Urban Taskforce
AUSTRALIA

22 November 2010

The Hon. Eric Roozendaal MLC
Treasurer of NSW
Minister for State and Regional Development
L36, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Treasurer

Re: The impact of a recent court case on land tax on urban development in NSW

As you are aware, 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.

The urban development industry has serious concerns about the implications of a recent decision of the NSW Supreme Court: *Leda Manorstead v Chief Commissioner*.[1] This decision related to whether certain land used for primary production qualified for the primary production land tax exemption.[2] While we understand that the individual property owner concerned may appeal the decision, we are concerned about the broader public policy implications if this decision stands.

In brief terms, this decision involved a parcel of land that had been rezoned for urban uses, and was subject to a development approval for a residential subdivision, but was nonetheless still in use for primary production (cattle grazing). At the relevant time, the property owner had expended $12.4 million on earthworks under terms of the residential subdivision development approval, but no actual building or infrastructure construction was underway and none was imminent. As earthworks were completed, the area was top-dressed and grassed and made available for cattle-grazing.

As you would be aware, the *Land Tax Management Act* provides that land that has been zoned urban is still exempt from land tax if:

- the "dominant use" of the land is for primary production;
- it has a significant and substantial commercial purpose or character; and
- it is engaged in for the purpose of profit on a continuous or repetitive basis (whether or not a profit is actually made).[3]

The key issue in the case was whether or not the carrying out of the earthworks – a preliminary step to construction – was a "use" of the land, and if so, whether it was the "dominant use" of land.

This case reveals a lack of clarity in the law. In fact the judgment itself says:

> What is revealed is a lack of consistency in the [judicial] authorities.[4]

Nonetheless, the Court engaged in a highly semantic exercise, analysing conflicting past cases from Victoria, British Columbia (in Canada), Queensland and NSW before concluding that the mere carrying out of earthworks was sufficient to became the dominant use of a parcel of land, and

[1] [2010] NSWSC 867
[2] Under the *Land Tax Management Act 1956* (NSW) s 10AA.
[3] s10AA(2)-(3).
[4] *Leda Manorstead v Chief Commissioner* [2010] NSWSC 867 [31].

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therefore result in the loss of a land tax exemption. It is worth noting that, at every point in time in this case, earthworks were only being carried out on just a quarter of the property concerned.[5] Experts agreed that 84 per cent of the site was committed to grazing.[6] The judgement itself says that

> [f]rom a land use perspective cattle grazing predominate[d] over the areas the subject of earthworks.[7]

In reaching its decision the Court also apparently gave weight to the fact that the land owner described itself as a property developer.[8]

The consequences of this decision for the industry and the wider community are clear.

Firstly, property developers will not commence preliminary work, such as earthworks, unless they are prepared to proceed with the whole project immediately. This outcome is contrary to the public interest, because it encourages developers to defer expenditure (and therefore postpone jobs and economic activity) and will ultimately extend the time it takes to complete development. Longer development times:

- increase the cost of new housing;
- reduce investment in new housing; and
- dampen housing supply.

Secondly, property developers will seek to scale back rezoning requests and development applications, so that only small areas of land are rezoned (or subject to development approval) at any given point in time. This 'drip-feed' outcome is contrary public interest because it would mean duplicated assessment processes and increased costs for land use regulators (councils and the Department of Planning). The additional embedded cost of red tape (extra legal, town planning, engineering, consultancies, etc) for each dwelling will impact on housing affordability. This more complicated regulatory approach is also likely to take longer and dampen housing supply.

Thirdly, property developers will avoid becoming the freehold owner of land used for primary production. This will not have impact of substance, other than it carries with it additional red-tape, the costs of which will need to be recovered in the final sale prices of new homes.

When developers adopt the above strategies, there will be no additional land tax for state, but the community will be worse off because investment will be deterred or delayed and new housing supply postponed. **Good public policy should incentivise a developer to carry out early works without imposing a penalty.**

We urge the government to take immediate action to ensure that developers face no tax penalty merely because they have carried out preliminary works on land subject to primary production.

We look forward to discussing this matter with you further.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

[5] Ibid [104].
[6] Ibid [106].
[7] Ibid [107].
[8] Ibid [88].