Urban Taskforce
AUSTRALIA

11 February 2009

Mr Ian Reynolds
Acting Deputy Director-General (Land Release and Strategy)
NSW Department of Planning
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PARRAMATTA NSW 2124

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Dear Mr Reynolds,

Re: Exhibition of Riverstone and Alex Avenue Precinct Planning Package

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 exhibited *Riverstone and Alex Avenue Precinct Planning Package* and identified some issues meriting further consideration. Our review has focused on the proposed changes to the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* (amendments 5 and 6) and the *Draft Contributions Plan No. 20: Riverstone and Alex Avenue Precincts* prepared by Blacktown City Council.

Our concerns are generally outlined below and **attachment 2 provides a summary of the Urban Taskforce recommendations**.

1. **The proposed "section 94" development levies grossly exceed the $20,000 per lot "cap"**

   There remains a chronic shortage of land for urban development, particularly in the Sydney region. This is making existing land available for residential development more expensive, which in the end is making housing less affordable. The Urban Taskforce is of the view that the problem of housing affordability in Australia is a function of strong demand and limited supply. A view that has been widely supported by others, including the NSW Government.[1]

   To make housing more affordable, we need to get more houses built and onto the market. Fortunately, government has realised that significant initiatives are required to minimise the cost of land and increase its availability. This has been done in the hope that housing prices will not continue to spiral out of reach for ordinary homebuyers.

   In this regard, the NSW Government and Blacktown Council must be mindful of the impact that development levies will have on land and housing affordability. Recently the NSW Government announced a review of state infrastructure contributions and water infrastructure levies that apply to the development of greenfield housing sites, infill development and employment lands, including industrial lands The objective of the review was to ensure that infrastructure levies would not frustrate the Government's plans to boost housing supply and affordability. On 17 December 2008, the Premier, the Hon. Nathan Rees MP, announced the outcome of this review. The reforms included

   > [c]apping infrastructure contributions payable to local councils at $20,000 per lot.[2]

   Our initial review of the section 94 plan suggests that this "cap" will be grossly exceeded. That is, if between 16.2 to 21.1 lots are developed on each hectare, a three bedroom detached dwelling would require a section 94 contribution in the order of $51,000 - $80,000 (refer to

[1] Commonwealth of Australia (2008) *A good house is hard to find: Housing affordability in Australia*, June 2008.
[2] Office of the Premier of NSW, media release, "Premier announces plan to kick-start housing construction", 17 December 2008.

attachment 1). The imposition of such a tax on development is simply exorbitant. When added to:

- existing government taxes and charges;
- the high acquisition cost of undeveloped land; and
- the numerous other development costs,

the cost of producing lots may be higher than the market value.

This would simply mean that, once again, no land will be developed; demand for housing will continue to outstrip supply and housing will remain out of reach of those in greatest need.

We strongly argue for an element of market reality when determining development charges, particularly when preparing a contributions plan. We are of the belief that this approach has not been adopted when preparing the Riverstone and Alex Avenue precincts contributions plans.

The section 94 levy for each dwelling should be capped no more than $20,000 a lot, as per the NSW Government's announcement of 17 December 2008.

The Urban Taskforce is also concerned with the absence of meaningful project specification/information provided in the draft contributions plan or planning reports prepared for each precinct. What we have been provided with in this exhibition is little more than wish lists with dollars assigned. This is particularly evident in the case of open space, community and recreational facilities.

No development levy should be imposed without detailed project justification.

The government has declared its desire to reduce the costs of bringing land to market. Therefore we cannot see how there can be justification for elaborate projects that will make housing more expensive (or unaffordable) through the imposition of $312 million for "open space" and "recreation facilities" and a further $65 million in "community facilities".

Project evaluation and prioritisation becomes essential when the costs of water cycle management facilities and works (drainage) is to cost in excess of $290 million and traffic management works is to cost more than $200 million.

The Urban Taskforce has a number of concerns with the two proposed precinct plans to be inserted into the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* and would like to draw the attention of the Growth Centres Commission to the following matters.

2. <u>The wording of the precinct plans' aims needs to be improved</u>

The Urban Taskforce is concerned with the language used to articulate the aims of each 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 an environmental planning instrument (such as a state environmental planning policy) is genuinely capable of different interpretations, the interpretation which best meets the aims stated in the plan is preferred.[3] For this reason, it is important that the aims of a plan are well written and understandable.

Unfortunately in some instances the wording used in the precinct plans are vague and subjective. We ask the Government to use expressions that already exist in law where there are well-established legal interpretations.

Clause 1.2(a) of both plans could prove to be problematic. This clause refers to

> development controls for land …….that will *ensure* the creation of *quality environments* and *good design outcomes* (emphasis added).

"[Q]uality environment and good design outcomes" are 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 "quality environment" to be one that provides for less residential

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

density, while others might argue that a "quality environment" is one that provides more housing choice.

Ensuring "good design outcomes" sounds good, but is entirely subjective. Such a phrase should never appear in a statutory plan unless it is given a specific meaning. Subjective words such as "good design" mean different things in the hands of different decision-makers – it is a recipe for confusion, legal disputation and inconsistency.

Subjective terminology such as "quality environments" or "good design outcomes" should be removed from the precinct plans. If design standards are thought to be necessary, they should be included in the development control plan.

It is very difficult to guarantee that at all times there will be a "quality environment". For example, many people will be of the view that an environment that includes an American fast food chain cannot possibly be a *quality* environment. Yet the plans' aims purport to extend just that kind of guarantee when it says that it will "ensure" a quality environment and good design outcome.

The plans' aims should not seek to "ensure" quality environments or good design outcomes.

Clause 1.2(f) in the case of amendment 5 and 1.2(g) in the case of amendment 6 refer to "sustainable development". This phrase is neither defined by the plans or by the Act. Words and expressions that are well understood and accepted at law should be used in a legal document. The *Environmental Planning and Assessment Act 1979* ("the Act") uses the phrase "ecologically sustainable development". It is defined 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.

The phrase "sustainable development" should be replaced with "ecologically sustainable development" to ensure that the meaning of the phrase is clear.

3. SEPPs generally should still override the precinct plans in the same way that they can override a local environment plan

Clause 1.9(1) lacks coherence. In both precinct plans its says that the plans are

> subject to the provisions of any State environmental planning policy and any regional environmental plan that prevail over this State Environmental Planning Policy as provided by section 36 of the Act.

Firstly, these precinct plans are contained in a state environmental planning policy (SEPP), not a local environment plan. Section 36 of the Act has nothing to say on the relationship between earlier and later SEPPs. The drafting of this clause has been lifted from the Standard Instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006*. While the drafting is appropriate for a local environmental plan, it makes no sense in a state environmental planning policy.

Secondly, even if it were possible to stretch the wording of 1.9(1) to the effect that SEPPs override the precinct plans, this contravenes the express text of clause 1.9(2A). This clause says precinct plans will override any other SEPP. This means that *State Environmental Planning Policy (Major Projects) 2005*, *State Environmental Planning Policy No 22—Shops and Commercial Premises* (SEPP 22) and other such SEPPs will be subordinate to any express provision contained in these precinct plans.

This has worrying implications. For example, SEPP 22 enables a property owner to make simple changes of use by going through a more straight forward 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. 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.

The exclusion of SEPP 22 suggests that the government wants to broaden the power of council to force an upgrading of premises or additional car parking when minor changes of uses occur. A broader 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 to the growth centre precincts to help avoid an increase in red tape when there are changes in use and there are only minor environmental impacts.

Other problems can be expected from the proposed provisions. On 6 November 2008 the NSW government announced that all development applications for projects with a value of $10 million or more will be determined by joint regional planning panels rather than councils. This decision will be brought into effect by a SEPP. However the precinct plan overrides other SEPPs and clause 1.6 in both precinct plans gives the consent role exclusively to the council.

State Environmental Planning Policy No 22—Shops and Commercial Premises, State Environmental Planning Policy (Major Projects) 2005 and possibly other state environmental planning policies (SEPPs) should still apply to the land covered by the precinct plans. This means **a new clause should be inserted which makes it clear that such SEPPs override the precinct plans in the same way that they override a local environmental plan.** The existing clauses 1.9(1) and clause 1.9(2A) should be replaced and/or re-drafted.

4. Additional zone objectives in the medium density zone reduces the clarity of other objectives

The precinct plans include objectives saying that the medium density zone is

> [t]o enable medium density housing adjacent to the local centre and within close proximity to public transport services.[4]

and

> [t]o enable medium density housing adjacent to the neighbourhood centre and within close proximity to public transport services.[5]

These zone objectives add nothing to the Standard Instrument zone objectives that are also include for the zone. In particular, the first zone objective states the zone is

> [t]o provide for the housing needs of the community within a medium density residential environment.

Given that the whole zone is intended to provide a medium density residential environment there seems little point in providing an explicit zone objective which directs medium density to a particular part of the zone (that is the parts of the zone adjacent to the centre/public transport). The judiciary is obliged to regard additional words as being inserted for a reason, so it will endeavour to derive a meaning from the insertion of the extra words. The result may be an interpretation that medium density residential is not to be encouraged generally across the zone, but instead only near centres and public transport.

Zone objectives in both precinct plans to say medium density is to be 'enabled' adjacent to the neighbourhood/local centre and within close proximity to public transport services should be deleted. They are unnecessary and may lead to a perverse interpretation.

5. The neighbourhood centre zone objectives in the Riverstone precinct plan are problematic

"Small-scale" retail, business and community uses

The neighbourhood centre zone says it is to provide for "small-scale" retail, business and community uses. The phrase "small-scale" should never have appeared in a statutory plan.

The objectives are not a summary of the specific controls for a zone. They are an additional mechanism of development control that can be used to block development that would otherwise be permissible (or more properly expressed – the zone objectives may influence the exercise of discretion available to the consent authority). A development can comply with all

[4] *State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (*Amendment 5).
[5] *State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (*Amendment 6).

other statutory rules, but nonetheless be rejected because, in the opinion of a particular decision-maker, it is not sufficiently "small-scale". This undermines the intent of the whole statutory planning process - which is about providing greater certainty.

If there is a desire to prohibit buildings of a particular bulk and scale then the precinct plan should clearly say so and set out the applicable floor space ratio restrictions. Such rules allow developers to make acquisition decisions and prepare development applications with some confidence about an outcome. Subjective words such as "small-scale" mean different things in the hands of different decision-makers. For instance, does the term small-scale refer to the size of the building or the range of goods or services offered? It is a recipe for confusion, legal disputation and inconsistency.

The subjective term "small-scale" should be deleted from the zone objective for a neighbourhood centre in the Riverstone precinct plan.

Scale and type

The second zone objective for the neighbourhood centre in the Riverstone precinct plan says that the zone is

> [t]o *ensure* the scale and type of business development is compatible with *the amount of surrounding area* (emphasis added).

Firstly, there are problems with the use of the word "ensure" in this context. To "ensure" something is to

> make sure or certain to come, occur, etc.[6]

For good reason the provisions of the Standard Instrument avoid using this word in zone objectives because it is difficult to guarantee that an outcome is achieved in a particular case. In fact, attempting to guarantee an outcome can be perverse. By seeking to "ensure" an outcome, the integrity of the merit assessment process is weakened. This is because the precinct plan elevates this single consideration above all others, including considerations that may actually be more important.

The Standard Instrument generally uses words such as "encourage" or "minimise" in recognition of the balancing exercise that must occur in every well structured merit assessment process. An attempt to "ensure" something, may lead to risk-averse decision-making, which forces development to be refused when there is only the slightest risk of an objective not being achieved.

Secondly, it is unclear what is meant by the "amount of surrounding area". Does this refer to the area of the zone, or the area of the lot? How will a development be regarded as being "compatible" with an "amount of area"? One would think that if the development physically fits within in area, it is compatible with it.

The danger of a provision of this kind is that even when:

- a proposed land use is permissible under the zone; and
- size/bulk is within the relevant floor space ratios,

development consent will, nonetheless, be refused because a consent authority forms the subjective opinion that is 'incompatible' with the "amount" of "surrounding area". This concept is entirely too vague, and will discourage land acquisition for the purpose of development.

The second zone objective for the neighbourhood centre in the Riverstone precinct plan should be deleted.

Residential development preclusion of active uses

The third zone objective for the neighbourhood centre in the Riverstone precinct plan says that the zone is

[6] *Macquarie Concise Dictionary*, 4th edition (2006).

> [t]o ensure residential development does not preclude the provision of active retail, business and community uses at street level.

This zone objective appears to envisage residential developments that are otherwise permissible being refused on the grounds that the development is residential on the ground floor. However, the only form of residential development permitted in the zone under the land use table is shop top housing. It seems possible that the purpose of zone objectives has been misunderstood. The zone objectives (unlike plan aims) are <u>not</u> a means of explaining the motivations behind the land use table. A stated above, they are an additional form of regulation that can be used to refuse other permissible development.

This zone objective can only be relevant when shop top housing is proposed which includes dwellings at ground floor level adjacent to a shop or business premises (for example, a townhouse style development with a shop on a corner). However, this configuration is prohibited by a separate provision (clause 6.8) tucked up at the back of the precinct plan. It is therefore impossible determine any useful purpose for the inclusion of this zone objective.

The third zone objective for the neighbourhood centre in the Riverstone precinct plan should be deleted.

6. <u>A wide range of uses are prohibited in the neighbourhood centre in the Riverstone precinct plan</u>

Retail premises

"Retail premises" are not permitted uses in the neighbourhood centre. Only "neighbourhood shops", "markets" and "food and drink premises" are permitted.

Neighbourhood shops 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 neighbourhood centre:

- 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, home wares 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.

Furthermore, neighbourhood shops are also limited in floor area to 100 square metres, 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 consumer 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. 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.

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

"Retail premises" should be a generally permitted use in the neighbourhood centre zone in the Riverstone precinct plan.

Neighbourhood shops, and other uses, should not be limited in floor space area by the precinct plan. The floor space permitted should be determined as part of the merit assessment process.

Tourist and visitor accommodation

Tourist and visitor accommodation has been expressly prohibited in the neighbourhood zone. This means that any development that offers temporary or short-term accommodation on a commercial basis, including hotel or motel accommodation, serviced apartments, bed and breakfast accommodation or backpackers' accommodation will be banned. That ban even extends to accommodation that takes the form of otherwise permissible shop top housing.

It is unclear what the public policy justification is for such a ban. Many successful neighbourhood centres include bed and breakfasts, and or short-stay accommodation.

Tourist and visitor accommodation should not be prohibited in the neighbourhood centre zone.

Vehicle repair stations

Vehicle repair stations would conventionally be permissible in a centre as kind of "business premises" yet, it is prohibited in the neighboured centre zone in Riverstone. Why should the local community be denied the opportunity to get their cars fixed within walking distance of their home and public transport?

Remember, even if the use is permitted with consent, consent can still be denied, if a particular proposal would have an unacceptable impact on the amenity of the area.

Vehicle repair stations should not be prohibited in the neighbourhood centre zone.

Generally, the list of uses permitted with consent **in the neighbourhood centre zone should be reviewed and broadened.** The list of uses permitted with consent in the same zone under the *Liverpool Local Environmental Plan 2008* and the *Canada Bay Local Environmental Plan 2008* will be a helpful reference in this regard.

7. Restrictions on ground floor uses in neighbourhood centre, local centre and mixed use zones

It is encouraging to note that residential and other uses are permitted in centres. The importance of land use mix to the success of a centre is widely accepted. Furthermore, it is now well understood that "land use patterns have a significant influence on how well public transport services can be delivered and utilised".[7] By introducing more land use flexibility in the vicinity of transport infrastructure, the infrastructure itself benefits in terms of patronage and therefore viability. Development in the vicinity of transport nodes depends on private investment for its construction and in this regard, land use controls must recognise market realities if there is any likelihood of encouraging beneficial development.[8]

It is noted that zone objectives to the local centre zone is to

> maximise public transport patronage and encourage walking and cycling.

Research consistently shows that residential density has a significant impact on the use of public transport. For instance, it was found that every 10 percent increase in population density was associated with about a 6-percent increase in boardings at train stations.[9] Furthermore, most

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

[8] Freestone, R., 2008, Better Planning and Research for Mixed-Use Developments. *Australian Planner, Vol. 45, No. 1, pp. 14-15.*

[9] 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.

urban services cannot be provided unless there is a certain number of people that can make them viable.[10] Therefore, it is essential that residential development be encouraged within town centres.

Providing for a mix of uses for centres well serviced by public transport is widely accepted as a planning response that would more readily encourage investment and development. Mixed use, neighbourhood centre or local centres zones should not require that each individual development comprise of a mix of uses. Rather, such zones should permit a mix of compatible land uses within a defined area. In particular, the prescription of ground level uses must be avoided. For instance, if the uses permitted at ground level are found not to be viable at a certain point in time, tight regulation limiting the ground floor use may prevent a much-needed development from proceeding. If too much retail space is built, but is not used, visitors will avoid the area because of its empty shopfronts.

The policy decision to prohibit ground floor residential (whether it be by zone objective or clause 6.8 in both precinct plans) may cause the very problem it is trying to avoid. If there is insufficient demand for retail space, developers are forced by these rules to build retail space that can be empty and underused leading to a ghost town atmosphere in the local streetscape. It's far better that developers be allowed to populate empty land with the vibrancy of a residential neighbourhood than leave it bare because of a lack of demand for retail space. Similarly, forcing developers to build retail space that they know will be vacant (in order for the developer to get the benefit of residential space above) is a waste of resources and will do nothing to create a vibrant streetscape.

The same issue is raised in relation to the fourth zone objective in neighbourhood zone and the fifth zone objective in the local centre zone which says each zone is

> [t]o allow for residential development that does not detract from the primary function of the zone which is to provide retail, business and community uses to serve the community.

The fifth zone objective for the mixed use zone in the Alex Avenue precinct plan is similarly worded. Likewise the issue arises in clause 4.4(c) in both plans (strangely) in relation to floor space ratio.

The fourth zone objective in neighbourhood zone, the fifth zone objective in the local centre zone and the fifth zone objective in the mixed use zone should be deleted in each of the two precinct plans.

Ground floor uses should not be limited to non-residential uses. This means at the very least residential flats and multi-dwelling housing should be a permitted use in the neighbourhood centre and local centre zones.

We also ask for **the deletion of clause 6.8 of the Alex Avenue precinct plan** that prohibits residential development at the ground floor within the mixed use zone **and clause 6.8 of the Riverstone precinct plan** which does the same thing in relation to the neighbourhood centre zone.

Clause 4.4(c) in both precinct plans (which sets an objective for floor space ratio rules to eliminate ground floor residences) **should be deleted.**

8. <u>Broad prohibitions on activities in the light industrial zone</u>

Retail premises

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.[11]

Research results digest. October 2002—Number 52 [http://onlinepubs.trb.org/Onlinepubs/tcrp/tcrp_rrd_52.pdf, accessed 7 April, 2008]

[10] Newman, P., 2005., Transit Oriented Development: An Australian Overview. Paper presented at the Transit Oriented Development Conference. Fremantle, Western Australia 5-8 July 2005.
[http://www.patrec.org/conferences/TODJuly2005/papers/Newman%20paper%20REV.pdf, accessed 7 April, 2008]

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 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.

It is particularly bizarre that bulky goods premises are expressly listed as a prohibited use in this zone, given the clear language of the Metropolitan Strategy.

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

Other uses

The list uses in the light industrial zone generally is unnecessarily narrow. For example, the light industrial zone in the *Liverpool Local Environmental Plan 2008* includes as permitted uses:

- cemeteries
- educational establishments;
- helipads;
- recreation facilities (major);
- recreation facilities (outdoor); and
- registered clubs.

All of these uses are prohibited in the light industrial zone in the Riverstone precinct plan.

The list of permissible uses in the Riverstone precinct light industrial zone should be reviewed and broadened, and should include, among other additional uses, cemeteries, educational establishments, helipads, recreation facilities (major), recreation facilities (outdoor) and registered clubs.

9. The use of floor space ratios is not consistent with best practice

Floor space ratios that discriminate based on use in the same zone

Density and land use mix are crucial to the success of a centre. Many successful places include a mix of uses, including jobs, retail, 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 without retail, entertainment and residential uses can be lifeless, cold and uninviting places outside of business hours.

The draft precinct plans impose significant floor space penalties on residential development in some areas For example in the Alex Avenue local centre zone, a maximum floor space ratio (FSR) of 2.25:1 is permitted for commercial/retail land uses, but residential FSR (in the form of shop top housing) in the same location is restricted to 2:1. This will impact on the feasibility of residential development in this location.

Conversely, in the Alex Avenue mixed use zone shop top housing and residential land uses may go up to 2.5:1, but commercial and retail are capped at 1.5:1.

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 on different parcels of land.[12]

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[11] Metropolitan Strategy – Supporting Information 105, B4.1.2.

[12] See A Duany, E Plater-Zyberk and J Speck *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* (2000).

This level of regulation and prescription of uses is unnecessary and must be avoided. For instance, if market conditions mean that non-residential development is not viable at a particular point in time, FSR penalties may prevent urban development from proceeding in a given area.

On the other hand, if residential and non-residential uses are treated equally, residential development can contribute to urban renewal when commercial or retail development is not viable.

We recommend that the lower floor space ratios for each land use type be raised to the maximum.

Maximum building floor space ratio

The table that follows clause 4.4(3) refers to a "maximum building FSR", however this column of the table is not invoked by any text in clause 4.4. The purpose of this column is not clear. In any event clause 4.4(2) already sets the floor space ratio for buildings by reference to the floor space ratio map.

The fourth column in the table following clause 4.4(3) should be deleted as it is not referred by any text in clause 4.4 and therefore serves no useful purpose.

Minimum floor space ratio by land use type

The precinct plan for Alex Avenue sets a minimum FSR of 0.75:1 for commercial and/or retail land uses in the local centre zone and a minimum FSR of 0.5:1 for commercial and/or retail land uses in the mixed use zone. The precinct plan for Riverstone sets a minimum FSR of 0.75:1 for commercial and/or retail land uses in the neighbourhood centre zone.

It is extremely unusual to set minimum floor space ratios and there are good reasons why this practice is to be avoided. The last thing any planning professional should want to see in a local or neighbourhood centre is an empty block of land lying fenced off and idle. Vacant undeveloped land will do nothing to enliven the streetscape and keep the centre active.

Minimum floor space ratios risk mandating a scale of development that may not be commercially viable. Developers do not need minimum floor space ratios to encourage them to develop land to its highest and best use. However, there are times when a site cannot be fully developed.

For example, a developer who plans a development with several tenants may have reached a legally binding commitment to proceed with one tenant, only to find that the remaining tenants are unable to take up the opportunity to occupy the balance of the planned development. This could occur, for example, because of changes in the broader economic situation. In such circumstances a developer would be obliged to proceed to build the premises for the first tenant and may elect not to build the remaining premises until the economy improves. If a minimum floor space ratio is imposed for the site the developer may be forced to either an 'all' or 'nothing' decision. The developer could be forced to choose the 'nothing' option if the cost of the building all the premises are too great. If this happens everyone loses:

- the developer loses because it defaults on its agreement with the tenant (although the default cost would be lower than the cost of building the whole development and allowing three quarters of it to remain idle);
- the tenant who was ready to proceed loses the opportunity to occupy the new premises;
- the local community loses because they are denied the jobs and other benefits the tenant may have brought to the area; and
- the streetscape is left worse off because the whole site remains vacant.

No minimum floor space ratio should be prescribed.

10. <u>Long list of prohibited uses will have bizarre implications</u>

Out of the many plans prepared in line with the Standard Instrument format that we have analysed, these two precinct plans have the longest list of prohibited uses in the land use table.

This is of serious concern.

A use does not need to be named in the prohibited use list in order to be banned in a zone. For example, in relation to low density residential zone the precinct plans merely say the prohibited development is

> [a]ny other development not specified in item 2 [Permitted without consent] or 3 [Permitted with consent].

There is no need to expressly prepare a long list banning everything. In contrast, in the medium density residential zone, everything from "air transport facilities" through to "wholesale supplies" is expressly named for prohibition in an extensive list. The latter approach unnecessarily complicates the document. The land uses table is easier to understand if there is not a long list of prohibited uses.

However, the prohibited uses list should also be kept short for another reason. Clause 2.3(3)(b) provides that

> a reference to a type of building or other thing does not include (despite any definition in this Precinct Plan) a reference to a type of building or other thing referred to separately in the Table in relation to the same zone.

This means a statement that an apparently broadly defined use is permissible (with consent) must be given an artificially narrow meaning that excludes any use that would fall into the prohibited uses list.

Hence while the medium density zone lists a "child care centre" as permissible with consent, it lists "office premises" as a prohibited use. Office premises are defined to mean a

> place used for the purpose of administrative, clerical, technical, professional or similar activities that do not include dealing with members of the public at the ... place on a direct and regular basis ...

Even though an office that was part of a child care centre would normally fall into the definition of a childcare centre because its purpose was for the child care centre,[13] the inclusion of an office as a prohibited use, means that a child care centre built in the medium density zone would not be able to have an office.

Similarly, in the neighbourhood centre zone in the Riverstone plan, business premises are permissible with consent. This would normally permit a veterinary clinic. However "restricted facilities" are listed as a prohibited use. These are defined to mean

> facilities where animals are constrained for management purposes ...

In short, any veterinary clinic that constrained animals for any period (which all vets must do from time-to-time) is banned in the neighbourhood centre zone.

The light industrial zone permits timber and building supplies and landscape and garden supplies as a permitted use but then lists bulky goods premises as a prohibited use. Bulky goods premises is defined to mean

> a building or place used primarily for the sale by retail, wholesale or auction of (or for the hire or display of) bulky goods ...

So it will be impossible for someone to establish premises in this zone to retail any bulky timber, bulky building supplies, bulky garden supplies or bulky landscape supplies!

Outrageously, the medium density zone's list of prohibited uses includes "electricity generating works" which are defined as a

> a building or place used for the purpose of making or generating electricity.

This would see building which incorporate a "place" for solar panels banned in this zone.

[13] Clause 2.3(3)(a).

We could list many more examples of bizarre outcomes that can occur with this long list of prohibited uses. In short, such lists must be avoided.

The long prohibited uses lists contained in the medium density, neighbourhood centres, environmental conservation, local centre and mixed use zone should be removed. Instead the drafting approach adopted for the low density zone and public recreation zone should be adopted.

11. "Community facilities" definition and use offends the principles of competitive neutrality

In the low density residential zone, medium density residential zone, neighbourhood centre zone, mixed use zone and public recreation zone "community facilities" are listed as permissible with consent. They are defined to be

> a building or place:
>
> (a) owned or controlled by a public authority or non-profit community organisation, and
>
> (b) used for the physical, social, cultural or intellectual development or welfare of the community,
>
> but does not include an educational establishment, hospital, retail premises, place of public worship or residential accommodation.

If the local council was to build and operate a gym, charge a fee to participate and make money from the operation it would be both a 'business' and a "community facility". This would be allowed even in a zone where business premises were not a permissible use, merely because the facility was owned by the council. Even more shockingly, if the council merely owned the premises and rented them to a commercial business they would be equally permissible. Yet a private individual who would want to run the same kind of business on private land within the same zone would be barred from so doing.

This aspect of the precinct plans violates the *NSW Government Policy Statement on the Application of Competitive Neutrality*, released in 2001.[14] This policy statement has been implemented under the *National Competition Policy and Related Reforms Agreement* – an intergovernmental agreement between the federal government and each state government.

The competitive neutrality policy means that government businesses must operate without net competitive advantages over other businesses as a result of their public ownership. This policy was designed to stamp out the competitive advantages government business enjoyed from immunity from regulatory requirements. As the policy itself states

> The benefits of adopting competitive neutrality reside in developing fairer and more cost reflective pricing policies and production in line with market requirements. These in turn should provide a basis for better resource allocation decisions throughout the economy and higher Gross Domestic Product growth than would otherwise occur.

Councils and public authorities operating businesses "for-profit" should be governed by exactly the same rules as the private sector.

The definition of "community facilities" should be narrowed so it excludes any commercial activity.

12. The state-wide exempt and complying development code should continue to apply as a minimum

Clauses 3.1 and 3.2 say that a development control plan (DCP) will set out which development is exempt and complying respectively. This departs from the approach of the Standard Instrument, which provides that exempt and complying development should be set out in a schedule to a plan.

Conventionally a DCP is a policy instrument that carries persuasive rather than statutory force but clause 3.1 and clause 3.2 will have the effect of giving the DCP statutory force.[15] The effect of clause 1.9(2A) is that the precinct plans will override the *State Environmental Planning Policy*

[14] See http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0007/3868/tpp02-1.pdf.
[15] See the comments of Priestley JA in *Leichhardt Municipal Council v Minister for Planning* (1995) 87 LGERA 78.

(Exempt and Complying Development Codes) 2008. Additionally clause 3.1 allows a development control plan to override the precinct plan (in relation to determining the scope of exempt development). The net effect is that a council determined DCP may effectively re-write the supposedly uniform exempt development provisions in the new exempt and complying development codes.

While the Department may be comfortable with the current provisions of the DCP, the DCP may be amended by the council in the future, such that it is considerably narrower than the new exempt development code. The Council should not be free to narrow the scope of exempt and complying development set out in state-wide codes.

The council should only be authorised to designate exempt or complying development under its DCP if it is above and beyond the exempt development set out in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*. It may also be appropriate for at least some of the exempt and complying provisions to be incorporated into the precinct plan itself.

13. The change of use provisions for businesses are too rigid

We note that the development control plan allows for a change of use of land and building to be exempt if it is a change from:

- a shop to another shop (not including new food shops); or
- an office/commercial premises to another office/commercial premises.

It is also possible to change from a shop to an office to be a complying development, but there is a list of conditions, including a 200 square metre floor space restriction.

The precinct plans themselves should include broad exempt and complying provisions relating to change of use. There is no reason why many changes of business premises located within a neighbourhood centre zone, local centre zone, mixed use zone or light industrial zone cannot be exempt from the requirement to lodge a development application.

Though not ideal, the exempt provisions in the *Liverpool Local Environmental Plan 2008* as they apply to business premises have some merit. For example, the Liverpool clause below could be used:

> 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.[16]

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 development control plans' change of use provisions should be broadened and mandated in the precinct plan 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.

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

[16] Schedule 2.

Food premises are already subject to control under the *Australian New Zealand Food Standards Code* that includes minimum construction standards for food premises. The precinct plan should list a changes of use to food premises as complying development when there is compliance with the food standards code.

When determining if a food premises should be issued with a complying development certificate, the certifier would be 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.

14. <u>Special clause on public utility infrastructure duplicates inherent provisions of the Act</u>

Clause 6.1 is titled "Public utility infrastructure". The clause is not necessary. The matters covered by this clause relate to the assessment of development proposals and receive detailed and adequate consideration as part of the development application determination process as per section 79C of the Act. In particular section 79C(1)(c) requires consideration of the suitability of a site for the development. The objects of the Act highlight the need to give consideration to servicing land.

Additionally, "public utility infrastructure" is given an opened ended definition. It is open for a consent authority to decide to broadly define "public utility" if they so choose. For instance the *Macquarie Dictionary* includes gas and transport as public utilities.

Clause 6.1 should be deleted from the precinct plans.

These comments are offered to encourage constructive dialogue between 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 draft Section 94 plan and precinct plans 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

Encl.

Urban Taskforce
AUSTRALIA

Attachment 1

Alex Avenue Precinct			
First Ponds Creek Catchment		**Eastern Creek Catchment**	
Water Management/Ha	$452, 412.00	Water Management/Ha	$318, 275.00
Traffic Management/Ha	$232, 211.00	Traffic Management/Ha	$232, 211.00
Open Space/Ha $7168/person (2.9 person/Lot @ 21.1 Lots/Ha = 61.19 persons)	$438, 609.92	Open Space/Ha $7168/person (2.9 person/Lot @ 21.1 Lots/Ha = 61.19 persons)	$438, 609.92
Combined Precinct Facilities/Ha $1507 (2.9 person/Lot @ 21.1 Lots/Ha = 61.19 persons)	$93, 283.30	Combined Precinct Facilities/Ha $1507 (2.9 person/Lot @ 21.1 Lots/Ha = 61.19 persons)	$93, 283.30
Total Contribution/Ha	**$1, 216, 516.22**	**Total Contribution/Ha**	**$1, 082, 379.22**
Total Contribution/Lot @ 21.1 Lots/Ha	$57, 654.78	Total Contribution/Lot @ 21.1 Lots/Ha	$51, 297.59

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Riverstone Precinct

First Ponds Creek Catchment

Water Management/Ha	$452, 412.00
Traffic Management/Ha	$232, 211.00
Open Space/Ha $7168/person (2.9 person/Lot @ 16.2 Lots/Ha = 46.98 persons)	$336, 752.64
Combined Precinct Facilities/Ha $1507 (2.9 person/Lot @ 16.2 Lots/Ha = 46.98 persons)	$70, 798.86
Total Contribution/Ha	**$1, 092, 174.50**
Total Contribution/Lot @ 16.2 Lots/Ha	$67, 418.17

Eastern Creek Catchment

Water Management/Ha	$318, 275.00
Traffic Management/Ha	$232, 211.00
Open Space/Ha $7168/person (2.9 person/Lot @ 16.2 Lots/Ha = 46.98 persons)	$336, 752.64
Combined Precinct Facilities/Ha $1507 (2.9 person/Lot @ 16.2 Lots/Ha = 46.98 persons)	$70, 798.86
Total Contribution/Ha	**$958, 037.50**
Total Contribution/Lot @ 16.2 Lots/Ha	$59, 138.12

Scheduled Lands - First Ponds Creek Catchment

Water Management/Ha	$452, 412.00
Traffic Management/Ha	$436, 362.00
Open Space/Ha $7168/person (2.9 person/Lot @ 16.2 Lots/Ha = 46.98 persons)	$336, 752.64
Combined Precinct Facilities/Ha $1507 (2.9 person/Lot @ 16.2 Lots/Ha = 46.98 persons)	$70, 798.86
Total Contribution/Ha	**$1, 296, 325.50**
Total Contribution/Lot @ 16.2 Lots/Ha	$80,020.09

Urban Taskforce
AUSTRALIA

Attachment 2

Exhibition of Riverstone and Alex Avenue Precinct Planning Package

Summary of Urban Taskforce's Recommendations

- The section 94 levy for each dwelling should be capped no more than $20,000 a lot, as per the NSW Government's announcement of 17 December 2008.
- No development levy should be imposed without detailed project justification.
- Subjective terminology such as "quality environments" or "good design outcomes" should be removed from the precinct plans. If design standards are thought to be necessary, they should be included in a development control plan.
- The precinct plans' aims should not seek to "ensure" quality environments or good design outcomes.
- The phrase "sustainable development" should be replaced with "ecologically sustainable development" to ensure that the meaning of the phrase is clear.
- A new clause should be inserted into the precinct plans which make it clear that other SEPPs override the precinct plans in the same way that they override a local environmental plan. The existing clauses 1.9(1) and 1.9(2A) should be replaced and/or re-drafted.
- Zone objectives in both precinct plans stating that medium density is to be 'enabled' adjacent to the neighbourhood/local centre and within close proximity to public transport services should be deleted. They are unnecessary and may lead to a perverse interpretation.
- The subjective term "small-scale" should be deleted from the zone objective for a neighbourhood centre in the Riverstone precinct plan.
- The second zone objective for the neighbourhood centre in the Riverstone precinct plan should be deleted.
- The third zone objective for the neighbourhood centre in the Riverstone precinct plan should be deleted.
- "Retail premises" should be a generally permitted use in the neighbourhood centre zone in the Riverstone precinct plan.
- Neighbourhood shops, and other uses, should not be limited in floor space area by the precinct plan. The floor space permitted should be determined as part of the merit assessment process.
- Tourist and visitor accommodation should not be prohibited in the neighbourhood centre zone.
- Vehicle repair stations should not be prohibited in the neighbourhood centre zone.
- Generally, the list of uses permitted with consent in the neighbourhood centre zone should be reviewed and broadened. The list of uses permitted with consent in the same zone under the *Liverpool Local Environmental Plan 2008* and the *Canada Bay Local Environmental Plan 2008* will be a helpful reference in this regard.
- The fourth zone objective in neighbourhood zone, the fifth zone objective in the local centre zone and the fifth zone objective in the mixed use zone should be deleted in each of the two precinct plans.
- Ground floor uses should not be limited to non-residential uses, This means at the very least residential flats and multi-dwelling housing should be a permitted use in the neighbourhood centre and local centre zones.
- We ask for the deletion of clause 6.8 of the Alex Avenue precinct plan that prohibits residential development at the ground floor within the mixed use zone and clause 6.8 of the Riverstone precinct plan which does the same thing in relation to the neighbourhood centre zone.

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- Clause 4.4(c) in both precinct plans (which sets an objective for floor space ratio rules to eliminate ground floor residences) should be deleted.
- Retail premises should be permitted in industrial zones as per the Metropolitan Strategy.
- The list of permissible uses in the Riverstone precinct light industrial zone should be reviewed and broadened, and should include, among other additional uses, cemeteries, educational establishments, helipads, recreation facilities (major), recreation facilities (outdoor) and registered clubs.
- We recommend that the lower floor space ratios for each land use type be raised to the maximum.
- The fourth column in the table following clause 4.4(3) should be deleted as it is not referred by any text in clause 4.4 and therefore serves no useful purpose.
- No minimum floor space ratio should be prescribed.
- The long prohibited uses lists contained in the medium density, neighbourhood centres, environmental conservation, local centre and mixed use zone should be removed. Instead the drafting approach adopted for the low density zone and public recreation zone should be adopted.
- The definition of "community facilities" should be narrowed so it excludes any commercial activity.
- The council should only be authorised to designate exempt or complying development under its DCP if it is above and beyond the exempt development set out in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*.
- The development control plans' change of use provisions should be broadened and mandated in the precinct plan 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.
- A change of use for non-food retail premises to food retail premises should be complying development.
- Clause 6.1 should be deleted from the precinct plans