Urban Taskforce
AUSTRALIA

Making things worse

The undesirable proposals and missed opportunities of the proposed new planning regulation

A submission to the NSW Department of Planning on the draft *Environmental Planning and Assessment Regulation 2010*.

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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

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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

The draft *Environmental Planning and Assessment Regulation 2010* appears to have been prepared on the basis that there is nothing fundamentally wrong with the planning system in NSW.

No serious attempt has been to made to tackle the basic problems with the existing regulations that are contributing to the lack of investment in NSW urban development. We have difficulty understanding how the existing regulation can be proposed for re-enactment, with the new extra provisions that will reduce certainty, increase costs and lengthen delays.

It's clear that when the Department of Planning 'consults' on these measures, it views consultation as a process of talking to other regulators in the planning system (local councils, other state government agencies) rather than talking to development applicants. It seems that the concerns of councils have been given a fair hearing, and very substantially addressed, while almost none of the concerns articulated by development applicants have been considered.

We also cannot understand how the Department of Planning through the regulatory impact statement, exhibited with the draft regulation, thinks it is fulfiling the statutory requirements of the *Subordinate Legislation Act*. In particular, the regulatory impact statement grossly misrepresents the nature and effect of the draft regulations. The misrepresentations include a gravely inaccurate account of proposed changes to the regime of planning certificates and (at best) a serious misconception as to the nature of the reforms to 'limit' stop-the-clock provisions.

In our view, the misrepresentations in the regulatory impact statement (and the associated exhibition material produced by the Department of Planning) are so unreasonable that no public authority charged with preparing such a statement under the *Subordinate Legislation Act* could properly consider the statement's preparation a reasonable exercise of its functions. It is our submission that the draft regulation cannot proceed in its present form without a further public exhibition with a more accurate regulatory impact statement.

We urge the Department of Planning to revise the draft regulation, having regard to the recommendations set out in this submission, before re-exhibiting the document.

The problems with the draft regulation can be divided neatly into three categories:

- proposed changes that will increase regulatory uncertainty and the costs of development;
- a failure to implement previously announced reforms to the planning system; and
- a failure to institute relatively simple beneficial reforms to a wide range of matters.

It is useful to briefly highlight some of these matters.

Changes that will increase regulatory uncertainty and the costs of development

New harsh 21 day time limit for the requests and supply of further information

The Department of Planning is proposing a harsh 21 day time limit for the requests and supply of further information. A consent authority will only be allowed to make such requests within 21 days of receiving

an application. The restriction on applicants is likely to lead to "fishing expedition" requests for further information by consent authorities just before their 21 day deadline.

Additionally, an applicant will only have a non-negotiable period of 21 days to respond. In many instances, 21 days will not be a reasonable allocation of time for the applicant.

These two changes alone will lead to more costs for applicants, less information for consent authorities and unnecessary rejection. Effectively, the new requirements are a prohibition on the exchange of information between a proponent and a consent authority after the 21 day periods have expired.

Planning certificates to be gutted and no action to improve compliance by councils

Although you wouldn't know it from reading the Department's fact sheet or the regulatory impact statement, planning (section 149) certificates are to be gutted, with a wide range of information essential for developers to be made optional (for example, whether a section 94 contributions plan is in force, and the name of the plan). Additionally, even when council elects to voluntarily provide the optional information, it will carry limited liability (i.e. only liability for bad faith omissions or errors).

Surprisingly, there are no proposals to take any measures to ensure that all conservation areas and items of environmental heritage are disclosed in planning certificates, despite widespread non-compliance by councils with current requirements.

Development consents to lapse more easily, increasing the risk of approval process expenditure

The draft regulation proposes to artificially narrow the notion of "physical commencement". This will place new, more restrictive rules on the life of development approvals. Development approvals will be more likely to lapse and will be less bankable. As a result, the development process will slow down. Developers will need a higher degree of certainty about the project proceeding before they start spending large amounts of money on consultants, studies, etc necessary to secure development approval.

Wide-ranging and substantial increases in fees as an "interim" measure

In the current environment we have difficulty in understanding how the Department of Planning can justify a nine per cent across-the-board increase in development application fees. Some fees are even going up by 30 per cent. Fee increases of this kind cannot be supported at a time when NSW urban development is in such poor shape. Apparently these fee increases are just an "interim" measure, pending even larger fee adjustments at some later unspecified date.

Some specific fee increases are grossly indefensible. For example, as it stands the maximum fee for a request for a Part 3A modification that the Director-General considers will involve a minor environmental assessment is $750. The draft regulation increases this fee by more than six times to $5,000.

The new maximum fee for a Part 3A modification that requires more than minor environmental assessment will now always be greater than a Part 3A application for the same matter that is not a modification. For example, if an approval originally authorised the construction of 1,000 dwellings, and a modification application sought the ability to build an additional 100 dwellings (perhaps based on a more efficient use of land than originally envisaged), the applicant would be forced to pay:

- a fee equal to 50 per cent of the original approval fee; AND
- a fee equal to whatever it would have cost if the applicant had merely sought approval to build 100 homes and a standalone basis.

This is a clearly punitive fee regime that can only be justified if the Department assumes that modifications are contrary in the public interest. Modifications are an inevitable and sensible consequence of good planning, responsiveness to market conditions and an evolving construction environment.

A failure to implement previously announced reforms to the planning system

Concurrences reforms abandoned

The Department of Planning is now also abandoning its previously announced reform agenda on concurrences and integrated development approvals. There will apparently be no action on July 2009 proposals to allow a consent authority to determine the DA, as if a non-responsive agency has no requirements.

Abolition of stop-the-clock

Furthermore, stop-the-clock is now no longer going to be abolished as promised in 2008. Stop-the-clock will be retained, largely unchanged.

A failure to institute relatively simple reforms to a wide range of matters

The Urban Taskforce, like local government, has made many submissions in recent years on the problems with the existing regulations. It seems that concerns of local government have been heard, but very few of the concerns raised on behalf of development applicants have been taken into account.

This submission highlights how the new regulations can address key problems embedded in the current planning system, by:

- requiring that consent authorities consult on draft conditions of consent;
- widening the scope for "as-of-right" development through non-discretionary development standards;
- expressly requiring consideration of the private proprietary interests of a development applicant;
- mandating the consideration of financial constraints on the economic viability of a desirable planning development;
- reform of the role and scope of development control plans in development assessment to restore historical arrangements;
- removal of the recently conferred (unprecedented) powers to block development applications if a voluntary planning is not executed;
- ending the ad-hoc and fluid exemptions for the existing cap on the percentage-based development levies;
- restoring existing use regulations to their pre-2006 state; and
- improving the public accessibility of information, including the greater provision of information by councils on the internet.

We trust the Department of Planning will find our contribution useful and constructive. We look forward to continuing our dialogue on these important issues.

Table of recommendations

Recommendation 1: Inflexible 21 day periods to request and supply further information

Clause 78 should merely re-enact the existing clause 54 with no substantive changes. Similarly, the proposed clause 85(3) and clause 85(6)-(7) should be re-written to merely re-enact existing clause 60(2) and clause 60(6) respectively. The proposed clause 92(2)-(3) is also problematic and should merely re-enact clause 67(2)-(3).

Recommendation 2: Abandonment of reform agenda on concurrences

The draft regulations should implement some of the positive measures included in the July 2009 *Draft Development Assessment Guidelines: Part A*. That is, if the advice is not received in 21 days from referral, concurrence or integrated development approval authorities, the consent authority can determine the DA, as if the agency has no advice.

However, we would favour going a step further, and propose that the draft regulations oblige consent authorities to determine a development application when the relevant authority does not respond in a set time period. The development application should be determined as if the unresponsive government agency has no requirements.

Recommendation 3: End stop-the-clock as promised

Stop-the-clock (used to calculate deemed refusal periods for appeal rights) should be abolished as promised by the government in 2008.

In the event that stop-the-clock is not abolished, the deemed refusal periods should remain unchanged at 40 and 60 days.

Recommendation 4: Extension of power to reject 'over-the-counter'

Clause 75(1) should be revised so that the over-the-counter rejection for obvious errors remains at seven days (not the proposed 14 days).

Recommendation 5: Deemed refusal when a matter has been referred to the PAC

If the intent of clause 120(3)(b) is to deprive a development application of deemed refusal status while a Planning Assessment Commission review is pending, the provision does not have our support.

If the intent is to provide two deemed refusal periods, either of which could form the basis of a merit appeal in the Land and Environment Court, the provisions should be clarified.

Recommendation 6: Consent authorities should consult on draft conditions of consent

A clause should be inserted in the regulation under the authority of section 80(11) of the Act. The new clause should require a consent authority to provide draft conditions of consent (in both hard copy and electronic form) at least 14 days before a determination is made. The applicant would be required to file and serve its response (in both hard copy and electronic form) within 7 days of receiving the draft conditions. The regulations consent authority would be required to consider the applicants submission on the draft conditions of consent by a clause of the regulation made under section 79C(a)(iv).

Recommendation 7: Development that meets standards should be entitled to approval

Any development proposal that meets the height controls and floor space 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 or "rules of thumb" 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.

Recommendation 8: An express requirement for the private proprietary interests of a development applicant to be taken into consideration

Clause 123 (in relation to Part 4) should be amended to require that, where relevant, a consent authority must take into consideration the private proprietary interests of a development applicant, including the applicant's interest in carrying out a reasonable development.

A similar amendment should be made to clause 10 in relation to Part 3A to the contents of the Director-General's report under Part 3A. This will then necessitate consideration by the Minister when determining whether to approve or disapprove of a Part 3A project.

In both cases an express requirement to consider the private proprietary interests of a development applicant should not be triggered unless the applicant has elected to provide information on the subject. This will avoid unnecessary red tape when an applicant has no wish or need to volunteer such information.

Recommendation 9: Consent authority should consider the financial constraints on the economic viability of a desirable planning development

Clause 123 (in relation to Part 4) should be amended to require that, where relevant, a consent authority must take into consideration the financial constraints on the economic viability of a desirable planning development of the type proposed by the applicant.

A similar amendment should be made to clause 10 in relation to Part 3A to the contents of the Director-General's report under Part 3A. This will then necessitate consideration by the Minister when determining whether to approve or disapprove of a Part 3A project.

In both cases an express requirement to financial feasibility issues should not be triggered unless the applicant has elected to provide information on the subject. Applicants may desire to keep financial information confidential for personal or commercial reasons and they should be entitled to do so.

Recommendation 10: Definition of "concurrence authority"

The existing definition of "concurrence authority" should remain unchanged. That is, the definition should not permit or foreshadow the addition of new concurrence authorities via regulation.

Recommendation 11: Sea level rise benchmark

We support the principle of a single state-wide sea level rise benchmark. Given that the government has adopted such a number by policy, we think it is appropriate for it to be incorporated into the regulation via the proposed clause 123(2).

Recommendation 12: Proposed change to the lapsing of development approvals

There should be no change in the current arrangements for lapsing of development approvals. The proposed clause 160 should be deleted, as it will make the process of spending money on consultants, studies, etc for development applications even more risky.

If clause 160 is to proceed, despite our objections, the transition provision in clause 160(2) should be revised so that the clause only applies to a development consent granted after two years of the date of commencement of the new regulation.

Recommendation 13: Definition of the "end of the proponent's environmental assessment period"

The regulations should prescribe *additional* dates on which a pending application for approval to carry out a project is taken to have been refused (for the purposes of enabling an appeal under section 75K(2)(b) and section 75Q(2)(b))). These dates would be:

- 21 days after an environmental assessment is received by the Director-General (in-line with clause 11(b) of the draft regulation), except where the environmental assessment is subsequently accepted by the Director-General prior to an appeal being lodged; and
- the date that the Director-General requires a proponent to submit a revised environmental assessment under section 75H(2), except where a revised environmental assessment is subsequently lodged and accepted by the Director-General prior to an appeal being lodged.

Recommendation 14: Definition of the "end of the proponent's environmental assessment period"

The existing definition of the "end of the proponent's environmental assessment period" should remain unchanged. That is, the definition should refer to section 75H generally, rather than section 75H(2). This will preserve the right to a deemed refusal of proponents who satisfy the Director-General with an adequate environmental assessment on the first attempt. In the event that a particular subsection must be nominated, it should be section 75H(1).

Recommendation 15: Definition of the "end of the public consultation period"

The definition of the "end of the public consultation period" should refer to a period of "at least" 30 days, in line with section 75H(3), which it cites.

Recommendation 16: When environmental assessment requirements may have been modified or re-issued

The proposed clause 12(1)(c) should not permit a rejection by the Minister earlier than two years after the most recent notification of environmental assessment requirements or modification of those requirements.

Recommendation 17: When environmental assessment requirements may have been modified or re-issued

The proposed clause 12(1)(c) should not apply to any requirements that "have effect" for the purposes of Part 3A, Division 2 by virtue of section 75P(1).

Recommendation 18: Proponents should be given the opportunity to 'show cause'

The proposed clause 12(1)(c) should not apply unless the Director-General has, within the previous 90 days, provided the proponent with a notice advising them of the possibility that their application will be rejected and inviting them to submit and environmental assessment or explain why an environmental assessment has not or cannot yet be submitted. The Director-General should be obliged to consider any consequent submission before making a decision to reject.

Recommendation 19: Proponents should be given the opportunity to 'show cause'

The proposed clause 12(1)(b) should allow proponents at least 90 days, not 21 days, to rectify deficiencies in environmental assessments, before an application can be rejected.

Recommendation 20: Clause 12 should be omitted altogether if there is no power

The Department of Planning should review whether or not the government has a sufficient grant of power to enact clause 12 in the new regulation. In the event that there is no robust legal basis for the clause, it should be omitted from the regulation.

Recommendation 21: Fees generally

No increase in planning permission and associated fees (under Part 4 or Part 3A) is warranted at this time.

Recommendation 22: Fees for modifications requiring only minor environmental assessment

The proposed six-fold increase in the fee for Part 3A modifications that only involve a minor environmental assessment (from $750 to $5,000) cannot be justified and should not proceed.

Recommendation 23: Fees for modifications requiring only minor environmental assessment

The proposed new punitive fee regime for Part 3A modifications should not proceed.

Recommendation 24: Role of SEPP 65 design review panels in DCPs

The proposed clause 31 should be deleted, as:

- the panels referred to no longer exist;
- the issues it seeks to cover are dealt with by the Residential Flat Design Code (in force under SEPP 65); and
- section 74C(5) of the Act, prevents a DCP reproducing the same material as an environmental planning instrument.

Recommendation 25 Wider reform of development control plans

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 a 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.

Recommendation 26: Removal of unprecedented powers to block DAs without appeal

The proposed clause 349, which confers unprecedented powers on councils to block development applications (without appeal) should be removed.

Recommendation 27: Restoration of a stable 1 per cent on percentage-based development levies

The proposed clause 49 should be revised so that it reflects the terms of clause 25K of the *Environmental Planning and Assessment Regulation 2000* as it stood prior to 30 January 2007. This would see a blanket cap of 1 per cent on all percentage-based development levies.

Recommendation 28: Restoration of existing use rights removed in 2006

While we support the proposal to remove the 1,000 square metre cap on the exercise of existing use right for commercial or light industrial premises, the draft regulation should go much further. The provisions on existing use rights should be returned to their pre-2006 state.

Recommendation 29: Each council should have a web page with all policies, strategies, etc capable of being considered in the development assessment process

Each council should have a web page showing all local policies, strategies, etc that are likely to be considered "in the public interest" as part of the development assessment process.

Recommendation 30: Each council should have a web page with all policies, strategies, etc capable of being considered in the development assessment process

The absence of a document, from either the Department of Planning's or a council's on-line register, should suggest that the document will not be given any substantive weight during development assessment.

Such a provision will require a consent authority to consider whether it should discount a document's significance when the requirement to make the document easily accessible to the public has not been adhered to. This could be achieved by adding a matter to the list of issues a consent authority is to take into consideration when deciding on a development application under section 79C(1)(iv).

Recommendation 31: Availability of draft development control plans on the web

The proposed clause 28 should be amended so that draft development control plans must be made available to the public via the council's website.

Recommendation 32: Availability of amending development control plans on the web

The proposed clause 22 should be amended so that amending development control plans must be published on the council's website in a central readily accessible place.

Recommendation 33: Availability of repeal notices on the web

The proposed clause 23 should be amended so that notice repealing a development control plans should be published on a council's website in a central readily accessible place.

Recommendation 34: A single website containing all development control plans

The proposed clause 30(4) should be revised so that a development control plan comes into effect on the day that it is published on a website, approved for that purpose by the Director-General, or on a later day specified in the notice. The Director-General would only be able to approve one such website for the whole state.

Recommendation 35: Availability of draft and amending contributions plans and repeal notices on the web

The proposed clauses 52, 53, 56 and 57 should be amended so that draft contributions plans, amending contributions plans and repeal notices for contributions plans must all be made available to the public via the council's website. The latter two should be available from a single point on a council's (or government) website to enable easy verification of the accuracy of a principal contributions plan and to establish the reasonableness of a plan, by reference to its historical evolution.

Recommendation 36: A single website containing all contributions plans

The proposed clause 55(4) should be revised so that a contributions plan comes into effect on the day that it is published on a website, approved for that purpose by the Director-General, or on a later day specified in the notice. The Director-General would only be able to approve one such website for the whole state.

Recommendation 37: Public disclosure of planning agreements

The proposed clauses 44 and 45 should be rationalised, so that they better complement (and do not overlap with) requirements of the *Government Information (Public Access) Act 2009*. However, there should be no loss of transparency or community accountability.

Recommendation 38: Availability of maps from a central point online

All maps that have been approved under or in connection with the *Environmental Planning and Assessment Act* (including its regulations and environmental planning instrument) should be placed online, with a copy of the dated instrument of approval, and a clear indication as to whether the maps are current, and if they are not current, when they ceased to be current.

Recommendation 39: Declaration that land be released

The formal requirement, in the growth centres, for land to be "released" prior to the commencement of statutory planning should be eliminated. Progression towards statutory planning should be capable of being driven by either a proponent or a public authority. This would require the deletion of the proposed clause 353 and the consequential amendment of the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*.

Recommendation 40: The proposal to gut planning certificates should be dropped

All the matters that must be disclosed on a section 149(2) certificate must continue to be disclosed. That is, the proposed clause 356 should merely re-enact the existing clause 279, and the related schedule should not be divided into two parts.

Recommendation 41: Ensuring that all conservation areas and items of environmental heritage are disclosed in planning certificates

A note should be inserted into the new Schedule 5, following items 2(g) and 2(h). The note would highlight that examples of conservation areas or items of environmental heritage include:

- land protected or preserved under the *State Environmental Planning Policy No 14—Coastal Wetlands*; or the *State Environmental Planning Policy No 26—Littoral Rainforests*;
- an area declared to be an aquatic reserve under Division 2 of Part 7 of the *Fisheries Management Act 1994*;
- an area declared to be a marine park under Part 2 of the *Marine Parks Act 1997*;
- land, places, buildings or structures listed on the State Heritage Register;
- land, places, buildings or structures listed as heritage in an environmental planning instrument;
- an Aboriginal place declared under the *National Parks and Wildlife Act 1974*; and
- world heritage properties, national heritage places; and Ramsar wetlands declared under the EPBC Act.

Introduction

We have to be frank about the planning system in New South Wales. The planning system is chaotic, random, dictatorial and irrational. It is extremely difficult for any business to buy land and invest in NSW with any certainty about the likelihood and timeliness of any planning approval.

In saying this we intend no disrespect to the many hard working public servants both in the Department of Planning and in local councils. In some senses, they too are victims of a dysfunctional system.

Property development has collapsed in NSW since 2002.

Until 2007, NSW was the nation's number one state for building activity – this shouldn't have been surprising given that it's Australia's largest state. However, in 2007, Victoria stole NSW's title.[1] Victoria has never looked back – in the last financial year, for every dollar spent by builders in NSW, $1.20 was spent in Victoria.[2] While NSW accounts for 33 per cent of the population, it makes up just 24 per cent of Australia's building activity.[3]

In the last financial year, work started on 52,000 new Victorian private sector homes, while in NSW work only started on 26,000 homes.[4] The lack of building activity carries high social costs. The housing undersupply is the main reason why rents in the inner suburbs of Sydney have been increasing at nine times the rate of inflation.[5] Each year more apartments and townhouses are built in Melbourne than in Sydney. On a per capita basis, Brisbane approves nearly three times as many new apartments and townhouses as Sydney.

The breakdown in NSW has not been mirrored in other comparable states. Whatever is wrong with NSW, it is a home grown problem.

In our report *Deny Everything* we explained that the five big things wrong with NSW planning can be expressed in simple terms:

- high regulatory risk and lack of respect for property rights
- the highest development levies in Australia;
- an undersupply of development sites;
- a lack of support for state and regionally significant projects; and
- the reinforcement of landlord oligopolies.[6]

The development of new housing, well-located workplaces and quality retail precincts will continue to fall short of NSW's requirement as long as the planning system is unreformed. The Urban Taskforce's *Going Nowhere* report concludes that the 'no reform' option will:

- leave the state's economy between $3.9 billion and $8.3 billion worse off by 2035;
- deprive the NSW budget of between $1 billion and $2.5 billion in additional revenue by 2020, and between $5 billion and $10.5 billion by 2028;
- make Melbourne Australia's largest city by 2037;

[1] Australian Bureau of Statistics, *8755.0 - Construction Work Done, Australia, Preliminary, Jun 2010.*
[2] Ibid.
[3] Ibid.
[4] Australian Bureau of Statistics, *8750.0 - Dwelling Unit Commencements, Australia, Preliminary, Jun 2010.*
[5] Housing NSW, *Rent and Sales Report Issue 92*.
[6] Urban Taskforce Australia, *Deny Everything* (2010). Available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=3195>.

- leave the Metropolitan Strategy as a mere rear vision mirror, reminding us what Sydney could have had if we retained the policy environment of the 1990s, when NSW housing production was strong; and
- deny NSW the benefits of increased overseas migration – migration that would otherwise help the state fund public services and maintain a sufficiently large labour force to keep our economy on an even keel.[7]

It is therefore surprising that the regulations seem to have largely been revised in a vacuum. It seems that the concerns of councils have been given a fair hearing, and very substantially addressed, while almost none of concerns articulated by development applicants have been considered.

It's clear that when the Department of Planning 'consults' on these measures, it views consultation as a process of talking to other regulators in the planning system (local councils, other state government agencies) rather than talking to development applicants (the actual users of the planning system).

We have difficulty understanding how the existing regulation can be proposed for re-enactment, with new provisions that will reduce certainty, increase costs and lengthen delays. Yet that is exactly what the Department of Planning is proposing.

We also cannot understand how the Department of Planning thought the regulatory impact statement, exhibited with the draft regulation, could, on any measure, fulfil the statutory requirements of the *Subordinate Legislation Act 1984*. In particular, the regulatory impact statement grossly misrepresents the nature and effect of the draft regulations. The misrepresentations include a gravely inaccurate account of proposed changes to the regime of planning certificates and (at best) a serious misunderstanding as to the nature of the reforms to 'limit' stop-the-clock provisions.

In our view, the misrepresentations in the regulatory impact statement (and collateral material produced by the Department of Planning) are so unreasonable that no public authority charged with preparing such a statement under the *Subordinate Legislation Act* could properly consider the preparation of the statement a reasonable exercise of its functions. Accordingly, it is our submission that the draft regulation can proceed in its present form, without a further public exhibition with a more accurate regulatory impact statement.

We urge the Department of Planning to revise the draft regulation, having regard to the recommendations set out in the body of this submission, before re-exhibiting the document with a more accurate regulatory impact statement.

[7] Urban Taskforce Australia, *Going Nowhere* (2010).

1. Development applications under EP&A Act's Part 4

1.1 Strict 21 day time limit for further information

The existing regulation allows a consent authority to make requests for further information and authorises the consent authority to specify a "reasonable" period for the provision of that information.[8] The current provision does not attempt to regulate when such a request can be made.

The draft regulation does away with the idea of a "reasonable" period and instead mandates a blanket 21 day period for a developer to respond.[9] Additionally a consent authority is precluded from requesting information (from an applicant) after 21 days from the lodgement of the development application.

We do not support this change.

Firstly, in many instances, 21 days will not be a "reasonable" allocation of time. Frequently additional information is required to address policies (often informal or not readily available) that were not known to the developer or even the community at large. Often a particular council will, unexpectedly, place a greater emphasis on a particular section 79C consideration than is typical. For example, some council officers are more passionate about social impact assessment while others see this as something that was/should have been dealt with in the original zoning decision. These matters can easily take more than 21 days to address.

A blanket inflexible time limit on the provision of information by an applicant is undesirable and will lead to:

- unnecessary cost for applicants;
- less or lower-quality information being provided to consent authorities; and
- unnecessary rejection of development applications.

Secondly, for more complex matters (e.g. matters typically progressed by property developers) it is likely that the consent authority will identify a need for additional information after the initial 21 day period.

Sometimes this information will be simple and provided readily by the proponent. However, whether the request is simple or complex, if it is made after the initial 21 day period, it will be unlawful. What kind of planning system bars, as a matter of law, the exchange of information between a proponent and a consent authority? Sure such exchanges of information will generally lead to better decisions?

We anticipate this change will lead councils to prepare standard-form 'fishing expedition' requests for further information (within 21 days) to circumvent the intent of the regulation and effectively allow them to ask for more information after 21 day period has elapsed. That is, a broad request for further information will be made, such that any more specific subsequent communications by council could be legally characterised as a clarification of the earlier request, rather than a new request.

Thirdly, if the applicant misses the 21 day deadline by even one day,

> the applicant is taken to have notified the consent authority that the information will not be provided...[10]

This is breathtaking. The applicant is deemed not have provided information, even when they have, in truth, provided such information. Even when the applicant provides the information on day 22 and the

[8] *Environmental Planning and Assessment Regulation 2000*, cl 51(2).
[9] Draft *Environmental Planning and Assessment Regulation 2010* cl 78(2).
[10] Draft *Environmental Planning and Assessment Regulation 2010* cl 78(6).

council only begins substantive work on its assessment 50 days later, the applicant would still have been deemed to have not provided the information.

Fourthly, since there is no harsh or strict timeline that a council or panel must adhere to (i.e. there is no deemed approval or penalty for not meeting the timelines) there can be no agrument for imposing a strict, non-negotiable timeline on an applicant.

Fifthly, where a development application is rejected within the first fourteen days, an application is taken never to have been made and the consent authority must refund to the applicant the whole of any application fee.[11] No such provision is made if a development application is rejected because information was unable to be supplied within the 21 day deadline, or the consent authority only realised they needed additional information (say) 25 days after lodgement. This outcome is unconscionable.

Sixthly, when a matter is to be dealt with by a joint regional planning panel, the panel will be denied the opportunity to request further information if the panel's first meeting takes place after the initial 21 day period has elapsed.

Finally, non-compliance with this provision may affect the validity of an approval. In the absence of a clear statement the courts will consider the language of the relevant provision and the scope and object of the whole statute.[12] This can be an uncertain and semantic process. Why create this need for litigation to decide whether or not consent will be valid, because a request for further information was made on day 28, instead of day 21? Or whether a decision to consider information provided by a developer following such a request voided a whole approval?

Strangely, the draft regulation makes it clear that a decision by a consent authority to consider late comments from a concurrence authority will not invalidate a decision. It says

> Nothing in this clause prevents a consent authority from having regard to a concurrence authority's decision on a development application that has been notified to the consent authority after the expiration of the relevant period ...[13]

This is a sensible enough provision. The presence of this provision for concurrence authorities (without a matching provision for applicants) suggests a legislative intent that consideration of advice from a proponent after the expiry period will invalidate a development approval. We see no reason why the information by applicants should be treated differently than the information provided by concurrence authorities. Of course, even with such a provision in relation to applicants, many consent authorities will be pleased to have the excuse to refuse development consent, and would happily plead the applicant's lateness as an excuse to disregard the additional material and say "no". This is still a very poor public policy outcome.

Recommendation 1: Inflexible 21 day periods to request and supply further information

Clause 78 should merely re-enact the existing clause 54 with no substantive changes. Similarly, the proposed clause 85(3) and clause 85(6)-(7) should be re-written to merely re-enact existing clause 60(2) and clause 60(6) respectively. The proposed clause 92(2)-(3) is also problematic and should merely re-enact clause 67(2)-(3).

We do, however, support the proposed new obligation on a concurrence authority/integrated development approval authority to respond within 21 days.[14]

[11] Draft *Environmental Planning and Assessment Regulation 2010* cl 75(3)-(4).
[12] *Project Blue Sky inc & ors v Australian Broadcasting Authority* [1998] 194 CLR 355, 390.
[13] cl 87(3). See also cl 95(3).
[14] Draft *Environmental Planning and Assessment Regulation 2010* cl 87(1)(a); cl 95(1).

1.2 Abandonment of reform agenda on concurrences

In July 2009 the Department of Planning circulated the *Draft Development Assessment Guidelines: Part A: Development Applications under Part 4 of the Environmental Planning and Assessment Act*. In our submission of 27 July 2009 we congratulated the Department of Planning for preparing the document.

Where an environmental planning instrument requires "concurrence" from a government agency for a development application the draft guidelines said:

> If the advice is not received in 21 days, the consent authority can determine the DA, as if the agency has no requirements. [15]

At the time we recognised that these statements were an improvement on the status-quo and we commended the Department for moving in this direction. However, **the draft regulations do not implement the proposal.** This would have required an amendment to the text of the proposed clause 89 (which is based on the current clause 64) and no such amendment was made.

Similarly in relation to "referrals" to government agencies the guidelines said:

> If the advice is not received in 21 days, the consent authority can determine the DA, as if the agency has no advice. [16]

No change has been in the regulation to enshrine this provision and offer the consent authority the necessary protection (a provision akin to the proposed clause 78(6) would have been appropriate).

For integrated development, where an environmental planning instrument requires "general terms of approval" from a government agency the guidelines said:

> If the advice is not received in 21 days ... the consent authority can determine the DA.[17]

This proposal has not been implemented by any change to the draft regulations.

In our view, with regard to referral, concurrences and integrated development, the consent authority should be obliged to determine a development application if the relevant authority does not respond in a set time period. The development application should be determined as if the unresponsive government agency has no requirements.

We find it very strange the Department is proceeding with a plan to impose rigid timelines on consent authorities to request information of applicants, and rigid timelines on applicants to provide information, but no equivalent rigid timelines on state government agencies.

Recommendation 2: Abandonment of reform agenda on concurrences

The draft regulations should implement some of the positive measures included in the July 2009 *Draft Development Assessment Guidelines: Part A*. That is, if the advice is not received in 21 days from referral, concurrence or integrated development approval authorities, the consent authority can determine the DA, as if the agency has no advice.

However, we would favour going a step further, and propose that the draft regulations oblige consent authorities to determine a development application when the relevant authority does not respond in a set time period. The development application should be determined as if the unresponsive government agency has no requirements.

[15] Ibid 4.
[16] Ibid.
[17] Ibid 4.

1.3 Stop-the-clock has not been abolished as promised

A key part of the 2008 planning reforms was a bold promise by the NSW Government to "remove the ability for agencies or councils to stop the clock". This commitment was as clear as day. To quote from the second reading speech of the then Planning Minister, Frank Sartor:

> The bill includes a number of amendments to the Act to improve the assessment system. These will be supported by consequential amendments to the regulations. Currently, deemed refusal time frames are based on net days to undertake an assessment and exclude the time when the council or an agency stops the clock. As a result, the assessment times are often double what are reported. **The regulations are to be amended to remove the ability for agencies or councils to stop the clock.** To balance this we are extending deemed refusal time frames from the current 40 or 60 days to 50, 70 or 90 days, depending on the class of development, which will provide realistic time frames for local councils to complete their assessment (bold underlining added).[18]

The draft regulation does not end stop-the-clock at all. There are four clauses that still clearly require the clock to be stopped.[19]

Indeed the regulatory impact statement released by the Department with the draft regulations makes no mention of the government's promise to end stop-the-clock. Instead it says that the draft regulation is about

> *limiting* the use of 'stop-the-clock' provisions and introducing new determination times of 50 days for simple DAs and 90 days for more complex DAs (emphasis added)...[20]

At best there are minor fiddles to the clock-stopping process works. These fiddles have been generously described as a "limitation" stop-the-clock, but in truth, they are no such thing. Stop-the-clock survives in all its glory.

The regulatory impact statement in 2010, unlike Mr Sartor in 2008, strongly supports the stop-the-clock system, saying it

> provides consent authorities with an incentive not to compromise on their deliberations where additional information is needed to make an appropriate well-informed decision.[21]

Strangely, the regulatory impact statement doesn't appear to comprehend what stop-the-clock actually is about. It assumes that by changing the use of 'stop-the-clock' development applications can be processed faster. It says this:

> The most substantial benefits of ... the proposed 2010 Regulation ... come from the proposed changes to the DA process which reduce the use of 'stop the clock' provisions and by doing so, should significantly reduce the average number of days available to process a DA. As the analysis below demonstrates, the average number of days that councils would have to assess a DA — even taking into account the increase in the deemed refusal period — would be expected to fall significantly as a result of restricting the use of 'stop the clock'.[22]

This statement makes it clear that the whole regulatory impact statement is built on the shakiest of foundations. That's because, as the draft regulations expressly state, the only purpose of the deemed refusal provisions (to which stop-the-clock relates) is to entitle an applicant to appeal to the Land and Environment Court.[23] The Land and Environment Court has declared that the legislative intent of the provision

[18] The Hon. Frank Sartor MP, Minister for Planning, NSW Parliamentary Hansard (12 August 2008) 7695.
[19] Draft *Environmental Planning and Assessment Regulation 2010* cl 115-118.
[20] CIE, *Environmental Planning and Assessment Regulation 2010 Regulatory Impact Statement* (2010) 14.
[21] Ibid 43.
[22] Ibid.
[23] Draft *Environmental Planning and Assessment Regulation 2010* cl 120(1).

is to allow a council reasonable time to consider a development application before it is exposed to an appeal against its deemed refusal.[24]

Unlike Queensland, there is no deemed approval in NSW. For large projects councils almost universally process development applications well outside the existing deemed refusal periods. Why would the authors of the regulatory impact statement think any kind of minor tweaking to the stop-the-clock rules will make any difference to the timeliness of council-decision-making?

To add insult to injury, the Department of Planning is still proceeding to lengthen the deemed refusal assessment period, even though this original commitment was only ever to "balance" the abolition of stop-the-clock.

Furthermore, where Mr Sartor had promised a regime of 50, 70 or 90 days, depending on the development's complexity, the proposal now is simply 50 or 90 days, with all but the simplest of development applications falling into the 90 category.

To add further insult to injury, the time period for councils to deal with crown (government) projects before an applicant may refer a matter to the Minister or joint regional planning panel is to be cut from 70 to 50 days.[25]

The stop-the-clock system should end as promised. There will be no adverse consequences, because this requirement only affects appeal rights to the Land and Environment Court. Most developers do not wish to have the matter determined in court and a surge in court matters is unlikely. However, abolition of stop-the-clock saves councils, developers and their lawyers countless hours (and dollars) because there will no longer be a need to keep track of various minute stages in the development process for the purposes of determining appeal rights.

Recommendation 3: End stop-the-clock as promised

Stop-the-clock (used to calculate deemed refusal periods for appeal rights) should be abolished as promised by the government in 2008.

In the event that stop-the-clock is not abolished, the deemed refusal periods should remain unchanged at 40 and 60 days.

1.4 Extension of power to reject 'over-the-counter'

Under the existing regulation, a consent authority may reject a development application within seven days after receiving it if:

- the application is illegible or unclear as to the development consent sought; or
- the application does not contain certain prescribed information, or is not accompanied by certain prescribed documents (the matters so prescribed are black-or-white issues).[26]

The draft regulation proposes to extend this period to 14 days.[27] No clear argument is advanced as to why such simple checks cannot be accomplished with the existing seven days. We note that there is already a separate provision allowing 14 days for more complex checks. The reason that the above checks should be done within seven days, is that they really can literally done at the counter in most cases. In truth, one day should be enough.

[24] I*poh Pty Limited v Sydney City Council* [2005] NSWLEC 514 [19].
[25] Draft *Environmental Planning and Assessment Regulation 2010* cl 75(1); *Environmental Planning and Assessment Regulation 2000*, cl 113B(1).
[26] *Environmental Planning and Assessment Regulation 2000*, cl 122(1).
[27] Draft *Environmental Planning and Assessment Regulation 2010* cl 75(1).

Recommendation 4: Extension of power to reject 'over-the-counter'

Clause 75(1) should be revised so that the over-the-counter rejection for obvious errors remains at seven days (not the proposed 14 days).

1.5 Denial of deemed refusal when a matter has been referred to the Planning Assessment Commission

The draft regulation (and the existing regulation) appears to strip applicants of a right to a deemed refusal, and therefore an appeal, merely on the basis that the Planning Assessment Commission has commenced a review of a development proposal.[28] While the Commission is often involved in Part 3A matters, this provision expressly relates to Part 4 matters that are not designated development.[29] That is, it could include commercial, retail and residential development up to $100 million in value. The provision says:

> The 50-day and 90-day periods are measured from:
>
> (a) the day the development application is lodged with the consent authority, or
>
> (b) the day the Commission provides a copy of its final report on a review to the consent authority and any public authorities whose concurrence is required, if a review has been conducted by the Planning Assessment Commission into development that is not designated development, or part of any such development.[30]

One interpretation of paragraph (b) is to deny projects the right to the normal deemed refusal period when the Minister requests a review by the Planning Assessment Commission concerning environmental aspects of a proposed development.[31] Instead, in such a case, the deemed refusal period will be calculated from the day the Commission provides a copy of its final report on a review to the consent authority. If this interpretation is correct, the provision is of serious concern.

As long as a matter is still before the Planning Assessment Commission, no deemed refusal can arise, and therefore no merit appeal may be heard in the Land and Environment Court. There is, therefore, no time pressure whatsoever on the Planning Assessment Commission to complete its report. The reporting process may take three months, or three years, but no deemed refusal will arise.

If the intent is to deprive a development application of deemed refusal status while a Planning Assessment Commission review is pending, the provision does not have our support. On the other hand, if the intent is to ensure that an applicant has deemed refusal status after a normal interval, but also may have a second bite at the cherry once a Planning Assessment Commission decision is handed down, then the proposal does have our support (providing the text is so clarified).

[28] *Environmental Planning and Assessment Regulation 2000*, cl 113(2); Draft *Environmental Planning and Assessment Regulation 2010* cl 120(3).
[29] This is possible due to s 23D(1)(a)(iii); s 80(6)(b).
[30] Draft *Environmental Planning and Assessment Regulation 2010* cl 120(3)(b).
[31] As per section 23D(1)(b)(iii) and section 80(6).

Recommendation 5: Deemed refusal when a matter has been referred to the PAC

If the intent of clause 120(3)(b) is to deprive a development application of deemed refusal status while a Planning Assessment Commission review is pending, the provision does not have our support.

If the intent is to provide two deemed refusal periods, either of which could form the basis of a merit appeal in the Land and Environment Court, the provisions should be clarified.

1.6 Consent authorities should consult on draft conditions of consent

Regretfully, more often than not, councils proceed to issue development approvals without consulting with applicants on the nature of the conditions of consent. Even when an applicant is provided with conditions in advance of an approval, it is usually too late in the process to substantively address them. In our experience, conditions often contain factual errors, or are predicated on a misunderstanding of the construction prorgam, materials to be used, the design and/or the construction method. At times, very surprising conditions may be included that fundamentally vitiates the benefit of an approval (for example, removing car parking from a proposed building). As a consequence an applicant must then engage in an expensive process of seeking modifications to, or appealing, an approval

The regulation could solve this problem.

The Act says that:

> The regulations may specify other matters of a procedural nature that are to be complied with before a development application may be determined.[32]

We believe the regulation should require consultation with an applicant on draft conditions of consent prior to a determination being made.

The Land and Environment Court's *Usual directions at the first directions hearing for development appeal applications* provide a useful reference point for our proposal.[33] These provisions require a respondent consent authority to file and serve draft conditions of consent (in both hard copy and electronic form) 14 days before a hearing.[34] The applicant is required to file and serve its draft conditions in response (in both hard copy and electronic form) seven days before a hearing.

If this occurs as part of the Court's process in a merits appeal, why cannot it occur when a consent authority makes the initial determination?

[32] s 80(11).
[33] <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Usual_directions_Class1_Development_Appeals.doc/$file/Usual_directions_Class1_Development_Appeals.doc> at 22 October 2010.
[34] Ibid [14].

Recommendation 6: Consent authorities should consult on draft conditions of consent

A clause should be inserted in the regulation under the authority of section 80(11) of the Act. The new clause should require a consent authority to provide draft conditions of consent (in both hard copy and electronic form) at least 14 days before a determination is made. The applicant would be required to file and serve its response (in both hard copy and electronic form) within 7 days of receiving the draft conditions. The regulations consent authority would be required to consider the applicants submission on the draft conditions of consent by a clause of the regulation made under section 79C(a)(iv).

1.7 The need for "as-of-right" development

Though local environmental plans may state the type of development permitted within certain zones and development control plans further articulate standards, compliance with the requirements of the local environmental plan (LEP) and development control plan (DCP) is not any assurance of development approval.[35]

A local environmental plan may state a maximum height or floor space ratio (FSR), but a developer cannot use these standards with certainty when preparing a development feasibility assessment or making a decision to purchase land.

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 published plans.[36]

Under current planning regulation in NSW, the situation exists that 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.

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.

[35] *Mobil Oil Australia Pty Ltd v Baulkham Hills Shire Council (No 2)* [1971] 2 NSWLR 314, 319; *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195, 209-210; *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] NSWLEC 399 [117]-[119].
[36] *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195, 209-210; *Carstens v Pittwater Council* [1999] NSWLEC 249 [22]-[23].

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 that 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.[37] 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".[38]

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".[39] 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.[40]

While 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.[41]

An environmental planning instrument also may 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.[42]

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 floor space 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;[43] and
- any proposal for residential apartment development that meets any development standards or rules of thumb 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.[44]

[37] Western Australian Planning Commission 2002 Planning Bulletin # 55
[38] Western Australia Planning Commission, <http://www.planning.wa.gov.au/WAPC+statements/769.aspx> at 30 June 2009.
[39] s 79C(2)-(3).
[40] s 79C(2).
[41] 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*.
[42] s 79C(3).
[43] See clause 29(1) of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* for an example of a similar provision.
[44] 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.

We note that the Act contemplates that non-discretionary development standards may be set either via regulation or environmental planning instrument.[45] We have no preference as to which legal tool should be used, although this submission is being made in the context of a review of the regulation.

Recommendation 7: Development that meets standards should be entitled to approval

Any development proposal that meets the height controls and floor space 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 or "rules of thumb" 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.

1.8 Additional considerations in the development approval process

Under the Act a consent authority is to take into consideration the following matters that are of relevance to a development application:

- provisions of:
  - any environmental planning instrument;
  - certain proposed environmental planning instruments;
  - any development control plan;
  - a final or draft planning agreement;
  - matters prescribed by the regulations, which at present are:
    - the Government Coastal Policy;
    - (in the case of the demolition of a building) the provisions of Australian Standard 2601;
- the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality;
- the suitability of the site for the development;
- any submissions made in accordance with this Act or the regulations; and
- the public interest.[46]

1.8.1 The private proprietary interests of a development applicant

While specific and general public interest considerations are expressly stated above, there is no balancing acknowledgement of the need to take into consideration the private proprietary interests of a development applicant.

[45] s 79C(2)-(3).
[46] s 79C(1); *Environmental Planning and Assessment Regulation 2000* cl 92.

Of course, the interests of a private land owner should not necessarily trump public interest considerations in a given case. Nonetheless, a development applicant should be entitled to expect that their private proprietary interests are, at least, worthy of consideration by the consent authority. An absence of any express statement to that effect implies that the private land owner's interest in theior land is factor that may be safely disregarded by a consent authority.

There should not be anything radical about idea that a landowner's propriety interest warrants consideration. It can and does work in practice. One example is offered by *National Australia Bank Ltd v Drummoyne Municipal Council*.[47] In that case Justice Bignold expressly considered the "private proprietary interests" of a bank in demolishing vacant bank premises (namely the impact of the retention of the existing building's facade on the bank's marketing strategies). However, Justice Bignold then explicitly balanced this consideration against the public interest conserving and enhancing the environmental heritage of Drummoyne. In that case, the public interest trumped the private interest because the public interest was substantial and the private proprietary interests, while impacted, were not unreasonably so (given the prospects for adaptive re-use of the building concerned). The *National Australia Bank Ltd v Drummoyne Municipal Council* was heard in 1988. It reflects an approach that is increasingly uncommon when local councils are undertaking development assessment.

To its credit, the Land and Environment Court has embraced the related concept of "reasonable development" in some of its planning principles. For example, *Pafburn v North Sydney Council*[48] sets out now well-established criteria for assessing amenity impact on neighbouring properties. One criterion asks:

> Would it require the loss of reasonable development potential to avoid the impact?

Other principles contain similar language. [49] Nonetheless in the absence of a clear planning principle from the Land and Environment Court a property owner's expectation of reasonable development is often not considered by local councils. Land and Environment Court planning principles are fragile creatures at best, and only operate in a "policy void" when neither council nor government has filled the space. As such planning principles can be easily displaced by something as simple as a development control plan. Planning principles are also far from comprehensive.

While the Act instructs the consent authority to consider "social and economic impacts in the locality" this will not necessarily allow or require consideration of the social and economic impacts on a private property owner. Council assessment reports rarely explicitly acknowledge the proprietary interests of a property owner in the development and use of their land.

In fact, consent authorities generally have a very poor understanding of the importance of property rights. We think that consent authorities will give better consideration to an applicant's interest in reasonable development if this is a nominated head of consideration under section 79C(1).

[47] (1988) 130 LGERA 299
[48] [2005] NSWLEC 444.
[49] *CSA Architects v Randwick City Council* [2004] NSWLEC 179 [15]; *Meriton v Sydney City Council* [2004] NSWLEC 313 [41].

In relation to Part 3A, we note that similar issues arise. The draft regulation provides that:

> The Director-General's report ... in relation to a project is to include the following matters (to the extent that those matters are not otherwise included in that report in accordance with the requirements of that section):
>
> (a) an assessment of the environmental impact of the project,
>
> (b) any aspect of the public interest that the Director-General considers relevant to the project,
>
> (c) the suitability of the site for the project,
>
> (d) copies of submissions received by the Director-General in connection with public consultation under section 75H or a summary of the issues raised in those submissions.[50]

It is a requirement for the Minister for Planning to consider the Director-General's report when deciding whether or not to approve the carrying out of a Part 3A project.[51] Again there is an express requirement to consider specific and general matters of public interest without an express consideration of the impact on any private interest.

In both cases an express requirement to consider the private proprietary interests of a development applicant should not be triggered unless the applicant has elected to provide information on the subject. This will avoid unnecessary reports or red tape when the applicant has no wish or need to volunteer such information.

Recommendation 8: An express requirement for the private proprietary interests of a development applicant to be taken into consideration

Clause 123 (in relation to Part 4) should be amended to require that, where relevant, a consent authority must take into consideration the private proprietary interests of a development applicant, including the applicant's interest in carrying out a reasonable development.

A similar amendment should be made to clause 10 in relation to Part 3A to the contents of the Director-General's report under Part 3A. This will then necessitate consideration by the Minister when determining whether to approve or disapprove of a Part 3A project.

In both cases an express requirement to consider the private proprietary interests of a development applicant should not be triggered unless the applicant has elected to provide information on the subject. This will avoid unnecessary red tape when an applicant has no wish or need to volunteer such information.

1.8.2 Financial constraints on the economic viability of a desirable planning development

Under existing planning law, a consent authority is lawfully able to consider whether desirable development is not economically feasible, and modify apply planning requirements, so as to ensure that such development is still able to take place.[52] The current law allows planning authorities to depart from utopian planning visions, in order to ensure that appropriate development is actually financially robust and is able to proceed. However, under the current law, a planning authority is under no compulsion to consider whether conditions sought by the authority will render desirable development economically unfeasible. That is, a decision to consider economic feasibility does not invalidate their

[50] *Draft Environmental Planning and Assessment Regulation 2010* cl 10. See also *National Australia Bank Ltd v Drummoyne Municipal Council* 130 LGERA 299 where the Court expressly considered private propriety interests and balanced them against public interest considerations.
[51] *Environmental Planning and Assessment Act 1979* s75J(2).
[52] *R v Westminister City Council, Ex parte Monahan* [1990] 1 QB 87. This case has been applied in the context of NSW planning law by both the Land and Environment Court and the Court of Appeal. *City West Housing Pty Ltd v Sydney City Council* [1999] NSWLEC 246 [139]; *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [36] (Basten JA with Giles and Santow JJA agreeing).

decision, but there is not necessarily any positive obligation to consider economic feasibility issues if the consent authority is reluctant to do so.

The comments of Lord Justice Kerr in *R v Westminister City Council, Ex parte Monahan*[53] clearly explain why it may be good public policy for a planning decision to be influenced by the need to ensure that the project is still feasible:

> **Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world.** It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. **Virtually all planning decisions involve some kind of balancing exercise.** A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, i.e., related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation (bold added).[54]
>
> Suppose that an urban authority had a policy of requiring the use of green tiles - which are substantially more expensive than others - in areas of residential developments bordering on the countryside. If a developer who wished to erect an otherwise highly desirable housing estate claimed that this would be uneconomic if green tiles had to be used, then the authority would clearly not be bound to reject his application out of hand. It would be bound to consider it on its merits, although it might well be highly sceptical about the assertion that the economic viability of the project would founder if green tiles had to be used. But if, after proper consideration, this were indeed the conclusion reached on a basis which would not admit of a charge of irrationality, then there could be no question about the validity of a decision which permitted the use of red or black tiles in the circumstances.[55]

The Court of Appeal has said that

> as is illustrated by the judgment of Kerr LJ in *R v Westminster City Council; Ex parte Monahan* [1989] 3 WLR 408 at 425 ... the imposition of a condition may involve financial constraints on the economic viability of a particular development, which may be of significance in particular circumstances. At the very least, such a consideration will not necessarily fall outside the boundary of "planning" considerations ...[56]

The Court of Appeal's approach was applied in *Health Projects International Party Limited v Baulkham Hills Shire Council*[57] where Commissioner Moore (as he then was) accepted the evidence that the revenue the company was seeking to obtain from paid parking (via a variation to a development consent) was a matter of financial significance for the applicant.

Of course, the case law is also clear that an ability of a consent authority to consider such factors does not necessarily mean that hardship factors, personal to an applicant, will influence every planning decision.[58]

We believe there should be an explicit duty for a consent authority to consider the financial constraints on the economic viability of a desirable planning development when the applicant has elected to provide information on the subject.

It is important that such a duty should be triggered unless the applicant volunteers information, because at times applicants may desire to keep financial information confidential for personal or commercial

[53] 1990] 1 QB 87
[54] *R v Westminister City Council, Ex parte Monahan* [1990] 1 Q.B. 87,111 (Kerr LJ).
[55] Ibid 113.
[56] *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [38] (Basten JA with Giles and Santow JJA agreeing).
[57] [2008] NSWLEC 1477 [25].
[58] *Hill v Blacktown City Council and the Minister Administering the Environmental, Planning and Assessment Act 1979, Pluijmers and Anor v Blacktown City Council and the Environmental, Planning and Assessment Act 1979* [2008] NSWLEC 203 [28]-[29]

reasons, and they should be entitled to do so. Of course, this would also mean that the duty to consider financial feasibility would not apply.

Recommendation 9: Consent authority should consider the financial constraints on the economic viability of a desirable planning development

Clause 123 (in relation to Part 4) should be amended to require that, where relevant, a consent authority must take into consideration the financial constraints on the economic viability of a desirable planning development of the type proposed by the applicant.

A similar amendment should be made to clause 10 in relation to Part 3A to the contents of the Director-General's report under Part 3A. This will then necessitate consideration by the Minister when determining whether to approve or disapprove of a Part 3A project.

In both cases an express requirement to financial feasibility issues should not be triggered unless the applicant has elected to provide information on the subject. Applicants may desire to keep financial information confidential for personal or commercial reasons and they should be entitled to do so.

1.8.3 Consideration as to whether or not a policy document has been made public

In section 7 ("Public accessibility of information") we have proposed that a failure to make a policy document (other than a development control plan or an environmental planning instrument) public in a prescribed manner should be a consideration in the development assessment process, and such a failure should be a factor in suggesting that the document will be given reduced weight in the decision-making process.

1.9 Definition of "concurrence authority"

The draft regulation defines a "concurrence authority" as

> a person whose concurrence is, by the Act, *this Regulation* or an environmental planning instrument, required by the consent authority before determining a development application (emphasis added).[59]

The definition contains the additional text (italicised above) which implies that the Regulation itself will prescribe concurrence authorities. As the Regulation does not set out do this, and does not propose to do this, this provision is, at best, redundant and misleading, and at worst, it inappropriately paves the way for the addition of new concurrence authorities via regulation.

Recommendation 10: Definition of "concurrence authority"

The existing definition of "concurrence authority" should remain unchanged. That is, the definition should not permit or foreshadow the addition of new concurrence authorities via regulation.

1.10 Sea level rise

The Urban Taskforce has participated at length in consultations with the NSW Government on its *Sea Level Rise* policy. While the scientific evidence as to the existence of human induced climate change cannot be ignored, we have previously noted that there is no scientific consensus about the likely impact in distant timeframes. In particular, the Intergovernmental Panel on Climate Change (IPCC) has made it clear that such projections must inevitably, in part, be based on assumptions as the social, economic and technological development of the world and that it is not possible to assign a statistical probability to these assumptions. As a result the IPCC has prepared a number of climate change scenarios for the future, and the NSW Government has elected to base its sea level rise projections on the worst case scenario.

Nonetheless, given that the NSW Government has adopted the sea level rise benchmarks as formal policy, we do favour a system where there is a single uniform benchmark and councils are not permitted to apply their own standard as they see fit. As a consequence we support the provision in the draft regulations that will establish such a benchmark.[60]

Recommendation 11: Sea level rise benchmark

We support the principle of a single state-wide sea level rise benchmark. Given that the government has adopted such a number by policy, we think it is appropriate for it to be incorporated into the regulation via the proposed clause 123(2).

[59] Draft *Environmental Planning and Assessment Regulation 2010* cl 3.
[60] Draft *Environmental Planning and Assessment Regulation 2010* cl 123(2).

1.11 Proposed change to the lapsing of development approvals

Existing rules require that work on a development must be "physically commenced" within two to five years of the grant of a development application. However the requirements for physical commencement are not onerous and, in many circumstances, can be satisfied by a developer who wants to keep an approval current.

However the government recently enacted legislation authorising regulations to change the definition of "physically commenced" by regulation,[61] introducing a new level of uncertainty about the existing two to five year requirement.

The regulation proposes, for the first time, to reduce the scope of the phrase "physically commenced" under the authority of the new statutory provision. The new clause says that

> work is not taken to be physically commenced if that work only comprises the carrying out of a survey within the meaning of the *Surveying and Spatial Information Act 2002*.[62]

This is nothing more than an attempt to override the unanimous decision of the Court of Appeal in Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council.[63]

If the government is seriously proposing to set aside a Court of Appeal judgment it should provide an explanation as to why three justices of the Court of Appeal are wrong.[64] We do not think they were. It's worth briefly highlighting their decision and their logic for it.

In this decision the Court accepted that survey work comprising land clearing, pegging and the erection of permanent survey marks and which, therefore, involved physical activities upon its land, was capable of constituting engineering or construction work relating to an approved subdivision which had been "physically commenced" upon the subject land.[65] The provisions of the Act concentrate upon the physical activity which is required to be commenced so that the statutory provisions are concerned only with identifying the point at which physical site works, as distinct from office design and planning, commence. [66] A process is "physically" commenced by the application of physical labour on the land to which the consent applies. [67]

The public policy rationale for this is clear. The purpose of the "physically commenced" provisions is to preserve a development consent once a significant investment has been made by the applicant in reliance on the consent. Even office based design and planning can involve a significant investment by a developer, acting in reliance on development consent. However, a small amount of office work, costing an applicant $5,000 may be viewed as minor, even while more substantial office-based work may have cost an applicant $1 million. In many circumstances the mere carrying out of office-based work is a low threshold on which to base the prolonging of a development consent, and to use such a threshold would clearly lead to many consents being preserved where no significant monies had been expanded.

For this reason, the Act sets up a system which focuses on physical commencement. This normally means that a significant amount of (costly) office based design and planning has already taken place. While the physical work may, in itself, be minor, the office-based work that has come before it would

[61] *Environmental Planning and Assessment Amendment (Development Consents) Act 2010*.
[62] cl 160(1).
[63] 140 LGERA 201.
[64] Tobias JA, with Santow JA and Stein AJA agreeing.
[65] *Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council* 140 LGERA 201 [72] and [80].
[66] *Ibid.*
[67] *Ibid.*

have been substantial. The Department of Planning has made the mistake of confusing the minor physical work that survey involved and has sought to change the law (ignoring the substantial office work that would have come before).

The suggestion, by the Department of Planning, that the new clause is necessary to prevent surveys being carried out as a sham is not supported by the law. The courts have made it clear that not just any survey work will be accepted as constituting physical commencement. The Court said it was not the case that

> any survey work, albeit of a physical nature, would so qualify. Simply entering land in respect of which a subdivision has been approved and knocking in one or two pegs would not ... necessarily qualify. There is an element of fact and degree in each case. ... [T]he requirement that the relevant work relate to the approved subdivision requires a real nexus between them. In particular, the concept that the work must be "physically commenced", requires physical activity which involves an appearance of reality and which is not merely a sham. In other words, the relevant work must be more than merely notional or equivocal in that it must truly be work relating in a real sense to that which has been approved ...[68]

Survey work which merely is a sham will not save a consent.

Fluidity in the definition of "physical commencement" will make developers more cautious about spending money to seek approvals. By placing new, more restrictive rules on the life of development approvals the development process will slow down. Developers will need a higher degree of certainty about the project proceeding before they start spending large amounts of money on consultants, studies, etc necessary to secure development approval. **In short, development approvals that are more likely to lapse are less bankable.**

We note that the proposed clause only apples to a development consent granted after the date of commencement of the new regulation.[69] This clearly intended to ensure that the provision does not have retrospective effect. However it is far from sufficient. In reality, developers have been acquiring land, making investment decisions, spending many on studies, consultancies, etc, based on the existing provisions of the law.

For example, anyone who lodges a development application for a major project in the next 12 months has probably been working on it for more than 18 months. They will be retrospectively caught by these new rules. If this clause is to proceed (and we hope it does not) the transitional provision should ensure that it does not apply to any consents issued prior to two years after the commencement of the regulation.

Recommendation 12: Proposed change to the lapsing of development approvals

There should be no change in the current arrangements for lapsing of development approvals. The proposed clause 160 should be deleted, as it will make the process of spending money on consultants, studies, etc for development applications even more risky.

If clause 160 is to proceed, despite our objections, the transition provision in clause 160(2) should be revised so that the clause only applies to a development consent granted after two years of the date of commencement of the new regulation.

[68] *Ibid* [86] (Tobias JA).
[69] cl 162.

2. Part 3A of the Act

2.1 Failure for a deemed refusal to arise

In relation to project approvals, the Act current allows a proponent to seek a merits appeal to the Land and Environment Court after a deemed refusal period. Relevantly the Act says:

> A proponent who is dissatisfied with the determination of the Minister with respect to an application by the proponent under this Division may appeal to the Court within 3 months after:
>
> (a) the date on which the proponent received notice of the determination of the application in accordance with the regulations, or
>
> (b) the date on which *the regulations provide* that a pending application is taken to have been refused for the purposes only of this section (emphasis added).[70]

A similar provision exists in relation to concept plan approvals.[71]

The existing and draft regulation both then define the deemed refusal period to measure from the "end of the proponent's environmental assessment period" which is taken to be

> a reference to the time at which the proponent has complied with all of the Director-General's requirements [in relation to the provision of an environmental assessment] ... [72]

As a consequence, a proponent who submits an environment assessment that is rejected by the Director-General as inadequate is not able to appeal either:

- the merits of the Director-general's rejection; or
- the failure of the government to conclusively determine the application.

A deemed refusal period never arises and a rejection of the substantive application may never take place.[73] Hence, there is no entitlement to a merits appeal. A proponent subject to an unfair decision is left only with the inadequate remedy of section 123 proceedings. Such proceedings allows a review of decisions by the Land and Environment Court, but only in relation to breaches of the Act (i.e. matters of law, not the merits of the decision).

The absence of a right to a merits appeal, in this situation, contrasts poorly with Part 4. Under Part 4, an applicant is able to benefit from a deemed refusal, as matter of course, whether or not the consent authority believes all relevant matters have been addressed in exhibition material. We're concerned that proponents of retail, commercial and residential projects exceeding $100 million do not enjoy the same rights and protections as proponents of smaller projects.

We note that, prior to July 2009, such proponents effectively *elected* to be covered by Part 3A (by seeking a ministerial opinion that their project was "important in achieving State or regional planning objectives"),[74] but now are *required* to be assessed under Part 3A whether they choose to be or not. Given this change, a proper merit appeal right is vital, to reduce the risk of arbitrary decision-making, and mitigate the increased regulatory risk that is now apparent in some larger projects.

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[70] s 75K(2)(b).
[71] s 75Q(2)(b).
[72] Draft *Environmental Planning and Assessment Regulation 2010* cl 3; *Environmental Planning and Assessment Regulation 2000* cl 8A(2)(b).
[73] We note the proposed clause 12(1)(b) *allows* the Director-General to reject an application but does not *require* him/her to do so.
[74] *State Environmental Planning Policy (Major Projects) 2005* Schedule 1 clause 13, immediately prior to its amendment on 1 July 2009.

Recommendation 13: Definition of the "end of the proponent's environmental assessment period"

The regulations should prescribe *additional* dates on which a pending application for approval to carry out a project is taken to have been refused (for the purposes of enabling an appeal under section 75K(2)(b) and section 75Q(2)(b))). These dates would be:

- 21 days after an environmental assessment is received by the Director-General (in-line with clause 11(b) of the draft regulation), except where the environmental assessment is subsequently accepted by the Director-General prior to an appeal being lodged; and
- the date that the Director-General requires a proponent to submit a revised environmental assessment under section 75H(2), except where a revised environmental assessment is subsequently lodged and accepted by the Director-General prior to an appeal being lodged.

2.2 No deemed refusal period when a proponents gets right first go

The existing and draft regulation provides for a deemed refusal period for Part 3A projects.[75] However, the deemed refusal does not arise until a set period after "the end of the proponent's environmental assessment period" (the period varies depending on the complexity of the proposal).

This phrase is given a special definition by the existing and draft regulations.

The existing regulation says the "end of the proponent's environmental assessment period"

> is a reference to the time at which the proponent has complied with all of the Director-General's requirements under section 75H of the Act.[76]

While the draft regulation alters the definition ever so slightly to say that it

> is a reference to the time at which the proponent has complied with all of the Director-General's requirements under section ***75H (2)*** of the Act. (bold emphasis added).[77]

The new reference to subsection (2) of section 75H is curious.

The principal provision in section 75H is subsection (1), which says:

> The proponent is to submit to the Director-General the environmental assessment required under this Division for approval to carry out the project.

We would have thought that if any particular subsection of 75H needed to be singled out, it would be subsection (1). Instead, the proposed new definition refers to subsection (2):

> If the Director-General considers that the environmental assessment does not adequately address the environmental assessment requirements, the Director-General may require the proponent to submit a revised environmental assessment to address the matters notified to the proponent.

This drafting will create the strange scenario, where a proponent does not benefit from a deemed refusal period unless, after first submitting an environmental assessment under section 75H(1), the

[75] Draft *Environmental Planning and Assessment Regulation 2010* cl 13(2)-(3); *Environmental Planning and Assessment Regulation 2000* cl 8E(2)-(3).
[76] *Environmental Planning and Assessment Regulation 2000* cl 8A(2)(b).
[77] Draft *Environmental Planning and Assessment Regulation 2010* cl 3.

Director-General decides that the documentation is inadequate and requires a revised assessment to be provided. Only then will the right to a deemed refusal period commence.

In the routine case, where a proponent gets it right the first time, section 75H(2) will not be invoked and therefore the proponent will never be entitled to a deemed refusal period. This is of serious concern.

Recommendation 14: Definition of the "end of the proponent's environmental assessment period"

The existing definition of the "end of the proponent's environmental assessment period" should remain unchanged. That is, the definition should refer to section 75H generally, rather than section 75H(2). This will preserve the right to a deemed refusal of proponents who satisfy the Director-General with an adequate environmental assessment on the first attempt. In the event that a particular subsection must be nominated, it should be section 75H(1).

2.3 Definition of the "end of the public consultation period"

There appears to be a drafting error in clause 9(2)(a) of the draft regulation, which says:

> a reference to the end of the public consultation period for a project or concept plan is a reference to the end of the *period of 30 days* referred to in section 75H (3) of the Act in relation to the project or concept plan ...(emphasis added)

Section 75H(3) says

> After the environmental assessment has been accepted by the Director-General, the Director-General must, in accordance with any guidelines published by the Minister in the Gazette, make the environmental assessment publicly available for *at least* 30 days (emphasis added).

The provision in the draft regulation (as does the existing regulation)[78] assumes that the period is always 30 days, when section 75H(3) itself assumes that it is at least 30 days, and possibly longer.

Recommendation 15: Definition of the "end of the public consultation period"

The definition of the "end of the public consultation period" should refer to a period of "at least" 30 days, in line with section 75H(3), which it cites.

2.4 New power to reject an application after two years

The draft regulation proposes to give a new power to the Director-General to reject an application, if the applicant has failed to submit an environmental assessment within two years of being told of the Director-General's requirements. The terms of the new clause are as follows:

> The Minister may decide to reject a project application without determining whether to approve or disapprove of the carrying out of the project or to give or refuse to give approval for the concept plan (as the case requires) if:

[78] *Environmental Planning and Assessment Regulation 2000* cl 8A(2)(a).

...

(c) the proponent has been notified of environmental assessment requirements under section 75F (3) of the Act and has not within 2 years after being so notified submitted to the Director-General an environmental assessment that is acceptable to the Director-General.[79]

At face value this may seem reasonable, but several issues appear to have been overlooked.

2.4.1 Environmental assessment requirements may have been modified or re-issued

Firstly, environmental assessment requirements may have been issued two years ago, but modified more recently.[80] For this provision to operate fairly, the two years must date from the most recent notification of environmental assessment requirements or modification of those requirements, not from when they were first notified.

Recommendation 16: When environmental assessment requirements may have been modified or re-issued

The proposed clause 12(1)(c) should not permit a rejection by the Minister earlier than two years after the most recent notification of environmental assessment requirements or modification of those requirements.

2.4.2 Environmental assessments may have been determined as a result of a concept plan approval

When giving an approval for a concept plan for a project, the Minister is entitled to determine that there are further environmental assessment requirements for approval to carry out the project or any particular stage of the project.[81] Such requirements "have effect" for the purposes of Part 3A, Division 2, which includes section 75F(3).[82]

It is unclear how this rejection would operate in this context. For example, if the Minister has approved the concept plan, and determined that there are further environmental assessment requirements for approval of a particular stage of the project, this new provision might allow the Minister to reject the project application, merely because the application was lodged more than two years after such a ministerial determination.

This might occur, for example, if a concept plan approval is given for a project that is expected to be progressively developed over a ten year period. The Minister may determine environmental assessment requirements for a particular stage of the project which is likely to be developed in, say, five years. In this situation it would be entirely inappropriate for the Minister (or his/her successor) to have the power to promptly reject a Part 3A application if it is lodged after two years of the original ministerial determination, but three years before the relevant stage of the development was ever expected to proceed.

It is not enough that a Minister 'wouldn't do that' (although we're not sure that's true). Development approvals are a form of property right. They affect the land values. Projects are usually partly financed through first mortgages over development sites, based on the land value with the approval. If it is possible for an approval to be prematurely terminated without grounds, then the value of the approval, and associated land, will be lower, and projects will be less likely to proceed.

[79] Draft *Environmental Planning and Assessment Regulation 2010* cl 12(1)(c).
[80] *Environmental Planning and Assessment Act 1979* s 75F(3).
[81] *Environmental Planning and Assessment Act 1979* s 75P(1).
[82] Ibid.

In this context, it is worth noting that the legislative intention is that concept plan approvals should provide "up-front certainty for those projects or programs which are either long term or complex", be like "bankable security" and "reduce environmental and investment risks and costs".[83]

Recommendation 17: When environmental assessment requirements may have been modified or re-issued

The proposed clause 12(1)(c) should not apply to any requirements that "have effect" for the purposes of Part 3A, Division 2 by virtue of section 75P(1).

2.4.3 Proponents should be given the opportunity to 'show cause'

The existing and draft regulations currently allow the Minister to reject a project application where the proponent has submitted an environmental assessment, but it has failed to comply with the Director-General's requirements.[84] This provision does not allow the application to be rejected unless the proponent has been notified by the Director-General that the requirements have not been complied with and has failed to comply with those requirements within 21 days after being notified.

The new power to reject an application after two years is not contingent on any similar ('show cause') notice being given to a proponent that their application is about to be rejected. Surely, after two years, they should be warned that a rejection is under contemplation and given a chance to explain why an environmental assessment has not or cannot yet be submitted?

Recommendation 18: Proponents should be given the opportunity to 'show cause'

The proposed clause 12(1)(c) should not apply unless the Director-General has, within the previous 90 days, provided the proponent with a notice advising them of the possibility that their application will be rejected and inviting them to submit and environmental assessment or explain why an environmental assessment has not or cannot yet be submitted. The Director-General should be obliged to consider any consequent submission before making a decision to reject.

By the way, in relation to the existing provision: the scope and complexity of environmental assessment requirements now massively exceed that contemplated when Part 3A passed through Parliament in 2005. It now seems to us that 21 days is an unreasonably short period of time to amend an environmental assessment to remedy misunderstandings, etc that might easily arise in the context of such challenging and wide-ranging requirements.

We submit that the current 21 day timeframe should be revised to 90 days.

[83] The Second Reading Speech for the Bill that introduced Part 3A, the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005*, (Hansard 27 May 2005 p 16332).
[84] Draft *Environmental Planning and Assessment Regulation 2010* cl 12(1)(b); *Environmental Planning and Assessment Regulation 2000* cl 8D(3)(c).

Recommendation 19: Proponents should be given the opportunity to 'show cause'

The proposed clause 12(1)(b) should allow proponents at least 90 days, not 21 days, to rectify deficiencies in environmental assessments, before an application can be rejected.

2.4.4 Is there a power for the regulations to authorise the "rejection" of Part 3A applications?

Generally speaking, Part 3A envisages a system where the Minister approves or disapproves or fails to deal with Part 3A applications. The word "reject" does not appear in Part 3A.

The phrase does appear in the existing and new regulations.[85] However, there appears to be no grant of power for such a function to be assigned to the Minister via regulation. We note that Part 3A expressly authorises

> regulations ... for or with respect to *the approval* of projects (and concept plans for projects) (emphasis added) ...[86]

However, there is no express grant of power for the rejection of projects/concept plans.

Recommendation 20: Clause 12 should be omitted altogether if there is no power

The Department of Planning should review whether or not the government has a sufficient grant of power to enact clause 12 in the new regulation. In the event that there is no robust legal basis for the clause, it should be omitted from the regulation.

[85] Draft *Environmental Planning and Assessment Regulation 2010* cl 12; *Environmental Planning and Assessment Regulation 2000* cl 8D.
[86] s 75Z.

3. Fees

3.1 It's not the right time for general fee increases

Until 2007, NSW was the nation's number one state for building activity – this shouldn't have been surprising given that it's Australia's largest state. However, in 2007, Victoria stole NSW's title. [87] Victoria has never looked back – in the last financial year, for every dollar spent by builders in NSW, $1.20 was spent in Victoria.[88] While NSW accounts for 33 per cent of the population, it makes up just 24 per cent of Australia's building activity.[89]

The lack of building activity carries high social costs. In the last financial year, work started on 52,000 new Victorian private sector homes, while in NSW work only started on 26,000 homes.[90]

The housing undersupply is the main reason why rents in the inner suburbs of Sydney have been increasing at nine times the rate of inflation.[91] Each year more apartments and townhouses are built in Melbourne than in Sydney. On a per capita basis, Brisbane approves nearly three times as many new apartments and townhouses as Sydney.

Rents for three bedroom homes in outer suburban Sydney have increased by 30 per cent in the last three years.[92] In fact, rents for three bedroom homes across NSW have been increasing by an average of 9 per cent a year over the last three years.[93]

The disparity in housing production is not a recent phenomenon. Nor is NSW only out of step with Victoria. NSW produces less new housing per head of population than any other state or territory in Australia. In the last four calendar years, NSW has had the lowest levels of dwelling commencements in Australian Bureau of Statistics record-keeping history, each year setting a new record low. It's likely that 2010 will break that trend, but only by the strength of a massive 5,000 dwelling public housing expansion program which has only been made possible by an almost complete exemption of public housing from the NSW planning system.

In the environment we have difficulty in understanding how the Department of Planning can justify a nine per cent across-the-board increase in development application fees. Some fees are even going up by 30 per cent.[94] Fee increases of this kind cannot be supported at a time when NSW urban development is in such poor shape.

We note with alarm that, according to the regulatory impact statement, the proposed fee increases are just the beginning:

> **A broader review of fees may be appropriate at a later date** to assess the impacts that the proposed reforms to the Part 4 development assessment process may have on DA processing and assessment procedures for consent authorities, concurrence authorities and integrated development approval bodies. In the interim, the draft 2010 Regulation considered here proposes minor increases ... (bold added)[95]

[87] Australian Bureau of Statistics, *8755.0 - Construction Work Done, Australia, Preliminary, Jun 2010.*
[88] Ibid.
[89] Ibid.
[90] Australian Bureau of Statistics, *8750.0 - Dwelling Unit Commencements, Australia, Preliminary, Jun 2010.*
[91] Housing NSW, *Rent and Sales Report Issue 92*.
[92] Housing NSW, *Rent and Sales Report Issue 92* and *Rent and Sales Report Issue 80.*
[93] Ibid.
[94] E.g. planning certificate fees: Draft *Environmental Planning and Assessment Regulation 2010* cl 305; *Environmental Planning and Assessment Regulation 2000* cl 259. Building certificate fees are to go up as much as 19 per cent: Draft *Environmental Planning and Assessment Regulation 2010* cl 306; *Environmental Planning and Assessment Regulation 2000* cl 260.
[95] CIE, *Environmental Planning and Assessment Regulation 2010 Regulatory Impact Statement* (2010) 90.

Recommendation 21: Fees generally

No increase in planning permission and associated fees (under Part 4 or Part 3A) is warranted at this time.

3.2 Fees for modifications requiring only minor environmental assessment

As it stands the maximum fee for a request for a Part 3A modification that the Director-General considers will involve a minor environmental assessment is $750.[96] The draft regulation increases this fee by more than six times to $5,000.[97]

There is no adequate justification for the fee increase in the regulatory impact statement, nor has any material been publicly released which would provide a firm basis for this jump in charges. Remember, we're talking about modifications that only require minor environmental assessment.

Recommendation 22: Fees for modifications requiring only minor environmental assessment

The proposed six-fold increase in the fee for Part 3A modifications that only involve a minor environmental assessment (from $750 to $5,000) cannot be justified and should not proceed.

3.3 Fees for modifications generally to skyrocket

As it stands the maximum fee for a Part 3A modification that requires more than minor environmental assessment is as follows:

> (a) 50% of the fee paid for the Part 3A application in respect of the approval for the project or concept plan that is proposed to be modified, or
>
> (b) $2,000,
>
> whichever is the greater.[98]

However, the replacement provisions provides for massively increased fees. Namely, it says the maximum fee

> is $5,000 or if the sum of the following comes to a greater amount, that greater amount:
>
> (a) 50% of the amount that was paid in respect of the approval of the project or concept plan or the development consent that is taken to be such an approval, and
>
> (b) the amount that would be payable under clauses 278 and 280–283 [which set out the fees for substantive applications] where the request for an application for approval of a project or concept plan in respect of the modification only.[99]

In short, it seems the fees for a modification of a Part 3A approval will now always be greater than a Part 3A application for the same matter that is not a modification.

[96] *Environmental Planning and Assessment Regulation 2000* cl 245K(2).
[97] Draft *Environmental Planning and Assessment Regulation 2010* cl 287(3).
[98] *Environmental Planning and Assessment Regulation 2000* cl 245K(3).
[99] Draft *Environmental Planning and Assessment Regulation 2010* cl 287(4).

For example, if an approval originally authorised the construction of 1,000 dwellings, and a modification application sought the ability to build an additional 100 dwellings (perhaps based on a more efficient use of land than originally envisaged), the applicant would be forced to pay:

- a fee equal to 50 per cent of the original approval fee; AND
- a fee equal to whatever it would have cost if the applicant had merely sought approval to build 100 homes on a standalone basis.

This is a clearly punitive fee regime that can only be justified if the Department assumes that modifications are contrary in the public interest. Modifications are an inevitable and sensible consequence of good planning, responsiveness to market conditions and an evolving construction environment. Bear in mind, modifications can be sought for wide range of reasons, including, the discovery of Aboriginal human remains, re-consideration of environmental values or a desire to address new community concerns. Applicants seeking modifications should not face a punitive fee regime.

This punitive fee regime cannot be justified, as the costs of assessing a modification will almost always be much less than from assessing as substantive application.

Even the current modification fee is untenably high (given that Part 3A fees are routinely several hundred thousand dollars, a 50 per cent fee for a modification that may yield little additional monetary benefit for the applicant is excessive). However, the new proposed fee is completely over-the-top.

Recommendation 23: Fees for modifications requiring only minor environmental assessment

The proposed new punitive fee regime for Part 3A modifications should not proceed.

4. Development control plans

4.1 Role of SEPP 65 design review panels in DCPs

The proposed regulation provides that:

> The council must not make a draft development control plan (including an amending plan) containing provisions that apply to residential flat development unless the council: ... has referred the provisions of the draft development control plan that relate to design quality to the design review panel (if any) constituted for the council's area (or a region that includes the council's area) under *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development* ...[100]

This provision is now obsolete and should be omitted from the final regulation.

Firstly, the panels referred to were panels appointed by the Minister for Planning, not councils.[101] As far as we know, the terms of appointment of all ministerially appointed panels has expired. Any design panels still in place, are panels appointed and maintained by local councils themselves and therefore have not been constituted under the *State Environmental Planning Policy No 65 — Design Quality of Residential Flat Development*.

Secondly, this clause is identical to a clause in the current regulation inserted in 2002.[102] At that time it was commonplace for development control plans to re-state provisions in force by virtue of environmental planning instruments. The policy rationale was that re-stating provisions of other documents would have educative benefits, even though there was no sound legal reason to do so. For this reason, many development control plans have incorporated provisions of *State Environmental Planning Policy No 65*.

However, since then, government has realised that this is not helpful as it leads to excessively large regulatory documents, often with competing provisions dealing with the same issues, but using different language or slightly different provisions. That's why the Act was amended in 2005 to say that a provision of a development control plan, has no effect if it is the same or substantially the same as the provision of an environmental planning instrument.[103]

Recommendation 24: Role of SEPP 65 design review panels in DCPs

The proposed clause 31 should be deleted, as:

- the panels referred to no longer exist;
- the issues it seeks to cover are dealt with by the *Residential Flat Design Code* (in force under SEPP 65); and
- section 74C(5) of the Act, prevents a DCP reproducing the same material as an environmental planning instrument.

4.2 Wider reform of development control plans

Council instituted development control plans (DCPs) present a grave risk to the success of the comprehensive local environmental plan process. We foresee development proposals that are clearly

[100] cl 31(1).
[101] *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development* cl 19.
[102] clause 21A.
[103] s 74C(5).

envisaged by, and consistent with a Standard Instrument compliant local environmental plan being refused on the basis of a development control plan.

Traditionally, 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 for it.

However, in *Zhang v Canterbury City Council*[104] 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.[105]

In that matter, a consent authority dealt with a proposal for a development on the basis that the impact on other land had to be demonstrated if the application was to be refused.[106] This may seem – to a lay person – to be a common-sense approach. However, the consent authority ran afoul of pre-determined DCP 'standards' which required no evidence of adverse impact. The Court concluded, that the consent authority's approach could only be supported if there were no "standards" which the decision maker had to take into account.[107] 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" ....[108]

The *Zhang* approach, is now routine and has been applied for developments as varied as multi-unit residential development;[109] late night trading of entertainment venues;[110] alterations to individual dwellings;[111] and industrial premises.[112]

The Court of Appeal recently re-affirmed the *Zhang* approach and said the case had "authoritatively considered" this issue.[113] In this recent case the Court of Appeal made it very clear that a decision-maker was

> not entitled to take the view that the standards set by the DCP were inappropriate for reasons of general policy.[114]

It seems odd to us, 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 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 as the

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[104] (2001) 115 LGERA 373
[105] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 386-7 (Spigelman CJ); Meagher and Beazley JJA concurred. I agree with Spigelman CJ.
[106] *Zhang v Canterbury City Council* [2001] NSWCA 167 [76]; (Spigelman CJ); Meagher and Beazley JJA concurred.
[107] Ibid.
[108] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 387 (Spigelman CJ); Meagher and Beazley JJA concurred.
[109] 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].
[110] For example, see *Moonlight City Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 1004 [23].
[111] For example, see *Pietranski v Waverley Council* [2009] NSWLEC 1278 [17].
[112] For example, see *Botany Bay City Council v Premier Customs Services* Pty Ltd [2009] NSWCA 226 [5] (Macfarlan JA).
[113] For example, see Botany Bay City Council v Premier Customs Services Pty Ltd [2009] NSWCA 226 [24] (Macfarlan JA).
[114] *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA 226 [27] (Macfarlan JA); Ipp JA and Hoeben J concurred.

interpretation of the existing law, but we do take issue with appropriateness of the law. We think it needs to be changed.

In fact, as the law stands, if development standards in a DCP are not inconsistent with a local environmental plan, they can effectively prohibit a development - even when the local environmental plan allows an application to be made for the development.[115]

It's worth contrasting the differing approaches between NSW and Queensland. In Queensland, the presence of a code, creates a legally enforceable right for a development applicant to insist on the approval of their proposal, provided it satisfies the code (and the applicant is still entitled to a merit assessment in the event that the code if not complied with). In NSW, it is unlikely that any proposal inconsistent with a DCP will get serious consideration, while there is no legal certainty that even proposals that are consistent with a plan will be approved.

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 'standards' in his work: *Principles of Planning Law*, published by Oxford University Press.[116] 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.
>
> The tendency towards rigid enforcement of rules expressed as development standards is perhaps the most frustrating and destructive aspect of planning.[117]

No lessor authority than 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 now dominates 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.[118]

In NSW the fact that a development control plan can both effectively prevent the goals of a local environmental plan being achieved and considerably devalue land should be a cause for public concern.

The solution is straightforward.

Firstly, the government should use its powers to immediately limit the range of subject matters that can be covered by a DCP. A provision inserted into the Act in 2005 contemplated (and authorised) the government to limit the scope of DCPs.[119]

This means that some existing provisions in such plans should automatically become 'dead letter'. This process should not be dependent on a review of individual plans – that would take far too long to be of any practical value.

The approach we are suggesting is not unprecedented; it's effectively what the government did in 2008 when it created new state environmental planning provisions restricting council discretion on apartment

[115] *North Sydney Council v Ligon 302 Pty Ltd [No. 2]* (1996) LGREA 23.
[116] L Stein, *Principles of Planning Law* (2008).
[117] L Stein, *Principles of Planning Law* (2008) 76-77.
[118] *Reg v Wicks* [1998] AC 92.
[119] *Environmental Planning and Assessment Act 1979* s 74E(1)(a).

sizes and ceiling heights.[120] The effect of these changes was to render ineffective provisions in DCPs that prescribed more restrictive apartment sizes and ceiling heights than those required by the *Residential Flat Design Code*. Such DCP provisions immediately ceased to have any status, despite the fact they were still technically part of the text of a council-approved DCP.

The subject matter of development control plans should be limited to standards that are a necessary response to any of the following issues:

- flooding and stormwater;
- erosion, sedimentation, acid sulphate and soils salinity;
- the preservation of heritage streetscapes in heritage conservation areas;
- public open space;
- the external built form (by use of building setbacks and controls for bulk, roofs, glare and reflection, walls and front fence);
- views, access to sunlight, private open space, privacy;
- utility services;
- safety and security;
- signs;
- traffic access and safety, parking, loading and unloading;
- noise, odour, hazardous uses;
- waste management landfill;
- construction activity;
- outdoor dining; and
- road and pavement design.

Development controls plans should not be capable of containing:

- height, bulk, intensity or scale where height and/or floorspace ratio controls are set out in an applicable environmental planning instrument;
- any other standard where a development standard, addressing the same issue, is set out in an applicable environmental planning instrument;
- provisions concerning a building's interior, including its internal configuration, structure, materials or design or the mix of dwelling types within an apartment buildings (the Building Code of Australia and SEPP 65 should be sufficient); and
- energy or water efficiency requirements (BASIX is sufficient).

We have suggested that the subject matter of DCPs be limited by regulation, because of this submission into the review of a regulation. However, we have no preference as to the legal mechanism for achieving this outcome. We note, for example, the Act also allows the same end to be achieved via an environmental planning instrument.[121]

Secondly, development controls plans should not be proscriptive.[122] That is, they should be capable of setting out reasonable standards, but should not include prohibitions.

Thirdly, development control plans should only be one factor for consideration in development assessment and that it should not be given any special weight above other factors of consideration.[123]

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[120] *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development (Amendment No 2)* which inserted clause 30A into the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development.*
[121] s 74E(3).
[122] Section 74E(1)(a) allows the regulations to govern the form, structure and subject-matter of development control plans.
[123] Section 74E(3) allow an environmental planning instrument to exclude or modify the application of development control plans.

Fourthly, it is important that the existing planning principle that allows consent authorities to give reduced weight to development control plans is strengthened. These propositions currently exist only as a weak planning principle articulated by the Land and Environment Court.[124] (They are weak because they only apply when there is a policy void – and because of the limited power of the Court, to make policy they are phrased in tentative terms). Having regard to the existing planning principle, we suggest **it should be clear that a DCP or a development standard in a 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 (if the consent authority sees fit) the local level.[125]

Finally, a development applicant should be entitled to argue, that the requirements of a development control plan will adversely impact on the feasibility of a development envisaged by the local environmental plan. If established, a consent authority should be obliged to modify or set aside the requirements of the development control plan.[126] We note that other jurisdictions allow such arguments to be made (also see section 1.9).[127]

As a general point, restricting the content or application of development control plans does limit the discretion of a decision-maker to consider any proper planning matter. For example, a provision in a regulation may mean that the content of a development control plan on, say, the emission of radiofrequency electromagnetic energy, is dead letter. That would not prevent a consent authority, from considering the subject of radiofrequency electromagnetic energy in the particular circumstances of the case, if it was necessary to properly consider:

- the impact of the development on the natural and built environments;[128]
- social and economic impacts in the locality;[129] and/or
- the public interest.[130]

However, such considerations would need to be driven entirely by the circumstances of the case, rather than a pre-determined council policy or standard. In the case of radiofrequency electromagnetic energy (for example), this is appropriate, because the issue is not sufficiently localised to each local government area that there is a need for every council to have its own distinct policy. The council could draw on information, evidence and facts in the public realm (and published by public authorities with more expertise on the subject) as required.

[124] *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 [87] (McClellan CJ).
[125] Again, section 74E(3) allow an environmental planning instrument to exclude or modify the application of development control plans.
[126] And again section 74E(3) would authorise such a measure.
[127] *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); *R v Westminister City Council, Ex parte Monahan* [1990] 1 QB 87,111 (Kerr LJ).
[128] s 79C(1)(b).
[129] s 79C(1)(b).
[130] s 79C(1)

Recommendation 25 Wider reform of development control plans

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 a 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.

5. Development contributions

5.1 Unprecedented powers to block DAs without appeal

In November 2008, the existing regulation was amended to give Wyong Council an unprecedented new power to indefinitely delay development applications on the grounds that they have not finalised a contributions plan.[131] In August 2009 the government made further changes so that no development application can be decided in the "Western Sydney Employment Area" until a section 94 contributions plan has been approved or an agreement reached with council. The draft regulation proposes to re-enact these provisions without any amendment of substance.[132]

These provisions mean that, in the absence of such plans, developers are forced to agree to "voluntary" planning agreements in order to secure development approval – even though a rezoning has already taken place.[133] This contradicts the intent of provisions in the *Environmental Planning and Assessment Act* which were designed to protect industry from abuse of the system of voluntary planning agreements. The Act says that a council

> cannot refuse to grant development consent on the ground that a planning agreement has not been entered into ... [134]

Yet, despite these clear words, the government has amended the regulation to allow some local councils to do just that. This is disturbing, because it seems that even the threadbare protections, for industry that *are* in the Act are now being gradually dismantled and thrown away.

These provisions are not time-limited. Local councils are unlikely to ever develop section 94 contributions plans in these areas, given their new broad power to block development applications in the absence of such plans. Additionally, there is no right of merit appeal to the Court, or anyone else, if a council rejects a proposed voluntary planning agreement (while there would have been a merit appeal if the matter had been dealt with by a contributions plan).

We raised this issue with the Department of Planning and formally communicated our concerns to the Director-General by letter on 8 September 2009. As we said then, **any regulation, preventing a development application from being lodged or dealt with in the absence of a local council contributions plan should cease to have effect within six months of a rezoning taking place.**

In response, Mr Sam Haddad, Director-General of the Department of Planning, wrote to us on 2 October 2009 (DGC09/1594). Mr Haddad said:

> I note your concerns regarding the use of regulatory provisions to prevent the determination of development applications until a contributions plan is prepared. This mechanism has only been used in unique circumstances where the rezoning of lands for employment purposes have had a long and complex history, and the rezoning provides the landowners with certainty over the future use of the land without waiting for the contributions plan to be prepared by council. Your concerns regarding the use of this mechanism are noted and it is hoped that the use of regulatory provisions will not be required in the future.

The fact, that more than a year after these transitional provision have been inserted, no section 94 contributions plan is yet to be finalised in the areas, is evidence enough that we are correct in our assessment of the situation.

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[131] *Environmental Planning and Assessment Amendment (Warnervale Contributions) Regulation 2008; Environmental Planning and Assessment Amendment (Wyong State Significant Sites Contributions) Regulation 2008; Environmental Planning and Assessment Amendment (Western Sydney Employment Area) Regulation 2009.*
[132] Draft *Environmental Planning and Assessment Regulation 2000,* cl 349.
[133] *Environmental Planning and Assessment Regulation 2000,* cl 270-271B.
[134] *Environmental Planning and Assessment Act 1979*, s 93I.

The councils in these areas have now had sufficient time to prepare their contributions plans and these unprecedented regulatory provisions should not be re-enacted.

Recommendation 26: Removal of unprecedented powers to block DAs without appeal

The proposed clause 349, which confers unprecedented powers on councils to block development applications (without appeal) should be removed.

5.2 Exemptions from the existing section 94A cap

Councils currently have the power to impose a percentage-based levy on development sometimes called a "section 94A levy"). Councils have a free hand on how they spend this money. There is no requirement for there to be any connection between the developments that are burdened by the levy and the expenditure, of the money raised. Additionally, (unlike regular section 94 contributions) a developer cannot appeal to the Land and Environment Court for the charge to be set aside for a particular project. For this reason, the percentage-based development levies are more like a tax than a user charge.

The regulations have traditionally imposed a 1 per cent cap to ensure these charges do not get out of hand.

In the past four years, the NSW Government has been moving steadily to introduce more onerous levies in brownfield areas. This began in January 2007 when the then Minister for Planning changed the regulations to authorise a 2 per cent (of project costs) local council levy for developments in Wollongong's commercial core zone.[135]

On 7 December 2007, the government moved to change the law to allow a 3 per cent development levy, in a whole variety of zones set out in the *Liverpool City Centre Local Environmental Plan 2007* (with a 2 per cent levy in some other zones).[136]

On 21 December 2007, (four days before Christmas) the government followed on with a further change to the law to permit a 4 per cent development levy in the Gosford city centre.[137] On the same day the law was also changed to allow a new 3 per cent levy in the Parramatta city centre.[138] Fresh back from the Christmas break on 1 February 2008, the government changed the law to authorise a 3 per cent local council development levy in the Newcastle city centre.[139]

There appears to be no grounds for different rates to apply in different areas. For example, why is there only a 2 per cent contribution for residential development in Liverpool, yet residential development in Gosford is required to make a 4 per cent contribution?

There is a clear pattern here: development levies have been gradually ratcheted up from 1 per cent to 4 per cent in the space of one year. However, at least, by the end of 2007, it was only the Department of Planning's six "regional cities" that had been allowed to break the one per cent cap.

[135] *Environmental Planning and Assessment Amendment (Levies) Regulation 2007*.
[136] *Environmental Planning and Assessment Amendment (Liverpool City Centre Levies) Regulation 2007*.
[137] *Environmental Planning and Assessment Amendment Regulation 2007*.
[138] *Environmental Planning and Assessment Amendment (Parramatta City Centre Levies) Regulation 2007*.
[139] *Environmental Planning and Assessment Amendment (Section 94A Levies) Regulation 2008*.

In May 2010 the NSW Government made a further change to the regulation to allow Sydney's highest ever percentage development levy to be imposed in Burwood town centre.[140] The levy adds 4 per cent to project costs and is supposed to raise up to $187 million.

In Burwood the planned levy means developers of:

- a 150 apartment block; or
- 15,000 square metres of office space,

would be required to pay $2 million in local council charges. This could easily make projects unviable.

This is an unheard of revenue grab by a suburban council. It is now the highest percentage development levy in Sydney and means that Burwood's development charges will exceed those of the Sydney CBD, Parramatta CBD and Liverpool CBD. This new levy will delay serious urban renewal around the Burwood town centre.

The Henry Tax Review, released in May 2010, criticised levies of this kind.

It concluded that development levies were only justifiable when they reflected "the avoidable costs of development".[141] The report explained that

> ... where infrastructure charges are poorly administered — particularly where they are complex, non-transparent or set too high — they can discourage investment in housing, which can lower the overall supply of housing and raise its price.[142]

The recently fluid nature of percentage-based development framework, and the apparently random levels of levies, has created considerable uncertainty. The Henry Review observed that:

> Where developer charges are set in an ad hoc fashion or are subject to unexpected changes, they can create uncertainty around new developments. If infrastructure charges are increased after a developer has bought land from its original owner, they cannot be factored into the price previously paid for the raw land. In this case, the charge would lower the expected return from the development. In addition, general uncertainty about charging is likely to discourage development activity, which could reduce the overall supply of housing and increase the price of housing. [143]

This illustrates why the stability of the pre-existing 1 per cent cap was important to business confidence and the willingness of developers to acquire sites in NSW.

As we mentioned above, these levies are not required to bear any relationship with actual infrastructure required by specific developments. On this point the Henry Tax Review said that

> In general, infrastructure charges will operate more effectively if they are set to reflect the cost of infrastructure, not to tax the profit of development.[144]

However, it is clear, for example, that the Burwood levy was set based on the perception of the industry's 'capacity to pay'. In fact, Burwood Council justified its levy, not on the detail of its infrastructure requirements, as much as a report by Hill PDA showing that the levy could be borne by industry. This was the main subject of discussion between the government and council.. Even when the government required a lower levy, there was no actual change to the council's $187 million infrastructure plan, which is unlikely ever to be implemented.

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[140] *Environmental Planning and Assessment Amendment (Burwood Town Centre Levies) Regulation 2010*.
[141] Commonwealth of Australia, Australia's future tax system: *Report to the Treasurer: December 2009: Part Two Detailed analysis: volume 2 of 2*, 427 [Recommendation 70]
[142] Ibid 428.
[143] Ibid 426-427.
[144] Ibid 424.

The Henry Review said that levies can act

> like a tax and can discourage development. This is more likely to occur where the size of the charge is not set relative to the cost of infrastructure but the developer's capacity to pay. In these cases, the charges may attempt to capture part of the increase in value resulting from the provision of infrastructure or from changes in zoning, that is, to impose a betterment tax .... However, the benefit to the developer is difficult to determine ...[145]

The review explained that betterment taxes

> ...can increase the uncertainty associated with land development. To operate effectively, betterment taxes need to isolate the increase in value attributable to the zoning decision or the building of infrastructure from general land price increases at the local level. This is often difficult since the value of land will move in anticipation of a change in rezoning. Sometimes this can occur many years before the re-zoning. Betterment taxes may be applied on an ad hoc basis and the rate of the betterment tax is sometimes left to discussions between developers and government as part of the planning approval processes, rather than being set in a transparent manner. Betterment taxation can involve lengthy disputes as, by setting the tax conditions, the dispute is really about how to share the economic rent.
>
> Additionally, having a betterment tax in place may encourage governments to create economic rent through additional zoning restrictions or delays in land release, in order to raise more revenue. Where zoning is used in such a manner, it is likely to stop land being developed to its most productive use — at least in the short run. A land tax applied to all types of land ..., is likely to encourage governments to allow land to be used for its most productive use as this will increase the value of the land (and hence increase the revenue raised from land tax).[146]

Bankstown and Willoughby councils are both presently seeking to waive the one per cent cap. Like Burwood, these are not "regional cities" and this suggests that the one per cent cap remains an unstable and unpredictable policy setting. Now that the door is open, an increasing number of councils are likely to push against it. It also only a matter of time before councils that have previously set 2 or 3 per cent levies seek to increase them to match Burwood's levy.

In our view, **the primacy of the one per cent cap should be restored and all percentage-based levies in excess of that cap should be scrapped.**

Recommendation 27: Restoration of a stable 1 per cent on percentage-based development levies

The proposed clause 49 should be revised so that it reflects the terms of clause 25K of the *Environmental Planning and Assessment Regulation 2000* as it stood prior to 30 January 2007. This would see a blanket cap of 1 per cent on all percentage-based development levies.

[145] Ibid.
[146] Ibid.

6. Existing uses

"Existing use" rights are a landowners' right to continue a land-use or operate a business that pre-dates current planning controls.

Such provisions provide stability and certainty to property ownership. Without strong, existing use rights, every new planning scheme is retrospective – potentially shutting down existing businesses or throwing people out of their homes. In the absence of existing use rights, governments are free to rezone (for example), high density residential land to low density; or commercial offices to light industrial. Strong existing use rights give a purchaser of land protection from arbitrary changes in a planning scheme that could either prohibit the current land-uses on a site or steal away the future development potential of a site. In essence, these provisions give a land purchaser some assurance about what they're purchasing.

Until 2006, NSW law allowed existing land-uses, (such as a business or home) to be enlarged, expanded or intensified, altered, extended, rebuilt, or be changed to another use, including a use that would otherwise be prohibited under the Act.[147] Existing use rights arise when the use of a site is prohibited by a planning scheme introduced after the 'use' commenced on the land.

While development consent was still required for 'existing use' re-development, the approval could be granted even if it was prohibited by a planning scheme that was made after the existing use right arose.[148] It was even possible to totally re-build buildings, in accordance with existing use rights, even though a planning scheme had prohibited the given use after the existing use rights arose.[149]

In 2006 and 2007, the NSW Government changed the law to dramatically narrow the scope of existing use rights for landholders.[150] As a result commercial and industrial premises subject to existing use rights cannot enjoy a change of use under existing use provisions if the alterations:

- involve anything more than minor alterations or additions;
- involve an increase of more than 10 per cent in the floorspace;
- involve the rebuilding of the premises;
- involve a significant intensification of that existing use; or
- relate to premises that have a floorspace of 1,000 square metres or more.

What's more, an existing commercial use that had been subsequently prohibited by a planning scheme could only be changed to another commercial use (and not to a prohibited light industry or residential use). Similarly, an existing light industrial use could be changed to another commercial or light industrial use, but not a prohibited residential use.[151]

Aside from the fact that the changes were an outrageous retrospective interference with the rights of many thousands of landowners across NSW, they were completely unnecessary. The previous law had required that a development application could be lodged and dealt with on its merits. That previous law still provided plenty of scope for a consent authority to deny development approval if a new proposed land-use (put forward under existing use rights) was inconsistent with good planning principles.[152] The removal of the long-standing ability to re-develop sites under existing use rights substantially reduced the ability for infill sites to be re-developed in a relatively efficient way, by making rezoning an almost certain prerequisite in a much wider category of cases. The inertia of the slow,

[147] Cl 41, *Environmental Planning and Assessment Regulation 2000* published in Gazette No 117 of 8.9.2000, p 9935.
[148] Ibid cl 42 and cl 43.
[149] Ibid cl 44.
[150] *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006* and the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007*.
[151] *Environmental Planning and Assessment Regulation 2000*, cl 41(1) (as amended by the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007).*
[152] *Bonim Stanmore Pty Ltd v Marrickville Council* (2007) 156 LGERA 12

inefficient and obstructive rezoning process has prevented many re-developments from taking place that might have otherwise occurred under existing use rights.

Additionally, a recent court decision (*Iris Diversified Property Pty Ltd v Randwick City Council*)[153] spelt out some additional, unanticipated consequences, of the 2006 regulation change. Previously, the development standards in a local environmental plan did not apply to the re-development of a site subject to existing use rights. However, now development standards in an LEP will apply to the assessment of a conforming use.

None of this is an academic debate. NSW planning schemes can and are changed to the detriment of the existing development potential of a site.[154] Any investor in NSW must now factor in the risk that development potential of land could be stolen overnight through a rezoning without compensation for any loss of value.

We note that the draft regulation proposes to drop one restrictive provision. The existing regulation prevents premises of 1,000 square metres or more, used for a commercial or light industrial use (subsequently prohibited by a planning instrument), from being changed to another (still prohibited) commercial or light industrial use (respectively).[155] This restriction is illogical and should be removed, as proposed,[156] but so should the other restrictions imposed in 2006.

Recommendation 28: Restoration of existing use rights removed in 2006

While we support the proposal to remove the 1,000 square metre cap on the exercise of existing use right for commercial or light industrial premises, the draft regulation should go much further. The provisions on existing use rights should be returned to their pre-2006 state.

[153] 173 LGERA 240.
[154] For an example of down zoning in action see *GPT Re Limited v Belmorgan Property Development Pty Ltd* [2008] NSWCA 256.
[155] *Environmental Planning and Assessment Regulation 2000*, cl 42(2).
[156] Draft *Environmental Planning and Assessment Regulation 2010* cl 66(2).

7. Public accessibility of information

7.1 Policies, strategies, etc should be on the internet

A decision-maker who wants to refuse development consent is literally blessed with an unending array of rules, policies, strategies and ordinances which can be relied upon to justify a "no".

In 2003 the NSW Court of Appeal declared that environmental planning instruments are not the only documents that can be used to block new development, and that a consent authority is able to refuse permissible development by referring to a wide range of material outside the formal planning processes on "public interest" grounds.[157] This decision is now regularly cited by both consent authorities and the courts when relying on a wide range of obscure material to justify saying "no" to an otherwise permissible development.

In 2005, the Act was amended to simplify council policies by requiring that only one development control plan should apply to any given parcel of land.[158] However, councils have undermined the effectiveness of this red tape reduction measure by adopting all sorts of policies, outside of the single development control plan, which may still be used in the development assessment process.

We congratulate the Department for its decision to establish a Register of Development Assessment Guidelines.[159] Many of our members have already found this a very helpful resource which has helped navigate the approval process.

It remains a problem, however, that most local councils have not emulated the Department's approach. It is normal for councils to include development control plans on their website, but it is not normal for councils to bring together, on a single web page, the many other council-documents which may be considered in development assessment. Sometimes, these documents are not on the web at all, but buried in council files. Their existence may come as a complete surprise to development applicants who have purchased land on the basis of the publicly available local environmental plan and development control plan.

We ask that the Department put in place two reforms as part of this process.

Firstly, **regulations should be put in place requiring policy, strategic documents or reports prepared by or for council be made available on a single web page maintained by each council** (a "register of development assessment guidelines"). This requirement will only apply to documents capable of being considered as part of a development assessment.

We note that there is an existing statutory requirement that development control plans (DCPs) are made available for inspection at council offices (see below).[160] However, neither the existing nor proposed regulations say anything about the vast array of strategies, heritage significance statements, policies, etc that are now routinely considered during development assessment.

Given that the Land and Environment Court has established planning principles, allowing consideration of council policies in development assessment (even when they are not embodied in development control plans), it is crucial that the documents be readily accessible to the community.[161] The Court has found that a "consent authority might range widely in the search for material as to the public

[157] *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 [81].
[158] s74C(2).
[159] NSW Department of Planning, *Draft Development Assessment Guidelines: Part A: Development Applications under Part 4 of the Environmental Planning and Assessment Act* (2009) 8.
[160] s 74E(4).
[161] *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 184; *Aldi Foods Pty Ltd v Holroyd City Council* [2004] NSWLEC 253.

interest".[162] Surely, if the Council is to have such broad discretion, those who are in the business should be entitled to know up-front, which documents council regards as important.

Even site specific studies or guidelines should be on-line if the councils intend that they be used in development assessment at some future point in-time. While the current owner of the land may already be well aware of these studies, subsequent purchasers may not be aware. By putting such documents on-line, there is an opportunity for purchasers to identify them as part of the due diligence process undertaken before an interest in land is acquired. If these documents are likely to restrict development potential, then the limitation can be taken into account at the time when deciding whether or not to make a purchase and agreeing on a purchase price.

Recommendation 29: Each council should have a web page with all policies, strategies, etc capable of being considered in the development assessment process

Each council should have a web page showing all local policies, strategies, etc that are likely to be considered "in the public interest" as part of the development assessment process.

Secondly, **the absence of a document, from either the Department of Planning's or a council's on-line register, should suggest that the document will not be given any substantive weight during development assessment.**

The Act allows a regulation to be made, adding a matter to the list of issues a consent authority is to take into consideration when deciding on a development application.[163] We submit that a provision be inserted into the regulations, requiring a consent authority to consider whether any relevant documents were placed on an on-line "Register of Development Assessment Guidelines" since their approval/adoption.[164]

Such a provision will require a consent authority to consider whether it should heavily discount a document's significance when the requirement to make the document easily accessible to the public has not been adhered to. We note that this approach has been taken by the government in relation to administrative decisions and related policy documents for many years.[165]

Recommendation 30: Each council should have a web page with all policies, strategies, etc capable of being considered in the development assessment process

The absence of a document, from either the Department of Planning's or a council's on-line register, should suggest that the document will not be given any substantive weight during development assessment.

Such a provision will require a consent authority to consider whether it should discount a document's significance when the requirement to make the document easily accessible to the public has not been adhered to. This could be achieved by adding a matter to the list of issues a consent authority is to take into consideration when deciding on a development application under section 79C(1)(iv).

[162] *Terrace Tower Holdings v Sutherland Shire Council* (2003) 129 LGERA 195, 210.
[163] s 79C(1)(iv).
[164] This would be an amendment to clause 92(1) of the *Environmental Planning and Assessment Regulation 2000*.
[165] *Freedom of Information Act 1989* s15(3); *Government Information (Public Access) Act 2009* s 24.

7.2 Availability of draft and amending development control plans and repeal notices on the web

Multiple provisions of the draft regulation require important documentation to be made publicly available on the government websites, including:

- Part 3A documents;[166]
- minutes of meetings;[167] and
- Planning Assessment Commission reports.[168]

Yet, in relation to draft development control plans, all the regulation says is that:

> Copies of the draft development control plan, and of any relevant local environmental plan or deemed environmental planning instrument, are to be made available to interested persons, either free of charge or on payment of reasonable copying charges.[169]

There is no obligation to place draft development control plans on a website. There should be.

This is important, not just for the purposes of an exhibition period. The Land and Environment Court legitimised the use of *draft* development control plans in development assessment decisions.[170] If they are to be employed for this purpose their ready availability on the internet must be assured.

Recommendation 31: Availability of draft development control plans on the web

The proposed clause 28 should be amended so that draft development control plans must be made available to the public via the council's website.

Similarly, development controls are amended by subsequent development control plans, yet these amending development control plans are not readily available on the internet. Such documents should be available, in the same way that amendments to statutory instruments are available.

It's worth noting that the Land and Environment Court has made it clear that the making of a development control plan is a legislative act rather than an executive act.[171] The public accessibility of documentation therefore, should follow the modern legislative practices, rather than those appropriate for executive decisions.

By making such amending DCPs publicly available online in a central point (i.e. with other amending DCPs) it is possible for a member of the public to:

- verify that changes made to a principal development control plan reflect the precise changes authorised by an amending DCP; and
- track the history of a provision in a DCP, and collect evidence relevant to the application of the Land and Environment Court's planning principle on the weight given to development control plans.[172]

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[166] cl 15.
[167] cl 332.
[168] cl 341.
[169] cl 28.
[170] *Aldi Foods Pty Limited v Holroyd City Council* [2004] NSWLEC 253 [42]-[43].
[171] *National Australia Bank Ltd v Drummoyne Municipal Council* 130 LGERA 299
[172] *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.

The *Government Information (Public Access) Act 2009* open access provisions do not extend to amending DCPs, only the principal DCPs. Since a DCP must now be considered as a "fundamental element" in or as a "focal point" of the decision-making process, it is crucial that not only the principal DCP, but all amending DCPs, are readily available in the same way that environmental planning instruments are available.[173]

Recommendation 32: Availability of amending development control plans on the web

The proposed clause 22 should be amended so that amending development control plans must be published on the council's website in a central readily accessible place.

Likewise, repeal notices are not available on the web. The only way a member of the public would normally become aware that a DCP is no longer in force, is if they happen to see an advertisement to that effect in a local newspaper (unlikely) or they notice that the DCP is no longer listed on the council's website (which may not be up-to-date).

Recommendation 33: Availability of repeal notices on the web

The proposed clause 23 should be amended so that notice repealing a development control plans should be published on a council's website in a central readily accessible place.

7.3 A single website containing all development control plans

One difficulty confronted by regular users of planning controls is that every council has a distinct approach to making development controls plans available. Council websites are all structured differently and many are difficult to navigate.

There would be a benefit if councils were all required to upload the current version of their development control plan(s) to a central website maintained either by the Department of Planning or the local government and shires associations.

The proposed regulation provides that:

> A development control plan comes into effect on the day that public notice of its making is given in a local newspaper, or on a later day specified in the notice.[174]

This provision is dated. In the modern age, publication on a website, well known to those with an interest in development control plans, is a far more effective means of informing the community about new development controls. Additionally, website publication enables the community to review the entire instrument straight away, while a newspaper advertisement, generally just supplies the instrument's name. Of course, many communities have several local newspapers, so it is often unclear in which paper a notice may be published, and where in the paper such a notice would be published.

While the *Government Information (Public Access) Act 2009* requires councils to place development control plans on their website as part of their open access information, this is not a precondition to them coming into effect, and usually there is lag between the finalisation of a development control plan and its appearance on a council website. The new regulations can and should address this problem.

[173] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 386-7 (Spigelman CJ); Meagher and Beazley JJA concurred.
[174] cl 30(4).

Recommendation 34: A single website containing all development control plans

The proposed clause 30(4) should be revised so that a development control plan comes into effect on the day that it is published on a website, approved for that purpose by the Director-General, or on a later day specified in the notice. The Director-General would only be able to approve one such website for the whole state.

7.4 Availability of draft and amending contributions plans and repeal notices on the web

As we mentioned in relation to development control plans above, multiple provisions of the draft regulation require important documentation to be made publicly available on the government websites, including:

- Part 3A documents;[175]
- minutes of meetings;[176] and
- Planning Assessment Commission reports.[177]

Yet, in relation to contribution plans, the regulation does not require draft plans, amending contributions or notices repealing plans to be published on the internet, nor made available as an historical record on a central website. The arguments in favour of such availability are set out above in relation to development control plans.

Recommendation 35: Availability of draft and amending contributions plans and repeal notices on the web

The proposed clauses 52, 53, 56 and 57 should be amended so that draft contributions plans, amending contributions plans and repeal notices for contributions plans must all be made available to the public via the council's website. The latter two should be available from a single point on a council's (or government) website to enable easy verification of the accuracy of a principal contributions plan and to establish the reasonableness of a plan, by reference to its historical evolution.

For the reasons we flagged above, in relation to development control plans, we believe that public accountability would be improved if all contributions plans were available on a single website.

Recommendation 36: A single website containing all contributions plans

The proposed clause 55(4) should be revised so that a contributions plan comes into effect on the day that it is published on a website, approved for that purpose by the Director-General, or on a later day specified in the notice. The Director-General would only be able to approve one such website for the whole state.

[175] cl 15.
[176] cl 332.
[177] cl 341.

7.5 Public disclosure of planning agreements

The *Government Information (Public Access) Act 2009* requires state government agencies and local councils to keep a register of government contracts that records information about each government contract to which the agency is a party that has (or is likely to have) a value of $150,000 or more. This requirement is not well understood by the Department of Planning or local councils.[178]

Provisions of the existing and the draft regulation provides for a competing register of planning agreements,[179] although there are some differences. The details of low-value planning agreements do not need to be disclosed in the register of government contracts, but they do need to be disclosed in the planning agreement register.

Significantly, the documents that do form part of the register of government contracts must be placed online, while those that form part of the planning agreement register need not appear on a website.

We recommend that the planning agreement register requirements be rationalised so that they better complement (and do not overlap with) requirements of the *Government Information (Public Access) Act 2009*. However, there should be no loss of transparency or community accountability.

Recommendation 37: Public disclosure of planning agreements

The proposed clauses 44 and 45 should be rationalised, so that they better complement (and do not overlap with) requirements of the *Government Information (Public Access) Act 2009*. However, there should be no loss of transparency or community accountability.

7.6 Maps

Much of the planning system remains a mystery, accessible only to those who have the corporate knowledge - accumulated over years of decoding the internecine documents produced by the Department of Planning. This, of course, significantly impacts on the costs of development and the heightened perception of regulatory risk.

One area of continuing opacity and legal uncertainty relates to the availability of maps for significant long-standing environmental planning instruments.

For example, *State Environmental Planning Policy No 71—Coastal Protection* only applies to land within the "coastal zone".[180] "Coastal zone" is said to have the same meaning as in the *Coastal Protection Act 1979*.[181] According to the *Coastal Protection Act 1979* the "coastal zone" is relevantly defined by reference to

> the area of land and the waters that lie between the western boundary of the coastal zone (*as shown on the maps outlining the coastal zone*) and the landward boundary of the coastal waters of the State (emphasis added) ...[182]

The Act goes on to provide that the reference to "maps" is:

> A reference to maps outlining the coastal zone is a reference to ...the maps approved for the purposes of this Act by the Minister ...[183]

[178] s 27.
[179] Draft *Environmental Planning and Assessment Regulation 2010* cl 44 and cl 45; *Environmental Planning and Assessment Regulation 2000* cl 25F and cl 25G.
[180] cl 4(1).
[181] cl 3.
[182] s 4(1)(b).

The maps do not form part of the Act and are not available on the Parliamentary Counsel website. The Act does contain this "editorial note":

> For approvals published in the Gazette, see Gazette No 140 of 18.11.2005, p 9629. This does not constitute a complete list of approvals.[184]

As the note makes clear, additional maps may have been approved which are not mentioned. Additionally, the note is not intended to have legislative force in its own right and will not necessarily have been amended if the maps approved and published in 2005 have been rescinded.

The Department of Planning maintains a web page which includes maps which purport to describe the coastal zone.[185] According to the web page, the maps

> show the areas within the greater metropolitan region (GMR) declared to be part of the NSW Coastal Zone.

However, there is no copy of the instrument by which ministerial approval was given to these particular maps under the terms of the *Coastal Protection Act*. In fact, there is no mention of whether these particular maps are coastal zone maps, for that particular Act (i.e. how do we know they have not been prepared for some other definition of coastal zone under an alternative instrument?). There is no statement at all saying who approved the maps, but what authority and when they came into effect. There is no statement assuring us that the maps are current. There is no mention of SEPP 71 which is what got us started on the wild goose chase to start with.

Similar issues arise in connection with the State *Environmental Planning Policy No 14—Coastal Wetlands*, *State Environmental Planning Policy No 26—Littoral Rainforests* and many other documents.

Little attention seems to be paid by the Department of Planning to publishing the chain of documentation that is necessary to assure a property purchaser, investor or financer that the information they are examining is current and correct. The failure to publish online legally coherent and robust maps is only the most appalling of many examples.

While some efforts have been in relation to new Standard Instrument complaint local environmental plans, it is not clear to us that this been addressed in relation to old local environmental plans, new or old state environmental planning policies, or maps sanctioned directly by legislation.

Recommendation 38: Availability of maps from a central point online

All maps that have been approved under or in connection with the *Environmental Planning and Assessment Act* (including its regulations and environmental planning instrument) should be placed online, with a copy of the dated instrument of approval, and a clear indication as to whether the maps are current, and if they are not current, when they ceased to be current.

[183] s 4A.
[184] s 4A.
[185] <http://www.planning.nsw.gov.au/PlansforAction/Coastalprotection/Metropolitanregioncoastalzonemaps/tabid/178/Default.aspx> at 2 November 2010.

8. Declaration that land be released

"Land release" is a term commonly used to describe the process of converting rural land, on the edge of urban areas, to urban uses. This involves the provision of infrastructure by both property developers and public authorities.

However, a relatively recent "innovation" in NSW is to define land "release" as a particular legal stage in a six step process.[186] This particular process only applies in Sydney.

This technical approach to the release land means that work does not commence on a precinct plan ("a development code") unless the Minister has formally declared that land has been "released".[187] This adds another bureaucratic layer to the land development process that seems to serve no useful purpose. (If the Hunter doesn't require this process, why does Sydney?)

We support the elimination of the formal requirement, in the growth centres, for land to be "released" prior to the commencement of statutory planning. Progression towards statutory planning should be capable of being driven by either a proponent or a public authority. It only complicates the process to require a ministerial declaration before a planning authority and a proponent can commence work on a statutory planning framework. If the declaration process were truly vital to greenfield land development, why would this not apply in the rest of NSW?

Recommendation 39: Declaration that land be released

The formal requirement, in the growth centres, for land to be "released" prior to the commencement of statutory planning should be eliminated. Progression towards statutory planning should be capable of being driven by either a proponent or a public authority.

This would require the deletion of the proposed clause 353 and the consequential amendment of the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*.

[186] National Housing Supply Council, *2nd Annual State of Supply Report* (2010) 202-203.
[187] *Environmental Planning and Assessment Regulation 2000*, cl 275(2); Draft *Environmental Planning and Assessment Regulation 2010* cl 353(2).

8. Planning certificates

8.1 Proposal to gut planning certificates

The Act allows the public to apply to a council for a planning certificate with respect to land in that council's local government area.[188] Councils must include information in a planning certificate as outlined in the existing regulation and other legislation.

According to the regulatory impact statement:

> These are often called 'basic planning certificates' ...[189]

This terminology is not as widespread as the regulatory impact statement suggests. In fact, these certificates are most commonly known as either "section 149 certificates" or "section 149(2) certificates". These documents are far from basic and play a vital role in alerting purchasers of a property of regulatory matters that may affect the property's value. As the regulatory impact says:

> [Planning certificates include] matters relating to: relevant environmental planning instruments and development control plans, zoning and land use provisions, complying development, coastal protection, mine subsidence, road widening and road realignment, hazard risk restrictions, flood-related development controls, land reserved for acquisition, contributions plans, biodiversity certified land, biobanking agreements, bushfire prone land, property vegetation plans, tree orders, directions under Part 3A, and site compatibility certificates for seniors housing, infrastructure and affordable rental housing.[190]

Developers are often purchasers of property. We use these certificates as part of our due diligence on a site, to ensure that we understand, as far as practicable, the regulatory issues a site may face. The certificates are required to be attached to contracts for the sale of land during conveyancing.

While an alert developer may find the relevant information out through other means, this may be time consuming, expensive and its accuracy would be questionable (for example, most government agencies place information on their website, but also issue legal disclaimers instructing people that the information should not be relied upon). Additionally, in the absence of such certificates, amateur developers (who do not do their research) are likely to outbid professional developers for sites, but then run into trouble once they discover regulatory constraints. Such an outcome is contrary to the public interest, because it will delay desirable urban development projects and prolong the presence of vacant and underutilised sites.

Local councils and incumbent property owners are constantly trying to water down planning certificates to reduce work load and boost property value respectively. However, as major purchasers of property, any move to water down or reduce the effectiveness of planning certificates alarms property developers. We favour their maintenance and strengthening (to reduce regulatory risk and ensure realistic prices are paid for development sites).

We are disturbed that the regulatory impact statement totally fails to communicate the nature and effect of the regulation changes concerning planning certificates. We are surprised at the complete disconnect between the statements of the regulatory impact statement and the clear text of the draft regulation.

According to the regulatory impact statement:

> Under the draft 2010 Regulation it is proposed that the regulations continue to prescribe all items currently listed in Schedule 4 of the 2000 Regulation (with one exception in relation to coastal protection) so that the public can continue to access this information via planning certificates. The main change proposed

[188] Section 149(2).
[189] CIE, *Environmental Planning and Assessment Regulation 2010 Regulatory Impact Statement* (2010) 105.
[190] Ibid 104.

> however is to remove certain information from section 149(2) planning certificates and prescribe them instead as *mandatory matters* for inclusion on full planning certificates (along with any other matters that a council may be aware of under section 149(5) of the Act) (emphasis added).[191]

In the above quote we italicised the assurance of the regulatory impact statement that it would be "mandatory" to include all matters on a so-called "full planning certificate". The statement is not true. It does not correspond with the black-and-white text of the draft regulation. The draft regulation provides the opposite. It says:

> (1) The prescribed matters to be specified in a ["basic"] planning certificate are the matters set out in Part 1 of Schedule 5.
>
> (2) The matters set out in Part 2 of Schedule 5 are additional matters that *may* be specified in a ["full"] planning certificate (emphasis added).[192]

The reference to "prescribed matters" invokes a provision of the Act which says that:

> On application made to it ... the council *shall*, as soon as practicable, issue a planning certificate specifying such matters relating to the land to which the certificate relates as may be prescribed (empathises added) ...[193]

Hence, it is the matters that are "prescribed" that "shall" (i.e. must) be included in a planning certificate.

According to the terms of the draft regulation the "additional" matters "may" be included on a planning certificate. "May" unquestionably means that the council will now have discretion as to whether or not this information is to be included on a planning certificate.[194]

Aside from the fact that councils would now be free to reduce their workload by electing not to provide information on so-called "full" planning certificates, there is significantly increased risk for a person relying on information that is voluntarily provided by council in a certificate.

In relation to the so-called "full" planning certificate (not a phrase that appears in the Act or regulation) the Act says:

> (5) A council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware.
>
> (6) A council shall not incur *any liability* in respect of any advice provided in good faith pursuant to subsection (5) (emphasis added).[195]

The utility of planning certificates is greatly reduced if councils are not compelled to stand behind them, in a legally accountable way. This proposal effectively transfers risk of error from the body that is in the best position to manage the risk (local council) to a party who is much less likely to be able to manage and quantify the risk (a property purchaser). This is a poor outcome and is likely to lead to dead-weight losses. The regulatory impact statement's misunderstanding as to the nature of the regulatory proposal has caused it to overlook a key economic cost.

In case there is any doubt about the significance of the matters that will now be discretionary (or the misunderstanding embedded in the regulatory impact statement) consider this extract:

> In addition to any other matters a council may wish to include, it is proposed under the draft 2010 Regulation that the following matters be transferred from section 149(2) planning certificates and *prescribed for inclusion on full planning certificates* instead:
>
> - contributions plans applying to the land;

[191] Ibid 105.
[192] Draft *Environmental Planning and Assessment Regulation 2010* cl 356.
[193] s 149(2).
[194] *Interpretation Act 1987* s9.
[195] s 149(5)-(6).

- property vegetation plans applying to the land;
- biobanking agreements applying to the land;
- biodiversity certified land;
- tree dispute orders made in relation to a tree on the land;
- Part 3A directions under section 75P(2)(c1) of the Act removing the effect of prohibitions or restrictions under EPIs;
- seniors housing site compatibility certificates;
- infrastructure SEPP site compatibility certificates; and
- affordable rental housing site compatibility certificates (emphasis added).[196]

These are all important matters in assigning a proper value to land. At the present time all of these matters must be disclosed on a section 149(2) certificate. As this information *is* currently prescribed for inclusion in a planning certificate, the council is accountable for the consequences of any negligence. As we have shown above, the draft regulation does not "prescribe" these matters for inclusion (despite the assertion to the contrary in the regulatory impact statement).

What does this mean? A developer who buys land under the impression that there is no applicable section 94 plan (because none was mentioned in the certificate obtained by the developer under section 149(5)) will have no recourse against the council.

A developer who has been assured by a seller, that land is subject to a site compatibility certificate (which may boost land value), will be unable to easily and reliably verify that assertion if a council has elected to omit that information from its section 149(5) certificate.

The regulatory impact statement goes onto to say that:

> The overall effect of these sets of measures is to reduce the information that has to be recorded on the basic section 149(2) planning certificates that has to be attached to a contract for the sale of land. Note that the same information will still need to be collected for disclosure on the full planning certificate.[197]

The first sentence is right. The second sentence is wrong. It comes close to the truth when it says:

> A refined certificate will limit the legal risks and practical difficulties for councils and the property industry caused by overly complex, onerous and cumbersome certificates that may readily become invalid or out-dated.[198]

It will certainly make life easier for councils, but it will make life much more difficult and riskier for property purchasers. It will also dampen economic activity through an inappropriate transfer of risk. The "property industry" generally will not benefit from this change, although it might benefit incumbent property owners who will be able sell land for a higher price than warranted if:

- the purchaser has either not obtained a section 149(5) certificate; or
- they did obtain such a certificate and the council omitted or provided incorrect information.

In evaluating the costs and benefits, the regulatory impact statement wrongly says the benefit of this reform will be:

> Increased information about land for interested parties

[196] Ibid 106.
[197] Ibid.
[198] Ibid.

Recommendation 40: The proposal to gut planning certificates should be dropped

All of the matters that must be disclosed on a section 149(2) certificate must continue to be disclosed. That is, the proposed clause 356 should merely re-enact the existing clause 279, and the related schedule should not be divided into two parts.

8.2 Ensuring that all conservation areas and items of environmental heritage are disclosed

The purpose of planning certificates was described by the Hon. Paul Landa MP, the Minister for Planning and Environment in the second reading debate for the original *Environmental Planning and Assessment Act* in 1979. Mr Landa said that section 149 was to provide:

> for a certificate that will detail *all controls* applying to a particular piece of land. A person may obtain that certificate from the relevant authority and it will provide in a single instrument the information [a person] ... would seek (emphasis added).[199]

The existing and draft regulations give effect to this intent, in part, by including a requirement for a planning certificate to disclose:

> ... whether the land is in a conservation area (however described),
>
> ... whether an item of environmental heritage (however described) is situated on the land.[200]

These current provisions are appropriate and should not be changed. They include any kind of "conservation area" even if another label is given to it. Similarly, the presence of any item of "environmental heritage" must be disclosed - even when described in different terms by the relevant statutory regime.

The *Environmental Planning and Assessment Act* itself makes it clear that the contents of a planning certificate relate to matters:

> arising under or connected with this *or any other Act* or otherwise (emphasis added) ...[201]

It seems that at least some councils have not kept pace with the ever-more complex and competing layers of land use controls.

Notably, the following forms of local statutory controls are not presently disclosed by planning certificates:

For example, declared:

- world heritage properties;
- national heritage places; and
- Ramsar wetlands,

under the *Environment Protection and Biodiversity Act 1999* (Cth) ("the EPBC Act") are, unquestionably, forms of "conservation areas".

The EPBC Act forbids any person from taking any "action" that would have a significant impact on such places. The EPBC Act provides a framework for the issuing of approvals, for the approval of such an "action". There is also a process where a proponent can establish whether or not approval of proposed

[199] NSW, *Parliamentary Debates*, Legislative Council, 21 November 1979, 3387 (Paul Landa).
[200] *Environmental Planning and Assessment Regulation 2000* Schedule 4 cl 2(g)-(h); Draft *Environmental Planning and Assessment Regulation 2010* Schedule 5 cl 2(g)-(h).
[201] s 149(2).

action is required under the EPBC Act (i.e. to decide whether it is a "controlled action"). A Federal-NSW bilateral assessment agreement is in place which allows the assessment regimes, under the *Environmental Planning and Assessment Act* ("EP&A Act"*)* to be automatically accredited under the EPBC Act.[202]

This bilateral agreement makes it clear that, under the existing provisions of the EP&A Act, there is an obligation on all consent authorities to consider the impacts of the development on the environment (including biophysical, social and economic factors) including impacts on the above listed declared places.

There is a requirement for the NSW Minister, the Director-General or the consent authority to issue guidelines to proponents of controlled actions. These guidelines may be generic or may be issued on a case-by-case basis. The consent authority must provide the Commonwealth with a copy of the assessment report that addresses the relevant impacts of the controlled action.

Clearly, not only are the places declared under the EPBC Act "conservation areas" (which in itself are enough to mandate their inclusion in a planning certificate), the machinery of the E,P&A Act has been co-opted to help give effect to the EPBC Act's declared areas.

Yet some councils do not provide complete information about EPBC Act declared areas, or when they do so, include them as optional (restricted-liability) information under section 149(5), rather than mandatory disclosures under section 149(2).[203]

Similarly, the *National Parks and Wildlife Act 1974* (NSW) allows "Aboriginal places" to be declared to conserve places of special significance with respect to Aboriginal culture.[204] Again, the mere nature of an Aboriginal place is enough to establish that it is a conservation area, and therefore a mandatory item in a planning certificate. However, it is also worth noting that no consent can be issued under the E,P&A Act's Part 4 for any development that might "harm or desecrate an Aboriginal place", except and the integrated development procedures.[205]

These are just examples of the problems. The problem is not with the text of the regulation. The problem rests in councils' narrow understanding of what a conservation area is, or what an item of environmental heritage is. We think the issue is best addresses by the insertion of a note into the new Schedule 5, following items 2(g) and 2(h). The note would highlight that examples of conservation areas or items of environmental heritage include:

- land protected or preserved under the *State Environmental Planning Policy No 14—Coastal Wetlands*; or the *State Environmental Planning Policy No 26—Littoral Rainforests*;
- an area declared to be an aquatic reserve under Division 2 of Part 7 of the *Fisheries Management Act 1994*;
- an area declared to be a marine park under Part 2 of the *Marine Parks Act 1997*;
- land, places, buildings or structures listed on the State Heritage Register
- land, places, buildings or structures listed as heritage in an environmental planning instrument;
- an Aboriginal place declared under the *National Parks and Wildlife Act 1974*; and
- world heritage properties, national heritage places; and Ramsar wetlands declared under the EPBC Act.

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[202] *Agreement between the Commonwealth of Australia and the New South Wales Government under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 relating to Environmental Impact Assessment*, January 2007.
[203] For example, see this section 149 certificate issued by Newcastle City Council: <http://majorprojects.planning.nsw.gov.au/files/36496/Appendix%20O%20(5)%20-%20Phase%201%20Environmental%20Site%20Assessment.pdf> at 2 November 2010.
[204] s 84.
[205] s 91.

Recommendation 41: Ensuring that all conservation areas and items of environmental heritage are disclosed in planning certificates

A note should be inserted into the new Schedule 5, following items 2(g) and 2(h). The note would highlight that examples of conservation areas or items of environmental heritage include:

- land protected or preserved under the *State Environmental Planning Policy No 14—Coastal Wetlands*; or the *State Environmental Planning Policy No 26—Littoral Rainforests*;
- an area declared to be an aquatic reserve under Division 2 of Part 7 of the *Fisheries Management Act 1994*;
- an area declared to be a marine park under Part 2 of the *Marine Parks Act 1997*;
- land, places, buildings or structures listed on the *State Heritage Register;*
- land, places, buildings or structures listed as heritage in an environmental planning instrument;
- an Aboriginal place declared under the National Parks and Wildlife Act 1974; and
- world heritage properties, national heritage places; and Ramsar wetlands declared under the EPBC Act.

9. Further information

The Urban Taskforce is available to further discuss the issues outlined in this submission.

Please contact:

Aaron Gadiel
Chief Executive Officer
GPO Box 5396
SYDNEY NSW 2001

www.urbantaskforce.com.au

Ph: (02) 9238 3955
E-mail: admin@urbantaskforce.com.au