Urban Taskforce
AUSTRALIA

7 April 2009

Mr David Farmer
General Manager
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Locked Bag 8821
Wollongong NSW 2500

Attention: Land Use Planning Team; file Number SU23594

By e-mail: wollongonglep@wollongong.nsw.gov.au

Dear Mr Farmer

Re: Draft Wollongong Local Environmental Plan 2009

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.

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

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

1. The plan's aims could be improved

Ecologically sustainable development

It is encouraging to note that Wollongong City Council has drafted a local environmental plan that recognises the need to support "economic and business development to increase employment opportunities". Such a position sets a strong foundation for effective and balanced local planning. After completing numerous reviews of comprehensive local environmental plans, it is refreshing for us to read clearly stated and unambiguous aims consistent with the Act. However, there is opportunity to further refine and simplify the aims of the plan for improved clarity, whilst still achieving the same end result. Ideally Council would replace:

> to conserve and enhance remnant terrestrial, aquatic and riparian habitats, native vegetation and fauna species,

with:

> to promote the ecologically sustainable development of Wollongong ...

By referring to ecologically sustainable development, Council would be adopting terminology that is defined by law.

The phrase, "ecologically sustainable development" is already extensively defined and detailed under the Act itself. 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]

Section 11 of the *Interpretation Act* makes it clear that when the phrase "ecologically sustainable development" is used in a local environment plan, it has the same meaning as in the Act.

The aim of the plan set out in 2(e) should be replaced with "to promote the ecologically sustainable development Wollongong".

Capacity/constraints of the land

Aim 2(c) says the plan is

> to encourage a range of housing choices, consistent with the *capacity of the land* (emphasis added) ...

Aim 2(g) says the plan is

> to ensure that development is consistent with the *constraints of the land* and can be appropriately serviced by infrastructure (emphasis added) ...

It is a well established principle of statutory interpretation that, all other things being equal, a change in language suggests a change in meaning. If the same meaning is intended to be communicated by the phrases "*capacity* of the land" and "*constraints* of the land" then the same language should be used.

However, we are also concerned that the intended meaning of these two phrases is not clear. We appreciate that the development potential of land is often constrained by available infrastructure. However, this point would be adequately dealt with by a simpler aim 2(g) that reads:

> to ensure that development can be appropriately serviced by infrastructure ...

We also acknowledge that the ability to develop land is also, from time-to-time, regulated to protect the amenity of local communities. However, this appears to be dealt with by clause 2(d) which says the plan aims

> to improve the quality of life and the social well-being and amenity of residents, business operators, workers and visitors ...

The final rationale for limiting development relates to environmental issues, which we think can be adequately dealt with by the reference to ecologically sustainable development above.

For this reason we recommend that **the aims in clause 2(c) and 2(c) be amended by deleting reference to the "constraints of the land" and the "capacity of the land".**

In relation to clause 2(d) (cited above) we also query whether the plan should not also seek to *maintain* as well as *improve* the quality of life/social well being of the community. Not every development approved will necessarily *improve* the status–quo, but every development would at least *maintain* the status-quo. The urban environment usually will get worse without urban renewal, so almost all development is likely to fulfil an important public purpose by at least maintaining, if not enhancing, the quality of life and social well being of the community. It's also desirable to acknowledge the needs of present and future residents, visitors, etc. This would mean that an amended clause 2(d) should say the plan aims

> to maintain and, where practicable, improve the quality of life and the social well-being and amenity of present and future residents, business operators, workers and visitors ...

The plan aim in clause 2(d) should be re-written to say that the plan aims to maintain and, where practicable, improve the quality of life and social well being of the community, and that the plan provides for both the present and future members of, and visitors to, the community.

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

2. Full range of residential development should be permitted in neighbourhood centres, local centres, commercial core zones and mixed-use zones

It is encouraging to note that residential and other uses are permitted in neighbourhood and local centres and commercial core zones. Council would agree that density and land use mix are crucial to the success of the Wollongong city centre. 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."[2] 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.[3]

However, the policy decision to only permit residential development as part of a mixed-use development (non-residential ground floor uses) may cause the very problem it is trying to avoid. This position is further reinforced by local provision 6.13 which makes it abundantly clear that residential accommodation will not be permitted at ground floor. By insisting on non-residential ground floor uses, Council could be responsible for ensuring empty ground floor spaces when retail uses are not attractive and/or discouraging development altogether.

If there is insufficient demand for retail space, developers are forced by these rules to build ground floor retail space that can be empty and underused leading to a ghost town atmosphere in the local streetscape. It's far better that developers be allowed to populate under-used land with the vibrancy of a residential neighbourhood than leave it undeveloped because of a lack of demand for retail space. Similarly, forcing developers to build retail space that they know will be vacant or occupied by poor quality tenants (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.

These issues were canvassed in the *Liveable Centres* report by urban design experts, Roberts Day. A copy of the report is enclosed with this submission. The report highlights how recent zoning plans prevent new homes being built in the areas that need it most. The report's author, Stephen Moore, is a well credentialed expert in urban design and town planning. Mr Moore concluded that:

- There is an endemic bias against residential development in the heart of centres.
- NSW was being denied the benefit of many genuine mixed-use centres.
- Mixing uses around public transport is the most effective way to reduce unnecessary traffic congestion.
- Reducing car dependence also boosts household disposable income. The average yearly cost of car ownership is the equivalent of servicing a $90,000 mortgage debt.
- Physical form is a place's most intrinsic and enduring characteristic. Regulation should be concerned with physical form of buildings, rather than the use of a building.
- The focus should be given to the adaptability of buildings rather than their immediate use.

It's clear that there will be no recovery in the Australian economy unless there is a recovery in new home development. Any prohibition on residential development near train stations and other high quality transport infrastructure will only delay the economic recovery in NSW.

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

[3] 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]

The neighbourhood centre, local centre, mixed-use zones and commercial core zones should permit residential development, including multi-dwelling housing and residential flats, as well as shop top housing.

In the commercial core zone there is an additional objective saying that the zone is

> [t]o provide for high density residential development within a mixed-use development if it:
>
> (a) is in a location that is accessible to public transport, employment, retail, commercial and service facilities, and
>
> (b) contributes to the vitality of the Wollongong city centre.

Commercial core zones are generally located in areas that are accessible to good transport, infrastructure and are by definition in areas for employment, retail, commercial and service facilities. It is unclear why an additional zone objective should be necessary requiring each residential development in a commercial core zone to be individually assessed against this criteria. This seems to simply provide yet another ground for a development consent to be refused.

Paragraph (b) is particularly worrying because it requires the consent authority to make a subjective judgment as to the degree which a given development proposal contributes the "vitality" of an area. A vague requirement like this will make it very difficult for a potential investor in Wollongong property development to understand what the likely treatment of a development proposal will be.

There should be no requirement for mixed-use residential developments within the commercial core to be individually assessed for their proximity to transport, employment, retail, commercial and service facilities, nor should they be assessed for their "vitality".

3. Limiting development in mixed-use zone to protect centres

Mixed- use zone objective

Council has added an additional zone objective to the mixed use zone that reduces opportunities for a competitive business environment. Council's objective

> [t]o support nearby or adjacent commercial centres without adversely impacting on the viability of those centres

is an unfortunate use of the planning system. This objective will stifle competition and reinforce existing monopolies/oligopolies. Objectives such as these will enable restriction of commerce, limitation of choice and will in all likelihood hamper the evolution of centres.

What this objective really means is that renewal in mixed-use zones will be limited so as to promote development elsewhere. 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.

Furthermore, determining if a development proposal is "supporting" commercial centres is unclear. 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" a nearby centre and will adversely impact on the "viability" of the nearby centre. In our market economy, it is actually a good thing for one business to put pressure on other local businesses. That pressure (or the threat of it) is what ensures businesses are offering competitive prices on good and services in an attractive environment.

In the end, protecting centres from competition and hence reinforcing a centres hierarchy limits the opportunity for consumer choice, 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.

In August 2008, the Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws.[4] 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.[5]

This restriction will force people to drive further to satisfy their general grocery and shopping needs. Limiting retail by way of a statutory plan does little more than to protect existing retail landlords.

The objectives to the mixed-use zone should not refer to supporting nearby or adjacent commercial centres or adversely impacting on the viability of those centres.

Restrictions on supermarket size

Clause 7.8 restricts retail developments to 400 square metres. It's difficult to imagine a legitimate purpose for restricting the size of such establishments when buildings of much larger bulk and scale are likely to be permitted in the same zone.

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 or Franklins. So, in industry terms, a small supermarket will have a floor area of 1,500 square metres.

Consumers will pay much more for groceries at small-scale 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.

There should be no specific limit on the size of retail premises in the mixed-use zone, given that buildings of much larger bulk and scale are likely to be permitted in the same zone

4. <u>Ban on retail premises in business zones</u>

Enterprise corridor zone

"Retail premises" are not a permitted uses in the enterprise corridor zones.[6] This defies commonsense, given that the objective for the enterprise corridor zone is

> [t]o provide a range of employment uses (including business, office, retail and light industrial uses) ...

It is clear *why* retail is included in the objectives for the zone. 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.

"Retail premises" should be generally permitted uses in enterprise corridor zones as per the zone objectives.

Business parks

"Retail premises" are not a permitted uses in the business park zone. This is odd given that it is a zone objective that the business park zone is

> [t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.

Clearly premises such as supermarkets, cake shops and clothing shops are the kind of services that could meet the daily needs of workers in the area. A business park should be a vibrant place, where workers have the choice to leave their workplace and stroll down to a retail district at lunchtime or before or after work.

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[4] Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008).
[5] Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (2008).
[6] Other than bulky goods premises and timber and building supplies.

Neighbourhood shops are permitted, however these are defined to be

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

This means a shop in the business park zone:

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

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

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

Furthermore, neighbourhood shops are also limited in floor area (100 square metres of retail floor area), which makes it impossible for a moderate scale supermarket to be established.

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

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

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.

"Retail premises" should be generally permitted uses in the business park zone.

General and light industrial zones

Council's general and light industrial zones do not permit retail premises or business premises (other than minor retailing such as food and drink premises, kiosks and landscape and garden supplies, service stations and timber and building supplies). This is despite the fact that both zones have an objective

> [t]o encourage employment opportunities ...

Retail is Australia's largest single source of employment.

Additionally, the light industrial zone also has an objective, like the business park zone above:

> [t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.

Although the Sydney Metropolitan Strategy does not apply to Wollongong, it offers a sensible approach on this issue. The Metropolitan Strategy stated that retailing in industrial areas be permitted when it has operating requirements akin to industrial uses.[7] There was also a promise of a new approach to reinvigorate employment lands, including flexible zonings for industrial and commercial activities.[8]

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

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

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

Retail premises should be a permitted use in the industrial zones. In the event that this is not accepted, "bulky goods" should be a permitted use in such zones.

5. <u>Unnecessary additional zone objectives to light industrial zone</u>

The Council has inserted additional objectives to its light industrial zones that appear to add nothing to the standard objectives. The objective added by Council simply restates and/or rewords the standard objectives. That is, in the light industrial zone Council has included zone objectives:

> [t]o encourage appropriate forms of industrial development which will contribute to the economic and employment growth of Wollongong.
>
> [t]o facilitate and encourage suitable types of light industrial, high technology services and manufacturing activities.
>
> [t]o ensure that development, which interferes unreasonably with the amenity of the area, is not carried out.

These objectives appear to have the same intent as the standard objectives which state that the zone is

> [t]o provide a wide range of light industrial, warehouse and related land uses.
>
> [t]o encourage employment opportunities and to support the viability of centres.
>
> [t]o minimise any adverse effect of industry on other land uses.

Council added zone objectives in the light industrial zones should be deleted because they are essentially a restatement of the Standard Instrument zone objectives.

In particular we note that each new development proposal in the light industrial zone will be measured against each zone objective. The Standard Instrument merely says that the zone is to "provide for" light industrial, warehouse and related land uses. One of the council's zone objectives says that the zone is to "encourage" light industrial, high technology services and manufacturing activities.

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.

By encouraging "light industrial, high technology services and manufacturing activities" the council appears to be attempting to narrow the range of uses to take place within this zone. In particular, the council appears to be *discouraging*:

- animal boarding or training establishments;
- child care centres;
- community facilities;
- freight transport facilities;
- industrial retail outlets
- landscape and garden
- neighbourhood shops;
- recreation facilities (indoor);
- service stations
- take away food and drink premises;
- timber and building supplies;

- vehicle sales or hire premises;
- veterinary hospitals; and
- warehouses or distribution centres.

All of these uses are permitted in the light industrial zone, but are arguably not "light industrial, high technology services and manufacturing activities".

The aims for the light industrial zone should not attempt to single out certain permitted uses for particular 'encouragement'.

6. <u>Unnecessary additional zone objective to environmental living zone</u>

The Council has inserted an additional objective to its environmental living zone that also appears to add nothing to the standard objectives. As is the case with the light industrial zone, the objective added by Council simply restates and/or rewords the standard objectives. That is, in the light industrial zone Council has included the zone objective:

> [t]o encourage development that is designed, sited and managed to avoid or mitigate any adverse environmental impact on any significant vegetation community including the ecological buffer required to protect that community.

This objective appears to have the same intent as the standard objectives which state that the zone is

> [t]o provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
>
> [t]o ensure that residential development does not have an adverse effect on those values.

In interpreting statutory documents (such as this plan) the judiciary will assume that additional words have been inserted for a reason. The courts will prefer an interpretation that gives a phrase a different meaning from an apparently similar provision in the same document. In this case the Court is likely to note the difference between the Council's objective which precludes *any* adverse environmental impact versus the Standard Instrument's provisions which say there should not be *an* adverse effect. The latter language is more open to accommodating minor, but inconsequential impacts, while the former language appears to preclude even the slightest impact.

Council added zone objectives should be deleted because they are essentially a restatement of the Standard Instrument zone objectives and the wording of the Standard Instrument objective is superior.

7. <u>The plan should not "hold back" on FSR</u>

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 (FSRs).

According to the plan floor space ratios are to be imposed to:

> (a) to provide an appropriate correlation between the size of a site and the extent of any development on that site;
>
> (b) 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;
>
> (c) to ensure buildings are compatible with the bulk and scale of the existing and future character of the locality.[9]

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 depending on the usage of the building or the process followed to finalise the design of the building.

The plan itself provides evidence that the Council has been "holding back" FSR. That's because the plan welcomes certain kinds of development at high floor space ratios, but penalises other

[9] Clause 4.4(1).

development with lower floor space ratios. We submit there is no good reason for these different development types to be treated differently given the objectives for floor space ration stated above.

Use-based floor space ratios

Clause 4.4B introduces specific FSR for Wollongong City Centre (commercial core). In one instance it legitimately seeks to match FSR with site area and street frontage. This is good practice. That is, such a control recognises that a building of greater proportions can be appropriately accommodated on a larger site. However, this same clause also seeks to match FSR with the usage of the building.

For instance, a building used only for residential purposes (as defined by the plan) is assigned a maximum FSR of 3.5:1 on a site of 2,000 square metres or greater with a street frontage of 20 metres or greater. However, if a building is used for purposes other than residential, on the exact same site, it may achieve a FSR of up to 6:1. This approach does not make sense. The plan itself says FSR is about achieving a building of appropriate size and scale; it has little to do with actual building usage where there is no difference in the intensity of use. There can be no suggestion that residential development is a more intense use of a site than commercial office space. Residential in a city centre, close to public transport, will not generate any more motor vehicle movements than equivalent commercial office space and may even generate less.

Furthermore, while the draft LEP does not prohibit all forms of residential development within the Wollongong city centre, it prohibits residential flat buildings and also imposes significant floor space penalties on development containing a mix of uses with residential.

This will severely impact the feasibility of residential development in this location and will potentially stall investment and urban renewal. This level of regulation and prescription of uses is unnecessary and must be avoided. For instance, if market conditions mean that non-residential development is not viable at a particular point in time, FSR penalties may prevent urban development from proceeding in a given area.

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

We urge the Council to consider and review the report *Liveable Centres* prepared by urban design experts at Roberts Day (enclosed with this submission. The report is critical of such provisions.

This discriminatory treatment of use by way of selective application of FSR does not reflect sound planning principles. Good planning requires that the planning system should concentrate on:

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

rather than trying to regulate the uses on different parcels of land.[10]

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

Mandating a design competition

Clause 7.5(5) introduces a blanket requirement for an architectural design competition for every development equal to or greater than 35 metres in height or having a capital value of more that $1,000,000 on a key site. These requirements are onerous and will act to stifle rather than stimulate urban renewal. A 35 metre building is a relatively modest regional centre development and a capital value of $1,000,000 for the development of a key site is minor. To consider the requirement for a design competition for such development simply introduces an additional and costly step in the development process.

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

We are alarmed at the notion that a "bonus" in FSR and height may be offered only to those who include a design competition into their application process. This "bonus" is nothing more than the application of an appropriate density and height for the zone. There is no real bonus because the Council is simply setting its base FSR and height lower with the expectation that the proponent will seek the additional 10 per cent by way of design competition. Essentially, Council is saying that if you accept a more costly, risky and complex application process you may get some additional development capacity in return.

There is no actual need for a design competition because a registered architect would be used for the developments covered by this clause and the market rewards good design.

Clauses referring to design competitions should be deleted from the draft LEP.

The only way that Council is to encourage urban renewal, including the redevelopment of infill sites, through this plan is to set attractive FSR and height controls for all development proposals. **Should Council wish to encourage excellence in design, it should consider the removal of restrictive FSR limitations and dubious bonus incentives and replace these with flexible building envelopes, formulated in accordance with best practice in urban design.** Designers would then be free to work within these general constraints to deliver the most appropriate building for the locality. This approach encourages innovation and more readily delivers "excellent" buildings than prescription. **If design standards to the level provided in Part 7 of the plan are thought to be necessary, these standards might be included in the development control plan, but <u>not</u> in a local environmental plan.**

Social housing floor space ratio

Under clause 4.4A Council proposes an additional 10 per cent floor space allocation for social housing providers. The Urban Taskforce acknowledges the need for social housing. This form of housing plays an important role in helping the homeless or those at risk of homelessness. Nevertheless, density bonuses are an inappropriate method of signalling support for social housing.

The philosophy implicit in this clause is that an apartment building of a particular bulk and scale is more acceptable to the planning system if it is developed and/or operated by a social housing provider. However, the explicit objectives for the clause do not disclose this policy. They make it clear that floor space controls are a means of controlling the density of a locality and to ensure that the bulk and scale of buildings is appropriate to the streetscape. A bonus scheme like this utterly undermines this rationale.

This bonus scheme is likely to <u>reduce</u> the amount of housing available because housing built for private renters or owner occupiers cannot be built to the same scale as social housing. This means that less housing is built overall. A reduction is the housing supply means higher prices for home buyers and renters who are not social housing tenants.

If a locality can accommodate additional floor space, then these design and density controls should be applied equally to all development proposals regardless of applicant.

Floor space ratios should not be linked to the nature of the development applicant, or whether the housing is social housing. This means clause 4.4A should be deleted and <u>all</u> floor proposed floor space ratios should be increased by 10 per cent.

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

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

Clause 6.1 should be deleted.

10. Zone and centres objectives create a multi-layered and confusing overlay

Clause 7.1 clause 6.14 apply an additional set of mandatory objectives to be considered in the development assessment process for areas that form part of the Wollongong city centre and Wollongong University Innovation campus respectively.

These objectives are above and beyond the objectives already specified for the particular zones in these areas. Effectively, this re-creates custom-purpose zones - a practice that was supposed to be eliminated with the adoption of the Standard Instrument.

Furthermore, the objectives in clauses 7.1 and 6.14 have a far more rigid and binding status than zone objectives under the Standard Instrument. Under the Standard Instrument, consent authorities merely need to "have regard" to zone objectives.[11] Under clause 7.1(2) and clause 6.14(3) the consent authority must consider whether the development is "consistent" with the zone objectives. The change in language creates a different legal obligation. Precedents set by courts in interpreting to the application of zone objectives for the Standard Instrument will not be applicable in relation to development in the Wollongong city centre or the innovation campus with regards to the objectives set out in clause 7.1(2) and clause 6.14(2).

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

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

These clauses contain provisions which may lead to otherwise compliant development proposals being refused approval, on the basis that they are inconsistent/antipathetic to the land objectives. Some examples follow.

Multifunctional and innovative centre

Clause 7.1(1)(b) says that development in the Wollongong city centre must

> strengthen the regional position of the Wollongong city centre as a multifunctional and innovative centre that encourages employment and economic growth

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 will only be supported if tenants or future owners are, in the opinion of the consent authority, "innovative". It's also possible that development will be refused because, in the opinion of a consent authority, the tenants will not employ enough people or will not contribute sufficiently to economic growth.

Vitality, identity and diversity

Clause 7.1(1)(c) says that development in the Wollongong city centre must

> protect and enhance the vitality, identity and diversity of the Wollongong city centre ...

This means that development that satisfies all of the rules established for urban form under the plan may still be denied development approval because, in the opinion of a public official, the development does not contribute to the "diversity" of the city centre. That might arise, for instance, if a public official forms the subjective view that there is "too much" commercial office space in the city centre, and the approval of any additional office space will mean that there insufficient diversity. This kind of subjective decision-making is impossible to predict when making investment decisions (such as buying property), and undermines the effectiveness of the plan.

Building design excellence

Clause 7.1(1)(e) says that development must

> facilitate the development of building design excellence appropriate to a regional city ...

Thanks to clause 7.1(2) this is an additional control on top of the design provisions set out in clause 7.5. The need for two separate provisions is unclear, and in any event, the issue of design

[11] Clause 2.3(2).

requirement, if necessary should be dealt with the development control plan, not the local environmental plan.

It is worth noting that clause 7.1(1)(e) sets out a different design standard than clause 7.5. The former seeks design that is "*appropriate* to a regional city (emphasis added)". A "regional city" can be defined as the term is widely used in current government policy including the Metropolitan Strategy and Illawarra Regional Strategy. Such policy places Wollongong an equal footing with other cities such as Parramatta, Liverpool and Penrith. However, in clause 7.5 it is stated that the development is

> to deliver the *highest* standard of architectural and urban design.

Therefore, not only does development in the Wollongong city centre need to demonstrate "design excellence appropriate to a regional city", it must facilitate the delivery of the "highest" standard of architectural and urban design. The two may not be the same. For example, the standard of design used for an iconic project in the heat of Sydney central business district would not be suitable for every project in Sydney's central business district or every project Parramatta or every project in Wollongong. Some projects will be designed to the highest possible standard some will merely be 'excellent' or even 'good'. This is true in Wollongong, just as much as it is true of Sydney.

The concept of 'design excellence' is highly subjective. The fact that the statutory instrument sets out two different standards is not helpful, but is a good pointer to the fact that this issue should be dealt with by a subsidiary policy document (if it all) rather than the statutory plan.

Ensuring sustainable social, economic and environmental outcomes

Clause 7.1(1)(g) says that development must

> encourage responsible management, development and conservation of natural and man-made resources and to ensure that the Wollongong city centre achieves sustainable social, economic and environmental outcomes ...

A clause like this is inherently subjective. How it is applied will be heavily influenced by the world view of the public officials who are charged with administering it. It is likely to be interpreted differently in the hands of different decision-makers.

For example, some people are of the opinion that the key to achieving and sustaining environmental and social outcomes is reducing car dependency. If the clause is interpreted in this way a development that provides for car parking in-line with clause 7.6 may nonetheless be refused on the grounds that it will provides for more car parking that the premises it replaces and increases the city centre's car dependency. Some will argue that such an outcome prevents the city centre achieving "sustainable social, economic and environmental outcomes".

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

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

- older people;
- children;
- people with disabilities

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

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

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

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

Car parking is used as an example, but the broad requirement that every development must *ensure* that Wollongong meets subjective outcomes places too much regulatory uncertainty onto the private sector.

Clauses 7.1 and 6.14 should be deleted – to the extent that any matters detail with by those clauses is essential, they should be dealt with in a development control plan.

11. <u>Increased red tape when there are minor changes in use for shops and commercial premises</u>

There is no reason why a change of use for non-food retail premises to food retail premises cannot be complying development under the plan.

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

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

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

12. <u>Unreasonable rules related to the erection of dwellings in rural and environmental zones should capable of being waived</u>

Clause 4.6 is intended to replace the *State Environmental Planning Policy No 1— Development Standards*. It permits a consent authority, with the concurrence of the Director-General of the Department of Planning, to give an approval that departs from development standards.

This provision is designed to apply in circumstances where:

- compliance with the development standard is unreasonable or unnecessary; and
- that there are sufficient environmental planning grounds to justify contravening the development standard.

Inexplicably the plan proposed to exclude clause 4.2A from the application of clause 4.6. Clause 4.2A deals with the erection of dwellings in rural and environmental zones. It is not clear why a consent authority should be prevented from waiving a development standard imposed by clause 4.2A if it is unreasonable/unnecessary and there are good planning grounds to waive the requirement.

Clause 4.6 (which replaces SEPP 1) should apply to clause 4.2A as it does to other clauses.

13. <u>Rural landscape zone is not a conservation zone</u>

Council has inserted a zone objective in relation to the "rural landscape zone" saying that the zone is

> [t]o encourage the retention, management or restoration of native vegetation.

However, the rural landscape zone is a zone that is to encourage and facilitate the location of primary industries. By nature, primary industry (agriculture) uses alternative landscapes creating "new" rural landscapes that this zone seeks to "maintain". Furthermore, the standard zone objective

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

reinforces the intention of this zone, that being, to provide for agriculture. The restoration of "native" vegetation is at odds with the intention of the zone and does not fit well with the standard zone objectives.

The zone objective saying the rural landscape zone is to restore native vegetation should be deleted.

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

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

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Encl.

Urban Taskforce
AUSTRALIA

Draft Wollongong Local Environment Plan 2009

Summary of Urban Taskforce's Recommendations

1. The aim of the plan set out in 2(e) should be replaced with "to promote the ecologically sustainable development Wollongong".
2. The aims in clause 2(c) and 2(c) be amended by deleting reference to the "constraints of the land" and the "capacity of the land".
3. The plan aim in clause 2(d) should be re-written to say that the plan aims to maintain and, where practicable, improve the quality of life and social well being of the community, and that the plan provides for both the present and future members of, and visitors to, the community.
4. The neighbourhood centre, local centre, mixed-use zones and commercial core zones should permit residential development, including multi-dwelling housing and residential flats, as well as shop top housing.
5. There should be no requirement for mixed-use residential developments within the commercial core to be individually assessed for their proximity to transport, employment, retail, commercial and service facilities, nor should they be assessed for their "vitality".
6. The objectives to the mixed-use zone should not refer to supporting nearby or adjacent commercial centres or adversely impacting on the viability of those centres.
7. There should be no specific limit on the size of retail premises in the mixed-use zone, given that buildings of much larger bulk and scale are likely to be permitted in the same zone.
8. "Retail premises" should be generally permitted uses in enterprise corridor zones as per the zone objectives.
9. "Retail premises" should be generally permitted uses in the business park zone.
10. "Retail premises should be a permitted use in the industrial zones. In the event that this is not accepted, "bulky goods" should be a permitted use in such zones.
11. Council added zone objectives in the light industrial zones should be deleted because they are essentially a restatement of the Standard Instrument zone objectives.
12. The aims for the light industrial zone should not attempt to single out certain permitted uses for particular 'encouragement'.
13. Council added zone objectives should be deleted because they are essentially a restatement of the Standard Instrument zone objectives and the wording of the Standard Instrument objective is superior.
14. We recommend that the lower floor space ratios for each land use type be raised to the maximum.
15. Clauses referring to design competitions should be deleted from the draft LEP.
16. Should Council wish to encourage excellence in design, it should consider the removal of restrictive FSR limitations and dubious bonus incentives and replace these with flexible building envelopes, formulated in accordance with best practice in urban design.
17. Clauses 7.1 and 6.14 should be deleted – to the extent that any matters detail with by those clauses is essential, they should be dealt with in a development control plan.
18. Floor space ratios should not be linked to the nature of the development applicant, or whether the housing is social housing. This means clause 4.4A should be deleted and all floor proposed floor space ratios should be increased by 10 per cent.
19. Clause 6.1 should be deleted.

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20. Clauses 7.1 and 6.14 should be deleted – to the extent that any matters detail with by those clauses is essential, it should be provided in a development control plan.
21. A change of use for non-food retail premises to food retail premises should be complying development.
22. Clause 4.6 (which replaces SEPP 1) should apply to clause 4.2A as it does to other clauses.
23. The zone objective saying the rural landscape zone is to restore native vegetation should be deleted.