Urban Taskforce
AUSTRALIA

15 April 2009

Mr Ian Reynolds
Acting Deputy Director-General (Land Release and Strategy)
NSW Department of Planning
PO Box 1457
PARRAMATTA NSW 2124

E-mail: community@planning.nsw.gov.au

Dear Mr Reynolds,

Re: Exhibition of Riverstone West Precinct Planning Package

The Urban Taskforce represents Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with government and the community.

The Urban Taskforce has reviewed the exhibited *Riverstone West Precinct Planning Package* and considers the intent of the plan to be commendable. That is, there is a desperate need for employment generating development in the North West sector and if the plan was to be amended to reflect our recommendations, this plan has the potential to deliver development and employment opportunities and attract regional investment into this region.

Our review has focused on the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* (amendment 7) and has identified some issues meriting further consideration.

Our concerns are generally outlined below and **attachment 1 provides a summary of the Urban Taskforce recommendations**.

1. The wording of the precinct 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 precinct plan are vague and subjective. We ask the Government to use expressions that already exist in law where there are well-established legal interpretations.

Clause 1.2(a) of the plan could prove to be problematic. This clause refers to

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

"[Q]uality environment and good design outcomes" are clearly desirable, but there is likely to be profound disagreement as to what the phrase means in different contexts. For example, some people may interpret a "quality environment" to be one that provides for less density, while others might argue that a "quality environment" is one that provides more choice in employment generating activities.

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

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

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

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

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

Clause 1.2(e) refers to "sustainable development". This phrase is neither defined by the plan or by the Act. Words and expressions that are well understood and accepted at law should be used in a legal document. The *Environmental Planning and Assessment Act 1979* ("the Act") uses the phrase "ecologically sustainable development". It is defined to mean all of the things set out in section 6(2) of the *Protection of the Environment Administration Act 1991*. Section 11 of the *Interpretation Act 1987* makes clear that when the phrase "ecologically sustainable development" is used in a local environment plan, it has the same meaning as in the Act.

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

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

Clause 1.9(1) lacks coherence. It says that the precinct plan is

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

This precinct plan is contained in a state environmental planning policy (SEPP), not a local environment plan. The drafting of this clause has been lifted from the Standard Instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006*. While the drafting is appropriate for a local environmental plan, it is less relevant in a state environmental planning policy. The wording of 1.9(1) appears to suggest that SEPPs override the precinct plans; this contravenes the express text of clause 1.9(3). This clause says the precinct plans will override any other SEPP. This means that *State Environmental Planning Policy (Major Projects) 2005*, *State Environmental Planning Policy No 22—Shops and Commercial Premises* (SEPP 22) and other such SEPPs will be subordinate to any express provision contained in these precinct plans.

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

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

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

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

State Environmental Planning Policy No 22—Shops and Commercial Premises, State Environmental Planning Policy (Major Projects) 2005 and possibly other state environmental planning policies (SEPPs) should still apply to the land covered by the precinct plans. This means **a new clause should be inserted which makes it clear that such SEPPs override the precinct plans in the same way that they override a local environmental plan.** The existing clauses 1.9(1) and clause 1.9(3) should be replaced and/or re-drafted.

3. <u>Retail should not be restricted in business parks</u>

The business park zone has a zone objective saying that the 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 ...

This zone objective essentially limits the potential for retail development to facilities that sell daily needs such as newspapers, soft drinks, bottled water, milks and the like. Retailers of items that are needed less frequently, such as videos/DVDs, toys and clothes are unlikely to be approved.

Furthermore, bulky goods premises are expressly nominated as a prohibited use. Bulky goods premises are defined as

> a building or place used primarily for the sale by retail, wholesale or auction of (or for the hire or display of) bulky goods, being goods that are of such size or weight as to require:
>
> (a) a large area for handling, display or storage, or
>
> (b) direct vehicular access to the site of the building or place by members of the public for the purpose of loading or unloading such goods into or from their vehicles after purchase or hire,
>
> but does not include a building or place used for the sale of foodstuffs or clothing unless their sale is ancillary to the sale or hire or display of bulky goods.

This means a shop is prohibited outright (quite separately from the zone objective) if it is selling large items, such as plants, office furniture, cases of soft drink, etc. This ban applies even if the bulky goods retailer would satisfy the day-to-day needs of workers in the area and/or meet the needs of local businesses.

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Floor space controls provided pursuant to clause 4.5A limit gross floor area to 500m^2, which makes it difficult for even a moderate scale supermarket to be established. Furthermore, total floor area used for shops in the zone must not exceed 3,500m^2. What the zone objective and floor space limitations really mean is that significant retail uses will not be encouraged. This is to the detriment of the local workforce and the future residents of Riverstone. These provisions are contrary to the provisions of the *Draft Centres Policy* released on 10 April 2009 (page 19, "Development Controls").

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.

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. As mentioned above, 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.

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 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 re-inforcing old-style separations of land use that force people to drive further.

"Retail premises", including bulky goods, should not be limited and be generally permitted uses in the business park zone. Neighbourhood shops, and other uses, should not be limited in floor space area by the precinct plan. The floor space permitted should be determined as part of the merit assessment process.

4. <u>Wider range of retail premises, including bulky goods, should be permitted in the industrial zones</u>

Industrial zones also prohibit bulky goods retailing, further limits retail premises and bans business premises all together. This means that bulky goods retail is not permitted anywhere in Riverstone West and that retail activity will be kept to a minor nature.

However, the Metropolitan Strategy stated that retailing in industrial areas should be permitted when it has operating requirements akin to industrial uses.[2]

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

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

Retail premises should be permitted in industrial zones as per the Metropolitan Strategy. In the event that retail premises are not made generally permissible, bulky goods premises, at the very least, should be permissible.

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

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

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

Clause 6.1 should be deleted from the precinct plan.

6. <u>The SEPP must not hold back on FSR</u>

A bonus can act as an incentive to take on care and control of land, *provided* it is a real bonus. What the Urban Taskforce finds most objectionable with so called bonus schemes is the notion that a "bonus" will be offered in return for a contribution or commitment to maintain land, when in fact the "bonus", when added to the base Floor Space Ratio (FSR), is often nothing more than the application of an appropriate density for the site or zone.

Our experience with density bonuses is that they are little more than a dubious means of "holding back" FSR with the express purpose of extracting additional contributions from the development industry.

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

In this instance, clause 6.4 effectively seeks a commitment to accept the obligation to care for land, land that would normally be cared for by local council. In return for accepting this liability, the developer will receive an additional FSR of 0.5:1 bringing the maximum FSR for the land zoned business park to 3.25:1. However, we would argue that the base FSR of 2.75:1 is too low in the fist place.

The Urban Taskforce is not opposed to development incentives including the ability to take up a bonus or enter into an agreement with government. The Urban Taskforce is however strongly opposed to "under-zoning" and "holding back" development opportunity in the guise of bonus policies.

The base FSR for in the business park zone should be set at least 3.0:1 with the potential for a 0.5:1 bonus in return for a commitment to maintain the nominated land in community title.

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

This precinct plan has a long list of prohibited uses in the land use table.

This is of serious concern.

A use does not need to be named in the prohibited use list in order to be banned in a zone. For example, in relation to low density residential zone in the Riverstone and Alex Avenue precinct plans the prohibited development is identified as

> [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 nearly everything. For example, in the business park zone 31 separate uses are expressly named for prohibition in an extensive list. The latter approach unnecessarily complicates the document. The land uses table is easier to understand if there is not a long list of prohibited uses.

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

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

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

Hence, while the business park zone lists a "warehouse or distribution centres" is 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 <u>wholesale</u> 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 bulky goods, by wholesale, would be prohibited in the business park zone.

The long prohibited uses lists contained in the business park, general industrial, light industrial and environmental conservation should be removed. Instead the drafting approach adopted for the low density zone in the Alex Avenue and Riverstone precinct plans should be adopted.

8. <u>The state-wide exempt and complying development code should continue to apply as a minimum</u>

Clauses 3.1 and 3.2 say that a development control plan (DCP) will set out which development is exempt and complying respectively. This departs from the approach of the Standard

Instrument, which provides that exempt and complying development should be set out in a schedule to a plan.

Conventionally a DCP is a policy instrument that carries persuasive rather than statutory force but clause 3.1 and clause 3.2 will have the effect of giving the DCP statutory force.[3] The effect of clause 1.9(2A) is that the precinct plan will override the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*. Additionally clause 3.1 allows a development control plan to override the precinct plan (in relation to determining the scope of exempt development). The net effect is that a DCP may effectively re-write the supposedly uniform exempt development provisions in the new exempt and complying development codes.

Exempt or complying development set out in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* should be exempt or complying development in the Riverstone West precinct.

It may also be appropriate for at least some of the exempt and complying provisions to be incorporated into the precinct plan itself.

8. <u>Light industrial zone should not be artificially limited to support development elsewhere</u>

The zone objective for the light industrial zone includes a provision that will limit opportunities for a competitive business environment. The objective says the zone is

> to support the viability of centres.

This 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.

We note that this provision mimics a similar provision in the Standard Instrument for light industrial zones. We also note that in a precinct plan, there is no requirement to adhere to the Standard Instrument in this respect. Indeed the draft precinct plan for Riverstone omitted this provision in relation to its light industrial zone.[4] We also remind the Department that this provision was only inserted into the Standard Instrument because it was requested by the Property Council of Australia and the Shopping Centre Council (as per the documents supplied to us via a freedom of information request).

What this objective really means is that development in the light industrial zone 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" a centre 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 goods and services in an attractive environment.

There should be no reference to supporting the viability of centres in the zone objectives for the light industrial zone.

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

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[3] See the comments of Priestley JA in *Leichhardt Municipal Council v Minister for Planning* (1995) 87 LGERA 78.

[4] Draft *State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Amendment No 6)*.

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

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Encl.

Urban Taskforce
AUSTRALIA

Attachment 1

Exhibition of Riverstone West Precinct Planning Package

Summary of Urban Taskforce's Recommendations

1. Subjective terminology such as "quality environments" or "good design outcomes" should be removed from the precinct plan.
2. The plan's aims should not seek to "ensure" quality environments or good design outcomes.
3. The phrase "sustainable development" should be replaced with "ecologically sustainable development" to ensure that the meaning of the phrase is clear.
4. A new clause should be inserted which makes it clear that such SEPPs override the precinct plans in the same way that they override a local environmental plan. The existing clauses 1.9(1) and clause 1.9(3) should be replaced and/or re-drafted.
5. "Retail premises", including bulky goods, should not be limited and be generally permitted uses in the business park zone. Neighbourhood shops, and other uses, should not be limited in floor space area by the precinct plan.
6. Retail premises should be permitted in industrial zones as per the Metropolitan Strategy. In the event that retail premises are not made generally permissible, bulky goods should be permissible.
7. Clause 6.1 should be deleted from the precinct plan.
8. The base FSR for the business park zone should be set at least 3.0:1 with the potential for a 0.5:1 bonus in return for a commitment to maintain the nominated land in community title.
9. The long prohibited uses lists contained in the business park, general industrial, light industrial and environmental conservation should be removed.
10. Exempt or complying development set out in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* should be exempt or complying development in the Riverstone West precinct.
11. It may also be appropriate for at least some of the exempt and complying provisions to be incorporated into the precinct plan itself.
12. There should be no reference to supporting the viability of centres in the zone objectives for the light industrial zone.

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