Urban Taskforce
AUSTRALIA

6 September 2010

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

Dear Mr Haddad,

Re: Exhibition of the draft *State Environmental Planning Policy (Competition) 2010*

Thank you for the opportunity to make a submission on the above document. We have carried out a detailed review of this document and we have prepared a comprehensive submission (attached).

In our view, the draft SEPP should not proceed in its present form. It does not currently have our support. Our submission makes recommendations that will address our concerns.

The provisions of the draft *State Environmental Planning Policy (Competition) 2010* ("the draft SEPP") can be sorted into one of four categories:

- harmful provisions that will deter much needed urban development (clause 8);
- window dressing that achieves little (clause 9);
- well-intended provisions that may be ineffective because they are not wide-ranging enough (clauses 10 and 11); and
- machinery provisions that need further work (clauses 6 and 7).

The draft SEPP is also notable for the key matters that are completely omitted from its text.

This letter briefly highlights some of our key points, set out in more detail in our submission.

1. **<u>The viability of commercial development cannot be excluded from decision-making altogether</u>**

   The proposed clause 8 of the draft SEPP (relating to the viability of proposed commercial development) does not have our support in its current form. Indeed, this clause would be extremely harmful and make the NSW planning system utterly unworkable.

   In our view, developers who are prepared to risk their own money on projects should not be forced to justify their commercial judgment to the public service, politicians or the courts. While clause 8 might well achieve that end, <u>it is far too broadly phrased</u>.

   If clause 8 was to be introduced in its current form, a consent authority would be precluded from considering a proposed development's economic viability when preparing conditions of consent.

   We would support clause 8 if it was re-drafted so that it said: the mere fact that a private-sector proponent is willing to take the entrepreneurial risk and proceed with a project is sufficient to establish that the project satisfies a community need and will be viable.

Urban Taskforce Australia Ltd. ABN: 21 102 685 174 | GPO Box 5396 Sydney NSW 2001
T 612 9238 3955 | F 612 9222 9122 | Level 12, 32 Martin Place Sydney NSW | Level 6, 39 London Circuit, Canberra ACT
admin@urbantaskforce.com.au | www.urbantaskforce.com.au

However, we oppose clause 8 proceeding in its current form, in the strongest possible terms. If we were forced to choose between the status-quo and clause 8, as currently drafted, we would support the status-quo.

2. <u>Little is achieved by merely codifying existing law on considering the impacts of loss of trade</u>

Clause 9 of the draft SEPP relates to "loss of trade etc for other commercial development".

This clause mimics the existing law – which has been in place for 31 years - on the application of section 79C(1)(b) of the *Environmental Planning and Assessment Act*.

The existing law, and the proposed clause 9, fails to acknowledge:

- the development (or threat) of new property assets, competing with existing property assets, is an inherently positive thing for society that should be encouraged for its own sake; and
- that a shopping centre will not necessarily cease trading merely because a business or businesses experience financial difficulties due to competition.

We believe that the planning system is not equipped to assess the costs and benefits of increased competition, and that any attempt to do so is likely to result in inefficient economic outcomes and will disadvantage ordinary consumers. For this reason, we have long argued that section 79C should be amended and a provision inserted into Part 3A so as to exclude consideration of this issue in the development assessment process. We have also argued that rules regarding rezoning decisions (through section 117 directions and/or changes to Part 3 of the Act) should be revised to prevent similar problems arising in that context.

As it stands, the proposed new clause 9 appears to merely preserve the status-quo and will do little to stop anti-competitive decisions. In particular, clause 9(2) retains the current anti-competitive loophole which allows local councils to consider the impact of new businesses on the trade of existing businesses.

3. <u>Removal of quotas and minimum distance requirements welcome, but the provisions drafted will not do the job properly</u>

Clauses 10 and 11 of the draft SEPP deal with "[r]estrictions on number of particular types of retail premises" and "[r]estrictions on proximity of particular types of retail premises".

We strongly support the thrust of the proposed provisions.

These clauses seek to override provisions environmental planning instruments and development controls plans that are clearly anti-competitive. However, the targeted provisions are some of the least common forms of anti-competitive regulation in the NSW planning system.

However, we see no reason why only provisions in environmental planning instruments and development controls plans should be overridden in this way. This limited approach overlooks the very large role given to non-statutory documents in the NSW development assessment process. The draft SEPP fails to recognise this reality.

There will also be some questions as to whether zone objectives in a Standard Instrument compliant local environmental plan are "restrictions" within the meaning of clause 10 and clause 11. Similarly, the status of provisions in environmental planning instruments and development controls plans that are "heads of consideration" rather than mandatory requirements may not be clear.

We ask that the provisions of clauses 10 and 11 are extended to non-statutory policy documents, strategies and studies, which might be considered in the development process. Zone objectives and other non-mandatory heads of consideration should also be included.

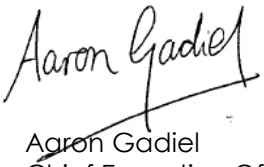
4. <u>Anti-competitive provisions in existing statutory plans should actually be removed</u>

A very small number of provisions of environmental planning instruments will be immediately overridden by the draft SEPP, if/when it is initially made. However, most anti-competitive provisions will remain untouched. The great bulk of anti-competitive provisions are not addressed by the current SEPP.

For example, if the planning system is to permit competition, changes will need be made to the *Standard Instrument (Local Environmental Plans) Order 2006,* as well as the large number of pre-2006 local environmental plans. Our submission documents the necessary changes in some detail.

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.

Yours sincerely
Urban Taskforce Australia



Aaron Gadiel
Chief Executive Officer

Encl.