Urban Taskforce
AUSTRALIA

30 January 2009

Mr Alan Stoneham
General Manager,
Penrith City Council,
P O Box 60,
Penrith NSW 2750

By email: localplanteam@penrithcity.nsw.gov.au

Dear Mr Stoneham

Re: Draft Penrith Local Environmental Plan 2008 (Stage 1)

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 both government and the community.

We understand that Penrith Council will prepare its comprehensive local environment plan (LEP) in two stages and that this is the first stage covering, the rural and industrial areas and the St Mary's Town Centre. The Urban Taskforce has reviewed the draft LEP 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

Ecologically sustainable development

The Urban Taskforce is concerned with the language used by Council in articulating the aims of the *Draft Penrith Local Environmental Plan 2008* ("the plan").

Section 25(3) of the *Environmental Planning and Assessment Act* ("the Act") makes it clear that if a provision of a local environment plan is genuinely capable of different interpretations, the interpretation which best meets the aims stated in plan is preferred.[1] For this reason, it's important that the aims of the plan are well written.

The plan includes the following aims:

(a) to promote development which is consistent with Council's vision for the City of Penrith, namely, one of a sustainable and prosperous region with a harmony of urban and rural qualities with a strong commitment to environmental protection and enhancement;

(b) to ensure development incorporates the principles of sustainable development through the delivery of balanced social, economic and environmental outcomes;

(c) to encourage development to be designed in a way that assists in the mitigation of, and adaptation to, the likely impacts of climate change; ...

(f) to encourage development that promotes responsible and environmentally sound management practices and resource use, and is sustainable in the long term; ...

(h) to sustain healthy and diverse rural lands in Penrith by conserving their biodiversity, maintaining the integrity of their ecosystems, maintaining their natural capital and promoting the social well being of rural communities, ...

The aims merely describe the elements of "ecologically sustainable development" that are already extensively defined and detailed under the Act itself. The concept of "ecologically sustainable development" already requires:

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

- environmental protection;
- the integration of economic and environmental decision-making;
- consideration of climate change;[2]
- inter-generational equity in decision-making;
- the application of the precautionary principle; and
- respect for biodiversity.[3]

Section 11 of the *Interpretation Act* 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. There is no need for a further reiteration of the elements of ecologically sustainable development in the plan. The aims will be clearer if the terminology used is consistent with the Act.

The aims set out in 2(a), (b), (c), (f) and (h) should be replaced with an aim "to promote the ecologically sustainable development of the City of Penrith".

Views

Under NSW planning law there is no legal right for a landholder to retain a view.[4] Such a right has no place in planning law, because of the harsh impact it would have on other landholders. However clause 2(d) of the plan comes dangerously close to introducing such a right when says the plan aims

> to protect items of environmental value, particularly ... views ...

Development apparently permissible under plan may, in effect, be banned because someone's view will be at risk. This clause cannot be excused by saying that only views of "environmental value" will be protected, because the "environment" is defined by the Act to include

> all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.[5]

Since "environment" has a very board definition,[6] <u>any</u> view is likely to have "environmental value". That means the plan aims to "protect" <u>any</u> view in the City of Penrith.

The law on visual amenity is more than adequate and should not be tampered with by provisions in the new plan. A "view" is a component of the broader concept of amenity and neighbourhood character.[7] Planning law envisages a *balance* being struck between the need for urban development and neighbourhood character.[8] The rights of a landholder to benefit from his or her view must be a balanced with:

- the right of other landholders to benefit from the use of their land; and
- the needs of the community for appropriate housing, commercial premises, industrial premises and retail development.

There should be no reference to view protection in the aims of the plan.

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[2] The need to give regard to climate change has recently been considered in the Land and Environment Court and the Court of Appeal (see Minister for Planning v Walker [2008] NSWCA 224). The Court has made it clear that climate change is an important consideration under the Act as it stands. The plan does not need embellishment to properly consider this matter and matters relating to ecologically sustainable development.

[3] 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.

[4] *Sloane v McDonalnds Industries (Sales) Pty Ltd* (1989) 17 NSWR 471 86, 101.

[5] s 4(1).

[6] "Environmental" is a cognate word of "environment" and thus will have the same meaning: Interpretation Act 1987 s 7.

[7] *Ex parte Little; Re Fairfield Municipal Council* [1963] NSWR 471.

[8] *Wain Leisure Ltd v Secretary of State for the Environment and the Lake District Special Planning Board* [1989] JPL 190.

Urban growth limits

Clause 2(g) says the plan aims

> to reinforce Penrith's urban growth limits and promote a compact city by identifying and promoting the intrinsic rural values and functions of Penrith's rural lands ...

No state or regional strategy has set "growth limits" for Penrith. Urban growth boundaries have not been particularly effective at forcing increased residential densities.[9] Melbourne has recently effectively abandoned its urban growth boundary.[10] Growth boundaries are not good policy and nor should they be introduced by stealth. **The aims of the plan should not refer to any growth boundaries.**

Rural living subordinated to other priorities

Clause 2(i) says that the plan aims

> to provide for rural living opportunities that are consistent with conserving the rural, agricultural, heritage, natural and scenic values of the rural lands ...

This objective ignores the role consent authorities have to balance competing community priorities when making decisions for the social, economic and environmental benefit of the community. The requirement that rural living be "consistent" with other priorities means that "rural living" is subordinate to those priorities. These issues are best dealt with by section 79C(1)(b) of the Act which requires consideration of

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

The aims of the plan should reflect the need to balance different community priorities, rather than establish blanket rules that elevate some priorities above all others.

2. Increased red tape when there are minor changes in use for shops and commercial premises

SEPP 22

The plan says that *State Environmental Planning Policy No 22—Shops and Commercial Premises* (SEPP 22) will no longer apply.[11]

SEPP 22 enables a property owner to make simple changes of use by going through a more straightforward process. It allows consent authorities to approve the change in the use of a building in a business zone from one kind of commercial premises/shop to another kind of commercial premises/shop, even when the local environment plan or another SEPP may prohibit the change of use.[12] SEPP 22 includes a safeguard that limits the circumstances where consent can be granted to when there is only a minor environmental effect and the change is in keeping with the objectives of the zone. [13]

The removal of SEPP 22 suggests that Council wants to broaden its power to force an upgrading of premises or additional car parking when minor changes of uses occur. A boarder power of this kind is inappropriate because it will reduce the flexibility of property owners to ensure the best mix of tenants and therefore reduce the productivity of retail and commercial premises.

SEPP 22 should apply in Penrith to help avoid an increase in red tape when there are changes in use and there are only minor environmental impacts.

Instead of making it harder for landlords to find new tenants for vacant premises, the plan should actually make things easier. There is no reason why many changes of business premises located within a neighbourhood centre zone cannot be exempt from the requirement to lodge a development application. Under the plan a change of use can only be considered as exempt development if it is located either within the mixed use zone or the industrial zones.

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[9] Levine, J *Zoned Out* (2006) 120.
[10] http://www.theage.com.au/national/goahead-for-urban-sprawl-20081202-6ps9.html?skin=text-only.
[11] Cl 1.9(2A).
[12] *State Environmental Planning Policy No 22—Shops and Commercial Premises* cl 6(1).
[13] Ibid cl 6(2).

Furthermore, in some circumstances, even within these zones, floor space restrictions further limit the potential for consideration of these minor developments as being exempt.

Though not ideal, the exempt provisions in *Liverpool Local Environmental Plan 2008* as they apply to business premises have some merit. For example, the Liverpool clause below could be used in place of the proposed clause in schedule 2 of the Penrith plan.

> Change of use—light industrial premises, office and business premises and shops ...
>
> (1) Must not involve the carrying out of any alterations other than alterations that are themselves exempt development.
>
> (2) The new use must be permissible in the zone.
>
> (3) Must not use curtilage of the premises for storage or display purposes.
>
> (4) Must not extend the existing hours of operation.[14]

The above clause would still safeguard legitimate community interests while enabling minor changes of use to occur without the need for a formal application of any type.

The schedule 2 provisions to exempt changes in use from development application should be broadened so that light industrial premises, office and business premises and shops may change their use without development application if

- the change does not involve the carrying out of non-exempt alterations;
- the new use is still permissible in the zone;
- curtilage of the premises will not be used for storage or display; and
- there is no extension to the hours of operation.

Changes of use to food premises

A change of use for non-food retail premises to food retail premises will not be complying development under the plan. The logic behind this is not apparent.

Food premises are already subject to control under the Australian New Zealand Food Standards Code that includes minimum construction standards for food premises. Council should include compliance with the Food Standards Code as a requirement of complying development for food premises and hence able to be considered as complying development.

When determining if a food premises should be issued with a complying development certificate, the certifier is able to consider compliance with the Building Code of Australia and the Australian New Zealand Food Standards Code prior to the issue of a certificate. This provides an adequate level of protection against inappropriate methods of construction and should enable the fit-out of food premises to be considered as complying development.

A change of use for non-food retail premises to food retail premises should be complying development.

3. Unnecessary additional zone objectives

The Council has inserted additional objectives to some zones that appear to add nothing to the standard objectives. The objectives added by Council simply restate and/or reword the standard objectives.

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. This could have bizarre and unintended consequences for this plan; given that so many provisions appear to do nothing more than duplicate other provisions.

[14] Schedule 2.

Primary production zone

The first dot point in the "primary production zone" that has been added by Council says that the zone is

> [t]o protect productive agricultural land which supplies produce to local and regional markets.

However this is merely a re-drafting of the first dot point in the objectives for this zone, inserted by the Standard Instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* which says the zone is

> [t]o encourage sustainable primary industry production by maintaining and enhancing the natural resource base.

The only discernable difference is that the Council inserted objective appears to discriminate against any agricultural enterprise that is seeking to exports its product rather than sell into the local and regional markets. It is unclear why exports should be treated less favourably than local producers.

The third dot point added by Council says the zone is

> [t]o ensure land uses are compatible with the environmental capabilities of the land.

Surely "sustainable primary production" is synonymous with "land uses [that] are compatible with the environmental capabilities of the land" (as provided by the Standard Instrument zone objective)?

The fourth dot point added by Council to the zone objectives says that the zone is

> [t]o preserve and improve natural resources through appropriate land management practices.

The third dot point inserted into the zone objectives by the Standard Instrument already provides that the zone is

> [t]o minimise the fragmentation and alienation of resource lands.

Surely the 'preservation' of "natural resources" is adequately dealt with by the existing zone objective seeking to "minimise" the "alienation of resource lands"?

Council should not feel obliged to add words, particularly if the same meaning can be gained from existing standard zone objectives. Additional objectives confuse and complicate matters as one seeks to differentiate between objectives.

The first, third and fourth Council added dot points in the primary production zone objectives should be deleted as they merely re-state the Standard Instrument objectives that have already been included.

Rural landscape zone

In the rural landscape zone the first zone objective inserted by Council says the zone is

> [t]o minimise conflict between land uses within the zone and land uses within adjoining zones.

However this adds very little to the existing zone objective inserted by the Standard Instrument which says the zone is

> [t]o provide for a range of compatible land uses, including extensive agriculture.

'Minimising conflict' and providing for 'compatible uses' are surely synonyms?

The second and third zone objectives inserted by Council says that the zone is

> [t]o ensure land uses are compatible with the environmental capabilities of the land.... [and]
>
> [t]o preserve and improve natural resources through appropriate land management practices.

However, this adds absolutely nothing to the Standard Instrument's zone objective saying that the zone is

> [t]o encourage sustainable primary industry production by maintaining and enhancing the natural resource base.

'Sustainability' embraces the notion that natural resources should be safeguarded and environmental capabilities are appropriately managed. The difference in emphasis appears to be Council's desire to "ensure" an outcome, while the Standard Instrument objective seeks to "encourage" an outcome. By seeking to "ensure" an outcome, the Council is weakening the integrity of the merit assessment process by elevating this consideration above others. The Standard Instrument objective to "encourage" the outcome is more workable and provides for a fuller merit assessment.

The first, second and third Council added dot points in the rural landscape zone objectives should be deleted as they merely re-state the Standard Instrument objectives that have already been included.

The same issues arise in connection with the rural small holdings zone**. The first and second Council added dot points in the rural small holdings zone objectives should be deleted as they merely re-state the Standard Instrument objectives that have already been included.**

Industrial zones

In the light industrial and general industrial zones Council has included a zone objective:

> [t]o limit the impact of industrial development on adjacent residential areas, in terms of its built form, scale, acoustic and visual privacy and air quality.

This objective has the same effect as the standard definition which states the zone is

> [t]o minimise any adverse effect of industry on other land uses.

The last zone objective in the light industrial and general industrial zones should be deleted because it is a restatement of the Standard Instrument zone objectives and the wording of the Standard Instrument objective is superior.

4. Entrenching the right to a "view" as a property right

Earlier, when discussing the aims of the plan, we pointed out that under NSW planning law there is no legal right for a landholder to retain a view.[15] Such a right has no place in planning law, because of the harsh impact it would have on other landholders and the social and economic costs it would impose on the community at large.

The plan aim contained in clause 2(d) (discussed above) is implemented by the zone objectives that directly confer statutory protection to views. This is akin to elevating "views" to the status of a property right, rather than its proper status as an aspect of community amenity.

In the primary production zone a Council-inserted objective says that the zone is

> [t]o protect and enhance the existing agricultural landscape character of the land, *including views and vistas from main roads and other vantage points* (emphasis added).

If the reference to "views and vistas" was absent, this zone objective would add nothing to the existing objective that seeks

> [t]o encourage sustainable primary industry production by maintaining and enhancing the natural resource base.

However the addition of "views and vistas" as a zone objective *does* have profound implications for landholders who seek to better utilise their land. It means that the protection of the views of others will have a higher priority than the social, economic and environmental benefits (including possible improved amenity) that might occur from a development that has some minimal impact on someone's "views and vistas".

Importantly, the Council added zone objective doesn't simply seek the maintenance of existing views, it demands their enhancement too. Over time, as people seek to modernise built form on their property, this could lead to a forced reduction in commercial activity in the zone, in order to promote better "views and vistas".

[15] *Sloane v McDonalnds Industries (Sales) Pty Ltd* (1989) 17 NSWR 471 86, 101.

No limitation is placed on the "views and vistas" that are to be protected and enhanced. There is a reference to "main roads", but also a reference to *any* other "vantage point". Given that a vantage point is merely a place where one sees a view, these additional words seem to serve no purpose. If a view can be *seen* from some place, then it receives the statutory protection of this zone objective.

A similar zone objective has been inserted into the plan in relation to the rural landscape zone and rural small holdings zone where each zone is:

> [t]o protect views and vistas from main roads and other vantage points

In addition to the problems involved in giving views the explicit statutory protection outlined above, this objective is unnecessary in these particular zones. That is because the existing Standard Instrument zone objective already says the rural landscape zone is

> [t]o maintain the rural landscape character of the land.

This wording satisfies the necessary public interest issues, but does so without giving express statutory protection to every single view or vista. Similarly, the existing Standard Instrument zone objective already says the rural small holdings zone is

> [t]o maintain the rural and scenic character of the land.

The aims in the rural production zone, rural landscape zone and rural small holdings zone seeking the protection and enhancement of "views and vistas" should be deleted from the plan.

5. <u>Objectives should not be made subordinate to other objectives</u>

In the village zone the plan attempts to insert an additional zone objective that is subordinate to all other objectives, namely that the zone is

> [t]o provide limited housing development opportunities for existing and new residents, including an ageing population, *where this is consistent with the other objectives of this zone* (emphasis added).

Firstly, this provision appears to be an attempt to circumvent clause 2.3(2) of the plan (mandated by the Standard Instrument) which says that

> [t]he consent authority must have *regard* to the objectives for development in a zone when determining a development application (emphasis added) ...

An obligation to have "regard" for an objective is less restrictive than an obligation to make a decision that is "consistent" with an objective. The wording of this particular zone objective appears to be attempting to re-introduce the previous more inflexible approach of older zoning instruments.

Secondly, it is contrary to the spirit and intent of the Standard Instrument for a plan to attempt to establish a hierarchy of zone objectives. A rigid hierarchy of this kind fetters the discretion of a consent authority and means less consideration of *merit* and more *bureaucratic humbug*.

The requirement that a village zone objective only be considered when there is consistency with other objectives should be removed.

6. <u>The requirement for residential development to be "limited" creates too much uncertainty</u>

In the village zone, which includes Mulgoa and Wallacia, the plan inserts a zone objective that says the zone is

> [t]o provide *limited* housing development opportunities... (emphasis added)

The phrase "limited" should not appear in a statutory plan unless it is given a specific meaning. A subjective word such as "limited" means 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 sufficiently "limited". This undermines the intent of the whole statutory planning process which is about providing greater certainty.

The statement that residential development should be "limited" should be removed from the objectives of the village zone.

7. Most retail and services banned in the village zone

Neither "retail premises", nor "shops" are generally permitted uses in the village zone. Other than on specific land identified in Schedule 1 of the plan, only neighbourhood shops are permitted.

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 a village zone (other than on those specifically listed sites):

- 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.

In short, shops of any size are banned in neighbourhood centres, if they sell either: large grocery items, clothing, music, homewares or electrical goods.

A florist who wants to set up shop in a neighbourhood centre will have to argue that flowers are a "small daily convenience good" and "satisfy day-to-day needs" of locals. A small shop that sells iPods, mobile phones and personal radios will be banned. As will a baby clothes shop.

Additionally "business premises" will also be banned in the village zone. This means that locals will be unable to set up a shopfront to engage in a profession or trade that provides services directly to members of the public. This means local communities will be deprived of internet access facilities, doctors' surgeries, hairdressers, video libraries and dedicated banks, post offices and dry cleaners. Why is okay to have banking services provided as an ancillary service in a neighbourhood shop, but unlawful to open a bank branch as a standalone service?

Where is the public interest in prohibiting these low impact uses? None of these retail and business types are inconsistent with the character of a rural village. In fact these services are particularity important if the local community is to benefit from a reasonable level of "services and facilities" as per the zone's objectives.

Furthermore, neighbourhood shops are also limited in floor area, which makes it impossible for even a moderate scale supermarket to be established. This limits the opportunity for competition, ensuring that the community pays more than they should. 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 grocery items in their locality.

In August 2008 the Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws.[16] It concluded that zoning and planning regimes act as an artificial barrier to new supermarkets. In the same month

[16] Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008).

the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords.[17]

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. 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.

What this prohibition really means is that people need to drive further to satisfy their general grocery and shopping needs. A Council that espouses ecologically sustainable development principles in their decision and plan making processes cannot in all honesty make policy that creates inequities between communities and also forces the greater use of the motor vehicle.

The argument that limiting floor area and seeking to control the type of goods sold from retail premises by way of plan does not stand up to scrutiny. Local amenity can be properly and appropriately considered at the development application stage. Limiting retail by way of a statutory plan does little more that protect existing retail landlords.

"Retail premises" and "business premises" should not be limited to specified sites and should be a generally permitted use in be permitted in the village zone.

8. <u>Character of the village zone areas should not remain static</u>

A zone objective inserted by Council for the village zone says that the zone is

> [t]o preserve the existing rural character of the village, its setting and where relevant, its cultural heritage values.

Wording that seeks to "preserve" something as general as the "existing" character will prevent the natural evolution of an area. Localities should be able to change, 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 based on the choices of residents, workers, shoppers, employers and business operators. Inflexible planning controls are a recipe for artificial 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 reference to "cultural heritage values" will create major problems. This concept is particularly amorphous and prone to widely different interpretations by different people.

The first Council inserted dot point for the village zone objective should be deleted.

9. <u>It is inappropriate to require development of the mixed used to be in-line with an unspecified "desired future character"</u>

The Urban Taskforce is a supporter of mixed use zones however Council has again added zone objectives that are unnecessary and/or confusing. The zone provides that it is

> [t]o provide a wide range of retail, business, office, residential, community and other suitable land uses complementing the *desired future character* of each precinct (emphasis added).

There is nothing in the plan that identifies the "desired future character" of each precinct. This statutory requirement will either:

- leave it up to consent authorities to form their own opinion as to the "desired future character" of a precinct on an ad-hoc basis; or

[17] Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (2008).

- effectively upgrade the development control plan to the status of a statutory plan in the assessment of "desired future character".

Either way, this is an inappropriate provision for a statutory plan. These matters are best dealt with by way of a development control plan alone.

The undefined reference to the "desired future character" of precincts should be deleted from the mixed use zone objectives.

10. <u>Private development in the mixed use zone should not be required to provide unrelated public infrastructure</u>

The Council has inserted a mixed use zone objective in the plan saying that the zone is

> [t]o create opportunities to improve the public domain.

At best it can be said that the meaning of this objective is vague and unclear. At worst, it appears to be an effort to require future private developments to build, or fund, new public infrastructure, even if the need for that infrastructure is not generated by the development concerned.

That is, this objective attempts to overcome the requirement for *nexus* that is well established in planning law, by making it legitimate for a consent authority to consider the needs of the public domain generally rather than the *impacts* of the development on the public domain.

A retail development may need to dedicate some of its plan as public parkland or a commercial office development may need to build bicycle racks for public use in order to meet the requirements of this zone objective. This objective could legitimise unjustifiable expropriations of private property – that is, a backdoor system of taxation outside of the existing infrastructure levy framework.

Where a development impacts on the public domain, it is already legitimate for a consent authority to seek to address those impacts in the development assessment process. There is no need for a specific objective in such a situation.

The mixed use zone objective requiring private development to create opportunities to improve the public domain should be deleted.

11. <u>A blanket guarantee of no loss of amenity for all existing residents is not sustainable</u>

A mixed use zone objective seeks

> [t]o ensure development does not adversely affect the amenity of residents (particularly acoustic and visual privacy).

This provision empowers landholders whose property might be located near proposed apartment, retail or commercial 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 and the Council may feel obliged to reject an otherwise compliant development application on these grounds.

In effect, this introduces the sort of buffer zone requirements that have existed for years for mines to urban development. In mining, it is routine for mining operators to pay many times market value to nearby landholders in order to secure a buffer zone around their very noisy and polluting operations.

Apartments, retail complexes and office development bear absolutely no relationship to any aspect of heavy industry, and nor is urban development anywhere near as profitable as operating a mine.

Apartment developments, in particular, 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.

These objectives will significantly increase the cost of development, sterilise opportunities to meet future housing, retail and employment needs and give local landholders a right to veto nearby construction. These issues are best dealt with by section 79C(1)(b) of the Act which was discussed above.

The mixed use zone objective seeking to guarantee the amenity of residents should be deleted.

12. <u>Subjective requirements for "high architectural standard" and "visually appealing" developments sound good but are not defined</u>

Council has inserted an additional objective in the general industrial zone that seeks:

> [t]o ensure the design of development that fronts arterial and other major roads is to a high architectural standard and visually appealing.

The phrases "high architectural standard" and "visually appealing" sound good, but they are entirely subjective. They should never appear in a statutory plan unless they are given a specific meaning. Such subjective language will mean different things in the hands of different decision-makers – it is a recipe for confusion, legal disputation and inconsistency.

For example, a consent authority could seek to refuse a development application from a major fast food chain because someone may consider an American-owned fast food store is intrinsically ugly and therefore not "visually appealing" development. It is worth noting that a court is likely to find the phrase "visually appealing" means something different from "high architectural standard" because <u>both</u> phrases are included in the plan. The rules of statutory interpretation will suggest that they mean <u>different</u> things.

Given the politicisation of the local development assessment process, this is a significant disincentive to invest in the general industrial zone.

Subjective terminology such as "high architectural standard" and "visually appealing" 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.

13. <u>Prohibition on retail premises in industrial zones</u>

Council's industrial zones do not permit retail premises. However, the Metropolitan Strategy stated that retailing in industrial areas be permitted when it has operating requirements akin to industrial uses.[18] 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.[19]

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 as a permitted use in industrial zones, with the inclusion of an additional objective to the zone that states the zone is to

> 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.

14. <u>The plan should not be used to protect unsustainable agriculture</u>

The need to adopt a standardised comprehensive plan is an opportunity for local councils to properly study a local area. It appears that Council has mostly considered the locality as it is today and in some cases yesterday, and has not properly considered the future. Council's

[18] Metropolitan Strategy – Supporting Information 105, B4.1.2.
[19] Ibid 63, A1.4.2.

desire to "protect" agricultural activities is a misguided attempt to hold onto traditional agriculture subject to a dramatically changing industry within a regional and global context.

If agriculture in the Penrith local government area were a viable and attractive industry, then its viability would not rely upon protection by way of a local environmental plan.

Australia's agricultural industry is generally located in areas outside of the Penrith local government area. There is no shortage of agricultural land available within Australia to supply produce that meets Sydney needs. The modern supply chain is no longer dependent on geographical proximity. In fact, the only significant commercial opportunity for many Australian regions is agriculture, while Penrith is fortunate that many competing industries are willing and able to locate in the region.

Council's own planning strategy recognises this fact. Council's strategy states that

> ... some agricultural producers in the region have experienced a range of economic pressures associated with changing commodity prices and markets, impacting on the viability of traditional farming.[20]

Local government attempts to limit the decline of agriculture in such locations is ineffective and undesirable.

Simply zoning land as "primary production" does not mean that local agriculture will remain. What it may do is leave land as vacant or under-utilised and relatively unproductive. By taking such a protectionist approach to "rural" activities, Council is at best condemning some to remain locked into marginal, unsustainable rural business.

The local provisions relating to Mulgoa Valley clause 6.12 are of further concern. They seek to introduce additional planning controls more onerous than provided by zoning. This clause includes an objective

> [t]o *protect* the agricultural capability of *prime* agricultural land in the valley (emphasis added).

There is also a requirement that before consenting to any development Council must be satisfied

> ... that the agricultural viability of holdings and potential of the land will not be adversely affected.

This indicates that Council has already made the assumption that it is able to judge the "viability" and "potential" of land. Council is not in the position to make commercial judgements on agricultural viability and land potential.

Matters far outside the expertise of Council have an impact on the viability of business. Council is not in a position to consider these matters and should not seek to do so when making a determination of development proposals.

Of even greater concern is Councils desire to create a de facto growth limit as a means of addressing "weaknesses of the Metropolitan Strategy". As Council rightly acknowledges, the Metropolitan Strategy does not set an urban growth boundary. Council seems to consider this to be an oversight on the part of the NSW Department of Planning, while we would argue that this is an intentional policy decision. Council's attempt to redress this "oversight" by applying dubious zonings and local provisions to sterilise land is highly inappropriate.

The fact that *State Environmental Planning Policy (Rural Lands) 2008* does not apply to the Penrith area strengthens this argument. In fact, the Minister's section 117(2) direction specifically advises that the SEPP is not to apply to land within the Sydney Basin. There is no oversight. The NSW Department of Planning's use of the Metropolitan Strategy and the SEPP is an appropriate and realistic approach to planning for agricultural activities.

There may be a case to limit typical small lot subdivision in non-urban areas on environmental, infrastructure and service demand grounds. Zones such as Rural Small Holdings-RU4 and Environmental Living-E4 will enable the environmental and scenic qualities of the area to be preserved, while limiting unrealistic demand on local infrastructure improvements.

[20] Penrith City Council 2008. *Penrith Planning Strategy*, pp.47

If agriculture is as viable as suggested by Council, this zoning and type of subdivision that may follow will provide for sufficient separation between agricultural and non-agricultural uses, enabling "sustainable" agriculture to continue. Furthermore, larger lot subdivision can be managed so that it does not place an unacceptable demand on existing infrastructure.

The Urban Taskforce does not support the use of the primary production zone RU1 in Penrith, particularly in areas in close proximity to rural villages. Opportunities to provide for quality rural residential living opportunities have been neglected by Council.

Localities should be able to change and evolve. The plan should not attempt to freeze the current character of an area or protect unsustainable uses. An attempt to create a static environment will lead an area to degrade, particularly if the original rationale for a locality's character loses relevance.

15. Superfluous local provisions

Ecologically sustainable development

Council is able to add local clauses that address specific local circumstances. The provisions in clause 6.1 titled "Sustainable Development" are not a genuine local circumstance. It seems that Council is seeking to ensure that the principles of ecologically sustainable development (ESD) are given due regard when considering development proposals. However, if the intention of the clause is to ensure that ESD is properly considered, then this clause is superfluous. The encouragement of ESD is an objective of the Act (as discussed above in the section of this submission dealing with the plan's aims). Therefore there is no need for Council to seek to add to these objectives, restate or reword them in a local environmental plan.

Clause 6.1 "Sustainable development" should be deleted from the plan.

Servicing

Council has included clause 6.11 titled "Servicing". The clause is poorly worded, and in any event, not necessary. The objective is general and subjective. Seeking to define or ensure that development of land "reflects the availability of services" is open to interpretation.

Furthermore Clause 6.11 (2) (a)-(d) relates to connection to reticulated water supply, waste water disposal and the need for public amenities. These are matters that relate to the assessment of development proposals and receive detailed and adequate consideration as part of the development application determination process pursuant to section 79C of the Act. Furthermore the objects of the Act highlight the need to give consideration to servicing land.

Clauses 6.11 (3) and (4) must be read together and in effect sets a minimum lot size where development will not be connected to a reticulated sewerage system. This is yet another matter that is best considered as part of a development/subdivision application to Council. Effluent disposal is best considered on a case by case basis as suitability of on-site disposal will be influenced by several matters including soil type, site gradient, overland flow paths etc. Setting an arbitrary minimum lot size lacks sophistication and limits the ability to design and construct site-specific solutions.

Clause 6.11 "Servicing" should be deleted from the plan.

Flight paths

Clause 6.18 "Development of land in the flight paths of the site reserved for the proposed Second Sydney Airport" is no longer required. On Tuesday 2 December 2008 the Commonwealth Government released a National Aviation Policy Green Paper[21] and it is stated that

> [t]he construction of an airport at Badgerys Creek is no longer an option.

[21] Commonwealth of Australia 2008. National Aviation Policy Green Paper: Flight Path to the Future. On line http://www.infrastructure.gov.au/aviation/nap/files/Aviation_Green_Paper.pdf [accessed 2-12-08]

The Commonwealth have removed this option for a second airport for Sydney from further consideration and it is for this reason that clause 6.18 is no longer required.

Clause 6.18 "Development of land in the flight paths of the site reserved for the proposed Second Airport for Sydney" should be deleted from the plan.

16. <u>Omissions from local provisions</u>

Clauses 6.6 and 6.7 have been omitted. This is most likely a drafting oversight but should be corrected.

Objectives to clauses 6.8, 6.9 and 6.10 should be added to give meaning to and justify Council's desire to impose additional control on affected land.

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 ask that you 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

Aaron Gadiel
Chief Executive Officer

Urban Taskforce
AUSTRALIA

Draft Penrith Local Environment Plan 2008

Summary of Urban Taskforce's Recommendations

1. The aims set out in 2(a), (b), (c), (f) and (h) should be replaced with an aim "to promote the ecologically sustainable development of the City of Penrith".
2. There should be no reference to view protection in the aims of the plan.
3. The aims of the plan should not refer to any growth boundaries.
4. The aims of the plan should reflect the need to balance different community priorities, rather than establish blanket rules that elevate some priorities above all others.
5. *State Environmental Planning Policy No 22—Shops and Commercial Premises* should apply in Penrith to help avoid an increase in red tape when there are changes in use and there are only minor environmental impacts.
6. The schedule 2 provisions to exempt changes in use from development application should be broadened so that light industrial premises, office and business premises and shops may change their use without development application if
    a. the change does not involve the carrying out of non-exempt alterations;
    b. the new use is still permissible in the zone;
    c. curtilage of the premises will not be used for storage or display; and
    d. there is no extension to the hours of operation.
7. A change of use for non-food retail premises to food retail premises should be complying development.
8. The first, third and fourth Council added dot points in the primary production zone objectives should be deleted as they merely re-state the Standard Instrument objectives that have already been included.
9. The first, second and third Council added dot points in the rural landscape zone objectives should be deleted as they merely re-state the Standard Instrument objectives that have already been included.
10. The first and second Council added dot points in the rural small holdings zone objectives should be deleted as they merely re-state the Standard Instrument objectives that have already been included.
11. The last zone objective in the light industrial and general industrial zones should be deleted because it is a restatement of the Standard Instrument zone objectives and the wording of the Standard Instrument objective is superior.
12. The aims in the rural production zone, rural landscape zone and rural small holdings zone seeking the protection and enhancement of "views and vistas" should be deleted from the plan.
13. The requirement that a village zone objective only be considered when there is consistency with other objectives should be removed.
14. The statement that residential development should be "limited" should be removed from the objectives of the village zone.
15. "Retail premises" and "business premises" should not be limited to specified sites and should be a generally permitted use in be permitted in the village zone.
16. The first Council inserted dot point for the village zone objective should be deleted.
17. The undefined reference to the "desired future character" of precincts should be deleted from the mixed use zone objectives.

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18. The mixed use zone objective requiring private development to create opportunities to improve the public domain should be deleted.
19. The mixed use zone objective seeking to guarantee the amenity of residents should be deleted.
20. Subjective terminology such as "high architectural standard" and "visually appealing" should be removed from the local environment plan.
21. Retail premises must be permitted in industrial zones as per the Metropolitan Strategy.
22. The Urban Taskforce does not support the use of the primary production zone RU1 in Penrith, particularly in areas in close proximity to rural villages.
23. Clause 6.1 "Sustainable development" should be deleted from the plan.
24. Clause 6.11 "Servicing" should be deleted from the plan.
25. Clause 6.18 "Development of land in the flight paths of the site reserved for the proposed Second Airport for Sydney" should be deleted from the plan.