Urban Taskforce
AUSTRALIA

1 October 2010

The Hon. Tony Kelly MLC
Minister for Planning
Minister for Infrastructure
Minister for Lands
L34, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Re: The draft *Interim Guideline for Part 3A Residential, Commercial and Retail Projects*

The Department of Planning has sought our views on the above-mentioned document ("the draft guideline"). We're pleased that we have been consulted and we have provided the Department with a detailed submission, which is attached.

There are some significant policy issues raised by the draft guideline and it is important that we highlight these matters to you directly.

In short, sections of the draft guideline do provide some welcome clarity as to how the current ministerial discretion to authorise a concept plan application will be exercised. However, large parts of the document assume the existence of a discretionary decision-making power that was, in fact, abolished by the Department of Planning in July last year. Other parts of the document attempt to create a two stage assessment process by turning (what should be) an informal pre-DA discussion into a formal element of the decision as to whether a project is Part 3A.

To briefly expand upon the short summary we need to provide some background.

The scope of Part 3A was reduced in July 2009 and decision-making became less discretionary

Prior to Part 3A many major development proposals were either left languishing in local councils undetermined, or were never lodged due to the difficulty in navigating the planning approval process. The Part 3A system was introduced as a means of freeing up the development approval bottleneck for projects that were important to the state, or a region within it.

The Part 3A process allows the approval of large projects to be handled by an expert team in the NSW Department of Planning, instead of local council staff. It also allows the Department of Planning to override other state government agencies and make final decisions more holistically.

Until July 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 "important in achieving State or regional planning objectives".

However, the government 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 important to state or regional planning objectives. At the time we were

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told that this was a deliberate decision by government to reduce the amount of discretion that could be exercised when deciding whether or not a project should be given Part 3A status.

While there are many competent and hardworking officers in local government planning departments, most council planners do not often have the opportunity to 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. The joint regional planning panels reform has been a positive step, however, for some complex projects valued at over $50 million, the system is second best to the Part 3A process.

In February we made a freedom of information request, which established that between July last year and February this year the Department of Planning refused to grant "Part 3A" status to 14 major residential, commercial and retail development projects worth $1.8 billion. These refusals were made without any formal merit assessment under planning legislation. 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. It's clear that the changes made in July last year, together with subsequent departmental practice, have made it harder for genuinely regionally significant projects to access the Part 3A stream.

A further reduction in the scope of Part 3A is now proposed

In this context we welcome moves to shed light on the Department's decision-making process. However, we do not support moves that constitute a further reduction in the (already very narrow) scope of Part 3A.

For example, the draft guideline says that the "reasonableness of what is being proposed" will be considered when determining whether or not a project is given Part 3A process. This is a vague and subjective judgment that would take place outside of a formal merit assessment process.

Under the *State Environmental Planning Policy (Major Development) 2005* ("the SEPP") whether or not a residential, commercial or retail project project is covered by Part 3A is tied to whether or not its capital investment value exceeds $100 million. The "reasonableness" of a project proposal is question for merit assessment once a formal application has been made.

This process outlined in the draft guideline would only be lawful if the SEPP were to be amended. However, no amendments are proposed in the draft guideline or in the accompanying material. If SEPP amendments are under consideration we urgently request that we be consulted. Changes to this important SEPP should not be contemplated without extensive consultation and careful consideration.

In any event, the Department should not be forming a conclusive and binding decision that a project is "unreasonable" in the absence of a full merit assessment. We do not object to the Department giving early advice to proponents about potential issues with their proposal, but at the end of the day, proponents should have the right to make an application somewhere and have it assessed on its merits. We note that, as law stands, a residential, commercial or retail project whose capital investment value exceeds $100 million cannot be dealt with by councils under Part 4, even when Part 3A status has been refused by the Department of Planning.

A more complex two-stage assessment process is now proposed

The draft guideline also mandates a "preliminary environmental assessment" when no such document is currently compulsory.

This forces higher value projects to undergo a two stage process, with less certainty, while the lower value project (under Part 4) is only exposed to a single stage process with a right of appeal in the event of an unfair or inappropriate decision.

It seems to us that the draft guideline confuses what should be an informal pre-DA meeting (as occurs routinely under Part 4) with a formalised step in an application process. The two should not be mixed together and satisfying officials in what is effectively a pre-DA process should not be made a prerequisite to the making of a formal application.

Why create a two stage process? This is unnecessarily bureaucratic and increases the costs of a proponent because it necessitates the preparation of two reports when one should suffice. The proponent would also bear extra holding costs while they wait for the Department to formally assess the first report, and again reconsider the issues when the second report is lodged.

Whether or not a project is covered by Part 3A is a separate decision to whether or not an 'authorisation for a concept plan application' should be issued for a prohibited development.

Where a Part 3A development is prohibited outright by an environmental planning instrument it cannot be approved unless the Planning Minister has authorised an application for the approval of a concept plan. The decision to issue such an authorisation is separate from the formal recognition of a project's Part 3A status. There is a key difference between the two. Part 3A recognition is not discretionary, while a decision to authorise an application for a concept plan is discretionary.

It *is* open to the Department to require a justification as to why the Minister should authorise an application for the approval of a concept plan. In some respects, this is akin to a request for a rezoning. However the draft guideline needs to clearly explain that the justification requirement does not relate to a decision about whether a project has Part 3A status.

Just as it is not necessary to apply for a rezoning if a Part 4 application departs for development standards, the requirement for ministerial authorisation for a concept plan application is *not* a prerequisite if the project merely departs from a development standard set by an environmental planning instrument. The draft guideline does not seem to appreciate this fact.

In conclusion

Part 3A has been known as one of the few parts of the NSW planning system that was vaguely functional. The draft guideline suggests that there will now be an even greater risk that large residential, retail and commercial projects will be left without access to proper development assessment process.

We look forward to further discussing these issues with you.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Encl.

Urban Taskforce
AUSTRALIA

1 October 2010

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

Dear Mr Haddad

Re: The draft *Interim Guideline for Part 3A Residential, Commercial and Retail Projects*

I refer to your correspondence of 6 September 2010 regarding the above matter. Thank you for the opportunity to comment on the proposed guideline.

Most local councils lack expertise in assessing complex state and regionally significant development projects and generally take too long to approve large development applications. When such projects are left to councils and poorly handled, the state can lose crucial investment.

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.[1] 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.

As you are aware, the Urban Taskforce has always been a strong supporter of Part 3A. Prior to Part 3A many major development proposals were either left languishing in local councils undetermined, or were never lodged due to the difficulty in navigating the planning approval process. The Part 3A system was introduced as a means of freeing up the development approval bottleneck for projects that were important to the state, or a region within it.

The Part 3A process allows the approval of large projects to be handled by an expert team in the NSW Department of Planning, instead of local council staff. It also allows the Department of Planning to override other state government agencies and make final decisions more holistically.

Until July 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 "important in achieving State or regional planning objectives".[2] However, the government then changed the rules so that residential, commercial or retail projects with an investment value of less

[1] *Environmental Planning and Assessment Regulation 2000*, cl 113.
[2] *State Environmental Planning Policy (Major Projects) 2005* Schedule 1 clause 13, immediately prior to its amendment on 1 July 2009.

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than $100 million would be shunted off to local councils to assess, under the supervision of panels.[3] The new rules also abolished the need for the Minister to decide whether individual projects were important to state or regional planning objectives. At the time we were told that this was a deliberate decision by government to reduce the amount of discretion that could be exercised when deciding whether or not a project should be given Part 3A status.

While data from 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. While there are many competent and hardworking officers in local government planning departments, most council planners do not often have the opportunity to 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. The joint regional planning panels reform has been a positive step, however, for many complex projects valued at over $50 million, the system is second best to the Part 3A process.

As you would be aware the Department of Planning refused to grant "Part 3A" status to 14 major residential, commercial and retail development projects worth $1.8 billion between July last year and February this year. These refusals were made without any formal merit assessment under planning legislation. 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. It's clear that the changes made in July last year, together with subsequent departmental practice, have made it harder for genuinely regionally significant projects to access the Part 3A stream.

Six projects that were denied Part 3A status 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.

In this context we welcome moves to shed light on the decision-making process that the Department has been following. However, we do not support moves that effectively constitute a further reduction in the (already very narrow) scope of Part 3A.

Sections of the draft *Interim Guideline for Part 3A Residential, Commercial and Retail Projects* ("the draft guideline") *do* provide some welcome clarity as to how the current ministerial discretion to authorise a concept plan application will be exercised. However, **large parts of the document assume the existence of a discretionary decision-making power that was, in fact, abolished by the Department of Planning in July last year.** Other parts of the document attempt to create a two stage assessment process by incorporating (what should be) an informal pre-DA discussion as a formal element of the decision as to whether or not a project is Part 3A.

1. <u>The draft guideline asks the Minister to exercise a discretion that he/she does not have</u>

The draft guideline says that it

> has been prepared to provide guidance on the Department's approach to requests for proposals to be declared a Major Project under Schedule clause 13, of the MD SEPP.[4]

According to the *Environmental Planning and Assessment Act 1979* ("the Act"), Part 3A applies to a class of development projects declared for that purpose under a State environmental

[3] The *State Environmental Planning Policy (Major Projects) Amendment (Joint Regional Planning Panels) 2009* commenced on 1 July 2010.

[4] Department of Planning, *Major Development SEPP: Interim Guideline for Part 3A Residential, Commercial and Retail Projects: September 2010* (2010) 1.

planning policy.[5] The *State Environmental Planning Policy (Major Development) 2005* ("the SEPP") makes such a declaration when it says that

> Development that, in the opinion of the Minister, is development of a kind: ... that is described in Schedule 1... is declared to be a project to which Part 3A of the Act applies.[6]

Accordingly, the key question that needs to be answered for most large-scale commercial, retail and residential development is: Can the Minister be satisfied that a project answers the description of a class of development in Schedule 1?[7] If the Minister forms an opinion that the project answers such a description, then the project *is* a declared project under the SEPP and there is no further "declaration" process. We note that our view is consistent with the project-specific documentation produced by the Department of Planning.[8]

Relevantly, clause 13 of Schedule 1 describes the following class of development:

> Development for the purpose of residential, commercial or retail projects with a capital investment of more than $100 million.[9]

The decision the Minister must make under clause 6, is one that must be based on objective facts. That is, the Minister must decide in his/her opinion, whether or not a project is a "residential, commercial or retail project" and, if so, whether or not its capital investment value exceeds $100 million.[10]

The draft guideline seems to misunderstand this reality when it says that

> [w]hile CIV is the trigger point for declaration of these types of projects under clause 13, the Department will also carefully consider the reasonableness of what is being proposed as part of its decision on whether to declare the proposal as a Major Project.[11]

Firstly, the Department, even as the Minister's delegate, does not "declare" a proposal a major project under clause 13. That job has already been done by the SEPP itself. The Department's job, as the Minister's delegate, is to form an opinion as to whether or not the factual circumstances set out in clause 13 exist.

Secondly, **the "reasonableness of what is being proposed" has no relevance whatsoever to a decision about whether a project is a "residential, commercial or retail project" and, if so, whether or not its capital investment value exceeds $100 million.** These are issues of fact that have nothing to do with the merits of project or its alignment (or otherwise) with planning objectives.

If the Department of Planning were to adopt the draft guideline without amending the SEPP, it would be adopting a policy exhorting the Minister to act unlawfully.

If the Department of Planning amended the SEPP to make the approach outlined in the draft guideline lawful, it would be returning to a discretionary regime akin to one existing prior to July 2009, although the threshold for Part 3A projects would be $100 million, rather than $50 million.

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[5] s 75B(1).
[6] cl 6(1).
[7] This assumes most development does not concern a state significant site or other specified site and that no order has been published by the Minister in the Gazette.
[8] For an example: <http://majorprojects.planning.nsw.gov.au/files/49772/MP09_0209%20Opinion_050310.pdf> as at 1 October 2010.
[9] cl 13(1)
[10] A helpful definition of "capital investment value" is included in the SEPP cl 3, which invokes the definition in the *Environmental Planning and Assessment Regulation 2000* cl 3.
[11] Department of Planning, *Major Development SEPP: Interim Guideline for Part 3A Residential, Commercial and Retail Projects: September 2010* (2010) 1.

We would support a return to the previous arrangements, but only if:

- the threshold is returned to its former level ($50 million instead of $100 million); and
- the discretionary test is the former one, i.e. where "the Minister determines are important in achieving State or regional planning objectives", not something as vague and subjective as "reasonableness".

If SEPP amendments are under consideration we urgently request that we be consulted. Changes to this important SEPP should not be contemplated without extensive consultation and careful consideration.

What is particularly disturbing is that, unlike the former arrangements, a project that is not accepted as a Part 3A project does not automatically default to Part 4 status (which was the case prior to July 2009). The only status that a project that answers the description set out in clause 13 is capable of having is a Part 3A status. In the event that the Department refuses to recognise such a project as Part 3A because it's supposedly "unreasonable" the project is denied a proper statutory merit assessment via *any* mechanism, including Part 4.

The Department should not be forming a conclusive and binding decision that a project is "unreasonable" in the absence of a full merit assessment. We do not object to the Department giving early advice to proponents about potential issues with their proposal, but at the end of the day, proponents should have the right to make an application somewhere, and have it assessed on its merits.

2. The draft guideline mandates a "preliminary environmental assessment" when no such document is currently required

The draft guideline says that

> The PEA [preliminary environmental assessment] lodged in support of a request for a project declaration and/or DGRs for residential and commercial development *must* include the following details:
>
> - the relevant EPIs applicable to the land and the type of development being proposed;
> - the permissibility or otherwise of the proposal in terms of the applicable EPIs; and
> - the key development standards and other controls under the applicable EPIs, any draft EPIs and the proposal's compliance or non compliance with these controls (emphasis added).[12]

A "preliminary environmental assessment" is not referred to either in the Act, the *Environmental Planning and Assessment Regulation 2000* ("the Regulation") or the SEPP. As is made clear by the Department of Planning's own fact sheet on the Part 3A process ("Steps in the Part 3A assessment process", fact sheet 2, October 2009) an applicant is not obliged to prepare a preliminary environmental assessment, but *may* choose to do so. It is therefore odd that the draft guideline should seek to lay out mandatory requirements for the contents of a preliminary environmental assessment.

Where a preliminary environmental assessment is to be used to determine that a project will answer the description set out in Schedule 1, clause 13, the information set out above is not relevant. It is wrong for the draft guideline to require the production of such information, when the consideration of the information would be an irrelevant consideration, and render the decision an unlawful exercise of power.

The above information *may* be of assistance to the Director-General when determining project-specific environmental assessment requirements.[13] However, **we do not think the Department**

[12] Department of Planning, *Major Development SEPP: Interim Guideline for Part 3A Residential, Commercial and Retail Projects: September 2010* (2010) 2.

should ask for information about the development standards at this stage of the process at all, and that requests for such information can and should be a routine part of the Director-General's environmental assessment requirements. This of course, does not preclude the informal provision of such information, and Departmental advice to proponents as part of a standard pre-DA process.

If the Department, nonetheless, wishes to persist with this proposal, the draft guideline would need to make clear that:

- a preliminary environmental assessment is not a mandatory requirement; and
- providing the above information would be helpful but is not required; and
- the information provided would only be used in establishing the environmental assessment requirements, not in deciding whether or not the project answers the description set out in Schedule 1, clause 13.

3. <u>The draft guideline creates a two-stage process where there should only be one</u>

The draft guideline says that

> If the proposal is not permissible or substantially does not comply with development controls, it will be necessary for a strongly founded argument to be provided as to why it is reasonable to progress the proposal under Part 3A.[14]

It is not uncommon for major projects to be to depart from development controls or land use permissibility. Many local environmental plans have not been updated to reflect the more recent strategic planning objectives adopted by the NSW Government or even the local council. Additionally new and innovative proposals are often not contemplated by planning authorities when controls were put in place.

Non-compliance with development controls

Whether it be under Part 3A or Part 4, the Act has always contemplated applications being made for development that did not comply with existing development controls. Applicants have always been entitled to lodge such applications. **Until now, the right to a merit assessment of proposals that did not comply with existing development controls was never in question.**

To illustrate the inconsistent approach that the draft guideline would apply, it is useful to consider two hypothetical high density residential developments. The developments are identical, except that one carries a capital investment value of $95 million, while the other sits at $105 million. Both projects are permissible with consent under the land use table in the local environmental plan, but both are outside the height limit imposed under that local environmental plan, and the setback requirements included in the development control plan.

The $95 million project falls outside of clause 13 of Schedule 1 of the SEPP. As a result it is dealt with under Part 4. The applicant is <u>entitled</u> to make an application, and have a statutory merit assessment process, with a right of appeal to the Land and Environment Court. All the applicant need do is make an objection in relation to the height controls under the *State Environmental Planning Policy No 1—Development Standards*.[15] While there would be no need to make formal objection to the setback requirements under the development control plan to secure a merit assessment, the applicant would normally provide information to be considered

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[13] s 75(2).

[14] Department of Planning, *Major Development SEPP: Interim Guideline for Part 3A Residential, Commercial and Retail Projects: September 2010* (2010) 2.

[15] Cl 6. If the local environmental plan is a Standard Instrument complaint document, instead of an "objection" the applicant would make a "written request" under clause 4.6.

in the merit assessment in accordance with the "planning principle" that allows consent authorities to give reduced weight to development control plans.[16]

However, if the draft guideline was in force, the applicant for the $105 million project would have no right to make a formal application, nor receive a merit assessment, or enjoy a right of appeal to the Land and Environment Court without first satisfying the Department of Planning that there is a "strongly founded argument" for departure from development controls.

That is, **the higher value project is forced to undergo a two stage process, with less certainty, while the lower value project is only exposed to a single stage process with a right of appeal in the event of an unfair or inappropriate decision.**

It seems to us that the draft guideline confuses what should be an informal pre-DA meeting (as occurs routinely under Part 4) with a formalised step in an application process. The two should not be mixed together and satisfying officials in what is effectively a pre-DA process should not be made a prerequisite to the making of a formal application.

Lack of permissibility

Under section 75M of the Act the Minister may authorise or require the proponent to apply for approval of a concept plan for a project. Significantly, the Regulation prevents an approval for the carrying out of a project where:

- no such authorisation or requirement has been issued; and
- the development is prohibited by an environmental planning instrument.[17]

Strangely the draft guideline only mentions this fact at the bottom of page 2. For much of the first two pages, the draft guideline seems to confuse a decision to determine whether a project answers the description given in Schedule 1, clause 13, (which is *not* discretionary) with a decision to authorise or require an application for the approval of a concept plan (which *is* discretionary).

It *is* open to the Department to require a justification as to why the Minister should authorise an application for the approval of a concept plan. In some respects, this is akin to a request for a rezoning, so it has its parallels in Part 3 of the Act. However the draft guideline needs to clearly explain that the justification requirement only relates to the discretionary decision to authorise a concept plan application, not the non-discretionary decision as to whether a project falls under Part 3A by reason of Schedule 1 clause 13.

Just as it is not necessary to apply for a rezoning if a Part 4 application is outside development standards, **the requirement for ministerial authorisation for a concept plan application is *not* a prerequisite if the project merely departs from a development standard set by an environmental planning instrument.**[18] The draft guideline does not seem to appreciate this fact.

4. There are problems with the treatment of "type 1" projects

The draft guideline says that "type 1" projects are:

> Projects which are permissible and comply with key development controls such as height and FSR.[19]

[16] *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 [87] (McClellan CJ). For example, the DCP 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.
[17] cl 8O(1).
[18] cl 8O(2).
[19] Department of Planning, *Major Development SEPP: Interim Guideline for Part 3A Residential, Commercial and Retail Projects: September 2010* (2010) 2.

According to the draft guideline:

> There are no additional requirements and a Project declaration under Part 3A and issuing of the DGRs will generally be promptly dealt with without the need for additional information or justification to be submitted.[20]

A "declaration" is not required in this situation, because the project (as part of a class) has already been declared by the SEPP. It is wrong (for the reasons we set above) for the draft guideline to suggest that the project's status as a "type 1" project will lead to swifter recognition as a Schedule 1, clause 13 project, than a type 2 or type 3 project.

5. <u>There are problems with the treatment of "type 2" projects</u>

The draft guideline says that "type 2" projects are:

> Projects which are permissible but propose variations to key development controls.[21]

According to the draft guideline:

> The Proponent will be required to provide justification for the variations to the key development controls. To demonstrate that the variations are well-founded, the Proponent should refer to the criteria in Table 1 below when preparing the PEA.[22]

The draft guideline also sets out criteria that have nothing to do with Schedule 1 clause 13 and says:

> When considering a request for a Type 2 ... proposal to be declared a Part 3A Project, the Department will consider the proposal against the following criteria.[23]

The fact that a variation to development controls is sought irrelevant to a decision as to whether Schedule 1, clause 13 applies (see discussion above).

It is also undesirable to require formal justification of departures from key development standards at this early stage of the process, when the environmental assessment requirements issued by the Director-General will inevitably require such matters to be addressed as a matter of routine.

Why create a two stage process? This is unnecessarily bureaucratic and increases the costs of a proponent because it necessitates the preparation of two reports when one should suffice. The proponent would also bear extra holding costs while they wait for the Department to formally assess the first report, and again reconsider the issues when the second report is lodged. It is not clear why a type 2 Part 4 project would be subject to a single stage process, while a type 2 Part 3A project is subject to a two-stage process.

There should be not distinction between type 1 and type 2 projects.

6. <u>A category is missing</u>

The draft guideline says that "type 3" projects are:

> Projects which are not permissible *and* propose variations to key development controls (emphasis added).[24]

This categorisation skips over a classification of project which should sit between type 1/type 2

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[20] Department of Planning, *Major Development SEPP: Interim Guideline for Part 3A Residential, Commercial and Retail Projects: September 2010* (2010) 2.
[21] Ibid.
[22] Ibid.
[23] Ibid 3.
[24] Ibid 2.

and type 3 projects. That is, projects that are not permissible but do not propose variations to key development controls. These will require authorisation for a concept plan application, **but may not need to be as rigorously justified as a type 3 development proposal.**

For example, a developer may be happy to comply with existing height and floor space ratio controls, but seeks to develop residential where only commercial office is permitted under the local environmental plan. In such an example, the developer may still need to demonstrate that the proposal is not inconsistent with a strategic direction, but less community issues are likely to arise if there no change in bulk or scale.

7. "Development Controls" versus "development standards"

We note that the draft guideline refers to "development controls" without a definition, leaving open the possibility that the phrase includes controls set out in a development control plan and/or provisions of *draft* environmental planning instruments.

"Development standards" are defined in the Act,[25] but "development controls" are not. Put simply "development standards" are requirements imposed under environmental planning instruments or regulations, but not development control plans. Is there a reason the Department has not used the established terminology?

A project should not be placed at any disadvantage merely because it does not comply with draft development standards or a draft or final development control plan.

8. The Department should make it clear that it will keep an open mind prior to the full merit assessment

The draft guideline says that:

> If a revised EA still does not adequately address the DGRs, the Department will not support the proposal proceeding to exhibition.[26]

We appreciate that these words are lifted more or less directly from the Act.[27] However, **it should be made clear that the Director-General will not withhold acceptance of an environmental assessment merely because there is a risk that development approval may ultimately be refused**, provided that the applicant has presented an arguable case in response to the environmental assessment requirements.

Should this principle not be accepted, an applicant (whose project is in Part 3A process by virtue of Schedule 1 clause 13 whether they like it or not) might be denied a merit appeal through the Department's refusal to allow the environmental assessment to be exhibited.

We are concerned that the draft guideline suggests the Department wishes to further discourage the proper use of Part 3A. Is it that the Part 3A enables "too many" projects to be triggered thereby requiring assessment by the Department of Planning and not local council? If so, we suggest that the Department should create employment opportunities by hiring more people.

Part 3A has been known as one of the few parts of the NSW planning system that was vaguely functional. The draft guideline suggests that there will now be an even greater risk that large residential, retail and commercial projects will be left without access to proper development assessment process.

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[25] s 4(1).

[26] Department of Planning, *Major Development SEPP: Interim Guideline for Part 3A Residential, Commercial and Retail Projects: September 2010* (2010) 4.

[27] s 75H(2).

We look forward to further discussing these issues with you.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer