Urban Taskforce
AUSTRALIA

9 February 2010

Mr Tom Gellibrand
Deputy Director General - Plan Making & Urban Renewal
Department of Planning
GPO Box 39
Sydney NSW 2001

Dear Mr Gellibrand

Re: *Draft Ku-ring-gai Local Environmental (Town Centre) Plan 2008*

We write to convey the Urban Taskforce's concerns with the draft *Ku-ring-gai Local Environmental (Town Centre) Plan 2008* ("the plan"). We acknowledge that the plan is no longer on exhibition and is with your Department awaiting approval prior to being made. However, we urge you to closely study a key clause contained in the exhibited draft plan: clause 6.4 "Provision of Public Benefits for Key Areas and Sites".

As an industry we are committed to seeking the best design responses to individual development sites. However, we have consistently queried whether the 'command and control' regulatory system is the best way to get good design outcomes.

The Ku-ring-gai local government area contains a number of centres in desperate need of renewal, in more compact (higher density), pedestrian friendly communities, with a mix of residential, retail and commercial development. This necessarily involves a significant increase in the height and floor space ratios of permitted development.

The plan marks out portions of the town centres of Turramurra, St. Ives, Pymble, Gordon, Lindfield and Roseville as "key areas". In these areas **the standard provisions of the local environmental plan *do not* permit buildings to achieve the full height and floor space ratios that have been assessed as appropriate**. Instead, **the height and floor space ratios have been low-balled**.

Clause 6.4 holds back to full permitted height and floor space ratios,[1] and links the grant of development these rights to the "provision of facilities and design features which will benefit the broader community".[2]

Generally speaking *height controls* are supposed to be set through an objective process, having regard to the impact of the shadowing of taller buildings on sensitive locations, the intended height of nearby urban development and the maintenance of important view corridors. *Floor space ratios* are theoretically related to the capacity of infrastructure and services to support the number of people likely to use a new building.

There is no legitimate reason for linking height controls and floor space ratios in a local environmental plan to factors that are *unrelated* to the stated purposes of these controls.

[1] These controls prevent the maximum height and floor space ratio from being achieved across a development site with a minimum area of 2000sqm, having a primary street frontage of 36 meters or more.
[2] Clause 6.4(6).

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Nonetheless, clause 6.4 empowers a new body - the "Public Benefits Design Panel" – to decide whether or not it should issue a "public benefits certificate". Only if it decides to do so, will a development proposal may be allowed to take up the last three metres in height and remaining floor space ratio (of between 0.3 to 0.5). For example, if the low-balled height across a site is 20.5 metres with an FSR of 2.5:1, the public benefits certificate will permit a maximum height of 23.5 metres and an FSR of 3:1.

Under clause 6.4 there is no limit to the kinds of facilities and design features that might be demanded of a developer before they could access the full height and floor space their site would otherwise be entitled. There is no requirement that these facilities and design features would be only required when they were necessary to mitigate against the impacts of additional height, bulk or intensity of use. In short, a developer will be hostage, under clause 6.4, to any range of illegitimate impositions that are not justified by the proposed height, bulk or intensity of use of development on their land.

Furthermore, clause 6.4 allows the development consent process to be fragmented, so that there are effectively two different consent authorities. That's because of the Public Benefit Design Panel – which will be a panel of "planning and design experts" appointed by the Council.[3]

There will be the standard development assessment overseen by either the council (for development under $10 million), the joint regional planning panel (for development $10 million plus) and, if a merits appeal is lodged, a commissioner of the Land and Environment Court. However, **the decision-makers in the conventional development assessment process**, even joint regional planning panel members, or Land and Environment Court commissioners, **will be prohibited for approving a development to the maximum capacity of a site, unless they have the separate approval of the new Public Benefit Design Panel.**

The Public Benefit Design Panel's decisions to refuse approval will not be appealable. **A Court Commissioner or joint regional planning panel will not have the power to override the Public Benefit Design Panel.** The panel will be appointed by local politicians (councillors) and therefore will lack independence from the highly charged atmosphere of Ku-ring-gai council local politics.

By introducing the requirement for a public benefit certificate and Public Benefit Design Panel the Council will be introducing an additional and separate development approval system. Such a system will guarantee that the development assessment process will be more complex, duplicative and not integrated. If this clause is allowed to remain, we will have a situation where one group of "experts" will make an assessment of "public benefit" with another group of experts making an assessment and determination of a development proposal.

If a developer was of the mind to seek a Public Benefit Certificate, that developer would be subjecting themselves to a panel that was appointed by the Council to make an assessment in accordance with Council "guidelines". Such guidelines are not defined, are not open to public scrutiny and subject to change at any time.

If all of the above wasn't worrying enough, **a further provision identifies "key sites" and prevents any development of any new building on this land unless the approval of the Public Benefit Design Panel has been obtained in advance.**[4] **There is no right to appeal** against decisions by the panel to withhold such approval. **There is also no provision for "deemed refusal"** and therefore no recourse if the panel simply ignores a request for approval of development on a key site.

Your Department has made considerable inroads towards simplifying the planning process and depoliticising the development approval process. The new local environmental plan for the Ku-ring-gai town centres is, generally speaking, a positive development. However, if clause 6.4 were to be included in the plan in its current form, recent improvements to the planning process would be severely undermined.

As a general rule, the standard height and floor space ratio restrictions in a local environmental plan should be set at the maximum intended level (i.e. they should not be low-balled). In those

[3] Ibid.
[4] Clause 6.4(5).

circumstances where government takes the view that some additional height and floor space ratios can only be accessed if certain pre-conditions are met, the preconditions should be:

- clearly articulated in the plan; and
- should relate directly to the impact of the additional height and floor space ratio.

The decision to grant any additional height and floor space ratios should be one for the consent authority. No public official body should have an unconstrained power to block a development application from proceeding, without access to a proper system of merits review. In any event, it is inappropriate for a council appointed body such as the Public Benefits Design Panel to perform such a role.

We appreciate your willingness to consider issues raised by the Urban Taskforce and if I can be of any further assistance, you or your staff are always welcome to contact me directly.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer