Urban Taskforce
AUSTRALIA

31 August 2009

Mr Sam Haddad
Director General
Department of Planning
GPO Box 39
Sydney NSW 2001

Dear Sam

Re: Draft Development Assessment Guidelines, parts B and C

Please find attached our submission to parts B & C of the development assessment guidelines. It follows our earlier submission on Part A of the guidelines (27 July 2009).

While we had some concerns with the proposed Part A, we believe it has the potential to be a helpful document, provided that the issues we outlined are addressed. However, we do not have the same attitude towards Parts B and C.

These two documents, as currently conceived, will further complicate the development assessment process. They will increase the emphasis on box ticking, at the expense of a genuine evaluation of the individual merit of development applications.

These proposed documents incorporate a variety of pre-existing policies and guides prepared and adopted by some councils on an ad-hoc basis. Many of the adopted provisions do not represent best practice, and in fact, **these documents illustrate what has been going wrong with the NSW planning system**.

It would be a **serious mistake** for the Department of Planning to give its approval to complicated, confusing (and in some instances) unlawful interpretations of the *Environmental Planning and Assessment Act*. These documents are likely to require the engagement of unnecessary consultants to complete convoluted documents for relatively straightforward development proposals. For complex development proposals, these documents are likely to divert attention from the key issues and instead require needless studies, reports and other humbug on matters that are not central to the development approval decision.

The finalisation of parts B and C work against the thrust of the government's reforms. **We recommend that the new "Development Assessment Guidelines" be confined to a revised version of the draft Part A document.**

The toolkits in parts B and C should either be dropped altogether and/or be progressed at a slower pace.

Our concerns are documented in some detail in the attached submission. Briefly they can be summarised in the following key points:

- social and economic assessment in development assessment will be routinely required for all single detached dwellings, residential flat development, commercial office or retail development;

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- the requirement for economic assessment of retail and office development includes development within a centre;
- the impact of new development on "existing and future business" will now be mandated for a much wider range of development;
- the impact of new development on property values must now be considered – a radical change to existing planning practice which focuses on amenity impact rather than property value impacts;
- social impact statements are now likely to be necessary for most high intensity development;
- cumulative impacts of past and possible future development will now need to be considered in all development assessment decisions – this is a far reaching change to existing planning practice which (appropriately) limits consideration of cumulative impacts in development assessment;
- heritage requirements are far broader than the existing statutory scheme, in particular, "heritage practices" are protected (rather than just heritage places or buildings) and the National Trust is elevated to quasi-public authority status;
- there are requirements to consider conserving other land uses (such as agriculture) even when land has been rezoned for urban use;
- there are new requirements for "risk assessment" in relation to accident, injury and criminal activity for residential, commercial, retail and other development;
- new development is penalised for using conventional energy sources;
- there is no limit on the "policy statements" from federal or state governments that are to be considered - further confusing an already messy policy framework;
- bicycle facilities, including racks, lockers and showers are mandated in shopping centres and other development which are major traffic generators;
- the standard application form makes request for personal and political information that is inappropriate and is not authorised by law;
- neighbours' views are elevated to being a "public interest" consideration – even when views are not raised as an issue by statutory plans or a development control plan; and
- increased (unreasonable and unnecessary) information demands are to be made of applicants.

We look forward to discussing our concerns with you at the next opportunity.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Encl.

Urban Taskforce
AUSTRALIA

28 August 2009

Ms Donna Rygate
Executive Director - Corporate Governance & Policy
NSW Department of Planning
GPO Box 39
SYDNEY NSW 2001

By e-mail: innovation@planning.nsw.gov.au

Dear Ms Rygate

Re: Draft *Development Assessment Guidelines: Parts B and C*

On the 22 July 2009 we wrote to you with our submission in response to the draft *Development Assessment Guidelines: Part A* (circulated on 10 July 2009). On the 27 July we were provided with drafts of Part B and Part C of these guidelines for comment.

As you would be aware, Part A was an overview of the development assessment process. Part B is described as a "toolkit for applicants" and includes a series of template statements of environment effects. Part C is a "toolkit for consent authorities" and includes a template development assessment report and an "evaluation guide" to section 79C issues under the *Environmental Planning and Assessment Act*.

While we had some concerns with the proposed Part A, we believe it has the potential to be a helpful document, provided that the issues we outlined are addressed. However, we do not have the same attitude towards Parts B and C.

These two documents, as currently conceived, will further complicate the development assessment process. They will increase the emphasis on box ticking; at the expense of a genuine evaluation of the individual merit of development applications.

These proposed documents incorporate a variety of pre-existing policies and guides prepared and adopted by some councils on an ad-hoc basis. Many of the adopted provisions do not represent best practice, and in fact, **these documents illustrate what has been going wrong with the NSW planning system**.

It would be a **serious mistake** for the Department of Planning to give its approval to complicated, confusing (and in some instances) unlawful interpretations of the *Environmental Planning and Assessment Act*. These documents are likely to necessitate the engagement of unnecessary consultants to complete convoluted documents for relatively straightforward development proposals. Even for complex development proposals; these documents are likely to divert attention from the key issues and instead, require needless studies, reports and other humbug on matters that are not central to the development approval decision.

Many of the subjects covered in these documents are dealt with in local council development control plans. These plans vary from council-to-council and even within a council area. The requirements are (appropriately) different for different kinds of development. **It is not practicable for the state government to lay down standardised documents, when the actual legal requirements are determined at a local council level.** We stand ready to co-operate if the government wants to

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force councils to standardise certain policies and reduce red tape. However, nothing in Part B or Part C seems to suggest there will be any reduction in the powers of local councils.

The finalisation of parts B and C are not essential to the implementation of the government's reforms to the development assessment regime. In fact they work against the thrust of the government's reforms. **We recommend that the new "Development Assessment Guidelines" be confined to a revised version of the draft Part A document.**

The toolkits in parts B and C should either be dropped altogether and/or be progressed at a slower pace.

If/when finalised, they should recognise that the decision to approve a development depends on an evaluation of the relevant facts and circumstances in each case, rather than a large number of blanket rules. This means the documents should not seek to set out any more detail than is currently expressly required by the *Environmental Planning and Assessment Act*, regulations and environmental planning instruments of general application.

While we think parts B and C should not form part of the development assessment guidelines, nor part of the statutory reforms to Part 4, we have taken the time to explain some of the significant problems that these documents will cause if they proceed. These concerns are set out below.

1. <u>There is an onerous list of issues in the template statements of environmental effects</u>

The *Environmental Planning and Assessment Act* requires the consideration of such matters "as are of <u>relevance</u> to the development.[1] The guidelines suggest that a statement of environmental effects must assess the likely impacts of the proposal, taking into consideration the social and economic impacts in the locality and the public interest in <u>all</u> instances.

Any attempt to introduce a template "statements of environmental effects" should not imply a new minimum level of information beyond the existing regulations. For instance, statements of environment effects for single dwelling, alterations and additions are usually very brief documents. The template will require much *more* extensive documentation for this low intensity form of development. Similarly, the requirements for a shop fit out in a shopping centre are self-evidently excessive.

For low intensity residential development a statement of environment effects should not necessarily include a written narrative, i.e. a plan may be sufficient. For such development, a narrative should only be required if there is a need to provide further explanation of matters that cannot be depicted on plan. A competent development assessment officer can make an assessment and determination of a development proposal, for low intensity residential development, with the aid of a set of quality plans, including a site analysis plan.

Social and economic assessment in development assessment *will* be routinely relevant for heavy industry and urban development with unique or unusual impacts, such as brothels, gun shops and sex shops.

However, these guidelines suggest that a statement of environmental effects for a single detached dwelling requires an assessment of the social and economic impacts of that development! This is self-evidently an unreasonable requirement.

We submit, with equal force, that **residential flat development, commercial office or retail development should also not be routinely subjected to social and economic analysis** in the development assessment process. If the local environmental plan permits development of its kind, then the social and economic impact of such development would have been considered at the strategic level. Further consideration of social and economic issues in development assessment would normally be needless repetition.

In some instances the social and economic benefits of a development proposal may be a necessary consideration, when it argued that those benefits offset reductions in amenity or

[1] Section 79C, underlining added.

environmental quality. However, this does *not* mean that social and economic impacts need to be considered in every case; it merely means that they should be considered where they are *relevant* to the development approval decision.

Currently, where an assessment officer decides social issues should be considered, such issues are usually dealt with very briefly without the need for extensive written material by the applicant. The proposed development assessment guidelines clearly expect much more than this.

Further requirements for social and economic assessment contained in the "Section 79C Evaluation Guide"; are discussed below.

2. <u>The "Section 79C Evaluation Guide" is inappropriate</u>

Part C includes a section titled ""Assessment – Section 97C – Evaluation Guide". The document sets out the matters already mandated for consideration under the Act <u>where relevant</u>. However, it goes further, by setting out much more detailed "specific considerations" for each provision of the Act.

Many of these "specific considerations" do not reflect any existing policy by the Department of Planning or decisions by the Land and Environment Court. **If these "specific considerations" are adopted they will represent a new level prescription in the development assessment process.**

Many of the "specific considerations" cannot possibly be addressed by the assessment officer in a timely manner.

A consent authority who wants to act in a timely fashion will be forced to ignore the evaluation guide – raising potential grounds for legal challenge.

A consent authority that is keen to deny an approval will have new ammunition to block development by requiring additional studies and reports. The studies made necessary by the evaluation guide will add little value to the assessment other than ticking a box in an assessment report.

The role of an assessment officer should not be reduced to answering endless and often meaningless questions. Their job is to focus on the issues relevant to the development application before them. Since every development is different; **templates should not attempt to set out the issues to be covered, but should instead cover simpler issues such as formatting and compliance with express provisions of the Act, regulations and state-wide environmental planning instruments.**

Aside from these general comments above, we also have particular concerns with some of the individual matters nominated as "specific considerations" in the evaluation guide. We briefly set out some of these concerns below.

Social impact statements not necessary in most instances

Consistent with the approach taken in the templates for the statements of environmental effects (discussed above) the evaluation guide's section on "social impacts in the locality" seeks to dramatically extend social assessment requirements. It does so by adopting the policies of a small number of councils mandating the preparation of extensive social impact statements as a routine part of development assessment (e.g. Randwick, Holroyd and Lismore).

It would be impossible for an assessment officer to make a comment at the level of detail suggested without comprehensive social impact assessment. For instance, without a comprehensive social impact assessment there would be no other practical way to make a comment on the benefit and cost of a development proposal on "social cohesion", "sense of place" and "social change management".

Adverse social impacts are better considered at a strategic level, rather than on a development-by-development basis. Only a small category of developments may raise social issues best dealt with on a development assessment basis, e.g. brothels. Social benefits of development can be described by the applicant in their statement of environment effects if

they consider it useful to do so. It is then a matter of the consent authority to decide if those benefits are significant enough to include in their assessment report.

Economic impact requirements go too far

The economic benefits and costs of a development proposal in terms of "existing and future business" or "property values as an indicator of environmental impacts" (whatever that means) can't be detailed without an economic impact assessment.

We don't think **the impact on existing or future businesses should ever be a legitimate consideration in either development assessment or rezoning**. But, even where (to our protest) the current planning rules permit consideration of the impact on existing and future business, the consideration is still confined to (some) office, retail and entertainment development.[2] This area planning practice is quite complex and cannot be dealt with adequately by dot points in an evaluation guide. Its inclusion is likely to lead consent authorities to make legal mistakes.

In relation to property values, it is a well established planning principle that depreciation of land values as a result of a proposed development is not a relevant ground for refusing a proposal.[3] Property value is <u>not</u>, in itself, a planning consideration. Where property values are alleged to be affected by adverse amenity impacts it is the amenity questions that must be considered, not their ramifications in terms of property values.[4]

It is possible that nearby property owners may be so adversely impacted by a development that a refusal is warranted.[5] If a refusal isn't warranted; ameliorative works might be required for the benefit of landholders who might otherwise be adversely impacted.[6] However, it is not appropriate for monetary compensation to be required (although in every limited circumstance, acquisition of land can be compelled as a condition of development).[7] **There is, therefore, no basis for introducing "property values" into section 79C considerations under the heading of "economic impact".**

There is, of course, no reason why the jobs and economic income generated by a development cannot be considered by a consent authority. In some instances this will be a very important part of the decision to approve development – for example; for industry, retail and commercial development.

Cumulative impacts are often not relevant

The evaluation guide requires that cumulative impact be considered in development assessment. In order for cumulative impacts to be considered, the impacts must be relevant and there must be some clear statutory basis for their consideration.

It <u>is</u> legitimate to reject a development application when:

- it is objectionable on its own merits; and
- there is "more than just a possibility" of later development applications of the same type.[8]

However, a development proposal <u>cannot</u> be refused when:

- it is unobjectionable in its own right; or
- there is only a "mere chance" that similar development applications may be made in the future.

Cumulative impacts can be important when dealing the principle of "intergenerational equity".[9] When this occurs there *is* a need to consider cumulative effects if:

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[2] *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675.
[3] *Perry v Hepburn Shire Council* (2007) 154 LGERA 182.
[4] Ibid.
[5] *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59 [156] (Preston CJ).
[6] Ibid.
[7] Ibid [160].
[8] *Emmott v Ku-ring-gai Municipal Council* (1954) 3 LGRA 177, 182 (Sugerman J); *Goldin and Another v Minister for Transport* [2002] NSWLEC 75 [34].
[9] *Gray v Minister for Planning and Others* [2006] NSWLEC 720; *Minister for Planning v Walker and Others* [2008] NSWCA 224 [56]-[63] (Hodgson J).

- no single event could be said to have such a significant impact that it would irretrievably harm a particular environment; and
- cumulatively, activities *would* harm the environment.[10]

There may also be specific provisions in environmental planning instruments that may compel consideration of cumulative impacts.[11]

Most development applications will not be covered by *any* of the above scenarios. This fact is ignored by the evaluation guide, which seeks to broaden consideration of cumulative impacts to all development types.

For example, the evaluation guide nominates "nibbling effects" as a specific consideration. However, the concept of "nibbling effects" (as explained by the guide) is very broad. The guide allows cumulative impacts to be considered merely because they are "repetitive" and will erode environmental conditions. This test is utterly at odds with the existing body planning practice. It allows cumulative impacts to be considered even when:

- the individual development application is not objectionable; and
- the ultimate cumulative impact will not irretrievably harm a particular environment.

To illustrate how these added specific considerations will impact on planning practice we will offer a hypothetical case study.

A new apartment development is proposed which will involve a minor increase in traffic with no unmanageable impacts on intersections. However, when other local developments that have occurred and are anticipated are considered, there may be a significant (but not unmanageable) increase in traffic.

While there may be a reduction in the quality of the urban environment as a result of the overall increase in traffic, the increase in traffic from that individual proposal is minor and unobjectionable. The additional traffic burden from all of the potential development will not irretrievably harm the local environment. The current practice holds that it is irrelevant that previous developments have added to the traffic burden and that subsequent developments may do so. The individual proposal therefore cannot be refused on traffic grounds.

However, under the Department's new evaluation guide, the proposal could be refused because even though the traffic impact on the individual development is "minor" it will contribute to the "eroding [of] environmental conditions". The Department's intended approach disregards the fact that the proposal under consideration may, in itself, be unobjectionable and that the environment will not be irretrievably harmed.

The Department of Planning should not seek to tamper with current practice on cumulative impacts.

There should be no new or extended requirement for a design statement

The evaluation guide asserts that a design statement may be required by a statement of environmental effects.[12] At present there is no requirement for a statement of environmental effects to include a design statement – so this appears to be a new additional requirement on development. In some instances, developers may voluntarily choose to include information on design in a statement of environmental effects, but this is not and should not become a blanket rule for all development.

The existing mandatory requirement for a design verification statement only applies to residential flat buildings covered by *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development*. The design verification statement is separate from the

[10] Ibid.
[11] See for example *Tweed Local Environmental Plan*, cl 8(1)(c), *Hastings Point Progress Association Inc v Tweed Shire Council and Anor; Hastings Point Progress Association Inc v Tweed Shire Council and Ors* [2008] NSWLEC 219 [4].
[12] Part C, 25.

statement of environmental effects.[13] The context of the guidelines makes it clear that the new requirement for design statements will extend beyond residential flat buildings.[14]

There should be no reference to "ecologically sustainable building design"

The evaluation guide makes the existence of an energy rating accreditation, an item for "specific consideration" for commercial buildings.[15] In relation to non-commercial buildings it suggests a consent authority require information as to the use of "renewable materials" in the building.

Developers will often seek energy accreditation of their development and will often use renewable materials. They may include this information in their statement of environmental effects and other material associated with their development application. However, for many development proposals, such considerations will be irrelevant. Introducing such requirements risks overcomplicating the approval process, particularly for more marginal (but socially desirable) development, such as regional and/or suburban office accommodation.

Treatment of development control plans is inadequate

A development control plan (DCP) is not binding on a consent authority.[16] The evaluation guide appears to recognise this by contemplating the possibility that development proposal may not comply with a DCP. In this situation, the evaluation guide suggests that a consent authority should ask itself whether the proposal has

> merit in satisfying the *objective of the standards*, and how should it then be dealt with (emphasis added) ...[17]

It's true that <u>one reason</u> for approving a development proposal inconsistent with a DCP is the fact that the proposal adheres to the spirit of the DCP, if not the letter of it. However this is not the only reason. The Land and Environment Court has set out a planning principle detailing the circumstances where it may give little weight to a DCP.[18] For example, a consent authority may give little weight to a DCP if:

- the plan was adopted with little or no consultation;
- the plan has been selectively applied by council; or
- the plan would lead to an inappropriate planning solution, especially an outcome which conflicts with State, regional or local policies.

These important considerations are omitted from the evaluation guide. It is inappropriate to set out a single limited ground for discounting a DCP, but stay silent on other important grounds.

Heritage considerations are far broader than the existing statutory scheme

There is already an existing series of statutory schemes governing the consideration of heritage issues. The heritage requirements are dealt with by

- provisions in local environmental plans (for heritage items and heritage conservation areas);
- the *Heritage Act* (for state-significant heritage matters); and
- the *National Parks and Wildlife Act* (which links consideration of Aboriginal heritage matters to the integrated development process under Part 4, Division 5 of the *Environmental Planning and Assessment Act*).

The specific considerations nominated in the evaluation guide, replicate these other schemes, but also go much further. For example, the consideration of heritage significance of places is not limited to places that have been listed or designated under a statutory scheme. Reference is made to the impact of development on the "heritage significance" of "practices" – the planning system should relate to buildings and places, not "practices". Reference is also made

[13] Environmental Planning and Assessment Regulation 2000, cl 50(1A)(b),
[14] As there is a separate section in the same box dealing specifically with residential flat buildings.
[15] Part C, 25; also see Part B, 77.
[16] *North Sydney Council v Ligon 302 Pty Ltd* 87 LGERA 435, 442 (Kirby ACJ).
[17] Part C, 23.
[18] *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 [87] (McClellan CJ).

to the consideration of matters of both Aboriginal and non-Aboriginal "spiritual" significance – this reduces the secular nature of our planning laws.

Worryingly the "National Trust register" is mentioned as a specific consideration – alongside the statutory mechanisms for protecting heritage. The National Trust is a non-government organisation; like the Nature Conservation Council and the Urban Taskforce. The National Trust is not a public authority, nor is it independent or objective. While it is free to support or oppose development applications in accordance with its charter, it should not be given quasi-public authority status in the Department of Planning's policy documents.

The inclusion of the National Trust risks changing existing Land and Environment Court (and therefore consent authority) practice. The Land and Environment Court will often be informed, that a location or place has been listed by the National Trust, but it is well understood that this is not equivalent to recognition under any statutory scheme.[19] A listing by the National Trust currently does not have determinative weight.[20]

The heritage section of the evaluation guide invokes the "Commonwealth national heritage list". A proposed development that will have, or is likely to have, a significant impact on the national heritage values of a national heritage place will be a "controlled action" under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[21] This action requires a separate approval under the federal act, irrespective of any approval under the *Environmental Planning and Assessment Act*.[22]

If the Commonwealth has determined that a proposed development is not a controlled action, it is inappropriate for an assessment report under Part 4, to attempt to consider the issue. On the other hand, if it is a controlled action, the assessment report should deal with matters in-line with the guide previously published by the Department.[23] None of this is clear from the current text. The existing guide to the EPBC Act issues speaks for itself.

Conserving other land uses should not be a factor in refusing development consent

In part of the evaluation guide titled "other land resources" it is suggested that a consent authority should consider whether a

> development will have an effect on conserving and using valuable land resources such as ... productive agricultural land ... [and] ... mineral and extractive resources[24]

Where a decision has been made to preserve particular land for agriculture or mining activities, the zoning and zone objectives will make this clear. In some circumstances the *State Environmental Planning Policy (Rural Lands) 2008* will apply. These matters will therefore be considered under the heading of "environmental planning instruments" and should not be listed as specific considerations in their own right. Listing them in this way, suggests that development applications on agricultural land that has been rezoned for urban uses may be refused because of the impact on agricultural land use. Similar concerns arise in relation to land with mining potential. These decisions are most appropriately made in the zoning level, not during development assessment.

Risk assessment for accident, injury and criminal activity is often not necessary

The evaluation guide suggests that there be a "risk assessment" for development, including (but not limited to) "residential areas and commercial/shopping centres" in relation to accident, injury and criminal activity. We query the need for every housing development, commercial development or retail development to carry out this kind of risk assessment. Most of the time, compliance with the Building Code of Australia will be adequate to ensure that a building does not present an unacceptable risk of accident or injury. In any event, as matter of professional practice, the professionals who design buildings are very focused on ensuring each new

[19] See for example *Meadowcorp Developments Pty Ltd v Ku-ring-gai Council* [2003] NSWLEC 371 [20].
[20] *Ben-Menashe v Ku-ring-gai Council* [2005] NSWLEC 598 (26 October 2005) [22].
[21] s 15B; s 67.
[22] s 67B.
[23] NSW Department of Planning, *Commonwealth Environment Protection and Biodiversity Conservation Act 1999: Guide to Implementation in NSW* (2007).
[24] Part C, 26.

building is both safe and secure. This does not necessarily require a documented risk assessment.

Access, transport and traffic issues are not sufficiently generic

While access, transport and traffic issues are important for some kinds of development, they are not important for all types of development. For example, a development application for a new kitchen in a heritage-listed home will raise no transport and traffic issues and access issue may only have the most peripheral relevance. Similarly, a development application for a new gas network will raise little issue in relation to the *Disability Discrimination Act* or bicycle use.

The authors of this section of the document are clearly thinking of high intensity urban uses within a metropolitan context, rather than infrastructure, low-intensity uses, regional development and/or remote development. By taking this check-list approach assessment reports will be made unnecessarily complex. There is a risk of some development being disadvantaged inappropriately (for example, a highway service station being prejudiced because it does not encourage bicycle use).

Public domain issues are not relevant to many development types

Public domain issues are important to the assessment of many different development projects, namely, where the development may adversely impact on the public domain, or offers significant improvements to the public domain.

Nonetheless, a very large number of development applications raise absolutely no public domain issues. To include this as a standard specific consideration under section 79C is, at best, overkill. At worst, it may lead to development applicants being expected to make concessions to improved public domain outcomes, when their development had no adverse public domain impact to begin with.

New development should not be penalised for using conventional energy sources

Thanks to Australian and NSW Government policy, the energy needs of NSW, for the foreseeable future, will be overwhelmingly met through coal fired power. This source of power will continue to be the most cost-effective means of satisfying our state's base load power needs, even after the proposed Carbon Pollution Reduction Scheme comes into operation.

It is unclear to us, why new development should be disadvantaged if it is not supplied by renewable and/or non-polluting energy sources, when almost every aspect of normal life in our society, including our transport, agricultural sector and existing stock of buildings will continue to be heavily reliant on carbon emitting activities.

In particular cases, development applicants may choose to highlight their plans to use renewable energy in their statement of environmental effects, but it is inappropriate that the subject be nominated as a specific consideration, under section 79C.

The climate change problem is big, but should not affect most development applications

The evaluation guide asks a consent authority to consider projected environmental impacts due to climate change.[25] Climate change is certainty a big issue. The NSW Government has said that

> [t]he impacts of climate change cut across all sectors of the NSW environment, society and economy, and present significant risks and some opportunities. Impacts will often be regionally specific as NSW has diverse climatic conditions, some of which are found nowhere else in Australia. NSW also has the largest population in the country and one of the most productive agricultural areas.[26]

Climate change impact will not just be felt on the coast or any areas where land is flood prone. However, the impacts of climate change will ultimately not determine where an apartment building is built, or greenfield land development for industry in a inland area. The reality is,

[25] Part C, 29.

[26] NSW Department of Environment and Climate Change <htttp://www.environment.nsw.gov.au/climateChange/impacts.htm> at19 August 2009.

climate change impacts will only be a key consideration in a very small number of development applications.

Policy statements from federal or state governments

The evaluation guide encourages consent authorities to consider any

> policy statements from Federal or State Government [that] have relevance.[27]

Given that there is a federal and state policy statement on just about every topic imaginable (many of which conflict with each other) we suggest that consent authorities be encouraged to focus just on policies which are necessary for effective decision-making and are immediately relevant to the development proposal concerned.

In particular, consideration of state policies should be confined to those policies that appear on the NSW government's on-line Register of Development Assessment Guidelines. Federal policies should only be relevant where the development proposal relates to a controlled action, in which case, the consideration of federal policies should only take place in accordance with the Federal-NSW bilateral assessment agreement.[28] Council policies should only be considered where they are contained in development control plans or included on an on-line register of development assessment guidelines maintained by the council (as per our submission on 22 July 2009).

AS 2601 should remain a matter for consideration, rather than a mandatory code.

The evaluation guide asserts that Australian Standard AS 2601—1991: *The Demolition of Structures* applies to the demolition of a building;[29] however the regulation merely requires that the standard be taken into consideration.[30]

3. Guidelines should not legitimatise 'bottom draw' policies

In reference to the "Section 79C Evaluation Guide" above, we discussed the role of state and federal policies. There is a broader issue here which is important in the context of many different parts of the development assessment guidelines.

Polices should have no standing, if they have not been prepared in accordance with the applicable legislation, or have not been publicly exhibited and are not generally known and accessible to the public.

By referring to local council policies prepared outside of a formal process, the guidelines seem to legitimise the use of these "bottom draw" policies. If a council sees a need to introduce a development policy, then the appropriate means to achieve this is via a formal, public and transparent process. For example, the Council may include provisions in a local environmental plan or development control plan or use the opportunities provide by the *Local Government Act* to adopt a local approvals or orders policy.

There is no place for ambiguous policies that can be used as means to impose further regulation on the applicant, or in the extreme, hinder legitimate land use and development.

The guidelines should not refer to, or legitimise, local council guidelines and policies prepared outside of a proper process.

We note with interest, the sixteen topic areas identified for development control plans in Part B of the guidelines.[31] However, we note the document says that councils are not limited to matters on this list. In 2005, the Act was amended to simplify council policies by requiring that only one development control plan should apply to any given parcel of land.[32] However,

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[27] Part C, 29.
[28] *Agreement between the Commonwealth of Australia and the New South Wales Government under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 relating to Environmental Impact Assessment*, January 2007.
[29] Part C, 24.
[30] *Environmental Planning and Assessment Regulation 2000*, cl 92(1)(b).
[31] Part B, 9.
[32] s74C(2).

councils have undermined the effectiveness of this red tape reduction measure by adopting all sorts of policies, outside of the single development control plan, to be used in the development assessment process. This practice has been legitimised by Part B of the guidelines. [33]

We are concerned that the list of matters is very broad and includes matters such as the "conservation of energy and water" and "radiation emission levels" which are more properly areas of state government policy responsibility.

We suggest that **the power of councils to include matters in development control plans and make other policies relating to development assessment should be restricted to nominated topic areas**.[34] This would reduce the volume of repetitive and conflicting policy documents that must be analysed and considered and more properly defines a council's policy responsibilities.

The topic areas would be provisions relating to the management of:

- flooding and stormwater;
- erosion, sedimentation, acid sulphate and soils salinity;
- local heritage (including local Aboriginal heritage);
- public open space;
- the external built form (by use of building setbacks and controls for bulk, roofs, glare and reflection, walls and front fence);
- views, access to sunlight private open space, privacy;
- utility services;
- safety and security;
- signs;
- accessibility, traffic access and safety, parking, loading and unloading;
- noise, odour, hazardous uses;
- waste management landfill;
- construction activity;
- outdoor dining; and
- road and pavement design.

4. Mandating bicycle facilities, including racks, lockers and showers, is inappropriate

The template statement of environmental effects for shopping centres and development related to retail, commercial and professional services say that:

> If your proposal is not a major traffic generator ... you will still need to show that there is adequate provision for access, including ... [p]roposed bicycle facilities (racks, lockers, showers). [35]

A template statement of environmental effects is an inappropriate vehicle for setting new development standards, but that's exactly what this seems to do. While bicycle racks may be appropriate for some development, racks will be nothing more than a waste of money and space in locations where the roads system, terrain or population demographics (e.g. the elderly) make bicycle use impracticable. Generally speaking mandating the provision of showers in a public building such as a shopping centre is a recipe for disaster. Similarly, mandating lockers raises significant issues with the costs of development and whether or not likely locker usage warrants that cost.

[33] Part B, 10.
[34] The NSW Government has the power to do this via an environmental planning instrument, as per section 74C(5) of the Environmental Planning and Assessment Act. See clause 30A *of State Environmental Planning Policy No 65—Design Quality of Residential Flat Development* for an example of where this has been done.
[35] Part B, 70.

5. Any traffic management plan or traffic impact statement requirements should reduce the current assessment burden

A number of the template statements of environmental effects contained in Part B refer to requirements for traffic impact statements and/or management plans, which are set out in table A of part B.[36] If this table were adopted, in replacement of equivalent provisions in development control plans, it may lead to a reduction of red tape. On the other hand, if this table were adopted alongside more restrictive development controls plans, it will reduce red tape in some local government areas and do nothing to decrease it in more restrictive council areas.

We favour an approach that reduces red tape, i.e. a table of this kind replaces all existing development control plans. This would involve the table being included in an environmental planning instrument and councils from being forbidden to set up new standards – either in a development control plan or in another council policy.

6. Request for personal and political information is inappropriate and is not authorised by law

Last year comprehensive provisions were introduced into the *Environmental Planning and Assessment Act* in relation to the declaration of political donations by development applicants.[37] However the template development application form goes much further than the existing statutory requirements.[38]

The application form asks applicants to declare their friendships, personal and family relationships, past and present club memberships, political party affiliations and more. The attempt to pry into the personal lives of development applicants is offensive and inappropriate. In particular, in a society with a secret ballot, requiring an individual to declare their political affiliation is an outrageous intrusion into civil liberties. This form also expects a member of, say, Alcoholics Anonymous, to declare the membership if a council employee is involved in their group.

We support efforts to properly manage potential conflicts of interests. However, it is for the consent authority and its staff to manage these issues without making unreasonable demands on development applicants to expose their personal life. The consent authority should arrangements in place for its staff to identify any potential conflict of interest and remove themselves from a matter. In the event that a staff member does not do so that should be grounds for disciplinary action and possibly dismissal.

The development application form should merely require compliance with the political donations disclosure regime set out in section 147.

We note that the template proposes that the same form be used in relation to a development application, construction certificate and subdivision certificate. However the political donations regime under section 147 does not apply in relation to subdivision certificates or construction certificates. The form does not make that clear. **We suggest two separate forms should be used – one for development applications and a separate one for construction/subdivision certificates.**

7. Council should not rule on permissibility prior to determination

The draft guidelines include an outline of the steps that should be followed when preparing a development proposal. The foreword states that:

> The first step is to confirm whether the proposal is permissible ….. Early discussions with Council will help confirm what the development is defined as, whether it is permissible …….[39]

We assume the reference to "permissible" is a reference to development being "permitted with consent".

[36] Part B, 85.
[37] s 147.
[38] Part B, 95.
[39] Part B The Development Proposal Statement of Environmental Effects Standard Development Application Form under Part 4 of the Environmental Planning and Assessment Act. Consultation Draft. p. 4

To suggest that early consultation with the council will *confirm* if a proposal is permissible is misleading. **Early discussions with a Council can only provide a council officers' opinion which is, at best, an *indication* of permissibility.**

It should also be acknowledged that there may be a difference of opinion on the matter of permissibility at the early consultation stage and if this is the case, the Council should nevertheless accept the development application and conduct an assessment of the development proposal. Whether or not a given development is "permitted with consent" is a question of law that may have to be resolved by the courts if the consent authority and the applicant are in disagreement.

8. Council must justify a need for specialist threatened species investigation

The guidelines suggest that:

> If there is no mapping available then the applicant should talk to Council to get advice on threatened species and communities found in the local government area and whether a specialist consultant should be engaged.[40]

A guideline that uses such language is open to abuse. If there is no threatened species mapping for a locality, then an investigation by the applicant will consider the potential for the existence of threatened species and if a specialist consultant is required, then the engagement of such specialist advice is at the discretion of the applicant.

Where there is no mapping available for threatened species in a locality, the consent authority must be required to justify any requirement of further detailed investigation into threatened species. A council or other public authority must not be permitted to act on a "hunch" that threatened species may exist in a location and opportunistically use the developer as a means to fund detailed investigations into threatened species.

9. Compliance with Part J of the Building Code of Australia is sufficient

Significant development, such as multistorey commercial premises, must be designed to meet building requirements as detailed in the *Building Code of Australia*. Part J of the code already requires detailed examination and design for energy efficiency. In fact the *Building Code of Australia 2010* will incorporate requirements that will result in the construction of buildings that meet the "six-star" rating.

It is sufficient for a statement of environment effects to acknowledge the existence of the energy efficiency requirements contained in the Building Code of Australia and to make a commitment that a development proposal will meet these requirements.

The suggestion that a statement of environmental effects should replicate an assessment against the Building Code of Australia for energy efficiency is of little value and achieves nothing more than a duplication of the assessment process.

10. Neighbours' views are not necessarily a "public interest" consideration

Part B treats views of neighbours as a public interest consideration.[41] While the assessment of the impact of development in a locality may involve consideration of its impact on views this does not make the issue a "public interest" consideration. When there is a view loss from a public place it's arguably a matter of public interest, but the loss views from private property is arguably not a public interest matter. The importance given to views would be, in part, influenced by the relevant environmental planning instruments and development control plan. If views are not set out as an issue in those documents and no objections are made, a consent authority may give the matter little or no consideration**. Part B should not categorise the impact of new development on the views of neighbours as a matter of "public interest".**

[40] Part B, 7

[41] For example on page 34 and page 37.

11. <u>The template "development application supplementary guide" makes unreasonable information demands</u>

Part B contains a "Development Application Supplementary Guide" which sets out onerous, and in many cases, excessive information requirements for development applications. The degree and level of information mandated by this document exceeds the information requirements of the *Environmental Planning and Assessment Regulation*. While some councils may require such information under, for example, their development control plan, not all do, and certainly not for all development types.

Any document of this kind must clearly distinguish between:

- information that <u>must</u> be provided; and
- other information which the applicant may choose to supply.

Importantly, there must be a clear legislative authority for any that particular information <u>must</u> be supplied.

Site analysis plan is not mandatory and should not be made mandatory

The guide says that a site analysis plan "needs to be submitted with the [development application] form." This is not a legal requirement. Nor should it be.

The law says a development application must be accompanied by a site plan.[42] A site plan is not the same thing as a site analysis plan. The two should not be confused. The requirements of a site plan are set out in the regulation.[43] The list for the site analysis plan clearly does not correspond to the existing requirements. For example, the site plan does not currently need to indicate "views to and from the site" or "orientation, microclimate or noises sources".

A development applicant may elect to detail a site analysis in the statement of environment effects. A site analysis will not be necessary for a wide range of straightforward developments and even where a site analysis is necessary, the specific content of a site analysis should not be regulated.

A landscape plan is not mandatory and should be made mandatory

The guide says that a landscape plan "needs to be submitted with the [development application] form". SEPP 65 lays down some requirements for landscape planning, but there is currently no such statutory rule applying generally to other development types (and nor should there be).

Many developments will not require a landscape plan. For example a development application that relates entirely to alterations within a building or a single fence will clearly not need a landscape plan. Nor is it necessary for a plan to be prepared by a "qualified Landscape Architect". The government does not currently accredit or register landscape architects, so it is difficult to comprehend which persons working as landscape architects will be regarded as "qualified" and which are not.

The contents of a landscape plan should dependant on the circumstances of each case, not a prescriptive list laid down by the Department.

Drainage and stormwater requirements are not mandatory and should be made mandatory

The guide says that a drainage plan and documents related to stormwater need, "needs to be submitted with the [development application] form". Again, the current law and the law should not be changed.

A drainage plan detailing how rainfall will be managed on site is mainly relevant where there are significant roof structures or other impervious surfaces. Stormwater documentation is only important in areas which are subject to significant overland flows and/or flood prone areas.

The contents of drainage and stormwater plans should dependant on the circumstances of each case, not a prescriptive list laid down by the Department.

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[42] *Environmental Planning and Assessment Regulation 2000*, Schedule 1, clause 2(1)(a).
[43] Clause 2(2).

Erosion and sediment control plans are not always essential

The guide says that an erosion and sediment control plan "needs to be submitted with the [development application] form". Again, this is not in-line with the current law. Such plans are not relevant if there is no disturbance to the ground (e.g. minor internal refurbishments).

Shadow diagrams may not be necessary

The guide says that a shadow diagram "needs to be submitted with the [development application] form". Again, there is no blanket requirement for such diagrams laid down by NSW law and there shouldn't be one. A shadow diagram can only be relevant for developments that exceed one storey, and even then, may not be relevant for minor additions (such as a dormer) or if there are no neighbours in the immediate vicinity.

Waste management plan requirements vary, depending on the council

The guide says that a waste management plan "needs to be submitted with the [development application] form". These issues are often dealt with in individual council development control plans. As long as this remains a matter for council policies, it is difficult to see how or why a state government prescription should be made. For minor development, a waste management plan may be complete overkill.

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

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