Urban Taskforce
AUSTRALIA

26 March 2010

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

Dear Mr Haddad

Re: The reform of the Standard Instrument

As you are aware, since 2006 the NSW Government has been working towards replacing all existing local environmental plans (LEPs), in each local government area, with a new modern plan, compliant with a consistent template set out in *the Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument").

We understand that the Department of Planning is preparing a paper for community consultation on the reform of the Standard Instrument. We have prepared this letter and a more detailed policy paper to raise issues we think the Department needs to address in its paper.

If the Department keeps heading in its current direction, the best we can hope for is that the whole Standard Instrument process will merely be a waste of time. On the other hand, under the current policy settings, **it seems more likely that the Standard Instrument will be used to increase and entrench the micro-regulation of land use across NSW.** This was never the original intention of the Standard Instrument process.

The Standard Instrument was supposed to simplify the planning system. However this went awry when, in December 2007, just before Christmas, far-reaching changes were made to the Standard Instrument. The changes reversed the most positive aspects of the Standard Instrument document and did nothing to address its flaws. As a consequence, we now have little hope that NSW will meet the dwelling and employment targets set out in the Metropolitan Strategy.

This letter sets out the major issues inherent in the Standard Instrument as it exists today. All of the problems we are citing are clearly evident in LEPs that have been gazetted and publicly exhibited. We have documented specific real life examples of each problem in the more detailed policy paper enclosed with this letter.

Some major issues of concern are set out below.

1. **<u>The Standard Instrument contains unjustifiable prohibitions on retail and business uses.</u>**

   Lower-order centres and employment zones

   In many 'lower-order centres' – often served by excellent public transport – Standard Instrument compliant LEPs will ban shops that sell large grocery items, clothing, music, home-wares, electrical goods or other household requirements that are not necessary as a matter of "daily convenience". This includes florists, mobile phones retailers and baby clothes shops.

   What's more, in these same centres, new rules will prevent shopfronts being established for people to practise a profession or trade that provides services directly to members of the public. This means local communities will be deprived of internet access facilities, hairdressers, video libraries and dedicated banks, post offices and dry cleaners.

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Mandatory floor space restrictions apply to shops, in addition to the floor space ratios and height controls that apply to buildings generally. These floor space restrictions make it impossible for even a moderate scale supermarket to be established in these 'lower-order' centres. Bizarrely, a supermarket in a local centre may be smaller and less visually obtrusive than an apartment building, but the floor space restrictions may mean that the supermarket is prohibited, while the larger apartment building is permitted.

Bans on retail and professional shopfronts are even intended for employment-related zones such as business development zones, business parks and enterprise corridors. That means people working in these area won't be entitled to stroll to a local supermarket, have lunch in a restaurant, get a haircut or visit a local hotel after work.

These prohibitions means that people need to drive further to access services and satisfy their shopping. Centres should be able to offer these services, if the bulk, scale and traffic requirements are met.

Large format retail and bulky goods premises

Large format retail and bulky goods premises are also to be banned in industrial zones, despite the intent of the 2005 Metropolitan Strategy and long-standing practice. **This means large format grocery stores**, such as Costco, **are prohibited in light industrial areas.** Large format business supplies retailers, such as Officeworks, or large format hardware suppliers, such as Bunnings, will often have great difficulty in finding sites. Smaller retail supermarkets, such as Aldi, also end up being excluded.

2. <u>The Standard Instrument allows too many single use zones</u>

Zones should be multi-purpose

This is now out-of-keeping with international best practice. For example the Standard Instrument allows:

- medium density zones that do not permit residential flat buildings;
- neighbourhood centre zones without purely-residential flat buildings or multi-dwelling housing (terraces and townhouses);
- local centre zones without purely-residential flat buildings or multi-dwelling housing (terraces and townhouses);
- commercial core zones without purely residential flat buildings or multi-dwelling housing;
- enterprise corridor zones without residential flat buildings;
- high density residential zones without retail premises;

Tragically, the Standard Instrument, as originally conceived, did not have many of these problems. For example, offices were to be permissible in every business development zone, apartments were to be allowed in every medium density zone and retail premises were to be permitted in every enterprise corridor zone. All this changed when the government gazetted its surprise amendments to the Standard Instrument in December 2007.

The Standard Instrument should allow, wherever possible, a mix of commercial, residential and retail development in a single zone, and even in a single building. However, the planning system should not try to force developers to build in a mix of uses - that will lead to under-utilised or empty space.

Zone objectives in the Standard Instrument stop development, even when it is permissible under the land use table in a plan. For example, in business development, enterprise corridor zones and industrial zones, developments that have the potential to compete with businesses in (usually nearby) centres will not satisfy the objectives of the zone.

Another example is the neighbourhood centre zone - which is limited by its zone objective to "small-scale" retail. This means development that satisfies height controls, floor space ratios and traffic requirements can still be knocked back because it isn't "small" enough.

Floor space ratios as back-door prohibitions

Floor space ratios are being misused to discriminate against certain permitted development types within a zone. **It is difficult to comprehend why development types of a similarly high intensity should be given different floor space ratios in the same locality.**

For example, while the *Draft Burwood Town Centre Local Environment Plan 2008* does permit residential development within the town centre, it imposes a significant floor space ratio (FSR) penalty on such development. For example, a maximum floor space ratio (FSR) of 6:1 is permitted in the town centre, but residential FSR in the same location is restricted to 2:1. This will severely impact the feasibility of residential development in this location and will potentially stall investment and urban renewal.

In high density residential zones, the *Draft Ryde Local Environmental Plan 2008* sensibly excludes residential flat development and multi-dwelling housing from the floor space ratio requirements but applies it to shop top housing. In this case the rule penalises retail development and confers disproportionate market power on the owner(s) of nearby retail land that is not so burdened.

3. <u>The Department is moving floor space ratios and height controls into LEPs from DCPs, but no additional investment certainty is being created</u>

Even if a development proposal complies with height and FSR controls, the consent authority is still able to "scale back" the development and apply a lesser height or FSR under the guise of improved design or amenity outcomes. **A development standard in a local environmental plan or development control plan is therefore little more than a statement of development potential, <u>not</u> a guarantee minimum development potential for that land.**

When an LEP states the maximum height or floor space ratio, a developer cannot use these standards with certainty when preparing a development feasibility assessment or making a decision to purchase land.

This means that all this effort to review height and floor space ratio controls, and move them from council DCPs to state government LEPs may amount to nought, as **councils retain a free hand to refuse consent or scale-back complying development on the grounds that it is visually obtrusive.**

To encourage investment in land development, the developer needs to be provided with a "bankable" statement of development potential – such a system exists in Queensland and Western Australia.

The necessary legislative framework already exists in NSW – it just needs to be applied by the state government as part of the Standard Instrument. This would mean:

- any development proposal that meets the height controls and floor space ratios set out in a local environmental plan should <u>not</u> be capable of being refused or conditioned on the grounds of height, density or scale; and
- any development proposal that meets any development standards set out in or under the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development* should not be capable of being refused or conditioned in relation to the issues intended to be addressed by those development standards.

4. <u>Council-controlled DCPs will undermine the new LEPs.</u>

Many development proposals that are clearly envisaged by LEPs and consistent with a Standard Instrument compliant local environmental plan will be refused on the basis of a development control plan (DCP). This will frustrate efforts to deliver on the urban renewal goals set by LEPs.

Traditionally, development control plans were merely one factor for consideration in a complex decision-making process. It was customary, and expected, that many developments would be approved even when they did not comply with the letter, or even spirit, of a development control plan.

This was common practice, in part, because it recognised that development control plans were not robust documents. They had often been prepared without the involvement of developers and therefore often ignored the needs and requirements of the end-users of developed

property assets. Consent authorities traditionally felt comfortable in approving development contrary to the provisions of a development control plan when they felt a good case could be made out.

However, over the last decade, a series of court decisions have reversed this understanding. A DCP is now the "fundamental element" or a "focal point" of development assessment decision-making.

As the law stands, if development standards in a DCP can effectively prohibit a development - even when the local environmental plan allows an application to be made for the development.

The solution is straightforward.

Firstly, the government should use its powers to immediately limit the scope of matters that can be covered by a DCP. This means that some existing provisions in such plans should automatically become 'dead letter'. This process should not depend on a review of individual DCPs – that will take far too long to be of any practical value.

The approach we are suggesting is not unprecedented; it is effectively what the government did in 2008 when it created new state environmental planning provisions restricting council discretion on apartment sizes and ceiling heights.

Secondly, development controls plans should not be proscriptive.

Thirdly, development control plans should only be one factor for consideration in development assessment and that it should be given no special weight above other factors of consideration.

Finally, a development applicant should be entitled to argue, that the requirements of a DCP will adversely impact on the feasibility of a development envisaged by the local environmental plan. If this is established, a consent authority should be obliged to modify or set aside the requirements of the development control plan. We note that other jurisdictions allow such arguments to be made.

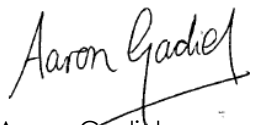
There is also a special need to create a state environmental planning policy to reduce the discretion of local councils to block development envisaged by local environmental plans by arbitrarily reducing car parking entitlements.

Such a policy should set minimum car parking entitlements for different categories of permitted uses, and only permit councils to impose lower car parking entitlements when it is justified by an objective expert traffic study. Of course, such a policy should not preclude an applicant for putting forward a proposal with little or no car parking, where the applicant can demonstrate that such parking is not required (e.g. where public transport is plentiful).

We have attached a detailed policy paper that covers these issues in greater depth. The paper cites NSW and interstate examples as well as relying on both judicial and academic commentary to illustrate key issues. We urge the Department of Planning to incorporate the maters raised by this paper into their own discussion paper to be released later this year.

We would welcome an opportunity to discuss these issues further.

Yours sincerely
Urban Taskforce Australia



Aaron Gadiel
Chief Executive Officer

Encl.

Urban Taskforce
AUSTRALIA

Reforming the Standard Instrument

Ensuring that the comprehensive local environmental plans work

A submission to the Department of Planning, as part of its review of the *Standard Instrument (Local Environmental Plans) Order 2006*.

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Contents

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.

Executive Summary

Since 2006 the NSW Government has been working towards replacing all existing local environmental plans (LEPs), in each local government area, with a new modern plan, compliant with a consistent template set out in *the Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument").

We understand that the Department of Planning is preparing a paper for community consultation on the reform of the Standard Instrument. The Urban Taskforce has prepared this policy document to raise issues we think the Department needs to address in its paper.

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The Standard Instrument was supposed to simplify the planning system. However this went awry when, in December 2007, just before Christmas, far-reaching changes were made to the Standard Instrument. The changes reversed the most positive aspects of the Standard Instrument document and did nothing to address its flaws. As a consequence, we now have little hope that NSW will meet the dwelling and employment targets set out in the Metropolitan Strategy.

All of the problems we are citing are clearly evident in LEPs that have been gazetted and publicly exhibited. We have documented specific real life examples of each problem.

The central issues canvassed by this document are set out below.

1. **<u>The Standard Instrument contains unjustifiable prohibitions on retail and business uses.</u>**

   Lower-order centres and employment zones

   In many 'lower-order centres' – often served by excellent public transport – Standard Instrument compliant LEPs will ban shops that sell large grocery items, clothing, music, home-wares, electrical goods or other household requirements that are not necessary as a matter of "daily convenience". This includes florists, mobile phones retailers and baby clothes shops.

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Traditionally, development control plans were merely one factor for consideration in a complex decision-making process. It was customary, and expected, that many developments would be approved even when they did not comply with the letter, or even spirit, of a development control plan.

This was common practice, in part, because it recognised that development control plans were not robust documents. They had often been prepared without the involvement of developers and therefore often ignored the needs and requirements of the end-users of developed property assets. Consent authorities traditionally felt comfortable in approving development contrary to the provisions of a development control plan when they felt a good case could be made out.

However, over the last decade, a series of court decisions have reversed this understanding. A DCP is now the "fundamental element" or a "focal point" of development assessment decision-making.

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Such a policy should set minimum car parking entitlements for different categories of permitted uses, and only permit councils to impose lower car parking

1. Introduction

Since 2006, the NSW Government has been working towards replacing all existing local environmental plans (LEPs), in each local government area, with a new modern plan, compliant with a consistent template set out in the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument").

The Standard Instrument is a crucial document for the development of NSW. It lays down the framework to which all future local environment plans (LEPs) must adhere.

Theoretically, the new Standard Instrument will simplify the planning system for residents, businesses and councils, by significantly reducing the overall number of LEPs, and by introducing a consistent approach to land use planning controls across NSW.

In 2006, the government promised that 155 new plans would be in place by 2011, but it has now revised that commitment with a new, less ambitious, timeline for the finalisation of just 67 plans. Of the 12 comprehensive LEPs originally promised for completion by March 2008, only two (Liverpool and Muswellbrook) were finalised. Of the 54 comprehensive LEPs that were originally to be in place by March 2009, only three were finalised (Canada Bay, Gosford and Goulburn Mulwaree).

In December 2007, just before Christmas, far-reaching changes were made to the Standard Instrument. The changes mean that NSW will fail to meet the dwelling and employment targets set out in the Metropolitan Strategy. We were given no warning of these changes; nor were we consulted prior to their gazettal.

On the 20 December 2007 the Urban Taskforce wrote to the government setting out our serious concerns about the changes. We also met with the Director-General of the NSW Department of Planning, Mr Haddad, and the then NSW Planning Minister, Mr Sartor. Mr Sartor promised to examine our concerns and put in place a process for resolving them. This never happened.

These changes will have a perverse impact on Sydney and NSW. We are concerned that these changes signal a lack of commitment by the NSW Government to its own strategic targets.

This submission identifies the key problems that have arisen as a result of the December 2007 amendments to the Standard Instrument, and also seeks to address additional flaws inherent in the original document.

2. Outright prohibition on retail and business uses

2.1 Narrow range of retail and business uses in lower-order centres

The current Standard Instrument permits local council to allow only a narrow range of retail and business uses in so-called "lower-order" centres. An example of this problem appears in the *Draft Penrith Local Environmental Plan 2008*.[1] In this plan, neither "retail premises" nor "shops" are generally permitted uses in a village zone. Only neighbourhood shops are permitted.

Neighbourhood shops are permitted, however these are defined to be

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

[1] See also the *Draft Greater Taree Local Environmental Plan 2008*.

This means a shop in a village zone (other than on those specifically listed sites) must:

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

In short, shops of any size are banned in neighbourhood centres if their purpose is to sell large grocery items, clothing, music, home-wares or electrical goods.

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

Additionally, "business premises" will also be banned in the village zone. This means that locals will be unable to set up a shopfront to engage in a profession or trade that provides services directly to members of the public. This means local communities will be deprived of internet access facilities, hairdressers, video libraries and dedicated banks, post offices and dry cleaners. Why is it okay to have banking services provided as an ancillary service in a neighbourhood shop, but unlawful to open a bank branch as a standalone service?

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

Furthermore, the Standard Instrument limits the floor area of all neighbourhood shops, which makes it impossible for even a moderate scale supermarket to be established. [2] This limits the opportunity for competition, ensuring that the community pays more than they should. Limiting the opportunity for a competitive retail environment (by restricting the type of goods sold and/or limiting floor area) robs the community of the opportunity to access a wide variety of competitively priced grocery items in their locality.

What this prohibition really means is that people need to drive further to satisfy their general grocery and shopping needs. The argument that limiting floor area and seeking to control the type of goods sold from retail premises, by way of plan, does not stand up to scrutiny. Local amenity can be properly and appropriately considered at the development application stage. Limiting retail by way of a statutory plan does little more than protect existing retail landlords.

Recommendation 1

The Land Use Table in the Standard Instrument should be amended so that "retail premises" and "business premises" are permitted uses in Zone B1 Neighbourhood Centre, Zone R4 High Density Residential and Zone RU5 Village.

Retail and business premises should be permitted (with consent) in such zones. The merits of individual proposals can be considered at the development assessment phase.

2.2 Lack of retail and business uses in employment zones

Many statutory plans do not permit "retail premises" and/or "business premises" (other than bulky goods premises, landscape and garden supplies, timber and building supplies) in business development and enterprise corridor zones.[3] For example, *Draft Ryde Local Environmental Plan 2008* does not even allow "retail premises" or "business premises" in the business park zone.

[2] cl 5.4(7).
[3] For example, the *Draft Greater Taree Local Environment Plan 2008*.

Business development zones, business parks and enterprise corridors are intended to be centres of employment. These environments function best when people working in these areas have somewhere to go to shop and socialise before work, at lunch time and after work.

Those working in a business development, business park or enterprise corridor zone should be entitled to have lunch in a restaurant, get a haircut or visit a local hotel after work. Surely these uses go hand-in-hand with business activity?

A prohibition on retail premises really means that people need to drive further to satisfy their shopping needs. Planning rules should be encouraging behaviour that reduces vehicle kilometres travelled, not reinforcing old-style separations of land use that force people to drive further.

Recommendation 2

The Land Use Table in the Standard Instrument should be amended so that "retail premises" and "business premises" are permitted uses in Zone B5 Business Development, Zone B6 Enterprise Corridor and Zone B7 Business Park.

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use for employment purposes.

2.3 Large format retail unwelcome in industrial zones

Many industrial zones recently published statutory plans to not permit retail premises or business premises in light industrial zones.[4] Sometimes food and drink premises, landscape and garden supplies, service stations, timber and building supplies are permitted, and occasionally bulky good premises are allowed, but almost always retail premises generally are prohibited.

This means large format grocery stores, such as Costco, are prohibited in light industrial areas. Large format business supplies retailers, such as Officeworks, or large format hardware suppliers, such as Bunnings, will often have great difficulty in finding sites. Smaller retail supermarkets, such as Aldi, also end up being excluded.

The 2005 Sydney Metropolitan Strategy offered a sensible approach to this issue. The Metropolitan Strategy stated that retailing in industrial areas should be permitted when it has operating requirements akin to industrial uses.[5] There was also a promise of a new approach to reinvigorate employment lands, including flexible zonings for industrial and commercial activities.[6]

However, the statutory plans that have been exhibited since the 2005 Metropolitan Strategy have not implemented this provision. There is potential to include a wider range of retail activities in industrial areas without jeopardising industrial activities. This could be achieved by including "retail premises" as a permitted use in industrial zones, with the inclusion of an additional objective to the zone that states the zone is to

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

Ideally retail premises and business premises should be a permitted use in the industrial zones. However, at very least, bulky goods premises should be permitted uses in industrial zones.

[4] For example, see *Draft Greater Taree Local Environment Plan 2008*.
[5] NSW Department of Planning, *City of Cities: Sydney's Metropolitan Strategy – Supporting Information* (2005) 105, B4.1.2.
[6] Ibid 63, A1.4.2.

Recommendation 3

At the very least, "bulky goods premises" should be added as a permitted use in Zone IN1 General Industrial and Zone IN2 Light Industrial. Costco-style development should also be permitted by permitting "retail premises" as a permitted use, with the inclusion of an additional objective to the zone that states the zone is to "provide for bulky goods retailing and other retail that is either ancillary to an industrial use, has operating requirements akin to industrial uses or demonstrable offsite impacts akin to industrial uses".

3. Too many single use zones

Planning authorities in NSW perceive themselves as protecting the community from the market. They often fall prey to the pitfall of seeking to stop the market doing from what it does, without asking why the market is acting in a particular way and whether the public interest is served by preventing the market from working.

In particular, the NSW planning system is inherently reluctant to zone for a mix of uses. This is now out-of-keeping with international best practice. The NSW system favours single use zoning evidenced by the proliferation (in the new standard-instrument compliant plans/draft plans), for example:

- medium density zones that do not permit residential flat buildings;[7]
- neighbourhood centre zones without purely-residential flat buildings or multi-dwelling housing (terraces and townhouses);[8]
- local centre zones without purely-residential flat buildings or multi-dwelling housing (terraces and townhouses);[9]
- commercial core zones without purely residential flat buildings or multi-dwelling housing;[10]
- enterprise corridor zones without residential flat buildings;[11]
- business development zones that do not permit retail premises;[12]
- light industrial zones that do not permit retail premises or bulky goods premises;[13]
- business parks that do not permit retail premises or bulky goods premises;[14]
- neighbourhood centres zones without retail premises;[15]
- village zones without retail or business premises; and[16]
- high density residential zones without retail premises;[17]

Tragically, the Standard Instrument, as originally conceived, did not have many of these problems. For example, offices were to be permissible in every business development zone, apartments were to be allowed in every medium density zone retail premises were to be permitted in every enterprise corridor zone. All this changed when the government gazetted surprise amendments to the Standard Instrument, just before Christmas in December 2007.

[7] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[8] See for example the land use table the *Draft Ryde Local Environmental Plan 2008*.
[9] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[10] See for example the land use table the *Canada Bay Local Environmental Plan 2008*.
[11] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[12] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[13] See for example the land use table the *Draft Ryde Local Environmental Plan 2008*.
[14] See for example the land use table the *Draft Ryde Local Environmental Plan 2008*.
[15] See for example the land use table the *Draft Lane Cove Local Environmental Plan 2008*.
[16] See for example the land use table the *Draft Penrith Cove Local Environmental Plan 2008*.
[17] See for example the land use table the *Draft Lane Cove Local Environmental Plan 2008*.

Also in December 2007 an amendment was gazetted to the Standard Instrument which changed the definition of shop-top housing. The effect of this amendment was to ensure that only convenience type shops could go in on the ground floor of a mixed-use development (rather than, say, a supermarket) in:

- Zone R1 General Residential;
- Zone R3 Medium Density Residential;
- Zone R4 High Density Residential; and
- Zone B1 Neighbourhood Centre.

A zone like the Standard Instrument's mixed-use zone (as originally conceived) offers a market friendly means of accommodating high intensity employment and residential uses in single zone.[18] That is, once the decision has been made that the infrastructure of an area is suitable for high intensity uses, it does not matter what mix of uses ultimately emerges. This can be managed through market processes. A mixed-use zone, properly implemented,[19] allows this to happen. Other zones that could offer a more flexible approach are the enterprise corridor zones (if modified) where office, retail, residential and light industrial uses could be flexibly mixed, and the business park zone (where retail, office and light industrial uses should be able to be mixed, if the standard instrument were appropriately amended).

The benefits of mixed-use zoning, well articulated in the report *Liveable Centres*[20] are often not realised because of planning criteria that requires authorities to be 'certain' that they can deliver sector based targets for commercial office, residential, etc. When land is able to be used flexibly for different uses, planning authorities *do* lose control as to the precise use of the land. This is ultimately in the public interest because it allows the market to do what it does best – deliver the product that delivers the greatest value to the economy and community.

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

Too many planning authorities view zoning as an exercise in dividing up a fixed amount of development across different geographic areas. They frequently fail to appreciate that by instating restrictive zoning, the economic and social value of development, and the overall level of development activity, is reduced.

If there is a concern that by rezoning land for a mix of uses, there will be less land available for high density residential uses, just rezone some more land for high density residential. There is no actual shortage of land in NSW – just a shortage of land zoned for some key uses (such as retail, high density residential and greenfield development).

The use of multi-use zones should be encouraged, to avoid sterilising land in the event that the market does not seek to develop some or all of the land made available by, for example, a light industrial zone that only authorises a very narrowly defined list of "light industrial" uses.

[18] If residential flats and multi-dwelling housing were reinstated as a mandatory permissible use in the mixed-use zone.
[19] By "properly implemented" we are referring to a mixed use zone that does not contain backdoor means of discriminatory against different high intensity uses. An example of such discrimination is offered by the *Draft Burwood Town Centre Local Environmental Plan 2008*, which zones for mixed uses, but then has discriminatory floor space ratios based on whether the use is retail;/commercial or residential.
[20] The report is available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=2375>.

Recommendation 4

The mandatory permissible uses in the land use table in the Standard Instrument should be broadened so that there is a greater focus on multiple use, rather than single use, zoning.

This will involve:

- neighbourhood centres zones permitting retail premises; permitting purely-residential flat buildings and multi-dwelling housing (terraces and townhouses);
- enterprise corridor zones permitting residential flat buildings;
- medium density zones permitting residential flat buildings;
- local centre zones permitting purely-residential flat buildings and multi-dwelling;
- commercial core zones permitting purely-residential flat buildings and multi-dwelling housing.
- business development zones permitting retail premises;
- light industrial zones permitting retail premises and bulky goods premises;
- business parks permitting retail premises or bulky goods premises;
- village zones permitting retail and business premises; and
- high density residential zones permitting retail premises.

The definition of "shop top housing" should be returned to its pre December 2007 state so that any retail premises could go into a ground floor of a mixed-use development in "General Residential", "Medium Density Residential", "High Density Residential" and "Neighbourhood Centre" (obviously development consent will still be required)

It's important to understand that while we advocate for mixed-use development to be permissible, we do not suggest that it should be mandated. That is, the Standard Instrument should allow, wherever possible, a mix of commercial, residential and retail development in a single zone, and even in a single building. However, the planning system should not try to force developers to build any kind of product.

There is an increasing tendency by many planning authorities to force residential developers to build retail space on the ground floor, even when the developer believes it is unlikely that the space will be adequately tenanted.

If there is insufficient demand for retail space, developers are still forced by such rules to build ground floor retail space that can be empty and underused, leading to a ghost town atmosphere in the local streetscape. It is far better that developers be allowed to populate empty land with the vibrancy of a residential neighbourhood than leave it bare because of a lack of demand for retail space. Similarly, forcing developers to build retail space that they know will be vacant (in order for the developer to get the benefit of residential space above) is a waste of resources and will do nothing to create a vibrant streetscape.

For example, the *Draft Greater Taree Local Environmental Plan 2008* says that any residential development in the neighbourhood centre, local centre, commercial core and the mixed-use zones must be "shop top housing". That is, residential development can only take place if it is above or attached to retail or business premises.

This is not an an isolated example. The Urban Taskforce commissioned Stephen Moore (a well credentialed expert in urban design and town planning and principal of Roberts Day) to prepare the

Liveable Centres report in response to the restrictive treatment residential development has been given in recent local environmental plans.[21]

Mr Moore found, that since 2007 NSW local councils, with the approval of the Department of Planning, had released 13 new local environmental plans in-line with the government's new standardised format. This report shows that eleven of the plans prohibit purely-residential buildings in centres, forcing a mix of residential and non-residential uses in every building within a centre.

This problem will partly be addressed by mandating a greater range of permitted uses, as per the previous recommendation. It will also need to be addressed by amending zone objectives which effectively require a mix of uses within a single building.

Recommendation 5

The zone objective for the Enterprise Corridor zone ("[t]o provide a range of employment uses (including business, office, retail and light industrial uses) and residential uses (but only as part of a mixed-use development)" should be amended to omit the text "(but only as part of a mixed-use development)".

4. Zone objectives that stop permissible development

Even if a given development is permissible under the land use table in a plan, it can easily be refused if it is inconsistent with the zone objectives

For example, residential flats may be permissible in an areas, but if the zone objectives provide for the existing character of the area to be maintained (and the existing character is low-density residential) residential flat development is unlikely to be approved.

Plans prepared in-line with the Standard Instrument[22] require a consent authority to have regard to the objectives for development in a zone.[23] This makes a zone objective an incredibly important factor in the development assessment process.

4.1 Use of zone objectives to protect businesses from competition

The key Land and Environment Court case, which deals with the operation and effect of zone objectives clauses designed to protect centres from business competition, is *Almona Pty Ltd v Newcastle City Council.*[24]

In this matter, Justice Pearlman, of the NSW Land and Environment Court, heard a merits appeal from a decision by Newcastle City Council to refuse an application for the "establishment of bulky goods retail, hardware and retail plant nursery" in Kotara, about seven kilometres from the Newcastle central business district.

The site was zoned as light industrial 4(a) under the *Newcastle Local Environmental Plan 1987*. The site was directly opposite a large shopping complex known as Garden City.

[21] The report is available on the internet: <http://www.urbantaskforce.com.au/LiveableCentres.php>.
[22] That is the Standard Instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006*.
[23] Cl 12 of the Standard Instrument, the *Standard Instrument (Local Environmental Plans) Order 2006*.
[24] [1995] NSWLEC 55.

> A key issue related to the LEP. One of the applicable zone objectives was to allow commercial, retail or other development only where it is ... unlikely to prejudice the viability of existing commercial centres; ...

The permissibility of a proposed development depended upon it being consistent with that objective.[25] The council argued that the development could not satisfy the zone objective and therefore should be refused.

Justice Pearlman rejected the developers' argument that the carrying out of the development would only be inconsistent with the zone objective if there was a real chance or possibility that the proposed development will bring into question the existence of the Newcastle CBD.

Instead Justice Pearlman ruled that the zone objective permitted

> only those developments which do not negatively affect the maintenance and reinforcement of the life or existence of existing commercial centres, of which the Newcastle CBD is, in the terms of the relevant planning instruments, of a higher order or paramount.
>
> [A] proposed development is permissible *if there is no real chance or possibility* that it will disadvantage or detrimentally affect the life or existence of existing commercial centres. In this case, the existing commercial centre in question is the Newcastle CBD which itself enjoys some paramountcy over other centres (italics added).

The proposed development would have placed other businesses in the region under competitive pressure, including those in the Newcastle CBD. That means, the project did not comply with the zone objective, and the Court refused the development application. On this occasion it did not matter, but analogous provisions existed in the regional environmental plan and the development control plan – and these too would have stopped the development dead in its tracks.

This case shows how zone objectives, that seek to support the viability of centres, operate to exclude the entry of new businesses that offer any "real chance" of competition with incumbent centre-located businesses. It's worth noting that the decision of Justice Pearlman made it clear that a "centre" is defined by reference to business and commercial zones, not the presence of any particular infrastructure. That is, its lines on paper that drives the process rather than the fundamentals of good planning.

Regretfully there are numerous examples of expressly anti-competitive provisions of this kind, in both the statutory plans in the small number of more recent plans, prepared in compliance with the Standard Instrument.

The zonings under the plan set out to prevent competition businesses located in certain zones from competing with businesses in "centres". Centres are not defined in the Standard Instrument, so it is presumably the intention to protect the business located in the "centres" identified in regional and subregional strategies from competition.

4.1.1 Business development zone

In the Standard Instrument the zone B5 "Business Development Zone" permits retail, but its objective is to

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

So developments that do not support the viability of centres, such as those with the potential to attract customers away from centres, will not satisfy the objectives of the zone.

The Department of Planning says this about the intended use of business development zones:

[25] That follows from cl 12(3) of the LEP which obliged the council not to grant consent to the carrying out of development unless the council is of the opinion that the development is consistent with the objectives of the relevant zone. It also follows from the specific wording contained in zone 4(a), cl 3 of which provides that the only development which is permissible with consent is development for a purpose "... which, in the opinion of the Council, is consistent with the objectives of this zone ...".

> This zone is generally intended for land where employment generating uses such as offices, warehouses, retail premises (including those with large floor areas) are to be encouraged. The zone supports the initiatives set out in the Metropolitan Strategy *City of Cities: A plan for Sydney's future* (NSW Government 2005) but might also be suitable for application in urban areas in regional NSW.
>
> The zone may be applied to locations that are located close to existing or proposed centres, and which will support (and not detract from) the viability of those centres.[26]

So, even though the government's strategic policies envisage the use of these zones in areas with infrastructure sufficiently robust to support offices and retail, businesses that may compete with centres cannot be established in these areas.

Incidentally, the Zone B5 Business Development was, until recently, marginally broader. Since December 2007 the zone objective is now limited retail to "specialised retail" – a limitation of this kind was not previously considered necessary. It reduces the flexibility that was previously available.

4.1.2 Enterprise corridor

Zone B6 "Enterprise Corridor" exists to promote businesses along main roads and to encourage a mix of compatible uses. It is also intended to enable a mix of employment (including business, office, retail and light industrial uses) and residential uses. However, it is also an objective of the zone to

> Maintain the economic strength of centres by limiting retailing.

So, developments concerned with retail are discouraged in zone B6.

Enterprise corridor zones benefit from passing traffic (over 50,000 vehicles per day).[27] The Department of Planning says that

> [t]he zone is generally intended to be applied to land where commercial or industrial development is to be encouraged along main roads such as those identified by the Metropolitan Strategy *City of Cities: a plan for Sydney's future* (NSW Government 2005).[28]

Enterprise corridor zones have been proposed for Victoria Road, Parramatta Road, the Pacific Highway, Anzac Parade, Pittwater Rd, Canterbury Rd and Gardeners Rd.[29] These areas all have excellent infrastructure which can fully support high intensity uses such as offices and retail development – yet retail development which may put businesses in centres under pressure is to be "limited".

4.1.3 Light industrial

In December 2007 the objectives for Zone IN2 Light Industrial were amended so that development in these areas must now "support the viability of centres". This means retail developments, such as bulky goods facilities, will be much harder to locate in light industrial areas, even if "retail premises" or "bulky goods premises" are included in the list of permitted uses for a particular local environmental plan. We are in possession of internal Department of Planning documentation (obtained through a freedom of information request) which says that this change was made at the instigation of the Shopping Centre Council and the Property Council – organisations that represent the interests of major incumbent retail landlords.

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[26] Department of Planning, Practice Note PN06-022, 12 April 2006, "Preparing LEPs using the Standard Instrument: standard zones" 4.

[27] Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 35.

[28] Ibid.

[29] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 31; Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 34.

The above discussion shows how the Standard Instrument creates areas where businesses are unable to be established if they would provide competition to businesses in established centres.

Recommendation 6

The anti-competitive provisions of the NSW Government's Standard Instrument should be removed. Namely:

- in a "Business Development Zone" retail, office premises and other uses should be permitted, even if it would provide competition to businesses located in established centres; and
- in "Enterprise Corridor" ; "Business Park"; "General Industrial"; and "Light Industrial" zones retail and other uses should be permitted even if it would provide competition to businesses located in established centres.

This means, in the Standard Instrument's Land Use Table:

- in a "Business Development Zone" the existing zone objective ("[t]o enable a mix of business and warehouse uses, and specialised retail uses that require a large floor area, in locations that are close to, and that support the viability of, centres") should be deleted and the following instead inserted: ("[t]o enable a mix of retail, business and warehouse uses";
- in an "Enterprise Corridor Zone" the existing zone objective ("[t]o maintain the economic strength of centres by limiting retailing activity") should be deleted;
- in a "Business Park" the existing zone objective ("[t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area") should be amended to omit the words "to meet the day to day needs of workers in the area"; and
- in a "Light Industrial" the existing zone objective ("[t]o encourage employment opportunities and to support the viability of centres") should be amended to omit the words "support the viability of centres" and the existing zone objective ("[t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area") should be amended to omit the words "to meet the day to day needs of workers in the area".

A direction should be inserted into the Standard Instrument ensuring that additional zone objectives are not inserted by councils to have the same effect as the above deleted provisions.

4.2 Prohibition on medium sized and large retail and business uses

In the Standard Instrument's "Zone B1 Neighbourhood Centre" the zone objective is

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

A subjective phrase such as "small-scale" should never have appeared in a statutory plan. The term "small-scale" is vague and undefined. True supermarkets or large format stores range from 1,500 square metres (six checkouts) for a typical Aldi or IGA Supa store to 2,500 to 3,500 square metres (12 to 16 checkouts) for a full-line Woolworths, Coles, Franklins or Superbarn. So, in industry terms, a small scale supermarket will have a floor area of 1,500 square metres. However, some government and local

council planners have been known to argue that a store of 700 square metres is a larger retail establishment – an idea that is rejected by both industry and consumers.

The *Liverpool Local Environmental Plan 2008* takes the extra step of banning shops with a gross floor area of more than 1,500 square metres.[30] So clearly, a supermarket of 2,000 square metres – which would still be small by industry standards – will be prohibited in Liverpool's neighbourhood centres. However, the fact is, even a "supermarket" of 1,000 square metres may be deprived of development consent, because of the objective that supermarket retailing must be "small". There is nothing in the *Liverpool Local Environmental Plan 2008* which says that a supermarket of 1,500 square metres satisfies the "smallness" criteria set out in the neighbourhood zone objectives.

The reference to "small scale" in the zone objective should be removed. By depriving local consumers from full-line supermarkets, locals will be forced to drive further to access lower cost groceries and those that are unable to drive will be deprived of the full-range of groceries that are only available at full-sized supermarkets.

Recommendation 7

In the Standard Instrument's "Zone B1 Neighbourhood Centre" the zone objective should amended to omit the words "small scale". Height and/or FSR controls are sufficient to control the bulk and scale of development, a subjective prohibition imposed through use of the words "small-scale" is inappropriate.

4.3 Zone objectives that "encourage" some development

A local environment plan is a legal document prohibiting and permitting activities. It can do nothing to "encourage" a particular class of development, except when it does so by disadvantaging other forms of development. This is well understood by consent authorities who frequently use the word "encourage" to signal that a particular form of development might be approved, while other forms of development are likely to find approval difficult.

For example, the *Draft Ryde Local Environmental Plan 2008* includes an objective for its commercial core and business park zone:

> To encourage industries involved in scientific research and development.

The Standard Instrument requires that this zone objective be considered when development applications in the commercial core zone are considered by consent authorities.[31] This zone objective obliges and empowers a consent authority to consider refusing a development because it does not involve scientific research and development. Such a refusal would be a loss to the community of Ryde, the broader Sydney community and the state as a whole, because it may prevent Macquarie Park from reaching its full potential. It may undermine the substantial investment the state has made in this locality as a transport hub. The reality is that Macquarie Park is best developed by allowing the market to determine the kinds of businesses that are located there – with appropriate controls over building form.

Zone objectives that "encourage" certain types of development, implicitly "discourage" other forms of development, even if those other forms of development a permitted uses in a zone. Through the use of

[30] Clause 7.25.
[31] Clause 2.3(2).

"encourage" objectives, state government set strategic planning objectives can be undermined by local councils.

Recommendation 8

A direction should be inserted in the Land Use Table of the Standard Instrument prohibiting the use of the word "encourage" in any additional zone objectives not already mandated by the Standard Instrument.

This would not prevent zone objectives that explain the clear purpose of the zone, for example: "To provide for the housing needs of the community within a high density residential environment".

4.4 Compliance with the Departmental practice note

In September 2009 the Department of Planning published an LEP practice note titled "Local environmental plan zone objectives" (PN 09–005).[32]

This practice note advised council that:

- in many instances there will be no need for a council to add any additional zone objectives;
- aspirational objectives for the local government area that are supported by policies or provisions outside of the LEP (e.g. community consultation process, development assessment procedural matters, desired urban design outcomes or building development standards) should not be included;
- adding numerous local objectives could undermine the purpose of the zone;
- objectives should not describe development control matters that are addressed through a development control plan, e.g. design requirements, setbacks, building envelope, site analysis or construction standards;
- language in zone objectives should be avoided when it is open to subjective interpretations, e.g. "well-designed", "high quality", "liveable", "economically sound" or a vague phrase such as "creating a sense of place".

The practice note is an excellent document, and the Department deserves praises for such a well written and clear explanation of good practice in the drafting of plans. Regrettably, local environmental plans that have been published since this practice note was issued have not consistently complied with it.

This practice note should be given teeth – this means its requirements should be elevated so that they are formally set out in the Standard Instrument itself. This is possible under the Act, which expressly provides that the Standard Instrument may contain requirements or guidance as to the form or content of non-mandatory provisions.[33] The contents of the practice note are so important, they should be directly incorporated into the instrument in this way.

Some provisions can be expressed as directions (such as prohibitions on the use of words like "well-designed", "high quality", "liveable", etc), others will need to be phrased as material for "guidance".

[32] <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=T%2f5w%2brIJIWc%3d&tabid=249>.
[33] s 33A(7).

Recommendation 9

The Standard Instrument should be amended to implement the Department of Planning's practice note 09-005 on local objectives in zones.

A direction should be inserted prohibiting the use of the phrases "well-designed", "high quality"', "liveable", "economically sound", "creating a sense of place" or their synonyms in additional (non-mandated) zone objectives or other non-mandatory provisions.

A direction should be inserted prohibiting additional zone objectives or clauses dealing with design requirements, setbacks, building envelope, site analysis or construction standards.

A direction should be inserted prohibiting additional zone objectives or clauses requiring consideration of matters the same as, or substantially the same as, the matters set out in section 79C of the Act.

A guidance provision should be inserted advising that development control matters that are addressed through a development control plan should not be referenced in zone objectives or other additional provisions.

A guidance provision should be inserted advising that if the same local objectives are being considered for several zones it may be best to include the overarching issue as an overall aim of the plan

5. Floor space ratios are being misused

A common defence of floor space ratios is to state that they are:

- to provide an appropriate correlation between the size of a site and the extent of any development on that site;
- to establish the maximum development density and intensity of land use, taking into account the availability of infrastructure and the generation of vehicle and pedestrian traffic; and
- to ensure buildings are compatible with the bulk and scale of the existing and future character of the locality.[34]

If the above statements are a legitimate justification for the imposition of maximum floor space ratios on a site, then it is difficult to comprehend why development types of a similarly high intensity should be given different floor space ratios in the same locality.

For example, while the *Draft Burwood Town Centre Local Environment Plan 2008* does permits residential development within the town centre, it imposes a significant floor space penalty on such development. For example, a maximum floor space ratio (FSR) of 6.0:1 is permitted in the town centre, but residential FSR in the same location is restricted to 2:1. This will severely impact the feasibility of residential development in this location and will potentially stall investment and urban renewal.

In high density residential zones, the *Draft Ryde Local Environmental Plan 2008* sensibly excludes residential flat development and multi-dwelling housing from the floor space ratio requirements but applies it to shop top housing. In this case the rule penalises retail development and confers disproportionate market power on the owner(s) of nearby retail land that is not so burdened.

[34] *Wollongong Local Environmental Plan 2009* cl 4.4.

This level of regulation and prescription of uses is unnecessary and must be avoided. For instance, if market conditions mean that non-residential development is not viable at a particular point in time, floor space ratio penalties may prevent any urban renewal in a given area from proceeding.

On the other hand, if residential and non-residential uses are treated equally, residential development can contribute to urban renewal when commercial or retail development is not viable.

The bulk and scale of a building is the same, whether its internal use is residential, commercial, retail or mixed-use. If a planning authority is concerned about the external building form, this can be dealt with by a development control plan, and does not need to regulate the internal use of a building. For example, a residential building can be built in the appearance of a commercial building (see the Regent Place development for example). Similarly, a supermarket can be in a mixed-use development underground, and have no external visual impact.

Recommendation 10

The existing direction in clause 4.4 in the Standard Instrument should be revised to make it clear that floor space ratios cannot discriminate between uses in the same zone.

6. Arbitrary caps on the floor space for certain developments

As a result of amendments made in December 2007, the Standard Instrument sets a maximum floor area for different types of development, regardless of the merit of individual proposals; regardless of the capabilities of local infrastructure or the nature of local suburbs.

For example, the *Lane Cove Local Environmental Plan 2009* (applying mandatory provisions of the Standard Instrument) sets a maximum floor space for neighbourhood shops at 300-400 square metres (depending on whether the shop fronts a local or regional road).[35] In the *Draft Penrith Local Environmental Plan 2008* the limit is 200 metres.[36] In the *Liverpool Local Environmental Plan 2008* it is 100 square metres.[37]

Surely what matters to the community are the bulk and scale of developments and off-site noise and traffic impacts? Bulk and scale issues can be dealt with by height or floor space ratio restrictions. Noise and traffic impacts can be objectively addressed as part of the development assessment process.

In the *Liverpool Local Environmental Plan 2008* additional local provisions have been inserted banning shops with a gross floor area of more than 1,500 square metres.[38] In the same plan, retail and bulky goods premises in the enterprise corridors zone is severely restricted. A clause prohibits development that would result in the total gross floor area of all retail premises (other than timber and building supplies, landscape and garden supplies or vehicle sales or hire premises) in a single building being more than 8,000 square metres.[39] Of course, such a restriction could properly arise from a development assessment, but it is impossible to see how such an arbitrary restriction can be imposed by a zoning plan, with no particular proposal on the table.

[35] cl 5.4(7).
[36] cl 5.4(7).
[37] cl 5.4(7).
[38] cl 7.25.
[39] cl 7.22.

Recommendation 11

The Standard Instrument's clause 5.4(4), (6)-(8) should be deleted and a direction should be inserted to ensure that no additional local provisions can be inserted which restrict the floor space of a development.

The existing provisions in relation to height and floor space ratio should be sufficient to deal with bulk and scale at a zoning level.

7. Mandatory use of non-discretionary development standards

Though local environmental plans may state the type of development permitted within certain zones and development control plans further articulate standards, compliance with the requirements of the local environmental plan and development control plan is not any assurance of development approval.

For instance, a developer may prepare a development proposal for a residential flat building within a high density residential zone. The proposal might be designed to comply with development standards contained in the local environmental plan and/or development control plan. Despite this, the planning authority is not obliged to grant consent. The consent authority is provided with discretion as to the application of these standards.

A local environmental plan may state a maximum height or floor space ratio (FSR), but a developer cannot use these standards with certainty when preparing a development feasibility assessment or making a decision to purchase land.

Unfortunately, under current planning regulation in NSW, the situation exists that even if a development proposal complied with say height and FSR controls, the consent authority is still able to "scale back" the development and apply a lesser height or FSR under the guise of improved design or amenity outcomes. A development standard, stated in a local environmental plan or development control plan, is therefore little more than a statement of development potential, not a guaranteed minimum development potential for that land.

What this really means is that, yet again, the current planning system in NSW does not provide any certainty for an investor. Land acquisition decisions, development potential of land and land value cannot be determined with confidence.

To encourage investment in land development, the developer needs to be provided with a "bankable" statement of development potential. While NSW does not currently provide for such certainty an alternative system can be devised.

The Queensland planning legislation provides a good model. The *Sustainable Planning Act 2009 (Qld)* includes a number of provisions that would encourage investment. For instance the Act refers to "code assessable" development.

The Act provides for the preparation and adoption of development "codes" that articulate the development standards that apply to land. Development proposals can be assessed for compliance against these codes. These development proposals are considered to be "code assessable applications" and the consent authority must determine a development application with regard to the applicable codes. If the development complies when assessed against the code, the authority is obliged to approve the application, whether or not conditions are required to achieve compliance. The development application can only be refused if the proposal does not comply with the code and

conditions cannot overcome this deficiency. Code assessable development does not require public notification.

Should the applicant wish to seek approval for development that is outside of the development standards in the development codes an alternative assessment pathway remains available. The applicant is able to demonstrate the merit of the proposal and argue that there is a case to approve the development application. This form of development is known as "impact-assessable development". Impact-assessable development is more complex.

Western Australia has also adopted a similar approach to residential development. Detailed development codes have been adopted for most forms of residential development and a local government should not refuse an application that meets the requirements of the code.[40] The residential codes have been the basis of the residential development assessment process of Western Australia since 1991. Their use is strongly supported by the community as the "codes ensure that buyers, builders and neighbours know what they are getting"[41].

The *Environmental Planning and Assessment Act 1979* already provides for something similar to code assessable development, although the concept is described as "non-discretionary development standards".[42] If an environmental planning instrument contains non-discretionary development standards and a development proposal complies with those standards, the consent authority:

- is not entitled to take those standards into further consideration; and
- must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards.[43]

While the Act, does not expressly prevent a consent authority from refusing a development application outright when it complies with a non-discretionary development standard, such provisions can be inserted into an environmental planning instrument.[44]

An environmental planning instrument also may allow flexibility in the application of a non-discretionary development standard, in the same way that the Queensland system allows for non-complying "impact-assessable" development.[45]

While we see wide potential for "non-discretionary" development standards to be used to remove regulatory risk from the planning system, as a starting point, we suggest the following measures be adopted:

- any development proposal that meets the height controls and floor space ratios set out in a local environmental plan should not be capable of being refused or conditioned on the grounds of height, density or scale;[46] and
- any development proposal that meets any development standards set out in or under the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development* should not be capable of being refused or conditioned in relation to the issues intended to be addressed by those development standards.[47]

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[40] Western Australian Planning Commission 2002 Planning Bulletin # 55

[41] Western Australia Planning Commission http://www.planning.wa.gov.au/WAPC+statements/769.aspx [Accessed 30 June 2009]

[42] s 79C(2)-(3).

[43] s 79C(2).

[44] For example, see: clause 30A of the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development*; clause 29 of the *State Environmental Planning Policy (Affordable Rental Housing) 2009*; and Part 7 of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*.

[45] s 79C(3).

[46] See clause 29(1) of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* for an example of a similar provision.

[47] See clause 30A(1) of the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development* for an example of a more narrowly phrased provision.

Recommendation 12

The Standard Instrument should be amended as set out below.

Any development proposal that meets the height controls and floor space ratios set out in a local environmental plan should not be capable of being refused or conditioned on the grounds of height, density or scale. Any development proposal that meets any development standards set out in or under the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development* should not be capable of being refused or conditioned in relation to the issues intended to be addressed by those development standards. These provisions can be modelled on Part 7 of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, but should also invoke section 79C(2) of the Act.

8. Development control plans will undermine the new LEPs

Council instituted development control plans (DCPs) present a grave risk to the success of the comprehensive local environmental plan process. We foresee development proposals that are clearly envisaged by, and consistent with a Standard Instrument compliant local environmental plan being refused on the basis of a development control plan.

Traditionally, development control plans were merely one factor for consideration in a complex decision-making process. It was customary, and expected, that many developments would be approved even when they did not comply with the letter, or even spirit, of a development control plan.

This was common practice, in part, because it recognised that development control plans were not particularly robust documents. They had often been prepared without the involvement of developers and therefore often ignored the needs and requirements of the end-users of developed property assets. Consent authorities traditionally felt comfortable in approving development contrary to the provisions of a development control plan when they felt a good case could be made out.

However, in *Zhang v Canterbury City Council*[48] the NSW Court of Appeal held that

> The consent authority has a wide ranging discretion - one of the matters required to be taken into account is "the public interest" - but the discretion is not at large and is not unfettered. [The DCP] had to be considered as a "fundamental element" in or a "focal point" of the decision-making process.[49]

In that matter, a consent authority dealt with a proposal for a brothel, on the basis that the impact on land affected by the presence of a brothel had to be demonstrated.[50] However, it taking what might be regarded – to a lay person - as a common-sense approach, the consent authority ran afoul of pre-determined DCP 'standards' which required no such evidence. The Court concluded that this approach could only be supported if there were no "standards" which the decision maker had to take into account. [51] It was said that

> evidence, or rather the absence thereof, about actual effects [of development], was not entitled to determinative weight, without regard to the presumptive "standard" ....[52]

[48] (2001) 115 LGERA 373
[49] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 386-7 (Spigelman CJ); Meagher and Beazley JJA concurred. I agree with Spigelman CJ.
[50] *Zhang v Canterbury City Council* [2001] NSWCA 167 [76]; (Spigelman CJ); Meagher and Beazley JJA concurred.
[51] Ibid.
[52] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 387 (Spigelman CJ); Meagher and Beazley JJA concurred.

While *Zhang* was about a brothel, this approach is now routine and has been applied for developments as varied as multi-unit residential development;[53] late night trading of entertainment venues;[54] alterations to individual dwellings;[55] and industrial premises.[56]

The Court of Appeal recently re-affirmed the *Zhang* approach and said the case had "authoritatively considered" this issue.[57] In this recent case the Court of Appeal made it very clear a decision-maker was

> not entitled to take the view that the standards set by the DCP were inappropriate for reasons of general policy.[58]

It seems odd to us, that a development control plan should be the "fundamental element" in, or a "focal point" of decision-making, when it is merely one of nine specific heads of consideration, nominated by section 79C(1), and each of these considerations is likely to conflict with each other and require a significant balancing act. We don't presume to disagree with the Court of Appeal as the interpretation of the existing law, but we do take issue with appropriateness of the law. We think it needs to be changed.

In fact, as the law standards, if development standards in a DCP are not inconsistent with a local environmental plan, they can effectively prohibit a development - even when the local environmental plan allows an application to be made for the development.[59]

It's worth contrasting the differing approaches between NSW and Queensland. In Queensland, the presence of a code creates a legally enforceable right for a development applicant to insist on the approval of their proposal, provided it satisfies the code (and the applicant is still entitled to a merit assessment in the event that the code if not complied with). In NSW, it is unlikely that any proposal inconsistent with a DCP will get serious consideration, while there is no legal certainty that even proposals that are consistent with a plan will be approved.

Leslie A Stein, a barrister and former Chairman of the Western Australian Town Planning and Appeal Tribunal and former Chief Counsel to the Sydney Metropolitan Strategy, commented on the subject of 'standards' in his work: *Principles of Planning Law*, published by Oxford University Press.[60] Stein observed that

> [i]t is always the case that a discretion to vary creates an exception that is applied in limited circumstances; there is a tendency to gravitate to the rule. The origin of the development standard and questions of whether it is based on a sound town planning principle, or whether better standards could be found, are no longer considered in the application of the standard; the standard is free of any philosophy or principle. ... [T]he reason behind the rules should require examination in particular cases.
>
> The tendency towards rigid enforcement of rules expressed as development standards is perhaps the most frustrating and destructive aspect of planning.[61]

No lessor authority than the House of Lords (in its capacity as the highest court in the United Kingdom), in another context, has challenged the kind of rigid thinking that now dominates development assessment in NSW:

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[53] For example, see *Longhill Projects Pty Ltd v Parramatta City Council* [2010] NSWLEC 1040 [19]; *Planit Consulting v Tweed Shire Council* [2009] NSWLEC 1383 [57]; *Moore v Kiama Council* [2009] NSWLEC 1362 [51]; *Skyton Developments Pty Ltd v the Hills Shire Council* [2009] NSWLEC 1299 [39].
[54] For example, see *Moonlight City Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 1004 [23].
[55] For example, see *Pietranski v Waverley Council* [2009] NSWLEC 1278 [17].
[56] For example, see *Botany Bay City Council v Premier Customs Services* Pty Ltd [2009] NSWCA 226 [5] (Macfarlan JA).
[57] For example, see Botany Bay City Council v Premier Customs Services Pty Ltd [2009] NSWCA 226 [24] (Macfarlan JA).
[58] *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA 226 [27] (Macfarlan JA); Ipp JA and Hoeben J concurred.
[59] *North Sydney Council v Ligon 302 Pty Ltd [No. 2]* (1996) LGREA 23.
[60] L Stein, *Principles of Planning Law* (2008).
[61] L Stein, *Principles of Planning Law* (2008) 76-77.

> [H]ard and fast rules should have no place when deciding questions of practical convenience. There is a place for guidelines, and for prima facie rules, or residual rules. But circumstances in individual cases vary infinitely. If convenience is the governing factor, then at some point in the system there should be space for a discretionary power, to be exercised having regard to all the circumstances.[62]

In NSW the fact that a development control plan can both effectively prevent the goals of a local environmental plan being achieved and considerably devalue land should be a cause for public concern.

The solution is straightforward.

Firstly, the government should use its powers to immediately limit the scope of matters that can be covered by a development control plan (DCP). This means that some existing provisions in such plans should automatically become 'dead letter'. This process should not be dependent on a review of individual plans – that will take far too long to be of any practical value. The approach we are suggesting is not unprecedented; its effectively what the government did in 2008 when it created new state environmental planning provisions restricting council discretion on apartment sizes and ceiling heights.[63] The effect of these changes was to render ineffective provisions in DCPs that prescribed more restrictive apartment sizes and ceiling heights than those required by the *Residential Flat Design Code*. Such DCP provisions immediately ceased to have any status, despite the fact they were still technically part of the text of a council-approved DCP.

The scope of development control plans should be limited to standards that are a necessary response to any of the following issues:

- flooding and stormwater;
- erosion, sedimentation, acid sulphate and soils salinity;
- the preservation of heritage streetscapes in heritage conservation areas;
- 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;
- traffic access and safety, parking, loading and unloading;
- noise, odour, hazardous uses;
- waste management landfill;
- construction activity;
- outdoor dining; and
- road and pavement design.

Development controls plans should not be capable of containing:

- height, bulk or scale where height and/or floor space ratio controls are set out in an applicable environmental planning instrument;
- any other standard where a development standard, addressing the same issue, is set out in an applicable environmental planning instrument;

[62] *Reg v Wicks* [1998] AC 92.
[63] *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development (Amendment No 2)* which inserted clause 30A into the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development.*

- provisions concerning a building's interior, including its internal configuration, structure, materials or design or the mix of dwelling types within an apartment buildings (the Building Code of Australia and SEPP 65 should be sufficient); and
- energy or water efficient requirements (BASIX is sufficient).

Secondly, development controls plans should not be proscriptive.

Thirdly, development control plans should only be one factor for consideration in development assessment and that it should be given no special weight above other factors of consideration.

Finally, a development applicant should be entitled to argue, that the requirements of a development control plan will adversely impact on the feasibility of a development envisaged by the local environmental plan. If it established, a consent authority should be obliged to modify or set aside the requirements of the development control plan. We note that other jurisdictions allow such arguments to be made.[64]

We also note there is a special need to create a state environmental planning policy to reduce the discretion of local councils to effectively block development envisaged by local environmental plans by arbitrarily reducing car parking entitlements.

Such a policy should set minimum car parking entitlements for different categories of permitted uses, and only permit councils to impose lower car parking entitlements when it is justified by an objective expert traffic study. Of course, such a policy should not preclude an applicant for putting forward a proposal with little or no car parking, where the applicant can demonstrate that such parking is not required (e.g. where public transport is plentiful).

Recommendation 13

The scope of matters that can be covered by a development control plan (DCP) should be strictly limited. Such plans should not be proscriptive. Such plans should only be one factor for consideration and should be given no special weight above other factors of consideration. A development applicant should be entitled to argue, that the requirements of a DCP will adversely impact on the feasibility of a development envisaged by the local environmental plan, and if established, a consent authority should be obliged to modify or set aside the requirements of the DCP.

There needs to be a state environmental planning policy to reduce the discretion of local councils to effectively block envisaged development by arbitrarily reducing car parking entitlements. Such a policy should set minimum car parking entitlements for different categories of permitted uses, and only allow councils to impose lower car parking entitlements when it is justified by an appropriately objective traffic study. Of course, such a policy should not preclude an applicant for putting forward a proposal with little or no car parking, where the applicant can demonstrate that such parking is not required (e.g. where public transport is plentiful).

[64] "If the board (of variance) can reasonably conclude that a zoning regulation practically destroys or greatly decreases the value of a price of property, it may vary the terms of the ordinance ...": *Culinary Institute of America v Board of Zoning Appeals of City of New Haven et al*, 143 Conn 257, 262 (1956) 121 A 2nd 637 (1956).

9. Further information

The Urban Taskforce is available to further discuss the issues outlined in this submission.

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