

14 August 2009

Mr Allan Young
General Manager
Gloucester Shire Council
PO Box 11
Gloucester NSW 2422

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

Dear Mr Young,

Re: Draft Gloucester Local Environmental Plan 2009

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

The Urban Taskforce has reviewed the *Draft Gloucester Local Environmental Plan 2009* ("the plan") and identified some issues of concern.

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

1. The plans aims are not appropriate

The Urban Taskforce is concerned with the language used by Council when articulating the aims of the plan.

The aims are important for two reasons. Firstly, when a court is applying a plan it is obliged to adopt an interpretation that would promote the plan's aims, over any purposes that would not promote those aims.¹ Secondly, in determining a development application a consent authority may be obliged to take into consideration plan aims if they are relevant.² It's clearly important that the aims of the plan are well written.

Protection of rural lands

The plan includes the following aim:

(b) to protect rural lands ...

The desire to "protect" agricultural activities is a misguided attempt to hold onto traditional agriculture subject to a dramatically changing industry within a regional and global context.

If agriculture in a given local government area is a viable and attractive industry, then its viability would not rely upon protection by way of a local environmental plan.

Most of Australia's agricultural industry is generally located well outside of the foreseeable areas of urban expansion. There is no shortage of agricultural land available within Australia to supply produce that meets our needs. The modern supply chain is no longer dependent on geographical proximity to urban areas. In fact, the only significant commercial opportunity for many Australian regions is agriculture, while many competing industries are willing and able to locate while areas on the fringes of the existing urban footprint.

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

¹ Interpretation Act 1987 (NSW) s 33.

² Environmental Planning and Assessment Act 1979 s 79C(1)(a)(i).

Simply zoning land as “primary production” does not mean that local agriculture will remain. What it may do is leave land as vacant or underutilised and relatively unproductive. By taking a protectionist approach to rural activities, planning authorities force local landholders into marginal, unsustainable rural business.

The ‘protection of rural lands’ (in clause 1.2(2)(b)) should be deleted from the aims in the plan.

Protection of natural resources

The plan includes the following aim:

- (b) to protect ... natural resources ...

The phrase “natural resources” includes land, forests, minerals, water, oil and gas.³ As development of land will necessarily involve substantial modification (and will often involve land clearing, extraction and earth-moving) the notion that all natural resources should be ‘protected’ suggests that the normal business of development should be prevented.

We suggest **the aim set out in clause 1.2(2)(b) should say that the plan will “provide for the use of the area’s natural resources.”**

Managing resources and development

The plan includes the following aim:

- (a) to manage the resources of the Gloucester area ...

A plan cannot, in itself, “manage” the resources of an area. A plan can permit certain activities or prohibit them. It provides a framework for decision-making. It will be up to people and organisations to manage resources, not legal documents.

Similarly, there is a provision of the plan that says it will

- (c) ...manage development to benefit the community ...

We suggest **the plan aim in clause 1.2(2)(a) be revised so that it “permits” the “management of the resources of the Gloucester area”.**

Again, the plan provides a framework for actual people and/or organisations to manage development. This aim also suggests that all development must be directed to the benefit of “the community”. Some development will be directed to the benefit of individuals, rather than “the community”. In a society that values private property rights, free enterprise and the spirit of personal responsibility, there is nothing wrong with this approach, so long as there are no unacceptable costs imposed on the community.

In our free-market system of private property, we expect that a large amount of private sector activity will be undertaken to benefit private individuals, and by allowing this to happen, society as a whole is better off. However, individual development proposals should not have to demonstrate their “benefit [to] the community”. There is a risk of this occurring, given that the aims of a local environmental plan may end up being considered in the context of individual development applications.

Clause 1.2(2)(c) should be revised so that the plan aims to

permit development that meets the requirements of Gloucester’s present and future residents, visitors, businesses and community organisations.

Ecologically sustainable development

The plan includes the following aims:

- (d) to embrace and promote the principles of ecologically sustainable development, conservation of biological diversity and sustainable water management, and to recognise the cumulative impacts of climate change,
- (e) to protect, enhance and provide for biological diversity, including native threatened species, populations and ecological communities, by long term management and by identifying and protecting habitat corridors and links throughout the Gloucester area.

³ Macquarie: Concise Dictionary (4th Edition) 805.

These aims merely describe the elements of “ecologically sustainable development” which is already contained in the fourth aim of the plan. Furthermore, these aims either restate and or reword the principles of ecologically sustainable development (ESD) and/or the objects of the *Environmental Planning and Assessment Act 1979*. The phrase, “ecologically sustainable development” is already extensively defined and detailed under the Act itself. The concept of “ecologically sustainable development” already requires:

- environmental protection;
- the integration of economic and environmental decision-making;
- inter-generational equity in decision-making;
- the application of the precautionary principle; and
- respect for biodiversity.⁴

Section 11 of the *Interpretation Act* makes clear that when the phrase “ecologically sustainable development” is used in a local environmental plan, it has the same meaning as in the Act. There is no need for a further reiteration of the elements of ecologically sustainable development in the plan.

There is opportunity to refine and simplify the aims of the plan for improved clarity, whilst still achieving the same end result. Council should not feel obliged to include aims and objectives when there is already legally recognised and widely accepted terms to say the same thing, but with less complication.

In the end, the LEP is a legal document that must be clear and unambiguous. For example, **if Council was to include the following aims:**

to promote the ecologically sustainable development of Gloucester Shire; and,

to achieve the objects of the *Environmental Planning and Assessment Act*,

a significant number of aims to the plan could be removed and or collapsed. Council would still be able to articulate its aims, but would be doing so more clearly and succinctly.

Aims as suggested above would still provide Council with the ability to guide and direct development for the betterment of the locality, while having regard to economic, environmental and inter-generational equity - ESD.

In addition to the above, the adoption of an aim “to achieve the objects of the *Environmental Planning and Assessment Act*” would further strengthen the plan while providing Council with the ability to deal with all aspects of the bio-physical, social and economic environments. If this approach to plan making was adopted, Council would be able to replace five cumbersome plan aims with two.

The aims of the plan set out in 2(a), (b), (c), (d) and (e) should be replaced with

To promote the ecologically sustainable development of Gloucester Shire; and

To achieve the objects of the *Environmental Planning and Assessment Act 1979*.

2. Unnecessary additional zone objectives

The Council has inserted some additional objectives to some zones. These additional objectives appear to add little to the standard objectives. In some cases, the objectives added by Council simply restate and/or reword the standard objectives or introduce terminology not defined in the plan. These additional objectives add uncertainty and confusion when attempting to determine what Council is really trying to achieve with the inclusion of the non-standard objectives.

⁴ The *Environmental Planning and Assessment Act 1979* already defines the phrase “ecologically sustainable development” to mean all of the things set out in section 6(2) of the *Protection of the Environment Administration Act 1991*. Section 11 of the *Interpretation Act 1987* makes clear that when the phrase “ecologically sustainable development” is used in a local environment plan, it has the same meaning as in the Act.

Council would understand that when interpreting statutory documents (such as this plan) the judiciary will assume that additional words have been inserted for a reason. The courts will prefer an interpretation that gives a phrase a different meaning from an apparently similar provision in the same document. This could have bizarre and unintended consequences for this plan; given that so many provisions appear to do nothing more than duplicate other provisions.

Examples of additional and unnecessary Council added objectives or objectives that require further definition are provided below.

Large lot residential zone

The objective in the "large lot residential zone" that has been added by Council says that the zone is

[t]o conserve biological diversity and native vegetation corridors, and their scenic qualities, in a rural residential setting.

However this is merely a re-drafting of the first dot point in the objectives for this zone, inserted by the Standard Instrument, which says the zone is

[t]o provide residential housing in a rural setting while preserving, and minimising impacts on, environmentally sensitive locations and scenic quality.

Furthermore, there is no need to include a zone objective that is a matter for consideration pursuant to the Act.

The objective inserted by Council to the large lot residential zone should be deleted as it merely rewords the first standard zone objective and restates the objects of the Act.

General industrial zone

The objective added by Council says the zone is

[t]o conserve biological diversity and native vegetation corridors, and their scenic qualities, in an industrial setting.

The inclusion of this objective to the general industrial zone has the potential to confuse the purpose of an industrial zone. Council would surely accept that the purpose of an industrial zone is to encourage and facilitate the location of industrial uses. By nature, industrial uses will alter landscapes and to seek to "conserve biological diversity and native vegetation corridors, and their scenic qualities" in an industrial context may not be a realistic expectation.

Furthermore an objective such as that suggested by Council will introduce an element of risk to the continuation of legitimate industrial activity. By including additional zone objectives that refer to the conservation of "biological diversity and native vegetation corridors, and their scenic qualities" will potentially adversely impact on the viability and continuation of the uses permitted in this zone.

Council must recognise that industrial uses are essential to the economic sustainability of the Shire. Therefore, Council must act cautiously and not seek to add inappropriate zone objectives.

Notwithstanding the above, the objects of the Act and section 79C already demand a thorough examination and consideration of environmental impact, therefore an additional zone objective is not necessary.

The objective inserted by Council to the general industrial zone should be deleted as it merely restates the objects of the Act and may restrict legitimate use of land for industrial purposes.

Environmental management zone

The objective in the "environmental management zone" that has been added by Council says that the zone is

[t]o conserve biological diversity and native vegetation corridors, and their scenic qualities, in a rural setting.

However this is merely a re-drafting of the first dot point in the objectives for this zone, inserted by the Standard Instrument, which says the zone is

[t]o protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.

As noted above, repetition of the same point should be avoided in any statutory instrument, because the courts are obliged to assume all words are inserted for a reason.

Furthermore, there is no need to include a zone objective that is a matter for consideration pursuant to the Act.

The objective inserted by Council to the environmental management zone should be deleted as it merely rewords the first standard zone objective and restates the objects of the Act.

3. Most retail banned in the village zone

"Retail premises" are not permitted uses in this zone. Only neighbourhood shops are permitted.

Neighbourhood shops are permitted, however these are defined to be

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

This means a shop in a village zone:

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

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

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

Where is the public interest in prohibiting these low impact uses? None of these retail types are inconsistent with the character of a village.

Furthermore, neighbourhood shops are also limited in floor area (in this case 80m²), which makes it impossible for even a moderate scale supermarket to be established. This limits the opportunity for competition, ensuring that the community pays more than they should. Limiting the opportunity for a competitive retail environment by restricting the type of goods sold and/or limiting floor area robs the community of the opportunity to access a wide variety of competitively priced grocery items in their locality.

In August 2008 the Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws.⁵ It concluded that zoning and planning regimes act as an artificial barrier to new supermarkets. In the same month the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords.⁶

Consumers will pay much more for groceries at small retail outlets. In his report *Choice Free Zone*, Professor Allan Fels found that larger format stores offer up to 18 per cent less for basic food items and up to 28 per cent less for other household products. The Australian Government's Bureau of Infrastructure, Transport and Regional Economics found that consumers paid 17 per cent more when they did not have ready access to a large format grocery store.

What this prohibition really means is that people need to drive further to satisfy their general grocery and shopping needs. A Council that espouses ecologically sustainable development

⁵ Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008).

⁶ Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (2008).

principles in other parts of their plan cannot in all honesty make policy that creates inequities between communities and also forces the greater use of the motor vehicle.

The argument that limiting floor area and seeking to control the type of goods sold from retail premises by way of plan does not stand up to scrutiny. Local amenity can be properly and appropriately considered at the development application stage. Limiting retail by way of a statutory plan does little more than protect existing retail landlords.

“Retail premises” should be a generally permitted use in village zones.

4. Full range of residential development should be permitted in local centre and mixed use zones

It is encouraging to note that some residential uses are permitted in local centres and mixed use zones. Council would agree that successful places include a mix of uses, including jobs, retail, entertainment and residential all coexisting. These different uses can work together to make a centre attractive and successful at all times of the day and week. Centres without retail, entertainment and residential uses can be lifeless, cold and uninviting places outside of business hours.

However, the policy decision to only permit residential development as:

- shop top housing in the case of local centre zone; or,
- residential flat buildings (but only as part of a mixed use development), in the case of mixed use zones,

may cause the very problem it is trying to avoid. By insisting on non-residential ground floor uses Council could be responsible for ensuring empty ground floor spaces when retail uses are not attractive and/or discouraging development altogether.

If there is insufficient demand for retail space, developers are forced by these rules to build ground floor retail space that can be empty and underused leading to a ghost town atmosphere in the local streetscape. It's far better that developers be allowed to populate empty land with the vibrancy of a residential neighbourhood than leave it bare because of a lack of demand for retail space.

Similarly, forcing developers to build retail space that they know will be vacant (in order for the developer to get the benefit of residential space above) is a waste of resources and will do nothing to create a vibrant streetscape.

The Urban Taskforce recently commissioned a research paper that considers the benefits of mixed-use urban neighbourhoods. The highly respected urban design and planning firm, Roberts Day, provide a compelling argument on the benefits of mixed use centres and particularly highlight the ability for local planning to facilitate and/or frustrate the provision on these highly desirable urban environments.⁷

We urge the Council to properly consider the creation of liveable and functional living centres. By adopting such a policy position, Council will be demonstrating best practice in planning, a commitment to the formation of sustainable communities and also providing the incentive needed to encourage the private sector to develop more in centre swellings dwellings.

The local centre and mixed use zones should permit residential development including residential flats, as well as shop top housing.

5. Residential flat development should be permitted in medium density residential zones

A review of the LEP maps indicated that the medium density residential zones adjoin local centre and mixed use zones. Such locations provide those who reside in these zones excellent access to the services and facilities provided in local and mixed use centres. It is an ideal and appropriate location for higher density residential opportunities. However, while residential flat development is permitted in the general residential and low density residential zones the plan

⁷ Roberts Day 2009. *Liveable Centres - Regulations Shape Reality: Form First*. Urban Taskforce Australia.

does not permit residential flat development in the medium density zone. The logic behind this is not apparent.

Medium density residential zones should permit residential development including residential flats.

6. Prohibition on retail premises in general industrial zone

The general industrial zone does not permit retailing other than "industrial retail outlets". However, industrial retail outlets are narrowly defined and will restrict most retail and bulk goods formats.

Although the Sydney Metropolitan Strategy does not apply to Gloucester, it offers a sensible approach on this issue. The Metropolitan Strategy stated that retailing in industrial areas be permitted when it has operating requirements akin to industrial uses.⁸ There was also a promise of a new approach to reinvigorate employment lands, including flexible zonings for industrial and commercial activities.⁹

There is potential to include a wider range of retail activities in industrial areas without jeopardising industrial activities. This could be achieved by including either retail premises and/or bulky goods premises (preferably both) as a permitted use in industrial zones, with the inclusion of an additional objective to the zone that states the zone is to

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

Bulky goods premises and other retail that is either ancillary to an industrial use, has operating requirements akin to industrial uses or demonstrable offsite impacts akin to industrial uses should be a permitted use in the general industrial zone.

7. Height clause objective could be worded better

The objective for height controls contained in the plan says:

The objective of this clause is to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the area. (emphasis added)¹⁰

The two policy imperatives expressed in this provision may often be mutually exclusive. That is, a development that complies with the bulk and scale requirements of the desired future character may be inconsistent with the existing character. If such development is to be prohibited or discouraged, the desired future character of some areas may never be achieved.

We ask that the objective for the height control clause be re-worded as follows:

The objective of this clause is to ensure that buildings are compatible with the bulk and scale of the existing or desired future character of the area.

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

Yours sincerely

Urban Taskforce Australia



Aaron Gadriel
Chief Executive Officer

⁸ Metropolitan Strategy – Supporting Information 105, B4.1.2.

⁹ Ibid 63, A1.4.2.

¹⁰ Clause 4.3(1).

Draft Gloucester Local Environment Plan 2009

Summary of Urban Taskforce's Recommendations

1. The 'protection of rural lands' (in clause 1.2(2)(b)) should be deleted from the aims in the plan.
2. We suggest the aim set out in clause 1.2(2)(b) should say that the plan will "provide for the use of the area's natural resources."
3. We suggest the plan aim in clause 1.2(2)(a) be revised so that it "permits" the "management of the resources of the Gloucester area".
4. Clause 1.2(2)(c) should be revised so that the plan aims to
 permit development that meets the requirements of Gloucester's present and future residents, visitors, businesses and community organisations.
5. The aims of the plan set out in 1.2(a), (b), (c), (d) and (e) should be replaced with
 To promote the ecologically sustainable development of Gloucester; and
 To achieve the objects of the *Environmental Planning and Assessment Act 1979*.
6. The objective inserted by Council to the large lot residential zone should be deleted as it merely rewords the first standard zone objective and restates the objects of the Act.
7. The objective inserted by Council to the general industrial zone should be deleted as it merely restates the objects of the Act and may restrict legitimate use of land for industrial purposes.
8. The objective inserted by Council to the environmental management zone should be deleted as it merely rewords the first standard zone objective and restates the objects of the Act.
9. "Retail premises" should be a generally permitted use in village zones.
10. The local centre and mixed use zones should permit residential development including residential flats, as well as shop top housing.
11. Medium density residential zones should permit residential development including residential flats.
12. Bulky goods premises and other retail that is either ancillary to an industrial use, has operating requirements akin to industrial uses or demonstrable offsite impacts akin to industrial uses should be a permitted use in the general industrial zone.
13. We ask that the objective for the height control clause be re-worded as follows:

 The objective of this clause is to ensure that buildings are compatible with the bulk and scale of the existing or desired future character of the area.