Urban Taskforce
AUSTRALIA

23 August 2010

Mr Roy Waldon
The Solicitor to the Commission
ICAC
GPO Box 500
Sydney NSW 2001

Dear Mr Waldon

Re: Public inquiry into lobbying of NSW public officials and authorities

This is a second supplementary submission in relation to the above inquiry and contains additional information above and beyond that contained in our two earlier submissions (19 July 2010 and 10 August 2010).

This submission arises because we have had an opportunity to review some of the transcript of further evidence taken by the inquiry since I appeared. We think we can shed further light on matters that the Commission is considering.

1. Possible misapprehension about the exercise of discretion in the planning system

We note the development application examples cited by Mr Gormly in questioning on the afternoon of 18 August 2010 all involved development applications whose approval would be outside existing development controls.

We are concerned that the Commission and/or Counsel Assisting may be under the impression that "lobbying" (as defined broadly by the Commission) only need take place when a proponent is seeking a variation or departure from standard planning controls or policies.

In *Lloyd v Robinson*[1] it was made clear that a town planning enactment

> ... at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss.[2]

There is no 'right' to an approval, even if, on the face-of-it, an approval complies with the applicable development controls.

Section 79C(1) of the *Environmental Planning and Assessment Act 1979* requires the bulk of development applications (that is, all development applications processed under Part 4) to be assessed against a long and prescriptive list of considerations.

The provision is set out as follows:

> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
>
> (a) the provisions of:
>
> (i) any environmental planning instrument, and
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> (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority ..., and

[1] (1962) 107 CLR 142.
[2] *Lloyd v Robinson* (1962) 107 CLR 142, 154. See also *WA Planning Commission v Temwood Holdings Pty Ltd* (2004) 137 LGERA 232 , 251 [50], [51] and 268 [116]; [2004] HCA 63 [50], [51], [116]; *Bentley v Bgp Properties Pty Limited* [2006] NSWLEC 34 [66].

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(iii) any development control plan, and

(iiia) any planning agreement t..., and

(iv) the regulations ...,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made ...,

(e) the public interest.

The effect of section 79C is that even when a particular development is expressly identified in a plan as "permitted", there can be no assurance of approval when an evaluation against vaguely expressed factors such as "social and economic impacts", "suitability of the site" and "the public interest" point to refusal. While objective information must form the basis of any decision made pursuant to section 79C, there is room for opinions to differ in weighing the same objective criteria.[3]

For example, in *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd*[4] the Court of Appeal struck down a consent granted by the Land and Environment Court for a residential development that complied with the *Liverpool Environmental Plan*. The basis for the decision was that the development was incompatible with existing development nearby. In that case a statutory requirement to consider:

- the social effect and the economic effect of the development in the locality;
- the relationship of that development to the development on adjoining land or on other land in the locality; and
- the existing and likely future amenity of the neighbourhood,

necessitated that the development be refused, as a matter of law.

Coles JA said that

> the correct legal approach to a consideration of a s 90 ... [a predecessor provision to section 79C] ... [is] that development consent should not be granted unless, having weighed the factors requiring consideration pursuant to s 90, it could be said, on balance, that consent should be granted.[5]

This means it is open to a consent authority to refuse development approval, even when the application complies with relevant development controls. The policy justification for this approach is best summarised by Leslie Stein, a barrister and former Chairman of the Western Australian Town Planning and Appeal Tribunal and former Chief Counsel to the Sydney Metropolitan Strategy in *Principles of Planning Law*, published by Oxford University Press.[6] Stein observed that:

> The introduction of a system of development control [i.e. development assessment], by its very nature, implies flexibility with respect to the specific dictates of the plan. The fact that the plan is therefore not conclusive in its own right means that the final planning decision is recognised to be a matter of discretion rather than a fixed set of rules for the use of land. When planning legislation creates a system of development control, it accordingly has its intent to shift some of the planning power from the zoning provisions to a discretionary decision. At that point, the role of the development plan or planning scheme changes to one of guidance ... As development control is about present assessment of a proposal against the existing plan it implies that the plan, even

[3] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]
[4] (1996) 90 LGERA 68
[5] *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd* (1996) 90 LGERA 68, 77.
[6] L Stein, *Principles of Planning Law* (2008).

> though subject to a time-consuming planning process, is only a framework for development and the relationship between what is proposed and what exists must be resolved on a case-by-case basis. [7]

The risk that an apparently complying development will be refused is inherent in every development application. This necessitates some degree of "lobbying" for even relatively minor household extensions, by applicants, town planners, architects or (where there is legal uncertainty) lawyers. To quote Stein again:

> ... [A] development application may involve complex planning questions that are not easily understood. As an example, a development application for a new house that blocks a neighbour's view requires a subtle analysis of the degree of interference, the consistency of the new house with others that have had the same effect, and the consequence of this decision on other possible applications. The absence of a policy framework or predefined standards means there is no anchor for the reasoning that must follow. The resolution of the issue may then involve the views of planning officers informed by their own predilections, lobbying by neighbours or the applicant, an attempt by the applicant to redefined the application in light of objections, and other political influences all of which are obstacles to speedy resolution of the application.[8]

The wide discretion given to planning authorities, and their demonstrated willingness to use it, ensures that applicants and their consultants must actively engage with decision-makers.

It's worth noting that even when development is likely to be approved, there is a risk that conditions may be imposed that frustrates the ability of the proponent to actually carry out the development.[9] An applicant must not only seek for an approval, they must ensure that no unacceptable conditions are imposed.

There is a well established body of case law documenting excessively harsh use of regulation to deprive owners of the benefit of their land.[10] While such actions might be overturned on a merits appeal in the Land and Environment Court, pursuing this avenue is expensive and time-consuming. Most applicants are well advised to ensure the merits of their proposal are properly understood by the first instance decision-maker. This inevitably will require some element of "lobbying" as defined by the ICAC.

In summary, development applications cannot be divided neatly into categories where lobbying is or is not needed. **All development applications, whether complying or non-complying, require a high discretionary merit assessment. Active steps to "lobby" a decision maker** (i.e. persuade them of the merits of a case) **are necessary whether or not the proposal appears to comply with controls.**

2. <u>Request for personal and political information is inappropriate</u>

We note the evidence given by a representative of Sutherland Shire Council on 18 August 2010. In particular, we note the interest shown by Mr Gormly in the development application form used by Sutherland Shire Council.

In 2008 comprehensive provisions were introduced into the *Environmental Planning and Assessment Act* in relation to the declaration of political donations by development

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[7] Ibid 127 -129 .
[8] Ibid 132 -133 .
[9] *Finlay v Brisbane City Council* (1978) 36 LGRA 352.
[10] Cited in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63 [145] (Callinan J): *Prentice v Brisbane City Council* [1966] Qd R 394; *Brisbane City Council v Mareen Development Pty Ltd* (1972) 46 ALJR 377; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170. A commission of inquiry (conducted by Bennett QC and established on 3 October 1966 by the Governor in Council of Queensland) inquired into the planning activities of the Brisbane City Council, a planning authority under Queensland enactments. The report of the Inquiry was made on 10 April 1967. It recorded many instances, not only of aggressive, but also of highly unreasonable and unlawful conduct by the Brisbane City Council in imposing conditions on subdivisional approvals or in refusing approvals altogether: see Queensland, Bennett QC, *Report of the Brisbane City Council Subdivision Use and Development of Land Commission*, June 1967 at 68–72; *Finlay v Brisbane City Council* (1978) 36 LGRA 352; *Corsi v Johnstone Shire Council* (1979) 38 LGRA 316; *Carroll v Brisbane City Council* (1981) 41 LGRA 446; *Allsands Pty Ltd v Shoalhaven City Council* (1993) 78 LGERA 435; *Trehy & Ingold v Gosford City Council* (1995) 87 LGERA 262; *Western Australian Planning Commission v Erujin Pty Ltd* (2001) 115 LGERA 24; *Ben-Menashe v Ku-ring-gai Municipal Council* (2001) 115 LGERA 181.

applicants.[11] However the Sutherland Shire Council development application form goes much further than the existing statutory requirements.[12]

The application form asks applicants to declare their friendships, personal and family relationships, past and present club memberships, political party affiliations and more. The attempt to pry into the personal lives of development applicants is offensive and inappropriate. In particular, in a society with a secret ballot, routinely requiring an individual to declare their political affiliation in order to make use of their land is an outrageous intrusion into civil liberties. This form also expects a member of, say, Alcoholics Anonymous, to declare the membership if a council employee is involved in their group.

We support efforts to properly manage potential conflicts of interests. However, it is for the consent authority and its staff to manage these issues without making unreasonable demands on development applicants to expose their personal life. The consent authority should have arrangements in place for its staff to identify any potential conflict of interest and remove themselves from a matter. In the event that a staff member does not do so that should be grounds for disciplinary action and possible dismissal.

Any development application form should merely require compliance with the political donations disclosure regime set out in section 147 of the *Environmental Planning and Assessment Act 1979*.

3. Part 3A confers no greater discretion on decision-makers than the long-standing provisions of Part 3 and Part 4.

In case there is any doubt, we wish to highlight to the ICAC that Part 3A of the *Environmental Planning and Assessment Act 1979* does not confer any greater discretion on a decision-maker, when compared with the corresponding provisions in the longer standing Part 3 and Part 4 of the Act.

Firstly, Part 3A permits concept plan approvals to be issued by a consent authority. While such approvals can override environmental planning instruments, this merely means that a concept plan approval is tantamount to a rezoning. Project-specific rezonings under Part 3 are, and have always been, commonplace under the Act.[13] Merely because Part 3A achieved the same end by use of different terminology, does not change the fact that the same public policy outcome is being achieved.

Both concept plan approval under Part 3A and rezoning under Part 3 involve the exercise of a high-level policy function and are both, therefore, highly discretionary. The planning system could not work without the ability to modify environmental planning instruments (via rezoning or concept plan approval) given their highly prescriptive, and frequently obsolescent, nature. Whether a rezoning is achieved under Part 3A or Part 3, the final decision-maker is, and always has been, the Minister for Planning.

Secondly, Part 3A also allows project approvals to be issued by a consent authority. Project approvals are equivalent to development approval issued under Part 4 of the Act. Both Part 3A project approvals and Part 4 development approvals are capable of overriding development standards laid down under environmental planning instruments.[14] Again this is necessary, given the highly prescriptive and frequently irrelevant nature of controls. This discretion has been part of the Part 4 process since the *Environmental Planning and Assessment Act 1979* came into effect, and the system could not function without it.

When a project requiring development assessment is brought under Part 3A it may change the identity of a decision-maker (e.g. from council or a joint regional planning panel to the Planning Assessment Commission or Minister for Planning), but it does not necessarily mean that the

[11] s 147.
[12] Part 15.
[13] These may be considered as "spot rezoning" with the development application to follow later, or, under Part 3, Division 4B, a development application and proposed environmental planning instrument amendment may be exhibited concurrently.
[14] See section 75R(3) in relation to Part 3A; see the *State Environmental Planning Policy No 1—Development Standards* in relation to part 4.

decision-maker secures any greater discretion that would have been available through the use of Part 3 and Part 4 together. In fact, prior to the commencement of Part 3A, the identity of a decision-maker under Part 4 was regularly changed (to the Minister) via environmental planning instrument amendments. The main benefit of Part 3A is the more integrated approach to decision-making achieved by bringing together the disparate elements of Part 3 and Part 4 into a single process; steered by the high level expertise offered by the Department of Planning's major projects assessment staff.

We appreciate the opportunity to participate in your investigation into lobbying in NSW. We would welcome any opportunity to further discuss these issues, answer questions or provide further comment.

Yours sincerely
Urban Taskforce Australia

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