

15 May 2009

Mr Sam Haddad  
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Dear Mr Haddad

**Re: Draft Centres Policy: Planning for Retail and Commercial Development - April 2009**

We appreciate the opportunity to comment on the above document.

We congratulate the Department for recognising that both the status-quo and the direction in the draft subregional strategies are not appropriate. However, we do not believe that the *Draft Centres Policy: Planning for Retail and Commercial Development* ("the policy") adequately addresses the social and economic needs of urban communities.

We acknowledge that elements of the document suggest a move toward greater flexibility and support greater competition between property owners and retailers. However, almost every statement in the document that signals a move in this direction is contradicted by other statements that foster anti-competitive restrictions. Taken as a whole this document confers unjustifiable market power on a small number of oligopolistic landlords (to use the words of the Productivity Commission).

If this document were to be finalised without serious revision it will entrench the current situation. In particular, key paragraphs within the document:

- introduce a new system of quota for floorspace, which will ration floorspace out amongst landlords across NSW;
- abandon the Metropolitan Strategy's equal emphasis on centres and corridors – depriving the metropolitan area of important land for commercial and retail uses;
- enshrine the obligation of planning authorities to consider the impact of new development proposals on existing businesses;
- attempt to mitigate the market risk for developments in favoured locations – strengthening existing oligopolies; and
- further entrench the practice of prohibiting development for reasons other than the local impacts of the development.

We are aware that the Department of Planning has asserted that the policy does not do any of the above. Nonetheless a careful study of the document leads us to conclude that this document, as drafted, will be harmful to the NSW economy and efforts to increase competition.

In response to questions posed by the policy, we provide the answers set out below.

**1. Are these the right principles to guide retail and commercial development?**

***Principle 1: Retail and commercial activity should be located in centres.***

This principle is clearly at odds with the Metropolitan Strategy.

The Metropolitan Strategy envisaged concentrated commercial, retail and residential development across the centres and corridors of Sydney. For example:

- Part B<sup>1</sup> of the full Metropolitan Strategy is actually titled the *Centres and Corridors Strategy for Sydney*.<sup>2</sup> The decision to title the policy exhibited in April 2009 as a "Draft Centres Policy" focuses on "centres", at the expense of "corridors".
- The Metropolitan Strategy's *Centres and Corridors Strategy for Sydney* articulates a "vision for centres", but immediately alongside this vision, with equal prominence, is a "vision for corridors". The *Draft Centres Policy* clearly relegates *corridors* to an afterthought, even though they enjoy equal prominence with *centres* in the Metropolitan Strategy.<sup>3</sup>
- The Metropolitan Strategy's "vision for corridors" states that  
Economic corridors will play a key role in the metropolitan and national economy, renewal corridors will be the focus for *diverse and liveable communities* and enterprise corridors will provide locations for important *local employment and services*. ... Existing and new infrastructure investment in these corridors will be used more efficiently by *concentrating new development* in these areas to support their role (emphasis added).<sup>4</sup>

Principle 1, if adopted by the government, will clearly abandon the vision for corridors articulated in the Metropolitan Strategy. We note, in particular, that the retail sector is Australia's largest source of employment.

- Item B4.1 of the Metropolitan Strategy seeks to:

Concentrate retail activity in centres, business development zones and enterprise corridors.

Principle 1 speaks only of centres, and ignores business development zones and enterprise corridors. It's worth noting that the Metropolitan Strategy envisaged that business development zones would not just be adjacent to strategic centres, but also that such zones could be separate from centres, but linked to them (for example, by a corridor).<sup>5</sup>

- Item B4.1.2 of the Metropolitan Strategy contemplates retailing in industrial areas being permitted when it

is ancillary to the industrial use or has operating requirements or demonstrative offsite impacts akin to industrial uses.<sup>6</sup>

- Item B6 of the Metropolitan Strategy seeks to:

Focus development in renewal corridors to maximise infrastructure use ...<sup>7</sup>

Renewal corridors are defined in this way:

Renewal Corridors generally follow transport and may join significant nodes or centres. The area of interest may be extended up to *one kilometre* across. They are usually a focus for commercial development and contain concentrations of employment, surrounded by or with the potential for complementary, higher density residential development (emphasis added).<sup>8</sup>

It was clearly the intent of the Metropolitan Strategy that retail and commercial activity be capable of being located in broad renewal corridors. Again, Principle 1 is diametrically opposed to the Metropolitan Strategy on this point.

There are good reasons why the Metropolitan Strategy envisaged commercial and retail activity being spread across centres, enterprise corridors, economic corridors, renewal corridors and – in certain cases – industrial areas. By ignoring the potential of corridors with excellent transport infrastructure to support commercial and retail development, the Department of Planning is depriving the economy of the benefits of the efficient use of this infrastructure.

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<sup>1</sup> NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 79 -117.

<sup>2</sup> Ibid 79.

<sup>3</sup> Ibid 80-81; NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy* (2005) 20-21.

<sup>4</sup> NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 81; Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy* (2005) 2.

<sup>5</sup> NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 105.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 111.

<sup>8</sup> Ibid 300.

Additionally, there is simply not enough land, and there will never be enough land, to provide for Sydney's needs if a centres-only approach is taken. If the NSW Government walks away from the idea of supporting retail and commercial development across centres and corridors it will be handing massive and disproportionate economic power to landowners located in the few centres that are cleared for such development.

The failure of principle 1 to recognise the importance of retail development in business parks is also a serious oversight. Clearly premises such as supermarkets, cake shops and clothing stores are the kind of services that could meet the daily needs of workers in a business park. 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.

State Plan Priority E5 states that the government wants to provide "jobs closer to home" and priority E7 is to "improve the efficiency of the road network". Both are appropriate goals, but will not succeed if this statement is allowed to remain in the policy:

[A] significantly looser planning regime that resulted in Sydney's existing network of centres being reconfigured to create a more decentralised model, such as in the USA, would significantly increase car travel and its associated externalities.<sup>9</sup>

The policy asserts that this statement is supported by empirical evidence, but none is referenced or cited in the document.

The statement is dangerous for four key reasons.

Firstly, it warns of decentralising Sydney's "existing network of centres" without defining what it means. Is it referring to all centres or just strategic centres? Is it referring to bulky goods centres? Is it referring to centres identified on Department of Planning documents, or actual concentrations of current higher intensity uses (many of which have not been formally identified as "centres")?

Secondly, parts of the policy do argue for a more decentralised model of centres (although other parts of the paper argue the reverse). Creating new centres clearly means decentralising the "existing network of centres". The statement seems to be arguing for a status-quo result – in which case, why has it been necessary to release this policy at all?

Thirdly, it fails to explain how allowing commercial and retail development to occur where there are concentrations of people working or living (an approach that is discouraged or prohibited by existing policies) will increase car travel.

Fourthly, it fails to explain why trying to force additional development (and vehicular traffic) into areas where the roads are already heavily congested (and at capacity) will reduce externalities, when it clearly increases them (i.e. the costs of congestion).<sup>10</sup>

Blanket criticisms of the United States are not helpful. The urban form is different, in different parts of that country. Dismissing a proposed planning approach, on the basis that it's a US-style approach is nothing more than resorting to anti-American jingoism.

### **Recommendation 1**

Principle 1 should be re-drafted to read as follows:

Principle 1: Retail and commercial activity should be located in centres, corridors, business parks and, in some circumstances, industrial areas.

<sup>9</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 2.

<sup>10</sup> See this publication for an analysis of the external costs of congestion: Bureau of Transport and Regional Economics, *Estimating urban traffic and congestion cost trends for Australian cities Working Paper No 71* (2007).

### **Recommendation 2**

The decision to title the policy exhibited in April 2009 as a "Draft Centres Policy" is inconsistent with the approach of the Metropolitan Strategy. The whole document should be re-titled *Draft Centres and Corridors Policy: Planning for Retail and Commercial Development*.

### **Recommendation 3**

"Bulky goods premises" and "retail premises" should be permitted in industrial areas as per the Metropolitan Strategy. The general and light industrial zones should have an objective

to provide for retail premises that are either ancillary to an industrial use, have operating requirements akin to industrial uses, or demonstrable offsite impacts akin to industrial uses and bulky goods premises;

This recommendation will also require an amendment to the Standard Instrument.

### **Recommendation 4**

The paper should not oppose, as it currently does, any attempt to decentralise the existing centres hierarchy.

### **Principle 2: Centres should be able to grow and new centres form**

This simple sentence is reasonable – as long as it is extended to embrace economic, enterprise and renewal corridors. However, we strongly disagree with elements of the narrative that appears under this principle.

The narrative states that new centres should be created

when it is *not possible* to accommodate growth in existing centres, or where there is *significant market demand* ... (emphasis added)<sup>11</sup>

The policy requires planning authorities to either determine that it is "not possible" to accommodate growth or that there is a "significant market demand" before proceeding to zone land for a new centre. This appears to be an additional requirement that sits on top of the suitability criteria set out on pages 11-12 and the net community benefit test set out on pages 24-26.

The only way a planning authority can decide that it is "not possible" to accommodate growth in a centre, is for them to attempt to make commercial decisions about:

- the appropriate price for a developer to pay to acquire a site within a centre;
- the practicality of a given developer forming a joint venture with incumbent landowners;
- the level of rent that prospective tenants (e.g. retailers) can afford to pay and should pay;
- the relative ease of vehicular access that is necessary to make a given commercial or retail development viable;
- the amount of car parking required to make a new development viable;
- the volume of pedestrian foot traffic required to make a given retail development viable;
- the ability of a given location to sustain an additional retail or commercial development; and

<sup>11</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 3.

- the degree of difficulty for a new entrant in a locality to compete directly alongside incumbent players.

These are commercial decisions - different businesses will come to different commercial conclusions. It's likely that different consultants will also come up with different answers to these questions. In a free market economy, these questions are best answered by those who are risking their own capital in a new business venture. Regulators are not well placed to form a view about these issues.

Assessment of "market demand" - particularly something as ambiguous as whether or not demand is "significant" - will also vary among developers and retailers. Innovative new retail formats may, in part, create new demand not previously considered possible by incumbent players (or regulatory authorities). Formats that offer lower prices may lead to greater purchases by consumers, sustaining additional retail outlets above levels predicted in consultants' reports. Market demand is not always homogenous - it may vary depending on the product on offer. Ultimately a regulator cannot be certain that demand for generic retail will be unchanged if the quality of the retail offer is improved or varied from the norm. This is something that a person risking their own capital is, again, best placed to decide.

In any event, even if the demand for an additional outlet is not present, surely it is still in the public interest for incumbent retailers to be placed under competitive pressure? Few entrepreneurs will invest in new businesses to steal trade from incumbent players unless they believe the existing businesses are doing a poor job.

Thankfully principle 3 seems to adopt this view when it states that

[t]he market is best placed to determine the need for retail and commercial development.<sup>12</sup>

But the text under principle 2 is clearly inconsistent with principle 3. Who will decide the need for retail and commercial development? Principle 2's text states it will be the planning authority (as a prerequisite to a decision to zone for a new centre), but principle 3 states it will be the market.

The policy also states that

[w]here there is population or economic growth, centres are expected to grow and, where appropriate, new centres are expected to form.<sup>13</sup>

This text first appears to require demonstrated population growth or economic growth before a new centre is permitted to form.

What this test overlooks is that the failure to create a new centre might in itself constrain population growth or economic growth.

For example, despite excellent transport infrastructure which is not used to capacity; an area may have relatively low densities of housing. The locality concerned may, itself, not be experiencing any population growth, because its planning controls have stopped the new housing necessary to support population growth. In such a situation the local planning authority is likely to be of the view that there is no need to create a new centre, because there has been no population growth. Catch-22.

In another example, it is difficult to measure economic growth that has been prevented because of planning controls. For example, Professor Allan Fels' report *Choice Free Zone* found that the potential gains of more competition-friendly planning could add up to \$78 billion in extra income for the NSW economy and \$296 billion for the national economy. Reform could deliver 147,000 extra jobs Australia wide and 47,000 new jobs in NSW. These figures represent economic growth that has not happened because of restrictive controls. Catch-22 again.

Additionally, a new centre may be required because of demographic change, rather than population or economic growth. The Metropolitan Strategy makes the point that even if there is zero population growth we will still need an extra 190,000 new homes by 2031 in the Sydney area.

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

The text quoted above also states that new centres are expected to form only where it is “appropriate”. The requirement for appropriateness is an additional requirement on top of economic and population growth. It is far from clear what is meant by this requirement.

#### **Recommendation 5**

Principle 2 should be re-drafted to read as follows:

Principle 2: Centres and designated economic, renewal and enterprise corridors should be able to grow and new centres form and new corridors designated.

#### **Recommendation 6**

New centres and corridors will need to be recognised, and appropriately zoned, when a proposal is forthcoming (from either the public or private sector) that satisfies the suitability criteria. Planning authorities should specifically be barred from forming their own opinion as to:

- the need for the development;
- whether the development can be accommodated in existing centres; or
- whether levels of market demand necessitate a new centre or corridor to be designated.

This will need to be implemented, at the very least, by section 117 directions. Legislative changes are also desirable.

#### ***Principle 3: Market determines need for development, planning regulates location and scale***

We agree that the market should determine the need for particular products or services as first part of the principle states. We have previously documented the many arguments in favour of this proposition, so we won't repeat them here. However, the first part of this principle is contradicted by:

- the text under principle 2 (see above);
- section 8 of the policy, titled “Rezoning and the Net Community Benefit Test”; and
- other portions of the policy.

The second part of the principle – that planning regulates “location” and “scale” also opens up a huge loophole for planning authorities to escape the apparently clear words of the first part of the principle. That's because it does not say why planning should regulate location and scale. Nor does it specify what factors should be considered.

When developers and retailers argue for a new development, planning authorities rarely dispute the “need” for the development in an absolute sense. That is, they will quickly concede that retail, bulky goods premises, offices and entertainment facilities are socially necessary. The issue is almost always one of scale and location.

For example, a planning authority may concede the need for retail premises to be permissible in a location near a train station, but may believe that retail premises on a larger scale (i.e. a supermarket) is not needed *at the given location*. Typically this will be because of the planning authority's view that there is still development capacity at some higher order centre within the region for additional supermarkets. The *need* for supermarkets (in a general sense) is not disputed, nor is the *need* for retail near the given train station. Nonetheless, the planning system has formed a view that the location is not suitable for retail on the scale of a supermarket.

In this example, the planning authority should be held to be acting illegitimately because the *purpose* of denying the given locality a supermarket was not in the public interest. That's because the decision on location and scale was based on a view that the supermarket should

be located elsewhere; rather than a consideration of the impacts a supermarket would have on the urban environment at the given location.

The policy needs to distinguish between legitimate and illegitimate reasons for the planning system to dictate the location and scale of development.

*Legitimate* reasons are set out in the suitability criteria on pages 11-12 (with the exception of the last point) – covering matters such as infrastructure, pedestrian access, proximity to local labour markets, etc.

*Illegitimate* reasons are those that seek to force development in other locations in the guise of more efficiently utilising under-used infrastructure at those locations. This forced development occurs by banning - or restricting the scale - of competing development, so as to favour development in the preferred location. Such measures are contrary to the public interest for three key reasons.

Firstly, banning a development in one locality does not necessarily mean the development will proceed in the planning authority's preferred location. Often there will be sound commercial reasons why the developer has decided not to develop on the land nominated by the planning authority. This could be the price demanded by the landholder, but also could be due to factors such as the existing levels of road congestion, travel time for the likely customer base, car parking limitations, lack of pedestrian traffic, etc. Important projects, and therefore economic and social benefits, are likely to be lost to the community as a whole.

Secondly, action of this kind by a planning authority confers excessive market power on landholders in the authority's preferred location. With few or no landholders competing against each other, landholders do not need to price their land competitively to attract a development proposal. They are also more likely to let a developer walk away when they believe the planning system will prohibit the same development happening anywhere else within the local region. They will have the view that it is only a matter of time until the need for the given development (such as a supermarket) is so great, that a developer will have to pay the inflated prices the landholder is seeking. Even if this turns out to be true the community will lose out on social and economic benefits while the development is delayed. Ultimately the customers of a delayed shopping centre will also end up paying more at the cash register in order to pay back the inflated price charged by the landholder.

Thirdly, while the planning authority may feel that infrastructure is being underutilised at their preferred development location; this does not mean that infrastructure is being fully utilised at the developer's preferred location. The suitability criteria on pages 11-12 (appropriately) requires consideration of infrastructure at the location preferred by the developer.

Of particular concern is the following text under principle 3 which states the policy

[s]hould assess *development applications* on the external costs and benefits of a development proposal, not on whether there is a demand for that development (emphasis added).<sup>14</sup>

There is no mention of what approach is to be taken at a rezoning stage. In fact, the policy is entirely unclear as to how principle 3 will be implemented when zoning decisions are made.

Whatever the policy ultimately states, it will also be necessary to overcome a series of court decisions that have interpreted the existing law to have an anti-competitive effect. In the words of Leslie A Stein, a barrister and former Chairman of the Western Australian Town Planning Appeal Tribunal and Chief Counsel to the Sydney Metropolitan Strategy:

The problem is that the *Kentucky Fried Chicken* case requires that the effect competition be analysed by turning it into an amenity issue, when in fact it remains exclusively a competition issue. It is, after all, only competition that may ruin another facility, an effect that will have consequences on the overall amenity enjoyed by residents. Although it is clear that economic competition is not a relevant planning consideration even if economic considerations are made relevant by legislation, competition is nevertheless the central issue ...<sup>15</sup>

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<sup>14</sup> Ibid 4.

<sup>15</sup> L A Stein, *Principles of Planning Law* (2008) 183.

It will also be necessary to amend the standard instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* to remove the numerous zoning objectives requiring the “viability of centres” to be supported or the “economic strength” of centres to be maintained. Steps should also be taken to prevent further such provisions being inserted by local councils.<sup>16</sup> The meaning of such clauses was discussed in a key decision by the NSW Land and Environment Court.<sup>17</sup> In that case the meaning of the phrase “likely to prejudice the viability of existing commercial centres” was considered and it was found that

[n]o higher threshold is required by the scope and context of (the objective) than that a development may disadvantage or detrimentally affect the viability of the existing commercial centres ... A proposed development is permissible if *there is no real chance or possibility* that it will disadvantage or detrimentally affect the life or existence of existing commercial centres. (emphasis added)<sup>18</sup>

There is a “real chance” that any successful business will steal trade from its competitors in the same region. Hence, such clauses dramatically reduce the chances of securing development approval for new businesses that may place businesses in an existing centre under competitive pressure.

### **Recommendation 7**

Principle 3 should be re-drafted to read as follows:

Principle 3: Market determines need for development in a given locality; planning regulates location and scale based on the impacts of development in that locality.

<sup>16</sup> Land Use Table, Zone B5 Business Development, item 1; Land Use Table, Zone IN2 Light Industrial, item 1; Land Use Table, Zone B6 Enterprise Corridor, item 1. For examples of problematic clauses inserted by councils in local environmental plans see: (1) the *Draft Ryde Local Environment Plan 2008* which includes an objective for its mixed-use zone seeking “economically sound employment centres”; (2) the *Draft Greater Taree Local Environmental Plan 2008* which states an objective for a neighbourhood centre “to support the role of the local centres”; and (3) the *Draft Wollongong Local Environmental Plan 2009* which states an objective for the mixed use zone “[t]o support nearby or adjacent commercial centres without adversely impacting on the viability of those centres”.

<sup>17</sup> *Almona Pty Ltd v City of Newcastle* [1995] NSWLEC 55 (Pearlman J).

<sup>18</sup> *Ibid* 8.



### **Recommendation 8**

The following text should be inserted under the heading for Principle 3:

It is legitimate for the planning system to regulate the location and scale of development, but restrictions cannot be justified by a view that a particular kind of development is unnecessary, oversupplied, or better located elsewhere.

When decisions are made about zoning; the suitability criteria sets out factors that should govern whether or not a site should be rezoned for retail and commercial development.

At the development assessment stage, it is appropriate to consider the likely *impacts* of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

It is not appropriate, either at the zoning stage or development assessment stage to consider whether a development is necessary or better located somewhere else. Nor it is appropriate to consider the impact of a development on any businesses, groups of business or landholders in the vicinity or elsewhere.

There is only one exception to this principle. In strategic planning (at a zoning stage) it may be necessary to consider whether development is necessary if, and only if, the government needs to make a decision about investing limited public funds in new infrastructure to facilitate the development. This scenario is most likely to arise in relation to greenfield development. It will be rare for this scenario to arise in relation to infill/brownfield development.

It's important to note that a planning or consent authority will often be called to balance competing social, economic and environmental considerations when making a decision about a development. When making such considerations the fact that a private-sector proponent is willing to take the entrepreneurial risk and proceed with a project will be sufficient to establish that the project satisfies a community need. In some circumstances the social and economic benefits derived from the satisfaction of this need will be sufficient to overcome amenity concerns that may exist in relation to a proposed development.

### **Recommendation 9**

Section 79C of the *Environmental Planning and Assessment Act* (NSW), which explains how development applications are to be evaluated by consent authorities under Part 4 of that Act, should be amended. The amended provision should make it clear that, when considering a development application, no direct or indirect consideration may be given by a consent authority to the loss of trade that might be suffered by any other planned or existing business or businesses. A similar amendment should be made to Part 3A.

### Recommendation 10

The standard instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* should be amended to remove the zoning objectives requiring the “viability of centres” to be supported or the “economic strength” of centres to be maintained, that is:

- Land Use Table, Zone B5 Business Development, item 1;
- Land Use Table, Zone IN2 Light Industrial, item 1; and
- Land Use Table, Zone B6 Enterprise Corridor, item 1.

An additional provision needs to be inserted into the standard instrument under section 33A(7) of the *Environmental Planning and Assessment Act 1979* specifying that any additional zone objective inserted into a local environmental plan must not seek to:

- support the viability of centres or corridors;
- maintain the economic strength of centres or corridors;
- promote economically viable or sound centres or corridors; or
- otherwise restrict the development in one location for the purposes of encouraging development in another location.

### Recommendation 11

Even though draft *SEPP 66 - Integration of Transport and Land Use* has formally been withdrawn, its policy documents live on through “section 117 directions” issued by the Minister for Planning in July 2007. These section 117 directions will need to be revised to formally drop:

- *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy*; and
- *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development*,

and instead adopt the principles articulated by the new centres policy.

### Principle 4: Ensuring the supply of floorspace accommodates market demand

Our concern with this principle relates to the idea that floorspace targets should merely “accommodate” demand. The wording of the principle blithely assumes that it is possible to “ensure” that floorspace demand can be reliably matched to market demand through regulatory controls. The text underneath the principle even goes as far as to say that the floorspace studies prepared pursuant to the new policy will

[e]nsure that the supply of available floorspace in centres *always* accommodates the market demand. (emphasis added)<sup>19</sup>

This suggests a process by which the regulatory system neatly serves just enough zoned land to meet the requirements of market demand – not too much and not too little. Frankly, this is impossible.

It is difficult for anyone, including government agencies, to accurately predict the shape of the retail and commercial sectors in five years, let alone, ten or twenty years. It is possible that some or all of the floorspace projected for a centre, local government area, subregion or region may not be economically feasible.

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<sup>19</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 4.

Floorspace targets for particular centres are extremely problematic. Centre floorspace targets will be used to prevent expansion of floorspace in other centres and corridors. There may ultimately be a shortfall in one of the centres or an expansion of a smaller centre may be economically viable and achieve the objectives of the Metropolitan Strategy. Planning authorities should be given flexibility and not locked into providing growth within particular centres at the expense of others.

Regretfully, whenever targets have been set by the Department of Planning to-date, local councils have tended to treat the targets as maximums, rather than minimums. For example, in 2008 the Urban Taskforce criticised elements of the draft local environment plan for Lane Cove for not taking sufficient advantage of opportunities to provide pedestrian friendly compact living communities around public transport nodes. Lane Cove Council's defence for the failure to permit great residential growth around public transport and town centres was that the plan "was required to be prepared in order to satisfy residential and employment growth targets under the Metropolitan Strategy for Sydney".<sup>20</sup> This is the dominant view by councils and even key officers within the Department of Planning. Planning authorities believe that they can reliably predict the future and will prohibit activities they regard as unnecessary as matter of course. Regretfully, the development activities that are prohibited, with the benefit of hindsight, often subsequently turn out to have been necessary. The community as a whole has to bear the economic and social costs of the regulatory failure.

Planning authorities should be expressly encouraged to provide development capacity well in excess of the minimum target. Otherwise floorspace targets should not be imposed as defacto ceilings on development capacity. This is important for two key reasons.

Firstly, as the Metropolitan Strategy said:

The supply of land available for development should always exceed market demand to ensure that land values are not unreasonably raised and lower the intended level of development.<sup>21</sup>

The market is far more unpredictable than the draft policy assumes. Additionally, at a given point in time, it is possible for different people to reach different conclusions about the strength of market demand. There is no certainty that any business or planning authority could have arrived at the right figure.

Secondly, a floorspace target that acts as a defacto ceiling on development will be used by incumbent retail landlords to lock out competition. That is, they will put in development applications to expand their existing shopping centres and 'use up' the floorspace provided for in strategies. In Victoria, South Australia and Western Australia floorspace demand and supply assessments have been used to limit, rather than permit, retail development.

There are 44 references throughout the document to the supply of floorspace "accommodating" demand, including, most significantly principle 4. On the other hand there are a modest number of references (four in total)<sup>22</sup> to the zoned supply of floorspace "exceeding" market demand. We think a better approach is to shoot well above the anticipated level of market demand, to maximise the opportunities for landholders to compete amongst themselves to attract development projects.

Again, the text under principle 4 clear says that the supply of floorspace "in centres" must always exceed demand, but it says nothing about the supply of floorspace in business parks, corridors or the supply of floorspace for retail types that are often not able to be accommodated in centres (for example, large floor plate bulky goods premises, or warehouse style low-cost grocery shopping).

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<sup>20</sup> Correspondence from Mr Peter Brown, General Manager, Lane Cove Council to the Urban Taskforce 18/11/2008, ref: 41811/08.

<sup>21</sup> Metropolitan Strategy – Supporting Information 123.

<sup>22</sup> Page 4 has one; page 9 has one; and page 11 has two.

### **Recommendation 12**

Principle 4 should be re-drafted to read as follows:

Principle 4: Planning authorities should always zone for much more floorspace than the market is likely to require.

### **Recommendation 13**

The 44 references to zoned land “accommodating” market demand should be replaced with the word “exceeding”.

### **Recommendation 14**

Planning authorities should also be required to provide for retail and commercial development opportunities in business parks and economic, enterprise and renewal corridors - and also in industrial areas when it meets the criteria set out in the Metropolitan Strategy.

[Item B4.1.2 of the Metropolitan Strategy contemplates retailing in industrial areas being permitted when it is ancillary to the industrial use or has operating requirements or demonstrative offsite impacts akin to industrial uses.]

### **Principle 5: Support a wide range of retail and commercial premises and contribute to a competitive retail market**

Firstly, this principle refers to a “wide” range of retail and commercial premises. A “wide” range is not a *full* range. This principle allows planning authorities to form a subjective opinion as to the range of commercial and retail premises that may be appropriate for an area.

Regrettably, they do not have a good track record on this front.

The first example comes from the standard instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* the neighbourhood centre zone exists to

provide a range of *small-scale* retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood (emphasis added).<sup>23</sup>

A subjective phrase such as “small-scale” is an inappropriate phrase for a statutory plan. If there is a desire to prohibit buildings of a particular bulk and scale then a development control plan can set out the applicable height or floorspace ratio restrictions. This will be considered, in the light of a particular proposal, at a development assessment stage. Subjective words such as “small” mean different things in the hands of different decision-makers – it is a recipe for confusion, legal disputation and inconsistency.

Another example is offered by the *Liverpool Local Environmental Plan 2008* neighbourhood centre zone a “neighbourhood shop” or “shop” are permitted, but “retail premises” are not permitted even though the zone objective seeks to encourage retail uses. This appears to prohibit a range of retail uses such as a jewellery retailer or a pet shop. We cannot see any public policy reason why a “shop” would be permitted, but the broader “retail premises” prohibited.

In a further example the *Draft Penrith Local Environmental Plan 2008* bans both retail premises and shops from its village zone. Only neighbourhood shops (convenience stores) are permitted. Additionally “business premises” are also banned. This means that locals will be unable to set up a shopfront to engage in a profession or trade that provides services directly to members of the

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<sup>23</sup> Land Use Table.

public. Local communities are deprived of internet access facilities, hairdressers, video libraries and dedicated banks, post offices and dry cleaners. Why is it okay to have banking services provided as an ancillary service in a neighbourhood shop, but unlawful to open a bank branch as a standalone service?

The standard instrument permits (and in some cases requires) a maximum floor area to be pre-set for different types of development, regardless of the merit of individual proposals, regardless of the capabilities of local infrastructure or the nature of local suburbs.

For example, the *Draft Lane Cove Local Environmental Plan 2009* sets a maximum floorspace for neighbourhood shops at 300-400 square metres (depending on whether the shop fronts a local or regional road). In the *Draft Penrith Local Environmental Plan 2008* the limit is 200 metres. In the *Liverpool Local Environmental Plan 2008* it is 100 square metres. In the *Liverpool Local Environmental Plan 2008* neighbourhood centre zone there is a ban on shops with a gross floor area of more than 1,500 square metres.<sup>24</sup>

Surely what matters to the community are the bulk and scale of developments and off-site noise and traffic impacts? Bulk and scale issues can be dealt with by height or floorspace ratio restrictions. Noise and traffic impacts can be objectively addressed as part of the development assessment process. Restrictions of this kind may be regarded by some planning authorities as allowing a "wide range" of retail, but it certainly does not permit the "full range" of retail.

Planning authorities should not be given any discretion to pick and choose the range of retail and business services that are permitted in an area in a planning scheme, other than for a few nominated uses that raise unique social issues (i.e. sex services premises; gun shops, etc). Plans should provide for the *full range* of retail.

The text under principle 5 appropriately states

the zoning and development assessment process should not take into consideration the likely impact of a new entrant on any existing retail and commercial premises.<sup>25</sup>

However, this statement is qualified, so that it does not apply if the proposal fails to meet "locational and design criteria". These criteria are not spelt out in the policy. It's possible the reference to design criteria is a reference to the material set out on pages 22-23. But even if this were the case, it makes no sense that a project does not (for example) provide "attractive cycling networks" may be knocked back on the basis that they may take business away from an incumbent (particularly when the incumbent may not even provide "attractive cycling networks"). In any event the criteria set out on pages 22-23 seem (appropriately) to be factors for consideration rather than binding rules. There is no reason why non-compliance with this criteria should permit anti-competitive decision-making. Non-compliance with the criteria is relevant to whether a rezoning for development approval is granted, but should not lead to consideration of the impact on another business.

The reference to "locational" criteria is even more mysterious. Nothing called "locational criteria" (or similar phrase) appears in the document. Perhaps it is a reference to the suitability criteria on pages 11-12? If so, this criteria is clearly relevant for a rezoning decision but not for a development assessment decision. And again, failure to sufficiently meet suitability criteria could be reason to knock back rezoning, but it should never be a basis for considering the impacts on other existing businesses.

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<sup>24</sup> Clause 7.25.

<sup>25</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 4.

### **Recommendation 15**

Principle 5 should be re-drafted to read as follows:

Principle 5: Support a full range of retail and commercial premises and contribute to a competitive retail market.

The text under the principle should make it clear that planning and consent authorities should remain blind to the identity of the proponent, and should not attempt to favour one proponent over another in order to foster competition. Such decisions should be left to the competition regulator.

### **Recommendation 16**

The standard instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* should be amended to remove the definition of “shop” and any standard instrument-compliant plan which permits a shop should instead permit “retail premises”.

### **Recommendation 17**

The standard instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* should be amended to remove the reference to “small-scale” in the zone objective for the neighbourhood centre zone (if that zone is to continue).

An additional provision needs to be inserted into the standard instrument under section 33A(7) of the *Environmental Planning and Assessment Act 1979* to ensure that similar terms are not inserted into additional zone objectives prepared by planning authorities.

### **Recommendation 18**

The standard instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* should be amended to remove the mandatory restriction on the floorspace of neighbourhood shops (contained in clause 5.4(7)).

An additional provision needs to be inserted into the standard instrument under section 33A(7) of the *Environmental Planning and Assessment Act 1979* preventing further use-linked floorspace restrictions from appearing in local environmental plans (such as clause 7.25 of *Liverpool Local Environmental Plan 2008*).

### **Recommendation 19**

The standard instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* should be amended to restore “shop top housing” to its pre-December 2007 definition. The earlier version permitted residential development to mixed-use in the same building with any form of residential or business premises, subject to merit assessment.

While the right of development proponents to mix-uses in a building should be supported, planning and consent authorities should never seek to force a mix of uses within a single development (e.g. forcing retail and residential to be in the same development).

### **Recommendation 20**

The reference to "locational and design criteria" should be removed from the text under principle 5. The zoning and development assessment process should not take into consideration the likely impact of a new entrant on any existing retail and commercial premises, irrespective of locational, design or suitability criteria.

### **Principle 6: Contributing to the amenity, accessibility, urban context and sustainability of centres**

It is not clear to us how a centre, in itself, can be "sustainable".

If "sustainable" is being used in an environmental sense; it is inappropriate.

An "activity" can be "sustainable". Some, but not all, activities authorised under the *Environmental Planning and Assessment Act* are sustainable. For example, a new mine or quarry is not a sustainable activity, because our supply of minerals will not be replenished. As a community we accept that some activities that are unsustainable must, nonetheless, be permitted.

A "centre" is a *place*, not an *activity*. So the assertion that a centre is "sustainable" in an environmental sense does not make sense. If it is a reference to the activities in a centre, it should be noted that some activities may take place in centres that are not particularly sustainable. For example, cars burning fossil fuels (a non-renewable resource) are likely to be present in significant numbers.

The word "sustainable" also has a commercial meaning. It is often used to refer to a business that is a going concern and is not running down its capital reserves. It may be that the authors of the policy intended this to be a reference to the economic sustainability of the businesses in a centre. If so, this is inconsistent with the other principles articulated in the policy and will continue anti-competitive elements to the planning system.

### **Recommendation 21**

Principle 6 should be re-drafted to read as follows:

Principle 6: Contributing to the amenity, accessibility and urban context of centres and corridors.

## **2A. Is this the appropriate planning framework for corridors?**

The first three of the four principles for corridors, quoted from the Metropolitan Strategy, relating to "infrastructure utilisation", "connecting places" and "ripe for renewal" are appropriate.

The fourth principle, "protect core roles", requires planning authorities to decide the "core role" of a corridor. The principle talks about

[p]rotecting land for core and specialised employment uses and reinforcing clusters ...<sup>26</sup>

This appears to involve planning authorities deciding for example, that a given area should be set aside for 'high technology' uses, another area should be set aside for 'health and research', etc. Our view is that if land is to be set aside for employment – so be it. The planning system should not regulate beyond what is required to separate genuinely incompatible uses and ensure that infrastructure is managed appropriately. This means for example, that office premises, business premises and retail premises – very high employers per square metre basis – should be permitted in employment lands in corridors. NSW may lose valuable economic activity if land is set aside for a particular kind of commercial development and that development never comes.

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<sup>26</sup> Ibid 2.

## **Recommendation 22**

The fourth principle for corridors "protect core roles" should be dropped, or at least modified so that land set aside for employment uses should be permitted to be used flexibly, with regulation only going so far as to separate genuinely incompatible uses and ensure that infrastructure is managed appropriately. Retail, business and office premises should not be prohibited or discouraged in any corridor land zoned for employment purposes.

## **2B. What development should be permitted in corridors?**

The Urban Taskforce has previously submitted material to government and parliamentary committees calling for a radical overhaul of zoning schemes. We continue to have the view that such an overhaul is required, but we are aware that the government is reluctant to embrace such a radical change in the short-term. The recommendations below are prepared on the basis that a major change to zoning rules is not under consideration. Accordingly, our proposals are within the broad scope of existing arrangements, and in some respects, echo much of the original intent of the standard instrument before its surprise amendment just prior to Christmas in December 2007.

We are aware that development in corridors may raise issues about the smooth traffic flow on busy roads. Firstly, we think this is an issue that can be dealt with on a project-by-project basis and there are often engineering solutions that can be funded by the development proponent. Secondly, the "enterprise corridors" were envisaged by the Metropolitan Strategy to be a narrow strip of development immediately adjacent to busy roads. "Renewal corridors" are a wide band of developable land – up to one kilometre across. Much of the development in a renewal corridor does not need to front directly onto a major road corridor. Similarly, economic corridors are even more broadly defined in terms of their geographic area.

### ***Enterprise corridors***

The Metropolitan Strategy's "vision for corridors" says that

enterprise corridors will provide locations for important *local employment and services* (emphasis added).<sup>27</sup>

Importantly the Metropolitan Strategy also expressly envisaged that enterprise corridors should

Recognise the important economic role that the mix of commercial, retail and light industrial activities perform along these busy roads, including servicing the local community. ... Residential development is often pursued in these corridors to take advantage of lower land costs.<sup>28</sup>

The text of the Metropolitan Strategy cited above should be the basis for determining the permissible uses and zone objectives for the enterprise corridor.

The Metropolitan Strategy also noted that residential development was appropriate when "good quality, high amenity residential dwellings" could be created.<sup>29</sup> This latter point is best dealt with on a project specific basis through the development assessment process, not at the zoning stage.

Enterprise corridors should be implemented via the enterprise corridor zone in the standard instrument.

The objectives for the zone should be:

- To promote businesses along main roads and to encourage a mix of compatible uses.
- To enable a mix of employment (including business, office, retail and light industrial uses) and residential uses.

<sup>27</sup> NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 81; Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy* (2005) 2.

<sup>28</sup> NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 302.

<sup>29</sup> Ibid.



The mandatory uses “permitted with consent” should be:

- amusement centres;
- business premises;
- community facilities;
- entertainment facilities;
- food and drink premises;
- function centres;
- hardware and building supplies;<sup>30</sup>
- hotel accommodation;
- landscape and garden supplies;
- light industries;
- multi dwelling housing;
- office premises;
- passenger transport facilities;
- residential flat buildings;
- shop top housing;
- recreational facilities (indoor);
- registered clubs;
- retail premises;
- seniors housing; and
- warehouse or distribution centres.

As per our earlier recommendation there should be no use-linked floorspace restrictions.

### **Renewal corridors**

The Metropolitan Strategy's “vision for corridors” said that

renewal corridors will be the focus for *diverse and liveable communities ...* (emphasis added).<sup>31</sup>

Importantly the Metropolitan Strategy also expressly envisaged that renewal corridors should be a focus for *commercial development* and contain *concentrations of employment*, surrounded by or with the potential for complementary, *high density residential development* (emphasis added).<sup>32</sup>

We think these above propositions for renewal corridors are appropriate.

To implement the Metropolitan Strategy properly in this respect, a zone should be used that permits a diverse range of uses, although mixed-uses within a building should not be a requirement (e.g. retail should be able to be built as a standalone development, without being mixed into residential, and vice versa).

Renewal corridors should be implemented via the mixed-use zone in the standard instrument.

The objectives for the mixed-use zone should be:

- To provide a mixture of compatible land uses.
- To integrate business, office, residential, retail and other development in accessible locations to provide opportunities for public transport and to facilitate walking and cycling.

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<sup>30</sup> “hardware and building supplies” should be defined to be “a building or place used for the display, sale (whether by retail or wholesale) or hire of goods or materials that are used in or ancillary to the construction, improvement, maintenance and use of buildings and adjacent outdoor areas whether or not landscape and garden supplies are sold on the premises.”

<sup>31</sup> NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 81; Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy* (2005) 2.

<sup>32</sup> NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 300.

The mandatory uses "permitted with consent" should be:

- amusement centres;
- boarding houses;
- business premises;
- child care centres;
- community facilities;
- educational establishments;
- entertainment facilities;
- food and drink premises;
- function centres;
- hotel accommodation;
- information and education facilities;
- multi dwelling housing;
- office premises;
- passenger transport facilities;
- recreation facilities (indoor);
- registered clubs;
- residential flat buildings;
- retail premises;
- shop top housing; and
- seniors housing.

### **Economic corridors**

The Metropolitan Strategy's "vision for corridors" says that

[e]conomic corridors will play a key role in the metropolitan and national economy.<sup>33</sup>

Economic corridors should be implemented via the mixed-use zone, the enterprise corridor zone or the business park zone, as is appropriate to the area.

The first two zones are listed above.

The objectives for the business park zone should be:

- To provide a range of office and light industrial uses.
- To encourage employment opportunities.
- To enable other land uses that provides facilities or services to meet the needs of workers in the area.

The mandatory uses "permitted with consent" should be:

- business premises;
- child care centres;
- entertainment facilities;
- food and drink premises;
- light industries;
- office premises;

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<sup>33</sup> NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 81; Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy* (2005) 2.

- passenger transport facilities;
- retail premises; and
- warehouse or distribution centres.

### **Recommendation 23**

Enterprise corridors should be implemented via its own zone, with the standard instrument amended as per above.

Renewal corridors should be implemented via the mixed-use zone, with the standard instrument amended as per above.

Economic corridors should be implemented via the mixed-use zone, the enterprise corridor zone or the business park zone, as is appropriate to the area. The business park zones provisions in the standard instrument should be amended as per above.

### **3. Does the planning framework contain the right elements? Are there elements that should be removed or added?**

#### ***Flexible network of centres***

The planning framework states that it is about:

A flexible network of centres, setting out where future growth is *likely* to occur to help provide certainty for public and *private investment* ... (emphasis added)<sup>34</sup>

We support the idea of a flexible network of centres *and corridors*. However, aside from the absence of corridors, we have two concerns with the way this idea is expressed.

Firstly, a regulatory system (such as the planning framework) will always have difficulty in working out where development is *likely* to occur. Whether or not a given development is likely to happen will ultimately depend on commercial, not regulatory considerations. The planning system can permit investment; it cannot force investment. A problem with the NSW planning system has been the tendency for planning authorities to believe that they can force development by prohibiting all forms of alternative investment. Often this has simply led to no investment; as developers fled to other jurisdictions. The word "likely" should be replaced with "may".

Secondly, it is the role of the planning system to provide certainty to the private sector by having clear rules, simple processes, swift processing times and low predictable costs. It is *not* the role of the planning system to provide certainty to investors in one location, by giving them assurance that they will be protected from competition in other nearby locations. Planning systems should reduce regulatory risk, but not market risk.

This part of the policy has disturbing echoes of the discredited approach of Draft SEPP 66 which sought to provide certainty for the private sector by prohibiting competition. The following is a quote from a policy document which formed a part of the Draft SEPP 66 package:

Centres with a mix of land uses are well established in existing urban areas but their success relies on continued investment. Investment confidence must be cultivated through consistent decision-making that supports centres. This approach enjoys widespread appreciation by the community and business sectors.<sup>35</sup>

This text demonstrated a poor understanding of basic economics. In a free market economy, investment decisions are risky. The presence of risk does not preclude an investment decision

<sup>34</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 5. Similar text appears, albeit without the reference "flexible" on page 6.

<sup>35</sup> Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* (2001) 27.

from taking place. Instead, an investor will seek returns, consistent with the risk. Only if the risks outweigh the expected returns will the investment decision not take place.

It's important that the policy should not, in itself, seek to provide certainty for private sector development. All this will do is provide certainty for oligopolistic landlords and provide few options for those seeking to satisfy unmet market demand. The fundamental purpose of a centres and corridors policy should be to permit an alignment between high intensity development and the necessary infrastructure.

#### **Recommendation 24**

The policy should seek to have a flexible network of centres *and corridors* where future growth may occur to help provide certainty for public investment. The policy should not seek to provide certainty for private investment by reducing the market risks of developing new property assets.

#### **Floorspace supply and demand assessments will always be inaccurate**

The policy should clearly and readily concede that any floorspace and supply demand assessment will always be inadequate and is unlikely to truly predict the needs of the community. It should clearly be stated that:

- Any assessment of the demand depends on a series of assumptions and that some assessments can be highly sensitive to the assumptions that are made. It is often not possible to decide which assumptions are correct and as a result different experts may come to different conclusions about the level of demand.
- Floorspace demand assessments will be partially based on population projections. Population projections can be subject to quite significant revisions over time, based on the uncertainty of key inputs, such as immigration levels, interstate and interregional migration, fertility rates, mortality rates, household size and housing supply. Population projections are not intended as predictions or forecasts, but are illustrations of growth and change in the numbers of households and families which would occur if certain assumptions hold. There is no way of measuring the probability of the assumptions' accuracy.
- The Australian Bureau of Statistics copes with the inherent uncertainty of population projection by providing alternative projections (each of which it readily concedes may be incorrect), however the Department of Planning typically releases and relies on a single projection, creating a misleading impression of certainty, when no such certainty exists.
- Floorspace demand assessments are also partly based on the historical behaviours of consumers at given levels of income. The actual levels of income may be more or less than originally projected, and consumer behaviour may change (particularly in response to new technology, formats, competition or services) in ways that are inconsistent with historical averages.
- The composition of individual households – mainly balance between households occupied by individuals, family and group households in the population have the potential to significantly change – this will impact on retail consumption patterns over time.
- Assessments of anticipated supply will often be inaccurate because of lack of consistent and complete data on floorspace supply in the pipeline (particularly infill land), uncertainty about the rate of development and the production capacity of the construction industry. Previously when the Australian Bureau of Statistics recorded floorspace, their figures were notoriously inaccurate (whole of land was recorded, plant nurseries used their garden areas, warehouses were included, etc).
- The particular needs of new entrants and their willingness to fight head-to-head with incumbent retail players is unlikely to be reflected in any analysis prepared prior to the new entrant seeking to establish themselves in the market.

- Typically the time lag between an assessment being carried out and its actual implementation in a gazetted planning scheme will be considerable. By which time it may already be out-of-date.

Too much of the policy document assumes that floorspace demand and supply analysis will give an easy answer to the community's social and economic needs. The value in such an analysis is not that it will give you a true picture of future, only that it will go some way to mitigating the need for the government and private sector to deal with some time-consuming and resource-intensive spot rezonings. We anticipate that spot rezonings are going to continue to be crucial in ensuring that there is sufficient retail and commercial floorspace available to the community.

#### **Recommendation 25**

The policy should clearly and readily concede that any floorspace and supply demand assessment will always be inadequate and is unlikely to truly predict the needs of the community. It should be explained in the policy why this is the case and the ongoing importance of spot rezonings should be expressly recognised.

#### ***There is no need for both floorspace ratios and height controls in centres***

The policy says that there will be

[c]omprehensive local environmental plans (LEPs) setting out sites, zones, heights and floorspace ratios (FSRs) to ensure the supply of floorspace accommodates market demand.<sup>36</sup>

We appreciate that the references to "sites" is intended to be helpful, however this approach involves planning authorities identifying particular sites for centre-style development, and zoning the sites to 'meet' the anticipated market demand.

This approach will confer disproportionate market power on the landlords who are lucky enough to be handpicked for centre-style development by planning authorities. This kind of planning is exactly the kind of practice that was criticised by the Productivity Commission and the Australian Competition and Consumer Commission. The process of hand-picking sites can also raises public perception problems for the planning authorities.

The best approach is not to focus on particular sites, but instead to focus on providing a large area of land zoned mixed-use, well in excess of expected demand. While there is no reason why smaller lots cannot be zoned as mixed-use, the policy should emphasise the importance of seeking out and zoning large lot sizes as mixed-use, to avoid the problems associated with unifying a series of small lots into a single development site. If decision-makers err on the side of significant oversupply of mixed-use land, the premium for such land will be reduced and it will be less important if some sites ultimately turn out not to be developable.

The quoted text also re-affirms the idea that both height and floorspace ratio (FSR) controls will be imposed. In April 2009 the Urban Taskforce released the *Liveable Centres* report which was authored by leading urban design firm, Roberts Day. The report's author, Stephen Moore, is a well credentialed expert in urban design and town planning.

The report found that the simultaneous use of both controls is not necessary. When combined, these controls can destroy opportunities to secure good design.

Amenity issues are more appropriately dealt with by impact-driven height controls rather than floorspace ratio restrictions. The only other justification for floorspace ratio restrictions is the need to control the maximum development density and intensity of land use, taking into account the availability of infrastructure and the generation of vehicle and pedestrian traffic. However, as the land under discussion would be zoned as centres or economic/enterprise/renewal corridors,

<sup>36</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 5.

high intensity land uses are already expected and planned for. Therefore there would be no further benefit in imposing floorspace ratio controls.

*Liveable Centres* recommended that the current directive of the NSW Department of Planning which states height and FSR must be set for centres should be rescinded and instead planning authorities should be discouraged from setting floorspace ratios in centres. We also submit the same approach should be taken in corridors.

#### **Recommendation 26**

The policy should say that comprehensive local environmental plans (LEPs) will set out *large areas of zoned land* and *sufficiently generous* height controls to ensure the supply of floorspace exceeds market demand. Where height controls are imposed in a centre or economic, enterprise or renewal corridor there is no need for a floorspace ratio restriction to also be imposed.

#### **Character of the area**

The policy says that retail and commercial development will be assessed for

whether the scale and design of the development is in keeping with, or will improve, the character of the area.<sup>37</sup>

If this statement is an attempt to summarise the current state of the planning law, it is not an accurate one. In fact, it is likely that at least some consent authorities will interpret this statement as an additional control.

A new retail or commercial development should be respectful to the existing character, but it should be informed by the statutory zoning plan. If the plan envisages a change in the nature of the character, a development that is incompatible with the current character, the development should nonetheless proceed.<sup>38</sup> Much of the forthcoming retail and commercial development will take place in areas 'in transition', and thus, perhaps the development will be (appropriately) inconsistent with the existing character of the area. If there is to be a statement on 'character' in the policy this point will need to be acknowledged.

#### **Recommendation 27**

Much of the forthcoming retail and commercial development will take place in areas in transition, and thus, perhaps the development will be (appropriately) inconsistent with the existing character of the area. If there is to be a statement on 'character' in the policy (as there is on page 5) this point needs to be acknowledged.

#### **Net community benefit test and the suitability criteria**

The so-called "net community benefit test" does not sit well in the policy and will undermine much of the high-level policy statements articulated in the document. Our comments on the test are detailed in our commentary on section (consultation question 19) below.

Strangely, the "planning framework" set out on page 5 makes no mention of how the suitability criteria, on pages 11-12 fits into the picture. Given that the suitability criteria are more useful, and in our view, more important than the net community benefit test, this is an omission that should be rectified.

<sup>37</sup> Ibid.

<sup>38</sup> See *Iloray Pty Ltd v Darebin City Council* [2003] VACT 692 for a discussion of this point.

### **Recommendation 28**

The “net community benefit test” should not be in the planning framework, and the “suitability criteria” (without the last dot point) should be included.

### **Monitoring and review**

The policy states that

[t]he supply of retail and commercial floorspace should be monitored on a regular basis to ensure it accommodates market demand. Where there is a shortfall of floorspace additional land should be identified and rezoned.<sup>39</sup>

This text assumes omniscience by planning authorities. Frankly, we think policy needs to be more realistic. The chances of planning authorities identifying a shortfall in retail and commercial floorspace, unprompted, are low. Demand and supply are difficult to accurately assess (see our discussion above). The length of time to complete a review of any statutory plan will be many years – if a review is ever completed. Local councils, in particular, will have difficulty because of the powerful political presence the existing retailers and landlords have through chambers of commerce, petitions and local media. The text does not recognise that, in most circumstances (outside of a once-in-a-decade comprehensive local environmental planning process), it will be private proponents who seek rezonings to increase the available supply of land zoned for commercial or retail development.

Of particular concern is the requirement for a “shortfall” before additional land is rezoned. This is contrary to other provisions in the document:

[T]his policy sets out that the planning system should rezone land to exceed the aggregate demand for retail and commercial floorspace. (emphasis added)<sup>40</sup>

The FSDAs should not be used to determine the need for particular retail and commercial development but rather to help planners to plan positively and proactively to exceed likely future floorspace demand. (emphasis added)<sup>41</sup>

Plans for the growth and development of centres should provide flexibility to ensure they exceed the likely future demand for large sites for shopping centres, supermarkets and customer parking. (emphasis added)<sup>42</sup>

The document cannot on one hand (appropriately) plan for zoned land to exceed market requirements (in order to create competitive tension between landlords for development) and on the other hand state that land should only be rezoned when there is a “shortfall”.

### **Recommendation 29**

The planning framework should expressly acknowledge the important role that private proponents will have in bringing proposals to rezone land for commercial and retail development before planning authorities. Given the social and economic importance of retail and commercial development, there should be a presumption in favour of rezoning where proposals which are generally consistent with the suitability criteria (excluding the last dot point of the proposed criteria). This presumption should apply with no need to demonstrate a shortfall or lack of accommodation in zoned land.

<sup>39</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 5.

<sup>40</sup> Ibid 4.

<sup>41</sup> Ibid 9.

<sup>42</sup> Ibid 11.

### **Recommendation 30**

A planning authority should be obliged to zone more land for commercial and retail development when there is a risk that the availability of zoned land may constrain market activity within the forthcoming five years.

### **Zones**

The policy says that it will apply in business, residential and industrial zones, but omits the (RU5) village zone (if that zone is to continue).

### **Recommendation 31**

If the "RU5" village zone is to continue the policy should apply to it.

## **4. Does the centres typology; contain too many centre types, not enough centre types or is about right?**

### ***Role of retail as an attractor***

The policy says that

retail uses will be a critical attractor for the centre, and when complemented with social, community and economic functions enables the centre to be a hub for the neighbourhood, town or region.<sup>43</sup>

This seems to be suggesting that retail development is "critical" to the success of a centre. We are nervous about this kind of thinking, because in the past it has been used to justify retail bans on vast areas of land in order to funnel all retail development into a single subregional centre.

We suggest the critical attractors for most centres will be residential density and/or employment density and good transport infrastructure. If people are already living or working in centres, in large numbers, and travelling through centres, then retail will naturally locate there. It does not need to be forced there.

### **Recommendation 32**

Retail should not be singled out as a critical attractor for centres.

### ***What is the purpose of the typology of centres?***

The policy does not explain the reason for creating a detailed typology of centres. Nor does the policy explain the use to which the typology will be put. The policy says

a typology of centres has been produced to help provide a 'common language' in strategies.<sup>44</sup>

There is no point in having a common language to discuss something if it is not clear why you are discussing it.

We suggest there are two possible mutually exclusive reasons you might want to have a typology of centres.

You may want a typology to describe the current condition of centres. This means the typology has no relevance for the future planning controls or infrastructure requirements of a centre.

<sup>43</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 7.

<sup>44</sup> Ibid.



Alternatively, you may want a typology to describe the future development potential of a location. This would be based on the quality of local infrastructure (relative to other areas that are candidates for higher density zoning), with regard to possible infrastructure improvements in the future.

However, it appears that neither of these approaches has been clearly adopted by the policy. Instead the policy says

[t]he centre types describe the difference between each type of centre in terms of the scale and likely diversity of future uses in those centres.<sup>45</sup>

So, it seems the typology is not describing what is currently there, it is describing what is “likely” to be there in the future. The policy goes onto to say

The centre types are useful categories because they give an indication as to the likely future range of services, activities and externalities to be expected.<sup>46</sup>

This is all very well, but how has this range been established as the “likely” future role? Does “likely” mean, it is likely that planning authorities will zone the land to permit the things described? Or does “likely” mean that zoning for those things can be taken for granted, and the government believes that (given the favourable zoning) that market conditions are “likely” to favour the development described in the typology?

Of course, the above quotes still do not tell us why this information is prepared and published by the government. On this point the policy states

[t]he centre typology has been designed as a descriptive tool to categorise the likely future function of centres, not a prescriptive tool to limit the growth of those or other centres in the future. The categorisation of a centre as a particular typology is not intended to limit the future growth or diversity of that centre.<sup>47</sup>

To be brutally frank, this statement is not coherent. This states the typology describes what is likely in the future, but development is not limited to the typology. That seems to be stating that the typology will not be used to guide zoning/strategic planning decisions. This cannot be correct! What is the point of describing and categorising something, putting it in a policy document then ignoring that information? This is not a credible policy position for the Department to take.

With respect, we submit that the Department must admit that any classification of centres in a strategy that relates to the future use of centres will be used to guide, both infrastructure planning and zoning for that locality.<sup>48</sup> Otherwise the whole existence of the typology is pointless.

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> This is certainly how centres hierarchies have been used by planning authorities in the recent past. For example, the draft *Taree Local Environmental Plan 2008* contains zone objectives limiting development in each level of centre, so as to ensure that centre does not have development inconsistent with its place in the hierarchy. The draft *Lane Cove Local Environmental Plan 2008* seeks to preserve the Lane Cove town centre's relative position in the North Shore centres hierarchy. The draft *Ryde Local Environmental Plan 2008* attempts to give statutory effect Macquarie Park's status as a specialised centre, by erecting barriers to commercial development that is not in-keeping with the specialisation identified for the area by the Metropolitan Strategy and the subsequent draft subregional strategy.

### Recommendation 33

The purpose of the typology of centres needs to be clearly spelt out.

EITHER

A typology must describe the current condition of centres. This means policy must make it absolutely clear that the typology has no relevance for the future planning controls or infrastructure requirements of a centre.

OR

A typology must describe the future development potential of a location. This would be based on the quality of local infrastructure (relative to other areas that are candidates for higher intensity uses) and have regard to possible infrastructure improvements in the future. In this case the typology will be used to inform future strategic and infrastructure planning.

### ***If the centres are about the future, why is their definition based on their current condition?***

As mentioned above, to the extent the policy states anything about the centres typology, it states that they are about the

scale and likely diversity of *future* uses in those centres (emphasis added).

If that is the case the descriptions and definitions given to the centres are nonsensical.

Of localities classified as local centres the policy states they

will be expected to have low traffic impacts and could serve a largely walkable catchment and have retail that serves daily and weekly convenience shopping needs.<sup>49</sup>

Places that are deemed to be major centres

would be expected to have a high level of transport access, a very broad range of community services (such as banking, medical centres, council facilities) and have additional retail services that offer comparison shopping and higher order shopping in addition to retail that serves daily and weekly convenience shopping needs.<sup>50</sup>

The policy itself nominates Cabramatta and Auburn as local centres, not major centres. Yet both these localities already have a very broad range of community services such as banking and medical centres (part of the description for major centres). Auburn already has council chambers. Both areas already have some higher order, comparison shopping (i.e. they both cater to more than just daily or weekly shopping needs). Neither currently have low traffic impacts. By classifying these two locations as "local centres" (and given the description of local centres) it's difficult to imagine that the authors of this policy have actually visited these places.

In short, Auburn and Cabramatta are already developed at a scale and diversity that is beyond the description given to them as "local centres". The label does not fail to give any indication as to the "scale and diversity of future uses in the centre" – it doesn't even adequately describe what is happening in these localities right now.

Other parts of the document concede that at least some local centres are places for high traffic – see for example this quote:

[L]arge floor plate offices, high traffic generating development or bulky developments would typically be more suitable to major centres or town centres ... (emphasis added)<sup>51</sup>

Of course, there is more high order/comparison shopping in somewhere like Chatswood, than there is in Cabramatta. Nonetheless, this occurs at both locations today. Furthermore, any forward looking planning strategy should be anticipating the likely growth of higher order

<sup>49</sup> NSW Government – Department of Planning, Draft Centres Policy: Planning for Retail and Commercial Development (2009) 7.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid 15.

shopping in places like Auburn and Cabramatta – this is not contemplated by the description attached to them as “local centres”.

In fact, the descriptions contained in table 1 are not forward looking at all. For example, they are all written in present tense – implying that they are describing the current condition of these centres, rather than the “scale and diversity of future uses in the centre”. For example, major centres are described in this way:

Major shopping and business centre serving the immediate subregional residential population usually with a full scale shopping mall, council offices, taller office and residential buildings, and central community facilities.<sup>52</sup>

If this description is supposed to be about the future, not the present, it should be phrased in this way:

This location is likely to become a major shopping and business centre serving the immediate subregional residential population usually with taller office and residential buildings and central community facilities.

The same can be said for every other centre description in table 1. If this approach was to be followed, then locations such as Cabramatta and Auburn would be better classified as major centres, given their likely future role.

#### **Recommendation 34**

If the centres typology is about the future, the descriptions must be written in future tense, not present tense. If it is about the future, many more locations will need to be recognised as centres, and many already recognised as centre should be given a higher status. For example, Cabramatta and Auburn should be major centres, rather than local centres.

#### ***Major centres should not be limited to one shopping mall***

Some major centres currently have more than one shopping mall. In some major centres developers are likely to want to build additional shopping malls in the future. That's why it is inappropriate for major centres to be described as having

a full scale shopping mall ...<sup>53</sup>

We suggest that the reference be dropped completely from the description. It's not necessary because:

- the words “major shopping and business centre” are sufficient; and
- referring to shopping malls in the description of major centre, but not specialised centres, town centres, etc implies that these other locations do not/will not have them.

#### **Recommendation 35**

The reference to “a full scale shopping mall” should be dropped from the description of a major centre.

#### ***There is no need for a specialised centre category***

The Urban Taskforce has consistently criticised the decision to create a sub-species of strategic centres as “specialised centres”.

For example, St Leonards is a specialised centre because it has the Royal North Shore Hospital. Do developers need the Department of Planning to tell us that health related developments might be a good idea in St Leonards given that the hospital is there? Of course not! Were

<sup>52</sup> Ibid 7.

<sup>53</sup> Ibid.

government officials aware of the presence of the hospital prior to the designation of St Leonards as a specialised centre? We trust they were. Will development that is not health related be discouraged in St Leonards? We hope not, but no-one can be sure, because that would appear to be the only purpose in designating "specialised" centres.

In another example, the draft Inner North Subregional Strategy has described Macquarie Park as a specialised centre due to the presence of Macquarie University. Planning authorities have now sought to translate the specialisation of a centre into a statutory form.

In the draft *Ryde Local Environmental Plan 2008* Ryde Council is proposing to include an additional objective in the commercial core and business park zones in Macquarie Park:

To encourage industries involved in scientific research and development.

The business park zone includes an additional provision which says it is a zone objective

[t]o provide a zone with strong links with Macquarie University and research institutions and an enhanced sense of identity.

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 planning authorities who frequently use the word "encourage" to signal that a particular form of development will be swiftly approved, while other forms of development are likely to find approval difficult.

The standard instrument requires that this zone objective be considered when development applications in the commercial core zone are considered by consent authorities.<sup>54</sup> If this zone objective stands we anticipate that developments will be refused because they do not involve scientific research and development. In the business park zone each development will also need to be assessed for its "strong links" with the university and research institutions. It would be possible for a consent authority to refuse development approval on the basis that such links are not sufficiently strong.

Refusing businesses development consent because they aren't scientific enough would be a loss to the community of Ryde, the broader Sydney community and the state as a whole, because it may prevent Macquarie Park from reaching its full potential. It may undermine the substantial investment the state has made in this locality as transport hub. The reality is that Macquarie Park is best developed by allowing the market to determine the kinds of businesses that are located there – with appropriate controls over building form.

There are no benefits from identifying specialised centres separately from major centres, in fact there are very real risks that development in specialised centres will be restricted in-line for the strategic vision articulated for the centre.

### **Recommendation 36**

The "specialised centre" category should be abolished, and existing "specialised centres" should be designated as either major centres or regional cities.

The description of major centre to be expanded so that it includes the following additional text:

Some major centres will contain major airports, ports, hospitals, universities and research activities. These perform a vital economic and employment role which generates metropolitan-wide benefits.

### **Neighbourhood centres and town centres**

We have consistently argued for a simpler local centres hierarchy. We appreciate that this version is simpler than the one contained in both the Metropolitan Strategy and the draft subregional strategies.

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<sup>54</sup> Clause 2.3(2).

We still do not understand why there needs to be a separate categorisation for town centres and neighbourhood centres.

For example, a town centre is described as a place where there is typically

retail facilities, council offices, community and entertainment facilities, professional offices, medical centres, and schools.

A neighbourhood centre is described as

[t]ypically providing retail and community facilities to meet the needs for the local population and workforce.

Granville is nominated as a neighbourhood centre, not a town centre. However, Granville has retail facilities, professional offices, medical centres, schools – as per the description of a town centre. Granville has a significant train station and therefore has considerably potential to expand and develop in the future. Classifying Granville and other similar centres, as something less than a town centre is artificial and not useful.

The statement in the description for town centres says these areas are a focus for residential development with high levels of amenity.

This statement, if it is allowed to stay in the final policy, will be cited in many decisions to refuse development consent for higher density residential development in town centres. It is better that such matters are dealt with through the existing mechanisms – such as the Residential Flat Design Code, rather than creating yet another document that can be relied upon to refuse development approval.

#### **Recommendation 37**

The town centre and the neighbourhood centre should be one and the same. The description should read as follows:

This location is likely to see significant residential and retail development. The development of entertainment facilities, professional offices and medical centres are likely. Typically the locality will have community facilities and schools, and possibly council offices.

#### **5. Are floorspace supply and demand assessments (FSDAs) the right approach to assessing retail and commercial floorspace demand? Who should be responsible for undertaking FSDA and how often?**

In answer to question 3 above, we explained why floorspace supply and demand assessments will always be inaccurate. In our answer to question 1 above, in commenting on principle 4, we observed that a floorspace target that acts as a defacto ceiling on development will be used by incumbent retail landlords to lock out competition. That is, they will put in development applications to expand their existing shopping centres and 'use up' the floorspace provided for in strategies. In Victoria, South Australia and Western Australia floorspace demand and supply assessments have been used to limit, rather than permit, retail development.

We do not think FSDAs are a panacea. At best they may reduce inconvenience to the government, councils, and landholders, by encouraging generous rezonings for retail and commercial floorspace as part of the preparation of comprehensive local environment plans. The text of the document needs to make this clear.

We strongly agree with this statement:

The FSDA should not be used to determine the need for particular retail and commercial development but rather to help planners to plan positively and proactively to exceed likely floorspace demand.<sup>55</sup>

<sup>55</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 9.

We urge its retention in the document. However we also see the need for further text clarifying the limitations of FSDAs and explaining that spot rezonings will be necessary.

Strangely the above-quoted text is contradicted by this statement:

FSDAs should be ... based on transparent and evidence-based analysis of a number of factors and trends such as ... *required retail and commercial floorspace per capita*. (emphasis added)<sup>56</sup>

Actual additional floorspace requirements are the product of market conditions, and cannot (as is suggested) arise from a simple headcount. There are several key reasons for this.

Firstly, there is expenditure that crosses local government, subregional and regional boundaries. Large regional centres, such as Chatswood for example, captures expenditure from Ku-ring-gai, North Sydney and Lane Cove households. A considerable amount of expenditure from Ku-ring-gai escapes the local government area to Hornsby, Chatswood and Macquarie Centre. Areas of lower population may have a greater need for floorspace for this reason. Other areas may have a reduced need because they are less attractive for, say, office development or are already heavily congested.

Secondly, parts of Sydney and NSW are currently experiencing an oversupply or undersupply of retail floorspace. When oversupply is defined bluntly as “below average turnover levels” or undersupply as “above average turnover levels” a study may purport to account for oversupplies and undersupplies. In truth, however, the market is much more complex and assessment will not always reveal whether or not supply is truly aligned with demand. In fact, different people will almost always come to different conclusions on this subject. That's why central planning has never been a successful economic model. To talk about “required” floorspace suggests a foreknowledge of market and consumer preferences, which is impossible. No-one can possibly know at the time an FSDA is prepared what the required retail and commercial floorspace will be.

Finally, such an approach does not accommodate local adjustments resulting from expenditure generated from tourism and workers. Demand for retail space in the Sydney CBD for example would be stronger due to workers and tourism expenditure.

The Department of Planning should carry out FSDAs. They should take place, if it is possible to do so, as part of comprehensive local environmental planning processes. Outside comprehensive processes, spot rezonings should be the primary mechanism for responding to the needs of the market. FSDAs should have no relevance to decisions to approve or refuse a spot rezoning as FSDAs should be about the minimum level of floorspace, not the maximum; and spot rezoning should be based on the suitability criteria not a regulator's view of market need).

Our comments made in relation to monitoring and review, in answer to question 3 above, are also relevant to this issue.

### **Recommendation 38**

The document should make clear that the objective of FSDAs is merely to reduce inconvenience to the government, councils, and landholders, by encouraging generous rezonings for retail and commercial floorspace as part of the preparation of comprehensive local environment plans. The use of the mixed use zone should be encouraged, to avoid sterilising land in the event that the market does not seek to develop some or all of the land made available for commercial and retail development.

The policy should also clearly state that it will be inevitable that FSDA will still not provide adequate levels of appropriate zoned land to accommodate additional floorspace. Planning authorities will be expected to carry out spot rezonings to provide for retail and commercial development irrespective of any figures generated by the FSDA process.

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<sup>56</sup> Ibid.

#### **Recommendation 39**

The Department of Planning should carry out FSDAs. They should take place, if it is possible to do so, as part of comprehensive local environmental planning processes. Outside comprehensive processes, spot rezonings should be the primary mechanism for responding to the needs of the market. FSDAs should have **no relevance** to decisions to approve or refuse a spot rezoning (as FSDAs should be about the minimum level of floorspace, not the maximum; and spot rezonings should not be refused wholly or partly on the basis of a regulator's view of "market need").

**6. Is the interim retail target set at the right level? Should councils be able to use existing information to set interim retail targets before an FSDA has been produced? Are interim commercial floorspace targets required? If so at what level should they be set?**

FSDAs should have no significance outside of a comprehensive planning process. As such they do not assist the spot rezoning process which should be driven by the suitability criteria (with the exclusion of the last dot point).

A number of comprehensive local environmental planning processes have been completed, so there is little value in setting an interim target for those areas. Others are so far advanced, that it is unlikely that any interim target will be able to influence the work that has already been carried out. In these areas, spot rezonings will be the main mechanism to address shortfalls in the supply of zoned land.

There is also little point in setting an interim target if the figure is wrong. It may lead planning authorities to once again assume that they know the answer because they have an official number, and ignore pleas to accommodate market requirements that do not fit within the official number they have been given.

The Department also needs to clarify whether reference to commercial floorspace includes a reference to office space, as well as shopfront premises.

#### **Recommendation 40**

No interim target should be set as there is a real risk that an arbitrary number will be too low, and will actually discourage planning authorities from making more than adequate provision for retail and commercial floorspace in their comprehensive local environmental plans.

In any event these measures will have immediate substantial impact well before any FSDA is completed:

- facilitate/encourage the designation and appropriate zoning of enterprise and renewal corridors; and
- mandate "retail premises" as a permissible use in all centres, designated corridors and business parks; and
- mandate "retail premises" and "bulky goods premises" as a permitted use in industrial areas, with a zone objective clarifying what kind of development is envisaged (as per recommendation 3).

**7. Is the approach of identifying a large area of land supported? Are there other suitability criteria that should be included, or criteria that should be omitted?**

#### **Figure 1**

Figure 1 only makes sense if it applies exclusively to the preparation of comprehensive local environmental plans. It should be clearly labelled as such. The existing network of centres, the

floorspace supply and demand assessments and retail and commercial floorspace targets should have no relevance in the spot rezoning process.

#### **Recommendation 40**

Figure 1 only makes sense if it applies exclusively to the process for the preparation of comprehensive local environmental plans. It should be clearly labelled as such.

#### **Large area of land**

We support the approach of identifying a large area of land.

#### **Recommendation 40**

The approach of identifying a large area of land is supported and should remain in the policy.

#### **Suitability criteria**

We support all of the points in the suitability criteria, except the last one. The last point says that proposed retail and commercial rezonings will be evaluated for their

impact on the supply of existing land use such as residential land (including impacts on housing supply and affordability) or industrial lands.

Firstly, the Department of Planning's justification for the "protection" of land zoned industrial normally comes down to employment. In fact, for that reason industrial land is often termed by the department as "employment land". However the sectors that employ the most people per hectare of land are retail and commercial office. Retail is Australia's largest source of employment. Regrettably many people involved in planning are not aware that the modern NSW economy is not as dependant on industry as it was in the 1950s, and there is nothing wrong with recognising the gradual reshaping of our economy around the services sector.

Secondly, the above requirement discourages zoning for a mix of uses and encourages single-use zoning. The benefits of mixed-use zoning, well articulated in the report *Liveable Centres* is often not realised because of planning criteria that requires authorities to be 'certain' that they can deliver of sector based targets for commercial office, residential, etc. When land is able to be used flexibly for different uses (as it should be in an enterprise corridor zone, local centre zone, mixed-use zone and high density residential zone) planning authorities do lose control as to the precise use of the land. This is ultimately in the public interest because it allows the market to do what it does best – deliver the product that delivers the greatest value to the economy and community.

In the greater scheme of things there is little risk that housing will displace commercial development across a region; or conversely that retail will displace housing. All will ultimately find their place based on the relative need to the community (as expressed through their economic value).

By the way, zoning is not a zero sum game. If there is a concern that, by rezoning land for mixed-use, there will be less land available for high density residential uses, just rezone some more land for high density residential somewhere else. There is no actual shortage of land in Sydney – just a shortage of land zoned for some key uses (such as retail, high density residential and greenfield development).

We are, however, deeply concerned this text that follows the suitability criteria on page 12:

Priority should be given to sites which perform best against the criteria ...



This statement supports other provisions in the policy which give the new system of FSDAs the qualities of a quota system. This sentence makes it clear that not all sites that satisfy the criteria should be approved. That is, the sentence assumes some form of rationing process to limit the number of sites going forward to a rezoning. Other parts of the document make it clear that the FSDAs will be used to refuse a spot rezoning or a proposal for a new centre – even when the suitability criteria is met. There can be no justification for this rationing. If a project broadly satisfies the suitability criteria, a rezoning should be approved by the planning authority. If infrastructure, urban amenity issues, etc are dealt with (as they would be if the project meets the criteria) it is in the public interest for as many sites as possible to be rezoned, to ensure maximum competitive pressure on landlords and retailers.

#### **Recommendation 41**

The suitability criteria are fully supported as is, with the exception of the last dot point. The last dot point – relating to the impact of supply on existing land use – should be deleted.

There should be no text that suggests that some projects that satisfy the suitability criteria should not proceed. As a general rule, all projects that satisfy the suitability criteria should proceed to a rezoning.

In order to satisfy the suitability criteria it should not be necessary for all sites to meet all the criteria.

#### **8. Should a more flexible approach to the policy framework be adopted in regional area? Are there other areas, such as some parts of Western Sydney, where a similarly flexible approach might apply?**

To talk about the policy being “flexible” in some geographic areas, rather than others, implies that the policy is not, in general, intended to be flexible. This is disappointing. A flexible policy is what NSW needs.

#### **Recommendation 42**

The policy should be flexibly applied everywhere, not just in regional locations or Western Sydney. If there is any need for regional variation, this should be clearly spelt out and justified.

#### **9. Should the B1 (Neighbourhood Centre) zone be removed?**

Yes. There is no practical need for it. The differences between centres of different scales can be managed through the amount of land zoned for high intensity uses and through height controls, rather than regulation of use through the land use table or the zone objectives.

#### **Recommendation 42**

The B1 (Neighbourhood Centre) zone should be removed and the mixed use zone or local centre zone instead used. However, residential flat buildings and multi-dwelling housing should be added as mandatory permissible uses in the local centre zone and the mixed use zone.

#### **10. Should the B5 (Business Development) zone be amended? What would be the appropriate name for the B5 zone?**

When the B5 zone was first created in the original standard instrument its objective was:

To enable a mix of office, retail and warehouse uses in locations which are close to, and which support the viability of, centres.

The mandatory permissible uses were childcare centres, office premises; passenger transport facilities, retail premises; and warehouse or distribution centres.

These days, following amendments made by the NSW Government without consultation just prior to Christmas 2007, the objective reads as follows:

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

The list of mandatory permissible uses has been narrowed to just childcare centres, passenger transport facilities and warehouse or distribution centres. Office premise and retail premises have been deleted.

While the original zone objective and list of permissible uses is vastly superior to the current text, neither fully reflects the role envisaged for the business development zone in the Metropolitan Strategy. There it was said that business development zones would not just be adjacent to strategic centres, but also that such zones could be separate from centres, but linked to them (for example, by a corridor).<sup>57</sup>

The confusion about this zone arises from the fact that it has no actual real purpose. It essentially fulfils a role that has traditionally been carried out by the light industrial zone. By trying to create a specific zone just for bulky good premises and nothing else, the Department risks creating a serious undersupply in land available for this form of development. It also risks creating pockets of undeveloped land – if there is insufficient market need for bulky goods premises in an area, landowners will not be able to look to light industry as an alternative.

We submit that the light industrial zone should be used to carry out all the purposes originally envisaged for the business development zone, including, potentially office premises, and retail premises (the latter being a mandatory permissible use as per our recommendation 3 above).

#### **Recommendation 43**

The B5 business development zone should be deleted from the standard instrument and the light industrial zone instead used wherever a business development zone was planned.

#### **11. Should the name of the B6 (Enterprise Corridor) zone be changed so as not to be confused with Economic, Renewal and Enterprise Corridors in the strategies?**

We're not aware of any confusion. It was always intended that areas identified at a strategic level as enterprise corridors would be given the enterprise corridor zone. It is simply revisionism to now suggest otherwise.

#### **Recommendation 44**

The name of the economic corridor zone should not be changed.

#### **12. When should general retail be a permitted use in enterprise corridors?**

Please see our answer to question 2B above.

#### **13. Is this the appropriate planning framework for business parks and the B7 (Business Park) zone?**

The proposed planning framework has several problems. First and foremost problem is this statement in the policy:

<sup>57</sup> NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 105.

[B]usiness parks need to be planned carefully to prevent strategic commercial centres suffering a significant loss of vitality and amenity ...<sup>58</sup>

Additionally, the policy says that

[i]n planning to successfully balance the economic advantages of business parks with the potential impacts on existing centres and infrastructure ...the ability of the business park to complement or strengthen nearby centres [should be considered] ...<sup>59</sup>

These statements assume that the office development is a zero sum game - that any office development in a business park will come at the expense of a nearby strategic centre. This is simply not true. Business parks are often made up of purpose-designed large-floor plate buildings. Tenants are rarely balancing up whether to locate in – say to – Liverpool or Wollongong or a business park. In suburban Sydney a business park's biggest competitor in attracting tenants is often the Sydney CBD or North Sydney, other business parks and CBD locations in other states. It is wrong to view the benefits created by business parks as something that must be balanced against costs to a strategic centre. As we have often said – prohibiting one form of development in a particular area does not mean that investment will flow to a planning authority's favoured area for development.

In any event, even if business parks gave tenants more choice – wouldn't that competition amongst landlords encourage investment, and ensure the floorspace is not priced above economically efficient levels?

This section of the policy also directly contradicts other sections of the policy which reassuringly assert that the FSDA will be a minimum, not a maximum requirement for floorspace. It does this by saying that

the ability of the business park to complement or strengthen nearby centres ... [will take] into consideration the office floorspace needed in each region or subregion based on the FSDA, and the capacity for business parks to contribute to supply without undermining established centres.<sup>60</sup>

Clearly, a proponent for a business park will only have a strong case here if a strategic centre is not able to fulfil its quota of office floor space. Effectively this approach assumes that FSDA is something to be rationed amongst different locations – a new quota system for floorspace.

It seems a proposal for a business park will be viewed more favourably if it relates to "knowledge-based industries". The reasons for this are not clear. We appreciate that knowledge-based industries are sexy, but other industries, such as call centres and freight company/supermarket head offices, are just as important in economic terms. The planning system should not favour some industries over another merely because they sound good in a press release.

Please also see our answer to question 2B above for more detail on the changes we think should be made to the standard instrument in relation to business parks.

#### **Recommendation 44**

References to business parks harming strategic centres, or the benefits of business parks being balanced with the impacts on existing centres should be removed from the policy. Proposals for business parks should be judged on their own merits and not for their hypothetical ability to deprive other locations of tenants.

<sup>58</sup> NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009) 9.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

#### **Recommendation 45**

No business park proposal should be refused, wholly or in part, because of the FSDA is allocated to other centre or centres.

#### **Recommendation 46**

Proposal for business parks should not be viewed more favourably merely because they include "knowledge-based industries".

**14. Are these the appropriate exceptions to retail and commercial development in industrial zones? Are there others? Should retail generally be excluded?**

Please see our response to question 1 on this topic, and in particular recommendations 3 and 10. Please also see our answer to question 10 and our recommendation 43.

**15. What is the right approach to heights and FSRs in different types of centres and settings?**

Please see our response to question 3 on this topic, and in particular recommendation 25. Please also see our answer to question 1 and recommendation 18.

**16. Should multi-dwelling housing and residential flat buildings be mandated as permissible uses in the B4 (Mixed-Use) and B2 (Local Centre) zones?**

Yes.

The policy also proposes (on page 15) the use of commercial core zones to prohibit residential development in centres. We think this is the wrong approach.

Permitting density and land use mix are crucial to the success of centres. Successful places include a mix of uses, including jobs, retail, entertainment and residential apartments all co-existing. 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. Of course, no building should be forced to have a mix of uses, and single use buildings within a mixed-use neighbourhood make perfect sense.

It is well understood that "land use patterns have a significant influence on how well public transport services can be delivered and utilised."<sup>61</sup> 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.<sup>62</sup>

It's far better that developers be allowed to populate under-used land with the vibrancy of a residential neighbourhood rather than leave it undeveloped because of a lack of demand for commercial or retail floorspace.

This issue was canvassed in the *Liveable Centres* report by urban design experts, Roberts Day. 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:

<sup>61</sup> Alford, G., 2006, Integrating Public Transport and Land use Planning – Perspectives from Victoria. *Australian Planner*, Vol. 43, No. 3, pp. 6-7.

<sup>62</sup> 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](http://onlinepubs.trb.org/Onlinepubs/tcrp/tcrp_rrd_52.pdf), accessed 7 April, 2008]

- 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 high quality transport infrastructure will only delay the economic recovery in NSW.

#### **Recommendation 47**

The commercial core zone and local centre zones should be deleted from the standard instrument, or if either or both are to stay, residential flat buildings and multi-dwelling housing should be a mandatory permissible use in these zones. The mixed use zone can and should be used in lieu of these two zones, but residential flat buildings and multi-dwelling housing should be made mandatory permissible uses, and other changes should be made to the zone as per our answer to question 2B.

#### **17. Does the definition of 'retail premises' need refining to better define the range of land uses it includes and the hierarchy of those subordinate land uses?**

No. This will merely provide more opportunities for the unnecessary micro-regulation of subtly different use types.

#### **18. What land uses should be included/excluded from the group terms 'shop' and "retail premises"? Why?**

There is no conceivable use for the definition of 'shop'. Shop means

retail premises that sell groceries, personal care products, clothing, music, home-ware, stationery, electrical goods or other items of general merchandise, and may include a neighbourhood shop, but does not include food and drink premises or restricted premises.

Retail premises means

retail premises means a building or place used for the purpose of selling items by retail, or for hiring or displaying items for the purpose of selling them by retail or hiring them out, whether the items are goods or materials (or whether also sold by wholesale).

Essentially the key difference between these two definitions is that:

- a place where you hire goods, such as a video library, is retail premises, but not a shop; and
- speciality stores that are not nominated in its definition fall outside the meaning of 'shop'.

Speciality stores that are excluded from the definition of 'shop' include pet shops, jewellery retailers and coin shops.

Both definitions embrace all manner of supermarkets, clothing, music and home-ware retailers. There can be no logical reason for permitting a "shop" in an area, but not "retail premises".

Recommendation 16 asks for "shop" to be deleted from the standard instrument (with "retail premises" used instead).

**19. Is the Net Community Benefit Test the right approach for rezoning? Are there other criteria that should be used to assess rezoning proposals? What guidance should be provided to stakeholders to enable them to assess proposals under the criteria identified?**

The net community benefit test is inappropriate, unnecessary, and contradicts large sections of the policy document. Perfectly good suitability criteria (with the exception of the last dot point) have been identified on pages 11-12. Yet for some reason proposed new centres are to be evaluated by both the suitability criteria and the net community benefit test, while out-of-centre developments will be evaluated by the net community benefit test alone.

If this test is retained (in any form), the whole process has been for nothing, and the government might as well give up trying to create more competition. The test is flawed for the following reasons.

Firstly, in order for it to apply

It must be first demonstrated that there are no suitably zoned sites within the existing centre.

Our commentary on principle 2 in answer to question 1 explains why it is neither practicable nor desirable for a test like this to be applied before more land is available for development.

Secondly, the test cites this proposition as the basis for its legitimacy:

... from time-to-time there will be an undersupply of floorspace in certain locations and therefore the planning system needs to assess the potential for development in these locations.

This statement runs against all of the other statements that say it is the job of the planning system to zone more land for development that the market requires, so as to foster competitive tension between landlords and business operators, encourage investment, innovation and efficient prices. The whole idea of competition is that new businesses should be free to set up and compete even if there is no undersupply.

Thirdly, the difference between a "new centre" and an "out-of-centre" development, on occasion, will be subtle. The distinction is artificial and unnecessary. If a development satisfies the suitability criteria, it should be approved. The fact that the development may be out of an existing centre is neither here-nor-there. Why do we have a centres policy? To ensure good use of infrastructure! If the suitability criteria leads us to believe a site has good infrastructure, then it doesn't matter that it is not part of an existing centre. It does not matter (and in fact is a good thing) that it will place land owners and businesses in the existing centre under competitive pressure.

Fourthly, the specific aspects of the net community benefit test raise issues that are not relevant. For example:

- If the suitability criteria are satisfied (which includes infrastructure issues) why does it matter if the site is not part of agreed state and regional strategic direction?
- Why does it matter if it creates a precedent or changes the expectations of landholders? The precedent would be that a development that meets the suitability criteria will get approved. A very good precedent to set, surely?
- How can zoning for retail or commercial development result in a loss of "employment lands"? Any land developed as commercial or retail premises is likely to employ a lot more people than an industrial use.

Fifthly, the policy test requires this question to be asked:

Will the proposal increase choice and competition by increasing the number of retail and commercial premises operating in the area?

This simply re-creates the whole discredited policy framework that this document is supposed to be replacing. These words almost identically mimic the *Kentucky Fried Chicken* case. This question requires a planning authority to decide whether there will be numerically more or less retail and commercial premises if the development goes ahead. This in turn will require an economic study to see if the new business will undermine the viability of existing businesses. If

studies show this to be a risk of rezoning, the rezoning will be refused because there will (allegedly) be less (not more) businesses in the area if the development proceeds.

This statement misses the point. The issue is not the numerical amount of retail and commercial premises in the area. One big supermarket can put out of business two smaller supermarkets. Is that bad? Not if the smaller supermarkets are out of business because they were more expensive, shoddily run, had little investment and generally offering poor service. By going out of business the land occupied by the inefficient small supermarkets becomes available for re-development. It's possible a new competitor to the big supermarket may arise. Or some other attractive service for the local community that is able to compete on its own merits may be set up. The benefits of competition are visible through good services, efficient pricing, innovation and investment. These things cannot be accurately measured by any community benefit test.

Competition may be present even if there is only one business in an area – so long as it easy rivals to be set up. The threat that other businesses may establish themselves will often be sufficient incentive for a business to offer goods services and value to its customers.

#### **Recommendation 48**

The net community benefit test should be deleted entirely from the policy and the suitability criteria (with the exception of the last dot point) should be used instead.

#### **20. Is there support for ensuring the impact on individual businesses is not considered in the merit assessment process?**

Yes. But it should also not be considered in the rezoning process. Our answer to question 1 dealt with this issue more fully.

#### **21. Is there more that can be done to prevent businesses using objectors to delay or increase the costs of the planning process for their competitors?**

The issue is not that businesses can make objections. If those objections are well founded and based on legitimate planning or legal issues, it is difficult to instruct a planning or consent authority that they must disregard them. In any event, such an instruction is easily circumvented by arranging for submissions to be made by chambers of commerce, industry organisations or members of the public.

The real issue is the scope of matters which are legitimate considerations in the decision-making process. So long it is legitimate for a decision-maker to consider the competitive impact a new business on existing businesses you will have businesses using the planning system to block rivals. The actual objection might lodged by anyone.

Any policy response that involves placing restrictions on who may make objections rather than what can be considered will just be window dressing.

#### **22. Other matters**

##### ***The RU5 village zone***

We can't work out why this zone is required. It seems to us that the mixed-use zone or local centre zone would do the job perfect adequately.

**Recommendation 49**

The RU5 village zone should be deleted from the standard instrument in the mixed use zone or the local centre zone instead used.

Again, thank you for the opportunity to make these comments. We would welcome an opportunity to discuss these issues further.

Yours sincerely

**Urban Taskforce Australia**

A handwritten signature in black ink, reading "Aaron Gadiel". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Aaron Gadiel  
Chief Executive Officer