Urban Taskforce
AUSTRALIA

It's time for jobs

How the planning system can be reformed to help build a recovery in NSW

Submission to the Standing Committee on State Development Inquiry into the New South Wales Planning Framework

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Urban Taskforce Australia Ltd. ABN: 21 102 685 174 | GPO Box 5396 Sydney NSW 2001
T 612 9238 3955 | F 612 9222 9122 | Level 12, 32 Martin Place Sydney NSW | Level 6, 39 London Circuit, Canberra ACT
admin@urbantaskforce.com.au | www.urbantaskforce.com.au

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The Urban Taskforce is a non-profit organisation representing 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.

Executive Summary

Firstly, the planning system should support the development of NSW and by so doing provide employment opportunities, permit competition, support business productivity, raise living standards and improve the competitiveness of the state's economy.

Secondly, the planning system should promote of ecologically sustainable development – as defined in the 1992 *Intergovernmental Agreement on the Environment*. The concept of "ecologically sustainable development" requires:

- environmental protection;
- the integration of economic and environmental decision-making;
- inter-generational equity in decision-making;
- the application of the precautionary principle; and
- respect for biodiversity.[1]

Thirdly, the planning system should promote liveable communities, meaning:

- neighbourhoods should be permitted to be diverse in use and populations, with appropriate restrictions on the location of heavy industry;
- people should free to choose their preferred method of transport, whether it be car, public transport or walking;
- development control (other than enforcement of building standards) should exclusively deal with the external appearance of the built form, in particular: the relationship between buildings; buildings and the streetscape; and buildings and open space;
- building standards should be about safety and structural integrity based on objective information and assessment.

Fourthly, the planning system should manage development whose public infrastructure requirements exceed the capacity of existing local infrastructure, by providing:

- where public funds are available - a clear mechanism to determine which projects will proceed in accordance with the available public funds; and
- where no public funds are available - a mechanism for a private sector proponent to voluntarily contribute to the costs of expanding the public infrastructure to accommodate the requirements of the development.

Finally, the planning system should promote private investment in the development of NSW by enshrining a respect for property rights as a fundamental tenent of planning law. This means:

[1] The *Environmental Planning and Assessment Act 1979* 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*.

- land owners should enjoy, free from legislative intrusion, the right to use and develop their land subject only to constraints objectively justified by principles two, three and four above;
- all decisions made by public officials that deny a land owner the right to develop his or her land: must be based on objective information, and where information is inadequate (and the precautionary principle is to be applied) rigorous risk assessment; and decisions should be subject to a just, quick and inexpensive merits appeal or review by an impartial third party;
- land owners should bear the costs of actions from which they individually derive private benefit and wider community (through the government) should bear the costs of actions involved in the supply of public-good benefits that are demanded by, and benefit, the community;
- changes which may reduce the development potential of land (such as down-zoning and heritage listing) must necessarily lead to compensation to affected land owners for any reduction in the value of land;
- the predictability of decision-making should be improved by dramatically reducing the number and breadth of strategies, policies and guidelines – the only such documents that should be considered are the final policies either approved by the state government or expressly provided for by an environmental planning instrument in relation to a specific area (e.g. a master plan);
- legislation, statutory instruments and policies should be designed so that the vast bulk of development envisaged is capable of being approved without the need for a subjective judgment by a consent authority;
- innovative and non-standard development should not be prohibited merely because it was not envisaged at the time a plan is prepared and should still be capable of being approved without the need for changes to statutory plans – in such cases there is room for some degree of subjective decision-making, although rights to a just quick and inexpensive review/appeal should remain; and
- the duplication and inconsistencies between different state government agencies; the state and the commonwealth should be removed.

Table of recommendations

Recommendation 1

We would propose that the objects of the Act be re-drafted to reflect the five principles we have articulated. This would read:

The objects of this Act are:

(a) to encourage the development of NSW and by so doing provide employment opportunities, permit competition, support business productivity, raise living standards and improve the competitiveness of State's economy;

(b) to promote ecologically sustainable development;

(c) to provide for liveable communities where:

  (i) neighbourhoods are permitted to be diverse in use and populations, with appropriate restrictions on the location of heavy industry;

  (ii) people may choose their preferred method of transport, whether it be car, public transport or walking;

  (iii) development controls concern the external appearance of the built form and its relationship to other structures, the natural environment and the public domain; and

  (iv) the health and safety of the community is protected by appropriate standards;

(d) to provide for the control of development which will place demands on local public infrastructure in excess of its capacity;

(e) to promote private investment in the development of NSW by respecting the right of land owners to use and develop their land.

Recommendation 2

Changes which may reduce the development potential of land (such as down-zoning and heritage listing) must necessarily lead to compensation to affected land owners for any reduction in the value of land;

Recommendation 3

We would propose that section 7, relating to the role of the Minister, be simplified to remove matters that do not require explicit statutory authorisation (e.g. the carrying out of research), recognise the limitations of government power and to better reflect the market nature of the economy. This would read:

7 Responsibility of the Minister

Without affecting the functions that the Minister has apart from this section, the Minister is charged with the responsibility of promoting and co-ordinating environmental planning and assessment for the purpose of carrying out the objects of this Act and, in discharging that responsibility, has the following functions:

(a) to advise planning and consent authorities on all matters concerning the principles of environmental planning and assessment and their implementation in environmental planning instruments and development control plans;

(b) to promote the co-ordination of the provision of public utility and community services and facilities within the State; and

(c) to promote flexible planning that accommodates potential changes in population and economic activity within the State.

Recommendation 4

Section 79C(1) of the Act should be simplified such that a consent authority must simply consider, subject to other provisions of the Act, whether the approval will give effect any object of the Act that the consent authority considers relevant. This recommendation assumes our separate recommendation (recommendation 1) for the reform of the objects of the Act is also adopted.

Recommendation 5

The Act should clearly set out a development timetable that mandates a fast and efficient processing of development applications by consent authorities. If any stage of the development timetable cannot be met, the applicant should be able to notify the Department of Planning who will be obliged to take the application out of council's hands and appoint a certified town planner to complete the processing the development application.

Recommendation 6

When the Planning Assessment Commission has the power to decide development applications for itself there should be a right of (merits) appeal to the Minister for Planning or the Land and Environment Court, or both.

Recommendation 7

Third parties should not have the right to seek a rehearing and reversal of valid approvals issued by consent authorities in relation to urban development such as residential apartments, retail/office development or light industrial developments.

Recommendation 8

The government should not shorten the time that a developer has to make good use of development consents. Businesses should be encouraged to make development applications even if they are not certain they have the necessary finance. This means allowing development applications an extra two years before they lapse.

Recommendation 9

A deemed-to-comply period for development applicants means a development consent is deemed to be given if no refusal has been issued in a set period. An appropriate timeframe would be as follows:

- 10 days for complying development;
- 20 days for development applications not requiring exhibition;
- 40 days for small scale development;
- 60 days for medium scale development; and
- 90 days for development equivalent to designated development.

Recommendation 10

The Act should be amended so that, in relation to any development application the only strategies, policies, plans and guidelines that may be considered in the development assessment

process are:

- final state environmental planning policies;
- final local environmental plans;
- state government strategies, policies, plans and guidelines approved by the Minister for Planning and available through an on-line register mandated by the Act;
- federal government strategies, policies, plans and guidelines approved by the Minister for Planning under a bilateral agreement with the Commonwealth and available through an on-line register mandated by the Act; and
- local council development control plans specifically authorised by either a state environmental planning policy or a local environmental plan.

Recommendation 11

That the 34 zones in the Standard Instrument be dramatically reduced, with the planning system instead concentrating on:

- the "form" (shape/configuration) of a structure;
- the relationship of buildings to each other, to streets and to open spaces; and
- a greater mix of housing, commercial and retail uses and transit and pedestrian oriented communities.

A planning system with just seven zones would be appropriate for NSW:

- Natural - consists of lands permanently set aside for conservation in an essentially natural state.
- Rural - consists of lands in open or cultivated state or sparsely settled. These include woodland, grassland and agricultural land.
- Suburban - consists of low density areas, primarily comprised of building forms consistent with detached housing and secondary dwellings.
- Urban General - consists of a mixed-use residential urban fabric with a range of building types including townhouses, terraces and low-rise apartment buildings.
- Urban Centre/Corridor – a mixed-use use environment consisting of higher density building types that accommodate retail and office uses, townhouses and apartments.
- Employment zone - consists of building types commonly associated with commercial, light industrial and retail uses.
- Industry zone – primarily for heavy industry, but also capable of including building types associated with commercial, light industrial and retail development.

Recommendation 12

The Act should oblige planning and consent authorities to assume a market need if the private sector is seeking to develop a particular parcel of land. It should be unlawful for such authorities to require any demand and supply analysis.

Recommendation 13

The Act should prohibit planning and consent authorities from considering the impact of a proposed development on other existing or planned developments either at a zoning or development assessment stage. The development should be assessed on its own merits, not on its potential impact on other developments.

Recommendation 14

The proposed joint regional panels should be given a clear role to stand in the shoes of a local

council in the rezoning process when:

- a council refuses or fails to deal with a rezoning request within a set statutory timeframe; and
- the panel is satisfied that the rezoning is (state/regional/subregional) strategy-consistent.

Recommendation 15

The Act should specifically prohibit any statutory plan from setting arbitrary limits to urban growth. Any limits that are imposed must be supported by evidence, or where the precautionary principle is applied, rigorous risk assessment.

Recommendation 16

Legislation, statutory instruments and policies should be designed so that the vast bulk of development envisaged is capable of being approved without the need for a subjective judgment by a consent authority.

Recommendation 17

Innovative and non-standard development should not be prohibited merely because it was not envisaged at the time a plan is prepared. Such development should still be capable of being approved without the need to amend statutory instruments – in such cases there is room for some degree of subjective decision-making, although rights to a just quick and inexpensive review/appeal should remain.

Recommendation 18

The planning system should not discriminate between development proponents who are government, non-profit organisations or commercial businesses. The development applications put forward should be judged on their own merits without discrimination against private businesses.

Recommendation 19

Statutory plans should reflect the need to balance different community priorities, rather than establish blanket rules that elevate some priorities above all others. When statutory plans set out a matter for consideration by a consent authority, the Act should prohibit the plan from elevating one consideration above another. The consent authority should have the discretion to deal with each consideration to the extent it considers it relevant.

Recommendation 20

The Act should be amended so that, in relation to any offices, retail premises, light industry premises or business premises, there is no requirement for a development application to be lodged for a change in use when:

- the change does not involve the carrying out of any alterations other than alterations that are themselves exempt development;
- the new use is permissible in the zone;
- other aspects of the original development approval (except the original prescription of use and conditions specific that use) will still be complied with.

Recommendation 21

The Act should prevent statutory plans from giving express protection of views. Views should remain as an aspect of community amenity, which is a consideration on the development assessment process, along with other factors.

Recommendation 22

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use around centres, including neighbourhood centres, and corridors. Retail and business premises should be permitted (with consent) in such zones. The merits of individual proposals can be considered at the development assessment phase.

Recommendation 23

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use for employment purposes, such as the existing business development zones, business parks and the enterprise corridor zones.

Recommendation 24

All "retail premises" which are either ancillary to an industrial use, have operating requirements akin to industrial uses or demonstrable offsite impacts akin to industrial uses should be permitted in light industrial zones.

Recommendation 25

No quantitative restriction should be imposed on the number of supermarkets (or other forms of development) in an area by statutory plans or regional or subregional strategies. Decisions to permit or deny additional supermarkets should be made at the development assessment stage, based on objective information, such as traffic studies.

Recommendation 26

Statutory plans should not attempt to freeze the current character of an area, unless the area is a designated heritage conservation 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.

Recommendation 27

Planning law should not seek, as an objective in its own right, to preserve uneconomic uses of land by prohibiting alternate uses. The planning system should permit the highest and best use of land, subject only to the constraints of available public infrastructure and other negative externalities (external/social costs), such the impact of noise or pollution from heavy industry.

Recommendation 28

It should be unlawful for decisions to be made under the Act that discriminates against:

- non-local businesses, including businesses whose supply chain straddles different regions; and
- members of a non-resident local workforce, visitors and future residents.

Recommendation 29

It should not be possible for planning or consent authority to force a development applicant to build premises with a particular mix of use. For example, it should not be lawful to force development applicants to build retail or business premises as part of a residential development.

Recommendation 30

Multi dwelling housing, residential flats and shop top housing should be permissible in all centres.

Recommendation 31

Floor space ratios should not discriminate between uses in the same zone.

Recommendation 32

Statutory plans should not be permitted to restrict development in one location merely to funnel development to another location. Development in an area should be permitted or prohibited based on its intrinsic qualities, that is, issues of amenity, infrastructure, noise, etc specific to the location concerned.

Recommendation 33

No provision of the Act, nor any instrument or decision made under it, should permit or require a public official to form a commercial opinion about a development.

Recommendation 34

Planning for areas with high quality public transport should provide opportunities to integrate suitable business, office, residential, retail and other development to give the community the choice of using public transport, walking or cycling, as an alternative to private motor vehicle transport. However, provision for motor vehicles in new developments in these areas should not be restricted unless the restrictions are justified by objective expert traffic analysis.

Recommendation 35

Objectives limiting development that may isolate sites and objectives which guarantee the existing amenity of nearby residences should not be permitted in statutory plans. Such considerations should remain a factor for consideration along with other issues, in the development assessment process.

Recommendation 36

Prohibitions on floor space area at the zoning stage, particular those linked to certain uses, are inappropriate and should be removed.

Recommendation 37

Residential flat buildings should be added as a permitted use in any zone intended for medium density housing.

Recommendation 38
Any system of compulsory infrastructure charges should be implemented through express provisions in the *Environmental Planning and Assessment Act*, not through backdoor provisions in local environmental plans or state environmental planning policies.

Recommendation 39

The Act should clearly state that statutory plans and development approval conditions can only require a proponent to make any contribution to the public domain where the requirement:

- arises directly from their development (nexus);
- is in proportion to the impact of the development; and
- is strictly necessary in order for the development to proceed.

Recommendation 40

The Minister for Planning should not be entitled to waive the requirement for a council to stick to its contributions plan when imposing levies. Nor should the Minister have the authority to approve a levy for something that is not listed as "key community infrastructure". The Minister for Planning

should not have a unique power to impose a percentage based tax without any opportunity for the normal rules of either judicial or parliamentary review to apply.

Recommendation 41

The state government should assume responsibility for statutory land use planning and approvals for airport land, just as they do for sea ports.

Recommendation 42

As ANEF contour maps have the potential to dramatically impact on the development potential of land in the vicinity of an airport it is inappropriate that these maps are prepared by the operator of the airport. They should be prepared by a government agency, independent of the airport operator, and any assumptions predictions made by the airport operators must be rigorously interrogated before being included in a proposed plan.

Recommendation 43

Airport related land-use restrictions in sites that are no longer to be further considered as airport locations, such as Badgerys Creek, should be abolished.

Recommendation 44

Land in the vicinity of airports should not be subject to additional and overly prescriptive development controls. This should be an area where intense, high quality industry and business activity is permitted. Within this area, appropriately designed and constructed residential development should also be permitted.

Recommendation 45

The policies released under Draft SEPP 66 should be formally withdrawn.

Recommendation 46

The NSW Government should adopt the recommendations made by the Urban Taskforce in its September 2007 submission to the NSW government: *Getting Life's Essentials - Planning for where we will live, work and shop over the next three decades*. Included in this submission's recommendations were the following:

- Each subregional strategy should incorporate a subregional and local government area target for shopfront space alongside the targets for dwellings and employment capacity.
- Provisions in the sub-regional strategies that attempt to separate retails uses from other uses should be abandoned.
- The sub-regional strategies should actually encourage amenities such as retail and cafes in all of the local centres, employment lands and major arterial roads.
- All four categories in the local centres hierarchy should simply be regarded as "local centres" and should permit the full range of retail premises.

Recommendation 47

The anti-competitive provisions of the NSW Government's Standard Instrument should be removed. Namely:

- In a "Business Development Zone" retail, office premises and other uses should be permitted, even if it would provide competition to businesses located in established centres.
- In "Enterprise Corridor" "Business Park"; "General Industrial"; and "Light Industrial" zones retail

and other uses should be permitted even if it would provide competition to businesses located in established centres.

- The definition of "shop top housing" should be returned to its pre December 2007 state so that any retail premises could go into a ground floor of a mixed-use development in "General Residential", "Medium Density Residential", "High Density Residential" and "Neighbourhood Centre".

Recommendation 48

Section 79C of the *Environmental Planning and Assessment Act* (NSW), which explains how development applications are to be evaluated by consent authorities under Part 4 of that Act, should be amended. The amended provision should make it clear that, when considering a development application, no direct or indirect consideration may be given by a consent authority to the loss of trade that might be suffered by any other planned or existing business or businesses.

Recommendation 49

A new centres and corridors policy would allow all retail, office and entertainment development to be permitted where infrastructure allows for it and where vehicle kilometres travelled will be reduced.

This means the NSW planning system should:

- allow retail in enterprise corridors and renewal corridors
- allow all kinds of retail in all kinds of centres
- recognise current bulky goods centres and
- allow retail with operating requirements akin to industrial uses in light industrial areas.

Recommendation 50

It is crucial that no new "affordable housing" levies be imposed.

Recommendation 51

Floor space ratios should not be linked to any rent control scheme or any cap on the sale price of new homes.

Recommendation 52

Any special development rules for regulated or social housing should not come at the expense of the broader housing needs of the community.

Any opportunity to develop regulated or social housing should be equally available to private sector – the law should not discriminate between non-profit and for-profit organisations.

Recommendation 53

Policy statements – both legislative and administrative – should clearly state that heritage processes are a way of managing the process of change in our urban and natural environments

Heritage conservation should be about saving the best of what we have and managing the process of change. It should not be about preserving a particular property or structure in an unaltered state. Practitioners need to be properly trained and given necessary tools such as design outcomes for achieving conservation objectives.

Recommendation 54

There should be a mandatory regular review system implemented for local heritage lists incorporated into principal LEPs

Recommendation 55

Councils should not be permitted to add items to the heritage lists included in LEPs on an ad-hoc basis.

Recommendation 56

To ensure that new listings are worthy of incorporation into an LEP, and as part of the first review of the existing listings, there should be a peer review of new listings (and, for the first review, all existing listings).

Recommendation 57

There should be a clear process to hear landholder objections to the listing of their property in an LEP as a heritage item at the time of each review. For this purpose councils should be required to write to each affected landholder:

- advising them that their property is either currently listed and the listing is being reviewed or that their property is proposed for listing (as appropriate);
- advising the landholder of the criteria for an item to be listed in an LEP;
- providing a copy of any report/study and peer review which relates to the proposed listing/omission;
- to invite the landholder to inform the council whether the landholder supports or opposes the proposed or continued listing of an item in the LEP and why they hold this view; and
- advising the landholder that the council will make a determination as part of the review and that this determination may be appealed to an independent arbitrator if the landholder is dissatisfied with the council determination.

When council makes a determination to include or (in the case of an item that was already included) omit an item as a heritage item under an LEP, the Council must write to the landholder and advise them:

- of the decision; and
- their right to have the decision reviewed on its merits by an independent arbiter appointed by the Heritage Council.

The Heritage Council should maintain a panel of experts who are available to act as arbitrators when landholders dispute a council's determination in relation to the inclusion (or omission) of a property from the LEP list of heritage items. The arbitrator's decision would be binding on the council.

Recommendation 58

There should be clear and objective criteria and tests available to practitioners and councils to determine the significance of local heritage.

Recommendation 59

Clear guidelines are required for Council and practitioners to follow and to educate the community about the functions and purposes of a heritage conservation area and how it is different to a heritage item. A heritage conservation area is about the preservation of the sense of place or the identity of the locality and should not be concerned with alterations to the internal fabric of a building.

Recommendation 60

NSW should adopt the Queensland model where an owner is entitled to claim compensation for the entry of a place in the local heritage register.

1. Introduction

Over the past three decades or so, social change and declining affordability have contributed to declining home ownership among younger households, particularly among low to moderate income aspiring first home buyer households seeking modestly priced starter homes.[2]

Census data shows that the home ownership rate (outright owners plus buyers) among households in the 25 to 39 year age group fell from 65 per cent in 1981 to 57 per cent in 2006.[3] Over the same period, the home ownership rate for households in the younger, 25 to 34 year age group fell from 61 per cent to just over 50 per cent.[4]

By 2006–07, in four of the major capital cities in Australia, only 30 to 35 per cent of transacted dwellings (houses and apartments) would have been accessible to the median income household in the home-buying 25 to 39 years age groups. For Australia as a whole, around 33 per cent of transacted dwellings would have been accessible to households on median income for median young households in 2006–07, compared with a longer run average of around 45 per cent. Accessibility, of course, is much lower for low income households.[5]

Sydneysiders are feeling the pressure on home ownership like never before. Generation X – who, by and large, now consist of young families, are facing challenges to get into homeownership unlike those faced by any previous generation. The 2006 census data shows that in Sydney 30 per cent of households own their own home outright, but in Melbourne it's 33 per cent. In Sydney 31 per cent of households have started in the property market with a mortgage, while in Melbourne it's just under 35 per cent.

Mortgage repayments have been spiralling out of control, when compared to wages. The average housing mortgage repayment to income ratio for typical first home mortgages has increased from 18 per cent in 1996 to 31 per cent today. In 1996 the proportion of Australia's population who owned their own home was 41 per cent – this fell to 33 per cent by the 2006 census. Over the same period the proportion of the community who were still paying off their home rose from 26 per cent to 32 per cent.

The National Housing Supply Council has observed that the private rental market is often the forced choice for an increasing number of low- and moderate-income households because of rising house prices relative to income (especially in job-rich areas well supplied with urban amenities) and consequent falling home ownership rates among younger households.[6] Due to the resulting upward pressure on the private rental sector, private renters as well as home buyer households have experienced increasing access and affordability problems.[7]

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[2] J Yates, *Housing implications of social, spatial and structural change*, Australian Housing and Urban Research Institute, Final Report no. 22, AHURI, Canberra, July 2002, p. 79, and M Rodrigues, *First home buyers in Australia*, Treasury Economic Roundup, Summer 2003–04, p. 62, cited by the National Housing Supply Council, *State of Supply Report: Report 2008* (2009).

[3] J Yates, H Kendig et al., *Sustaining fair shares: the Australian housing system and intergenerational sustainability*, Australian Housing and Urban Research Institute Final Report no. 111, February 2008, p. 32, Table 3.2: 'Current and projected age-specific home ownership rates'., cited by the National Housing Supply Council, *State of Supply Report: Report 2008* (2009).

[4] Ibid.

[5] These estimates are taken from an address given by the Head of the Economic Analysis Research Department at the Reserve Bank of Australia (A Richards, 'Some observations on the cost of housing', address to 2008 Economic and Social Outlook Conference, The Melbourne Institute of Applied Economic and Social Research, Melbourne, 27 March 2008, accessed 20 January 2009, <www.rba.gov.au/Speeches/2008/>). They are based on regional estimates of median gross household income for 25–39 year olds from ABS survey data, assumptions of a 10 per cent deposit, borrowing capacity set by representative interest rates, and a repayment capacity based on 30 per cent of gross household income. They were cited the National Housing Supply Council, State of Supply Report: Report 2008 (2009).

[6] National Housing Supply Council, *State of Supply Report: Report 2008* (2009).

[7] Ibid.

Low income households have felt the brunt of these pressures. In 1996, for example, 43 per cent of lower income private renters paid more than 30 per cent of their income in meeting their housing costs. By 2006, this proportion had increased to 60 per cent.[8]

NSW Treasury has observed that increased dwelling production in both greenfield and brownfield areas is the main lever that the State has in influencing housing affordability.[9] That's because the price of housing is a product of demand and supply. Higher levels of demand, disproportionate to available supply, will force home prices upward. If supply if limited by legislation (for example, no significant greenfield land release in the outer-western Sydney housing sub-market) then the only real cap on prices is the ability of the buyer to pay. This will reflect their borrowing capacity which will be a function of interest rates and income. In a supply constrained environment, prices will generally tend to move upward in line with increases in income and/or falls in interest rates. The available data suggests that there have been heavy supply constraints, induced by regulatory constraints, in Sydney and the Hunter for many years.[10]

In the 12 months to June 2008 – before the current economic crisis really began to hit - construction had started on just under 31,000 new homes in NSW.[11] This was already below the State's seven year average of 39,000 homes.

In the 2007/08 financial year, NSW had the second lowest level of new home construction in NSW since the ABS started keeping this data in 1985. The lowest year on record was recorded in 2006/07 – when construction commenced on fewer than 30,000 homes. The modest increase in housing production was not enough to plug massive shortfalls in housing supply. In the 2007/2008 financial year Sydney saw an 18 per cent increase in rents for three bedroom homes and a 15 per cent increase for two bedroom apartments.[12]

NSW's low construction levels compares poorly with pre-financial crisis figures for Queensland – where construction commenced on 44,000 homes in the 2007/2008 financial year, well above its seven year average of 40,000 a year. In Victoria the figure was 42,000, just under its seven year average of 43,000 homes a year. The production of new homes increased in Queensland by 6.5 per cent over the previous financial year, while in Victoria and New South Wales it increased by 3 per cent.

NSW with its superior population base has been building significantly lower numbers of new homes than both Victoria and Queensland, both in absolute and relative terms.

[8] National Housing Supply Council estimates based on Australian Bureau of Statistics, *Survey of Income and Housing: CURF on CD-ROM/RADL, 2005–06 (Second Edition)*, cat. no. 6541.0.30.001, ABS, Canberra, 2008.
[9] Ibid.
[10] Regulatory constraints have been identified as a specific problem on the supply side by the National Housing Supply Council: National Housing Supply Council, *State of Supply Report: Report 2008* (2009) 7.
[11] Australian Bureau of Statistics figures.
[12] Housing NSW *Rent and Sales Report*.

Figure 1:
New monthly home approvals (all home types); July 1983 – January 2009; trend series

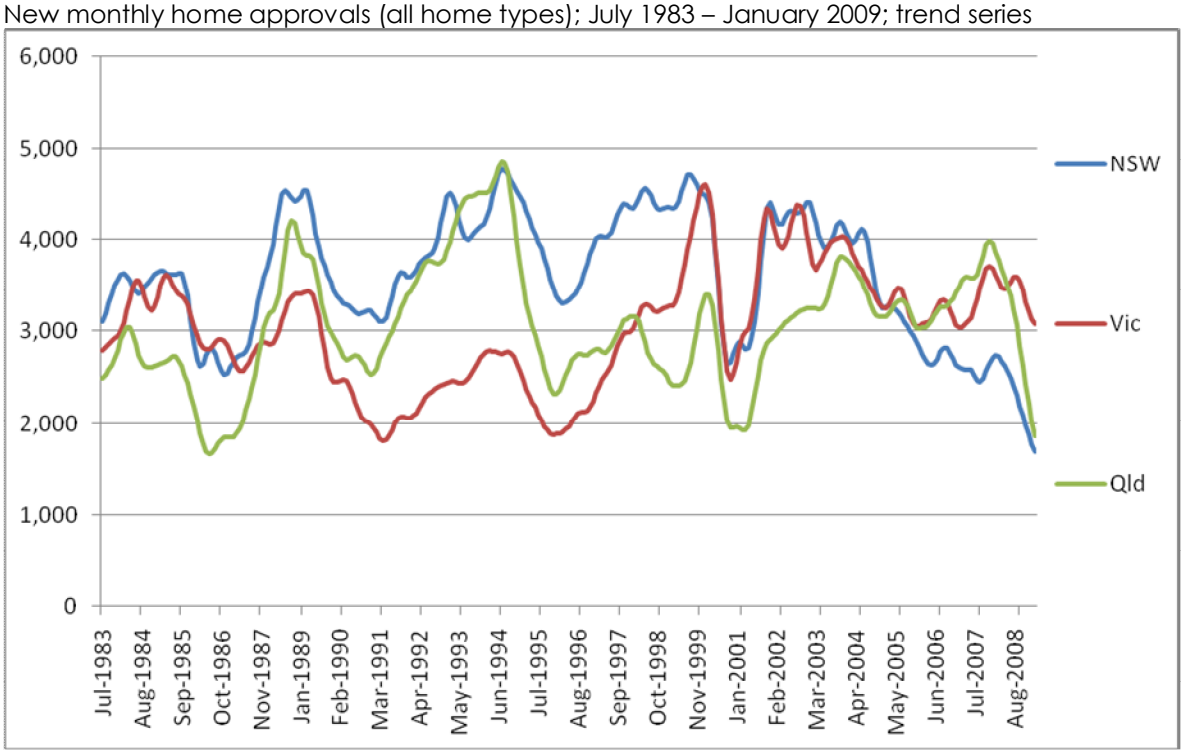

Figure 1 above shows NSW's performance, in terms of home approvals, relative to other state's over the entire period that the Australian Bureau of Statistics has been keeping figures on this subject. The graph shows how, in 2004, NSW began approving less new homes (in absolute terms) than either Queensland or Victoria.

Figure 2:
New monthly house approvals; July 1983 – January 2009; trend series

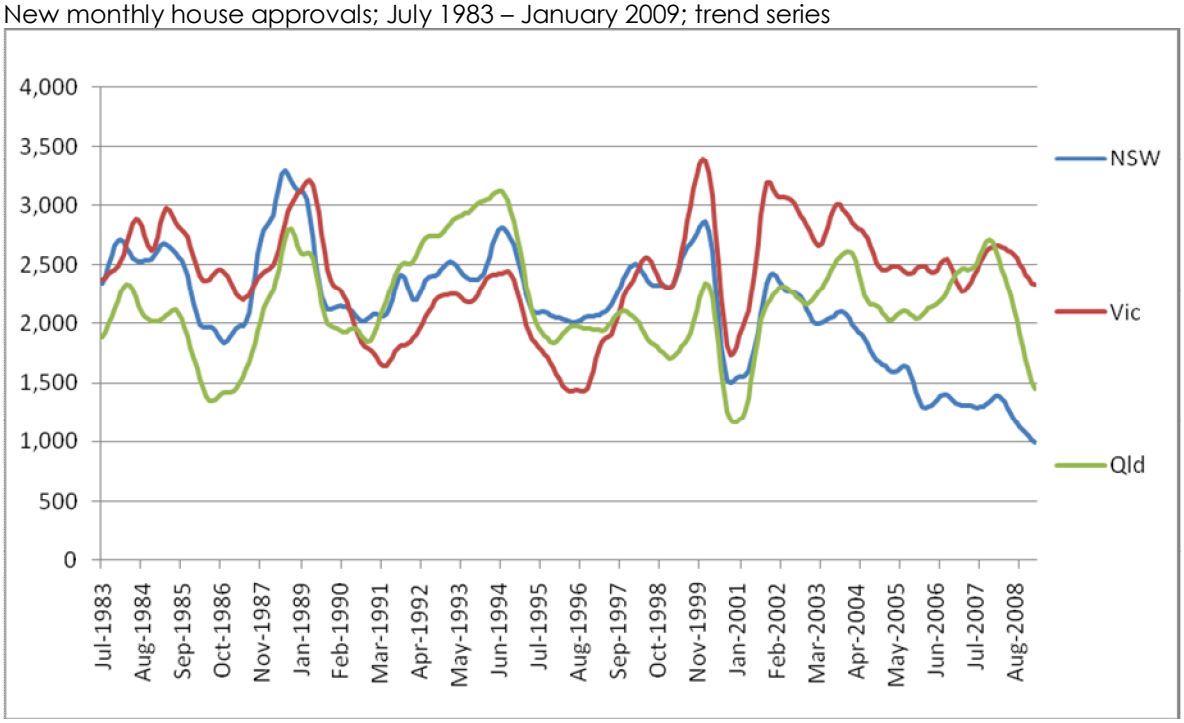

Figure 2 above shows NSW's performance, in terms of house approvals. It is even more dramatic than figure 1. For that portion of the housing market (predominantly families) who are seeking to buy free standing homes, in absolute terms, NSW is literally a disaster area. The graph shows that, in 2002, NSW began approving less new houses (in absolute terms) than either Queensland or Victoria.

Figure 2:
New monthly apartment /town house approvals; July 1983 – January 2009; trend series

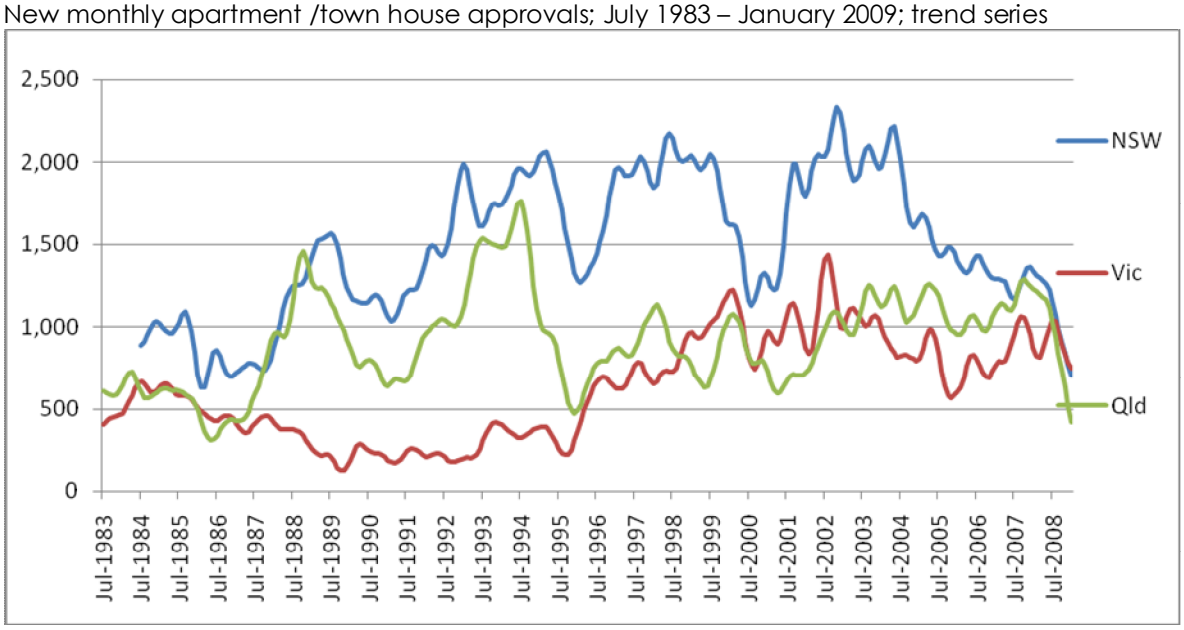

Figure 3 above shows NSW's performance, in terms of apartment, town houses and terrace. This is the segment of the market where one would expect NSW to be strongest. However, even here, it is evident that NSW's recent performance in comparison with other states has been poor. The absolute number of higher density homes being produced has been comparable with the other states, but relative to population size (and the supply of free standing houses) NSW is massively behind the eight-ball.

By constraining supply, the land acquisition costs for the development of new housing are increased. However, town planning rules also impact on affordability by increasing the costs of construction the new housing that *does* receive approval.

In 2008 an Australian Building Codes Board study revealed that council planning regulations increase the cost of building homes by up to 14 per cent, adding tens of thousands of dollars to the prices of new houses and apartments.[13] The board, a federal-state government agency, examined the additional requirements imposed by local councils, such as increased ceiling heights, room sizes and noise controls. The board found the local government regulations led to construction cost rises from 1.5 to 14 per cent. Most local council requirements examined increased costs by between 4 and 6 per cent compared with the cost of complying with the national code.

Sydney's future social and economic growth needs are well described in many documents, not the least of which is the NSW Government's metropolitan strategy: *City of Cities: A Plan for Sydney's Future*. That document anticipated that Sydney's population would grow by an extra 980,000 residents added to the city between 2006 and 2031. However, revised government projection released in October 2008 suggests that at least an extra 1.4 million residents will now be added in the same period – almost 50 per cent higher than the 2005 plan.[14]

[13] Australian Building Codes Board, *Impacts on Housing Affordability: Local Government Regulatory Measures that Exceed the Requirements of the Building Code of Australia - Results of Preliminary Analysis 2008* (2008).
[14] NSW Department of Planning, *New South Wales State and Regional Population Projections, 2006-2036: 2008 release* (2008).

Even going by the 2005 plan, Sydney will need:

- 640,000 new homes;
- 500,000 more jobs;
- at least 7,500 hectares of extra industrial land; and
- 6.8 million square metres of additional floor space.

Work undertaken by Hill PDA for the Urban Taskforce suggests that Sydney will need four million square metres of additional retail space.[15]

The 2005 strategy states that even if we have zero population growth over that time, that is, our births and migration equal deaths, we would still require 190,000 new homes in Sydney to respond to demographic changes where fewer people are living in each home. Currently, 22 per cent of all households in Sydney are occupied by one person. The Metropolitan Strategy states that by 2031, there are likely to be an additional 300,000 single person households in Sydney – representing 30 per cent of all households. The trend to smaller households is partly driven by the ageing of the population, which tends to result in more single and two person households. Increasing affluence and more single and young people living alone are also major contributors to the increased demand for housing.

Our production of new homes is at record lows, but our State's population is at a record high. The State's population continues to climb – even as our supply of new homes dramatically falls.

The government's plan for managing Sydney's growth centres coupled with the land release program provides for approximately 220,000 homes on the fringe areas of Sydney (one third). Approximately 420,000 new homes (two thirds) will therefore need to be constructed in existing suburbs. Actual land production has fallen well short of these targets. It is clear that there is an important public interest in encouraging development in greenfield and brownfield development areas. However, the current planning system hinders, rather than assists, in getting this outcome.

The debate about the impact of planning legislation on our cities can often be skewed if it focuses on housing, at the expense of other forms of development. An example of how town planning can impact on other development is evidence by the state of retail competition in Australia. Our planning system protects existing retail landlords even when they're doing a poor job of servicing consumers or charging tenants excessive rents. In most areas entrepreneurs are not free to establish new competing retail outlets, because the planning authorities explicitly act to prohibit new retail development that may cannibalise the market share of existing retail landlords.

In his evidence before the ACCC Grocery Prices Inquiry, John Schroder, chief executive officer of major shopping centre owner Stockland Retail said that

> in the middle of dense urban Sydney, where *there is an under-supply of supermarkets*, we'll drive up the rent. In fact, in some cases, depending on what the research tells us, we'll almost bid the space out (emphasis added).

If the supply of supermarkets is constrained by planning laws retail landlords will charge higher rent and consumers will pay more for their groceries. 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.

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

[15] A Fels, S Beare & S Szakiel Choice Free Zone (2008) 19.

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

A poor planning system means less development activity. Without strong development activity, NSW's construction industry will wither. For every $1 million in construction expenditure, 27 jobs are created throughout the broader economy. The construction activity made possible by property developers contributes $69 billion to the national economy each year and creates 709,000 direct jobs. The construction industry is Australia's third largest source of employment.

This submission has much to say both on the planning system generally, and the impact of planning regulation on housing, retail, office and industrial development.

2. Principles of the planning system

It has been a feature of human history that in the absence of good law, individuals will take the law into their own hands. The *Environmental Planning and Assessment Act 1979* (NSW) ("the Act") was introduced in response to systemic civil disobedience arising from a community perception that the control and regulation of development was inadequate. The 1970s was an era of direct community action. It was not unusual for individuals to attempt to seek to prevent demolition and construction works by unlawful interference in construction activity (such as blocking public roadways, vandalising construction equipment, obstructing earth moving equipment, etc). Civil disobedience by community groups was complemented by unlawful green bans imposed by the trade union movement.

The Act was an attempt to bring order to the process of urban development. Its authors envisaged an environment where contentious issues could be dealt with by reference to factual information, rather than unruly protest campaigns. The Act was an attempt to address community disquiet that the existing law was inadequate. By creating a legitimate legal process for the community's concerns to be dealt with the Act reduced the need for unlawful actions by those opposed to urban development.

Since the Act came into effect in 1980 it has been one of the most hotly contested bodies of law NSW or Australia has ever seen. It has been amended on 122 separate occasions – an average of four amendments a year. In one respect it has been enormously successful. The era of civil disobedience around development activity has largely come to a close. It is no longer perceived socially acceptable in the mainstream community for individuals or trade unions to break the law to make political points about urban development.

However the fluid and ever widening legislative environment has deprived the development industry of certainty and exposed investment in urban development to significant sovereign risk. The highly politicised process that governs the regulation of development is, if anything, understated by concentrating on the Act itself. The most significant impact on business activity comes from the myriad of statutory instruments and administrative policies that are given force by virtue of the Act.

There are 308 statutory environmental planning instruments currently in force, plus an unknown number of "deemed" instruments left over from the pre-1980 legislation.[16] There are 232 different sets of guidelines to be used in the development assessment process.[17] There are 38 pages of section 117 directions. There is an unknown number state government strategies and draft strategies. On top of this there is a countless multiplicity of development control plans, strategies and policies in force at a local government level.

It should be no surprise that, with so many documents, there are inconsistencies. In fact, inconsistencies between competing policy documents and laws are the norm in the NSW planning system. A decision-maker who wants to refuse development consent is literally blessed with an unending array of rules, policies strategies and ordinances which can be relied upon to justify a "no". A decision-maker who is minded to approve a development must navigate a complex and internecine maze of conflicting, overlapping, vague and rambling documents. It is not surprising that the Act is the most heavily litigated piece of legislation in NSW.

The regulatory environment in NSW has been improved by the passage of planning reforms through the Parliament last year and their progressive implementation by the NSW Government. Nonetheless, the NSW Government has recognised that these reforms cannot be the end of the matter. The decision to ask the NSW Parliament's Standing Committee on State Development to inquire into the NSW planning

[16] www.legislation.nsw.gov.au, accessed 28 February 2009.
[17] www.rdaguidelines.planning.nsw.gov.au/register.cfm, accessed 28 February 2009.

system is a clear recognition that the current legislation framework is in desperate need of improvement.[18]

Our central proposition is that the *Environmental Planning and Assessment Act*, and all that hangs off it, has lost its way. So much of the activity required by the legislation is not and cannot be required by any legitimate public policy goal. Instead, the activity is made necessary because of political considerations, legal requirements, habit, the conventional thinking of public officials and a fear of criticism.

2.1 Key principles of planning

We submit that planning legislation should be about five key principles

Firstly, the planning system should support the development of NSW and by so doing provide employment opportunities, permit competition, support business productivity, raise living standards and improve the competitiveness of the state's economy.

Secondly, the planning system should promote of ecologically sustainable development – as defined in the 1992 *Intergovernmental Agreement on the Environment*. The concept of "ecologically sustainable development" requires:

- environmental protection;
- the integration of economic and environmental decision-making;
- inter-generational equity in decision-making;
- the application of the precautionary principle; and
- respect for biodiversity.[19]

Thirdly, the planning system should promote liveable communities, meaning:

- neighbourhoods should be permitted to be diverse in use and populations, with appropriate restrictions on the location of heavy industry;
- people should free to choose their preferred method of transport, whether it be car, public transport or walking;
- development control (other than enforcement of building standards) should exclusively deal with the external appearance of the built form, in particular: the relationship between buildings; buildings and the streetscape; and buildings and open space;
- building standards should be about safety and structural integrity based on objective information and assessment.

Fourthly, the planning system should manage development whose public infrastructure requirements exceed the capacity of existing local infrastructure, by providing:

- where public funds are available - a clear mechanism to determine which projects will proceed in accordance with the available public funds; and
- where no public funds are available - a mechanism for a private sector proponent to voluntarily contribute to the costs of expanding the public infrastructure to accommodate the requirements of the development.

Finally, the planning system should promote private investment in the development of NSW by enshrining a respect for property rights as a fundamental tenet of planning law. This means:

[18] http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/530183a60404cec9ca25747500005550/$FILE/080626%20Final%20TOR.pdf , accessed 28 February 2009.

[19] The *Environmental Planning and Assessment Act 1979* 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*.

- land owners should enjoy, free from legislative intrusion, the right to use and develop their land subject only to constraints objectively justified by principles two, three and four above;
- all decisions made by public officials that deny a land owner the right to develop his or her land: must be based on objective information, and where information is inadequate (and the precautionary principle is to be applied) rigorous risk assessment; and decisions should be subject to a just, quick and inexpensive merits appeal or review by an impartial third party;
- land owners should bear the costs of actions from which they individually derive private benefit and wider community (through the government) should bear the costs of actions involved in the supply of public-good benefits that are demanded by, and benefit, the community;
- changes which may reduce the development potential of land (such as down-zoning and heritage listing) must necessarily lead to compensation to affected land owners for any reduction in the value of land;
- the predictability of decision-making should be improved by dramatically reducing the number and breadth of strategies, policies and guidelines – the only such documents that should be considered are the final policies either approved by the state government or expressly provided for by an environmental planning instrument in relation to a specific area (e.g. a master plan);
- legislation, statutory instruments and policies should be designed so that the vast bulk of development envisaged is capable of being approved without the need for a subjective judgment by a consent authority;
- innovative and non-standard development should not be prohibited merely because it was not envisaged at the time a plan is prepared and should still be capable of being approved without the need for changes to statutory plans – in such cases there is room for some degree of subjective decision-making, although rights to a just quick and inexpensive review/appeal should remain; and
- the duplication and inconsistencies between different state government agencies; the state and the commonwealth should be removed.

This means the planning system cannot and should not be about ideology. For example, it should not be about creating communities of economic homogeneity as a goal in itself. It should not require the separation of land uses when the separation is not well justified by objective facts. It should not be the vehicle for reshaping society in accordance with the latest fad. Town planning laws should never be viewed as the central lever to overcome endemic social problems.

2.2 The Act's objectives

As is normal in modern legislation, the Act sets out its objectives. These objectives are significant because they are used by the courts to test the validity of decision made under the Act. Accordingly, they are an important touchstone for any public official charged with making a decision on a development application or contemplating the making or an amendment of an environmental planning instrument or a policy or plan sanctioned by or under the Act.

Objectives of the Environmental Planning and Assessment Act are:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

(iii) the protection, provision and co-ordination of communication and utility services,

(iv) the provision of land for public purposes,

(v) the provision and co-ordination of community services and facilities, and

(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and

(vii) ecologically sustainable development, and

(viii) the provision and maintenance of affordable housing, and

(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

The most charitable thing that can be said about these objectives is that they are a product of their era. Although they have been amended on an ad-hoc basis three times there has been no single overall review of these objective since the Act was passed by Parliament in 1979.[20]

Modern economic concepts

Concepts such as employment, competition, business productivity and living standards do not rate a mention. This is not surprising, because the significance of these issues in the public policy debate did not emerge until the late 1980s and early 1990s. The legislation merely shows its age when it overlooks these policy principles. More recent legislation routinely refers to such concepts.[21]

Ecologically sustainable development

The concept of "ecologically sustainable development" appears almost as an afterthought as the seventh item in a long list, even though it has been the touchstone of land use management since 1992.[22] It's clear that it has been added in later, because older language, which has been superseded by the broad definition given to "ecologically sustainable development," still appears in the objectives.[23] For example, there is no need for the Act's objects to spell out that the Act relates to the "management, development and conservation" of "natural areas, forests... [and] water"[24] when all of these things are embraced by the more robust aspect of ecologically sustainable development that requires the "conservation of biological diversity and ecological integrity."[25]

Co-ordination and orderly development

The objects of the *Environmental Planning and Assessment Act* includes the encouragement of

> the promotion and co-ordination of the orderly and economic use and development of land...[26]

The word "orderly" means

> arranged or disposed in order, in regular sequence, or in a tidy manner.[27]

The concepts of "orderly" and "co-ordination" are expressed to be desirable for their own sake. The objects of the Act do not explain why these concepts are important. As a result planning authorities regularly cite these words as evidence of their authority to attempt to dictate the location and nature of future private sector investment, without offering a sound public policy justification for that intervention.

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[20] Section 5 was amended in 1995, 1996 and in 1999.

[21] For example: *Air Transport Act 1964* s 4A; *Electricity Supply Act 1995* s 43EB; *Fair Trading Act 1987* s 60C; *Liquor Act 1982* s 54BA; *Motor Accidents Compensation Act 1999* s 5; and the *Water Industry Competition Act 2006* s7.

[22] The *Intergovernmental Agreement on the Environment* was signed by all state governments and the commonwealth in 1992.

[23] The *Environmental Planning and Assessment Act 1979* 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*.

[24] Section 5(a)(i).

[25] *Protection of the Environment Administration Act 1991* s 6(2)(c).

[26] s 5.

[27] *Macquarie Concise Dictionary*, 4th ed. (2006) 853.

These concepts may have made more sense in the 1970s when the primary development of cities was outward. However, in Sydney, since 2005, 60 to 70 per cent of new housing development is supposed to be within the existing urban footprint.[28] Goals for other urban areas, such as Newcastle, also embrace the idea of substantial infill development.

Infill development, by definition, tends to be a lot less "tidy" or "orderly". It happens when it is economic for it to occur, and not a day sooner. It has been proven impossible for planning authorities to dictate the pace and order of infill development. The only thing they are able to do is remove statutory prohibitions on infill development and regretfully, even this has not occurred in-line with government strategies. Even in relation to greenfield development, the concept of "orderly" sequential development has suffered a few blows because the planning authorities have "released" areas for development, such as Edmondson Park, but the planned development has not taken place. It is difficult for planning bureaucracies to put themselves in the shoes of private sector enterprise and it is usually not possible for them to reliably assess what developments will be viable and what developments will not be attractive.

At best the concept of "orderly" and "co-ordinated" development is well intended, but difficult to implement. At worst, the concept undermines the proper functioning of the market economy, because it encourages planning authorities to over-rule the business judgment of the private sector and dictate where private investment will go. The language of the Act's objectives legitimises such intervention even when there is no sound public interest requirement for that degree of intervention.

Public involvement and participation

The objective for "increased public involvement and participation" is quite dated. The Act certainly provides for increased public participation when compared to arrangements that existed prior to 1980. However, there is not, and cannot be, an ever increasing level of public participation in urban development. There is a point where attempting to increase public participation further effectively requires the nationalisation of private sector urban development activity.[29]

Public participation is now a standard feature of almost all modern natural resource/land management legislation. Most modern legislation contains provisions for public participation without regarding it as such a novel concept that it needs to be spelled out in the legislative objectives.

[28] As per the *City of Cities: Sydney Metropolitan Strategy* published by the NSW Government.

[29] For example, the government's reforms to exempt and complying development scaled back the concept of public participation, because in many instance the rights of one person to participate in a development decision may infringe on the right of another person to expect a decision on their development to be made quickly and efficiently in accordance with the appropriate rules.

Recommendation 1

We would propose that the objects of the Act be re-drafted to reflect the five principles we have articulated. This would read:

> The objects of this Act are:
>
> (a) to encourage the development of NSW and by so doing provide employment opportunities, permit competition, support business productivity, raise living standards and improve the competitiveness of State's economy;
>
> (b) to promote ecologically sustainable development;
>
> (c) to provide for liveable communities where:
>
> (i) neighbourhoods are permitted to be diverse in use and populations, with appropriate restrictions on the location of heavy industry;
>
> (ii) people may choose their preferred method of transport, whether it be car, public transport or walking;
>
> (iii) development controls concern the external appearance of the built form and its relationship to other structures, the natural environment and the public domain; and
>
> (iv) the health and safety of the community is protected by appropriate standards;
>
> (d) to provide for the control of development which will place demands on local public infrastructure in excess of its capacity;
>
> (e) to promote private investment in the development of NSW by respecting the right of land owners to use and develop their land.

Recommendation 2

Changes which may reduce the development potential of land (such as down-zoning and heritage listing) must necessarily lead to compensation to affected land owners for any reduction in the value of land;

Section 7 of the Act gives the Minister for Planning responsibility for

> ... promoting and co-ordinating environmental planning and assessment for the purpose of carrying out the objects of this Act and, in discharging that responsibility, shall have and may exercise the following functions: ...
>
> (c) to promote the co-ordination of the provision of public utility and community services and facilities within the State,
>
> (d) to promote planning of the distribution of population and economic activity within the State,
>
> (e) to investigate the social aspects of economic activity and population distribution in relation to the distribution of utility services and facilities ...

This role for the Minister does not recognise any role for market forces. It instead assumes that the Minister is solely responsible for the planning of population distribution and economic activity within NSW.

The 1970s was an era where, in public policy circles, it was still a credible proposition that government could determine the locations and scope of population growth in different regions. This thinking led the

Whitlam Government to embark on ambitious, expensive and spectacularly unsuccessful schemes to direct population growth to particular localities.

In 1973 Albury-Wodonga and Bathurst-Orange were designated as growth centres. It was said that Albury-Wodonga would become a second Canberra. Neither became the great inland centres envisaged by the Whitlam government.[30] It is the most notable failure of planned/forced population growth.

The *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy* ("the Metropolitan Strategy) said that Sydney will need an extra 640,000 new homes between 2004 and 2031. This was based on the assumption that there would only be 980,000 extra residents added to the city between 2006 and 2031. However, revised population figures issued in October 2008 said that at least an extra 1.4 million residents will now be added in the same period.[31] This figure is almost 50 per cent higher than the 2005 plan.[32]

The dramatic escalation in Sydney's population forecasts illustrates the unreliability of strategic plans that stretch out more than a year or two into the future. However, these long-term plans, as wrong as they invariably are, have a profound impact on cities because there is a tendency to prohibit anything not required by the strategy. If the strategy underestimates the required housing - and housing growth in excess of the strategy has prohibited by a statutory instrument – a shortfall in supply arises and housing becomes less accessible and less affordable.

Effective demand for housing by home-buyers is determined by a whole range of variables, including employment, the availability and cost of finance, and expectations of the rate of return from alternative investments.[33] These issues also affect the supply side. Forecasts on the supply side are also impacted by the lack of consistent and complete data on land supply in the pipeline (particularly infill land), uncertainty about the rate of conversion from raw land to serviced lots and actual dwellings and the production capacity of the construction industry.[34]

It is not possible for the government to dictate population growth and distribution in defiance of above factors.[35] It is not possible for government to produce strategies which can accurately anticipate these inputs more than one or two years in advance (and even then the projections are unreliable due to the variability of market conditions). It's also not possible to anticipate these factors five, ten or twenty years in advance. Yet the current planning system has a tendency to prohibit, by statutory instrument, all that is outside the strategy suggests a naive belief in the accuracy of the crystal ball used to prepare such strategies.

For example, in 2008 the Urban Taskforce criticised elements of the draft local environment plan for Lane Cove for not taking sufficient advantage of opportunities to provide pedestrian friendly compact living communities around public transport nodes. Lane Cove Council Council's defence for the failure to permit great residential growth around public transport and town centres was that the plan "was required to be prepared in order to satisfy residential and employment growth targets under the Metropolitan Strategy for Sydney".[36] This is the dominate view by councils and even key officers within the Department of Planning. Planning authorities believe that they can reliably predict the future and will prohibit activities the regard as unnecessary as matter of course. Regretfully, the development activities that are prohibited, with the benefit of hindsight, often subsequently turn out to have been necessary. This necessitates time-consuming and politically contentious changes to the law (rezonings) to accommodate specific projects as an almost routine feature of the planning system.

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[30] For example, it was planned to increase the population of Albury-Wodonga to 300,000 by 2000. Currently the population of both cities is well under 100,000.
[31] NSW Department of Planning, *New South Wales State and Regional Population Projections, 2006-2036: 2008 release* (2008).
[32] The Urban Taskforce estimates that more than 930,000 new homes will now be required by 2031, although we note that the NSW Government has retained its policy goal for only 640,000 new homes, despite the increased population pressure.
[33] National Housing Supply Council, State of Supply Report: Report 2008 (2009) 9.
[34] Ibid.
[35] As is envisaged by the existing section 7(d) of the Act.
[36] Correspondence from Mr Peter Brown, General Manager, Lane Cove Council to the Urban Taskforce 18/11/2008, ref: 41811/08.

Recommendation 3

We would propose that section 7, relating to the role of the Minister, be simplified to remove matters that do not require explicit statutory authorisation (e.g. the carrying out of research), recognise the limitations of government power and to better reflect the market nature of the economy. This would read:

7 Responsibility of the Minister

Without affecting the functions that the Minister has apart from this section, the Minister is charged with the responsibility of promoting and co-ordinating environmental planning and assessment for the purpose of carrying out the objects of this Act and, in discharging that responsibility, has the following functions:

(a) to advise planning and consent authorities on all matters concerning the principles of environmental planning and assessment and their implementation in environmental planning instruments and development control plans;

(b) to promote the co-ordination of the provision of public utility and community services and facilities within the State; and

(c) to promote flexible planning that accommodates potential changes in population and economic activity within the State.

3. The process of development assessment

3.1 Factors to be considered in development assessment

Section 79C(1) of the Act requires the bulk of development application (that is, all development applications processed under Part 4) to be assessed against a long and prescriptive list of considerations.

The provision is set out as follows:

> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
>
> (a) the provisions of:
>
> (i) any environmental planning instrument, and
>
> (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the draft instrument has been deferred indefinitely or has not been approved), and
>
> (iii) any development control plan, and
>
> (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
>
> (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), that apply to the land to which the development application relates,
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
>
> (c) the suitability of the site for the development,
>
> (d) any submissions made in accordance with this Act or the regulations,
>
> (e) the public interest.

This ready-made list fosters a check-list approach by consent authorities. Failure to have regard for some part of section 79C is a common feature of legal challenges to the validity of development consents. As a result consent authorities are keen to impose detailed documentary requirements on proponents dealing with every nuance of section 79C, even when the consent authority is privately of the opinion that some or all of the requirements are balderdash and irrelevant to the application at hand. By its very nature, the public sector is risk averse, and will want to put a proponent through no end of red tape if that's what it takes to minimise the risk of a successful challenge to the validity of a planning approval.

One advantage of Part 3A is that the requirements for consideration are not set out in a prescriptive list in the Act. It's therefore possible for the consent authority (either the Minister or the Planning Assessment Commission) to only consider – and require documentation for - the matters that are genuinely relevant to the application. Part 4 would benefit from the same approach.

Recommendation 4

Section 79C(1) of the Act should be simplified such that a consent authority must simply consider, subject to other provisions of the Act, whether the approval will give effect any object of the Act that the consent authority considers relevant. This recommendation assumes our separate recommendation (recommendation 1) for the reform of the objects of the Act is also adopted.

3.2 A development assessment timetable

A faster, more efficient development assessment system is crucial to rebuilding confidence in NSW property development. It is essential that these new regulations and SEPP amendments mandate a specific timetable for the handling of Part 4 development applications.

This would require:

- A reduction in requirements for detailed documentation at the development application stage. For example, detailed civil, flooding and stormwater information should only be required at the construction certificate stage.
- Where a proponent and a consent authority have agreed on a concept plan (master plan) the consent authority should be able to give binding up-front commitments on the permissible height, floor space and uses, consistent with the agreed plan. Once given these commitments could not be subsequently withdrawn when a development approval is granted. This would allow proponents to move quickly on the early stages of the development process, including site preparation, and it will reduce holding costs.
- Demolition and excavation should be permitted at any early stage – prior to a final development approval being granted. Demolition can take up 6 to 9 months – depending on the size of a development. Concerns about the risk of sites being abandoned in an unsightly state can be managed by requiring the lodgement of a bond when this option is exercised.
- Multi-stage development applications processes, such as the one currently applying in the City of Sydney should not be permitted. In the City of Sydney a floor space ratio of 14:1 is permitted on the main sites. However, a developer must first lodge a stage one development application, for the building envelope, and then subsequently hold a design competition, and then lodge a stage two development application. If this process is not followed the permissible floor pace is reduced to 8:1. In contrast, in Brisbane there is single development application process and it is code assessable. There is no advertising and no height limits, subject to airport restrictions. The average timeframe is six months to get approval. There is no need for a design competition because a registered architect would be used and (in the Sydney CBD) the market rewards design excellence.
- Advertising of a development application should take place within 5 business days.
- Maximum advertising period should be 14 days for major development rather than 28 days.
- Assessment of a major development application should take no more than 4 weeks by all sections of council. No more than a week later, a formal letter should be sent to the applicant detailing any issues. Should this timeframe lapse, then the applicant will be entitled to notify the Department of Planning, who will be obligated to appoint a town planning certifying company to complete the assessment work and prepare a report to the Council/Central Sydney Planning Committee (CSPC)/Regional Planning Panel (as appropriate).

An example of how this timetable works is set out below:

- Week 1: Development application lodgement and advertising begins.

- Week 2 - 6: Advertising to be completed and feedback from all relevant departments including any independent hearing and assessment panel to be completed.
- Week 7: Written comments to be provided to the applicant.
- Weeks 8 - 9: Applicant and council to agree on any amendments.
- Weeks 10 -11: Application to be amended if required and re-lodged with Council.
- Weeks 12 -13: Council offices to prepare/finalise report to a Council/CSPC/Regional Panel (as appropriate).
- Weeks 14 -15: Notice of determination to be completed.

If any stage of the above process cannot be met, the applicant may notify the Department of Planning who will be obliged to take the application out of Council's hands and appoint a certified town planner to complete processing the development application.

Recommendation 5

The Act should clearly set out a development timetable that mandates a fast and efficient processing of development applications by consent authorities. If any stage of the development timetable cannot be met, the applicant should be able to notify the Department of Planning who will be obliged to take the application out of council's hands and appoint a certified town planner to complete the processing the development application.

3.3 Right of appeal for development applicants

Conferring the power to make final development decisions on the unelected Planning Assessment Commission puts major projects at much greater risk of arbitrary decision-making with a single tier decision-making process.

Proponents of a $5 million 20 unit apartment block will have greater rights to reviews of unsatisfactory decisions than someone seeking to build a $100 million new community. If the Planning Assessment Commission is to have the power to decide development applications for itself, then we believe there must be a right of appeal to the Minister for Planning or the Land and Environment Court, or both. We do not accept the proposition that a so-called 'public hearing' by unelected commissioners should deprive a development applicant of independent review.

We also note, that without any right of appeal/review, there is no mechanism for an applicant to resolve an application that languishes with the Commission well after its 90 day deemed refusal period. The applicant is entirely at the mercy of the Commission – which may, in fact, never make a decision.

Recommendation 6

When the Planning Assessment Commission has the power to decide development applications for itself there should be a right of (merits) appeal to the Minister for Planning or the Land and Environment Court, or both.

3.4 Third party merits appeal by objectors

There is no history in the NSW planning system for third parties to have the right to seek a merits review of decisions to approve urban development such as residential apartments, retail/office development or light industrial developments. We do not support the planned introduction of a right for persons affected by so-called 'public interest' development to seek a review of a consent authority's approval. The best safeguard against corrupt decision-making would be for any development that poses a corruption risk to be determined by a regional panel in the first instance.

The new category of 'public interest development' makes the process of securing new development approvals even more complex where objectors can seek a rehearing and reversal of valid approvals issued by consent authorities.

While these new provisions are said to only apply when development standards are exceeded by 25 per cent, significant developments will exceed development standards by 25 per cent in a variety of reasonable situations, for example:

- the local environment plan is hideously out-of-date or does not reflect State strategies;
- the council has asked for larger apartments or more open space and the developer has agreed in return for more height; or
- the council has deliberately low-balled height and floor space restrictions to force developers into a "voluntary" planning agreements.

Recommendation 7

Third parties should not have the right to seek a rehearing and reversal of valid approvals issued by consent authorities in relation to urban development such as residential apartments, retail/office development or light industrial developments.

3.5 Lapsing of development approvals

Existing rules require that work on a development must be "physically commenced" within five years of the grant of a development application. However the requirements for "physical commencement" are not onerous and are met relatively easily by a developer who wants to keep an approval current.

However the government's uncommenced planning legislation introduces a new requirement that work must be "substantially commenced" within seven years of the grant of a development approval. The legislation will also allow the government to change the definition of "physically commenced" by regulation, introducing a new level of uncertainty about the existing five year requirement.

These more onerous requirements will make developers more cautious about spending money to seek approvals. Please bear in mind, the costs associated with securing a Part 3A application run into millions of dollars.

By placing new, more restrictive rules on the life of development approvals the development process will slow down. Developers will need a higher degree of certainty about the project proceeding before they start spending large amounts of money necessary to secure development approval.

In short, development approvals that are more likely to lapse are less bankable.

The credit squeeze is having a major impact on the availability and cost of business finance – stopping new construction projects dead in their tracks. Once current development projects are completed we

will see a rapid loss of construction jobs. Every $1 million in construction expenditure creates 27 jobs throughout the broader economy.

In the current credit crisis, the last thing the government should be doing is shortening the time that a developer has to make good use of a development consent. In fact, the government should increase the amount of time a development consent can be valid.

Businesses should be encouraged to make development applications even if they are not certain they have the necessary finance. This means allowing development applications an extra two years before they lapse.

Recommendation 8

The government should not shorten the time that a developer has to make good use of development consents. Businesses should be encouraged to make development applications even if they are not certain they have the necessary finance. This means allowing development applications an extra two years before they lapse.

3.6 Deemed approval for development consents

We advocate the introduction of "deemed-to-comply" periods rather than "deemed refusal" periods.

Deemed-to-comply periods are a vastly superior method of ensuring that consent authorities allocate the necessary resources to (and appropriately manage) their development assessment functions. Without deemed-to-comply periods, consent authorities lack incentives to quickly deal with development applications.

A deemed-to-comply period for development applicants means a development consent is deemed to be given if no refusal has been issued in a set period. An appropriate timeframe would be as follows:

- 10 days for complying development;
- 20 days for development applications not requiring exhibition;
- 40 days for small scale development;
- 60 days for medium scale development; and
- 90 days for development equivalent to designated development.

Recommendation 9

A deemed-to-comply period for development applicants means a development consent is deemed to be given if no refusal has been issued in a set period. An appropriate timeframe would be as follows:

- 10 days for complying development;
- 20 days for development applications not requiring exhibition;
- 40 days for small scale development;
- 60 days for medium scale development; and
- 90 days for development equivalent to designated development.

3.7 Strategies, policies, plans and guidelines

The predictability of decision-making should be improved by dramatically reducing the number and breadth of strategies, policies, plans and guidelines – the only such documents that should be considered are the final policies either approved by the state government or expressly provided for and required by an environmental planning instrument in relation to a specific area (e.g. a masterplan).

Recommendation 10

The Act should be amended so that, in relation to any development application the only strategies, policies, plans and guidelines that may be considered in the development assessment process are:

- final state environmental planning policies;
- final local environmental plans;
- state government strategies, policies, plans and guidelines approved by the Minister for Planning and available through an on-line register mandated by the Act;
- federal government strategies, policies, plans and guidelines approved by the Minister for Planning under a bilateral agreement with the Commonwealth and available through an on-line register mandated by the Act; and
- local council development control plans specifically authorised by either a state environmental planning policy or a local environmental plan.

4. The development decision and statutory plans

4.1 Less emphasis on rigid zoning

The current planning system in NSW combines the worst of the United State and United Kingdom systems. We have adopted the rigidity of United State zoning laws, but have not accepted their system of approvals where there is a presumption that – if building codes are met – development that is in-line with a zone will be approved. We have instead picked-up the United Kingdom system of planning approvals, where the consent authority has wide discretion to approve or not approve, but we have overlooked the fact that the UK does not have a rigid system of zoning.

In March 2006, the NSW Government gazetted the Standard Instrument for preparing new local environmental plans. The idea was sound: for the first time, local plans across NSW will use the same planning language, making it easier for communities to understand what is planned for their local area and the zoning controls.

All councils are required to use the Standard Instrument to prepare a new principal local environmental plan for their area, to be completed by 2011. An amendment to the Standard Instrument gazetted on 14 December 2007 took effect from 1 January 2008.

There are 34 zones provided for under the standard local environment plan to be adopted everywhere in NSW in the coming years.

These zones are principally defined by use, rather than the scale of buildings. This approach is out-of-keeping with modern developments in planning which 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 micromanage the uses that different pieces of land may be put. [37]

This approach would create more opportunities for a mix of housing, commercial and retail uses and transit and pedestrian oriented communities.

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. Pedestrian-oriented amenities such as retail and cafes should not be discouraged or prohibited.

Compact, mixed-used areas, making efficient use of land and infrastructure, make good planning sense. They create more attractive, liveable, economically strong communities. They facilitate a development pattern that supports pedestrian based communities and reduces dependence on motor vehicles by putting residents' and (in centres of employment such as business parks and light industrial areas) employees' daily needs within a short walk of home or work.

Planning schemes that concentrate on building form, rather than building use, are also less complex, contain more broadly defined zones and therefore less bureaucratic.

The current zoning scheme laid down by the standard template – particularly since it was amended in December 2007 - encourages wasteful inefficient development disproportionately focused on the a few areas zoned commercial centre at the expense of local centres, neighbourhood centres, corridors

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

and employment lands - increasing dependency on the cars and promoting inefficient use of infrastructure.

In the City of Miami, instead of having 34 zones, their new zoning form-based zoning scheme focuses on seven zones. These are:

- Natural - consists of lands approximating a wilderness condition, permanently set aside for conservation in an essentially natural state.
- Rural - consists of lands in open or cultivated state or sparsely settled. These include woodland, grassland and agricultural land.
- Sub-Urban - consists of low density areas, primarily comprised of single family and two family residential units.
- Urban General - consists of a mixed-use but primarily residential urban fabric with a range of building types including townhouses, small apartment buildings, and bungalow courts.
- Urban Centre - consists of higher density mixed-use building types that accommodate retail and office uses, townhouses and apartments.
- Urban Core - the highest density and greatest variety of uses, including civic buildings of regional importance.
- District zone - consists of the least regulated building and accommodates commercial and industrial uses.

Inflexible and overly prescriptive zoning is a major problem with a planning system. Because the environmental planning instruments made under the Act are laws, and because they are incredibly rigid, it has become almost routine for a law to be changed in order for the day-to-day business of development to take place.

Recommendation 11

That the 34 zones in the Standard Instrument be dramatically reduced, with the planning system instead concentrating on:

- the "form" (shape/configuration) of a structure;
- the relationship of buildings to each other, to streets and to open spaces; and
- a greater mix of housing, commercial and retail uses and transit and pedestrian oriented communities.

A planning system with just seven zones would be appropriate for NSW:

- Natural - consists of lands permanently set aside for conservation in an essentially natural state.
- Rural - consists of lands in open or cultivated state or sparsely settled. These include woodland, grassland and agricultural land.
- Suburban - consists of low density areas, primarily comprised of building forms consistent with detached housing and secondary dwellings.
- Urban General - consists of a mixed-use residential urban fabric with a range of building types including townhouses, terraces and low-rise apartment buildings.
- Urban Centre/Corridor – a mixed-use use environment consisting of higher density building types that accommodate retail and office uses, townhouses and apartments.
- Employment zone - consists of building types commonly associated with commercial, light industrial and retail uses.
- Industry zone – primarily for heavy industry, but also capable of including building types associated with commercial, light industrial and retail development.

4.2 An excess supply of zoned land should be encouraged

The Metropolitan Stagey says that

> [t]he supply of land available for development should always exceed market demand to ensure that land values are not unreasonably raised and lower the intended level of development.[38]

This is a very sound principle. Unfortunately it is rarely followed in practice by decision-makers operating within the NSW planning system:

- when non-statutory strategies are prepared;
- when changes are to statutory plans (environmental planning instruments) are considered; and
- in relation to development applications for office development, retail development and entertainment facilities.

Planning authorities will frequently question (and document the need) for proponents to demonstrate whether there is a "shortfall" in land supply in a particular market or sub-market. Often a proponent will be required to commission a detailed supply and demand analysis/justification to show the existence of a "shortfall".

This requirement is inconsistent with the Metropolitan Strategy and the market-base nature of the Australian economy. The presence of excess supply of zoned land is important to provide competition and choice for business and consumers. For example, a land owner who is sitting on undeveloped land, waiting for a better price, is given disproportionate market power by a regulatory system that prevents other land owners from offering their land for sale in competition.

In the case of retail development, consumers benefit when retailers in one area keep their prices low, to ensure that new competing retail developments are not built to undercut them. Even if zoned land is not actually developed, the threat of competition is often enough to foster efficient economic outcomes and lower prices.

Another manifestation of this problem is through a direct requirement for a needs assessment in statutory plans. In the Draft Ryde Local Environment Plan the low density residential zone has an additional zone objective that says the zone is

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

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

Consent authorities are already required to address social, economic and environmental considerations in their decision-making process.[39] It is unclear why further prescription requiring consideration of the community's needs is necessary. If a development is consistent with the local environment plan, a consent authority should be entitled to expect that it is consistent with the community's needs.

Recommendation 12

The Act should oblige planning and consent authorities to assume a market need if the private sector is seeking to develop a particular parcel of land. It should be unlawful for such authorities to require any demand and supply analysis.

[38] Department of Planning, *City of Cities: A plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 123.
[39] See section 79C of the *Environmental Planning and Assessment Act 1979*.

Planning authorities frequently consider whether rezonings (such as a nominated annual residential lot release per year) will impact "unreasonably" on other existing or planned land release within the same market or sub-market on the development of centres or employment lands in the vicinity.

It is impossible for a public authority to assess whether an impact is "unreasonable". In the market economy it is in the public interest for competitors to have impacts on each other. This is how prices are kept low and services standards desired by consumers are maintained.

There is no way that a government agency or council can decide whether an impact is "unreasonable" and nor should they. That kind of value system belongs in a 1970s Eastern bloc economic system, rather than Australia in the 21st century.

Recommendation 13

The Act should prohibit planning and consent authorities from considering the impact of a proposed development on other existing or planned developments either at a zoning or development assessment stage. The development should be assessed on its own merits, not on its potential impact on other developments.

4.3 Spot rezoning processes

In NSW, even once the standard (instrument) local environment plans are implemented everywhere (which will take several years at least) there will still be 34 zones prescribing in great detail different uses that may be permitted in different zones. Many of these zones are very similar – for example, it is not entirely clear why an area might be a "business development zone", but not a "light industrial zone", "mixed-use zone" or "enterprise zone".

A development which involves a non-permitted use cannot be approved unless the land concerned is first rezoned. As rezonings are entirely at the discretion of the council, the Department of Planning and the Minister for Planning, "spot" rezoning requests are often arbitrarily denied, or held-up for years on end.

Spot rezonings usually involve a change of zoning for a single site, or additional permitted uses and/or development controls that relate to the development of that site. The Department of Planning has been trying to reduce the number of spot rezonings. They have said that reducing the number of amended LEPs in the planning process limits the administrative load on councils and the Department. However, the department has recognised that some spot rezonings have planning merit.

Local councils are frequently obstinate and difficult in progressing requests by proponents for rezoning. Often these requests are entirely consistent with State and regional strategic directions, but nonetheless fail to attract the necessary consideration by councils.

There needs to be more flexibility in this system. This is particularly important when the potential for development is identified outside the technical limits of a given zone, but is nonetheless is consistent with state, regional and sub-regional strategies.

The planned joint regional panels should be given a clear role to stand in the shoes of a local council in the rezoning process when:

- a council refuses or fails to deal with a rezoning request within a set statutory timeframe; and
- the panel is satisfied that the rezoning is strategy-consistent.

The panel would be able to submit a justification report supporting the rezoning to the Department of Planning. If the matter would normally then be delegated back to the council to finalise, in this case, it would be delegated to the joint regional panel. The panel would be obliged to deal with the matter in a set statutory timeframe.

For example, if an applicant proposes to develop rural zoned land for a residential estate and the land is shown on a strategic plan as forming part of a future urban growth corridor. If the council fails to support a rezoning, the joint regional planning panel should have an obligation to consider the matter in the council's place.

Another example may be where an applicant is seeking a rezoning to permit "retail premises" in an industrial zone or for reconfiguring a lot to subdivide land to a density in excess of that provided for in given zone. In both these examples the panel could only deal with the matter if it was satisfied that the proposal is consistent with state, regional or sub-regional strategies.

The benefits of this reform are clear:

- a more streamlined process than the current system of "spot" rezonings;
- the ability for planning authorities to use planning agreements to extort disproportionately high 'voluntary' levies from developers prior to rezoning decisions will be reduced'
- applicants whose development application are denied (or not dealt with) by a council can have the merits of their matter dealt with by the joint regional planning panel; and
- bureaucratic rules confining particular uses to particular zones will come second to state and regional strategies.

Recommendation 14

The proposed joint regional panels should be given a clear role to stand in the shoes of a local council in the rezoning process when:

- a council refuses or fails to deal with a rezoning request within a set statutory timeframe; and
- the panel is satisfied that the rezoning is (state/regional/subregional) strategy-consistent.

4.4 Urban growth limits

NSW should continue to avoid setting arbitrary limits on the growth of any urban area. No state or regional strategy has set "growth limits" in NSW. Urban growth boundaries have not been particularly effective at forcing increased residential densities.[40] Melbourne has recently effectively abandoned its urban growth boundary.[41]

Growth boundaries are not good policy because they arbitrarily limit an urban areas growth, irrespective of the costs and benefits of future development proposals. They are generally unrelated to genuine environmental issues and there is little international evidence to support their success.

Despite the absence of growth limits from state or regional policies, some councils have attempted to go it alone. For example, clause 2(g) of the *Draft Penrith Local Environmental Plan 2008* include an aim

> 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 ...

[40] Levine, J *Zoned Out* (2006) 120.
[41] http://www.theage.com.au/national/goahead-for-urban-sprawl-20081202-6ps9.html?skin=text-only.

Recommendation 15

The Act should specifically prohibit any statutory plan from setting arbitrary limits to urban growth. Any limits that are imposed must be supported by evidence, or where the precautionary principle is applied, rigorous risk assessment.

4.5 Vague and subjective requirements

Too many statutory instruments made under the Act set out vague and subjective requirements for routine development. Objective rules allow developers to make acquisition decisions and prepare development applications with some confidence about an outcome.

The *Draft Ryde Local Environment Plan 2008* includes an objective for its commercial core and business park zones:

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

The phrases "high-quality" and "well-designed" sound good, but they are entirely subjective. They should never appear in a statutory plan unless they are given a specific meaning. Anyone could assert theirs is a product that is "high quality" and "well-designed" – any decision maker could disagree. The fact is, these words lack an objective meaning and are dependent on the *opinion* of the decision maker, rather than a verifiable fact.

For example, a consent authority could seek to refuse a development application from a major fast food chain because the facility may not be considered a "high-quality" development. It is worth noting that a court is likely to find the phrase "high quality" means something different from "well-designed" because both phrases are included in *Draft Ryde Local Environmental Plan 2008*. The rules of statutory interpretation will suggest that they mean different things. Given the politicisation of the local development assessment process, this is a significant disincentive to invest in these kinds of developments in the commercial core and business park zones of Ryde.

Another example is given by the *Draft Greater Taree Local Environment Plan 2008* include a zone objectives that says the primary production zone is

> [t]o permit *small scale* rural tourism uses associated with primary production and environmental conservation (emphasis added).[42]

A subjective phrase such as "small-scale" is an inappropriate phrase for a statutory plan. If there is a desire to prohibit buildings of a particular bulk and scale then a development control plan can set out the applicable height or floor space ratio restrictions. Subjective words such as "small" mean different things in the hands of different decision-makers – it is a recipe for confusion, legal disputation and inconsistency.

The same plan also includes a general and light industrial zone objective that says those zones are

> [t]o encourage *innovation* and *sustainability* in industry (emphasis added).

This objective could prove problematic as a land use must also be "innovative" and "sustainable" to satisfy the zone objective. Consent authorities are already required to address social, economic and environmental considerations in their decision-making process.[43] It is unclear why further prescription requiring consideration of the innovation and sustainability is necessary. The zone objective allows a

[42] The second last dot point added by Council.
[43] See section 79C of the *Environmental Planning and Assessment Act 1979*.

development consent to be refused because a public official has decided that they are not "innovative and sustainable". This will be a loss to the community of Greater Taree because it may prevent industrial zones from reaching their full potential.

A further example of subjective language is offered by the *Draft Penrith Local Environmental Plan 2008* village zone, which includes Mulgoa and Wallacia, and 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.

The *Draft Lane Cove Local Environmental Plan 2008* says it is an objective for the local centre zone

> [t]o preserve the character of the Lane Cove Town Centre by encouraging a *moderate* scale of development ..... (emphasis added)

What is a "moderate scale" of development? A rule this vague does not allow developers to make acquisition decisions and prepare development applications with some confidence about an outcome.

Zone 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 "innovative", "limited", "moderate" or "small-scale". This undermines the intent of the whole statutory planning process which is about providing greater certainty.

There is a role for subjective judgment to be exercised when giving approval for matters that are clearly outside the scope of a plan for an area. For example, the broad and subjective provisions of State *Environmental Planning Policy No 1— Development Standards* and clause 4.4 of the Standard Instrument are appropriate and should be retained. However, subjective words like this should not be used in relation to the anticipated routine business of the development within a given zone. Innovative and non-standard development should not be prohibited merely because it was not envisaged at the time a plan is prepared. Such development should still be capable of being approved without the need to amend statutory instruments – in such cases there is room for some degree of subjective decision-making, although rights to a just quick and inexpensive review/appeal should remain.

Recommendation 16

Legislation, statutory instruments and policies should be designed so that the vast bulk of development envisaged is capable of being approved without the need for a subjective judgment by a consent authority.

Recommendation 17

Innovative and non-standard development should not be prohibited merely because it was not envisaged at the time a plan is prepared. Such development should still be capable of being approved without the need to amend statutory instruments – in such cases there is room for some degree of subjective decision-making, although rights to a just quick and inexpensive review/appeal should remain.

4.6 The planning system should be blind to the identity of the applicant

The planning system has traditionally been blind to the identity of the applicant. That is, characteristics which are personal to the applicant have not normally influenced a decision as to approval or approval conditions.

On 18 February 2009, the NSW Government announced that it will streamline town planning rules for "social housing" projects. However, the rule change published two days later is much broader than the government's original announcement suggested. The NSW Government also released a planning circular (PS 09–007) which says the changes are about "affordable housing". The concept of "affordable housing" is much wider than "social housing".

The new rules, as published, waive local environment plan requirements for the development of residential flats and multi dwelling housing. They say that development may take place, despite any provision of a local environment plan, although development consent is still required. The new rules also waive any requirement for car parking. They also state consent must not be granted without a compatibility certificate from the Director-General of the Department of Planning.

We would welcome a reform of this kind, without reservation, if it applied equally to all developers. This kind of reform is exactly the sort of change we have been seeking for some time (although we query the need for a site compatibility certificate).

However, the rules will only apply to homes developed by or on behalf of public authorities, non-profit housing providers or by a joint venture partner with Housing NSW. A wide range of government agencies could potentially use these new provisions - including Landcom, the Redfern-Waterloo Authority, Sydney Harbour Foreshores Authority, the State Property Authority, the new Sydney Metro Authority, local councils, any government department, as well as not-for-profit organisations such as City West Housing. There is no requirement for land to be in existing government ownership. These organisations will be free to bid for sites with zoning problems in direct competition with the private sector.

The new provisions do not require that any of the development be limited to social housing or rental or affordable housing – and nor should they.

We support making housing more affordable and the best way to do this is to increase the available supply. These reforms will overcome rezoning difficulties and will help boost the development of new homes. In particular, it is good policy to allow higher density developments within 800 metres of all Sydney transit stations, regardless of the zoning of the land. After all, this merely implements the Government's 2005 Metropolitan Strategy. However, there is no case for these rules to be limited to non-profit developers or government developers such as Landcom or the new Sydney Metro Authority.

These special rules are an admission that the existing system is not working for government and non-profit developers. However, the same could be said for private sector projects. We believe the state government should give both public and private housing developments the same support.

These are permanent changes to the planning law and seek to give non-profit and government developers preferential access to sites with zoning problems in the vicinity of train stations. While it's true, right now, that private sector developers have less access to capital than government developers, this situation will not last forever. It's a mistake to respond to a transitory economic situation to make permanent changes to our law discriminating against the private sector.

State governments should be doing everything possible to encourage private sector development activity. The NSW Government should be telling the investment community that the private sector is welcome in these important urban renewal sites near transit stations. There is no reason why approvals for housing developed by the government for private rental and sale should be fast tracked, while private sector projects wallow in red tape.

The amendments also violate the *NSW Government Policy Statement on the Application of Competitive Neutrality*, released in 2001.[44] 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. If a public authority is developing regular housing for sale on the open market it is, unquestionably, operating a "business" within the meaning of the policy.

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.

The NSW government policy also requires government business activities to be subject to "corporatisation principles". Among other things these principles affirm the business must "operate within the same regulatory framework as other businesses". The same rules should apply to the public and private sectors when they develop housing.

Recommendation 18

The planning system should not discriminate between development proponents who are government, non-profit organisations or commercial businesses. The development applications put forward should be judged on their own merits without discrimination against private businesses.

4.7 The principles of merit assessment

The underlying philosophy of the Act is, or should be, that consent authorities have to balance competing community priorities when making decisions for the social, economic and environmental benefit of the community.

Regretfully, there are many statutory plans which attempt to fetter the ability of consent authorities to take into account all relevant factors and make a decision which is in the interest of the community.

For example, clause 2(i) says that the *Draft Penrith Local Environmental Plan 2008* aims

[44] See http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0007/3868/tpp02-1.pdf.

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

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 an integrated fashion.

Recommendation 19

Statutory plans should reflect the need to balance different community priorities, rather than establish blanket rules that elevate some priorities above all others. When statutory plans set out a matter for consideration by a consent authority, the Act should prohibit the plan from elevating one consideration above another. The consent authority should have the discretion to deal with each consideration to the extent it considers it relevant.

4.8 Regulating changes of use

The philosophy of the statutory instruments made under the Act is heavily focused on what goes on inside buildings, rather than the external appearance of the buildings. We accept that the form/shape of a building and its relationship to the streetscape, other buildings and open space is a legitimate matter of public interest. On the other hand, we have difficulty understanding what the public interest is in requiring rezoning or development applications to change the use of a shop from, say, a convenience store, to a music store.

For example, under the *Draft Penrith Local Environmental 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.

Furthermore, in some circumstances, even within these zones, floor space restrictions further limit the potential for consideration of these minor developments as being exempt. That means a shop that has been given development approval as "food and drink premises" will need another development application in order to changes to a baby clothes shop. It is utterly unclear why this is such a crucial matter of public importance that a small business must be forced to go through such paper work.

Recommendation 20

The Act should be amended so that, in relation to any offices, retail premises, light industry premises or business premises, there is no requirement for a development application to be lodged for a change in use when:

- the change does not involve the carrying out of any alterations other than alterations that are themselves exempt development;
- the new use is permissible in the zone;
- other aspects of the original development approval (except the original prescription of use and conditions specific that use) will still be complied with.

4.9 Protection of views

Under NSW planning law there is no legal right for a landholder to retain a view.[45] Such a right has no place in planning law, because of the harsh impact it would have on other landholders.

However planning authorities have, on many occasions, sought to enshrine a property right in a view.

For example, clause 2(d) of the *Draft Penrith Local Environmental Plan 2008* comes dangerously close to introducing such a right when it says one of its aims is

> 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.[46]

Since "environment" has a very board definition,[47] any view is likely to have "environmental value". That means the *Draft Penrith Local Environmental Plan 2008* aims to "protect" any view in the City of Penrith.

This plan aim is implemented by 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".

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 "view" is properly seen as a component of the broader concept of amenity and neighbourhood character.[48] Planning law envisages a *balance* being struck between the need for urban development

[45] *Sloane v McDonalnds Industries (Sales) Pty Ltd* (1989) 17 NSWR 471 86, 101.
[46] s 4(1).
[47] "Environmental" is a cognate word of "environment" and thus will have the same meaning: Interpretation Act 1987 s 7.

and neighbourhood character.[49] The rights of a landholder to benefit from his or her view must be a balanced with the rights of others to make use of their property and the broader social and economic needs of the community.

The general planning law on visual amenity is more than adequate. It's alarming that local councils are able to tamper with this law through statutory plans. By subverting the law on views through a statutory plan, a council affects

- 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.

Recommendation 21

The Act should prevent statutory plans from giving express protection of views. Views should remain as an aspect of community amenity, which is a consideration on the development assessment process, along with other factors.

4.10 Over-regulation of retail development

Note: Section 7 of this submission has more detail on the competition issues arising for the existing operation of the planning system.

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.

In August 2008, the Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws.[50] It concluded that zoning and planning regimes act as an artificial barrier to new supermarkets. In the same month the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords.[51]

An example of these problem laws appears in the *Draft Penrith Local Environmental Plan 2008*.[52] In this plan neither "retail premises", nor "shops" are generally permitted uses in a village zone. 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";

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[48] *Ex parte Little; Re Fairfield Municipal Council* [1963] NSWR 471.
[49] *Wain Leisure Ltd v Secretary of State for the Environment and the Lake District Special Planning Board* [1989] JPL 190.
[50] Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008).
[51] Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (2008).
[52] See also the *Draft Greater Taree Local Environmental Plan 2008*.

- ensure the purpose of the goods are to satisfy day-to-day needs; and
- be directed to people who live or work locally.

In short, shops of any size are banned in neighbourhood centres, if they sell 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, 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.

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 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.

Recommendation 22

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use around centres, including neighbourhood centres, and corridors. Retail and business premises should be permitted (with consent) in such zones. The merits of individual proposals can be considered at the development assessment phase.

Many statutory plans do not permit "retail premises" and/or "business premises" (other than bulky goods premises, landscape and garden supplies, timber and building supplies) in business development and enterprise corridor zones.[53] The *Draft Ryde Local Environmental Plan 2008* does not even allow "retail premises" or "business premises" in the business park zone!

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

[53] For example, the *Draft Greater Taree Local Environment Plan 2008*.

Those working in a business development, business park or enterprise corridor zone should be entitled to have lunch in a restaurant, get a haircut or visit a local hotel after work. Surely these uses go hand-in-hand with business activity.

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

Recommendation 23

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use for employment purposes, such as the existing business development zones, business parks and the enterprise corridor zones.

Many industrial zones recently published statutory plans to not permit retail premises or business premises in light industrial zones.[54] Sometimes food and drink premises, landscape and garden supplies, service stations and timber and building supplies are permitted, and occasionally bulky good premises are allowed, but almost always retail premises generally are prohibited.

This means large format grocery stores, such as Costco, are prohibited in light industrial areas. Large format business supplies retailers, such as Officeworks, or large format hardware suppliers, such as Bunnings, will often have great difficulty in finding sites. Smaller retail supermarkets, such as Aldi, also end up being excluded.

The Sydney Metropolitan Strategy offers a sensible approach to this issue. The Metropolitan Strategy stated that retailing in industrial areas should be permitted when it has operating requirements akin to industrial uses.[55] There was also a promise of a new approach to reinvigorate employment lands, including flexible zonings for industrial and commercial activities.[56]

However, the statutory plans that have been exhibited since the 2005 Metropolitan Strategy have not implemented this provision. 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 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 and business premises should be a permitted use in the industrial zones.

Recommendation 24

All "retail premises" which are either ancillary to an industrial use, have operating requirements akin to industrial uses or demonstrable offsite impacts akin to industrial uses should be permitted in light industrial zones.

[54] For example, see *Draft Greater Taree Local Environment Plan 2008*.
[55] NSW Department of Planning, *City of Cities: Sydney's Metropolitan Strategy – Supporting Information* (2005) 105, B4.1.2.
[56] Ibid 63, A1.4.2.

The Urban Taskforce has consistently argued that the draft subregional strategies will further contribute to Sydney's undersupply of retail floor space. The *Liverpool Local Environmental Plan 2008* is an excellent example of what can happen when a statutory plan faithfully follows the draft subregional strategy.[57] The plan, like the draft subregional strategies, largely reinforces the continuation of the existing centres in their current condition.

We've previously criticised the draft subregional strategies for using subjective unhelpful descriptions for centres. Terms including "small strip of shops, one or small cluster of shops" appear frequently in subregional strategy documents. The Department of Planning has always responded to our concerns with assurances that the definitions and typology are "indicative" and the intention is not to standardise different places. However the publication of the final *Liverpool Local Environmental Plan 2008* confirmed our worst fears by faithfully applying the subjective and prescriptive terminology in a statutory plan.

For example, a neighbourhood centre is defined in the subregional strategy as "one or a small cluster of shops and services…". The zone objectives for a neighbourhood centre in the *Liverpool Local Environmental Plan 2008* say that the zone exists:

> to provide a range of *small-scale* retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood;
>
> to provide the opportunity for *a small scale* supermarket that will provide goods for the day-to-day needs of people who live and work in the surrounding neighbourhood; and
>
> to allow for residential and other accommodation while maintaining active retail, business or other non-residential uses at street level (emphasis added).

A subjective phrase such as "small-scale" should never have appeared in a subregional strategy and certainly should never have appeared in a statutory plan. A "neighbourhood shop" or "shop" are permitted, but "retail premises" are not permitted in this zone even though a zone objective seeks to encourage a range of small scale retail uses. This appears to prohibit a range of retail uses which could well be small in size or number – such as a jewellery retailer or a pet shop. We cannot see any public policy reason why a "shop" would be permitted, but the broader "retail premises" prohibited.

Worryingly, a "small scale supermarket" is not defined. True supermarkets or large format stores range from 1,500 square metres (six checkouts) for a typical Aldi or IGA Supa store to 2,500 to 3,500 square metres 12 to 16 checkouts for a full-line Woolworths, Coles, Franklins or Superbarn. So, in industry terms, a small scale supermarket will have a floor area of 1,500 square metres. However some government and local council planners have been known to argue that a store of 700 square metres is a supermarket – an idea that is rejected by both industry and consumers.

The plan also bans shops with a gross floor area of more than 1,500 square metres.[58] So clearly, a supermarket of 2,000 square metres – which would still be small by industry standards – will be prohibited in neighbourhood centres. However, the fact is, even a "supermarket" of 1,000 square metres may be deprived of development consent, because of the objective that supermarket retailing must be "small". There is nothing in *Liverpool Local Environmental Plan 2008* which says that a supermarket of 1,500 square metres satisfies the "smallness" criteria set out in the neighbourhood zone objectives.

Both the zone objectives and the floor space restrictions should be removed. By depriving local consumers from full-line supermarkets locals will be forced to drive further to access lower cost groceries and those that are unable to drive will be deprived of the full-range of groceries that are only available at full-sized supermarkets.

[57] In this case the Draft South West Subregional Strategy.
[58] Clause 7.25.

Similarly the ban on food and drink premises of more than 300 square metres in size cannot be justified. Why should premises of 400 or 500 square metres be permitted for some uses, but not others? Surely what matters to the community are the bulk and scale of developments and off-site noise and traffic impacts? Noise and traffic impacts can be objectively addressed as part of the development assessment process and prohibitions at the zoning stage are inappropriate and premature.

Of concern to anyone who cares about competition, is the zone objective limiting the number of supermarkets to only one ("a small-scale supermarket"). This clause is reminiscent of provisions in a Penrith local environment plan that set minimum distances between general stores – heavily criticised by Professor Allan Fels in his report, *Choice Free Zone*.[59] Competition and consumer convenience are heavily impacted by this kind of restriction.

This objective was not part of the Standard Instrument template, but was added by Liverpool City Council. However, at least some of the problems in the *Liverpool Local Environmental Plan 2008* arise because the Council has attempted to follow the intent of the draft subregional strategies and has codified the draft strategies' subjective descriptions.

The *Draft South West Subregional Strategy* states that a "village" is defined as "a strip of shops and surrounding residential area within a 5 to 10 minute walk contains *a small supermarket*, hairdresser, take–away food shops…." and a neighbourhood centre is to contain "*one* or a small cluster of shops and services".

We have already made previous and numerous submissions warning that the draft subregional strategies would be used to inappropriately limit and block development in centres. We regret that our predictions have come true in the *Liverpool Local Environmental Plan 2008*.

Even if only one supermarket is actually established, the threat that another one could be established will act as an incentive for the first supermarket to invest in their business and keep prices lower. By legislating to block local choice, services quality will suffer and prices will be higher than they need to be (see *Choice Free Zone* for more on this).

The decision to ban more extensive shopping facilities ignores the potential for growth in these localities. If there are not sufficient people to support more extensive shopping facilities, then the market will not provide such a facility.

There is no need to ban such facilities merely because the Council does not consider them necessary – after all, according to the Metropolitan Strategy "[t]he supply of land available for development should always exceed market demand."[60]

Recommendation 25

No quantitative restriction should be imposed on the number of supermarkets (or other forms of development) in an area by statutory plans or regional or subregional strategies. Decisions to permit or deny additional supermarkets should be made at the development assessment stage, based on objective information, such as traffic studies.

4.11 Existing character

Many statutory plans seek to "preserve" or "protect" the existing character of an area. There is nothing wrong with designating the building form for an area, for example, stating that a zone is about

[59] *Penrith Local Environmental Plan No 201 (Rural Lands)*, cl 18.
[60] NSW Department of Planning, *Metropolitan Strategy Supporting Information* (2005) 123.

providing for low density residential housing. However, there may be something wrong if a statutory plan goes further by expressly requiring that the "existing character" of an area must be retained, irrespective of the benefits of a particular new development proposal.[61]

Provisions in statutory plans that seeks to "preserve" something as general as the "existing" character will prevent the natural evolution of an area.

For example, in the *Draft Penrith Local Environmental Plan 2008* 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... (emphasis added)

The *Draft Lane Cove Local Environmental Plan 2008* says it is an aim the plan

> to *preserve* and, where appropriate, improve the *existing* character, amenity and environmental quality of the land to which this Plan applies in accordance with the indicated expectations of the community ...(emphasis added) [62]

Localities should be able to change and evolve, both physically and culturally, without a disproportionate emphasis being given to what exists now at the expense of what a locality might be like in the future.

Successful places have evolved into their current state over a period of time 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 statutory plans should not attempt to freeze the current character of an area, unless the area is a designated heritage conservation 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.

Recommendation 26

Statutory plans should not attempt to freeze the current character of an area, unless the area is a designated heritage conservation 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.

4.12 The preservation of uneconomic land uses as a policy goal

Some statutory plans go to great lengths to "protect" agricultural land. The desire by some planning authorities 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 a given local government area is a viable and attractive industry, then its viability would not rely upon protection by way of a local environmental plan.

Most of Australia's agricultural industry is generally located in well outside of the foreseeable areas of urban expansion. There is no shortage of agricultural land available within Australia to supply produce that meets our needs. The modern supply chain is no longer dependent on geographical proximity to urban areas. In fact, the only significant commercial opportunity for many Australian regions is

[61] This *would*, of course, be appropriate for a heritage conservation area.
[62] Clause 1.2(2)(b).

agriculture, while many competing industries are willing and able to locate while areas on the fringes of the existing urban footprint.

The fact that *State Environmental Planning Policy (Rural Lands) 2008* says that it is

> to identify State significant agricultural land for the purpose of *ensuring* the ongoing viability of agriculture on that land ... (emphasis added).[63]

A SEPP's only power is to prohibit something, or to permit something that would otherwise be prohibited because of some other statutory instrument made under the Act. The only way that a SEPP can "ensure" the ongoing viability of a particular land use is by depriving the land owner of the power to use his/her land for another income generating purpose. That is, a business might be regarded as available if it only gave a return on capital of, say, four per cent. However, there is a prohibition on any alternative income-earning activities on a parcel of land, the value of the land (a form of capital) is pushed down, therefore seemingly increasing the "return to capital". While on paper this may look like an effort to make a business viable, it does so at the expense of making the land-owner and the surrounding community poorer than they need to be.

> The SEPP sets out a rural planning principle that says that proposed rezonings must consider the need for
>
> the ... *protection* of opportunities for current and potential productive and sustainable economic activities in rural areas,[64]

It is unclear why economically sustainable agricultural enterprises must be "protected' by a law that prohibits land from being used for another purpose. If agriculture is a good business it will be viable irrespective of the zoning of land. On the other hand, if agriculture does not offer good returns to the land holder, a more viable business that creates more income for the landholder and the local community should be free to arise.

A good example of the attempt to protect agriculture is set out in the *Draft Penrith Local Environmental Plan 2008*. This plan sets out to prevent urban development on agriculture land, even as the councils' own planning strategy says 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.[65]

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, planning authorities local landholders into marginal, unsustainable rural business.

The local provisions relating to Mulgoa Valley in the *Draft Penrith Local Environmental Plan 2008* further highlight the extent that councils will go to.[66] 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

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[63] Clause 2(d).

[64] Clause 7(a). Under section 117 of the Act, the Minister for Planning has directed that councils exercise their functions relating to changes in minimum lot sizes under local environmental plans in accordance with the Rural Planning Principles and the Rural Subdivision Principles.

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

[66] Clause 6.12.

... 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. Councils are 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.

Recommendation 27

Planning law should not seek, as an objective in its own right, to preserve uneconomic uses of land by prohibiting alternate uses. The planning system should permit the highest and best use of land, subject only to the constraints of available public infrastructure and other negative externalities (external/social costs), such the impact of noise or pollution from heavy industry.

4.13 Parochial planning controls

Regretfully, the fact that many statutory instruments are, in the first instance, authored by local councils is apparent from the parochial nature of many provisions.

For instance, one aim of the *Draft Ryde Local Environment Plan 2008* is

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

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

> The basic purpose of zoning was to keep Them where They belonged – Out. If They had already gotten in, then its purpose was to confine Them to limited areas. The exact identity of Them varied a bit around the country. [67]

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

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

from the benefits of local development.

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

[67] Peter Hall, *Cities of Tomorrow* (1988) 60.

In short the aims of the plan should not have referred to development "that responds to the welfare of the citizens of Ryde". Instead the aim should refer to development "that responds to the needs and aspirations of Ryde's residents, future residents, workers and visitors".

Regulatory controls imposed under the planning system can also be used to pursue protectionist policies on an inter-regional basis. For example the *Draft Greater Taree Local Environmental Plan 2008*[68] says the plan is

> to encourage a strong, growing and diversified economy that promotes *local self-reliance*, and recognises and strengthens the local community and its social capital in ways that safeguard the quality of life of future generations (emphasis added).

The aims of a statutory plan are important and legally significant.[69] While we would commend the Council for its clear support for "a strong, growing and diversified economy," we do not think it appropriate for a plan to seek to promote "local self-reliance". This suggests that Taree is not interested in engaging in commercial activity that extends across the local government boundary. In the modern economy any local council should be prepared, for example, to host a manufacturing business that makes only a component of a larger product assembled elsewhere. Any local government area should be able to accommodate, for example, a retail development that brings in its merchandise from another city or region. It should not be possible or appropriate for one part of NSW to attempt to cut itself off from the rest of the state, country or world through this plan.

In the *Draft Penrith Local Environment Plan 2008* the Council says that the primary production zone is

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

To some extent this is merely a re-drafting of a standard provision already include in the plan by the Standard Instrument. This provision says 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.

At the end of the day, statutory plans made under the Act only have any significance because they are laws approved and published by the NSW Government on behalf of us all. Such plans should not attempt to pit one part of our community against the other – nor shield the residents of a council area from the needs of those in a neighbouring council area.

Recommendation 28

It should be unlawful for decisions to be made under the Act that discriminates against:

- non-local businesses, including businesses whose supply chain straddles different regions; and
- members of a non-resident local workforce, visitors and future residents.

[68] Clause 2(h).

[69] Section 25(3) of *the Environmental Planning and Assessment Act* makes clear that if a provision of a local environment plan is genuinely capable of different interpretations, that interpretation which best meets the aims stated in plan is preferred.

4.14 Forcing developers to build retail space

The Urban Taskforce has long been an advocate for mixed-use development. That is, allowing a mix of commercial, residential and retail development in a single zone, and even in a single building. However, we have never favoured forcing developers to build any kind of product where there is not an established market need.

There is an increasing tendency by many planning authorities to force residential developments to build retail space on the ground floor, even when the developer believes it is unlikely that the space will be adequately tenanted.

If there is insufficient demand for retail space, developers are still forced by such rules to build ground floor retail space that can be empty and underused leading to a ghost town atmosphere in the local streetscape. It is 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.

For example, the *Draft Greater Taree Local Environmental Plan 2008* says that any residential development in the neighbourhood centre, local centre, commercial core and the mixed-use zones must be "shop top housing". That is, residential development can only take place if it is above or attached to retail or business premises.

Recommendation 29

It should not be possible for planning or consent authority to force a development applicant to build premises with a particular mix of use. For example, it should not be lawful to force development applicants to build retail or business premises as part of a residential development.

4.15 Residential development should not be banned in the commercial or local centres

The Urban Taskforce strongly opposes the prohibition of residential development in centres. If lively, active and safe urban centres are to be created, residential development must be permitted.

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.

It is well understood that "land use patterns have a significant influence on how well public transport services can be delivered and utilised."[70] By introducing more land use flexibility in the vicinity of new transport infrastructure, the infrastructure itself benefits in terms of patronage, and therefore viability. Without an appropriate mix of complementary land uses, people will be less inclined to use public transport, as their ability to access a variety of destinations will be limited.[71]

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

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

Research consistently shows that population density has a significant impact on the use of public transport. For instance, it was found that every 10 percent increase in population density was associated with about a 6 percent increase in boardings at transit stations.[72] If this argument is accepted, then caution must be exercised when considering a local environment plan that actively seeks to limit town centre residential opportunities.

Regretfully many councils have been including provisions in their latest statutory plan that prohibit residential development taking place in commercial zones or even local centre zones.

For example, the Urban Taskforce has strongly opposed the proposal to prohibit residential development in the commercial core of St Leonards and Macquarie Park. If we are serious about creating a lively, active and safe urban centre, then residential must be permitted.[73] Another example is offered by the *Draft Greater Taree Local Environmental Plan 2008* prohibits multi dwelling housing, residential flats and shop top housing in its commercial core zone.

Centres can be mixed centres without the requirement that each individual development contain a mix of uses.

Recommendation 30

Multi dwelling housing, residential flats and shop top housing should be permissible in all centres.

4.16 Floor space ratios should not be misused

Density and land use mix are crucial to the success of a centre. Yet strangely it is now standard for density to be regulated, not only be height controls, but by floor space ratios.

A common defence of floor space ratios is to state that they are:

- to provide an appropriate correlation between the size of a site and the extent of any development on that site;
- to establish the maximum development density and intensity of land use, taking into account the availability of infrastructure and the generation of vehicle and pedestrian traffic; and
- to ensure buildings are compatible with the bulk and scale of the existing and future character of the locality.[74]

If the above statements are a legitimate justification for the imposition of maximum floor space ratios on a site, then it is difficult to comprehend why development types of a similarly high intensity should be given different floor space ratios in the same locality.

For example, while the *Draft Burwood Town Centre Local Environment Plan 2008* does not prohibit residential development within the town centre, it imposes a significant floor space penalty on such development. For example, a maximum floor space ratio (FSR) of 6.0:1 is permitted in the town centre, but residential FSR in the same location is restricted to 2:1. This will severely impact the feasibility of residential development in this location and will potentially stall investment and urban renewal. In the

[72] Parsons, Brinckerhoff, Quade and Douglas et al. 1995 in Cervero, R., Ferrell, C., and Murphy, S. 2002, Transit-Oriented development and Joint Development in the United States: A Literature Review. Transit Cooperative Research Program. Research results digest. October 2002—Number 52 [http://onlinepubs.trb.org/Onlinepubs/tcrp/tcrp_rrd_52.pdf, accessed 7 April, 2008]

[73] See the *Draft Lane Cove Council Local Environmental Plan 2008* and the *Draft Ryde Local Environmental Plan 2008*.

[74] *Draft Wollongong Local Environmental Plan 2009* cl 4.4.

Draft Wollongong Local Environment Plan 2009 housing to be developed by social housing providers is given an additional 10 per cent floor space ratio entitlement, on top of other housing.[75]

In high density residential zones, the *Draft Ryde Local Environmental Plan 2008* sensibly excludes residential flat development and multi-dwelling housing from the floor space ratio requirements but applies it to shop top housing. In this case the rule penalises retail development and confers disproportionate market power on the owner(s) of nearby retail land that is not so burdened.

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 any urban renewal in a given area from proceeding.

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.

The bulk and scale of a building is the same, whether its internal use is residential, commercial, retail or mixed-use. If a planning authority is concerned about the external building form, this can be dealt with by a development control plan, and does not need to regulate the internal use of a building. For example, a residential building can be built in the appearance of a commercial building (see the Regent Place development for example). Similarly, a supermarket can be in a mixed-use development underground, and have no external visual impact.

Recommendation 31

Floor space ratios should not discriminate between uses in the same zone.

4.17 Limiting development to preserve a centres hierarchy

Note: Section 7 of this submission has more detail on the competition issues arising for the existing operation of the planning system.

Many statutory plans attempts to introduce and/or maintain a centres hierarchy. Such provisions typically restrict commerce, limit choice and will often hamper the evolution of centres.

For example, the *Draft Lane Cove Local Environmental Plan 2008* attempts to faithfully translate the NSW Government's draft subregional strategies into reality. This would be a highly desirable outcome if the strategies were beneficial for a local area. However the *Draft Lane Cove Local Environmental Plan 2008*, like the draft subregional strategies, restricts commerce, prevents choice and attempts to ban the evolution of centres.

The plan says it is an objective for the Lane Cove town centre

> [t]o ensure that this centre retains its role of "local centre" in the hierarchy of lower North Shore retailing and to permit development for the purpose of offices, community and other facilities that conform with the village character

What this really means is that growth in this centre will be limited with the objective of protecting and ensuring greater growth in other centres in the subregion. This approach is not responsive to community needs. In particular, it fails to recognise that restricting development in one locality will not necessarily mean the same level of development will occur in the favoured location. Development opportunities are likely to be lost to the community as a whole.

[75] Clause 4.4A.

The "hierarchy of lower North Shore retailing" can only be taken to mean the hierarchy of centres outlined in the subregional strategy along with centre typology and radii. This is nothing less than a defacto incorporation of the subregional strategies directly into a statutory plan. Courts will only be able to apply and make sense of this requirement by reference to the subregional strategies and are empowered by this provision to apply them direct when determining development applications.

How will this work? Well, Lane Cove has been defined as a "town centre" under the applicable draft subregional strategy. "Town centres"

> have one or two supermarkets, community facilities, medical centre, schools, etc. Contain between 4,500 and 9,500 dwellings. Usually a residential origin than employment destination. Radii – 800m

Therefore, because Lane Cove already contains its quota of supermarkets, a decision-maker is obliged to have regard to the objectives for a zone when considering development applications. An additional supermarket would be inconsistent with the objectives for the zone and therefore is unlikely to be approved.

If there was any doubt about interpretation of the reference to the hierarchy in the objective for Lane Cove town centre, it would be cleared up by reference to the aims of the *Draft Lane Cove Local Environmental Plan 2008*.[76] Clause 1.2(d) says

> in relation to economic activities, to provide a hierarchy of retail, commercial and industrial activities that enable the employment capacity targets of the Metropolitan Strategy to be met, provide employment diversity and are compatible with local amenity, including the protection of the existing village atmosphere of the Lane Cove Town Centre,

Another example is offered by the *Draft Greater Taree Local Environmental Plan 2008* which states an objective for a neighbourhood centre as

> [t]o strengthen the local community and support the role of the local centres (emphasis added).

A local centre has an objective

> [t]o strengthen the local community and *support the role of Taree central business district* (emphasis added).

The commercial core zone has an objective

> [t]o reinforce the role of Taree central business district as the major regional centre (emphasis added).

What this really means is that growth in centres will be limited with the objective of protecting and ensuring greater growth in other centres in the local area. This approach is not responsive to community needs. In particular, it fails to recognise that restricting development in one locality will not necessarily mean the same level of development will occur in the favoured location. Development opportunities are likely to be lost to the community as a whole.

Determining if a development proposal is "supporting" or "reinforcing" the role of centres means asking whether or not business located in a 'subsidiary' centre will compete with businesses in a larger centre. Furthermore, including objectives such as these will introduce more uncertainly to the development determination process. That is, even applications for permitted land uses will be open to challenge by competitors on the grounds that the development does not support the role of a higher order centre.

In the end, preserving a centres hierarchy 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 robs the community of the opportunity to access a wide variety of competitively priced grocery items in their locality.

[76] Section 25(3) of the Environmental Planning and Assessment Act makes it clear that if a provision of a local environment plan is genuinely capable of different interpretations, that interpretation which best meets the aims stated in that instrument is preferred.

In August 2008 the Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws.[77] It concluded that zoning and planning regimes act as an artificial barrier to new supermarkets. In the same month the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords.[78]

What prohibition of this kind really means is that people need to drive further to satisfy their employment, entertainment, general grocery and shopping needs. Limiting retail, commercial office development or entertainment facilities by way of a statutory plan does little more than to protect existing retail landlords. That's not say that such development cannot be limited, but any limitation should be based on the capacity of infrastructure, issues of community amenity, etc.

In a final example, the *Draft Ryde Local Environment Plan 2008* includes an objective for its mixed-use zone

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

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

The objective may require a consent authority to refuse a development because it will undermine some other employment centre. The objective may also lead to a consent authority refusing a development application because local traders allege that the development will push them out of business and therefore economically weaken the centre. In our market economy *consumers* should be in charge. That means that consumers ultimately decide whether or not new retail, entertainment or office development should proceed.

Recommendation 32

Statutory plans should not be permitted to restrict development in one location merely to funnel development to another location. Development in an area should be permitted or prohibited based on its intrinsic qualities, that is, issues of amenity, infrastructure, noise, etc specific to the location concerned.

4.18 Requirement for a commercial opinion

Too many provisions in statutory plans require consent authorities to form commercial opinions about the nature of a development. These kinds of judgments are not only inherently subjective, they should form no part of a planning approval process.

For example, the *Draft Ryde Local Environmental Plan 2008* says that the Macquarie Park Corridor is to be a location for "premium globally competitive businesses".[79] This may mean a development applicant will have to justify the credentials of the future owners or tenants of any development to a consent authority. It raises the prospect that development consents will limit tenants or future owners to "globally competitive businesses". These concepts are so vague that there will be increased investment uncertainty.

A business may not be a premium globally competitive business. It may merely be a globally competitive business. It might only be competitive on a national basis. Heaven forbid – it might only be competitive within Sydney! Surely such businesses should have the same right to establish themselves in

[77] Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008).
[78] Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (2008).
[79] Clause 6.6(2)(a).

the Macquarie Park Corridor as those that are premium globally competitive businesses. What public official could objectively decide how competitive a business is - surely the market decides this? Yet this statutory plan requires a public official to make that very decision.

In another example, the same plan includes an objective for its commercial core and business park zone:

> To encourage industries involved in scientific research and development.

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

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

The Standard Instrument requires that this zone objective be considered when development applications in the commercial core zone are considered by consent authorities.[80] If this zone objective authorises the refusal of developments because they do not involve scientific research and development. This will be a loss to the community of Ryde, the broader Sydney community and the state as a whole, because it may prevent Macquarie Park from reaching its full potential. It may undermine the substantial investment the state has made in this locality as transport hub. The reality is that Macquarie Park is best developed by allowing the market to determine the kinds of businesses that are located there – with appropriate controls over building form.

Recommendation 33

No provision of the Act, nor any instrument or decision made under it, should permit or require a public official to form a commercial opinion about a development.

4.19 Car usage

It is desirable for modern urban communities to become diverse, compact, pedestrian friendly community, with a mix of uses and supported by high quality public transport. Achieving this goal will mean many people shopping in, or working in renewed urban environments will be able to avoid using a private motorcar. In fact, some local residents may even choose to do without a car altogether.

However, this kind of evolution does not mean that households or businesses should be forced to operate without access to a motor vehicle. It is inappropriate for planning instruments or development approvals to deny new developments the capacity to build sufficient car parking to meet the expectations of business and households, unless the restriction is directly justified by objective and detailed traffic analysis. Refusing approval to development based on an anti-car ideology is a recipe for social disaster.

For example, the *Draft Burwood Town Centre Local Environmental Plan 2008* aims

[80] Clause 2.3(2).

to provide for development that maximises public transport patronage and encourages walking and cycling ...[81]

This plan overlooks the fact that the plan also needs to provide for development that accommodates the choice of many people to own and use a private motorcar. A car will continue to be a necessity for many households, such as

- older people;
- children;
- people with disabilities.

Even a great many of singles and couples are still likely to need a motor vehicle, if only to attend to shopping and social activities which are inaccessible or impractical by walking or public transport. The benefits of compact, pedestrian friendly communities are that car use is likely to be reduced, not eliminated. Sensible land use and transport planning allows for all modes of transport (cars, transit, walking and cycling).

An environmental planning instrument that supports development which maximises public transport patronage without also acknowledging the need to provide for transport choice may reduce the attractiveness of developing in major centres. In particular, commercial, retail and apartment developments will generally require a reasonable amount of car parking spaces.

Good access to alternative forms of transport can mean a reduction in car parking, but we should not think that we could unrealistically restrict car parking. If people demand access to private motor vehicles, the market will require that provision be made for car parking. Developments that are not able to meet community expectations in this regard are unlikely to be built. Planning should continue to permit car related infrastructure (parking and roads).

The onus should not be on any particular development to maximise public transport patronage and encourage walking and cycling. Instead planning instruments could provide opportunities for public transport usage to be maximised through the integration of business, office, residential, retail and other development in accessible locations.

Recommendation 34

Planning for areas with high quality public transport should provide opportunities to integrate suitable business, office, residential, retail and other development to give the community the choice of using public transport, walking or cycling, as an alternative to private motor vehicle transport. However, provision for motor vehicles in new developments in these areas should not be restricted unless the restrictions are justified by objective expert traffic analysis.

4.20 Creation of buffer zones

Councils which are ideologically opposed to accommodating their share of Sydney's additional housing needs are able to utilise a wide variety of tools to undermine a statutory plan's apparent support for apartment development in a particular area.

Provisions in some local environmental plans empower landholders whose property might be located near proposed apartment developments to extort developers into buying them out. If a developer does not pay an overblown price for the property concerned, the landholder can lodge an objection

[81] Clause 1.2(2)(f).

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 apartment 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 bear absolutely no relationship to any aspect of heavy industry, and nor is the development of apartments anywhere near as profitable as operating a mine.

Buffer zones will significantly increase the cost of development, sterilise opportunities to meet Sydney's future housing needs and give not-in-my-backyard (NIMBY) landholders a right to veto nearby apartment construction.

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

For example the *Draft Ryde Local Environmental Plan 2008* reduces the opportunity to develop apartments in medium and high density residential zones with a zone objective which says developments should

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

In the *Draft Lane Cove Local Environmental Plan 2008* the chances of developing apartments in high density residential zones have been significantly reduced by a zone objective which says developments should

> avoid the isolation of sites resulting from site amalgamation ...

An additional objective says

> *ensure* that the existing amenity of residences in the neighbourhood is respected (emphasis added).

In the *Draft Burwood Town Centre Local Environmental Plan 2008* aims

> to minimise site isolation...[82]

Such provisions are not required in order to ensure that appropriate consideration is given to the impact of a development on local amenity. This is already a key component of the Act.[83] However, the difference is, the Act allows amenity issue to be factor, which must be considered along with other factors. For example, the loss of amenity for one landholder may be a gain of amenity for the whole community, arising from the more active streetscape and additional local shops a higher density residential development may bring. Furthermore the need for the community to accommodate the needs of our changing and growing population must also weigh up in the equation.

[82] Clause 1.2(2)(h).
[83] See section 79C.

Recommendation 35

Objectives limiting development that may isolate sites and objectives which guarantee the existing amenity of nearby residences should not be permitted in statutory plans. Such considerations should remain a factor for consideration along with other issues, in the development assessment process.

4.21 Restrictions on floor space linked to use

Standard Instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* a maximum floor area to be pre-set for different types of development, regardless of the merit of individual proposals, regardless of the capabilities of local infrastructure or the nature of local suburbs.

For example, the *Draft Lane Cove Local Environmental Plan 2009* sets a maximum floor space for neighbourhood shops at 300-400 square metres (depending on whether the shop fronts a local or regional road). In the *Draft Penrith Local Environmental Plan 2008* the limit is 200 metres. In the *Liverpool Local Environmental Plan 2008* it is 100 square metres.

Surely what matters to the community are the bulk and scale of developments and off-site noise and traffic impacts? Bulk and scale issues can be dealt with by height or floor space ratio restrictions. Noise and traffic impacts can be objectively addressed as part of the development assessment process.

Recommendation 36

Prohibitions on floor space area at the zoning stage, particular those linked to certain uses, are inappropriate and should be removed.

4.22 Apartment development in medium density zones

Residential flat buildings are an essential form of housing that can deliver desirable housing outcomes in areas well serviced by essential infrastructure – yet they are often banned in the medium density zone. For example, see the *Draft Lane Cove Local Environmental Plan 2008* and the *Liverpool Local Environment Plan 2008*.

Low and medium rise residential flat buildings meet the zone objective to "provide for a suitable visual transition between high density residential areas and lower density areas."

Tragically, residential flat buildings were to be a mandatory permissible use in all medium density zones, until amendments were suddenly made to the Standard Instrument just before Christmas 2007.

Recommendation 37

Residential flat buildings should be added as a permitted use in any zone intended for medium density housing.

5. Infrastructure charges

There is ultimately a market price for housing, commercial, retail and industrial property that is set with regard to similar properties in the vicinity and elsewhere. If the costs imposed by a rigid formula, and flat dollar fee per lot or hectare, are too high land production is sterilised.

The viability of any land release effort may be seriously undermined by an infrastructure charge that is set in isolation of market conditions and the final sale price of land. Additionally the existing system of flat charges is not related either to the actual cost of infrastructure in a particular region or the capacity of the land to bear the charge.

Greenfield sites would be better served by a percentage levy on the final sale price of land. This will ensure that in areas where the market price is lower, the burden of the charge is proportionally lower.
A flat charge artificially exaggerates the cyclical nature of the market. When property prices fall, a fixed dollar (flat) charge does not fall (unlike some other costs, such as marketing and some construction costs). This leads to a more rapid fall-off in investment. Conversely when property prices are rising, development activity will be higher than normal. Government taxes and charges should not accentuate the boom and bust of the property cycle, but should act in a stabilising way to get a more even spread of economic activity over time.

A major difficulty with the existing system of section 94 (local council) charges is that payment is required too early in the development process. Even when the charges are affordable, the timing of the payment makes financing very difficult. The developer may not have sufficient real estate available to secure the debt made necessary by the charges. The financing distortion can be removed if the charges that are payable only fall due when the developer actually receives final payment for the developed land from the end-user.

The Urban Taskforce notes the NSW Government reforms to state and local council infrastructure charges announced in December 2008. We are carefully monitoring the implementation of these reforms. We will form further recommendations on infrastructure charges once the outcome of the current processes is clearer.

5.1 Backdoor state infrastructure charges

Since October 2007, the NSW Government has been progressively introducing a new defacto state infrastructure contribution regime outside of the growth centres.[84] These new local environment plan provisions grant rezonings, but make the rezonings less meaningful because a new arbitrary power is created for the Department of Planning to impose infrastructure charges without even the threadbare safeguards of the existing state infrastructure contribution statutory framework.

These clauses means that development approval for a rezoned land use cannot be given by the local council unless the Department of Planning signs off on a financial contribution infrastructure normally provided by the state.

By using local environmental plans (LEPs) to impose compulsory infrastructure levies, key provisions of the existing scheme are circumvented, in particular:

- The Minister is not obliged to make a determination of the level of development contributions up-front. Instead the Director-General of the Department of Planning makes a decision on

[84]For example see: *Camden Local Environmental Plan No 74—Harrington Park* cl 38; *Hawkesbury Local Environmental Plan 1989* cl 55; *Maitland Local Environmental Plan 1993* cl 55; *Parry Local Environmental Plan 1987* cl 41; *Tamworth Local Environmental Plan 1996* cl 55; *Wyong Local Environmental Plan 1991* cl 42G; *Draft Greater Taree Local Environment Plan* c l 6.1; *Draft Local Environment Plan No 151 for El Caballo Blanco/Gledswood* cl 6.5.

compulsory charges specific to each individual development application. This reduces the transparency and certainty. The lack of up-front information acts as a disincentive to invest.

- There is no obligation on the government to publicly exhibit the proposed charges or consult with land owners or other relevant stakeholders. Again this increases the perception that charges are arbitrary.
- There is no obligation for the contribution to be "reasonable".
- There is no obligation to identify a special contributions area or any similar area to which the contributions relate.
- There is no requirement that the funded infrastructure be within a particular area.
- There is no requirement for the decision on the quantum of charges to be made publicly available.

We have asked government to commit to implementing its system of compulsory infrastructure charges through express provisions in the *Environmental Planning and Assessment Act*, rather than local environment plans. This request has not been adopted by the government.

Recommendation 38

Any system of compulsory infrastructure charges should be implemented through express provisions in the *Environmental Planning and Assessment Act*, not through backdoor provisions in local environmental plans or state environmental planning policies.

5.2 Imposing back-door charges by conditioning development consents

Some councils illegitimately use the leverage of a development application to secure a developer's in-kind or cash contribution to unrelated public infrastructure. Such impositions are on top of whatever compulsory levies and charges that may already be imposed. Where there is no nexus or proper apportionment such impositions are unlawful. Regretfully, many developers face massive holding costs and are between a rock and a hard place when negotiating with councils. As a consequence they are forced into development consent conditions that has them carrying out works or making contribution for infrastructure that is utterly unrelated to their development.

While this normally happens behind closed doors, every now and then a council will overplay their hand and be up-front about their practice.

For example, in the *Draft Penrith Local Environmental Plan 2008* there is a mixed-use zone objective saying that development in 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.

Recommendation 39

The Act should clearly state that statutory plans and development approval conditions can only require a proponent to make any contribution to the public domain where the requirement:

- arises directly from their development (nexus);
- is in proportion to the impact of the development; and
- is strictly necessary in order for the development to proceed.

5.3 Sweeping ministerial authority on levies

Last year legislative changes were passed through parliament that actually increased the power of the government and local councils to levy charges on the development process. These powers were inappropriate when they were passed and are even more inappropriate in the current economic environment.

The changes give the Minister for Planning a new power to waive the requirement for a council to stick to its contributions plan when imposing levies. The changes also give a Minister, the authority to approve a levy for something that is not listed as "key community infrastructure".

The proposed regime for percentage-based State infrastructure charges is essentially a tax regime. They are not closely related with any particular infrastructure and it has now been legislated that they are entirely beyond the reach of judicial review. The Minister for Planning should not have a unique power to impose a percentage based tax without any opportunity for the normal rules of either judicial or parliamentary review to apply.

If there is a desire by government to avoid judicial review of decisions to set percentage-based State infrastructure charges, then the decisions should be set by making a regulation each time they are imposed. That way, in the very least, there is parliamentary scrutiny and review of such levies.

While it may seem attractive, from the government's perspective, to remove the right of government decisions to be challenged, the practical effect is to expose the private sector to an increased risk of arbitrary impositions. If the risks of development are greater; the reward must be greater if a project is to proceed. More marginal projects are less likely to create profits that commensurate with the elevated risk. Development activity will be reduced. Given that the government would plan on complying with the laws, in any event, it does not need to exclude its decisions from the ambit of judicial review and derives little benefit from assuming such sweeping powers.

Recommendation 40

The Minister for Planning should not be entitled to waive the requirement for a council to stick to its contributions plan when imposing levies. Nor should the Minister have the authority to approve a levy for something that is not listed as "key community infrastructure". The Minister for Planning should not have a unique power to impose a percentage based tax without any opportunity for the normal rules of either judicial or parliamentary review to apply.

6. Development at or near airports

Our comments may be grouped into the four general categories of:

- importance of airports
- certainty for development in the vicinity of airports;
- consideration of off-site impacts when managing land use on airport sites;
- reliability of the Australian Noise Exposure Forecast (ANEF) system; and
- sterilisation of land in the vicinity of airports.

6.1 We need airports

By global standards, we are a distant nation and hence airports are vitally important entry points and essential for business and tourism growth. If we do not invest and expand airport infrastructure, we will not be able to meet future business and tourism travel demand nor will we be able to cater for technological advancements such as new-generation aircraft.

The contribution that air cargo makes to economic activity should not be underestimated. It has been shown that nations with good air cargo connectivity have competitive trade and production advantage over those without such capability.[85]

Furthermore, investment in airport and supporting infrastructure is significant and we should ensure that the opportunity that this provides is maximised. The presence of an airport and the additional infrastructure that it attracts must be seen as an advantage and valued.

Planning must not lose sight of the fact that airports are a necessity and their existence is essential for international commerce.

6.2 The ANEF system provides certainty

The ANEF system can be an effective planning tool when considering land use in the vicinity of airports. If we are able to look beyond the questionable assumptions upon which the ANEF is generated, the ANEF system does provide clarity and certainty for the land use planner, building designer and investor.

The planner is able to refer to clearly marked plans and assign appropriate land uses based on noise exposure forecasts. The building designer can refer to the same plans and with the use of Australian Standards design buildings that meet stringent acoustic criteria. A developer may use the ANEF system to consider the restrictions that will be placed on land use in the vicinity of an airport and/or the need for specialised building elements need to meet standards. With this clear knowledge the decision to invest and return on investment can be determined.

Should an alternative planning system be considered, it must provide an equivalent level of clarity and certainty as that which is provided by the ANEF system.

6.3 On-site land use and off-site environmental impact

To be of any real value, airport planning strategies must consider on site airport development in the context of the locality. The consideration of airport land use in isolation does not encourage good planning outcomes for the people residing, working and schooling in the area. Other factors such as

[85] Kasarda, J. and Green, J. 2005. Air cargo as an economic development engine: A note on opportunities and constraints. *Journal of Air Transport Management 11 (2005) 459–462*

the changing commercial and social environment brought about by additional expansion at the airport can also be easily overlooked. The current system that separates the approval functions for airports on Commonwealth land does not encourage a holistic land use planning approach.

In the case of Commonwealth land, approval for an onsite airport development is divorced from the impact on communities in the vicinity of the airport. Two levels of government are involved in the planning process, which is often the cause of conflict between the different levels of government and the community.

It is inappropriate that those who will experience the greatest level of impact due to airport land use do not have an approval role. That is, the Commonwealth can approve development on an airport site including the expansion airport operations leaving the state planning authorities to manage off-site impacts.

Recommendation 41

The state government should assume responsibility for statutory land use planning and approvals for airport land, just as they do for sea ports.

6.4 The way that ANEF charts are generated is unreliable and open to manipulation

Aircraft noise must be properly considered and appropriate planning must be undertaken to permit development that is suited to local environmental conditions. Appropriate planning does not mean that valuable land in the vicinity of airports should have their development potential restricted by the inappropriate use the Australian Noise Exposure Forecast (ANEF).

Despite the benefits of using ANEF as a planning tool, the way that these contours are establishment has received attention in the Federal Court of Australia.[86] It is apparent that the assumptions used as the major inputs for the generation of the ANEF contours are not only variable, but also not checked by Airservices Australia as part of their endorsement process. That is, Airservices Australia's role as one that focuses on the checking of the mathematical translation of assumptions into contours. However, whether the assumptions used are valid is not the role of Airservices Australia when determining if an ANEF for an airport should be endorsed.

It is of great concern that the practice of Airservices Australia when determining whether an ANEF may be endorsed "is not to assess any of the data in a qualitative way or to seek to determine the likelihood of the assumptions behind the relevant data actually occurring"[87].

These ANEF contour maps have the potential to dramatically impact on the development potential of land in the vicinity of an airport. We do not think that it is appropriate that these maps can be prepared by the operator of the airport, based on their forecasts of a possible future operating environment, without extensive testing of assumptions and validation of predictions made by the operator of an airport.

Surely it is plainly obvious that it is in the interest of an airport operator to overstate the future operating environment of their airport as a means of creating artificially expanded exclusion zones in their vicinity.

For example, operators of Canberra Airport, when revising their master plan, made the assumption that Canberra airport will have the same ultimate aircraft movements as Sydney's Kingsford Smith Airport. Furthermore, heavier aircraft movements at noise sensitive times were factored into the assumptions.

[86] *The Village Building Co Limited v Airservices Australia* (2007) FCA 1242.
[87] Ibid.

This overestimation of aircraft movements and bias to noisier aircraft at sensitive times multiplies the impacts on the ANEF charts. Essentially, unrealistic assumptions have the affect of over estimation of impact and hence land use restriction.

Recommendation 42

As ANEF contour maps have the potential to dramatically impact on the development potential of land in the vicinity of an airport it is inappropriate that these maps are prepared by the operator of the airport. They should be prepared by a government agency, independent of the airport operator, and any assumptions predictions made by the airport operators must be rigorously interrogated before being included in a proposed plan.

6.5 Plans for future airports

On Tuesday 2 December 2008, the Commonwealth Government released a National Aviation Policy Green Paper[88] and it is stated that

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

The Federal Government's declaration that there will be no airport in Badgerys Creek should lead to the immediate abolition of airport-related development restrictions – yet these restrictions still remain.

Western Sydney is burdened by heavy planning restrictions preventing development in the flight paths of the proposed Badgerys Creek Airport.[89] These rules prevent approval of new homes, schools and hospitals in areas that might be heavily impacted by aircraft noise. They also ban any industrial activity that may pose aviation risks. These restrictions would make a lot of sense if an airport was to go ahead. However, both sides of politics have nailed their colours to the wall and said that Badgerys Creek is dead.

If they are serious, the federal and state governments should order the immediate removal of all airport-related development restrictions in the Badgerys Creek region. Western Sydney can become the jobs centre of NSW – radically improving the lives of the region's 1.6 million residents. There's no point holding development activity back to accommodate a future airport, if no-one has any intention of building one.

Business parks, pharmaceuticals, information and communications technology and advanced manufacturing could all be located in land near the Badgerys Creek airport site. We need to see Silicon Valley style development in the heart of the Western Suburbs.

In example of the restrictions is set out in the clause 6.18. "Development of land in the flight paths of the site reserved for the proposed Second Sydney Airport" is no longer required.

Recommendation 43

Airport related land-use restrictions in sites that are no longer to be further considered as airport locations, such as Badgerys Creek, should be abolished.

[88] 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]
[89] For example, *Draft Penrith Local Environment Plan 2008* cl 6.18.

6.6 The airport operations should not sterilise land

ANEF and building regulation in the vicinity of airports (existing and future) should not focus on the exclusion of certain land uses. Building regulation should consider the desired internal acoustic environment for differing land uses in the vicinity of airports and then provide acceptable standards of construction to meet these requirements and/or the opportunity for the formulation of design solutions to meet acoustic goals for the desired land use. Essentially, no land use would be prohibited, instead building regulation would seek to ensure that design and construction is appropriate for differing end use.

Currently, reliance on ANEF, Australian Standards and overly conservative land use controls has encouraged low density, low-tech development in the vicinity of airports. As previously noted, these areas are serviced by high quality transport infrastructure and in the case of Sydney airport, are in close proximity to the Sydney CBD. This location should not be a sterile undesirable area with an over-supply of warehouse and low-tech industry, but an extension of the Sydney business zone. Within this zone, all forms of land use should be permitted, provided such use occurs in appropriately designed buildings. There is no reason that office, retail, high tech manufacturing, warehousing and residential uses could not be located in the vicinity of airport development.

Land in the vicinity of airports should not be subjected to additional and overly prescriptive development controls. In fact, this area should be viewed as an area of "opportunity" and commerce. This should be an area where intense, high quality industry and business activity is permitted. Within this area, appropriately designed and constructed residential development should also be permitted.

Growth, commerce and industry must not be unrealistically restricted and it is the role of planning to facilitate the right type of development in key locations. In this regard, it is suggested that any planning policy addressing airport development must include objectives that:

- recognise the importance of the aviation industry, airports and infrastructure;
- recognise that development in the vicinity of airports should make full advantage of location and maximise the opportunities that this provides;
- ensure compatible land uses are permitted; and,
- facilitate the identification and provision of supporting off-site infrastructure.

Recommendation 44

Land in the vicinity of airports should not be subject to additional and overly prescriptive development controls. This should be an area where intense, high quality industry and business activity is permitted. Within this area, appropriately designed and constructed residential development should also be permitted.

7. Competition issues

In 1995 the NSW Government entered into the *Competition Principles Agreement* with the Commonwealth Government. The agreement stated that legislation should not restrict competition, unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.[90]

[90] cl 5(1).

The State Government committed itself to a program of legislative competition reviews, each review was required to:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction; and
- consider alternative means for achieving the same result including non-legislative approaches.[91]

However, in 2002, some seven years later, the NSW Government advised the National Competition Council that it had not listed the *Environmental Planning and Assessment Act* for review under the Competition Principles Agreement.[92] This meant, unlike hundreds of other pieces of legislation, the *Environmental Planning and Assessment Act* escaped any serious review of its impact on competition.

There are substantial anti-competitive provisions in the *Environmental Planning and Assessment Act* itself, and in the plans and policies made under the Act. These anti-competitive provisions are so severe, that they cannot be justified by any expressly stated public policy goal.

These anti-competitive provisions have their greatest impact in the provision of new retail property assets for the benefit of the shopping needs of households. Under the NSW planning system supermarkets and shopping malls are one of the most heavily regulated sectors of the economy, alongside mines, casinos and brothels. These lack of competition also impacts development proposal for new entertainment facilities, business premises and office premises.

The NSW economy should be able to depend on a fiercely competitive market for the provision of supermarkets and shopping malls, but the planning system is instead working to prevent competition and protect incumbent owners of retail property assets from the pressure that competition can place on a business.

This submission identifies the various breaks on competition and proposed changes that will free up the provision of retail services, more consistent with other sectors of our market economy.

7.1 Draft SEPP 66

The provisions of the draft *SEPP 66 - Integration of Transport and Land Use*, which was released as part of the governments' Integrated Land Use and Transport (ILUT) package in 2001. This says that businesses and services, which generate transport demand, should be in locations that offer a choice of transport, and increase opportunities for people to make fewer and shorter trips. This draft policy generally applies to trip generating services that have a gross floor space of 1,000 square metres, or more.

This draft policy was published in 2001 and was finally withdrawn earlier this year. Documents released as part of the ILUT Package were:

- *Integrating Land Use and Transport-Overview*;
- *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy*;
- *Integrating Land Use and Transport*: *Improving Transport Choice - Guidelines for Planning and Development*; and
- *Employment and Journey to Work Patterns in the Greater Metropolitan Region: An Analysis of 1996 Census Data.*

[91] cl 5(9).
[92] National Competition Council, *National Competition Policy Legislation Review Compendium* (5th edition 2004) 3.21.

Even though Draft SEPP 66 has formally been withdrawn, its policy documents live on through "section 117 directions" issued by the Minister for Planning in July 2007.

7.1.1 Definition of centres

Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development describes a centre as

> containing the highest appropriate densities of housing, employment, services, public facilities within an acceptable walking distance - 400 to 1000 metres - of major public transport nodes, such as railway stations and high frequency bus routes with at least a 15 minute frequency at peak times.[93]

Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy identifies preferred locations for large-scale office development and higher order retail, entertainment, commercial and public facilities.[94] Since then the list of major centres in the ILUT has been superseded by the list of strategic centres set out in the 2005 Metropolitan Strategy.[95] This strategy defines 25 current centres and eight emerging strategic centres as part of the NSW Government's 25 year strategy.[96] No specific process is identified for the designation of any further emerging strategic centres in the future.

A list of smaller centres ("local centres") across Sydney is also being identified for additional jobs and dwellings over the life of the Metropolitan Strategy.[97] These will be listed in the subregional strategies.

Given that an estimated 85 per cent of shopping trips made into existing centres are by car, rather than public transport, it is unclear why new retail sites should be exclusively located in areas serviced by public transport. This preludes the location of retail in, say, business parks, where those employed on site might choose to walk to, or catch a shuttle bus to, the local shopping facilities. It would also preclude locating a shopping centre on a major corridor experiencing a high volume of traffic. Shopping centres in such locations can divert cars from the narrow streets of already heavily congested centres such as Burwood and Chatswood.

7.1.2 Investment in centres favoured

The policy sets out to influence investment decisions in favour of centres:

> Centres with a mix of land uses are well established in existing urban areas but their success relies on continued investment. Investment confidence must be cultivated through consistent decision-making that supports centres. This approach enjoys widespread appreciation by the community and business sectors.
>
> Retail, intensive entertainment and other commercial development should be located in town centres, preferably with high frequency rail or bus services. The scale and density of development should match centre public transport service levels. Similarly, the trade area of services, including retail, should match the reach of the public transport network.[98]

The policy's understanding of basic economics is extremely poor. In a free market economy, investment decisions are risky. The presence of risk does not preclude an investment decision from taking place. Instead, an investor will seek returns, consistent with the risk. Only if the risks outweigh the expected retains will the investment decision not take place.

We are not aware of any convincing economic analysis that demonstrates that existing centres are so unattractive to consumers that they will only attract investment with a system of regulatory protection.

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[93] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport*: *Improving Transport Choice - Guidelines for Planning and Development* (2001) 9.
[94] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 8.
[95] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.
[96] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 23.
[97] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 93.
[98] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* (2001) 27.

The policy goes onto to say that

> concentrating activities lets people make a single trip for a range of purposes.[99]

It is not hard to demonstrate that this statement is not correct. Most importantly it ignores the significant trips that are already going to be taken by most households, irrespective of the concentration of activities in centres.

For example, most households will undertake one or more of the following trips on a daily or weekly basis:

- travelling to work by car, and returning home;
- dropping children at school and picking them up again;
- taking children to sports games; and
- travelling to neighbouring suburbs, or even different parts of the city to visit friends, family.

These trips, by themselves are single purpose. By concentrating retail in places that are:

- away from areas people are working in (such as business parks, light industrial areas and other centres of employment);
- away from major arterial roads such as Victoria Road, Parramatta Road, the Pacific Highway, Parramatta Rd, Anzac Parade, Pittwater Rd, Canterbury Rd and Gardeners Rd; and
- away from local schools, sports fields and other community facilities,

more single-purpose car trips are made necessary, and, even when shopping is combined with some of these trips, more kilometres have to be travelled (because of the need to divert off the direct route).

The Department of Planning says that its 2005 Metropolitan Strategy incorporates the principles of the *Right Place for Businesses and Services* policy.[100] In describing the policy the Department said that it

> aimed to eliminate proliferation of retail in industrial areas, and included locational criteria for emerging retail forms.[101]

This approach is not only bad economics; it reflects an outdated planning approach that fails to acknowledge the modern needs of communities.

This old approach regards the separation and regulation of different land-uses as crucial, rather than regulation of the scale of buildings. This approach is out-of-keeping with modern developments in planning which 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 micromanage the uses that different pieces of land may be put.[102]

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

- reduces opportunities to get a good mix of commercial and retail uses, and
- reduces the opportunity to have transit and pedestrian oriented communities.

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[99] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport*: *Improving Transport Choice - Guidelines for Planning and Development* (2001) 8.
[100] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.
[101] Ibid.
[102] See A Duany, E Plater-Zyberk and J Speck *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* (2000).

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. Pedestrian-oriented amenities such as retail and cafes should not be discouraged or prohibited in any centre of employment, including light industrial zones, business development zones, neighbourhood centres and business parks.

Compact, mixed-used areas, making efficient use of land and infrastructure, make good planning sense. They create more attractive, liveable and economically strong communities. They facilitate a development pattern that supports pedestrian based communities and reduces dependence on motor vehicles by putting employees' daily needs within a short walk of work.

7.1.3 New centres

The Right Place for Businesses and Services acknowledges the possibility that there may be a need for new centres:

> New centres are required in expanding urban areas, and they may also be needed in existing areas because of significant population growth or social trends.[103]

However, the criteria for identifying new centres is unclear, referring back to text on locating development which substantively exhorts consent authorities to locate development in centres, rather than setting out criteria that would assist in creating new centres.[104]

The Right Place for Businesses and Services states that

> [r]etail is essential to the activity and viability of most centres because of its dominance of economic activity and relationship with personal and other services. ... Supermarkets and large specialist and department stores have an important role in anchoring a broad range of shopping and other services and thereby allow single multi-purpose trips. Retail proposals should be accommodated in centres to allow choice and free pedestrian movement. Ideally, a single retail property should not comprise the whole centre so as to allow for new market entrants and competition and avoid the unnecessary creation of new centres. It is particularly important for decision makers to be consistent and fair because of the competitive nature of the industry. [105]

This paragraph talks about the "unnecessary" creation of new centres. It is a policy statement that would be very much at home in a policy document of the former Soviet Union's State Planning Commission (Gosplan). Imagine if we had a law in place to ensure that we had no more cinemas than 'necessary' or no more video stores than 'necessary'. Who decides what's necessary?

In our market economy, it should be consumers who ultimately decide whether or not new retail facilities are necessary, not State government planners. If an existing retail facility is doing a poor job of servicing consumers, or is charging its tenants excessive rents, which is reflected in artificially high prices to consumers, then an entrepreneur should be free to establish a new competitor retail facility. Our market economy tells us that even the threat of a new facility can be effective in ensuring that incumbent retail property owners invest in their assets to keep them fresh and work to keep costs down. However, these planning rules protect incumbent from that necessary competitive threat by ensuring there are no "unnecessary" retail facilities.

The policy effectively prevents a new single retail property comprising a whole centre. This is actually anti-competitive rather than pro-competitive for two reasons.

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[103] Department of Urban Affairs and Planning and Transport NSW, Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy (2001) 8.
[104] Ibid.
[105] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 6.

Firstly, in almost all existing incumbent centres there is an existing dominant incumbent retailer occupying the key site(s) with little prospect of other sites becoming available (reinforced by zoning and the drafting subregional strategies).

Secondly, by definition, private sector proponents are only able to advance proposals for new centres based on their projects they are seeking to develop. This policy effectively precludes the private sector from successfully initiating the creation of a new centre under the planning system, and therefore leaves the creation of new centres as entirely a matter for the bureaucracy. Given that the bureaucracy has, to date, been eager to 'protect' consumers from any oversupply in retail property assets (which would actually benefit consumers), it is unlikely that they will take the initiative to establish new centres.

In the absence of a designated new centre, you may assume that the private sector might be able to propose a new retail facility, outside of the official centres. But this is prevented too. The policy declares that:

> Development on isolated, stand-alone sites is generally not acceptable. However, alternatives may be acceptable when a net community benefit can be clearly established.[106]

The location of bulky goods retailing is given marginally more flexibility with a recognition that it may not always be realistic to locate bulk good retailing in centres:

> When it is not realistic for bulky goods outlets to be in centres, they should be located in one or two regional clusters to moderate travel demand and allow for public transport accessibility. Existing clusters should be reinforced. If justified, new clusters should be in areas that would indirectly support major centres and link to public transport corridor. [107]

The percentage of people who go to a bulky goods retailer on public transport is exceptionally low. Almost by definition, people overwhelmingly (more than 95 per cent) travel to these centres by car. After all, they are bulky goods centres. Have you ever tried to take a new flat screen television home on the train?

To determine whether a new cluster is justified or whether a development proposal is suitable for a cluster location, the following issues, additional to the net community benefit criteria, must be assessed:

- the economic and social impact on existing and planned centres;
- the demand for the amount of floor space for trading bulky goods and the potential impact any oversupply would have on existing centres;
- the degree and potential of short and long-term accessibility by public transport;
- the effect on the demand for travel and impact of increased traffic to the arterial road network;
- where industrial areas are proposed to be used, the operational and access needs of existing and future industry and the impact on property prices for industrial development.[108]

Here again we see the obsession with preventing an "oversupply" and considering the economic impact on existing centres.

An oversupply of a particular good or service is beneficial to consumers because it means lower process and better services, as those who are supplying the service compete fiercely by:

- cutting costs (sometimes accepting lower profits); and
- innovating (e.g. new formats, new add-ons services) to distinguish themselves from their competitors.

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[106] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 5.
[107] Ibid.
[108] Ibid.

Sometimes an oversupply can create the sort of shake-up that every industry needs from time-to-time. Complacent businesses can be placed under pressure, and even exit the market, while innovative new businesses take their place.

A centre will not 'die' merely because a particular business, such as an aging stale shopping mall, is unable to compete with a fresh new competitor in a neighbouring suburb. Perhaps the management of the mall may change; the ownership may change. A new owner may choose to invest in the shopping mall, or redevelop the asset to meet a market demand that is not being addressed.

For example, who, 25 years ago, could foresee that the decline of strip shopping would herald a new use for the thousands of retail shops sitting outside of the new shopping malls? That is, the restaurant districts of Leichhardt, Crows Nest, etc were not able to be predicted, but were made possible by the inability of the traditional retailers in these areas to compete with new innovative retail formats.

The Metropolitan Strategy supporting information says that a 'net community benefit test' applies where local environment plans

> have not yet been modified as a result of subregional planning or other spatial planning which identifies zones for future trip generating activities (retail and commercial) using section 117 directions.[109]

Under the 'net community benefit' test (which is able to be applied by a council during a rezoning process):

> proposals must ensure that there will be no detrimental effect on public investment in centres and that private investment certainty in centres is maintained. They should also be able to provide the same performance as a centre, with suitable accessibility to:
>
> • manage travel demand
>
> • utilise public transport
>
> • moderate car use. ...
>
> In determining the net community benefit or cost, the following assessment criteria must be considered:
>
> • the degree to which the policy and its objectives can be satisfied
>
> • the proposed level of accessibility to the catchment of the development by public transport, walking and cycling
>
> • the likely effect on trip patterns, travel demand and car use
>
> • the likely impact on the economic performance and viability of existing centres (including the confidence of future investment in centres and the likely effects of any oversupply in commercial or office space on centres ...)
>
> • the amount of use of public infrastructure and facilities in centres, and the direct and indirect cost of the proposal to the public sector
>
> • the practicality of alternative locations which may better achieve the outcomes the policy is seeking
>
> • the ability of the proposal to adapt its format or design to more likely secure a site within or adjoining a centre or in a better location.
>
> Any proposal to rezone land for trip-generating businesses or services should conform to a local strategy which incorporates the policy objectives.[110]

However, as mentioned above, the flexibility of the net community benefit test, to the extent that there is any, ends when a local environment plan is modified as a result of a subregional strategy. This means an examination of the Metropolitan Strategy and the (still draft) subregional strategies under it is

[109] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.
[110] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 5.

necessary to see what, if any, flexibility for new centres or centre-like development outside of existing centres is provided for.

The Metropolitan Strategy identifies eight emerging strategic centres.[111] In the first three draft subregional strategies there are no future centres identified and no clear process to permit future centres to emerge. The only reference to new local centres in the Metropolitan Strategy (which is reproduced in identical terms in each of the three draft subregional strategies) is the statement that "new centres may be possible if transport services improve". There is no provision in these strategies for new centres to be recognised:

- when it can be demonstrated that existing transport services can accommodate the demands of a new centre; or
- when it is apparent that there is a community need for a new centre; or
- when it can be argued that the increased competition generated by a new centre will be beneficial to consumers.

The Department of Planning declared in 2005 that the ILUT package remains government policy, but that the draft SEPP 66 will cease to operate as a draft statutory instrument when new ministerial directions are issued to councils under section 117 of the Act.[112] This new direction will provide advice and guidance on the zoning for all types of retail and commercial activity.[113] The centres policy will be substantially implemented through the zoning made pursuant to this direction. Local councils will not be free to provide for new centres in the zonings in their local environmental plans if those zonings are not sanctioned by a state regional or subregional strategy.

7.1.4 Consideration by competition Inquiries

In the United Kingdom the Competition Commission considered the impact on supermarket competition of planning policies similar to those set out in draft SEPP 66. *The Supply of Groceries in the UK market investigation: Provisional findings report* found that:

> An inevitable consequence of a plan-led system that seeks to meet these overarching objectives is that grocery retailers are not able to open a new larger grocery store in any location of their choice. That is, the planning system will, quite deliberately for the purposes of meeting its objectives, act—to some extent—as a barrier to entry and/or expansion for larger grocery stores..[114]
>
> ...[W]e consider that... for larger grocery stores, the planning system constrains overall entry and also acts in favour of the existing national-level grocery retailers, while controlled land holdings are likely to be impeding entry into a number of areas of high concentration ... [115]
>
> We provisionally find that a combination of one or more of the following features prevent, restrict or distort competition in certain local markets for the supply of groceries by larger grocery stores: ....
>
> ... The planning regime (in particular, PPS6 in England, SPP8 in Scotland, PPS5 in Northern Ireland and MIPPS 02/2005 in Wales), and the manner in which the planning regime is applied by Local Planning Authorities, acts as a barrier to entry or expansion in a significant number of local markets:
>
> (i) by limiting construction of new larger grocery stores on out-of-centre or edge-of-centre sites; and
>
> (ii) by imposing costs and risks on smaller retailers and entrants without pre-existing grocery retail operations in the UK that are not borne to the same extent by existing national-level grocery retailers.[116]

[111] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 23.
[112] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.
[113] Ibid.
[114] Paragraph 25.
[115] Paragraph 30.

In May 2008 Professor Allan Fels released *Choice Free Zone*. This report concluded that shoppers are paying far too much for their groceries because of restrictive out-of-date planning laws. Professor Fels found that an overhaul of the state government's centres' policy would allow greater competition, leading to consumers paying up to 18 per cent less for basic food items and up to 28 per cent less for other household products. Professor Fels warns that under the present planning regime

> governments appear to be up-holding anti-competitive processes that elsewhere would potentially considered to be contravening the *Trade Practices Act*.

The report by Professor Fels and Concept Economics was the most detailed analysis of the impact of planning policies on retail competition ever produced in Australia. It supported the role of the planning system in protecting the community from congestion, noise and the loss of cultural and environmental assets. However, it was very critical of planning laws that are protecting existing retail landlords from the threat of competition. New supermarkets and larger food stores are being denied the opportunity to compete with existing shopping centres. Less choice means higher prices for groceries and everyday household goods. Other key points of the Fels "Choice Free Zone" report:

- Reform of the system could amount to $78 billion in extra income for the NSW economy and $296 billion Australia-wide.
- It would also be a boom for employment, delivering 147,000 jobs nationally and 47,000 jobs in NSW.
- The report argues against present planning laws which effectively restrict supermarkets to established centres, resulting in traffic congestion and restrictive trade.
- Major retail landlords in existing shopping centres were taking between 17 and 21 per cent of retail turnover as rent. This compares with 9 to 12 per cent in other countries.

Professor Fels said that retail developments should be encouraged outside established shopping centres, easing the transport burden and encouraging more "pedestrian friendly" communities. Copies of *Choice Free Zone* are available from the Urban Taskforce and can also be downloaded free of charge at this web link: http://www.urbantaskforce.com.au/attachment.php?id=1519.

In August 2008 the Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws. The *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* concluded that zoning and planning regimes act as an artificial barrier to new supermarkets.

The ACCC found that the limitation on competition was "potentially impacting on competition between supermarkets". The ACCC said that

> [T]he centre's policy... is likely to lead to a greater concentration of supermarket sites in the hands of the [major supermarket chains] ... In particular, such policies, by limiting opportunities for new developments, contribute to increasing the level of concentration in the retail grocery sector.

The ACCC recommended that

> zoning and planning polices, and, in particular, consideration of individual planning applications, should have specific regard to competition issues - specifically, whether proposed developments would assist in facilitating the entry into an area of a supermarket operator that is not presently operating in the area.

Also in August 2008 the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords. Its inquiry report: *The Market for Retail Tenancy Leases in Australia* found that zoning and planning controls can:

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[116] Paragraph 47.

- limit competition and erode the efficient operation of the market for retail tenancies;
- give extra negotiating power to incumbent landlords and retail tenants;
- particularly advantage owners that have control over large amounts of retail space located some distance from competitors and their tenants; and
- disadvantage businesses that wish to gain access to additional space.

The Commission also found that

> some positive economic rents are extracted from consumers as the overall supply of retail space has been restricted.

This means that consumers are paying the price of restrictive planning laws. In response to the Productivity Commission's findings the Federal Government's said:

> The Commonwealth considers that unwarranted restrictions resulting from some planning and zoning regulations can influence the quantity and location of retail space available and therefore competition in the retail market ...Improvements to competition will not only improve the landlord-tenant relationship in shopping centres, but may also have positive flow-on effects for consumers through greater choice and lower product prices.

The Commission recommended that:

> While recognising the merits of planning and zoning controls in preserving public amenity, States and Territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.

In support of this recommendation the Productivity Commission's report said that:

> The retail market operates within the confines of zoning and planning controls. While such controls can have merit in preserving public amenity and contributing to the cost-effective use of public infrastructure, their application can limit competition and erode the efficient operation of the market for retail tenancies. They restrict the number and use of sites, can confer some negotiating power on incumbent landlords and retail tenants, and restrict commercial opportunities of others. Zoning and planning controls can particularly advantage owners that have control over large conglomerations of retail space located some distance from competitors and their tenants. They can also disadvantage businesses that wish to gain access to additional space.
>
> In addition, the Commission considers that there is scope to increase retailing opportunities and competition in the retail tenancies market for the benefit of new entrants to the sector and consumers more generally. While recognising the merits of zoning and planning controls in enhancing public amenity and economising on the use of public infrastructure, the application of such controls restrict the availability of retail space and can reduce competition. The Commission therefore suggests that State and Territory governments examine the potential to relax those zoning and planning controls that unduly restrict the availability of retail space and the conditions under which it is utilised. ...
>
> Landlords, in particular those who own larger shopping centres, do not operate in a perfectly competitive market for the provision of retail space. Due to zoning restrictions, high set-up costs and geographic factors (such as the population size that is required to support large retail concentrations), owners of retail concentrations such as shopping centres compete in an oligopolistic fashion with other landlords.
>
> This type of competition suggests that some positive economic rents are extracted from consumers as the overall supply of retail space has been restricted. This restriction leads to a net loss in economic surplus, which can also be viewed as a market failure.
>
> Further, to the extent that some anti-competitive pressure is created by rents paid, this should be diminished given sufficient competition between shopping centres, as centres will compete with one another to attract consumers and tenants. These competitive pressures can be diminished by restrictions on the number of

centres that can be built (though zoning restrictions), and if so, appropriate attention should be given to reducing such restrictions. ...

A number of retail developments have also emerged outside of current planning regulations, and potentially offer competition to existing retail centres (box 10.5). The distinction between bulky goods zoning (which allows a certain type of retailing) and general retailing appears arbitrary, especially if sufficient public infrastructure exists to support retailing at the bulky good sites. ...

Despite this, these types of restrictions do influence the quantity and location of retail space available and are likely to affect competition in the retail market. ...

The Commission recommends further regulatory changes over the medium term (two to five years) in order to lower administration and compliance costs for governments and businesses operating with retail tenancy regulation and explore opportunities to reduce planning and zoning constraints on the supply of retail space."

7.1.5 Withdrawal of draft SEPP 66 policies

Draft 66 and the policies that were created under it severely undermines the operation of a free-market economy in the provision of retail services to the public. It discourages multi-purpose trips because it ignores the significant trips that are already going to be taken by most households, irrespective of the concentration of activities in centres.

It reflects an outdated planning approach that regards the separation and regulation of different land-uses as critical, rather than regulation of the scale of buildings. Light industrial areas, business parks and business development zones are intended to be centres of employment. These environments function best when people working in these areas have somewhere to go to shop and socialise before work, at lunch time and after work.

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. Pedestrian-oriented amenities such as retail and cafes should not be discouraged or prohibited in any centre of employment, including light industrial zones, business development zones, neighbourhood centres and business parks.

Draft 66 ensures that bureaucrats, rather than consumers, ultimately decide whether or not new retail facilities are necessary. If an existing retail facility is doing a poor job of servicing consumers, or is charging its tenants excessive rents, which is reflected in artificially high prices to consumers, then an entrepreneur should be free to establish a new competitor retail facility.

By preventing a new single retail property being recognised as a new centre, the policy effectively precludes the private sector from successfully initiating the creation of a new centre. As a result the decision to create new centres is reserved for the bureaucracy. Given that the bureaucracy has, to date, been eager to 'protect' consumers from any oversupply in retail property assets (which would actually benefit consumers), it is unlikely that they will take the initiative to establish new centres. Private sector operators also prevented from establishing new retails facilities outside of centres.

Recommendation 45

The policies released under Draft SEPP 66 should be formally withdrawn.

7.2. Draft subregional strategies

The centres policy described above means that the formal identification and categorisation of centres will govern if, when and how new retail facilities are to be developed. The subregional strategies will prescribe a list of smaller centres ("local centres") across Sydney for the life of the Metropolitan Strategy (i.e. until 2031).[117]

Ten subregional strategies have been released by the Department of Planning in draft form. The Urban Taskforce has undertaken a detailed analysis of the North-East, Inner North and East subregional strategies. We concluded that they fail to pay any significant attention to the retail needs of Sydney over the next 25 years. Our submission to the Department shows that the Sydney metropolitan area will need an additional four million square metres of occupied retail space by 2031 - a 50 per cent increase over current levels.

Where retail is mentioned in the draft strategies, it is usually in the context of preventing it or capping it. For example, in the case of local centres, the prescriptive hierarchy proposed will strangle the growth of vibrant retail communities. The limitation of "villages" to one "small" supermarket and banning supermarkets in "small villages" and neighbourhood centres is outdated 1950s planning. Town centres are limited to one "small" shopping mall – they're banned altogether in other local centres.

Enterprise zones are proposed for a wide range of areas – but the retail is specifically limited – increasing the number of single purpose car trips and unnecessarily contributing to traffic congestion.

Only the strategic centres are free from express rules limiting retail growth. But we firmly believe any plan that tries to provide for all of Sydney's retail growth in the strategic centres is doomed to failure. Perhaps that's why, even in the strategic centres, the draft strategies only provide for a tiny proportion of Sydney's needs over the next 25 years.

Our submission to the Department of Planning shows the North-East, Inner North and East will need another 893,000 square metres of shopfront space over the next 25 years, including 51 new supermarkets. Yet all three draft strategies, taken together, only promise 100,000 square metres of additional shop-front space – and only in Chatswood and Bondi Junction. These subregional strategies only plan for 11 per cent of what the community will need.

In any event, the strategic centres are to be burdened with new rules that have the potential to cripple their capacity to support retail growth in the future. The foreshadowed metropolitan parking policy threatens to impose a command and control approach on parking in and around strategic centres. This will limit the value of strategic centres for any form of retail where the use of a car is considered desirable by the community (bulky goods, large family grocery purchases, etc).

7.2.1 Local centres

The Metropolitan Strategy proposed a hierarchy for "smaller centres and places".[118] The draft sub-regional strategies use an amended hierarchy for "local centres".[119]

All of the local centre classifications heavily fence in the capacity for retail services in the local centres to grow in line with community need.

For example, town centres have only one "small" shopping mall, and just one to two supermarkets. Villages may only have a single "small" supermarket. Small villages cannot have any supermarkets at all. This ban was not included in the Metropolitan Strategy released by the NSW Government in 2005.

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[117] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 93.
[118] Ibid 31.
[119] Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 139; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 139; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 128.

Neighboured centres are only permitted five shops – and the radius for a neighbourhood centre has been cut back to as low as 150 metres (it was 200 metres in the Metropolitan Strategy).

There is a repeated emphasis on "small" retail facilities.

7.2.2 Application of the local centres hierarchy

This nature of the restrictions on retail inherent in the hierarchy can be illustrated by examining how the hierarchy has been applied by the draft subregional strategies to everyday communities in the North East, Inner North and East.

Table 1: Proposed "villages" that currently have more than the mandated one supermarket.

Sub-regional strategy	**Village**	**No. of supermarkets**	**Names of supermarkets**
North East	Avalon	2	Franklins, Food for Less
	Balgowlah	2	Franklins, Food For Less
Inner North	Crows Nest	2	Franklins, Woolworths
East	Hillsdale	2	Franklins, Woolworths
	Paddington, Oxford Street	2	IGA. There is also a Woolworths on Glenmore Road - a one minute walk from Oxford Street
No. of excess supermarkets		**5**	

Table 1 shows that at least five of the proposed "villages" already have two supermarkets, which is, in itself, inconsistent with the definition of a village. This is by no means an exhaustive examination. There may be other inconsistencies of a similar kind with other "villages".

Table 2: Proposed "small villages" that currently have a supermarket not permitted by the proposed Department of Planning classification.

Sub-regional strategy	**Small village**	**No. of Supermarkets**	**Names of supermarket(s)**
North East	Frenchs Forest	1	Woolworths
Inner North	Boronia Park	1	Woolworths Metro
	Coxs Rd, North Ryde	1	Franklins
	Putney	1	IGA
	Willoughby	1	IGA
East	Vaucluse & Old South Head Road	1	Franklins
No. of excess supermarkets		**6**	

Table 2 shows that at least six of the proposed "small villages" already have a supermarket, which is again inconsistent with the definition of a "small village". This is by no means an exhaustive examination. There may be other inconsistencies of a similar kind with other "small villages".

The Urban Taskforce's analysis of the recently released draft North subregional strategy is not yet complete.

However, it seems at least some of the problems with these earlier draft subregional strategies also appear in this draft subregional strategy. For example, Cherrybrook, St Ives and Turramurra are named as villages, which may only have one "small supermarket", but each currently has two supermarkets.

Lindfield and Berowra are named as "small villages" (which are not supposed to have any supermarket), but both already have a supermarket. The draft subregional strategy is currently being reviewed by the Urban Taskforce and a detailed submission will be made to the Department of Planning.

7.2.3 No new centres, no upgraded centres?

With some limited exceptions, no clear mechanism is given in the subregional strategies on how centres will grow and be upgraded in the hierarchy over the next thirty years. The only new town centre flagged in the first three draft subregional strategies is Mascot Station. Otherwise the classification of the various different kinds of centres appears to be based largely on the current condition of the centres (although as tables 3 and 4 show, there is some reductions in retail capability).

There is a brief acknowledgement in the definition of neighbourhood centres, that there may be new neighbourhood centres in the future – but no such acknowledgement for small villages, villages, town centres or strategic centres.

7.2.4 Revision of the draft subregional strategies

The Urban Taskforce has provided detailed recommendations on the draft sub-regional strategies in our September 2007 submission to the NSW government: *Getting Life's Essentials - Planning for where we will live, work and shop over the next three decades.*

Among other things, our submission recommended that each subregional strategy should incorporate a subregional and local government area target for shopfront space alongside the targets for dwellings and employment capacity.

Provisions in the sub-regional strategies that attempt to separate retails uses from other uses should be abandoned. The separation and regulation of different land-uses, particularly retail, should no longer be a key planning objective. The planning system should be concerned with:

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

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. The sub-regional strategies should actually encourage amenities such as retail and cafes in all of the local centres, employment lands and major arterial roads. All four categories in the local centres hierarchy should simply be regarded as "local centres" and should permit the full range of retail premises.

Compact, mixed-used areas, making efficient use of land and infrastructure, make good planning sense. They create more attractive, liveable, economically strong communities. They facilitate a development pattern that supports pedestrian based communities and reduces dependence on motor vehicles by putting residents' and (in centres of employment such as business parks and light industrial areas) employees' daily needs within a short walk of home or work.

Recommendation 46

The NSW Government should adopt the recommendations made by the Urban Taskforce in its September 2007 submission to the NSW government: Getting Life's Essentials - Planning for where we will live, work and shop over the next three decades. Included in this submission's recommendations were the following:

- Each subregional strategy should incorporate a subregional and local government area target for shopfront space alongside the targets for dwellings and employment capacity.
- Provisions in the sub-regional strategies that attempt to separate retails uses from other uses should be abandoned.
- The sub-regional strategies should actually encourage amenities such as retail and cafes in all of the local centres, employment lands and major arterial roads.
- All four categories in the local centres hierarchy should simply be regarded as "local centres" and should permit the full range of retail premises.

7.3 Standard Instrument

Draft SEPP 66 operates both through development assessment and through the zoning scheme. It is to be implemented for zoning through local environmental plans prepared in-line with the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument").

The Standard Instrument sets out a standard local environment plan (LEP) that will progressively be rolled out across NSW in the coming years.[120] The zonings under the plan create the potential for less than favourable treatment for some categories of retail when individual projects are assessed.

Clause 12 of the standard LEP states that the system of zones laid down under the LEP categorises development as:

- being development that may be carried out without consent;
- development that can occur only with consent; and
- development that is prohibited.[121]

The consent authority must also have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.[122]

Zone B5 "Business Development Zone" permits retail, but its objective is to

> enable a mix of specialised retail uses that require a large floor area and warehouse uses in locations which are close to, and which support the viability of, centres.

So developments that do not support the viability of centres, such as those with the potential to attract business away from centres, may not satisfy the objectives of the zone.

The Department of Planning says this about the intended use of business development zones:

> This zone is generally intended for land where employment generating uses such as offices, warehouses, retail premises (including those with large floor areas) are to be encouraged. The zone supports the initiatives set out

[120] As provided for in s 33A of the Act.
[121] As provided for in s 30(1) of the Act.
[122] Cl 12 of the Standard Instrument, the *Standard Instrument (Local Environmental Plans) Order 2006*.

in the Metropolitan Strategy *City of Cities: a plan for Sydney's future* (NSW Government 2005) but might also be suitable for application in urban areas in regional NSW.

The zone may be applied to locations that are located close to existing or proposed centres, and which will support (and not detract from) the viability of those centres.[123]

The Zone B5 Business Development was, until recently, marginally broader. Until 14 December 2007 its objective included the provision of "offices", but this has now been deleted. It also previously permitted retail generally, but this was also deleted. The zone objective is now limited retail to "specialised retail" – a limitation of this kind was not previously considered necessary. It reduces the flexibility that was previously available.

Office premises and retail premises have been deleted from the list of development "permitted with consent".

Zone B6 "Enterprise Corridor" exists to promote businesses along main roads and to encourage a mix of compatible uses. It is also intended to enable a mix of employment (including business, office, retail and light industrial uses) and residential uses. However, it is also an objective of the zone to

Maintain the economic strength of centres by limiting retailing.

So, developments concerned with retail are discouraged in zone B6.

Enterprise zones benefit from passing traffic (over 50,000 vehicles per day).[124] The Department of Planning says that

[t]he zone is generally intended to be applied to land where commercial or industrial development is to be encouraged along main roads such as those identified by the Metropolitan Strategy *City of Cities: a plan for Sydney's future* (NSW Government 2005).[125]

Enterprise zones have been proposed for Victoria Road, Parramatta Road, the Pacific Highway, Parramatta Rd, Anzac Parade, Pittwater Rd, Canterbury Rd and Gardeners Rd.[126]

There are a number of zones identified in the Standard Instrument for job generating activities. These include: B7 "Business Park"; IN1 "General Industrial"; IN2 "Light Industrial"; and IN3 "Heavy Industrial".

An objective of each of these zones is to "encourage employment opportunities". However, the biggest single job generating sector of the Australian economy (retail premises) are not included in the range of matters permitted with consent in the zone. Curiously, even though business parks will create concentrations of people engaged in employment, it is not intended that they access retail premises on site, but instead, that they travel somewhere else for supermarket and related shopping.

On 14 December 2007 the objectives for Zone IN2 Light Industrial were amended so that development in these areas must now "support the viability of centres". This means retail developments, such as bulky goods facilities, will be much harder to locate in light industrial areas, even if "retail premises" or "bulky goods" retailing is included in the list of permitted uses for a particular local environmental plan. We are in possession of internal Department of Planning documentation, obtained through a freedom of

[123] Department of Planning, Practice Note PN06-022, 12 April 2006, "Preparing LEPs using the Standard Instrument: standard zones" 4.
[124] Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 35.
[125] Ibid.
[126] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 31; Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 34.

information request, which says that this change was made at the instigation of the Shopping Centre Council and the Property Council.

Also on 14 December 2007 an amendment was gazetted to the Standard Instrument which changed the definition of shop-top housing.

The effect of this amendment was to ensure that only convenience type shops could go in on the ground floor of a mixed-use development (rather than, say, a supermarket) in:

- Zone R1 General Residential;
- Zone R3 Medium Density Residential;
- Zone R4 High Density Residential; and
- Zone B1 Neighbourhood Centre.

The above discussion showed how the Standard Instrument creates areas where businesses are unable to be established if they would provide competition to businesses in established centres.

The Urban Taskforce has in this submission, made recommendations for a dramatic streamlining of the current system of zoning. We would prefer that the anti-competitive elements of the Standard Instrument were removed as part of this simplification process. If that's not possible, then it will be necessary (in our view) to at least remove the specific anti-competitive provisions of the Standard Instrument.

Recommendation 47

The anti-competitive provisions of the NSW Government's Standard Instrument should be removed. Namely:

- In a "Business Development Zone" retail, office premises and other uses should be permitted, even if it would provide competition to businesses located in established centres.
- In "Enterprise Corridor" "Business Park"; "General Industrial"; and "Light Industrial" zones retail and other uses should be permitted even if it would provide competition to businesses located in established centres.
- The definition of "shop top housing" should be returned to its pre December 2007 state so that any retail premises could go into a ground floor of a mixed-use development in "General Residential", "Medium Density Residential", "High Density Residential" and "Neighbourhood Centre".

7.4 Development assessment under Part 4

A series of key decisions in the Land and Environment Court have set precedents and given consent authorities guidance on how the draft SEPP66 and its associated policies are to be used in the development assessment process.

In *Bonim Stanmore Pty Ltd v Marrickville Council*[127], Hoffman C refused a development application for the demolition of a club and construction of a supermarket, based partly on the traffic impacts and associated provisions of draft SEPP 66. He concluded at paragraph 64 that

[127] [2006] NSWLEC 771.

> it is obvious from the government documents that good planning would require locations for new supermarkets within existing centres or designated new centres, or on the edges of such centres such as the consolidation of the centre might occur.

Stadurn Pty Limited v Blacktown City Council[128] dealt with an appeal against refusal of development consent for the construction of a bulky goods retail establishment at Kellyville Ridge. The site was zoned 3(d) Special Business and the proposed use was permissible in the zone.

A number of regional and State planning policies applied to the proposal considered in that case. Chief among these was *Sydney Regional Environmental Plan No 19: Rouse Hill Development Area* (SREP 19) which provides a framework for co-ordinated planning and decision making in relation to the Rouse Hill Development Area. Additionally, the Rouse Hill Regional Centre (RHRC) is identified in draft SEPP 66 itself as a major urban centre. The Minister intervened in the proceedings in support of the refusal of consent, arguing that the proposal was inconsistent with the aims of Draft SEPP 66 in that it does not moderate unsustainable growth in car travel and threatens the integrity of the RHRC by creating a dispersed retail centre.

Due to the provisions of the ILUT the Land and Environment Court considered whether or not the proposed development was sufficiently well located to public transport. The court accepted expert evidence that the site has good access to public transport and that this will be further improved with the construction of the bus transit ways along Windsor Road. However, this was held to be insufficient to overcome the benefits of co-locating bulky goods establishments within the centre.[129] It was found that the thrust of the principles incorporated in Draft SEPP 66 provide for the concentration of retail, commercial and other activities in major centres. In the words of an expert witness quoted with judicial approval in the case, this:

> … supports public transport services and thus helps to ensure that there is a public transport choice available to shoppers visitors and workers. Disbursed activities have the opposite effect, watering down the concentration of workers and visitors and hence making it less viable to provide a high frequency and convenient public transport service.

The court found that the proposed development would have an adverse impact on the RHRC taking into account the myriad of regional and State planning policies and instruments that supported the RHRC's development. Also, that it was realistic and appropriate that bulky goods retailing should be part of the RHRC rather than creating another separate area to accommodate that use.

Section 79C of the *Environmental Planning and Assessment Act* explains how development applications are to be evaluated by consent authorities under Part 4. Among other things a consent authority must take into consideration:

- any environmental planning instrument;
- any draft environmental planning instrument;
- any development control plan;
- the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality;
- the suitability of the site for the development;
- any submissions made; and
- the public interest.

The Act, in itself, does not explicitly state how the "economic impacts in the locality" are to be identified and considered. However, a predecessor provision in substantially the same terms was considered by the Land and Environment Court in *Fabcot Pty Ltd v Hawkesbury Shire Council*[130], where it was found that the provision, section 90(1)(d), was:

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[128] [2004] NSWLEC 348.
[129] *Stadurn Pty Limited v Blacktown City Council* [2004] NSWLEC 348 [72]
[130] (1997) 93 LGERA 373.

> ... limited to environmental and planning considerations (*Lui v Fairfield City Council*, 10384/96, 23 December 1996, Murrell AJ). For example, s90(1)(d) relating to the social effect of a proposal does not relate to moral considerations, for which the criminal law is the appropriate regulatory vehicle: it is not for local government councils nor for this court to assume the mantle of moral arbiter (*Lui v Fairfield City Council*).
>
> Similarly, economic competition between individual trade competitors is not an environmental or planning consideration to which the economic effect described in s90(1)(d) is directed. The *Trade Practices Act 1974* (Cth) and the Fair *Trading Act 1987* are the appropriate vehicles for regulating economic competition. Neither the Council nor this Court is concerned with the mere threat of economic competition between competing businesses. In an economy such as ours that is a matter to be resolved by market forces, subject to the *Trade Practices Act* and the *Fair Trading Act*. It is not part of the assessment of a proposal under the *Environmental Planning and Assessment Act* for a consent authority to examine and determine the economic viability of a particular proposal or the effect of any such proposal on the economic viability of a trade competitor. Moreover, it is at least arguable from the fact that the *Trade Practices Act* now applies to local government councils, that if a local council were to refuse or to limit a proposal for development on the ground of competition with a trade competitor, it could be guilty of anti-competitive conduct contrary to Pt4 of that Act.
>
> It seems to me that the only relevance of the economic impact of a development is its effect "in the locality"; that is to say, in the wider sense described in *Kentucky Fried Chicken Pty Ltd v Gantidis* ((1979) 140 CLR 675, at 687).

While at first blush this quote may appear to suggest that the development assessment process would not protect other businesses from competition, the quote cited with approval in this decision (In *Kentucky Fried Chicken Pty Ltd v Gantidis*[131]) said that:

> If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical or financial causes, and if the resultant community detriment will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However, the mere threat of competition to existing businesses if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration.[132]

Therefore if the profitability of individual businesses are threatened and this does raise a prospect of existing facilities ceasing to be available to the community, then the impact on profitability of existing business can be an environmental and planning consideration under section 79C.

This conclusion – an interpretation of existing law - reinforces existing legislation and policies do not recognise that

- the development (or threat) of new property assets competing with existing property assets is an inherently positive thing for society, that should be encouraged for its own sake; and
- a shopping centre will not necessarily cease trading merely because a business or businesses experience financial difficulties due to competition.[133]

In *Fabcot Pty Ltd v Hawkesbury Shire Council* this approach led to a refusal by the Land and Environment Court to overturn a council's refusal of a development approval for a new supermarket. In this matter the judge accepted the evidence of an expert witness that would be a 10 to15 per cent decline in non-supermarket trading in the Windsor town centre if the proposal for a supermarket outside that town centre was to proceed:

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[131] (1979) 140 CLR 675.

[132] *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675, 687 per Stephen J, with whom Mason and Aicken JJ agreed.

[133] Channel nine is still available to the public despite the fact that its owner (Bond Media) experienced severe financial difficulties in the 1980s; the cross city tunnel is still operating, despite the severe financial difficulties faced by its developer (which led to its forced sale in 2007).

> ... [T]he out of town, stand-alone supermarket now proposed will to a significant extent break the synergy or nexus between supermarket and non-supermarket shopping in Windsor. To "marginalise" the non-supermarket businesses ... would clearly put at risk the viability of those businesses. The effect would be as described in *Kentucky Fried Chicken Pty Ltd v Gantidis*: The facilities presently enjoyed by the community in Windsor would be put in jeopardy by the proposed development and the resultant community detriment would not be made good by the proposed development itself.

If the facilities in Windsor were being enjoyed so much by the community, why would members of the community stop shopping there? The approach outlined in this case has become the standard way of dealing with new retail developments, in councils, at the Department of Planning and in the Land and Environment Court.[134]

The above discussion has explained how this provision allows a development application to be refused on the basis that it will put competitive pressure on businesses located in a centre and therefore (supposedly) put the provision of services in a centre at risk.

We believe that the planning system is not equipped to assess what the costs and benefits of increased competition will be on existing businesses, and that any attempt to do so is likely to result in inefficient economic outcomes and will disadvantage ordinary consumers. For this reason section 79C should be re-written so as to exclude consideration of this issue in the development assessment process.

Recommendation 48

Section 79C of the *Environmental Planning and Assessment Act* (NSW), which explains how development applications are to be evaluated by consent authorities under Part 4 of that Act, should be amended. The amended provision should make it clear that, when considering a development application, no direct or indirect consideration may be given by a consent authority to the loss of trade that might be suffered by any other planned or existing business or businesses.

7.5 A new centres and corridors policy

Make no mistake, the Urban Taskforce supports a centres approach, as part of a re-invigorated centres and corridors policy.

The Metropolitan Strategy envisaged concentrated commercial, retail and residential development across the centres and corridors of Sydney. Somewhere along the line, the Department of Planning appears to have informally abandoned its commitment to the development of the corridors of Sydney, and has decided to pursue a 'centres-only' approach. Numerous corridor development initiatives contained in the Metropolitan Strategy have not been implemented – or worse still – are now not possible to implement because of changes to the Standard Instrument made by the former Minister in December 2007.

A new centres and corridors policy would allow all retail, office and entertainment development to be permitted where infrastructure allows for it and where vehicle kilometres travelled will be reduced.

This means the NSW planning system should allow retail in enterprise corridors and renewal corridors. It should allow all kinds of retail in all kinds of centres. It should recognise current bulky goods centres as centres in their own right. It should allow retail with operating requirements akin to industrial uses in light industrial areas.

[134] *Bongiorno Hawkings Frassetto & Associates v Griffith City Council* [2007] NSWLEC 551; *Woolworths Ltd v Wyong Shire Council* [2005] NSWLEC 400; *GWH Buildings Pty Ltd v Great Lakes City Council* [2004] NSWLEC 557; *Centro Properties Ltd v Warringah Council* (2003) 128 LGERA 17; *Agostino v Penrith City Council* (2002) 123 LGERA 305; and *Jetset Properties v Eurobodalla Shire Council* [2007] NSWLEC 198.

Recommendation 49

A new centres and corridors policy would allow all retail, office and entertainment development to be permitted where infrastructure allows for it and where vehicle kilometres travelled will be reduced.

This means the NSW planning system should:

- allow retail in enterprise corridors and renewal corridors
- allow all kinds of retail in all kinds of centres
- recognise current bulky goods centres and
- allow retail with operating requirements akin to industrial uses in light industrial areas.

8. Rent control measures and price caps on new home sales

The Urban Taskforce is often asked to respond to call by government, opposition and councils for more "affordable" housing. There is a lot that can be done to improve the supply of housing that is affordable. Any policy solution must boost overall home supply and help both those looking for rental housing as well as those aspiring to own their own home. This next section explains our thinking about "affordable housing" policies.

8.1 Government policy should encourage a transition to home ownership

There has been a noticeable and serious decline home ownership, particularly in Sydney, amongst key demographics. The central issue underlying housing affordability is the supply of housing. Lack of affordability is caused by a systemic mismatch between the demand for and supply of housing. Planning laws have been contributing to this problem by:

- preventing or limiting the construction of new medium and high density housing in areas where it is most in demand;
- restricting the availability of greenfield land for the development of detached housing; and
- imposing massive development levies on greenfield development and lower, but nonetheless burdensome, levies on brownfield development.

Supply-side measures are the key to boosting affordability for both renters and home buyers. Tackling these issues will improve affordability for everyone. **Any policy solution must boost overall home supply and help both those looking for rental housing as well as those aspiring to own their own home.**

There are three viable ways to make rental housing more cost effective:

- Increasing the supply of new housing generally by removing restrictions on the development of new homes that developers want to build and home buyers/investors want to buy.
- Reducing the cost of developing and building rental housing.
- Government subsidies for the rents of people resident in a certain class of housing. The Commonwealth's National Affordable Rental Housing Scheme is an excellent example of this approach.

The Urban Taskforce believes the biggest impact can be made on the largest scale through the first and second points. For example, the government should release residential land for development for detached housing on multiple fronts. This will boost competition between different land-owners and developers. The government should also more readily permit the development of new compact, pedestrian-friendly, mixed-use neighbourhoods in inner and middle ring suburbs. This would bring together new apartments, workplaces, shopping, and recreation areas within walking distance of public transport infrastructure and in the vicinity of major transport corridors.

The third policy point above – subsidies from government - can also be a valuable tool. However, **subsidies that are funded by levies or restrictions on other forms of housing are grossly inequitable, and will lead to a decline in overall housing affordability.**

8.2 No new levies

Many advocates of "affordable housing" policies believe that new levies on development activity can be used to fund the development Those that argue for levies are mistaken if they believe that either the developer or original land holder ultimately bears the costs of new or increased developer charges.

Modern capital is very mobile. It flows to wherever it gets the best return. A local developer will not be able to secure capital for a NSW development if he/she cannot offer the rate of return that is available for investments of a similar risk profile in other states or countries. In order to ensure that a market rate of return is still achieved, a developer will either reduce the amount of money he or she pays for undeveloped land, or increase the price paid by the home buyer.

It is not often possible, in practice, to pay less for undeveloped land for several important reasons. Many developers have already acquired the land and factored in all the charges known about at the time of purchase – in these cases it is too late to adjust the price paid to landowners for new or increased charges, yet the development cannot proceed unless the necessary rate of return can be earned.

There is also a natural floor to land price, below which the owners of undeveloped land will not accept. This floor does, in part, reflect the opportunity cost for other uses of the land – such as rural lifestyle blocks (in greenfield) or low density housing (in brownfield). The floor is also driven by the long-held expectations of those land holders. Even though those expectations may not be realisable in the short term, these land holders are very patient, hold minimal debt and often originally acquired the land at very low prices. They tend to have no difficulty in waiting for prices to rise to the level consistent with their expectations.

In this debate, economic purists tend to overlook the disproportionate market power given to the landowners by planning laws. For this reason landholders are often able to resist developers' efforts to pass the cost of development charge onto them through a lower land acquisition cost. Land owners enjoy disproportionate market power because appropriately zoned land (both in greenfield and brownfield areas) tends to be drip fed by the planning system into the market.

This generally means there is only one party left who must pay for an increased developer charge – the home buyer (or commercial/retail/industrial end user). However, often a home buyer cannot afford a new or increased levy. That's because there is a ceiling on the price that home buyers are able to pay, i.e. their borrowing capacity. The maximum amount that home buyers are able to borrow is, in turn, based on their income. Without increases in income, home buyers are unable to pay more for new homes. As a result, any project which cannot be delivered at a price home buyers currently can afford simply doesn't get built. An increase in costs from a new developer charge can't be passed onto a home buyer until home buyers' borrowing capacity increases enough to pay for the levy.

That's why, in part, the supply of new houses in Sydney has almost completely dried up. State, local council charges of up to $70,000 to $90,000 for each home lot in the growth centres cannot be afforded by anyone – land owners, developers or home buyers. So the homes simply don't get built and no money is actually raised.

Recommendation 50

It is crucial that no new "affordable housing" levies be imposed.

8.3 Density bonuses

Some groups regularly propose the use of a "density bonus" for apartment development if some or all apartments are sold or rented below market rates.

We do not understand why an apartment building of a particular bulk and scale is more acceptable to the planning system if it is subject to a rent control scheme or sold cheaply. We understand the policy rationale of floor space ratios is to ensure that the bulk and scale of buildings is appropriate to the

streetscape and in keeping with physical form of the surrounding community.[135] A bonus scheme like this utterly undermines this rationale.

A bonus scheme of this kind simply encourages planning authorities to scale back proposals for increased floor space, to take into account the availability of the bonus. That is, if 2:1 is thought to be appropriate in a particular street because of nearby parkland, and low-rise buildings, planning authorities will adjust the intended floor space ration to 1.5:1, to ensure that any rent control developments are still in keeping with the surrounding urban form.

Any bonus scheme is likely to reduce the amount of housing available because:

- less homes will be developed under a rent control scheme or cap on the sale price of apartments than if the same floor space ratio had been available for new home development for sale at market rates (it is well established that price controls reduce the amount of supply of a regulated item); and
- apartment buildings developed outside the scheme will be subject to more restrictive floor space ratios than would have applied if the bonus scheme had not existed.

A reduction is the housing supply means higher prices for home buyers and renters who are not fortunate enough to be tenants in a rent control property or win the right to buy a home whose sale price has been capped below the market level.

We don't have to go far to find examples of this approach. Byron Shire Council has been consulting publicly on an affordable housing policy.

This policy offers a "bonus" in return for a financial payment to fund "affordable housing". However, there is no real bonus because the council is setting its floor space ratio a low 0.4:1 and then offering a "bonus" of 0.1. This gives a total density of 0.5:1 - a very modest density for medium density development. In fact, the existing residential dwelling floor space ratio in Byron Shire is currently 0.5:1. The proposed total floor space ratio is equivalent to that existing under the current local environment plan.

Recommendation 51

Floor space ratios should not be linked to any rent control scheme or any cap on the sale price of new homes.

8.4 Non-profits or public authorities

Some proponents of "affordable housing" argue that the influence of the private sector needs to be reduced in the production of new homes, and instead there needs to be a much stronger role for public authorities and not-for-profits.

This argument suggests that these not-for-profit organisations should be able to access additional income through preferential development rights under the planning system, which they can then use to finance their social housing program. This is achieved by creating a more generous regulatory environment for public authorities or not-for-profits seeking to purchase prime development sites close to transport infrastructure. These preferential development rights may include the right to build apartments in an area where departments are banned, or the right to an additional floor space ratio.

[135] See, for example, the objectives for the floor space ratio provisions in clause 4.4(1) of the *Liverpool Local Environmental Plan 2008* or *Canada Bay Local Environmental Plan 2008*.

Such proposals invariably would allow public authorities or non-profits to ability to undertake developments in which:

- some or all of the housing can be sold off in the open market in direct competition with private sector developers; and/or
- newly developed housing is initially designated as social or regulated housing, but individual homes can be sold off later as unregulated housing.

This kind of policy restricts competition and choice. It will have the effect of either:

- reducing the price obtained by land owners for potential apartment development sites (by banning private sector "for-profit" developers for bidding on the same terms of others); and/or
- requiring home buyers to pay more for their new home than they should, because the developers of apartments will be artificially restricted to a smaller pool.

In effect, this policy is nothing more than a disguised subsidy for certain housing providers. The burden of the subsidy is borne by a small class of land owners and home buyers, which is neither equitable nor justifiable. Such subsidies should come from the broader tax base.

More advantageous rules for social and affordable housing providers on land close to transport infrastructure would are not justifiable because such land has already been generally identified as appropriate for higher densities – so a special rule for regulated or social housing will come at the expense of home buyers and other renters.

Interestingly, the United Kingdom is often cited in glowing terms as the model for an expanded subsidised/non-profit system of residential rentals. Housing adviser, Kate Barker, who is an external member of the Bank of England's monetary policy committee publicly, discussed the differences between the United Kingdom and Australia in a visit in March 2008.[136]

Ms Barker preferred solution for the United Kingdom was the opening up greenbelt areas for development, building more public housing, and speeding up approvals for housing construction. Ms Barkers observed that in the United Kingdom, about 20 per cent of the population live in housing that is explicitly subsidised rent. That's because there is a greater proportion of the population in the UK simply can't pay either market rents, or indeed, certainly cannot afford to buy their own house. Ms Barker observed that there is not a large private rental sector in that country. Ms Barkers said that

> I don't think you can just carry stuff over from one economy to another. ... You know you have a better private rental sector here and so you can meet more of people's aspirations perhaps in that sector, with a little bit of subsidy, rather than government having to directly provide houses.
>
> And there are problems actually with having to expand it in a different ways because historically we built very big estates that just had social tenants in and they now prove quite difficult places to manage.

Recommendation 52

Any special development rules for regulated or social housing should not come at the expense of the broader housing needs of the community.

Any opportunity to develop regulated or social housing should be equally available to private sector – the law should not discriminate between non-profit and for-profit organisations.

[136] Reported in by ABC Radio, transcript available here http://www.abc.net.au/pm/content/2008/s2525095.htm (accessed 25 March 2009).

9. Heritage

The administration of the heritage requirements at a local government level is causing concern to the Urban Taskforce and its members. There is also a growing belief within the general community that "heritage" is a tool or argument to be used to stop development.

A recent example of this behaviour is given in *The Council of Trinity Grammar School v Ashfield Municipal Council.*[137] In this case, the Land and Environment Court caught Ashfield Council misusing heritage rules to block the expansion of a local school. Ashfield Council had blocked plans by Trinity Grammar to build a swimming pool, a new hall, extra classrooms and underground parking. The court intervened and overturned this decision – instead giving the development the green light.

The school's proposal involved the demolition of 11 houses already owned by the school. It was blocked by the council, partly on heritage grounds. Senior Commissioner Dr John Roseth said that the council and resident opposition could only be explained by their "long-standing frustration and animosity in the relations with the school." The Council had, among other things, relied on the presence of several heritage conservation areas surrounding the site to refuse the development application. It also relied on its plans to declare a new heritage conservation area covering school property.

The court refused to accept the council's argument that the development would have an unacceptable impact on the existing heritage conservation areas. The Court also dismissed council claims that 11 houses should not be demolished because they were 'suitable' for a heritage conservation area.

The saga had been going on for 20 months. The application was lodged in March 2006. It took the council 13 months to decide to refuse the application, and another 7 months for the court appeal to be dealt with. This case was only the latest attempt by councils misusing the State's heritage laws to block well planned urban development.

In 2006, in *Sandoval Investments v North Sydney Council*[138], the Land and Environment Court found that an apartment building that had been listed as a heritage item by North Sydney Council didn't satisfy the listing requirements.

The building in question was located at 106 Kirribilli Ave, Kirribilli. It was a white rendered residential flat building comprising eight units over five levels and known as "Cabana". It was built in 1949. Three different heritage experts (including North Sydney Council's own heritage expert) agreed that the building does not satisfy the threshold criteria of significance for listing as a heritage item.

A heritage expert told the court that the building's white render finish was out of keeping and the Functionalist/Modernist elements of the building were uncharacteristic and handled crudely. Another expert said that the building did not display the essential characteristics of the style and constitutes a poor piece of architecture not designed by an architect of importance.

Despite all this, the building was not able to be demolished because of the presence of other heritage buildings in the vicinity. What's more, the building itself is still listed by the council as heritage protected!

In October 2007, efforts by Parramatta Council to heritage list up to 12 ordinary 1960s and 1970s homes in Toongabbie and Epping were widely reported in the media. This recent matter had echoes of the 2004 case of *Rahmani v Ku-ring-gai Council*[139]. Under the *Ku-ring-gai Planning Scheme Ordinance* (Schedule 7), Nos. 19, 21, 23, 25 and 29 Richmond Avenue St Ives are heritage listed. In 2004 the owner of 27 Richmond Avenue, which was not heritage listed, sought approval to demolish the property and build a duplex instead. In response, the council formally proposed that the house be heritage listed!

[137] [2007] NSWLEC 733 (7 November 2007).
[138] [2006] NSWLEC 721 (28 November 2006)
[139] [2004] NSWLEC 595 (27 October 2004).

They then opposed the redevelopment on that basis. This is a classic example of the sort of misuse of the heritage system our submission talked about.

The council also refused the development application because it would affect the heritage significance of the surrounding listed houses and their settings. This means that the existing heritage listings didn't just affect the houses listed, it affected the neighbours too. No. 27 Richmond Avenue and its neighbours were 1950s and 1960s project homes. No. 27 was one of the smallest and cheapest houses of its time. It has a basic design. The NSW Heritage Office said that it did not regard the homes as being of State heritage significance.

A heritage expert unsuccessfully argued that 27 Richmond Avenue could be demolished: Firstly, the design had been reproduced in various forms many times. Secondly, the materials used were low in cost and the internal spaces are small, resulting in the design not now being suitable as a single dwelling for this site. The dwelling was not technically significant and had been altered. To achieve liveability, significant extensions and alterations would be required and such changes would obscure the house from view and confuse its original presentation in its context.

The expert also argued, to no avail, that the Richmond Avenue group of houses can no longer be interpreted as that of a single designer because of the significant alterations that have taken place, not only to the houses but also to the landscape setting. The integrity of the original estate had been severely diminished. The council was successful in blocking the demolition.

These examples illustrate that all is not well with the heritage provisions under the *Environmental Planning and Assessment Act*.

9.1 Managing the process of change

We believe there is insufficient understanding that heritage processes are a way of managing the process of change in our urban and natural environments. There is an unfortunate perception that if a site or building is listed as a heritage item or within a conservation area then it cannot be developed or altered, only conserved.

Recommendation 53

Policy statements – both legislative and administrative – should clearly state that heritage processes are a way of managing the process of change in our urban and natural environments

Heritage conservation should be about saving the best of what we have and managing the process of change. It should not be about preserving a particular property or structure in an unaltered state. Practitioners need to be properly trained and given necessary tools such as design outcomes for achieving conservation objectives.

9.2 Listing process

The principal local environmental plans (LEPs) of councils contain a schedule listing items of local heritage significance, conservation areas, elements of streetscape or the natural environment. Many of these lists or inventories are more than 15 years old.

The lists were prepared at a point in time and only altered to add additional items rather than being reviewed to consider:

- whether the listed items ever were of local heritage significance;

- whether they remain significant after the passage of time; and/or
- the implications of evolving listing criteria for items of local significance.

Many of the lists are not robust, having been prepared following nomination to councils by local special interest groups or identified in a local government area (LGA) wide survey that involved little more than a brief site inspection of sites/localities identified by the council. Once an item or place is listed there is no clear program or procedure for the review of the list including the removal of items.

Ideally the current process of LEP review and adoption of new standard instrument LEPs would include a review by ALL councils of their current heritage lists rather than the simple transfer of old and untested lists into a new LEP. However, this is not practical for those Councils whose LEPs are in an advanced stage of preparation.

Recommendation 54

There should be a mandatory regular review system implemented for local heritage lists incorporated into principal LEPs

This can occur as part of the regular five-year review of the LEPs, or it can be legislated as a separate process. The first review should have to take place within three years, or when the standard LEP is finalised for the LGA (whichever is the latter).

Some items are only listed as heritage items under LEPs as a result of political campaigns, in the light of a particular development proposal. Quite frankly, this kind of ad-hoc political manipulation of the heritage system devalues the system and cheapens the concept of heritage conservation.

Recommendation 55

Councils should not be permitted to add items to the heritage lists included in LEPs on an ad-hoc basis.

Instead, proposals for items to be listed under LEPs as heritage items should be considered holistically at the time of the regular review. This will enable a more robust assessment of heritage value, based on objective criteria, independent of any political campaigns that might emerge from time-to-time.

Recommendation 56

To ensure that new listings are worthy of incorporation into an LEP, and as part of the first review of the existing listings, there should be a peer review of new listings (and, for the first review, all existing listings).

Such a review would be conducted on an LGA by LGA basis. The Heritage Office should appoint experts to conduct the review, but the cost of the review should be met by the relevant council. This would provide a robust and technically sound process at arm's length from the political process, help remove political considerations from the listing process and ensure that only items of genuine heritage significance are listed. A council's proposals should have regard to this peer review report.

Recommendation 57

There should be a clear process to hear landholder objections to the listing of their property in an LEP as a heritage item at the time of each review. For this purpose councils should be required to write to each affected landholder:

- advising them that their property is either currently listed and the listing is being reviewed or that their property is proposed for listing (as appropriate);
- advising the landholder of the criteria for an item to be listed in an LEP;
- providing a copy of any report/study and peer review which relates to the proposed listing/omission;
- to invite the landholder to inform the council whether the landholder supports or opposes the proposed or continued listing of an item in the LEP and why they hold this view; and
- advising the landholder that the council will make a determination as part of the review and that this determination may be appealed to an independent arbitrator if the landholder is dissatisfied with the council determination.

When council makes a determination to include or (in the case of an item that was already included) omit an item as a heritage item under an LEP, the Council must write to the landholder and advise them:

- of the decision; and
- their right to have the decision reviewed on its merits by an independent arbiter appointed by the Heritage Council.

The Heritage Council should maintain a panel of experts who are available to act as arbitrators when landholders dispute a council's determination in relation to the inclusion (or omission) of a property from the LEP list of heritage items. The arbitrator's decision would be binding on the council.

The council could not proceed to exhibit an LEP which included the subject property if the arbitrator has determined it should not be listed. If the review of heritage items is occurring separately from an LEP review, the council would be obliged to submit an LEP amendment to the Department of Planning within a set timeframe, reflecting the outcome of the review (including the outcome of any arbitrations).

In addition to the review of the local listing process, it would be beneficial for Council staff and Councillors to receive targeted training in relation to the objectives of listing and conservation management. Any proposal for the listing of buildings or places on a local heritage list should then be subject initially to thorough research and analysis by the Council and its consultants before being subject to peer review.

Consistency of approach by ALL Councils in NSW is required in the listing process and this could be achieved through the adoption of clear guidelines for the determination of heritage significance and the use of standardised inventory forms by all Councils.

A review of the local heritage listing process as described above, together with a broad awareness program to educate the community and Council's, would provide for a more robust listing process and certainty for landowners in the management and development of listed sites.

Buildings and places worthy of conservation would be retained and opportunities for their ongoing management should be clearly known by all interested parties.

9.3 Test for achieving local heritage status

Presently there is no consistent approach undertaken by local government to identify the heritage significance of an item of local heritage. As with the standardisation of LEP provisions and the zoning of land, the Urban Taskforce considers that there should be clear and objective criteria and tests available to practitioners and councils to determine the significance of local heritage.

The Heritage Office could develop these guidelines and their implementation directed by the Minister under s.117 of the EP&A Act. The guidelines could be based on baseline studies, which identify key themes and considerations to be used to support a proposed heritage listing.

Recommendation 58

There should be clear and objective criteria and tests available to practitioners and councils to determine the significance of local heritage.

9.4 Purpose of a heritage conservation area

Identification of a conservation area under a list in an LEP should be about conservation of the built form of buildings as viewed from the public domain. It should relate to the preservation of the sense of place or the identity of the locality and should not be concerned with alterations to the internal fabric of a building.

Too often, development control plans adopted by Councils are becoming overly prescriptive and being used as a checklist to prevent the adaptive reuse or internal upgrade of buildings within a heritage conservation area. Clear guidelines are required for Council and practitioners to follow and to educate the community about the functions and purposes of a heritage conservation area and how it is different to a heritage item.

Recommendation 59

Clear guidelines are required for Council and practitioners to follow and to educate the community about the functions and purposes of a heritage conservation area and how it is different to a heritage item. A heritage conservation area is about the preservation of the sense of place or the identity of the locality and should not be concerned with alterations to the internal fabric of a building.

9.5 Just terms compensation

In Queensland the *Queensland Heritage and Other Legislation Amendment Act 2007*, which amended the *Queensland Heritage Act 1992*. This is the first major review of the heritage legislation in its 15-year life and modified Queensland's heritage framework for the listing of places on the register and the approval of their redevelopment.

The amended Act requires local governments to keep a local heritage register. However, unlike NSW, an owner is entitled to claim compensation for the entry of a place in the local heritage register. A change of this kind would address many of the ongoing problems with the local heritage system here in NSW.

Recommendation 60

NSW should adopt the Queensland model where an owner is entitled to claim compensation for the entry of a place in the local heritage register.

10. Further information

The Urban Taskforce is available to further discuss the issues outlined in this submission.

Please contact:

Aaron Gadiel
Chief Executive Officer
GPO Box 5396
SYDNEY NSW 2001

Ph: (02) 9238 3955
E-mail: admin@urbantaskforce.com.au