Urban Taskforce
AUSTRALIA

4 January 2010

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

Dear Ms Rygate

Re: Draft NSW Coastal Planning Guideline – Adapting to Sea Level Rise

The above document ("the guidelines") will apply to a very wide area – more than the existing Coastal Zone. This issue is of great significance to the future of urban development.

It's important that you are aware of our alarm at the direction and approach the Department of Planning. This letter briefly sets out our concerns, which we discuss in more detail in our formal submission (attached).

1. **The environmental, social and economic costs of different adaption strategies must be properly considered**

   The consideration of the impacts of climate change and the subsequent adaptation and/or mitigation strategies must be founded upon the principles of ecological sustainable development. The guidelines do not make this clear.

   In particular, the guidelines should explicitly state that steps taken to adapt to climate change must be appropriate, justifiable and measured; taking into consideration the social, environmental and economic costs to the community. The costs of taking action to prevent or reduce anticipated levels of development must be considered, as well as the costs and impacts of climate change. The principles articulated in the guideline should be amended to expressly recognise the need to provide investment certainty by respecting property rights and legitimate expectations of development, subject to the paramount consideration that human safety must always be protected.

2. **Strong credible property rights are crucial to securing sustained and ongoing investment.**

   By respecting some property rights, and ignoring others, this guideline will further weaken investment confidence in NSW. The guideline must identify when property rights and legitimate expectations of development exist and treat them differently from areas where no such rights or expectations are in place.

3. **The willingness of individuals and the private sector to bear some risk when acquiring and dealing with property assets is greater than the public sector.**

   The public sector should not attempt to impose its risk preferences on the community-at-large - when human safety is not an issue and the assets at risk are predominantly privately funded. Given the opportunity, planning and consent authorities will impose great costs others, rather than bear the slightest of risks themselves.

   An economically efficient approach (when human safety is not an issue) would be to ensure, through the normal mechanisms (a section 149 planning certificate) that a future purchaser was aware of the risks of climate change related-impacts, and allow them to factor that risk into the price they agree for the property asset concerned.

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4. **The quashing of private rights now imposes costs both on individuals and the community now.**

   Nothing is gained by bringing forward the pain of future climate change impacts to the present day, and then asking some members of the present-day community to bear a disproportionate share of the burden. The perception of increased sovereign risk and the social and economic costs of lost development opportunities will magnify the costs (if they are brought forward), rather than reduce them.

5. **While climate change is real, and some sea level rise is highly likely, no specific long-term projection about sea level rise is certain.**

   The degree of global warming and sea level rise will depend on how we respond to the climate change challenge. That is, how we, as a global community, alter our carbon-dependant lifestyles. This means a policy that brings forward possible future costs and imposing them as certain present day costs will often not be good policy.

   If the possible costs are very high (for example, there is a serious threat to human life) then action will be warranted.

   However, where the uncertain future costs are less severe (for example, the costs relate to loss of replaceable private property) the public sector should show more reluctance before burdening today's community with planning restrictions. This should be articulated as a principle in the guideline.

6. **Where legitimate expectations have been raised, land development should continue as originally planned**

   Climate change policies can and should be applied more rigorously to land that has not been zoned for urban uses and has not been flagged for urban uses via a strategic planning process. The economic and social costs to individuals and to the community on restricting the future development of such land (when necessary to mitigate the future costs of climate change) are relatively modest.

   However, the guideline should clearly articulate that urban development in relation to:

   - land zoned to permit development; and
   - land that has been identified within strategic planning as being suitable for future development, but has not yet been rezoned for urban uses,

   may continue to be developed as originally planned, except where new information demonstrates that there will be a clear, serious and unavoidable risk to human safety if development proceeds as originally envisaged.

7. **The guideline should encourage engineering solutions**

   The guideline should seek to liberalise rules preventing land filling in low lying areas, levy banks and flood channels where these are desirable to help adapt to the impacts of climate change. The guideline should have stronger language obliging consent authorities to authorise structural protection works, such as seawalls and gabion walls, where they are necessary as part of a climate change adaption approach.

It follows from the above propositions that we don't support:

- the proposal for "investigation areas";
- development control plans imposition of further development restrictions in the name of climate change adaption; and
- the proposed clauses for insertion into environmental planning instruments.

However our submission contains detail on the positive proposals that will address the legitimate issues requiring action.

We look forward to discussing these issues with you at the first opportunity.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Encl.

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4 January 2010

Ms Yolande Stone
Director, Policy Planning Systems and Reform
NSW Department of Planning
GPO Box 39
SYDNEY NSW 2001

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

Dear Ms Stone,

Re: Draft NSW Coastal Planning Guideline – Adapting to Sea Level Rise

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 NSW Coastal Planning Guideline – Adapting to Sea Level Rise* ("the guideline"). We have identified some issues of concern.

The science published by the United Nations' Intergovernmental Panel on Climate Change (IPCC) cannot be ignored. Climate change is clearly a real concern. It *is* appropriate to consider how climate change will impact on land use and development patterns in the long term.

However, **consideration of the impacts of climate change, and the subsequent adaptation and/or mitigation strategies, must be founded upon the principles of ecological sustainable development.** This means steps taken to adapt to climate change must be appropriate, justifiable and measured; taking into consideration the social, environmental and economic costs to the community.

We wish to highlight some specific issues for your further consideration. These are set out below. Appendix A to this submission summarises our key points and contains short answers to each of the consultation questions posed by the Department of Planning in the guideline.

1. **The document gives no recognition to or weight to investment certainty, property rights and existing legitimate expectations of development**

   Unbelievably, the words "investment certainty", "property rights" and/or "legitimate expectations of development" do not appear anywhere in the guideline, and most significantly, are not included in the six principles underlying the document at all.

   Strong credible property rights are crucial to securing sustained and ongoing investment. "Sovereign risk" arises when property rights are weak and subject to unpredictable and unnecessary impositions by the state. In property development terms, "NSW" is now synonymous for "sovereign risk"- more so than any other jurisdiction in Australia. The guideline, in their current form, will make this problem worse. **By respecting some property rights, and ignoring others, this guideline will further weaken investment confidence in NSW.**

   The guideline rightly highlights the potential for climate change to impact on the NSW coastline. However, the guideline does not adequately emphasise

   > the need for ensuring that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed.[1]

[1] *Intergovernmental Agreement on the Environment* (1992) available at <http://www.environment.gov.au/esd/national/igae/index.html>.

This idea is not one manufactured by the Urban Taskforce – it has been agreed by all states and territories, together with the federal government, as part of their shared commitment to "ecologically sustainable development".

When a property right and/or a legitimate expectation of development is quashed in pursuit of the "public interest" private individuals bear significant costs. Additionally, the perceived increased sovereign risk reduces investment generally in NSW, thus imposing wider costs on the community as a whole. These costs must be factored into any policy approach. Put simply, **the costs of taking action to prevent or reduce anticipated levels of development must be considered, as well as the costs and impacts of climate change.**

In some instances, it will be appropriate for individuals and the community to bear the costs of preventing or reducing anticipated development activity. As a matter of principle, **human safety concerns must be always paramount**. Genuine and substantial concerns for the safety of people who may occupy future buildings on developed land should always override all other considerations. Human safety concerns might arise, for example, if abrupt climate change induced flood events can be expected during a building's lifespan and no safe evacuation route can be engineered. However, in most instances, climate change impacts on buildings will not raise serious human safety issues of this kind.

Firstly, where there are concerns about human safety, these can often be addressed through good engineering. For example, as part of a development, topography can often be altered to ensure that there will always be safe accessible routes for evacuation in the event of a sudden climate-change induced flood event. In coastal areas, sea walls can frequently be constructed and other reinforcement works undertaken, to ensure that a foreshore area will remain stable.

Secondly, many issues raised by climate change impacts (in an urban development context) relate to the likely affect on property, rather than human safety.

For example, the guideline contemplates prohibiting or restricting development in order to mitigate the risk that private property assets (such as houses) will become unusable before they reach the end of their normal life (typically 30 to 40 years). If the prohibition or restriction quashes an existing property right, or a legitimate expectation of development, then the economic damage caused by climate change is not eliminated. The costs are merely brought forward, imposed on the current land owners, and – in all likelihood - magnified.

A more economically efficient approach would be to ensure, through the normal mechanisms (a section 149 planning certificate) **that a future purchaser was aware of the risks of climate change related-impacts, and allow them to factor that risk into the price they agree for the property asset concerned.** If the risks are judged to be high, this will be reflected in the purchase price for the developed asset. If the risks are high enough, the price of the developed asset will be driven down, and the development may not take place. This outcome would be achieved without any need for a "command and control" intervention by the planning system.

It is encouraging to note that the guideline encourages a "risk-based" approach to strategic land use planning and development assessment. The public sector is generally not comfortable with any degree of risk and it takes a very risk-averse approach to business and development. Given the opportunity **planning and consent authorities will impose great costs on the economy, the consumers of developed property assets and property owners, rather than bear even the slightest of risks.**

The willingness of individuals and the private sector to bear some risk when acquiring and dealing with property assets is greater than the public sector. **The public sector should not attempt to impose its risk preferences on the community-at-large when human safety is not an issue and the assets at risk are predominantly privately funded.**

The ability to understand and work with risk is essential for the successful implementation of the guideline and for sustainable coastal development. The *NSW Sea Level Rise Policy Statement* addresses this matter well when it states that:

> Planning and investment decisions should therefore consider sea level rise projections of timeframes that are consistent with the intended timeframes of the decision....these decisions should consider

likely sea level over the expected life of an asset in order to decide on how the asset is to be located or designed...[2]

The very fact that a 2100 timeframe is included in the document as a consideration, suggests that this principle will not be respected. Few, if any, building assets constructed today are expected to last 90 years without effectively being re-built. When we raised this issue in discussions with the Department it was put to us that there were risks to <u>public</u> infrastructure, such as roads, which have a longer life span than private buildings.

In consultations, planning officials argued that forced early retirement of public infrastructure, such as roads, justifies the imposition of development prohibitions or restrictions, even when they come at the expense of quashing existing property rights and/or legitimate expectations of development.

However, roads, like water and electricity reticulation, in master-planned estates are generally constructed by private sector developers at no cost for a local council or state government. The main cost incurred by public authority relates to the maintenance of roads, not the capital costs. The benefits of maintenance expenditure by public authorities are returned to the community in relatively short timeframes (when compared to the 30 to 40 year life of buildings). For example, a council can expect to reseal a sub-arterial road every 10 to 12 years and undertake shoulder grading every 3 to 5 years. Generally speaking, the affect of climate change on the viability of a public road will be anticipated well in advance of the need to make the road redundant. The maintenance program can be adjusted accordingly.

A further reason for development prohibitions and restrictions advanced by planning officials related to the management of beach erosion and the risks that public foreshore areas may no longer be accessible. Serious equity and economic efficiency issues arise when present day property rights and legitimate expectations are quashed in order to reduce costs that the community may face in the future. **The quashing of private rights <u>now</u> imposes costs both on individuals and the community <u>now</u>**. Nothing is gained by bringing forward the pain of future climate change impacts to the present day, and then asking some members of the present-day community to bear the disproportionate share of the burden. **The perception of increased sovereign risk and the social and economic costs of lost development opportunities will magnify the costs (if they are brought forward), rather than reduce them.**

The principles articulated in the guideline should be amended to expressly recognise the need to provide investment certainty by respecting property rights and legitimate expectations of development, subject to the paramount consideration that human safety must always be protected.

2. <u>Bringing forward *possible future* costs and imposing them as *certain present day* costs will often not be good policy</u>

It also must be recognised that while there is a strong scientific consensus supporting the existence of human-induced climate change, no such consensus exists in relation to the degree of sea level rise we are likely to see.

The NSW Government's sea level rise projections are based on the most extreme climate change impact scenario produced by the Intergovernmental Panel on Climate Change (IPCC) in 2007.[3] The IPCC does not recommend the adoption of the most extreme scenario or most conservative sea level rise projection.

Depending on which IPCC global warming scenario is adopted, the degree of warming expected is considerably different. Furthermore, there is considerable variation within each scenario.[4] Emissions scenarios depend upon assumptions made concerning global economic

[2] NSW Department of the Environment, Climate Change and Water *NSW Sea Level Rise Policy Statement* (2009) 3.
[3] NSW Department of the Environment, Climate Change and Water NSW Sea Level Rise Policy Statement (2009) 3.
[4] IPCC, 2007. Climate Change 2007: *The Physical Science Basis*, contribution of working group 1 to the fourth assessment report of the Intergovernmental Panel on Climate Change.

growth and technological change. Therefore a range of sea level rise projections can be made depending on assumptions regarding the future concentration of greenhouse gases.[5]

Please understand, this is not a radical proposition. Every credible scientific paper recognises the inherent uncertainty at making future projections and, in particular, no scientist is able to predict the success or otherwise of social and economic efforts that might be taken to reduce carbon emissions in a timely way. Put simply, **the degree of global warming and sea level rise will depend on how we respond to the climate change challenge. That is, how we, as a global community, alter our carbon-dependant lifestyles.**

Given the inherent uncertainties, policy makers should be cautious when imposing a certain cost on the community today, in order to avoid a possible, but uncertain, cost in the future. This is not argument for emitting carbon. We recognise and support firm international action for reducing carbon emissions. This is about what action we should take, and when we should take it, in response to the consequences of climate change.

If the possible costs are very high (for example, there is a serious threat to human life) then **action will be warranted.** However, **where the uncertain future costs are less severe** (for example, the costs relate to loss of replaceable private property) **more reluctance should be demonstrated before government acts to burden today's community. This should be articulated as a principle in the guideline.**

3. The guideline must identify when property rights and legitimate expectations of development exist and treat them differently from areas where no such rights or expectations are in place

The guideline states that they will apply to "all coastal areas of NSW, including the NSW Coastal Zone, as well as Sydney Harbour and Botany Bay".[6] The phrase "coastal areas" are used broadly in the guideline which means that it will apply to all of the NSW "coastline, beaches, coastal lakes, estuaries, as well as the tidal reaches of coastal rivers". Coastal areas also include "other low lying land surrounding these areas that may be subject to coastal processes in the future as a consequence of sea level rise". This means that **this guideline has very wide and general application to a great proportion of the land most crucial to the urban future of NSW.**

The guideline does not explicitly identify circumstances where:

- land owners already have some property right that embraces increased urban development; and
- land owners have a legitimate expectation, fostered by government/local council action, that urban development will be permitted.

To the extent that these circumstances are implicitly addressed (through different approaches to dealing with climate change issues, depending on zoning, etc) the guideline still falls short.

A person has a property right and/or a legitimate expectation of development if the land has been, or could have been, traded, or re-financed, used a collateral, etc based on its future use (or more intensified use) as urban land. This occurs:

- when a development approval has been issued in relation to a site;
- when land is already zoned to permit development – even if no development approval has been issued; and
- when land is not yet zoned, but has been identified in strategic planning processes as being suitable for future development.

The guideline implicitly recognises the property rights of:

- the owners of existing developed property; and
- the owners of land where a development approval has already been issued,

[5] Walsh, K.J.E.; Betts, H.; Church, J.; Pittock, A.B.; McInnes, K.L.; Jacket, D.R. and McDougall, T.J., 2004. Using sea level rise projections for urban planning in Australia. *Journal of Coastal Research*. 20(2). pp. 586.
[6] NSW Department of Planning, *Draft NSW Coastal Planning Guideline: Adapting to Sea Level Rise* (2009), 1.

but does not recognise the rights/legitimate expectations of:

- owners of land that has been zoned for urban intensification (without development approval); and
- the owners of land that has not been zoned, but has been identified for intensified urban use via strategic planning processes.

Climate change policies can and should be applied more rigorously to land that has not been zoned for urban uses and has not been flagged for urban uses via a strategic planning process. That's because the economic and social costs to individuals and to the community on restricting the future development of such land (when necessary to mitigate the future costs of climate change) are relatively modest.

However, **the guideline should clearly articulate that urban development in relation to:**

- **land zoned to permit development; and**
- **land that has been identified within planning strategies as being suitable for future development, but has not yet been rezoned for urban uses,**

may continue as originally planned, except where new information demonstrates that there will be a clear, serious and unavoidable risk to human safety if the development proceeds as originally envisaged.

4. <u>Where property rights and legitimate expectations of development exist, engineering solutions should be actively encouraged</u>

Where there is an existing legitimate expectation of development, guideline should clearly favour the development proceeding and encourage engineering solutions to manage the risks presented by climate change. A development applicant must be given the opportunity to demonstrate that orderly and safe development can proceed on land within coastal areas.

Outright prohibition of development is a blunt, unsophisticated policy response to a complex environmental and planning challenge. Outright prohibition or the "winding back" of development potential gives no regard to property rights and values. Furthermore, outright prohibition is inconsistent with the *NSW Sea Level Rise Policy Statement* which states that

> ...benchmarks are not intended to be used to preclude development of land that is projected to be affected by sea level rise. The goal is to ensure that such development recognises and can appropriately accommodate the projected impacts of sea level rise on coastal hazards and flooding over time, through appropriate site planning, design and development control.....
>
> Landowners affected by current and future coastal hazards may seek approval from their local council to construct works on their land to protect their property.[7]

An applicant should always be given the opportunity to demonstrate that land is suitable for the purpose identified in the application and has merit.

The guideline should make it clear that industry should be accorded flexibility in how it responds to anticipated sea level rises. For instance, it is not satisfactory for there to be a blanket ban on land filling in low laying areas, nor should there be strong restrictions on the construction of levy banks and flood channels when these could be used to help adapt to climate change. In some instances this may be an appropriate means of protecting residential development from flood and/or removing developable land from the 1 in 100 year flood level. By prohibiting land filling planning authorities may sterilise land that is zoned for urban development or already identified for future urban development.

The guideline should seek to liberalise rules preventing land filling in low lying areas and the construction of levy banks and flood channels where it is desirable to help adapt to the impacts of climate change.

Structural protection works such as seawalls and gabion walls are mentioned as possible structural protection works, but consent authorities are not obligated to set-aside their frequent

[7] DECCW 2009, NSW Sea Level Rise Policy Statement. p.5-6

reluctance to approve such works. **The guideline should have stronger language obliging consent authorities to authorise structural protection works, such as seawalls and gabion walls, where they are necessary as part of a climate change adaption approach.**

5. No regime of "investigation areas" should be instituted

In the guideline consultation, questions 1 and 2 ask the following:

1. In the absence of completed coastal hazard and flood studies which take the NSW sea level rise planning benchmarks into consideration, should councils be able to use investigation areas for planning or development assessment purposes?
2. Should the NSW Government propose a set measure for identifying investigation areas across the state?

The consequences of climate change, as it impacts on urban development, will be felt gradually and incrementally over the next 90 years. The most urgent challenge of climate change, is finding a way to put a price on carbon, and create the necessary economic invectives to avoid the worst impacts of climate change altogether. On this front, urgent, international action is desperately required. The separate and distinct challenge of responding to the likely consequences of climate change is nowhere near as pressing. This fact should not be an excuse for inaction, but is a reason for careful, considered evidenced-based action. It is reason to go about the work of establishing coastal risk areas on the basis of evidence, without prematurely identifying an areas based on broad brush assumptions.

Given the risk averse nature of government, any "investigation area" is likely to be far more broadly defined than any actual impact area identified in a proper study. **The declaration of an investigation area will sterilise development opportunities, bankrupt some individuals, hurt local economies and impose social costs on the broader community.** All this will be for no useful purpose if it turns out that some or all of an investigation area is not actually going to be significantly impacted by climate change.

The need to adapt to climate change is sufficiently long-term that no land needs to sterilised prior to the completion of properly researched coastal hazard and flood studies. In a 90 year timeframe 1 to 2 years is not an unreasonable delay. The declaration of "investigation areas" is inappropriate.

In any event, an applicant will already be required to prepare flood studies where flooding may be an issue. As matter of routine practice, these studies will now need to factor in the sea level rise projections contained in the *NSW Sea Level Rise Policy Statement.* The *Environmental Planning and Assessment Act* already allows a consent authority to consider the suitability of a site for the development.[8] No "investigation area" is required.

6. There should be no new requirement for applicants to fund coastal risk assessments

Consultation questions 9 and 10 pose the following:

9. If a relevant coastal hazard or flood study has not been completed or council has not identified an investigation area, should applicants be required to undertake their own coastal risk assessment as part of the DA requirements?
10. Should this requirement only be restricted to large-scale or medium to high risk coastal developments?

If applicants are required to routinely produce coastal risk assessments, local authorities will delay the completion of necessary coastal risk assessments, and instead rely mainly on applicant funded studies.

We do not support a new requirement for applicants to carry out coastal risk assessments as part of a development application process. If there are special reasons why a development application requires supporting information relating to coastal risks, there is already sufficient

[8] s 79C(1)(c).

power for consent authorities to request information and consider these issues as part of the development consent process.

7. <u>Planning certificates under section 149 of the Act are the appropriate mechanism to advise land owners of coastal risk areas</u>

Consultation question 3 asks:

3. Should council rate notices or other mechanisms be used to advise or remind landowners if their properties are located in coastal risk areas?

The *Environmental Planning and Assessment Act* already sets up a mechanism for the owners and purchasers of real estate to be informed about planning issues relevant to a parcel of land. Planning certificates (commonly known as "section 149 certificates") are important documents that:

- identify the relevant planning instruments, development control plans and contributions plans;
- specify the statutory zoning;
- set out the availability of complying development;
- disclose whether or not there are development restrictions under the *Coastal Protection Act*;
- identify whether the land is in a mine subsidence district;
- explain whether the land is affected by possible road widening or road realignment;
- disclose if the land is affected by a council and/or government policy on hazard risk restrictions;
- specify the flood related development controls;
- identify any statutory plans foreshadowing public acquisition of the land;
- disclose whether or not the land is bush fire prone land;
- declare whether or not a property vegetation plan applies;
- advise as to the existence of an order relating to trees on the land;
- disclose whether or not provisions of environmental planning instruments have been waived under Part 3A of the *Environmental Planning and Assessment Act*; and
- advise on the application of the contaminated land management regime to the site.[9]

These certificates are disclosed to potential purchasers of land, as part of the contract of sale. They are also used by lenders and others who are considering whether to accept land as security for a debt or an obligation. They play a crucial rule in the land valuation process.

The danger of including one of the above elements in some other document (a "coastal risk area"), such as a rates notice, but not the other elements, is that the property owner may be fooled into thinking that the rates notice has disclosed all of the planning issues they should know. In reality, some of the other issues listed above may have far more immediate implications for the land owner than the inclusion of their land in a coastal risk area.

Alternatively, if all of the above information was included in a rates notice, a land owner is likely to be overwhelmed, and not find the information useful. The status-quo works best, because a land owner who wants to know the planning issues around their land can easily obtain the information, and, where necessary, seek professional advice. The government should not pretend such elaborate information can be reduced to brief easy-to-understand dot points on a rate notice.

In short, **planning certificates under section 149 should remain the only statutory means of providing planning information about a property**. The introduction of another method, such as the inclusion of information that relates to coastal hazards on rate notices will confuse property

[9] *Environmental Planning and Assessment Regulation 2000*, Schedule 4.

owners and purchasers, and may lead them to conclude that they are aware of all of the planning issues relevant to a property, when in truth, such information is only available from a section 149 certificate.

8. <u>Coastal risk areas should have a role in new strategic planning processes, and a more limited role in development assessment when human safety is an issue or special engineering solutions are necessary</u>

The guideline asks:

4. If land is subject to immediate coastal risks, should further development in these areas be prohibited?
5. How should consideration be given to potential coastal risk areas when zoning land in LEPs? ...
6. Should a model clause be developed for councils to use in LEPs to identify coastal risk areas using maps and to apply specific development controls to that identified land?
11. Should new development be prevented in coastal risk areas that are already subject to coastal risks (as identified by an immediate hazard line)?

Outright prohibition of development on any land should be avoided. Provided human safety concerns can be addressed, the opportunity to consider the merits of development and possible solutions, even within coastal hazard planning areas, is the preferred approach.

We support the identification of coastal risk areas, based on properly resourced studies and detailed mapping (not on broad-brush analysis or assumptions). **The existence of a coastal risk area would be a legitimate matter for consideration in any new strategic planning process commenced after the area has been identified.**

We <u>do not</u> support the use of clause 5.5 in the Standard Instrument[10] in relation to coastal risk areas and sea level rises. This clause predominately relates to the need to protect the coastal environment from the impacts of development, rather than the protection of property and human safety arising from the impacts of climate change.

Furthermore, this clause only applies in the Coastal Zone and the definition of "coastal areas" under the guideline is broader.[11] It would be inappropriate to extend clause 5.5 outside of the existing defined Coastal Zone (such a move would have a chilling effect on investment in other areas).

Instead, we suggest that a separate clause be inserted. **Such a clause should expressly direct a consent authority, when determining a development application, to:**

- use, and only use, sea level rise benchmarks published by the NSW Government;
- consider the effect of coastal processes and coastal hazards, including those arising from increased sea levels, on the safety of those individuals who will use the proposed development over the course of the development's expected lifespan;
- consider whether the development's impact on coast processes will result in significant and detrimental coastal risk exposures of other development or properties;
- permit engineering solutions where they are necessary as part of a climate change impact mitigation strategy, including sea walls, gabion walls, land filling in low lying areas, levy banks and flood channels, even when provisions of any environmental planning instrument or a non-statutory policy would otherwise prevent such works.

The clause <u>should not</u> attempt to prevent development in order to ensure that the property assets built under the development approval are undamaged by climate change. In relation to land which has already been zoned for development, such decisions are best made by informed developers and purchasers of developed properties, rather than public authorities (see sections 1-3 above). The clause should not require buildings to be moveable (in many cases this will equate to sterilisation of the land).

[10] Contained at the end of the *Standard Instrument (Local Environmental Plans) Order 2006*.
[11] NSW Department of Planning, *Draft NSW Coastal Planning Guideline: Adapting to Sea Level Rise* (2009), 1.

If such a clause is to be introduced, clause 5.5 (and the model local clause 6.5) should be amended to remove any chance of duplication.

We do not support further council prescription via development control plans (DCPs). Consistency across local government areas is desirable. There is already sufficient guidance material with state wide applicability such as the *Coastal Design Guideline for NSW 2003* that can be readily applied to coastal areas without the need for each council to prepare further individual plans.

New and innovative solutions and adaptation strategies will arise as we learn more about climate change and the impacts of sea level rise in coastal areas. DCPs and other forms of mapping that have the effect of sterilising portions of land without giving the opportunity for innovative design solutions are undesirable. In essence, the guideline must never suggest an outright ban on development but should always allow for innovative design solutions to coastal hazards to be devised. In short, **prescriptive DCPs that purport to be the definitive design solutions for coastal areas should be prohibited.**

These comments are offered to encourage constructive dialogue between government and the development industry and we ask that you accept these comments as our contribution to the policy development process. We are always able to provide a development industry perspective on planning policy and we would welcome the opportunity to meet and discuss these issues in more detail.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Encl.

Urban Taskforce
AUSTRALIA

Appendix A:

Summary of Urban Taskforce's Key Points
in response to the *Draft NSW Coastal Planning Guideline – Adapting to Sea Level Rise*

The Urban Taskforce key points (other than those that specifically respond to a consultation question) are as follows.

1. The consideration of the impacts of climate change and the subsequent adaptation and/or mitigation strategies must be founded upon the principles of ecological sustainable development. This means steps taken to adapt to climate change must be appropriate, justifiable and measured; taking into consideration the social, environmental and economic costs to the community. The costs of taking action to prevent or reduce anticipated levels of development must be considered, as well as the costs and impacts of climate change. The principles articulated in the guideline should be amended to expressly recognise the need to provide investment certainty by respecting property rights and legitimate expectations of development, subject to the paramount consideration that human safety must always be protected.
2. Strong credible property rights are crucial to securing sustained and ongoing investment. By respecting some property rights, and ignoring others, this guideline will further weaken investment confidence in NSW. The guideline must identify when property rights and legitimate expectations of development exist and treat them differently from areas where no such rights or expectations are in place
3. The willingness of individuals and the private sector to bear some risk when acquiring and dealing with property assets is greater than the public sector. The public sector should not attempt to impose its risk preferences on the community-at-large when human safety is not an issue and the assets at risk are predominantly privately funded. Given the opportunity, planning and consent authorities will impose great costs on others, rather than bear even the slightest of risks themselves. An economically efficient approach (where human safety is not an issue) would be to ensure, through the normal mechanisms (a section 149 planning certificate) that a future purchaser was aware of the risks of climate change related-impacts, and allow them to factor that risk into the price they agree for the property asset concerned.
4. The quashing of private rights now imposes costs both on individuals and the community now. Nothing is gained by bringing forward the pain of future climate change impacts to the present day, and then asking some members of the present-day community to bear the disproportionate share of the burden. The perception of increased sovereign risk and the social and economic costs of lost development opportunities will magnify the costs (if they are brought forward), rather than reduce them.
5. While climate change is real, and some sea level rise is highly likely, no specific long-term projection about sea level rise is certain. Put simply, the degree of global warming and sea level rise will depend on how we respond to the climate change challenge. That is, how we, as a global community, alter our carbon-dependant lifestyles.

   This means a policy that brings forward possible future costs and imposing them as certain present day costs will often not be good policy. If the possible costs are very high (for example, there is a serious threat to human life) then action will be warranted. However, where the uncertain future costs are less severe (for example, the costs relate to loss of replaceable private property) more reluctance should be demonstrated before government acts to burden today's community. This should be articulated as a principle in the guideline.
6. Climate change policies can and should be applied more rigorously to land that has not been zoned for urban uses and has not been flagged for urban uses via a strategic planning process. That's because the economic and social costs to individuals and to the community on

restricting the future development of such land (when necessary to mitigate the future costs of climate change) are relatively modest.

7. However, the guideline should clearly articulate that urban development in relation to:
   - land zoned to permit development; and
   - land that has been identified within planning strategies as being suitable for future development, but has not yet been rezoned for urban uses,

   may continue as originally planned, except where new information demonstrates that there will be a clear, serious and unavoidable risk to human safety if the development proceeds as originally envisaged.
8. Where there is an existing legitimate expectation of development, guideline should clearly favour the development proceeding and encourage engineering solutions to manage the risks presented by climate change. The guideline should seek to liberalise rules preventing land filling in low lying areas and the construction of levy banks and flood channels where these are desirable to help adapt to the impacts of climate change. The guideline should have stronger language obliging consent authorities to authorise structural protection works, such as seawalls and gabion walls, where they are necessary as part of a climate change adaption approach.

Below are brief answers to the specific consultation questions posed in the guideline. More detail on the Urban Taskforce's position is contained in the body of our submission.

1. *In the absence of completed coastal hazard and flood studies which take the NSW sea level rise planning benchmarks into consideration, should councils be able to use investigation areas for planning or development assessment purposes?*

No. The need to adapt to climate change is sufficiently long-term that no land needs to be sterilised prior to the completion of properly researched coastal hazard and flood studies. The declaration of an investigation area will sterilise development opportunities, bankrupt some individuals, hurt local economies and impose social costs on the broader community. In a 90 year timeframe 1 to 2 years is not an unreasonable delay. Where flooding is an issue, there is an existing requirement for appropriate studies to be prepared.

2. *Should the NSW Government propose a set measure incorporating the sea level rise planning benchmarks for identifying investigation areas across the State?*

No. See answer to 1 above.

3. Should council rate notices or other mechanisms be used to advise or remind landowners if their properties are located in coastal risk areas?

No. Planning certificates issued under section 149 should remain the only statutory means of providing planning information about a property. The introduction of another method, such as the inclusion of information that relates to coastal hazards on rate notices, will confuse property owners and purchasers, and may lead them to conclude that they are aware of all of the planning issues relevant to a property. In truth, complete information can only be available from a section 149 certificate.

4. *If land is subject to immediate coastal risks, should further development in these areas be prohibited?*

No.

The response of the planning system should be different depending on the circumstances. When human safety is at serious risk and there is no engineering solution, development may need to be prevented. However, this will be rare and should be determined on a case-by-case basis.

Innovative engineering solutions should not only be permitted, they should be expressly encouraged, and existing rules liberalised.

Where the land is not zoned for urban uses and has not been flagged for rezoning in strategic planning exercises, there may be a case to prevent urban development. In other circumstances there will either be an existing property right or a legitimate expectation of development. These should not be compromised merely to 'protect' future developed property assets from possible climate change impacts. Properly informed developers and property purchasers are better placed to make such decisions, rather than regulatory authorities.

5. *How should consideration be given to potential coastal risk areas when zoning land in LEPs? i.e. areas that may be at risk in the future due to sea level rise and other climate change parameters.*

"Coastal risk areas" should be given the rigorous consideration in new strategic planning processes commenced entirely after they have been finalised. They should be given a more limited role in development assessment.

We do not support the draft LEP coastal risk planning clause proposed in the guideline, or the use of any existing clause. Instead, we suggest that a separate clause be inserted. Such a clause should expressly direct a consent authority, when determining a development application (where these issues are relevant), to

- use, and only use, sea level rise benchmarks published by the NSW Government;
- consider the effect of coastal processes and coastal hazards, including those arising from increased sea levels, on the safety of those individuals who will use the proposed development over the course of the development's expected lifespan;
- consider whether the development's impact on coast processes will result in significant and detrimental coastal risk exposures of other development or properties;
- permit engineering solutions where they are necessary as part of a climate change impact mitigation strategy, including sea walls, gabion walls, land filling in low lying areas, levy banks and flood channels, even when provisions of any environmental planning instrument or a non-statutory policy would otherwise prevent such works.

The clause should not attempt to prevent development in order to ensure that the property assets built under the development approval are undamaged by climate change. In relation to land which has already been zoned for development, such decisions are best made by informed developers and purchasers of developed properties, rather than public authorities (see sections 1-3 above). The clause should not require buildings to be moveable (in many cases this will equate to sterilisation of the land).

If such a clause is to be introduced, clause 5.5 (and the model local clause 6.5) should be amended to remove any chance of duplication.

6. *Should a model clause be developed for councils to use in LEPs to identify coastal risk areas using maps and to apply specific development controls to that identified land?*

See our answer to question 5 above.

7. *Should a similar provision be incorporated directly into SEPP 71 – Coastal Protection to apply to development in the NSW Coastal Zone?*

This is not necessary – see our answer to question 5 above.

8. *Should consideration be given to expanding the application of any coastal risk clause in SEPP 71 to also apply more broadly to the Sydney coastal region?*

This is not necessary – see our answer to question 5 above

9. *If a relevant coastal hazard or flood study has not been completed or council has not identified an investigation area, should applicants be required to undertake their own coastal risk assessment as part of the DA requirements?*

No. If there are special reasons why a development application requires supporting information relating to coastal risks, there is already sufficient power for consent authorities to request information and consider these issues as part of the development consent process.

10. *Should this requirement only be restricted to large-scale or medium to high risk coastal developments?*

See our answer to question 9 above.

11. *Should new development be prevented in coastal risk areas that are already subject to coastal risks (as identified by an immediate hazard line)?*

No. Provided human safety concerns can be addressed, the opportunity to consider the merits of development and possible solutions, even within coastal hazard planning areas, is the preferred approach.