Urban Taskforce
AUSTRALIA

2 July 2010

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

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

Dear Ms Rygate,

Re: Second round of draft model local clauses for Standard Instrument LEPs

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 government and the community.

As you would be aware, Urban Taskforce has diligently reviewed and provided comment on many exhibited comprehensive local environmental plans. We have highlighted numerous drafting problems and identified many examples of draft plans that either intentionally or inadvertently unfairly restrict development.

The Urban Taskforce recorded its objection to the use of a number of round one model clauses in particular standard clauses:

- Clause 6.1 - Arrangements for designated State public infrastructure; and,
- Clause 6.4 – Development of the foreshore must ensure access.

Clause 6.1 permits defacto state infrastructure contributions. That is, this model clause means that development approval for a rezoned land use cannot be given by the local council unless the Department of Planning signs off on a financial contribution for infrastructure normally provided by the state.

We also consider that clause 6.4 is problematic. For instance, model clause 6.4(a) suggests that a council is empowered to require that a development of foreshore land incorporates public access to the foreshore "through ... the proposed development". Furthermore, model clause 6.4(c) enables a council to secure this public access through private property by "appropriate covenants, agreements or other instruments registered on the title to the land".

We argue that these model clauses unfairly remove a persons' right to use private property and also enable local council to have the private land owner and/or developer surrender a portion of their site for public purposes without any form of just compensation. In fact, these model clauses enable councils to secure access across private property without the need to acquire land for a public purpose. The right to exclude others is a fundamental element of private property.

We have now had the opportunity to review the second round of draft model clauses. Once again we are compelled to highlight what we consider to be problematic model clauses as detailed below.

1. **Lot size limitation is not the answer– draft clauses 4.1B and 4.1C**

   Clause 4.1B is not required if our focus was on good design outcomes and not regulation. It is sufficient that clause 4.1 sets a general minimum lot size across the zone. This control when used in tandem with others in the LEP such as height and FSR means that there are already sufficient

controls over development. There is no need for more detailed lot size controls that are to be applied to varying subsets of residential uses. Such controls are best located in a development control plan.

The achievement of an average residential density in certain zones does not depend entirely on minimum lot sizes. A more appropriate and usable control is FSR. This would enable residential density to be considered as an average across a zone and/or locality without being tied to a prescribed lot size that will not be appropriate in all cases across a zone.

If an LEP must contain development controls, then they should be controls that will actually encourage good design so that liveable, attractive places may evolve. Focus should be placed on design outcomes appropriate for the type of development being considered. For instance, appropriate FSR, height and setbacks are those that provide sufficient "control" over development, while enabling some flexibility for an appropriate design response for a particular development proposal.

Lot size is not a concern if appropriate separation distances are maintained and dwellings are designed so that they respect their context, provide adequate private open space, protect the privacy of occupants within adjoining dwellings and incorporate elements that encourage energy efficiency, natural lighting and ventilation.

While we appreciate that the standard instrument includes a minimum lot size across the zone, we do not support the introduction of an additional requirement that assigns a minimum lot size to differing types of development permitted in the zone.

If a use is permitted within the zone, whether it be a single dwelling house, dual occupancy, multi dwelling house or residential flat building, it should be left up to the building designer to prepare a scheme that responds to the size of site, location and orientation. It should be left up to the applicant to acquire a development site comprising of a single lot or a number of lots to properly support their development scheme.

An appropriate development scheme is one that is on a site that is of suitable proportions that facilitates good design outcomes as suggested above.

Proposed model clause 4.1C has our in-principle support. If used as intended, it could complement the existing standard clause 4.1 and provide added flexibility for uses that can be appropriately contained on smaller lots. However, again we must emphasise the need to focus on design outcomes and not blind adherence to regulation.

2. <u>Active Street frontages will occur in the right location – draft clause 7.1</u>

Main street exposure is important for the success of retail and commercial businesses. Streets and centres with high levels of pedestrian traffic are prime locations for retail premises and such premises will naturally establish in these locations. In these cases there is not the need for planning regulation requiring retail at ground level and/or prohibiting residential uses on the ground level. However, it is inappropriate to require retail and business uses at the ground level along secondary streets with little pedestrian traffic.

There is clearly a judgment that needs to be formed about whether there is sufficient foot traffic in a street to justify the inclusion of a shopfront in a development. This is a commercial judgment that a planning authority is ill-equipped to make. We should also note that, in most instances, there is no market failure. A developer in a town centre would be usually keen to have a retail shopfront, rather than residential flats on a ground floor level, if the pedestrian traffic was high enough.

In any event, if the objective of locating retail and business activity at ground level is to enhance passive surveillance and public safety, forcing retail in non-viable locations will ensure that passive surveillance does not eventuate. That is, businesses will not go where they cannot survive. Therefore, draft clause 7.1 and the general use of clauses insisting on active street frontages, regardless of exposure to clientele, in reality means that streets where retail is not viable remain empty and ghostlike.

It makes more sense to permit viable development at ground level that is designed in such a way to encourage passive surveillance regardless of use. For example, a residential lobby with a wide street frontage, articulated and landscaped walls and attractive facade provides a much better alternative to empty shop fronts. Furthermore, if designed to be adaptable, a ground floor terrace can be converted into a business premises or cafe when there is a market at a later date. Some of Sydney's most successful retail strips have been extended through the conversion of residential premises.

Notwithstanding any of the above, we must question the legitimacy of introducing clauses such as these to an LEP at all. Surely these site and area specific clauses, if they are necessary at all, are more appropriately located in a development control plan prepared by the council in consultation with the local community.

3. <u>Draft clause 7.6 – Development in areas subject to aircraft noise can be simplified</u>

Regulation in the vicinity of airports (existing and future) should not focus on the exclusion of certain land uses. Regulation should however consider the desired internal acoustic environment for differing land uses in the vicinity of airports and then provide acceptable standards of construction to meet these requirements and/or the opportunity for the formulation of design solutions to meet acoustic goals for the desired land use. Essentially, no land use would be prohibited, instead, regulation would seek to ensure that design and construction is appropriate for differing end uses.

Currently we rely on the ANEF endorsed by AirServices Australia and Australian Standards. We have argued that these controls can be and are overly conservative, encouraging mostly low density, low-tech development in the vicinity of airports. Be that as it may, at least these controls provide a level of certainty for development.

The consistent application of the Australian Standard and appropriate land use zone in the vicinity of airports is all that is required. It is for this reason that the Urban Taskforce questions the need for the inclusion of draft clause 7.6(2)(a) that states that the consent authority

> must consider whether the development will result in an increase in the number of dwellings or people affected by aircraft noise

This matter is already considered by land use zone. If residential development is permitted in the vicinity of an airport by way of land use zone, then an increase in the number of dwellings or people in that zone is likely and therefore does not require further consideration. Furthermore, Australian Standard 2021-2000 further articulates criteria for building siting in the vicinity of airports.

Draft clause 7.6(2)(b) correctly identifies this criterion and states that the consent authority

> must consider the location of the development in relation to the criteria set out in Table 2.1 (Building Site Acceptability Based on ANEF Zones) in AS 2021-2000, Acoustics-Aircraft noise intrusion- building siting and construction,

Clause 7.6(2)(a) is therefore redundant and should be deleted from the final version of clause 7.6.

In addition, clause 7.6(3) refers to a

> …..Noise Exposure Forecast Contour Map ….*prepared* by the Department of the Commonwealth responsible for airports.

The Department of the Commonwealth responsible for airports does not *prepare* ANEF contour maps; the airport operator does. The Commonwealth Department *endorses* the maps. In this regard, we recommend that the final version of clause 7.6(3) be amended so that it states

> (3) In this clause:
>
> ANEF contour means a noise exposure contour shown as an ANEF contour on the Noise Exposure Forecast Contour Map for that airport <u>endorsed</u> by the Department of the Commonwealth responsible for airports.

We have always argued that land in the vicinity of airports should not be subject to additional and overly prescriptive development controls. In fact, this area should be viewed as an area of opportunity and commerce. This should be a district where intense, high quality industry and business activity is permitted. Within this area, appropriately designed and constructed residential development should also be permitted.

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

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer