Urban Taskforce
AUSTRALIA

Planning as it should be

How the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* enabled the planning system to work as was originally intended.

An Urban Taskforce submission to the NSW Government on the review of the exercise of the NSW Coordinator-General's functions

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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

We congratulate the government for enacting the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* and considering broader application of the Coordinator-General's powers.

The group of public servants who have been assembled to administer this legislation - the NSW Nation Building and Jobs Plan Taskforce - are a team of well-resourced, highly competent, skilled planning staff. Creating this team and empowering them to sit in the place of consent authorities to determine development proposals was recognition of the inherent in existing local planning processes. More than that, it was an admission that Part 3A is no longer delivering the legal certainty and bankability that was originally anticipated.

The work conducted by the NSW Nation Building and Jobs Plan Taskforce is refreshing because they have broken away from the traditional rigid thinking of local consent authorities. They provide an impartial assessment of council controls and evidence that, when used as intended, appropriate controls are able to produce quality outcomes.

Whilst we welcomed steps to streamline town planning rules for public projects, we have always been of the view that the same measures should be adopted for private sector projects. As a general rule, we think that the state government needs to give both public and private housing developments the same support. Both public and private projects have the ability to deliver social and economic benefits. We reject the suggestion that publicly funded projects always carry greater social benefits than privately funded projects. Undoubtedly, some public projects carry great social benefits. However, private sector projects have a major role in ensuring that people are properly housed and have jobs. From an economic stimulus perspective, a home or workplace, built by the private sector, is just as effective at creating jobs as a publicly built one.

Broadly speaking, our submission has two broad themes.

Firstly, the government should amend the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act* to extend it to a wider range of private sector projects when the proponent seeks coverage and:

- the project is within 400 metres of a transport corridor serviced by high quality public transport (e.g. buses, light rail); or
- the project is within 800 metres of a train station; or
- the project includes 1,000 or more residential dwellings; or
- the project would create 200 or more jobs; or
- the project is otherwise state or regionally significant.

If need be, this could be a temporary measure until the shortfall in NSW's supply of housing and retail premises is eliminated.

In the event that the government considers it undesirable to extend the application or life of the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act* a similar result can be achieved via amendments to the Part 3A scheme under the *Environmental Planning and Assessment Act*.

Secondly, the government should modify the arrangements applying under Part 4 of the *Environmental Planning and Assessment Act* so that decision-makers are required to adopt an approach that is more akin to that adopted by the NSW Nation Building and Jobs Plan Taskforce. We recommend changes require decision makers to:

- carry out their assessment of significant development proposals within 2-3 months;
- approve development that is consistent with state or regional strategies, even when the zoning plan is not up-to-date;
- ensure that development standards are applied flexibly;
- remove the possibility of "bottom draw" policies being used to influence decision-making;
- approve developments that meet clearly articulated rules;
- permit residential development in town centres;
- better apply rules on residential flat design;
- work as part of an expert team focusing on state or regionally significant projects.

This can be achieved either by amending legislation, or through environmental planning instruments, ministerial orders and ministerial directions.

1. Introduction

This submission has been prepared by the Urban Taskforce as input to the NSW Government's Review of the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009*. The government issued terms of reference in March 2010 and called for submissions from interested parties.[1] The terms of reference state that this review is to examine and report on:

(a) the effectiveness of NSW Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 in facilitating the implementation of the Nation Building Economic Stimulus Plan in NSW;

(b) the exercise by the Coordinator-General of the functions conferred by the Act in accordance with section 30 of the Act;

(c) the legal and economic benefits and consequences of applying the principles of this legislation, and the manner in which it has been implemented, to other significant projects or classes of projects in NSW;

(d) options and mechanisms for applying the principles should they be applied to such projects or classes of projects in NSW.

This submission will comment on all terms of reference.

To properly examine the functions of the Coordinator-General there is a need to consider why there was a need to create such a position in the first place. Centrally, the Coordinator-General was assigned special powers to facilitate the delivery of significant infrastructure projects in a timely fashion.

The NSW Government clearly understands that the government's ability to deliver major infrastructure projects in a timely manner is severely hampered by development control legislation, including, but not limited to the *Environmental Planning and Assessment Act 1979*.[2] Furthermore, it is obvious that providing the Coordinator-General with powers to declare an infrastructure project exempt from all development control legislation suggests that there is real concern with the way in which the NSW planning system deals with and/or hinders project delivery.

The NSW Nation Building and Jobs Plan Taskforce includes a team of well-resourced, highly competent, skilled planning staff. Creating this team and empowering them to sit in the place of consent authorities to determine development proposals was an admission of the problems inherent in the existing local planning processes. More than that, it was recognition that even Part 3A no longer delivers the certainty and bankability that was originally anticipated.

The Coordinator-General's performance should be rated as A+. The NSW Nation Building and Jobs Plan Taskforce considered significant residential development proposals, involving the exhibition of plans, referral and negotiation with local council, consideration of public submissions and referral to an expert advisory panel within an eight to twelve week period. Our experience would suggest that if left to the local council and subject to the usual development approval process, such development applications would not surface for at least twelve to eighteen months.

There is absolutely no way that a local council could deal with an application that does not strictly comply with local development controls and is subject to community objection within an eight to twelve week period. In these instances, the normal private sector developer would typically be forced to negotiate their way through an endless stream of vague and unhelpful correspondence, staff and

[1] NSW Government, 2010. "Review of Implementation of The Nation Building and Jobs Plan in NSW and potential applications for other projects. Terms of Reference, March 2010" <http://more.nsw.gov.au/sites/default/files/uploads/u10/NBJP%20review%20-%20Terms%20of%20Reference.pdf> at 10 May 2010.

[2] Other legislation that effectively forms part of the NSW planning system includes: the *Contaminated Land Management Act 1997*; the *Fisheries Management Act 1994*; the *Heritage Act 1977*; the *Mine Subsidence Compensation Act 1961*; the *National Parks and Wildlife Act 1974*; *Protection of the Environment Operations Act 1997*; the *Roads Act 1993*; the *Rural Fires Act 1997*; and the *Water Management Act 2000*.

council resistance, unsubstantiated requests for design changes, endless council meetings and in the end, if the developer has not given up, they may face a protracted court battle.

The Coordinator-General and NSW Nation Building and Jobs Plan Taskforce proved that development assessment can be efficient and can still deliver quality outcomes. However, the case studies that we present in this submission leave no doubt that the Coordinator-General and NSW Nation Building and Jobs Plan Taskforce have exposed momentous flaws, inconsistencies and inefficiencies in the planning system.

The NSW Nation Building and Jobs Plan Taskforce's consultation with local councils shows that some local council planning staff are inflexible and focused on blind adherence to process. Many council comments on development applications suggest that they have lost sight of the intended outcomes of development controls. There is evidence that a departure from a rule will result in a better outcome, while still meeting the objective of the rule, yet the departure is met with resistance from the councils. This is contrary to the intent of the NSW planning system. The original rationale of the system, now often ignored, recognised that strict compliance with development standards should not be required when it would be unreasonable or unnecessary.[3]

Most alarmingly, the NSW Nation Building and Jobs Plan Taskforce has revealed that many areas, well located and serviced, ideally suited to higher densities and residential flat development are not permitted due to local zoning rules.

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 development 'standards' in his work: *Principles of Planning Law*, published by Oxford University Press.[4] 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.
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> The tendency towards rigid enforcement of rules expressed as development standards is perhaps the most frustrating and destructive aspect of planning.[5]

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 dominates conventional development assessment in NSW:

> [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.[6]

The regime put in place by the NSW Government involved a highly efficient, expert, competent team with a clear mission. The approach taken by the team to decision-making was not driven by bureaucratic process, but a desire to get good outcomes.

The work conducted by the NSW Nation Building and Jobs Plan Taskforce is refreshing because they have broken away from the traditional rigid thinking of local consent authorities. They provide an impartial assessment of council controls and evidence that, when used as intended, appropriate controls are able to produce quality outcomes.

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[3] *State Environmental Planning Policy No 1—Development Standards* cl 3.
[4] L Stein, *Principles of Planning Law* (2008).
[5] Ibid 76-77.
[6] *Reg v Wicks* [1998] AC 92.

Whilst we welcomed steps to streamline town planning rules for public projects we have always been of the view that the same measures should be adopted for private sector projects. As a general rule we think that the state government needs to give both public and private housing developments the same support. Both public and private projects have the ability to deliver social and economic benefits.

We reject the suggestion that publicly funded projects always carry greater social benefits than privately funded projects. Undoubtedly, some public projects carry great social benefits. However, private sector projects have a major role in ensuring that people are properly housed and have jobs. From an economic stimulus perspective, a home or workplace built by the private sector is just as effective at creating jobs as a publicly built one.

The government can build on the success of the approach it has taken to public sector stimulus projects in two ways.

Firstly, the government can amend the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act* to extend it to a wider range of private sector projects when the proponent seeks coverage and:

- the project is within 400 metres of a transport corridor serviced by high quality public transport (e.g. buses, light rail); or
- the project is within 800 metres of a train station; or
- the project includes 1,000 or more residential dwellings; or
- the project would create 200 or more jobs; or
- the project is otherwise state or regionally significant.

In the event that the government considers it undesirable to extend the application or life of the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act* the similar result can be achieved via amendments to the Part 3A scheme under the *Environmental Planning and Assessment Act*.

Secondly, the government can modify the arrangements applying under the *Environmental Planning and Assessment Act* so that decision-makers under that regime are required to adopt an approach that is more akin to that adopted by the NSW Nation Building and Jobs Plan Taskforce.

This submission will contain specific recommendations, supported by analysis of the decisions made under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act*.

We congratulate the government for installing the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009*. We would encourage a broader application of the Coordinator-General's powers. We trust that the review will consider the evidence provided below.

2. Reforming Part 4 to reflect the approach of the Coordinator-General

2.1 Robust assessment of development proposals are possible in 2-3 months

The development industry continually argues that the time taken to assess development applications is excessive. Local authorities would have us believe that assessment times reflect the effort needed to provide an adequate assessment of a proposal, allowing for community consultation, consideration by the Council and referral to other statutory authorities.

Most local councils lack expertise in assessing complex state and regionally significant development projects and generally take too long to approve large development applications. The net result drives investment away from NSW.

The NSW Government's *Local Development Performance Monitoring Report 2008-2009* reveals that an application for a project of more than $5 million in value is stuck in council bureaucracy for an average of 230 days. This compares with an average of 74 days for all development applications.

Projects valued at more than $20 million now take an average of 324 days to process, up from 286 days in the previous year. Development applications worth $30 million or more now take an average of 370 days to be dealt with - up from a previous figure of 300 days. The projects that will inject more than $50 million in the economy now take 384 days to process, up from 315 days in the previous year.

Councils are wilfully ignoring the current legal benchmark – which is between 40 and 60 days to decide development applications.[7]

Despite the rhetoric about getting the planning system working again, the situation has deteriorated for those wanting to invest large sums in NSW. These delays can increase the cost of building new homes and business premises by 15 per cent – through extra interest payments on debt and through the money tied up in unproductive capital.

While data for the full year 2009-2010 is not yet available, anecdotal evidence suggests that the recent introduction of joint regional planning panels has not reduced the time it takes to handle large projects. In part, this can be attributed to the fact that the assessment work for these projects is still being carried out by the same council staff who were previously preparing reports for councillors, under the same rules that previously applied.

While there are many competent and hardworking officers in local government planning departments, most council planners do not often have the opportunity to regularly assess projects in the $50 million to $100 million range. The lack of familiarity with projects of this scale, and the inevitable involvement of state government agencies as concurrence/referral authorities, makes the assessment process convoluted and time consuming.

Projects are most often stalled due to factors such as:

- minor non-compliance with development controls;
- a project being a little out of the ordinary for the locality; or
- simply not being the type of development that the council would normally "encourage".

The Coordinator-General and the NSW Nation Building and Jobs Plan Taskforce have faced similar challenges when seeking to make determinations of development proposals for social housing. Evidence shows, that in many cases legitimate development proposals have been met with strong

[7] *Environmental Planning and Assessment Regulation 2000*, cl 113.

resistance from the local council and objections from the local community. If these proposals were in the ordinary local planning system, controlled by council, a determination would be unlikely in a reasonable time. However, the NSW Nation Building and Jobs Plan Taskforce has clearly demonstrated that an application can be exhibited, comments considered, referred to an expert advisory panel and then determined within eight to twelve weeks.

2.1.1 Case study: Lake Macquarie Council - 24 dwellings

The NSW Nation Building and Jobs Plan Taskforce considered an application for the consolidation of the two existing allotments and the erection of a three storey building containing 24 general housing dwellings in the local government area of Lake Macquarie.[8]

These dwellings are "residential flat buildings" and are not permitted on the subject site under the *Lake Macquarie Local Environmental Plan 2004*. The proposal did not comply with development controls relating to matters including use, height, density and compliance with sea level rise policy. The council lodged an extensive objection to the development. Experience would suggest that resolution of these matters with a hostile council would take considerable time – if at all. For the private sector, the prospect of such delays is enough to kill a project. Holdings costs arising from delays can more than cancel out the profit of a private sector project.

In this instance, thanks to the sensible approach allowed under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act,* the delays were avoided. While the powers vested in the Coordinator-General means that all council development controls can be set aside, the NSW Nation Building and Jobs Plan Taskforce sought to deal with council and community concerns. The NSW Nation Building and Jobs Plan Taskforce were able to deal with 23 written letters of objection, a petition containing 233 signatories, a detailed objection from the Council, referral to the Taskforce Advisory Panel and draft a comprehensive and robust assessment report. The matters dealt with in this determination were significant, yet an approval was still possible in less than eight weeks.

Our review of the assessment report shows an exemplary level of professionalism with careful consideration of relevant issues of concern, and provides a balanced and substantive argument for approval. Yet this assessment was possible within a short timeframe. The application was lodged on 7 December 2009 and authorisation (approval) was given on 20 January 2010. It should be noted, that this is just one of many applications that have been determined in less than eight weeks.

2.1.2 How fast processing times can be incorporated into the mainstream planning system

When considering the performance of the Coordinator-General the review must acknowledge the timeliness and efficiency gains to the development assessment process and the quality of development assessment possible within tight time lines.

We advocate the introduction of "deemed-to-comply" or "deemed approval" periods rather than "deemed refusal" periods. The Queensland Government's new planning legislation, the *Sustainable Planning Act 2009*, introduces a system of deemed approvals for some categories of development.[9]

Deemed approval periods are a vastly superior method of ensuring that consent authorities allocate the necessary resources to appropriately manage their development assessment functions. Without deemed-to-comply periods, consent authorities lack incentives to quickly deal with development applications.

[8] NSW Nation Building and Jobs Plan Taskforce Assessment Report 17-19 Josephson Street, Swansea, 21-01-2010 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/RJosephsonStSwanseaAssessmentReport.pdf> at 10 may 2010.
[9] Sections 330-333.

Recommendation 1A: Deemed-to-comply periods should apply

A deemed-to-comply period for development applications should be introduced, so that development consent is deemed to be given if no refusal has been issued in a set period.

This change requires an amendment to the *Environmental Planning and Assessment Act*.

In the event that the NSW Government does not intend amending the *Environmental Planning and Assessment Act*, the alternative recommendation below could be considered.

Recommendation 1B: Development assessment timetable imposed by ministerial order

As an alternative to the proceeding recommendation, the Minister for Planning should issue a direction under section 117(1) of the *Environmental Planning and Assessment Act* mandating a development assessment timetable, including a timeframe for the finalisation of an assessment report and a timeframe for final determination, for each category of development. The direction should include an enforcement mechanism.

2.2 Providing development in the right location despite zoning

If we are to meet the housing needs of a fast growing population we will need to see a significant shift in the way that planning has provided for housing in the past. In short, we must increase residential populations in areas well serviced with necessary infrastructure and in close proximity to jobs and services. These are ideal locations for appropriate higher density infill development that will not only enable additional housing needs of a growing Sydney to be met, but will at the same time provide opportunities for the creation of vibrant, healthy and liveable urban communities.

The NSW Government's Metropolitan Strategy and regional strategies identify locations that are ideal for increased urban development. These areas that are in, or are in close proximity to centres of activity and are well serviced by community infrastructure. Unfortunately, our experience with local environmental plans is that these ideal locations are being overlooked. These locations are not being zoned appropriately to permit higher density residential development. It is for this reason that the Coordinator- General has been given powers to set aside draconian local planning regulations that prohibit entirely appropriate urban development.

2.2.1 Case study: Rockdale City Council - 22 dwellings

The Coordinator-General was forced to "turn off" the provisions of the *Rockdale Local Environmental Plan 2000* so that a higher density general affordable housing proposal was able to proceed. [10]

In this instance, the subject site was less than one kilometre from the local shopping centre of Bexley North. Two bus stops are located 250 metres from the site which provides regular bus services to Bexley North shopping centre, railway station and the adjoining suburbs of Burwood, Bardwell Park and

[10] NSW Nation Building and Jobs Plan Taskforce Assessment Report Carson Crescent, Bexley North, 11-12-2009 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/Assessment%20Report%20Carson%20Cres%20Bexley%20North.pdf> at 10 May 2010.

Drummoyne. Furthermore, within 400 metres of the site, there are community facilities including the local library and lawn bowls club.

Yet this location is zoned "2(a)", which is a low density residential zone. The development proposal involved the construction of 22 housing units, spread over seven separate single and two storey buildings of very moderate proportions. It was classified as a "residential flat building" under the LEP. Hence, even though the location is ideal for higher density development, outdated local planning laws mean this important development is not permitted. It should be noted that this style of development actually meets the local zone objective "to allow for new buildings which provide a mix of housing forms in the zone while respecting the existing urban character",[11] but was impermissible because the list of permitted uses did not reflect the zone objective.

2.2.2 Case study: Shoalhaven City Council – 29 dwellings

Good planning acknowledges that people will seek homes in some locations due to proximity to work opportunities, services or life style. Shoalhaven City Council attracts a consistent influx of 'empty nesters' and retirees. Population projections, undertaken by the Council indicate that growth in the 55 year and over age group for the Bomaderry/Nowra area is likely to be considerable.[12] Unfortunately, as discovered by the NSW Nation Building and Jobs Plan Taskforce, the local environmental plan does not properly consider this projected growth and does not include a sufficient supply of zoned land in the right locations for additional housing.

The Coordinator-General was forced to "turn-off" development control legislation to permit the development of land for the purposes of "residential flat buildings" in Bomaderry.[13] This proposal was a higher density housing development for over 55s. The subject site is located in close proximity to the Bomaderry commercial centre which provides all the necessary shopping services. Also provided are higher order services such as a post office and dental practice. A medical facility is also only 700 metres from the site. Recreational services, including a bowling club and ex-servicemen's club, are also located in this area. The subject site is also serviced by public transport which provides regular service to the town centre of Nowra. The subject site is ideally located to provide housing for the over 55 age group. However the zoning does not permit medium density development.

This is yet another example of local zoning laws not properly considering locations that are ideally suited for higher density development.

2.2.3 How a mainstream planning system can respond to out-of-date or inappropriate zoning

The Coordinator-General has successfully exposed out-of-date local planning laws that hinder the provision of appropriate housing in the right locations.

There needs to be more flexibility in this system. This is particularly important when the potential for development is identified outside the technical limits of a given zone, but nonetheless, is consistent with state, regional and sub-regional strategies.

Some interstate jurisdictions are more flexible about approving development outside of an existing statutory plan. For example, Queensland's *Integrated Planning Act 1997* has historically included the option for consent authorities to issue "preliminary approvals" which may override planning schemes. The new *Sustainable Planning Act 2009* continues these provisions.[14]

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[11] *Rockdale Local Environmental Plan 2000* – Cl. 28, Residential zone particulars. Zone 2(a) Low Density Residential Zone objective (c) <http://www.legislation.nsw.gov.au/maintop/view/inforce/epi+496+2000+cd+0+N> at 10 May 2010.

[12] Judith Stubbs and Associates, *A Place for Aging* (2004) <http://www.shoalhaven.nsw.gov.au/council/pubdocs/communityissues/aPlaceForAging.pdf> at 10 May 2010.

[13] NSW Nation Building and Jobs Plan Taskforce Assessment Report, 16-28 Ritchie Street, Bomaderry, 11-12-2009 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/RG%20Assessment%20Ritchie%20St%20Bomaderry.pdf> at 10 May 2010.

[14] See cl 242 – a "preliminary approval" is one kind of development application and can override a planning scheme. It may be appealed under cl. 461.

The inherent limitations and inflexibilities from rigid statutory planning in NSW must be overcome. An applicant should be entitled to formally apply for either:

- a preliminary approval – which only needs to briefly outline the proposed development; or
- a development approval,

even if the development is prohibited or discouraged by a statutory plan.

The consent authority should have the power to approve, conditionally approve or reject the application. A conditional approval, refusal or deemed refusal (on the grounds of zoning) should be capable of being appealed to a joint planning review panel (however the council representatives should not be permitted to sit on the panel when the appeal is being made against a council decision). Principles and directions articulated in approved strategic documents would inform any appeal of this kind.

The panel would be able to submit a justification report, supporting the rezoning to the Department of Planning. The panel would be obliged to deal with the matter in a set statutory timeframe.

For example, an applicant proposes to develop rural zoned land for a residential estate and the land is shown on a strategic plan as forming part of a future urban growth corridor. If the council fails to support a rezoning, the joint regional planning panel should have an obligation to consider the matter in the council's place.

Another example may be where an applicant is seeking a rezoning to permit "retail premises" in an industrial zone or for reconfiguring a lot to subdivide land to a density in excess of that provided for in a given zone. In both these examples the panel could only deal with the matter if it was satisfied that the proposal is consistent with state, regional or sub-regional strategies.

The benefits of this reform are clear:

- a more streamlined process than the current system of "spot" rezonings;
- the ability for planning authorities to use planning agreements to extort disproportionately high 'voluntary' levies from developers prior to rezoning decisions will be reduced;
- applicants whose development application are denied (or not dealt with) by a council can have the merits of their matter dealt with by the joint regional planning panel; and
- bureaucratic rules confining particular uses to particular zones will come second to state and regional strategies.

Recommendation 2A: Appeal rights on rezoning decisions

The joint regional panels should be given a clear role to stand in the shoes of a local council in the rezoning process when:

- a council refuses or fails to deal with a rezoning request within a set statutory timeframe; and
- the panel is satisfied that the rezoning is (state/regional/subregional) strategy-consistent.

This requires an amendment to the *Environmental Planning and Assessment Act*.

In the event that the NSW Government is not willing to consider amending the Act, but is willing to consider amending environmental planning instruments, the alternative recommendation below could be considered.

Recommendation 2B: Authorise approvals outside existing lists of permitted uses

As an alternative to the preceding recommendation, a new state environmental planning policy be enacted, similar in concept to the existing *State Environmental Planning Policy No 1— Development Standards*.

The new *State Environmental Planning Policy (Zonings)* would, when a land use is prohibited by an environmental planning instrument in a given location, nonetheless allow the development to be carried out if:

- the person intending to carry out that development makes a development application;
- the application is supported by a written objection that established that the zoning of particular land was unreasonable or inappropriate in the circumstances of the case; and
- a zoning is taken to be "unreasonable or inappropriate" if it is inconsistent with or does not advance the objectives of the Metropolitan Strategy or an applicable regional strategy approved by the NSW Government.

In these circumstances, the consent authority would have the power to issue an approval, notwithstanding the zoning. Similarly, if the consent authority refuses, the Land and Environment Court would be able to issue an approval on a merits appeal.

2.3 Conflicting and inappropriate development controls

Development controls are a guide to building designers. In themselves, development controls do not guarantee the best design outcomes in different locations. A development standard may make sense in the abstract, but lead to a poor outcome in a particular case as a result of context, site orientation and surrounding development.

Therefore, blind adherence to development controls is inappropriate, unimaginative and makes no sense. It is fortunate that the Coordinator-General has been given powers to put aside local development controls because many local authorities do not consider development control plans as guidance material, but as rigid standards that must be adhered to, regardless of potential for improved outcome.

Consistency between local plans is highly desirable. A development proposal that is permitted and meets zone objectives should not be effectively prohibited by a council policy, development control plan or be dependent on a special determination by the Council. Inconsistency between plans leads to confusion for applicants and consent authorities and also creates uncertainty. The NSW Nation Building and Jobs Plan Taskforce have highlighted a number of cases of inconsistency between plans.

2.3.1 Case study: Wollongong City Council - 26 dwellings

The NSW Department of Housing sought to construct 26 housing units in Corrimal. The development is contained in one two storey and one three storey building. [15] The development is a "residential flat building" pursuant to the *Wollongong Local Environmental Plan 1990* and residential flat buildings *are* permitted in the subject zone.

[15] NSW Nation Building and Jobs Plan Taskforce Assessment Report. 1-4 Robert Street, Corrimal, 8-02-2010 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/RG%20Assessment%20Robert%20St%20Corrimal.pdf> at 10 May 2010.

Two and three storey residential flat developments exist in close proximity to the subject site. A three storey building and a two storey building are located two lots to the south of the subject site and a residential flat building has been recently constructed 50 metres from the subject site. Development in the area consists predominately of single and two storey residential dwellings interspaced with multi-unit housing of up to three storeys.

Clearly the subject site is in a location that is suited to higher density development and the area is experiencing a gradual change in built form. It would seem that this is the ideal location for appropriate residential flat development, noting that this development is permitted in the zone.

Bizarrely, Wollongong City Council objected to the proposal as it was, considered to be an over development of the site based on their development control plan (DCP) for residential development. At the time, Council's DCP stated that residential flat buildings would not be supported in "2(a)" and "2(b)" zones outside of "urban consolidation areas". It should be noted that the LEP permits residential flat developments in these zones, whether in "urban consolidation areas" or not. Furthermore the Council argued that a three storey development was out of character for this location. It is absurd that a council would seek to prevent development to such an extent.

The land enjoys an appropriate zoning and the proposed development has been designed to respect adjoining development. The development was supported by the NSW Nation Building and Jobs Plan Taskforce as it was clearly an appropriate development of the site.

2.3.2 Case Study: Wollondilly Shire Council – 22 dwellings

It is apparent that Wollondilly Shire Council permits residential flat buildings in their "residential 2(a)" zone with consent. However, *Wollondilly Development Control Plan 50* defines locations where residential flats are allowable. This is yet another example of conflict between the local environmental plan and the DCP. [16]

In this case, the NSW Nation Building and Jobs Plan Taskforce found that residential flat development on Westbound Avenue is permissible under the LEP, but the DCP does not allow this type of development. Needless to say, the NSW Nation Building and Jobs Plan Taskforce was able to successfully argue that the inconsistency should be disregarded and that the site was ideally located for higher density development being in easy access to a town centre.

However, of greater concern is the fact that Wollondilly Shire Council is in the process of preparing a standard instrument-compliant LEP that will prohibit residential flat buildings in this location, where they were previously permitted under the existing LEP.[17] Apart from the fact that this is essentially "down-zoning" the location, it is an example of local councils not identifying locations suited to higher density development, which would assist in providing much needed housing. These sites are serviced by public transport and in close proximity to town centres. These are ideal locations for higher density development.

2.3.3 Case study: Rockdale City Council – 22 dwellings

The NSW Nation Building and Jobs Plan Taskforce experience in determining a development application in the context of the *Rockdale Development Control Plan 56*, is an interesting example of where adherence to development controls does not guarantee good built form outcomes. [18] The proposal to construct 22 dwellings distributed over seven single and two storey buildings, in an ideal location, did not comply with floorspace ratio, boundary setback and soft landscaping area. In some

[16] NSW Nation Building and Jobs Plan Taskforce Assessment Report. 73-75 Westbourne Ave, Thirlmere, 1-04-2010. <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/RG%20Assessment%20Westbourne%20Ave%20Thirlmere.pdf> at 10 May 2010.

[17] Most local environmental plans in NSW are currently in the process of being re-drafted in-line with the *Standard Instrument (Local Environmental Plans) Order 2006*.

[18] NSW Nation Building and Jobs Plan Taskforce Assessment Report. Carson Crescent, Bexley North, 11-12-2009 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/Assessment%20Report%20Carson%20Cres%20Bexley%20North.pdf> at 10 May 2010.

instances the non-compliance was relatively minor, as in the case of landscaping. Council's DCP requires 30 per cent of the site to be soft landscaping, while the proposal only provides for 27 per cent of the site as soft landscape. There are occasions where such a minor non-compliance will cause protracted negotiation between council and applicant, needing a resolution of the council to resolve the matter. However, in this example the non-compliances in other areas were significant.

The DCP 56 requires that a three metre side boundary setback be maintained. It should be noted that because the dwellings in question are only single and double storey buildings, the Building Code of Australia only requires 90 centimetres at the ground floor and 1.2 metres for the first floor. Nevertheless, Rockdale's DCP requires a three metre setback because the buildings form part of a multi-dwelling development. The DCP does not consider the fact that the development will appear from the street to be typical single and two storey dwellings. Strict compliance with the requirements of the DCP would require substantive redesign.

The NSW Nation Building and Jobs Plan Taskforce was able to demonstrate that breaking the council imposed setback by up to 1.6 metres was possible without adverse impact on local amenity. By employing good design practices such as careful placement of boundary windows, the use of obscure or highlight windows and the minimisation of "over-looking" opportunities, wasteful and overly generous setback requirements can be breached while maintaining and/or improving amenity and privacy outcomes.

2.3.4 How the mainstream planning system can respond to the problems created by DCPs

Council instituted DCPs *are* a key reason for a lack of development in NSW for private sector developers.

The Coordinator-General and the NSW Nation Building and Jobs Plan Taskforce have successfully identified conflicting and inappropriate local planning controls in DCPs. They responded by considering development on its merits, rather than rigid rules. The result was well-designed developments in liveable built environments.

Prior to the 'noughties' decade, 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*[19] 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.[20]

In that matter, a consent authority dealt with a proposal for a brothel, on the basis that a refusal was only warranted when the impact of the presence of a brothel was demonstrated.[21] Many would regard this as a common-sense approach. However, the consent authority ran afoul of pre-determined DCP 'standards' which required refusal; even when there was no evidence of adverse impacts. The

[19] (2001) 115 LGERA 373
[20] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 386-7 (Spigelman CJ); Meagher and Beazley JJA concurred. I agree with Spigelman CJ.
[21] *Zhang v Canterbury City Council* [2001] NSWCA 167 [76]; (Spigelman CJ); Meagher and Beazley JJA concurred.

Court concluded that a common sense approach could only be supported if there were no "standards" which the decision maker had to take into account.[22] 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" ....[23]

While *Zhang* was about a brothel, this approach is now routine and has been applied for developments as varied as multi-unit residential development;[24] late night trading of entertainment venues;[25] alterations to individual dwellings;[26] and industrial premises.[27]

The Court of Appeal recently re-affirmed the *Zhang* approach, saying the case had "authoritatively considered" this issue.[28] In this recent case the Court 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.[29]

It is odd 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 the Act's 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's interpretation of the existing law, but we *do* think the law needs to be changed.

As the law stands, 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.[30]

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). The scope of development control plans should be limited to a necessary response to a short list of issues.

Secondly, development controls plans should not be proscriptive.

Thirdly, development control plans should only be one factor for consideration in development assessment and 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 development envisaged by the local environmental plan. If it 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.[31]

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[22] Ibid.
[23] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 387 (Spigelman CJ); Meagher and Beazley JJA concurred.
[24] 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].
[25] For example, see *Moonlight City Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 1004 [23].
[26] For example, see *Pietranski v Waverley Council* [2009] NSWLEC 1278 [17].
[27] For example, see *Botany Bay City Council v Premier Customs Services* Pty Ltd [2009] NSWCA 226 [5] (Macfarlan JA).
[28] Ibid [24].
[29] *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA 226 [27] (Macfarlan JA); Ipp JA and Hoeben J concurred.
[30] *North Sydney Council v Ligon 302 Pty Ltd [No. 2]* (1996) LGREA 23.
[31] "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).

Recommendation 3A: Limits on the scope and use of development control plans – legislative change

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 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.

This change requires an amendment to the *Environmental Planning and Assessment Act*.

In the event that it is not practicable to amend the *Environmental Planning and Assessment Act*, an alternative recommendation below could be considered.

Recommendation 3B: Limits on the scope and use of development control plans – ministerial order

As an alternative to the preceding recommendation, an order requiring the amendment of all development control plans, under section 74F of the Act should be made. We suggest that the order would mandate the insertion of a standard clause in each and every DCP. In the event that councils do not amend their DCPs in the set timeframe, the government should unilaterally move to insert the clause itself. The clause would

- allow a consent authority to waive a development standard in the DCP that is unreasonable or inappropriate in the circumstances of the case;
- nullify any DCP development standard that does not have a stated objective within the DCP within three months of the order being made;
- make it clear that a provision of the DCP should be disregarded if:
  - it was adopted with little consultation with the land owner, developer or other interested persons; or
  - it has been selectively applied in the past; or
  - it would (either inherently or perhaps by the passing of time) bring about an inappropriate planning solution; or
  - it would bring about an outcome which conflicts with other policy outcomes adopted at a state, regional or local level;
- provide that any matter outside a nominated list of topics is null and void;
- provide that any prohibition is null and void;
- ensure that the requirements of the DCP is only one factor for consideration and should be given no special weight above other factors of consideration; and
- allow a development applicant to argue that the requirements of the DCP will adversely impact on the feasibility of development envisaged by a local environmental plan (or other environmental planning instrument), and if established, a consent authority should be obliged to modify or set aside the requirements of the DCP.

There are 308 statutory environmental planning instruments currently in force, plus an unknown number of "deemed" instruments left over from the pre-1980 legislation. There are 232 different sets of

guidelines to be used in the development assessment process. There are 38 pages of "section 117" directions. There are an unknown number of state government strategies and draft strategies. On top of this there is a countless multiplicity of development control plans, strategies and policies in force at a local government level.

The *Environmental Planning and Assessment Act* confers incredible, wide-ranging powers on regulators to effectively make new laws, without any reference back to Parliament. It is one of the most unaccountable areas of government in existence – for example - nowhere else does a draft plan, which lacks any formal approval by government, effectively deprive people of the use of their land or property.[32]

2.4.1 Case study: Lithgow Council - 24 affordable general dwellings, Lot 1 Barton Street, Lithgow

Lithgow Council has no development control plan specific to residential development. However, the Council did adopt a policy in June 2004, known as the *Policy and Guidelines for Residential Unit Development*. This policy is not available on Council's website. The *Guidelines for Residential Unit Development* does not have the status of a development control plan, but is used by Council as a guide to applicants and also used by council development assessment officers, when considering a development application.

The NSW Nation Building and Jobs Plan Taskforce considered these guidelines when seeking to apply open space area requirements to a proposal for 24 residential dwellings in the Lithgow local government area.[33] The overly generous open space requirements were reduced by considering the context. The subject site is situated adjacent to local sporting and public open space facilities. Future residents will have easy access to these facilities negating the need for large areas of open space on the subject site.

Furthermore, because this site is poorly serviced by public transport, there is a need to provide more parking, assuming that each household will need the use of a private motor vehicle. Hence the reduced open space provision can be devoted to car parking.

The Nation Building and Jobs Plan Taskforce did not follow the requirements of the council's policy. Even though the policy was not a DCP, a private developer would have difficultly in convincing the council to depart from it. A private developer can easily be caught by policies of this kind, because they are not publicised on council's website and do not form part of a DCP, and so a developer may end buying land without being aware of the policy and its restrictions.

2.4.2 Case study: Lake Macquarie Council - 24 dwellings

Lake Macquarie Council has adopted a sea level rise policy that sets a 50 year and 100 year benchmark. This policy requires the increase in dwelling floor level to protect against flooding. Minimum floor levels have been set of 2.27 Australian Height Datum (AHD) for buildings with a 50 year development life and 2.85 AHD for buildings with a 100 year development life.

The policy does not form part of a development control plan. It is in a separate document titled *Lake Macquarie Sea Level Rise Preparedness Adaptation Policy*.[34]

Though the development life of dwellings detailed in the application would be 50 to 60 years, the council sought to apply the most conservative 100 year benchmark.[35] Thankfully, the NSW Nation Building and Job Plan Taskforce argued that the 50 year benchmark was the most appropriate and disregarded Council's unreasonable application of their policy.

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[32] *Terrace Holdings Pty Ltd v Sutherland Shire Council* [2003] 129 LGERA 195.
[33] NSW Nation Building and Jobs Plan Taskforce Assessment Report. Lot 1 Barton Street, Lithgow, 18-02-2010 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/R%20Barton%20St%20LithgowFinal%20Report.pdf> at 10 May 2010.
[34] Adopted by Council 8 September 2008.
[35] NSW Nation Building and Jobs Plan Taskforce Assessment Report 17-19 Josephson Street, Swansea, 21-01-2010 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/RJosephsonStSwanseaAssessmentReport.pdf> at 10 May 2010.

The most revealing aspect of this case is that the Council's objection to the proposal included an objection based on exceeding the 10 metre height limit. It seems that the Council does not consider the fact that their own sea level rise policy requires floor levels be increased and that this increase will mean that the total height of the development will be increased. The existing height limit is 10 metres and this height can accommodate a three storey development. Therefore, if Council's height control is to remain valid it should be adjusted upwards to allow for designs responding to sea level rise policy.

The powers provided to the Coordinator-General enable the "turning off" of these inappropriate development controls, however, this would not have been possible in the case of a private sector development application. Council development controls, such as these, when applied without due consideration of overall impact have the potential to kill private sector development.

It should be noted that the NSW Nation Building and Job Plan Taskforce disregarded council's objections based on height controls. The Taskforce confirmed that if a building was restricted in height as suggested by council good design outcomes would be impossible without a reduction of development from three to two storeys.

2.4.3 Formalising the policies that may be relied upon in development assessment

The predictability of decision-making should be improved by dramatically reducing the number and breadth of strategies, policies, plans and guidelines – the only such documents that should be considered are the final policies, either approved by the state government or expressly provided for and required by planning legislation.

Recommendation 4: Limits on matters that can be considered

The *Environmental Planning and Assessment Act* should be amended so that, in relation to any development application, the only strategies, policies, plans and guidelines that may be considered in the development assessment process are:

- final state environmental planning policies;
- final local environmental plans;
- state government strategies, policies, plans and guidelines approved by the Minister for Planning and available through an on-line internet register, mandated by the Act;
- federal government strategies, policies, plans and guidelines approved by the NSW Minister for Planning under a bilateral agreement with the Commonwealth and available through an on-line internet register, mandated by the Act; and
- local council development control plans specifically authorised by either a state environmental planning policy or a local environmental plan.

If it is considered undesirable to amend the Act, some of these reforms may be adopted through an environmental planning instrument.

2.5 Refusing development on 'merit' despite compliance with the planning controls

Localities must be able to change and evolve both physically and culturally, without a disproportionate emphasis being given to what exists now at the expense of what a locality might be like in the future. Successful places have evolved into their current state over a period of time. Inflexible planning controls are a recipe for artificially contrived places. For these reasons, development controls should not attempt to freeze the current character of an area. An attempt to create a static environment may lead an area to degrade, particularly if the original rationale for a locality's character loses relevance.

Compliance with the requirements of the local environmental plan (LEP) and development control plan (DCP) 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 free to refuse the application based on considerations that are not expressly detailed in the plans.

This means that even when a local environmental plan states a maximum height or floorspace ratio (FSR), but a developer cannot use these standards with certainty when preparing a development feasibility assessment or making a decision to purchase land.

Under current planning regulation in NSW, 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 an entitlement to build.

This seems to have been a matter that was consistently raised in council submissions to the NSW Nation Building and Jobs Plan Taskforce, as demonstrated in the examples below. Fortunately, determinations made by the Coordinator-General have fostered good liveable urban environments without being swayed by self-serving objections.

2.5.1 Case study: Taree Council – 28 dwellings

Although the zone and development controls permitted two storey developments, Taree Council submitted an objection that raised concerns with the height of the development.[36] This was absurd; the proposal had been designed with generous setbacks and privacy screening and did not give rise to unacceptable impacts for existing residential development. The orientation and design of the development did not result in any adverse impact on adjoining residential development.

While the existing development in the vicinity of this proposed single storey; the height was consistent with the planning controls and did not warrant this level of objection from a local authority. Furthermore, single storey development may be the dominant form of development currently, but what exists now cannot be used as an argument to prevent progress.

Had Taree Council been the consent authority this development would have been refused, despite its compliance with the planning controls on "merit". There would have been no certainty that a merits appeal in the Land and Environment Court would have reversed Taree Council, because the Court has consistently held that (in applying the current law) mere compliance with development controls is no guarantee of approval. Fortunately, in this case, these concerns were disregarded by the NSW Nation Building and Jobs Plan Taskforce and development consent issued.

[36] NSW Nation Building and Jobs Plan Taskforce Assessment Report. 1-5 Gill Ave & 10-12 Bruntnell Street, Taree, 21-01-2010 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/RG%20Assessment%20Gill%20&%20Bruntell%20St%20Taree.pdf> at 10 May 2010.

2.5.2 Case study: Lake Macquarie Council – 12 dwellings

Listed heritage is something to be valued and preserved. However, development that will have no impact on the heritage value of a locality should not be refused based on phony heritage concerns. In the case of York Street, Teralba, the local council objected to the development of a site for affordable housing on heritage grounds.[37] This was absurd when proper consideration is given to the site context. The subject site is adjacent to an existing three storey residential flat building. The subject site was not in the vicinity of anything that exhibits heritage character. Furthermore, the area in the vicinity of the subject site exhibits no particular character as it consists of varying single and two storey buildings of eclectic age and style.

As a consequence, heritage matters, while given due consideration, were disregarded as a reason for not proceeding with this proposal. Again, in this case, an approval was given by the Coordinator-General. Had the decision been left up to Lake Macquarie Council, it would have been refused on 'heritage' grounds.

2.5.3 How the intent of planning instruments can be fulfilled despite the bias of consent authorities

Local development controls and/or local authorities must not be permitted to freeze development to the current dominant form, particularly if the development proposed is consistent with the existing development and will not give rise to unacceptable impact to neighbours.

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, which 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."

Western Australia has also adopted a similar approach to residential development. 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.[38] 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".[39]

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[37] NSW Nation Building and Jobs Plan Taskforce Assessment Report. 41-43 York Street, Teralba, 8-04-2010 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/RG%20Assessment%20YORK%20STREET%2041-45%20TERALBA.pdf> at 10 May 2010.

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

[39] Western Australia Planning Commission, <http://www.planning.wa.gov.au/WAPC+statements/769.aspx> at 30 June 2009.

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".[40] 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.[41]

Whilst 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.[42]

An environmental planning instrument may also 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.[43]

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 floorspace ratios set out in a local environmental plan must not be refused or conditioned on the grounds of height, density or scale;[44] and
- any proposal for residential apartment development, 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.[45]

Recommendation 5: Development that meets standards should be entitled to approval

Any development proposal that meets the height controls and floorspace 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 proposal for residential apartment development, 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.

This change can be made through an environmental planning instrument.

[40] s 79C(2)-(3).
[41] s 79C(2).
[42] 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*.
[43] s 79C(3).
[44] See clause 29(1) of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* for an example of a similar provision.
[45] 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.

The state government should also consider preparing codes as per the "code assessable" development regime in Queensland. If the development complies when assessed against the code, a consent 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.[46] Code assessable development would not require public notification.

Of course, should the applicant wish to seek approval for development that is outside of the development standards stated in the development codes, an alternative assessment pathway must remain available, as in Queensland. 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".[47]

Recommendation 6: As-of-right development should be possible in higher density zones

State government prepared codes should be introduced, similar to the Queensland model, and provide for "as-of-right" development in high density development in the general residential, high density residential, medium density residential, mixed-use, local centre, commercial core, business park and enterprise corridor zones.

As in Queensland, the consent authority would be a public authority (not a certifier).

The change can be made through an environmental planning instrument.

2.6 Restrictions on use in town centres

The Urban Taskforce has actively sought the implementation of local planning controls that permit mixed-use town centres. Mixed-use does not suggest that each building must itself contain a mix of uses, rather the centre supports a variety of land uses distributed within and across different buildings. Our argument is that vibrant, active centres are those that have a variety of uses that include residential, business and retail uses.

However, planning regulation that seeks to force a mix of uses within each individual building is doomed to failure. For instance, if there is not the demand for ground floor retail uses and a developer wishes to build residential apartments, the developer has only two choices. The development proposal will either include ground floor retail space that will most likely remain vacant/under-utilised or to not develop at all. This means that town centres that would benefit from urban renewal are not developed, or tokenistic, retail components are included in development proposals in a vain attempt to obtain approval for the residential component above.

2.6.1 Case study: Lake Macquarie Council - 19 dwellings

The *Lake Macquarie Local Environmental Plan 2004* permits residential dwellings as part of a mixed-use development within the "3(2) Urban Centre (support)" zone. The LEP further clarifies mix use by requiring that at least 20 per cent of the gross floor area of the development is occupied by a commercial, retail or recreational facility.

[46] Weir, M. 1998. Performance Zoning: A new influence in planning law. *Local Government Law Journal*. Vol. 3. p. 128.
[47] England, P. 2005. Judicial interpretation of planning schemes under the Integrated Planning Act 1997 (Qld): The more things change…*Environmental Planning Law Journal*. Vol. 22. p. 283

Housing NSW sought to meet the requirements of Council by including a minor percentage of floorspace for recreational purposes.[48] The amount of floorspace devoted to this use was so minor that it was tokenistic at best. The Council objected to the lack of residential floor area in the proposal. The NSW Nation Building and Job Plan Taskforce resolved the matter by simply deleting the tokenistic ground floor use.

However, the most significant revelation in this instance is that the NSW National Building and Job Plan Taskforce argued that housing in itself is not incompatible with surrounding town centre uses and will not generate any unreasonable environmental or amenity impacts that would justify refusal. Furthermore, it was argued that social housing in close proximity to commercial services will provide many obvious community benefits, but most importantly, a housing development was considered to be an appropriate land use within the urban centre support zone.

2.6.2 How restrictions on use in town centres can be overcome

The Coordinator-General has successfully demonstrated that regulating the use within individual buildings in town centres can result in tokenistic attempts to circumvent development controls, however, a variety of different uses, such as purely residential buildings, can nonetheless support town centre viability.

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;[49]
- neighbourhood centre zones without purely-residential flat buildings or multi-dwelling housing (terraces and townhouses);[50]
- local centre zones without purely-residential flat buildings or multi-dwelling housing (terraces and townhouses);[51]
- commercial core zones without purely residential flat buildings or multi-dwelling housing;[52]
- enterprise corridor zones without residential flat buildings;[53]
- business development zones that do not permit retail premises;[54]
- light industrial zones that do not permit retail premises or bulky goods premises;[55]
- business parks that do not permit retail premises or bulky goods premises;[56]
- neighbourhood centre zones without retail premises;[57]
- village zones without retail or business premises; and[58]
- high density residential zones without retail premises;[59]

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 surprise amendments to the Standard Instrument, just before Christmas in December 2007.

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[48] NSW Nation Building and Jobs Plan Taskforce Assessment Report. 8-10 Ernest Street, Belmont, 5-03-2010 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/RG%20Assessment%20ERNEST%20ST%20BELMONT.pdf> at 10 May 2010.
[49] See for example the land use table in the *Liverpool Local Environmental Plan 2008*.
[50] See for example the land use table in the *Draft Ryde Local Environmental Plan 2008*.
[51] See for example the land use table in the *Liverpool Local Environmental Plan 2008*.
[52] See for example the land use table in the *Canada Bay Local Environmental Plan 2008*.
[53] See for example the land use table in the *Liverpool Local Environmental Plan 2008*.
[54] See for example the land use table in the *Liverpool Local Environmental Plan 2008*.
[55] See for example the land use table in the *Draft Ryde Local Environmental Plan 2008*.
[56] See for example the land use table in the *Draft Ryde Local Environmental Plan 2008*.
[57] See for example the land use table in the *Draft Lane Cove Local Environmental Plan 2008*.
[58] See for example the land use table in the *Draft Penrith Cove Local Environmental Plan 2008*.
[59] See for example the land use table in 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.[60] 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,[61] 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*[62] 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.

[60] If residential flats and multi-dwelling housing were reinstated as a mandatory permissible use in the mixed-use zone.
[61] 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.
[62] The report is available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=2375>.

Recommendation 7

The mandatory permissible uses in the land use table in the *Standard Instrument (Local Environmental Plans) Order 2006* 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)

2.7 Problems with SEPP 65

State Environmental Planning Policy No 65—Design Quality of Residential Flat Development and its associated *Residential Flat Design Code* establish "rules of thumb" which, when applied in certain situations can encourage improved design outcomes.

Rules of thumb are not standards that must be complied with. They are suggestion and guidelines to be used by building designers. Unfortunately, local consent authorities tend to consider these rules of thumb as development controls and insist on strict compliance. In the flowing examples, the NSW Nation Building and Job Plan Taskforce has successfully demonstrated how rules of thumb can be inappropriate in some cases and should never be considered to be a development control requiring absolute compliance.

2.7.1 Case study: Wollongong City Council – 26 dwellings

For instance, a development proposal for 26 affordable housing units in Wollongong did not comply with the *Residential Flat Design Code* in relation to apartment mix. [63] It was appropriately (and successfully) argued that the needs of future tenants would be better met through the provision of one and two bedroom apartments and that three bedroom apartments would not meet consumer need in

[63] NSW Nation Building and Jobs Plan Taskforce Assessment Report 76-78 New Dapto Road, Wollongong, 10-02-2010 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/RG%20Assessment%20New%20Dapto%20Road%20Wollongong.pdf> at 10 May 2010.

this instance. This outcome probably would not have been achieved by a private sector developer dealing directly with the council.

2.7.2 Case study: Gosford City Council – 30 dwellings

The ability to meet rules of thumb as they relate to apartment orientation is particularly challenging. In some cases it is possible, but in many infill cases single aspect apartments are unavoidable. The *Residential Flat Design Code* includes a very ambitious rule of thumb that encourages no more than 10 per cent single aspect south facing apartments.

The NSW Nation Building and Jobs Plan Taskforce has successfully demonstrated that this rule of thumb is not appropriate due to building orientation and the need to maximise yield. In the case of a development in Gosford, design elements, such as the installation of sky lights over living areas was shown to improve solar access of south facing apartments and that departure from the rule of thumb was appropriate in this instance. [64]

The Nation Building and Jobs Plan Taskforce makes a very valid observation that should be considered by any approval authority in these circumstances. That is, consideration of the overall good solar performance of the building must be taken into account when making a decision to depart from the rule of thumb.

2.7.3 Problems in the application in SEPP 65 need to be overcome

Local consent authorities should be encouraged to adopt this approach for all developments. It is pointless forcing a specific mix of apartment size if this mix does not meet market demand. It is appropriate to consider the overall solar performance of a building, not the percentage of single aspect apartments.

Recommendation 8

State Environmental Planning Policy No 65—Design Quality of Residential Flat Development and the *Residential Flat Design Code* needs to be reviewed and simplified in consultation with stakeholders. Such a review should lead to a more workable document that articulates non-prescriptive principles and, only where necessary, standards that are important for apartment amenity.

2.8 The value of an expert team of assessors

The NSW Nation Building and Jobs Plan Taskforce process allows the approval of large projects to be handled by an expert team, instead of local council staff. It also allows the central team of experts to override other state government agencies and make final decisions more holistically.

Regretfully, Part 4 does not offer such a highly expert group of assessors for regionally significant projects.

[64] NSW Nation Building and Jobs Plan Taskforce Assessment Report 208-210 Gertrude Street, Gosford, 25-02-2010 <http://more.nsw.gov.au/sites/default/files/pdfs/approvals/R%20Gertrude%20St%20North%20GosfordFinal%20Report.pdf> at 10 May 2010.

Recommendation 9: Improved handling of regionally significant projects

The staff of the proposed Sydney Metropolitan Development Authority should prepare development assessment reports and liaise with state government agencies for matters before joint regional planning panels in Sydney, in lieu of local council staff. This would require a change to the *Environmental Planning and Assessment Act*.

3. Reforming Part 3A to reflect the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act*

3.1 Scope of the major projects stream

There is always a need for some decisions on state or regionally significant projects to be taken above the local government level. This may occur, for example, for a development which will address the housing, shopping or employment needs for a catchment that crosses council boundaries. In recent years Part 3A of the *Environmental Planning and Assessment Act 1979* has served this purpose.

The NSW Government quietly denied "Part 3A" status to 14 major residential, commercial and retail development projects worth $1.8 billion between July last year and February this year, according to documents obtained by the Urban Taskforce through freedom of information laws. The value of the private sector projects, admitted into Part 3A, was far less than the value of projects that were refused access to the major development regime.

The government had effectively closed the Part 3A door to most large private sector residential, commercial or retail developments. It seems, the political controversy has had an impact, with government more reluctant to accept new projects into the Part 3A system.

Until mid-2009, any residential, commercial or retail project could be declared as a Part 3A project, so long as its value exceeded $50 million and the Minister for Planning decided that the project was of state or regional significance.

However, in July 2009 the government then changed the rules so that residential, commercial or retail projects with an investment value of less than $100 million would be shunted off to local councils to assess, under the supervision of panels. The new rules also abolished the need for the Minister to decide whether individual projects were of 'state or regional' significance. Instead, the only test of whether a project becomes Part 3A is now its value - $100 million or more theoretically being enough to deem a 'major development'.

Internal departmental documents, obtained through a freedom of information request, reveal that under the new rules 14 projects with a total value of $1.8 billion have been refused Part 3A status. These refusals were made without any formal merit assessment under planning legislation.

Six projects were in the $50 million to $100 million range and were ineligible under the new, tighter rules however eight projects were valued at more than $100 million. These projects total $1.4 billion in value; the largest single project was worth $290 million.

Until 2009, Part 3A was known as one of the few parts of the NSW planning system that was vaguely functional. There is now a risk that large residential, retail and commercial projects will be left without access to any fast-track development process.

The continuing debate between government and opposition about Part 3A has become irrelevant for many developers. It is hard to take NSW seriously, when you're told a proposal for a $290 million project isn't worthy of full assessment and public exhibition as a major development.

Recommendation 10A: Wider scope for the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009*

The *Nation Building and Jobs Plan (State Infrastructure Delivery) Act* should be amended to extend it to a wider range of private sector projects when the proponent seeks coverage and:

- the project is within 400 metres of a transport corridor serviced by high quality public transport (e.g. buses, light rail); or
- the project is within 800 metres of a train station; or
- the project includes 1,000 or more residential dwellings; or
- the project would create 200 or more jobs; or
- the project is otherwise state or regionally significant.

If need be, this could be a temporary measure until the shortfall in NSW's supply of housing and retail premises is eliminated.

In the event that the above recommendation is not practicable, the Urban Taskforce suggests an alternative approach.

Recommendation 10B: Wider scope for Part 3A

As an alternative to the preceding recommendation, the *State Environmental Planning Policy (Major Development) 2005* should be amended to extend to a wider range of private sector projects when the proponent seeks coverage and:

- the project is within 400 metres of a transport corridor serviced by high quality public transport (e.g. buses, light rail); or
- the project is within 800 metres of a train station; or
- the project includes 1,000 or more residential dwellings; or
- the project would create 200 or more jobs; or
- the project is otherwise state or regionally significant.

If need be, this could be a temporary measure until the shortfall in NSW's supply of housing and retail premises is eliminated.

3.2 Reducing the susceptibility of Part 3A to legal challenge

The Department of Planning's Part 3A process has come under sustained legal attack in recent times, with a series of Court decisions striking down Part 3A approvals.

Business in NSW needs to be able to bank on state government approvals, particularly major approvals issued under Part 3A of the state's planning laws. Planning approvals, once issued, are a property right that affects land valuation.

The fact that any planning approval, let alone a Part 3A approval, can so easily be set aside further weakens the already tenuous position of property rights in this state.

The *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* is a more legally robust platform for the issue of major approvals and is preferable, from this perspective, over Part 3A of the *Environmental Planning and Assessment Act*.

Recommendation 11A: Part 3A should be as legally robust

Part 3A of the *Environmental Planning and Assessment Act* should be amended so that approvals issued by the government are no more likely to be struck down if issued under that legislation, than if they were issued under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009*.

In the event that the above recommendation is not practicable, at the very least, the provisions of regulations that have caused legal problems should be addressed.

For example, in one case, a provision in clause 8B of the *Environmental Planning and Assessment Regulation 2000* regarding the content of a Director-General's report was used to buttress a judicial view that a part 3A approval could be struck down.[65]

Recommendation 11B: The regulations and environmental planning instruments related to Part 3A should be legally robust

The regulations and environmental planning instruments related to Part 3A of the *Environmental Planning and Assessment Act* should be amended so that approvals issued by the government are (as far as practicable) no more likely to be struck down if issued under that legislation, than if they were issued under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009*.

[65] *Minister for Planning v Walker* (2008) 161 LGERA 423, 444.