Urban Taskforce
AUSTRALIA

Improving local council accountability

The public accessibility of information held by local government

A submission to the Information Commissioner in response to *Consultation paper 1: Development applications and personal information on websites - issues for local councils*.

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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

This paper has been prepared in response to *Consultation paper 1: Development applications and personal information on websites - issues for local councils* ("the consultation paper"). The consultation was released by the NSW Government's Office of the Information Commissioner.

Generally speaking, we are of the view that local government decision-making is not sufficiently transparent (although there are some notable exceptions). We believe improved transparency would benefit NSW commercially (by attracting investment dollars based on a more certain planning regulatory environment) and boost public confidence in council decision-making.

We urge the Office of the Information Commissioner to seriously consider all of our recommendations, not just those that are in direct response to the specific issues nominated in the consultation paper.

In relation to the consultation process, we urge the Office of the Information Commissioner, in future, to proactively contact groups that represent the users of local council services when seeking feedback on transparency issues concerning local government.

In the consultation paper the Office of the Information Commissioner has identified four options for dealing with the disclosure of personal information provided in relation to development applications.

We support "Option 2 – publish all information about DAs on websites" with some qualifications. We strongly support the maintenance of the two existing exclusions from the open access regime, relating to internal plans of the residential parts of a building and commercially sensitive information. Beyond these two exclusions we do not see a basis for further limiting the information placed on a website.

To deal with some of the specific examples nominated in the consultation paper:

- There is no need to submit personal photos that identify particular people as part of a development application. An applicant's personal hardship factors are of little relevance and will rarely be decisive to planning decisions.[1] In the rare scenarios, where normal planning considerations have been subordinated to an exceptional or special circumstance, the argument for complete transparency is at its strongest. In any event, such matters can be communicated without photos depicting specific people. Applicants can merely be warned that the material will be placed online.
- Government documents bearing signatures are routinely published online. There is no evidence that this has paved the way for fraud.
- If an applicant has provided financial details relate they are already supposed to be withheld (see above). There normally no role for personal stories of financial hardship in development assessment.
- If private citizens wish to avoid disclosing their own phone numbers they can arrange for their architect or town planner (or a friend) to lodge the development application on their behalf and be the official contact for the council. Any person may lodge a development application, as long as they have the relevant land owners consent.

[1] *Longa v Blacktown City Council* 54 LGRA 422; *Ellmoos v Sutherland Shire Council Citation* [1962] NSWR 1353; *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].

Objections *should* be placed on the public record if they are to be considered as part of the development assessment process. We note that a vast number of development proposals are defeated, not because of any intrinsic problems with the idea, but because of the opposition of existing residents and businesses who have a philosophical or vested interest in blocking new development.

Incumbent business operators, who play an important role for local government at election time, have strong vested interest in mobilising campaigns against new developments that may place them under competitive pressure. Under the State's planning laws, existing businesses regularly object to development applications from potential new competitors. They may make political donations and lobby against development approvals being granted. Lists of objectors to new development frequently include a long line of large and smaller businesses whose commercial interests will be impacted by new development. Well-off individuals also often make objections to development applications in a bid to push-up their property values.

The reality of local government decision-making is that legitimate technical issues favouring an approval are often balanced against the political pressure exerted by individuals and businesses seeking to boost their property values and (businesses) seeking to protect themselves from competition, personal and commercial interests favouring refusal.

The text of the written objections and the identity and addresses of the objectors is important in determining whether decisions to refuse new development are based on genuine concerns as to legitimate planning issues, or attempts to inappropriately preserve private interests at the expense of the wider public interest. By making such submissions publicly available, the applicant, independent members of the community and the media are able to readily scrutinise recommendations and/or decisions to refuse development, and the objections, and decide for themselves whether a decision to refuse is political or based on genuine technical merits of a proposal.

The scrutiny of the identity, motives, addresses of objectors in the public interest is as important as the scrutiny of the application itself.

We have also given some thought to other transparency and accountability issues relating to the implementation of the new *Government Information (Public Access) Act 2009* in local government.

Firstly, we think that **policies, strategies, etc should be more readily available on the internet.**

The Department of Planning maintains a Register of Development Assessment Guidelines for state government sanctioned policies.[2] 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 of Planning'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. Often they are on the web in the most nominal sense (for example, they are on the web by virtue of their inclusion council papers two years ago, but not on the web page which lists council development policies). The existence of such documents 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 suggest that guidelines 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.

[2] NSW Department of Planning, *Draft Development Assessment Guidelines: Part A: Development Applications under Part 4 of the Environmental Planning and Assessment Act* (2009) 8.

Secondly, **draft and amending development control plans and repeal notices should be available on on the web.** At the current time 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 sanctioned the use of *draft* development control plans to guide development assessment decisions.[3] If they are to be employed for this purpose their ready availability on the internet must be assured.

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.

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).

Thirdly, **there should be 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.

Guidelines produced by the Information Commissioner should insist that development control plans are published on the internet prior to, or on, the day that they come into effect.

Fourthly, **draft and amending contributions plans and repeal notices should be available on the web.**

Again, in relation to contribution plans, councils do not typically publish draft plans, amending contribution plans or notices repealing plans to be published on the internet, nor are they 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.

Fifthly, **we support public disclosure of planning agreements as per the law.**

The *Government Information (Public Access) Act 2009* requires state government agencies and local councils to keep a register of government contracts that record 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 local councils.

Our members are keen to ensure that local councils fully comply with the law in relation to the public disclosure of voluntary planning agreements, and we think it is necessary for the Information Commissioner to proactively work with local councils to ensure they meet their obligations in this regard.

Sixthly, **more needs to done to disclose maps, without disclaimers.**

The regulations under the *Government Information (Public Access) Act 2009* require local councils to place environmental planning instruments on the internet, but there is no express reference to maps that are referred to in (and crucial to understanding of an) environmental planning instrument).[4]

[3] *Aldi Foods Pty Limited v Holroyd City Council* [2004] NSWLEC 253 [42]-[43].
[4] *Government Information (Public Access) Regulation 2009*, Schedule 1, clause 2(c).

The intent of the *Government Information (Public Access) Act 2009* is seriously undermined if, when information is placed on the web, members of the public are forced to absolve the council or the consequences of their own negligence before they are given access to essential regulatory information. This is, for example, the practice of Burwood Council. Other councils attach a disclaimer making it clear that they are not confident the information on their website is accurate or can be relied upon. No such disclaimer is considered necessary, for example, for Parliamentary Counsel's website.

Table of recommendations

Recommendation 1: We prefer option 2, with a proviso

Our preferred option is clearly number two, subject to the existing exclusion that there should be no publication of:

- the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and its external configuration in relation to the site on which it is proposed to be erected; or
- commercial information, if the information would be likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret.

The text, identity and address of objectors should also be published, subject to the existing exclusions (e.g. for defamatory material).

Recommendation 2: 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 3: Availability of draft development control plans on the web

Draft development control plans must be made available to the public via the council's website, even if they are no longer on public exhibition.

Recommendation 4: Availability of amending development control plans on the web

The guidelines should make it clear that all amending development control plans must be published on the council's website in a central readily accessible place, in addition to the principal instrument.

Recommendation 5: Availability of repeal notices on the web

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

Recommendation 6: A single website containing all development control plans

Guidelines produced by the Information Commissioner should insist that development control plans are published on the internet prior to, or on, the day that they come into effect. Ideally they would be published on a single approved website for the whole state.

Recommendation 7: Availability of draft and amending contributions plans and repeal notices on the web

Guidelines should require draft contributions plans, amending contributions plans and repeal notices for contributions plans to be made available to the public via the council's (or a single state-wide) 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 8: Disclosure of planning agreements

The Information Commissioner should proactively work with councils so that they are aware of their obligations in relation to the disclosure of voluntary planning agreements under the *Government Information (Public Access) Act 2009*.

Recommendation 9: 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 10: Maps and other material must be provided without disclaimers

The Information Commissioner's guidelines should prohibit any council from providing open access information conditionally (for example, by requiring members of the public agree to a waiver) or from disclaiming legal responsibility for the accuracy of the information.

1. Introduction

This paper has been prepared in response to *Consultation paper 1: Development applications and personal information on websites - issues for local councils* ("the consultation paper"). The consultation was released by the NSW Government's Office of the Information Commissioner.

The purpose of the consultation paper is to seek community feedback in relation to some nominated implementation issues for the new *Government Information (Public Access) Act 2009* in local government. The first section of this document addresses the specific issues nominated by the consultation paper. The following five sections relate to other transparency and accountability issues that we have identified, also relating to the implementation of the new *Government Information (Public Access) Act 2009* in local government.

Generally speaking, we are of the view that local government decision-making is not sufficiently transparent (although there are some notable exceptions). We believe improved transparency would benefit NSW commercially (by attracting investment dollars based on a more certain planning regulatory environment) and boost public confidence in council decision-making.

We urge the Office of the Information Commissioner to seriously consider all of our recommendations, not just those that are in direct response to the specific issues nominated in the consultation paper.

In relation to the consultation process, we urge the Office of the Information Commissioner, in future, to pro-actively contact groups that represent the users of local council services when seeking feedback on transparency issues concerning local government. We suspect that the great majority of submissions the Office will receive will be from local government itself. The Office would be assisted by a broader range of submissions from groups who deal with agencies, not just agencies themselves. Local councils are public authorities and therefore are no more incentivised to invite public scrutiny of their affairs than state government agencies.

2. Options proposed by the consultation paper

In the consultation paper the Office of the Information Commissioner has identified four options for dealing with the disclosure of personal information provided in relation to development applications.

The consultation paper invites us to indicate our preferred option and why.

2.1 Option 1 – put no, or minimal, DA information on websites

According to the consultation paper:

> Under this option, no information at all to do with DAs would be posted on council websites. Alternatively, councils might post minimal details similar to those advertised in local papers outlining the DAs received and the DAs determined, listing addresses only, but not all of the information required by the GIPA Regulation.
>
> DA information would still continue to be disclosed at council offices and people invited to make submissions.

We do not believe this option is appropriate, nor suited to the modern expectations for transparent government decision-making. We note that the full details of development applications dealt with under Part 3A and joint regional planning panels are placed on the internet by the NSW Government, and can see no legitimate reason why the same process should not be followed in relation to other development applications.

2.2 Option 2 – publish all information about DAs on websites

According to the consultation paper:

> The second option is to publish all information in DAs, irrespective of whether it is personal information or not. We understand that some councils are currently doing this, and notifying people when they lodge DAs, or make a submission in response to a DA, that the information will be made public on the council's website. In some cases, councils give people the option to ask that their names and signatures be removed.
>
> The advantage of this full-disclosure option is that the public is fully informed about the DA process and the basis on which council decisions are made. From the council's point of view, this option affords certainty since no discretion needs to be applied. All information received could be entered or scanned and posted directly onto the website. However, the lack of a discretionary element can be problematic. As noted earlier, DAs may contain a significant amount of personal information, not all of which may be suitable for online publication. For example, the OIC is aware of some councils publishing photographs identifying people in their homes submitted as part of a DA. While the photographs alone may not create particular problems, they can raise privacy concerns when published in combination with people's names, addresses, signatures and financial details. Similarly, we are aware that some councils have published information about medical conditions supplied to support a DA or an objection.

Under the regulation, as it stands, there is already exclusion for

> the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and its external configuration in relation to the site on which it is proposed to be erected, [and] ... commercial information, if the information would be likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret.[5]

We strongly support the maintenance of these two existing exclusions from the open access regime.

The exclusion in relation to the residential parts of a building reduce the risks that criminals will make use of development applications to plan home invasions or burglaries. Additionally it protects individuals from having the internal layouts of their private homes publicised for the sake of satisfying idle curiosity and gossip.

The protection offered to businesses in relation to the commercial information is important if a frank dialogue is to take place between consent authorities and businesses seeking development consent. Protection of commercially sensitive information is a well understood principle of all government information disclosure regimes. Without such protection the public sector is unlikely to be fully informed about a business's operational circumstances and poorer decisions are likely to be made as a result – to the disadvantage of the community and the individual business concerned. (While a business may suffer as a consequence of the need to ensure their commercially sensitive information is not made public, this will generally be better allowing their competitors becoming aware of their trade secrets or commercial strengths and weaknesses.)

Beyond these two exclusions we do not see a basis for further limiting the information placed on a website. For example there is no need to submit personal photos that identify particular people as part of a development application. An applicant's personal hardship factors are of little relevance and will rarely be decisive to planning decisions.[6]

[5] *Government Information (Public Access) Regulation 2009*, Schedule 1, cl 3(2).
[6] *Longa v Blacktown City Council* 54 LGRA 422; *Ellmoos v Sutherland Shire Council Citation* [1962] NSWR 1353; *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].

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 in his work: In the *Principles of Planning Law*, published by Oxford University Press:

> The logic of excluding private hardship, such as illness or dire financial stress, is that it is impossible to measure waht level of hardship should change a planning outcome.[7]

In a significant English decision on the extent with which personal considerations a material in a planning decision, Lord Scarman said:

> [Human factors] can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them, a specific case has to be made and the planning authority must give reasons for accepting it.[8]

It is in these rare scenarios, where normal planning considerations have been subordinated to an exceptional or special circumstance, that the argument for complete transparency is at its strongest. Anything less than complete openness about the special reasons for an unusual planning decision will breed mistrust of public decision-making. . In any event, such matters can be communicated without photos depicting specific people. Applicants can merely be warned that the material will be placed online.

The fact that particular renovations will render premises more suitable for a person living with a disability can be stated in a development application without providing the medical details of the person who will actually occupy the premises.

It is important to understand that Councils will not normally approve a development on the basis of a single individual's personal story because an approval runs with land, not with the person. Merely because it is claimed that someone will live in premises at the time a development application is lodged, does not mean that they will be living there when the renovation is finished, or at all. The fact that a specific person does not take up residence does not invalidate the consent. Councils should generally discourage people from providing specific medical information as part of a development application; advising them that the details will be placed on the internet will probably have this effect.

Objections *should* be placed on the public record if they are to be considered as part of the development assessment process. We note that a vast number of development proposals are defeated, not because of any intrinsic problems with the idea, but because of the opposition of existing residents and businesses who have a philosophical or vested interest in blocking new development. We are not alone in making this observation. It is a political phenomenon that has been observed all over the world and is well documented in academic literature.

Development approval can be described as a "closed system" decision-making process.[9] Such a system is characterised by a defined set of stakeholders that can directly influence the outcome of a decision.[10] Development systems become closed primarily through two factors – the basic preferences of local voting population, who tend to be averse to change, and the planning laws, which tend to magnify the preference of those resident voters.[11]

Incumbent business operators, who play an important role for local government at election time, have strong vested interest in mobilising campaigns against new developments that may place them under competitive pressure.[12] Under the State's planning laws, existing businesses regularly object to development applications from potential new competitors. They may make political donations and

[7] L Stein, *Principles of Planning Law* (2008).
[8] *Westminister City Council v Great Portland Estates PLC* [1985] AC 661, 670.
[9] S Staley, "Markets, smart growth and the limits to policy", *Smarter Growth* (2001) 201-217.
[10] Ibid.
[11] S Staley and EW Claeys, "Is the future of development regulation based in the past? Toward a market-oriented, innovation friendly framework", *Journal of Urban Planning and Development* (December 2005), 202-213, 203.
[12] A Fels, S Beare and S Szakiel, *Choice Free Zone* (2008) 38.

lobby against development approvals being granted. Lists of objectors to new development frequently include a long line of large and smaller businesses whose commercial interests will be impacted by new development. Well-off individuals also often make objections to development applications in a bid to push-up their property values.

This closed system approach tends to exclude consideration of the interests of future residents, neighbouring local government areas and non-resident third parties.[13] This approach becomes particularly problematic when communities are faced with accommodating innovative development proposals.[14]

In the *Principles of Planning Law*, published by Oxford University Press, [15] Stein observed that

> In the 'development control process', when an application is made for the commencement of a use and the physical development of land, the goals and assumptions that were integral to the initial [strategic] planning process and that are expressed in the policies are not usually reviewed at this time. This is because the emphasis in development control shifts, to a significant extent, from pure planning considerations to what is politically acceptable, and often an overwhelming criterion for that acceptability is whether what is proposed is congruent with existing development in that locality; the 'community interest' always appears to be served when the new development fits into the locality. [16]

The reality of government decision-making is that legitimate technical issues favouring an approval are often balanced against the political pressure exerted by individuals and businesses seeking to boost their property values and (businesses) seeking to protect themselves from competition, personal and commercial interests favouring refusal.

The text of the written objections and the identity and address of the objectors is important in determining whether decisions to refuse new development are based on genuine concerns as to legitimate planning issues, or attempts to inappropriately preserve private interests at the expense of the wider public interest. By making such submissions publicly available, the applicant, independent members of the community and the media are able to scrutinise recommendations and/or decisions to refuse development, and the objections, and decide for themselves whether a decision to refuse is political or based on genuine technical merits of a proposal.

Lest there be any doubt about the political nature of many decisions to refuse development, consider the following five examples.

Example 1: Refusal of development in the Freshwater village centre

In late 2010 the Sydney East Joint Regional Planning Panel rejected a proposal for a mixed use commercial/retail/residential development within the Freshwater village centre. The proposal involved the demolition of all existing buildings over eight lots and the construction of four new buildings of varying heights and seven townhouses.

Council officers initially recommended that the development be approved, but the panel rejected their recommendation.[17] The panel set out three reasons for their decision:

1. According to the panel, the proposal exceeded both the eleven-metre and the three-storey height limits. Council officers had said that "the non-compliance with the height requirement does not result in unacceptable or unreasonable impacts on adjoining and surrounding properties that would be symptomatic of overdevelopment".

[13] S Staley and EW Claeys, "Is the future of development regulation based in the past? Toward a market-oriented, innovation friendly framework", *Journal of Urban Planning and Development* (December 2005), 202-213, 203.
[14] Ibid.
[15] L Stein, *Principles of Planning Law* (2008).
[16] L Stein, *Principles of Planning Law* (2008) 11.
[17] < http://jrpp.planning.nsw.gov.au/DevelopmentRegister/tabid/62/ctl/view/mid/424/JRPP_ID/384/language/en-AU/Default.aspx> at 11 January 2011.

2. The panel through the proposal was inconsistent with the "desired future character" of the Harbord (Freshwater) Village Locality. Council officers had said that "the proposed development has been found to be consistent with the Desired Future Character Statements for each locality". The difference of opinion seems to be that the panel thought that every large building in the proposal should have a retail or business component, while the officers thought that it was enough that most buildings had that component.

3. The public opposition to the proposal was "overwhelming". There were nearly 2,000 objectors as well as the local and State representatives of the community. The panel said the volume of their opposition was sufficient to conclude that it represented "the public interest".

Unlike the council officers, the joint regional panel seemed to have no regard to the NSW Government's draft subregional strategy. In giving their support to the project, council officers found that the redevelopment of the site will assist in achieving its subregional strategy status as a "small village".

This decision by the joint regional planning panel seems to have turned on the large not-in-my-backyard campaign by local residents. Transparency about this specific text, identity and addresses of objectors assists the wider community in forming an opinion as to the true reasons a development proposal has been refused.

Example 2: Sand quarry at Somersby

In August 2009 the NSW government refused approval to a sand quarry at Somersby involving the extraction, processing and transportation by road of up to 450,000 tonnes of sand a year for a period of 15 years and progressive rehabilitation of the site. The quarry would have supplied construction sand for the Central Coast and the broader Sydney region.

The state government had convened an independent hearing and assessment panel which found that the project could proceed, subject to conditions. However the project was opposed by local MPs, and the Director-General recommended refusal based on "public concern" and "anxiety".[18]

Example 3: Melbourne's Windsor Hotel

In February 2010 the office of the Victorian Minister of Planning accidently leaked a communications strategy prepared by a ministerial media advisor to a journalist.[19] The document discussed stopping the redevelopment of Melbourne's Windsor Hotel, even though it was expected to receive a favourable report from an independent expert panel commission by the government. The basis for the planned blocking of the development would have been "community's views".

Example 4: Sydney City Council

For every two residents of the City of Sydney, five people work in the City. That's 429,000 workers compared to 166,000 residents. On top of this many thousands more visit the City every day and feel a deep and passionate commitment to it. In short, more than any other local government area, the public realm of the City of Sydney belongs to many more people than just its existing residents. Yet the Lord Mayor, Ms Clover Moore, has made her priorities as chair of the Central Sydney Planning Committee clear:

> I speak up for residents. I prepare submissions and advocate for residents affected by developments and construction. My Independent Team of Councillors at the City determines development and shares my commitment.[20]

The chairperson of a committee (charged with deciding development applications of $50 million or more) sees her role as being about the interest of existing residents. The chairperson defines that role in

[18] < http://majorprojects.planning.nsw.gov.au/files/38831/Assessment%20Report.pdf> at 16 July 2010.
[19] < http://www.abc.net.au/news/stories/2010/02/26/2830806.htm?site=melbourne&section=news> at 16 July 2010.
[20] <http://www.clovermoore.com/main/?id=9> at 7 July 2010.

terms of the impact of developments and construction; rather than, say, affordable rents, housing choice, effective utilisation of the state's sunk investment in public transport, reducing congestion across the Sydney metropolitan area, etc. In this context, there is a strong public interest in knowing the details of the objection letters which form the basis of the Lord Mayor's decision-making process. Third parties who are disadvantaged by her decisions (for example, renters and home buyers who miss out on the change to live in the City of Sydney) should have ready access to this information.

Example 5: The views of residents are embedded in the planning system

The Land and Environment Court, in *New Century Developments Pty Ltd v Baulkham Hills Shire Council*[21] made the following relevant comments on assessing the impact of development:

> Indeed... it is not difficult to envisage a development which causes such great offence to a large portion of the community that for that reason it ought not to be permitted on town planning grounds ... Such antagonism would amount to a detrimental social impact ... . [T]here is room for opinions to differ in weighing the same objective criteria. [22]
>
> [A] court would prefer views from residents which are based upon specific, concrete, likely effects of the proposed development. [23]

This decision has been cited and applied many times since by decision-makers in the planning system, including subsequent decisions in the Land and Environment Court. Public opinion is accepted by the planning system as a legitimate input in the planning process, however, objections should be based on specific, concrete, likely effects of the proposed development. By placing objections on the internet, community members can more easily establish for themselves whether or not objections relate to specific, concrete, likely effects of the proposed development. The identity and address of the objectors will help people form an understanding as to whether objections might also be motivated by some unstated agenda.

Consider this fictional example

Bill owns a 700 square metre vacant lot. One day he hopes to build himself and his family a home on the property. He becomes aware of a development application to build a four storey apartment building next to his property. He is concerned that the presence of the apartment building will reduce future increases in the value of his property – he has an opinion from a real estate agent who says it might cost him $20,000 over the next three years. Bill approaches the local council and calls on them to refuse development approval to the apartment development. He cites traffic concerns as the main reason for his objection.

In this case, the development applicant, and members of the community who might benefit from a housing choice and a stronger supply of more affordable housing should be entitled to know precisely who is objecting and what property they believe will be impacted. (In Sydney's inner suburbs a median priced apartment sells for $560,000, but a house costs $1.1 million.) This may use information to make their own submission arguing that Bill's stated concerns about traffic impacts are merely a cover for his desire to boost is property's value. They may argue that the public interest in a stronger supply of housing outweighs Bill's desire to advance his personal economic position.

The scrutiny of the identity, motives, addresses of objectors in the public interest and is as important as the scrutiny of the application itself.

2.3 Option 3 – publish no personal information about DAs on websites

According to the consultation paper:

[21] [2003] NSWLEC 154 (Lloyd J).
[22] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]
[23] Ibid [63]

> A third option is to publish all non-personal information about DAs, but not include any personal information. The advantage of this option is that the privacy of people's personal information is protected. However, inflexible application of this option may work against the rationale for disclosing information about DAs in the first place. For example, a person's address is personal information, but withholding address details from information about a DA would render the information useless. Also, disclosure of some personal information may be necessary to give context to decisions made in relation to DAs.
>
> A disadvantage for local councils is that this option would be time-consuming and a challenge to put into practice, as administrative staff who might not necessarily be trained to make such decisions would need to examine each DA, and every new document that was received in respect of a DA, to decide what was personal information in order to exclude it from publication on the website.

We do not support this option. We have explained why the names, addresses and text of objectors should be on the public record. The same logic also should apply to development applicants.

The public benefits from the disclosure of the identity of applicants. This additional scrutiny may help identify undeclared associations between council staff, councillors and applicants. Conversely, the scrutiny builds public confidence by allowing unjustified rumours alleging associations between councillors and applicants to be dispelled.

2.4 Option 4 – not publish some categories of personal information

According to the consultation paper:

> Under this option, there would be some categories of personal information in DAs that local councils should never publish on their websites due to the need to protect the privacy of the individual concerned. These categories might be, for example, signatures, medical information, financial details, photographs identifying individuals and contact numbers.
>
> The advantage of this option is that it would provide certainty to councils about what to publish, and members of the public would be clear about what information would appear on websites. It also has the advantage of balancing the disclosure requirements in the GIPA Act and Regulation promoting transparency and accountability, while recognising that some personal information should be afforded greater protection. A disadvantage could be that some councils might have to change the way they enter and publish DA information, which could have time and cost implications, especially when the current processes are highly automated or volumes are high.

This option does not have our support for several reasons.

Firstly, as mentioned above, there is no need for photographs identifying individuals to form part of any development application, so there is no point designing rules to accommodate this situation.

Secondly, government documents bearing signatures are routinely published online. There is no evidence that this has paved the way for fraud. A fraudster who is sophisticated enough to convincingly forge a signature will also be clever enough to access a wide range of documentation where the signatures of a property owner can already be viewed (for example, inspection of application at a council; land transfer documents at the Land Title Office).

Thirdly, as mentioned above, there is normally no role for the personal medical information of a development applicant, or an occupant. Development approvals relate to the land and generic occupants, not specific people. An approval that would normally be given, but is given based on the identity of the applicant is exceptional, and in such circumstances, the maximum level of transparency should be applied to the decision and the reasons for it.

Fourthly, where financial details relate to a business they are already supposed to be withheld (see above). There is no role for personal stories of financial hardship in development assessment. Applicants should be discouraged from providing this irrelevant information and advice that it will be placed on the internet may be helpful in achieving this outcome.

Finally, the contact numbers of our members (who are developers) have routinely been published online for many years. While at times objectors have rung to voice their opposition to development proposals, this is part of the ordinary democratic process our society is blessed with. If private citizens wish to avoid disclosing their own contact numbers they can arrange for their architect or town planner (or a friend) to lodge the development application on their behalf and be the official contact for the council. Any person may lodge a development application, as long as they have the relevant land owners consent.

2.5 Our preferred option

Based on the above analysis, our preferred option is clearly number two, subject to the existing exclusion that there should be no publication of:

- the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and its external configuration in relation to the site on which it is proposed to be erected; or
- commercial information, if the information would be likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret.

The text, identity and address of objectors should also be published, subject to the existing exclusions (e.g. for defamatory material).

Recommendation 1: We prefer option 2, with a proviso

Our preferred option is clearly number two, subject to the existing exclusion that there should be no publication of:

- the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and its external configuration in relation to the site on which it is proposed to be erected; or
- commercial information, if the information would be likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret.

The text, identity and address of objectors should also be published, subject to the existing exclusions (e.g. for defamatory material).

3. 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.[24] 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.

[24] *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 [81].

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.[25] 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 have congratulated the Department of Planning for its decision to establish a Register of Development Assessment Guidelines.[26] 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 of Planning'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 suggest that **guidelines 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).[27] 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.[28] The Court has found that a "consent authority might range widely in the search for material as to the public interest".[29] 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 2: 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.

[25] s74C(2).
[26] NSW Department of Planning, *Draft Development Assessment Guidelines: Part A: Development Applications under Part 4 of the Environmental Planning and Assessment Act* (2009) 8.
[27] s 74E(4).
[28] *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 184; *Aldi Foods Pty Ltd v Holroyd City Council* [2004] NSWLEC 253.
[29] *Terrace Tower Holdings v Sutherland Shire Council* (2003) 129 LGERA 195, 210.

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

At the current time 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 sanctioned the use of *draft* development control plans to guide development assessment decisions.[30] If they are to be employed for this purpose their ready availability on the internet must be assured.

Recommendation 3: Availability of draft development control plans on the web

Draft development control plans must be made available to the public via the council's website, even if they are no longer on public exhibition.

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.[31] 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.[32]

Local councils currently apply the *Government Information (Public Access) Act 2009* open access provisions as if they do not extend to amending DCPs and only apply to principal DCPs. As a matter of law this is approach is questionable. As a matter of policy, 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.[33]

[30] *Aldi Foods Pty Limited v Holroyd City Council* [2004] NSWLEC 253 [42]-[43].
[31] *National Australia Bank Ltd v Drummoyne Municipal Council* 130 LGERA 299
[32] *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.
[33] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 386-7 (Spigelman CJ); Meagher and Beazley JJA concurred.

Recommendation 4: Availability of amending development control plans on the web

The guidelines should make it clear that all amending development control plans must be published on the council's website in a central readily accessible place, in addition to the principal instrument.

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 5: Availability of repeal notices on the web

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

5. 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.

Furthermore, 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, but 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. Guidelines produced by the Information Commissioner should insist that development control plans are published on the internet prior to, or on, the day that they come into effect.

Recommendation 6: A single website containing all development control plans

Guidelines produced by the Information Commissioner should insist that development control plans are published on the internet prior to, or on, the day that they come into effect. Ideally they would be published on a single approved website for the whole state.

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

Again, in relation to contribution plans, councils do not typically publish draft plans, amending contribution plans or notices repealing plans to be published on the internet, nor are they 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.

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

Guidelines should require draft contributions plans, amending contributions plans and repeal notices for contributions plans to be made available to the public via the council's (or a single state-wide) 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.

7. 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 record 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 local councils.[34]

Provisions of the planning regulations provide for a competing register of planning agreements,[35] 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.

Our members are keen to ensure that local councils fully comply with the law in relation to the public disclosure of voluntary planning agreements, and we think it is necessary for the Information Commissioner to proactively work with local councils to ensure they meet their obligations in this regard.

Recommendation 8: Disclosure of planning agreements

The Information Commissioner should proactively work with councils so that they are aware of their obligations in relation to the disclosure of voluntary planning agreements under the *Government Information (Public Access) Act 2009*.

[34] s 27.
[35] Draft *Environmental Planning and Assessment Regulation 2010* cl 44 and cl 45; *Environmental Planning and Assessment Regulation 2000* cl 25F and cl 25G.

8. Maps and disclaimers

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 planning authorities. 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 related to environmental planning instruments, including local environmental plans.

The regulations under the *Government Information (Public Access) Act 2009* requires local councils to place environmental planning instruments on the internet, but there is no express reference to maps that are referred to in (and crucial to understanding an environmental planning instrument).[36]

For example, *State Environmental Planning Policy No 71—Coastal Protection* only applies to land within the "coastal zone".[37] "Coastal zone" is said to have the same meaning as in the *Coastal Protection Act 1979*.[38] 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) ...[39]

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 ...[40]

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.[41]

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.[42] 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.

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[36] *Government Information (Public Access) Regulation 2009*, Schedule 1, clause 2(c).
[37] cl 4(1).
[38] cl 3.
[39] s 4(1)(b).
[40] s 4A.
[41] s 4A.
[42] <http://www.planning.nsw.gov.au/PlansforAction/Coastalprotection/Metropolitanregioncoastalzonemaps/tabid/178/Default.aspx> at 2 November 2010.

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 planning authorities, including local councils, 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.

Burwood Council, for example, does publish a series of zoning maps on its website. However, before any member of the public may view those maps they are confronted with a web page that says:

> Burwood Zoning Map
>
> The Burwood zoning map displays the current official land use zonings for the Burwood Local Government Area.
>
> Other information is also displayed such as Cadastral Boundaries, Property Addresses and Historic Buildings or Structures.
>
> Burwood Council Disclaimer
>
> The accompanying information (Material) provided by Burwood Council (Council) is intended for general information purposes only. Council does not warrant or make any claim regarding the accuracy, completeness or authenticity of the Material. Any person using or relying upon the Material does so on the basis that Council shall bear no responsibility for any errors, faults, defects or omissions in the Material. Council will not accept liability for any loss or damage directly or indirectly suffered as a result of any use of, or reliance upon, the Material.
>
> The Material is not intended to be exhaustive or to replace the need for prospective respondents to make their own independent enquiries, examinations, investigations, interpretations, deductions or conclusions. Any person in receipt of the Material is advised to verify all relevant representations, statements and information and obtain independent advice before acting on the Material. No decision or action based upon the Material should be taken by any person without first obtaining independent verification of the Material.
>
> Council may, from time to time, rely on third parties to provide certain information comprising the Material. Any reliance by Council on a third party, or reference by Council to third party, is not to be considered an endorsement of any product or service provided by that third party.
>
> If you agree with these terms please click on 'I AGREE'. Alternatively, if you do not agree, please click on 'I DISAGREE'.[43]

If you click on the "I DISAGREE" button you are denied access to the maps.

These maps (for areas of Burwood Council outside of the town centre) are not available on the internet from anyone else. In fact, they only body that can supply these maps is the Council itself. If they are not able to provide maps you can rely on, then no-one can.

The intent of the *Government Information (Public Access) Act 2009* is seriously undermined if, when information is placed on the web, members of the public are forced to absolve the council or the consequences of their own negligence before they are given access to essential regulatory information.

Another approach is used by Willoughby Council. A link on their website titled "legal" tells members of the public that:

> Willoughby City Council provides the material on this website for information and communication purposes only. Whilst Council endeavours to ensure that the information provided is accurate and complete; no warranty is given that the material located on this web site is free from error or omission. All persons accessing the website are responsible for

We note, for example, that the Parliamentary Counsel sees the need for no such disclaimer on its website.[44] Indeed, if the authors of policies, maps and regulatory documents (whether they be Parliamentary Counsel or Willoughby Council) are not certain about the information they publish on their own rules, how can the rest of us be? This disclaimer undermines the integrity of the open access regime, and Information Commissioner's guidelines should forbid them.

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[43] <http://www.burwood.nsw.gov.au/development/zoning_maps.html> at 12 January 2010.

[44] <http://www.legislation.nsw.gov.au> at 12 January 2011.

While some efforts have been in relation to new Standard Instrument complaint local environmental plans (where maps are available on the Parliamentary Counsel's website), this issue is not being addressed in relation to old local environmental plans, new or old state environmental planning policies, or maps sanctioned directly by legislation. Most environmental planning are not Standard Instrument compliant, and this will be the case for many years to come.

Recommendation 9: 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 10: Maps and other material must be provided without disclaimers

The Information Commissioner's guidelines should prohibit any council from providing open access information conditionally (for example, by requiring members of the public agree to a waiver) or from disclaiming legal responsibility for the accuracy of the information.

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