Urban Taskforce
AUSTRALIA

15 November 2010

Mr Brad Hazzard, MP
Shadow Minister for Planning
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Hazzard

Re: *Planning Appeals Legislation Amendment Bill 2010*

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.

We're writing to express our concerns with some aspects of the above-mentioned legislation.

1. **Planning arbitrators scheme**

   We did not oppose the original (unimplemented) planning arbitrators scheme which was included in 2008 planning legislation. We are unconvinced of any necessity for a change from the model previously articulated by the NSW Government.

2. **New conciliation-arbitration scheme should be voluntary**

   The planning arbitrators scheme allowed dissatisfied applicants a full merit appeal in the Land and Environment Court after a determination by a planning arbitrator.[1] This was consistent with the principle that arbitration is a voluntary alternative to a robust court process, not a blanket replacement for it. We note that our view is consistent with the description of the Department of Justice and the Attorney-General who say that:

   > **Alternative Dispute Resolution** (ADR) is a term used to describe a variety of different processes, in which an impartial person helps people to resolve their disputes. The word 'alternative' is usually understood to mean that these processes are an *alternative* to having a decision made by a judge in court (emphasis added).[2]

   By participating in an arbitration process the applicant loses the right to a conventional robust merit appeal. **An applicant must be entitled to opt-out of the scheme.**

3. **A mandatory conciliation-arbitration scheme should not be extended beyond small-scale development**

   In the second reading speech for the bill, the government said that

   > [i]f conciliation-arbitration is successful, it will be open to the Attorney General to expand by regulation the types of *small-scale development* that can be included in the scheme (emphasis added)

   However, the text of the bill does not reflect the government's stated intention. Schedule item [1] inserts a new section 34AA into the *Land and Environment Court Act 1979*. **The provision places no restrictions on the types of development that the government may include in the**

[1] *Environmental Planning and Assessment Amendment Act 2008*, Schedule 2.1 [37], proposed section 97(6).
[2] <http://www.lawlink.nsw.gov.au/lawlink/adr/ll_adr.nsf/pages/adr_index> at 26 October 2010.

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

conciliation and arbitration function by regulation.[3] Furthermore a general power is given to the Court to force any matter to be dealt with through this process.[4]

We oppose the proposed provisions in section 34AA(1)(a)(ii)) and section 34AA(1)(b)). The provisions may be used to force applicants of larger and more complex developments into a conciliation-arbitration model. We would have no objection if applicants were always assured, via a legislated right, to opt-out of the scheme and pursue a conventional merit appeal in the Court.

4. A commissioner who presides over a conciliation conference should be disqualified from conducting an arbitration, unless the parties otherwise agree

For sound reasons of public policy, it is neither practicable, nor desirable, for a commissioner who presides over a conciliation conference to then preside over an arbitration without the consent of the parties.

The existing provisions of the Land and Environment Court prevent a commissioner from presiding over a conciliation conference and subsequent proceedings without consent.[5] Furthermore, in an industrial relations context, it has been customary to ensure that a commissioner presiding over a conciliation conference does not conduct a subsequent arbitration if any party to the dispute objects.[6]

The reason for this is clear. If a conciliation conference is to be successful, parties should be free to speak frankly, make concessions and offer compromises in the hope of reaching an agreed outcome. The presence of the person who will ultimately conduct an arbitration in the event that no agreement will be reached will reduce the candour (and therefore the effectiveness) of the conference. Parties will be anxious to avoid compromising their position in the event that the matter goes to arbitration.

Additionally, a conciliation conference often can involve a degree of informality and frank discussion with a commissioner about the nature of the matters in dispute. It is possible that the commissioner's language or conduct may lead a party to conclude that the commissioner will bring less than an open mind to any arbitral proceedings. If the commissioner is allowed to preside in those circumstances the public confidence in the Court may be weakened.

In judicial proceedings it is open for a party to apply for a judge to recuse him or herself, but due the prohibition on revealing the events at a conciliation conference in proceedings,[7] there will be no opportunity for such an application in connection with an arbitration by a commissioner.

In the second reading speech for the Bill, the government said that

> in relation to existing conciliation practices, 85 per cent of matters that go to a section 34 conciliation conference are disposed of by the commissioner who undertook the initial conciliation either because the parties reached agreement or otherwise agreed to the same commissioner disposing of the matter.[8]

This figure is a furphy, because it includes matters where the issue was successfully resolved through conciliation. (It's only commonsense that a commissioner who just resolved a matter by conciliation should then give effect to that resolution by any necessary orders.) The government also says:

> Over 48 per cent of matters not settled by agreement during conciliation were later disposed of by the same commissioner that conducted the conciliation.[9]

This means, at the present time, a majority of matters not settled during conciliation are not dealt with by the same commissioner. This is unsurprising for the reasons we outlined above.

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[3] Proposed section 34AA(1)(a)(ii)).
[4] Proposed section 34AA(1)(b)).
[5] s 34(13).
[6] See for example, section 105 of the former *Workplace Relations Act 1996* as stood prior to the introduction of WorkChoices.
[7] *Land and Environment Court Act 1979* s 34(11).
[8] <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/c33563ab13039a1fca2577d60016adf3/$FILE/LC%20Planning.pdf>
[9] Ibid.

The existing provisions of the Land and Environment Court that ensure that the commissioner who resides over an unsuccessful conciliation conference does not further deal with a matter (without consent) **should be retained in the new conciliation/arbitration model.**

5. <u>The right for those who apply to amend a development consent to appeal after 40 days should be retained in the Act</u>

Schedule 1 [15] proposes to delete the existing section 96(6) of the *Environmental Planning and Assessment Act*. This provision relates to application to *amend* an existing development consent issues by a council or a planning panel. This provision currently says:

> An applicant who is dissatisfied with the determination of the application or the failure of the consent authority to determine the application ***within 40 days*** after the application is made may appeal to the Court and the Court may determine the appeal (bold emphasis added).

The bill also proposed to delete a similar provision that relates to amendments to development consents issued by the Land and Environment Court.[10]

The new provisions do not specify how long an applicant must wait before they have a right to appeal to the Court. Instead the provision allows this matter to be dealt with by regulation. We have no confidence that such a regulation will treat applicants fairly.

It's worth briefly explaining why we are very concerned about any move to transfer the appeal time periods for amendments to development consent, to the regulations.

The provisions of the Act referred to above, relate to application to <u>amend</u> existing development consents. The equivalent provisions for applications for an initial development consent are more complex and are already in the regulations. They include intricate rules requiring the 'clock' on appeal rights to be stopped in various circumstances.

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. **<u>The regulations are to be amended to remove the ability for agencies or councils to stop the clock.</u>** 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).[11]

However, the government recently exhibited the new draft regulation which does not end stop-the-clock at all.[12] There are four clauses that still clearly require the clock to be stopped.[13] To add insult to injury, the Department of Planning is still proceeding to <u>lengthen</u> 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 day 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 <u>cut</u> from 70 to 50 days.[14]

Given that the government has not hesitated to walk away from the clear text of Mr Sartor's second reading speech in 2008, **we do think the Parliament should allow the government to**

[10] Schedule Item 1 item 16 deletes the existing section 96AA(3).
[11] The Hon. Frank Sartor MP, Minister for Planning, NSW Parliamentary Hansard (12 August 2008) 7695.
[12] Draft *Environmental Planning and Assessment Regulation 2010*
[13] Draft *Environmental Planning and Assessment Regulation 2010* cl 115-118.
[14] Draft *Environmental Planning and Assessment Regulation 2010* cl 75(1); *Environmental Planning and Assessment Regulation 2000*, cl 113B(1).

move the time period for appeal rights on amendments to development consents to the regulations. If the move is allowed, we would anticipate that the process will be revised to the disadvantage of development applicants (and the state).

Thank you for the opportunity to make these comments. We would welcome an opportunity to discuss these issues further.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer