Urban Taskforce
AUSTRALIA

14 April 2009

Ms Lyn Russell
General Manager
Wagga Wagga City Council
P O Box 20
Wagga Wagga NSW 2650

By e-mail: council@wagga.nsw.gov.au

Dear Ms Russell

Re: Draft Wagga Wagga Local Environmental Plan 2008

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 Wagga Wagga 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 wording of the plan's aims needs to be improved

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

The wording of the aims is of legal significance. Section 25(3) of the *Environmental Planning and Assessment Act 1979* ("the Act") says that when a provision in an environmental planning instrument (such as a state environmental planning policy) is genuinely capable of different interpretations, the interpretation which best meets the aims stated in the plan is preferred.[1] For this reason, it is important that the aims of a plan are well written and understandable.

Unfortunately in some instances the wording used in the plan is subjective. We ask the Council to use expressions that already exist in law where there are well-established legal interpretations and to refrain from the use of subjective terms.

Clause 1.2(2)(a) and (c) of the plan could prove to be problematic. These clauses seek to "ensure that choices and opportunities ....." and "ensure the sustainability of the natural attributes of Wagga Wagga....."

'Ensuring' choices and sustainability are clearly desirable, but there is likely to be profound disagreement as to what these phrases actually mean. These ideas sound good, but they are entirely subjective. It is very difficult to guarantee (as per the dictionary definition of "ensure") that at all times there will be "choices and opportunities...." or "sustainability of the natural attributes..."

The plans' aims should not seek to "ensure" choice or sustainability.

Council's aim 1.2(2)(b) is sufficient. This aim uses words and expressions that are well understood and accepted at law and its use in a LEP is encouraged. In this regard, Council's aim,

> to promote development that is consistent with the principles of ecologically sustainable development ...

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

means that the plan will require the elements of "ecologically sustainable development" be considered. The concept of "ecologically sustainable development" already requires:

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

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

Therefore there is no need for aims 1.2(2)(a) and (c) as they describe elements of ecologically sustainable development.

The aims set out in 1.2(2)(a) and (c) should be deleted as Council's aim 1.2(2)(b) is sufficient.

There is also an aim for the plan that says the plan is

> to give effect to the desired outcomes, strategic principles, policies and actions contained in the Council's adopted strategic planning documents ...

This aim attempts to elevate the status of Council's strategic planning documents by directly invoking them in the aims of the plan. Frankly, this appears to be a back-door attempt to give implicit statutory effect to provisions in strategic planning documents that have not been expressly incorporated into the plan itself.

It is unfair on members of the public to confer such legislative status to an unknown number of documents that are not as readily accessible as a statutory plan.

As Council's strategic planning documents have not necessarily been endorsed by the NSW Department of Planning, or the Minister, and are not as accessible or identifiable as a statutory plan, it is inappropriate for the plan to invoke them in its aims.

2. <u>The land use table contains subjective terminology</u>

Council has added a number of additional zone objectives to its land use zones that are subjective and difficult to define. As detailed below, subjective terms should not appear in a statutory document because they mean different things in the hands of different decision-makers. This is a recipe for confusion, legal disputation and inconsistency.

Rural zones

Council has inserted objectives that refer to fostering "sustainable rural community lifestyles" and the maintenance of "rural landscape character of the land". These terms are not easily defined and will certainly create confusion in interpretation and use.

Furthermore, it is unclear how a local environmental plan is to "foster…..rural community lifestyles". If this means that Council will only permit rural developments in its rural zones, then this objective adds nothing to the existing standard objectives for rural zones.

A similar argument can be made for the Council inserted zone objective to the rural village zone. Council's objective refers to the "rural village character of the land". The rural village character is subjective and will give rise to disputation. However, in any case this objective is

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

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

not required as the standard zone objective already provides for land uses that are associated with a rural village.

The permitted and prohibited uses table also reinforces land uses to be encouraged, thereby establishing the "character" of the area.

The first and second Council inserted zone objectives to the primary production zone and first Council inserted zone objective to rural village zone RU5 should be deleted as they contain subjective terms and add nothing to the standard zone objectives**.**

Medium density residential zone

Council has inserted an additional objective in the medium density residential zone:

> To ensure that medium density residential environments are of a high visual quality in their presentation to public streets and spaces.

The phrase "high visual quality" sounds good, but it is entirely subjective. Such a phrase should never appear in a statutory plan unless it is given a specific meaning. If there is a desire to prohibit a particular class of building then the plan should clearly say so. Such rules allow developers to make acquisition decisions and prepare development applications with some confidence about an outcome.

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

Subjective terminology such as "high visual quality" should be removed from the local environment plan. If design standards are thought to be necessary by Council, they should be included in the development control plan.

Commercial core zone

Council has again added zone objective that is unnecessary and/or confusing. The zone provides that it is

> [t]o ensure the maintenance and improvement of the historic, architectural and aesthetic character of the commercial core area.

There is nothing in the plan that identifies the "historic, architectural and aesthetic character" of the zone. This statutory requirement will leave it up to the consent authority to form its own opinion as to the "historic, architectural and aesthetic character" of the commercial core on an ad-hoc basis. This is an inappropriate provision for a statutory plan. Such matters, if necessary, are best dealt with by way of a development control plan alone.

The first Council inserted zone objective in the commercial core zone that refers to an undefined reference to the "historic, architectural and aesthetic character" of the zone should be deleted.

3. Prohibition on retail premises in industrial zones

Council's industrial zones do not permit retail premises, bulky goods premises or business premises. Although the Sydney Metropolitan Strategy does not apply to Wagga Wagga, 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.[4] There was also a promise of a new approach to reinvigorate employment lands, including flexible zonings for industrial and commercial activities.[5]

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

[4] Metropolitan Strategy – Supporting Information 105, B4.1.2.
[5] 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 and business premises should be a permitted use in the industrial zones. In the event that this is not acceptable, at very least bulky goods premises should be permitted in such zones.

4. Inappropriate objective in the height clause

In the building height clause, clause 4.3(1)(c) states that an objective of the clause is

> to encourage mixed-use development with residential components that have high residential amenity and active street frontages ...

In some contexts this may be a desirable objective, however, it has no role in the height clause. This clause sets out heights of buildings and does not regulate how the buildings are to be used.

Clause 4.3(1)(c) should be deleted.

5. Unreasonable rules should be capable of being waived

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 clauses 6.1, 6.2 and 6.3 from the application of clause 4.6.[6]

Clause 6.1 deals with arrangements for designated State public infrastructure. Clause 6.2 deals with public utility infrastructure. Clause 6.3 relates to a development control plan. It is not clear why a consent authority should be prevented from waiving a development standard imposed by clauses 6.1, 6.2 and 6.3 if it is unreasonable/unnecessary and there are good planning grounds to waive the requirement. Only development standards can be set aside under clause 4.6 – provisions of clause 4.1 do not affect provisions of clauses 6.1 to 6.3 that deal with matters other than development standards.

Clause 4.6 (which replaces SEPP 1) should apply to clauses 6.1, 6.2 and 6.3 as it does to other clauses (and as SEPP 1 would, were it to remain in force).

Clause 6.4 states that any provision in part 6 prevails over any other provision of the plan to the extent of any inconsistency. This could have unintended consequences, including removing the application of clause 4.6 form clause 6.5 (as well as 6.1 to 6.3).

Clause 6.4 is unnecessary and could have unforeseen consequences. It should be deleted.

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

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. The logic behind this is not apparent.

Food premises are already subject to control under the *Australian New Zealand Food Standards Code* and AS 4674—2004 Design, construction and fit-out of food premises. These documents include minimum construction standards for food premises. Council should include compliance with the Food Standards Code and AS 4674—2004 as a requirement of complying development for food premises and hence be 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, the

[6] Clause 4.6(8A).

Australian New Zealand Food Standards Code and AS 4674—2004 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.

7. Defacto state infrastructure contributions

Since October 2007 the NSW Government has been progressively introducing a new defacto state infrastructure contribution regime outside of the growth centres.[7] 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.

An example of this approach is set out in clause 6.1. This clause 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 environment 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 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.

In the absence of government action on this point, **we request that clause 6.1 be amended to incorporate the Act's safeguards (limited as they are) against arbitrary levies.**

This clause is particularly worrying when read in conjunction with the plan aim in clause 1.2(2)(e) which says the plan is

> to co-ordinate development with the provision of public infrastructure and services.

This aim appears to be suggesting that developers will not only pay for infrastructure related to their own development, but also infrastructure that will be needed for future development carried out by others. That cuts across the whole concept of "nexus", which links the payments made by developers to the needs created by their particular development.

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[7] 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 Environmental Plan 2008* cl 6.1.

8. Special clause on public utility infrastructure duplicates inherent provisions of the Act

Clause 6.2 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 6.2 should be deleted from the plan.

9. Long list of prohibited uses will have bizarre implications

This plan contains long lists of prohibited uses in the land use table. This is of serious concern. A use does not need to be named in the prohibited use list in order to be banned in a zone. For example, in the land use table set out in the *Liverpool Local Environmental Plan 2008* it merely stated that the prohibited development is

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

There is no need to expressly prepare a long list banning everything. In contrast, in the medium density residential zone, everything from "air transport facilities" through to "wholesale supplies" – that's 60 separate land uses - are named for prohibition in an extensive list. The latter approach unnecessarily complicates the document. The land uses table is easier to understand if there is not a long list of prohibited uses.

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

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

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

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

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

Even though an office that was part of a child care centre would normally fall into the definition of a childcare centre because its purpose was for the child care centre,[8] the inclusion of an office as a prohibited use means that a child care centre built in the medium density zone would not be able to have an office.

Similarly, while the light industrial zone lists "warehouse or distribution centres" as permissible with consent, it lists "bulky goods premises" as a prohibited use. Bulky goods premises are defined to mean a

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

Even though premises from which wholesale sales were made would normally fall into the definition of a "warehouse or distribution centre" the inclusion of "bulky goods premises" as a prohibited use, means that any premises that sold bulk goods, by wholesale, would be prohibited in the light industrial zone.

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

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

The long prohibited uses lists contained in the land use table should be removed. Instead the drafting approach adopted for the *Liverpool Local Environment Plan 2008* should be adopted in this respect.

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

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

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Urban Taskforce
AUSTRALIA

Draft Wagga Wagga Local Environment Plan 2008

Summary of Urban Taskforce's Recommendations

1. The plans' aims should not seek to "ensure" choice or sustainability.
2. The aims set out in 1.2(2)(a) and (c) should be deleted as Council's aim 1.2(2)(b) is sufficient.
3. As Council's strategic planning documents have not necessarily been endorsed by the NSW Department of Planning, or it's Minister, and are not as accessible or identifiable as a statutory plan, it is inappropriate for the plan to invoke them in its aims. T
4. he first and second Council inserted zone objectives to the primary production zone and first Council inserted zone objective to rural village zone RU5 should be deleted as they contain subjective terms and add nothing to the standard zone objectives.
5. Subjective terminology such as "high visual quality" should be removed from the local environment plan. If design standards are thought to be necessary by Council, they should be included in the development control plan.
6. The first Council inserted zone objective in the commercial core zone that refers to an undefined reference to the "historic, architectural and aesthetic character" of the zone should be deleted.
7. Retail premises and business premises should be a permitted use in the industrial zones. In the event that this is not acceptable, at very least bulk goods premises should be permitted in such zones.
8. Clause 4.3(1)(c) should be deleted.
9. Clause 4.6 (which replaces SEPP 1) should apply to clauses 6.1, 6.2 and 6.3 as it does to other clauses (and as SEPP 1 would, were it to remain in force).
10. Clause 6.4 is unnecessary and could have unforeseen consequences. It should be deleted.
11. A change of use for non-food retail premises to food retail premises should be complying development.
12. In the absence of government action on this point, we request that the clause 6.1 be amended to incorporate the Act's safeguards (limited as they are) against arbitrary levies.
13. Clause 6.2 should be deleted from the plan.
14. The long prohibited uses lists contained in the land use table should be removed. Instead the drafting approach adopted for the *Liverpool Local Environment Plan 2008* should be adopted in this respect.

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