and research institutions and an enhanced sense of identity.

This raises similar issues to the zone objectives discussed above. Each development will need to be assessed for its “strong links” with the university and research institutions. It would be possible for a consent authority to refuse development approval on the basis that such links are not sufficiently strong. This would ultimately undermine the significant public investment in this centre as a transport hub and strategic centre.

It is also difficult to imagine how a development will be able to show it contributes to a zone’s “enhanced sense of identity”. Since a zone is a *legal concept* not a conscious being, it is hard to imagine how a development can improve any aspect of its self-awareness.

**The business park zone objective requiring developments to have strong links with the university/research institutions and/or contribute to the zone’s sense of identity should be removed.**

## 9. **Ambiguous obligation for design and land use to “recognise” local features in a mixed use zone**

In the mixed use zone it is an objective

[t]o recognise topography, landscape, setting and unique location in design and land use.

It is unclear what Council means. For example, how does a development applicant seeking to comply with a local environment plan “recognise” topography in “design”? This is a very vague and uncertain concept for something as solid as a statutory plan.

This provision is of particular concern because it suggests that a given land use may still not be permitted within a mixed use zone, even though it is a permitted use generally – if the land use does not “recognise” to a “unique location”. Such vague statutory provisions will discourage proponents from acquiring sites within the zone to re-develop because of the significant uncertainty as to whether they can rely on the permitted uses table in the local environment plan.

We appreciate council's intent may be to encourage development that adopts an urban design approach that is sympathetic to site opportunities and constraints. If this is the case, then this objective and its supporting controls are better placed in a development control plan, not a local environment plan.

**Council should not include a mixed use zone objective requiring “recognition” of site features in either design or land use in the local environment plan.** If such a provision is considered necessary by Council, the **development control plan is the appropriate vehicle**, although a development control plan should not attempt to undermine the authority of the permitted uses table in the local environment plan.

#### **10. Developments will be assessed for their impact on the “economic soundness” of a centre**

In the mixed use zone it is also an objective

[t]o create vibrant, active and safe communities and economically sound employment centres.

Is it truly necessary or appropriate to instruct a consent authority to consider whether a development contributes to the creation of “economically sound employment centres”?

In August 2008 the Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws.<sup>9</sup> It concluded that zoning and planning regimes act as an artificial barrier to new supermarkets. In the same month the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with “oligopolistic” shopping centre landlords.<sup>10</sup>

This objective is the kind of provision that leads to these anti-competitive outcomes. The objective may require a consent authority to refuse a development because it will undermine some other employment centre. The objective may also lead to a consent authority refusing a development application because local traders allege that the development will push them out of business and therefore economically weaken the centre.

In our market economy consumers should be in charge. That means that consumers ultimately decide whether or not new retail, entertainment or office development should proceed.

If an existing business is doing a poor job of servicing consumers or is charging its tenants excessive rents then an entrepreneur should be free to establish a new competing business. Even the *threat* of a new business can be effective in ensuring that incumbent businesses and property owners invest in their assets and keep costs down.

If there is competition, those who are providing the service compete fiercely by:

- cutting costs and sometimes accepting lower profits; and
- innovating, through new formats and additional services to distinguish themselves from their competitors.

Complacent businesses can be placed under pressure and even exit the market while innovative new businesses take their place. This is not so if competition is restricted. The protection of competitors, rather than competition, has long been rejected as a principle in competition law and policy everywhere in the world. Town planning should not be exempt.

Consent authorities are not in a position to evaluate the claims of businesses that a new development will harm them so seriously that the “economic soundness” of a centre will be jeopardised.

For example, this commonly arises when existing small retailers object to the establishment of a new supermarket. The Australian Government's Bureau of Infrastructure, Transport and Regional Economics carried out an Australia-wide study in which it collected over 80,000 prices in 132 locations from major cities to the most remote areas. The outcome of the study was detailed in the Bureau's submission to the ACCC's grocery prices inquiry. The Bureau looked at grocery

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<sup>9</sup> Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008).

<sup>10</sup> Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (2008).

prices in places that were not within easy reach of a major chain supermarket. This is not a small group given that half of non-metropolitan Australians are in this situation. These consumers were found to pay an average 20 per cent premium in prices, although once adjustments are made for differences in the size of the local populations, the price premium paid by consumers without ready access to a major chain supermarket was 17 per cent.

The evidence clearly shows that large format chain stores are delivering groceries to Australian households cheaper than smaller independent stores. They have much lower costs, due to economies of scale, economical supply chains, bigger floor space and other efficiencies.

**The objective requiring “economically sound centres” should be deleted because it could lead to a pattern of anti-competitive decisions by consent authorities.**

#### **11. Discriminatory height controls for shop top housing in high density residential zones**

In high density residential zones, the plan sensibly excludes residential flat development and multi-dwelling housing from the floor space ratio requirements but applies it to shop top housing.

This discriminatory treatment does not reflect modern planning principles. Such principles emphasise that the planning system should concentrate on:

- the "form" (shape/configuration) of a structure; and
- the relationship of buildings to each other, to streets and to open spaces,

rather than trying to regulate the uses to which different pieces of land might be put.<sup>11</sup>

Such a rule penalises retail development and confers disproportionate market power on the owner(s) of nearby retail land that is not so burdened.

This raises the same competition issues that were flagged by the Australian Competition and Consumer Commission and the Productivity Commission last year (refer to the above discussion).

**We urge Council to remove the discrimination against shop top housing (in relation to floor space ratios) in the high density residential zone.**

#### **12. Retail and business premises to be restricted in business parks**

Neither “retail premises” nor “business premises” are permitted uses in the business park zone.

Neighbourhood shops are permitted, however these are defined to be

retail premises used for the purposes of selling small daily convenience goods such as foodstuffs, personal care products, newspapers and the like to provide for the day-to-day needs of people who live or work in the local area, and may include ancillary services such as a post office, bank or dry cleaning, but does not include restricted premises.

This means a shop in the business park zone:

- must sell “small daily convenience goods”;
- the purpose of the goods must be to satisfy day-to-day needs; and
- must be directed to people who live or work locally.

Furthermore, neighbourhood shops are also limited in floor area (500m<sup>2</sup> or 5 per cent of floor area of building), which makes it difficult for a moderate scale supermarket to be established.

Business premises such as banks, post offices, hairdressers, dry cleaners, travel agencies, internet access facilities, medical centres and betting agencies are banned outright – even though these enterprises would offer useful services for local employees and businesses.

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<sup>11</sup> See A Duany, E Plater-Zyberk and J Speck *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* (2000).

Limiting the opportunity for a competitive retail environment by restricting the type of goods sold and/or limiting floor area robs the community of the opportunity to access a wide variety of competitively priced items in their locality.

Consumers will pay much more for groceries at small retail outlets. In his report, *Choice Free Zone*, Professor Allan Fels found that larger format stores offer up to 18 per cent less for basic food items and up to 28 per cent less for other household products. As mentioned above, the Australian Government's Bureau of Infrastructure, Transport and Regional Economics found that consumers paid 17 per cent more when they did not have ready access to a large format grocery store.

Business parks and other business zones are intended to be centres of employment. These environments function best when people working in these areas have somewhere to go to shop and socialise before work, at lunch time and after work.

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. Pedestrian-oriented amenities such as retail and cafes should not be discouraged or prohibited in any centre of employment. A prohibition on retail and business premises really means that people need to drive further to satisfy their shopping needs. Planning rules should be encouraging behaviour that reduces vehicle kilometres travelled, not re-inforcing old-style separations of land use that force people to drive further.

If there is a desire to prohibit buildings of a particular bulk and scale then the plan should clearly say so and set out the applicable floor space ratio restrictions. Local amenity and traffic issues can be properly and appropriately considered at the development application stage.

**“Retail premises” and “business premises” should be generally permitted uses in all business zones, including the business park zone.**

### **13. Pubs, restaurants and roadside stalls to be banned in the business development zone**

The plan proposes to ban pubs, restaurants and roadside stalls from the business development zone. According to the zone objective, this zone is about permitting a mix of business and warehouse uses, and specialised retail uses. Office premises are permitted.

Those working in a business development zone should be entitled to have lunch in a restaurant, or visit a local pub after work. Surely these uses go hand-in-hand with offices and large-format retail.

**The ban on pubs, restaurants and roadside stalls in the business development zone should be lifted.**

### **14. Requirement for development in the light industrial zone to be “suitable” and to service the “local population”**

Council proposes a zone objective for the light industrial zone

[t]o provide for suitable industrial activities in order to increase local employment opportunities and to service the needs of the local population ...

This zone objective overlaps with the standard instrument zone objectives:

To provide a wide range of industrial, warehouse and related land uses

To encourage employment opportunities and to support the viability of centres

However, it also requires the consent authority to consider two additional issues:

- whether a development is “suitable”; and
- whether a development services the needs of the local population.

In relation to the former, it opens up the possibility that a development application will be refused on the basis that the particular land use proposed is not “suitable” even though the use is permitted in the land use table.

If there is a desire to prohibit buildings of a particular use then the plan should clearly say so in order that developers can make acquisition decisions and prepare development applications with some confidence about an outcome. Subjective words such as “suitable” mean different things in the hands of different decision-makers, creating confusion, legal disputation and inconsistency.

There may be a misapprehension that the permitted uses set out in the land use table can be taken as a guide as to what is “suitable”. However this is not how the Standard Instrument works.

If a land use is not included in the land use table, it is actually prohibited, not merely unsuitable.<sup>12</sup> Even if the use is permitted with consent, the consent authority must have regard to the zone objectives when determining a development application.<sup>13</sup> For example, this means an application for an industrial retail outlet may be rejected because its use is “unsuitable”, despite the fact that it is permitted in the land use table.

Additionally, this objective opens up the possibility that a consent authority may refuse a development because it does not service the needs of the local population. Light industrial zones frequently are home to facilities and services that service whole regions and sub-regions, not just the residents of the relevant local government area. These zones can also be the base of significant employment, including the employment of people outside the local government area concerned. This objective would appear to significantly constrain the development potential of land zoned as light industrial in Ryde.

**The light industrial zone objective requiring development to be “suitable” and service the needs of the “local population” should be deleted.**

#### **15. Prohibition on retail premises in industrial zones**

Council’s industrial zones do not permit retail premises. However, the Metropolitan Strategy stated that retailing in industrial areas should be permitted when it has operating requirements akin to industrial uses.<sup>14</sup> There was also a promise of a new approach to reinvigorate employment lands, including flexible zonings for industrial and commercial activities in established employment lands served by efficient public transport.<sup>15</sup>

There is potential to include a wider range of retail activities in industrial areas without jeopardising industrial activities. This could be achieved by including “retail premises” as a permitted use in industrial zones, with the inclusion of an additional objective stating

that the zone will provide for bulky goods retailing and other retail that is either ancillary to an industrial use, has operating requirements akin to industrial uses or demonstrable offsite impacts akin to industrial uses.

**Retail premises should be permitted in industrial zones as per the Metropolitan Strategy.**

#### **16. Some provisions are more suited to a development control plan**

There is a low density residential zone objective

[t]o maintain on sites with varying topography the two storey pitched roof form character of dwelling houses and dual occupancy (attached) developments.

**The reference to the “two storey pitched roof form character of dwelling houses” should be removed from the local environment plan** and if thought necessary by Council, should be included in a development control plan.

Furthermore, Council has proposed a zone objective for the light Industrial zone that seeks

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<sup>12</sup> CI 2.3(1).

<sup>13</sup> CI 2.3(2).

<sup>14</sup> Metropolitan Strategy – Supporting Information 105, B4.1.2.

<sup>15</sup> Ibid 63, A1.4.2.

[t]o enhance the amenity of local areas through better building design, reduced hard-paved surfaces and landscaping.

This objective is another example of an objective that would be more suited to a development control plan. Furthermore, "better building design" is a subjective term, not easily defined and should not be used in a local environment plan. It may not always be possible to enhance the amenity of a local area – for example a development may merely maintain the amenity of an area.

**Council should not include a light industrial zone objective requiring "better building design" or "enhanced amenity" in the local environment plan.** If such a provision is considered necessary by council, the development control plan is the appropriate vehicle.

Council seems to have lifted detailed land use and design controls from its previous *Ryde Planning Scheme Ordinance* and placed them into the plan as schedule 6. Schedule 6 contains a detailed listing of precinct controls and matters that will be considered when making a determination. The content of schedule 6 would be more appropriately placed in a development control plan because these matters relate to detailed centre design, site specific controls and a level of detail expected in an application to Council.

**The content of clause 6.7 and schedule 6 in the local environment plan should be deleted and, if is still necessary, be placed in a development control plan.** The plan should not attempt to act as a de facto development control plan.

## **17. West Ryde Urban Village**

We support the development outcomes that Ryde Council is seeking in relation to the West Ryde Urban Village but question whether the proposal is the best approach. That is, Council is imposing a floor space restriction but the plan allows this restriction to be waived if (in essence) the development will contribute to a compact, pedestrian-friendly mixed use environment.

This approach will not work for every development. For example, it may not be appropriate or desirable for every development in this area to have retail at the ground floor level. If there is insufficient demand for retail space, developers may be forced by these rules to build retail space that can be empty and under-used, leading to a ghost town atmosphere in this important locality.

**The West Ryde Urban Village should be exempt from the floor space ratio restrictions outright, and Council should instead consider articulating the principles of clause 4.4C in a development control plan.**

We note that clause 4.6, which is intended to replace SEPP 1, does not allow the height controls to be departed from in the West Ryde Urban Village. This presumably relates to the additional flexibility this area is to receive in relation to floor space ratio. Nonetheless we think consent authorities should still have the capacity to set aside rules when their application would be unreasonable and/or there are sound planning grounds to so.

In any event, for reasons discussed above, it may not always be practicable to fully comply with all of the elements set out by Council in clause 4.4C. In the event that Council does not accept our proposition that those elements should be omitted from the local environment plan, then the ability to depart from the height controls under clause 4.6 should still be available if the floor space ratio is not waived under clause 4.4C.

**In short, we recommend that the flexibility offered by clause 4.6 should remain available for development in the West Ryde Urban Village generally. If this proposition is not accepted it certainly should be available if a floor space ratio is in force because of an inability by a developer to satisfy the requirements of clause 4.4C.**

## **18. Zone and centres objectives create a multi-layered and confusing overlay**

Clauses 6.5 and 6.6 apply an additional set of mandatory objectives to be considered in the development assessment process for areas that form part of the West Ryde Urban Village, the Macquarie Park Corridor and the Eastwood Urban Village.

These objectives are above and beyond the objectives already specified for the particular zones in these areas.

Effectively, this re-creates custom-purpose zones - a practice that was supposed to be eliminated with the adoption of the Standard Instrument.

Furthermore, the objectives in clauses 6.5 and clause 6.6 have a far more rigid and binding status than zone objectives under the Standard Instrument. Under the Standard Instrument, consent authorities merely need to *have regard* to zone objectives. Under clauses 6.5 and 6.6 the consent authority must consider whether the development is *consistent* with the zone objectives. The change in language creates a different legal obligation. Precedents set by courts in interpreting to the application of zone objectives for the Standard Instrument will not be applicable in relation to development in the West Ryde Urban Village, the Macquarie Park Corridor and the Eastwood Urban Village with regards to the objectives set out in clauses 6.5, and 6.6.

The requirement for "consistency" was considered in *Schaffer Corp Ltd v Hawkesbury City Council* (1992) 77 LGRA 21 in which Pearlman CJ said (at 27):

... a development will be generally consistent with the objectives if it is not antipathetic to them.

These clauses contain significant provisions which may lead to otherwise compliant development proposals being refused approval, on the basis that they are inconsistent/antipathetic to the land objectives. Some examples (in relation to the Macquarie Park Corridor) follow.

### ***Location for premium globally competitive business***

Clause 6.6(2)(a) says that the Macquarie Park Corridor is to be a location for "premium globally competitive businesses". This may mean a development applicant will have to justify the credentials of the future owners or tenants of any development to a consent authority. It raises the prospect that development consents will limit tenants or future owners to "globally competitive businesses". These concepts are so vague that there will be increased investment uncertainty.

A business may not be a *premium globally competitive business*. It may merely be *globally competitive business*. It might only be competitive on a *national* basis. Surely such businesses should have the same right to establish themselves in the Macquarie Park Corridor as those that are premium globally competitive businesses.

### ***Reducing car dependency***

Clause 6.6(2)(b) says that development in the Macquarie Park Corridor must contribute to "reducing car dependency".

This is an additional control on top of the existing restrictions on car parking in the Macquarie Park area set out in clause 4.45D. A development application that provides for more car parking than the premises it replaces may be inconsistent/antipathetic with this objective even if the development complies with the specific car parking requirements in clause 4.45D.

It is desirable for Macquarie Park to become a diverse, compact, pedestrian-friendly community, with a mix of uses, supported by high quality public transport. Achieving this goal will mean many people working or shopping in Macquarie Park may choose to avoid using a private motor vehicle. In fact, some local residents may even choose to do without a car altogether.

However, the private motor vehicle will continue to be a necessity for many people. For example, households that include

- older people;

- children;
- people with disabilities

are likely to continue to require a motor vehicle to get on with the basics of life.

The benefit of compact, pedestrian-friendly communities is that car use is likely to be reduced but not eliminated. Sensible land use and transport planning allows for all modes of transport (cars, transit, walking and cycling).

Overly onerous restrictions on car parking in Macquarie Park reduce the attractiveness of this locality as a strategic centre. In particular, commercial, retail and apartment developments will generally require a reasonable number of car parking spaces.

Good access to alternative forms of transport can mean a reduced need for car parking but there should not be an attempt to unrealistically restrict car parking. If people demand access to private motor vehicles, the market will require that provision be made for car parking. Developments that are not able to meet community expectations in this regard are unlikely to be built.

### ***The quality of land development***

Clause 6.6(2)(c) sets out an objective for the Macquarie Park land

[t]o guide the quality of future development in the corridor...

While it is not very clear how a development proposal can be consistent with an unspecified “guide”, this clause is presumably intended to exhort the consent authority to refuse a development if it is not a “quality” development. This raises the same issues as the objective for “high quality” development in the commercial core and business park zones, although, the impact of this provision is even more serious because of the requirement for “consistency”.

### **Reflection of the natural setting with the railway station areas as focal points**

Clause 6.6(2)(d) sets out an objective for the Macquarie Park land

[t]o ensure that the corridor is characterised by a high quality, well-designed and safe environment that reflects the natural setting, with three accessible and vibrant railway station areas providing focal points ...

The problems with the reference to “high quality, well-designed development” have been discussed earlier in this submission in relation to the objectives for the commercial core and business park zones.

This objective also will see development tested for its “reflection” of the “natural setting”. This is an ill-defined and ambiguous provision.

The objective includes a reference to “three accessible and vibrant railway station areas providing focal points”, but the structure of the sentence seems to suggest that the railway station areas are part of the natural setting. This presumably is not the intention of the Council.

### **Improved lifestyle for all those who live, work and study in the area**

Clause 6.6(2)(e) sets out an objective for the Macquarie Park land

[t]o ensure that ... an improved lifestyle is created for all those who live, work and study in the area.

This is a very bold requirement for a zoning plan. We think that local environment plan is overreaching if it is attempting to determine the kind of lifestyle people may. In particular, the undefined notion of a “better lifestyle” is highly subjective. One person’s notion of a better lifestyle is another person’s idea of a horrible existence. We submit that the local environment plan should focus on offering choice and should recognise that different people will have different preferences as to the kind of lifestyle that might pursue. This clause may deny people choice, because it could lead to a development application being refused if the lifestyle of those who would benefit from the development does match a consent authority’s idea of an “improved lifestyle”.

In short, **we recommend that clauses 6.5 and 6.6 be omitted from the local environment plan.**

These comments are offered to encourage constructive dialogue between local government and the development industry and we ask that you accept these comments as our contribution to the planning reform process. We trust that you will carefully consider the contents of this correspondence and make amendments to the plan as appropriate.

We are always able to provide a development industry perspective on planning policy and we would welcome the opportunity to meet and discuss these issues in more detail.

Yours sincerely

**Urban Taskforce Australia**

A handwritten signature in black ink that reads "Aaron Gadiel". The signature is written in a cursive style with a long horizontal stroke at the bottom.

Aaron Gadiel  
Chief Executive Officer

Encl.

## **Draft Ryde Local Environment Plan 2008**

### **Summary of Urban Taskforce's Recommendations**

- The aims of the plan should not refer to development “that responds to the welfare of the citizens of Ryde”. Instead the aim should refer to development “that responds to the needs and aspirations of Ryde's residents, future residents, workers and visitors”.
- Three loosely worded aims, 1.2(2)(c)-(d) should be replaced with one meaningful and legally defined aim: “To promote ecologically sustainable development in the City of Ryde”.
- The objectives for low density residential zones should not make reference to the character of a location or neighbourhood, as the existing standard zone objective already ensures that the area will remain low density.
- The zone objectives for low density residential zones should not refer to “community needs”.
- Objectives which guarantee the existing “amenity” for everyone should be removed from the medium and high density residential zones.
- Council's objective that development in the neighbourhood centre zone must have no impact on local residents should be deleted.
- Residential uses, including residential flats and shop top housing, should be permitted within the commercial core zone.
- Subjective terminology such as “high-quality” or “well-designed” should be removed from the local environment plan. If design standards are thought to be necessary by Council, they should be included in the development control plan.
- The commercial core and business park zone objectives “encouraging” developments connected with scientific research should be deleted.
- The business park zone objective requiring developments to have strong links with the university/research institutions and/or contribute to the zone's sense of identity should be removed.
- Council should not include a mixed use zone objective requiring “recognition” of site features in either design or land use in the local environment plan. If such a provision is considered necessary by Council, the development control plan is the appropriate vehicle, although a development control plan should not attempt to undermine the authority of the permitted uses table in the local environment plan.
- The objective requiring “economically sound centres” should be deleted because it could lead to a pattern of anti-competitive decisions by consent authorities.
- Council should remove the discrimination against shop top housing (in relation to floor space ratios) in the high density residential zone.
- “Retail premises” and “business premises” should be generally permitted uses in all business zones, including the business park zone.
- The ban on pubs, restaurants and roadside stalls in the business development zone should be lifted.
- The light industrial zone objective requiring development to be “suitable” and service the needs of the “local population” should be deleted.
- Retail premises should be permitted in industrial zones as per the Metropolitan Strategy.
- The reference to the “two storey pitched roof form character of dwelling houses” should be removed from the local environment plan and if thought necessary by Council, should be included in a development control plan.

- Council should not include a light industrial zone objective requiring “better building design” or “enhanced amenity” in the local environment plan. If such a provision is considered necessary by council, the development control plan is the appropriate vehicle.
- The content of clause 6.7 and schedule 6 in the local environment plan should be deleted and, if it is still necessary, be placed in a wide development control plan.
- The West Ryde Urban Village should be exempt from the floor space ratio restrictions outright, and Council should instead consider articulating the principles of clause 4.4C in a development control plan.
- The flexibility offered by clause 4.6 should remain available for development in the West Ryde Urban Village generally. If this proposition is not accepted it certainly should be available if a floor space ratio is in force because of an inability by a developer to satisfy the requirements of clause 4.4C.
- Clauses 6.5 and 6.6 should be omitted from the local environment plan.