Urban Taskforce
AUSTRALIA

Reforming the Standard Instrument

Ensuring that the comprehensive local environmental plans work

A submission to the NSW Government and the Local Planning Panel, as part of the review of the *Standard Instrument (Local Environmental Plans) Order 2006*.

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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

Since 2006 the NSW Government has been working towards replacing all existing local environmental plans (LEPs), in each local government area, with a new modern plan, compliant with a consistent template set out in *the Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument").

The state's planning minister, Mr Brad Hazzard, has said there is state-wide frustration among NSW councils with the Standard Instrument (which is used as a template for all new local environmental plans). He did not mention the many concerns that developers have with the Standard Instrument.

We have prepared this policy document because we are concerned that the government seems to view the Standard Instrument as a matter between councils and its own public servants. In truth, the Standard Instrument should concern the whole community, including the development applicants whose activities it regulates.

Any consultation about the reform of the Standard Instrument must not just be limited to local councils. One of the reasons there have been so many problems with zoning plans, is that the Department of Planning and Infrastructure has only consulted other regulators - such as councils - without talking to the people actually impacted by zoning rules.

If the Department keeps heading in its current direction, the best we can hope for is that the whole Standard Instrument conversion process will merely be a waste of time. On the other hand, under the current policy settings, **it seems more likely that the Standard Instrument will be used to entrench the micro-regulation of land use across NSW.** This was never the original intention of the Standard Instrument process.

All of the problems we are citing are clearly evident in LEPs that have been gazetted and publicly exhibited. We have documented specific real life examples of each problem.

The central issues canvassed by this document are set out below.

1. **<u>The Standard Instrument contains unjustifiable prohibitions on retail and business uses.</u>**

   Lower-order centres and employment zones

   In many 'lower-order centres' – often served by excellent public transport – Standard Instrument compliant LEPs will ban shops specialise, e.g., bakers, butchers, delicatessens, clothing stores, music stores, etc.

   What's more, in these same centres, new rules will prevent shopfronts being established for people to practise a profession or trade that provides services directly to members of the public. This means local communities will be deprived of internet access facilities, hairdressers, video libraries and dedicated banks, post offices and dry cleaners.

   Mandatory floor space restrictions apply to shops, in addition to the floor space ratios and height controls that apply to buildings generally. These floor space restrictions make it impossible for even

a moderate scale supermarket to be established in these 'lower-order' centres. Bizarrely, a supermarket in a local centre may be smaller and less visually obtrusive than an apartment building, but the floor space restrictions may mean that the supermarket is prohibited, while the larger apartment building is permitted.

Bans on retail and professional shopfronts are even intended for employment-related zones such as business development zones, business parks and enterprise corridors. But the Standard Instrument means people working in these areas won't be entitled to stroll to a local supermarket, have lunch in a restaurant, get a haircut or visit a local hotel after work.

These prohibitions mean that people need to drive further to access services and satisfy their shopping. Centres should be able to offer these services, if the bulk, scale and traffic requirements are met.

Large format retail and bulky goods premises

Large format retail and bulky goods premises are also to be banned in industrial zones, despite the intent of the 2005 Metropolitan Strategy and long-standing practice. **This means large format grocery stores**, such as Costco, **are prohibited in light industrial areas.** Large format business supplies retailers, such as Officeworks, or large format hardware suppliers, such as Bunnings, will often have great difficulty in finding sites. Smaller retail supermarkets, such as Aldi, also end up being excluded.

2. The Standard Instrument allows too many single use zones

Zones should be multi-purpose

This is now out-of-keeping with international best practice. For example the Standard Instrument has:

- medium density zones that do not permit residential flat buildings;
- neighbourhood centre zones without purely-residential flat buildings or multi-dwelling housing (terraces and townhouses);
- local centre zones without purely-residential flat buildings or multi-dwelling housing;
- commercial core zones without purely residential flat buildings or multi-dwelling housing;
- enterprise corridor zones without residential flat buildings or retail premises; and
- high density residential zones without retail premises.

The Standard Instrument should allow, wherever possible, a mix of commercial, residential and retail development in a single zone, and even in a single building. However, the planning system should not try to force developers to build in a mix of uses - that will lead to under-utilised or empty space.

Zone objectives in the Standard Instrument stop development, even when it is permissible under the land use table in a plan.

For example, in business development, enterprise corridor zones and industrial zones, developments that have the potential to compete with businesses in (usually nearby) centres will not satisfy the objectives of the zone.

Another example is the neighbourhood centre zone - which is limited by its zone objective to "small-scale" retail. This means development that satisfies height controls, floor space ratios and traffic requirements can still be knocked back because it isn't "small" enough.

Floor space ratios as back-door prohibitions

Floor space ratios are being misused to discriminate against certain permitted development types within a zone. **It is difficult to comprehend why development types of a similarly high intensity should be given different floor space ratios in the same locality.**

For example, while the *Burwood (Town Centre) Local Environment Plan 2010* does permit residential development within the heart of the town centre, it imposes a significant floor space ratio (FSR) penalty on such development. For example, a maximum floor space ratio (FSR) of 6:1 is permitted

in the town centre, but residential FSR in the same location is restricted to 2:1. This will severely impact the feasibility of residential development in this location and will potentially stall investment and urban renewal.

In high density residential zones, the *Ryde Local Environmental Plan 2010* sensibly excludes residential flat development and multi-dwelling housing from the floor space ratio requirements but applies it to shop top housing. In this case the rule penalises retail development and confers disproportionate market power on the owner(s) of nearby retail land that is not so burdened.

3. <u>The Department is moving floor space ratios and height controls into LEPs from DCPs, but no additional investment certainty is being created</u>

Even if a development proposal complies with 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 in a local environmental plan or development control plan is therefore little more than a statement of development potential, <u>not</u> a guarantee minimum development potential for that land.**

When an LEP states the maximum height or floor space ratio, a developer cannot use these standards with certainty when preparing a development feasibility assessment or making a decision to purchase land.

This means that all this effort to review height and floor space ratio controls, and move them from council DCPs to state government LEPs may amount to nought, as **councils retain a free hand to refuse consent or scale-back conforming development on the grounds that it is visually obtrusive.**

To encourage investment in land development, the developer needs to be provided with a "bankable" statement of development potential – such a system exists in Queensland and Western Australia.

The necessary legislative framework already exists in NSW – it just needs to be applied by the state government as part of the Standard Instrument. This would mean:

- any development proposal that meets the height controls and floor space ratios set out in a local environmental plan should <u>not</u> be capable of being refused or conditioned on the grounds of height, density or scale; and
- any development proposal that meets any development standards 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.

4. <u>Council-controlled DCPs will undermine the new LEPs.</u>

Many development proposals that are clearly envisaged by LEPs and consistent with a Standard Instrument compliant local environmental plan will be refused on the basis of a development control plan (DCP). This will frustrate efforts to deliver on the urban renewal goals set by LEPs.

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 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 out.

However, over the last decade, a series of court decisions have reversed this understanding. A DCP is now the "fundamental element" or a "focal point" of development assessment decision-making.

As the law stands, if development standards in a DCP can effectively prohibit a development - even when the local environmental plan allows an application to be made for the development.

The solution is straightforward.

Firstly, the government should use its powers to immediately limit the scope of matters that can be covered by a development control plan (DCP).[1] 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 will 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 sizes and ceiling heights.[2] 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.

A similar approach has also recently been proposed by the O'Farrell Government in relation to state significant development.[3]

Development controls plans should not be capable of containing:

- height, bulk or scale where height and/or floor space 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 efficient requirements (BASIX is sufficient).

Secondly, development controls plans should not contain prohibitions, only development standards.[4]

Thirdly, the application of development standards in development control plans should be modified so that any development standard set out in a development control plan should not be applied when:

- it is unreasonable or unnecessary in the circumstances of the case;
- it confines the intensity of a development and, as a result, development (identified by an environmental planning instrument as desirable) will not take place in a reasonable period because it will not be economically feasible;[5] or
- the consent authority is satisfied, either inherently or by the passing of time, that the development standard would bring about an inappropriate planning solution, including an outcome which conflicts with other policy outcomes adopted at a State, regional or local level.[6]

5. Recent changes to Aboriginal heritage provisions have perverse effects

As a result of changes made in February this year, the existence of an "Aboriginal place of heritage significance" is no longer automatically be disclosed in the heritage map of an LEP. Instead it may be hidden in a heritage study adopted by council and not expressly mentioned in an LEP at all. What's more the heritage study only needs to disclose the "general location" of the place.

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[1] The power is conferred by section 74E(3) and section 74C(5)(b)

[2] *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.*

[3] *State Environmental Planning Policy (State and Regional Development) 2011* cl 11.

[4] This point is informed by SEPP 1.

[5] See *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). Consider also the practice in the US: If the board (of variance) can reasonably conclude that a zoning regulation practically destroys or greatly decreases the value of a price of property, it may vary the terms of the ordinance ...": *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).

[6] This point is informed by the planning principles articulated in *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472

This means that development on private land may be restricted, but the existence of the restrictions will not be identifiable by examining the LEP. Even if a property owner or purchaser is made aware of the heritage study, and is able to get access to it, the document may only describe the "general location" of the place; creating significant uncertainty as to which areas are actually protected.

As a result of the changes made in February **all** "Aboriginal objects" are now treated as heritage items, even when they have not been specifically named in an LEP. There isn't even a need for such objects to be fixed to the ground. Household furniture, garden implements, etc are all covered. This means, for example, that development consent is now required to move household furniture that provides evidence of the Aboriginal habitation of an area.[7] We anticipate that these new provisions will greatly assist the Environmental Defenders' Office and others who wish to mount third party legal challenges against new development on technical grounds.

Until now, the *Environmental Planning and Assessment Act* has only extended protection to known, identified and mapped objects. It has been the role of separate legislation - the *National Parks and Wildlife Act 1974* - to protect unmapped objects.

The distinction between the two legislative regimes has now been obliterated. Both now purport to do the same job.

It is also important to note that, under the new provisions, where a development control plan has extended protection to vegetation (as tree preservation orders have done in the past) it is no longer possible for a permit to be issued to remove any tree that bears evidence of Aboriginal habitation of an area, except in a limited narrow set of circumstances.

There is no legal requirement that the evidence is historic. That is, the tree may bear very recent markings evidencing Aboriginal habitation of the area and still be given this special protection.

6. There needs to be inherent flexibility for good development to be approved, even when it is outside pre-determined planning controls

Clause 4.6 of the Standard Instrument is intended to fulfil the function of *State Environmental Planning Policy No 1—Development Standards* ("SEPP 1"). (SEPP 1 does not apply to land covered by a Standard Instrument-compliant LEP.) However, the underlying purpose of SEPP 1 has not been faithfully translated into the new clause 4.6 of the Standard Instrument.

Standard Instrument-compliant LEPs contain significant carve-outs from clause 4.6. As a result all such LEPs make it impossible for development standards be varied in relation to a wide range of development. The E*nvironmental Planning and Assessment Model Provisions 1980*, which the Standard Instrument replaced, had no carve outs from SEPP 1.

Specific LEPs finalised under the Standard Instrument have prevented clause 4.6 from applying to provisions, such as:

- the height of buildings;
- minimum lot sizes and strata subdivision in general residential and medium density residential zones;
- development of riverfront land;
- maximum floor areas;
- caps on the overall number of lots; and
- rules on sun plane protection.

By excluding the SEPP 1 mechanism so readily, and in such wide variety of cases, **the planning system is formally declaring that some development standards must be rigidly applied even when they are unreasonable or unnecessary in the circumstances of a case.** To us, this is indefensible. Surely any good planning system must be prepared to vary prescriptive rules when it can shown that, in particular context, the rules are unreasonable or unnecessary.

[7] Standard Instrument cl 5.10(s) read in conjunction with the definition of "Aboriginal object" in the dictionary.

Given the extensive safeguards that are clearly embedded in SEPP 1, there is no basis for the Standard Instrument itself, or for LEPs prepared under the Standard Instrument, to exclude the SEPP 1-style mechanism from operating.

Furthermore, the highly legalistic distinction between "development standards" and "prohibitions" continues to cause problems. The SEPP 1-style mechanism should be extended to cover prohibitions (not just development standards).

Unfortunately, in our experience, even with the newest local environmental plans, zoning is often inappropriate, illogical and does not stand up to scrutiny. However, political inertia means that it is rarely worthwhile for a private proponent to acquire land in the home of pursuing a rezoning, as the process is unlikely to be fruitful.

The most common scenario is where the zone is broadly correct, but through some accident of definitions, or lists of permissible uses, an obvious or sensible use has been omitted. In other instances, the actual zoning of the land does not make sense, in the context of surrounding land uses, or local, state or regional planning policies.

The benefits of reform are clear:

- a more streamlined process with a reduced need to pursue rezoning (and therefore a part-implementation of the Productivity Commission's findings);
- applicants whose development application are denied (or not dealt with) by a council or a panel can have the merits of their matter dealt with by the Land and Environment Court;
- the ability for planning authorities to use planning agreements to extort disproportionately high 'voluntary' levies from developers prior to rezoning decisions will be reduced (because of the presence of a right to a merits appeal); and
- bureaucratic rules confining particular uses to particular zones will come second to clearly articulated strategic planning policies.

Change can be achieved in a variety of ways. For example SEPP 1 or clause 4.6 could be extended. Alternatively a new provision could be inserted in the Standard Instrument. Whichever way it is achieved, **we think it should work as follows:**

- The consent authority must be satisfied that that the prohibition is either:
  - unreasonable or unnecessary in the circumstances of the case; or
  - would, inherently or by the passing of time, bring about an inappropriate planning solution, including an outcome which conflicts with other policy outcomes adopted at a State, regional or local level.
- The consent authority must take into consideration the public benefit of maintaining the prohibition adopted by the environmental planning instrument.[8]

There should be no carve-outs from this provision.

Given the government's emphasis on handling power back to local communities, we should be confident that consent authorities, under the supervision of the Land and Environment Court, can manage these provisions sensibly. Where state government interests are affected, the relevant government agencies will inevitably be consulted by council as part of the development application process. They have an opportunity to comment, and if the matters come before the Court, to intervene.

[8] *Wehbe v Pittwater Council* [2007] NSWLEC 827 [38]-[40].

1. Introduction

The NSW Planning and Infrastructure Minister, Brad Hazzard, has announced that he will loosen "Labor's straightjacket on planning" by launching a new review of the Standard Instrument. We understand this review will be carried out by a "Local Planning Panel" which will have an "independent" chair approved by both the Local Government and Shires Association and the NSW Government, with two nominees of local government and the Department of Planning and Infrastructure.

Since 2006, the NSW Government has been working towards replacing all existing local environmental plans (LEPs), in each local government area, with a new "modern" plan, compliant with a consistent template set out in the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument").

The Standard Instrument is a crucial document for the development of NSW. It lays down the framework to which all future local environment plans (LEPs) must adhere.

Mr Hazzard has said there is state-wide frustration among NSW councils with the Standard Instrument (which is used as a template for all new local environmental plans). He did not mention the many concerns that developers have with the Standard Instrument.

We have prepared this policy document because we are concerned that the government views the Standard Instrument as a matter between councils and its own public servants. In truth, the Standard Instrument should concern the whole community, including the development applicants whose activities it regulates. Any consultation about the reform of the Standard Instrument must not just be limited to local councils, as implied by the Minister's media statement. One of the reasons there have been so many problems with zoning plans, is that the Department of Planning and Infrastructure has only consulted other regulators - such as councils - without talking to the people actually impacted by zoning rules.

In 2006, the former government promised that 155 new Standard Instrument-compliant plans would be in place by 2011, but in 2009 was forced to revise that commitment with a new, less ambitious timeline for the finalisation of just 67 plans. Under this revised timeline, council plans had been identified as a "priority LEPs" list and was to be finalised by June 2011. Only 23 standard instrument compliant LEPs of the 67 priority LEPs have been gazetted. The following summarises the situation:

- In the Sydney Region West Auburn, Camden, Penrith and Wollondilly are complete, but Blacktown, Fairfield, Hawkesbury, Holroyd and Parramatta are not.
- In the Sydney Region East Burwood (town centre), Lane Cove, Ryde and Waverley (Bondi Junction town centre) are complete, but Botany Bay, Hurstville, Leichhardt, Marrickville, Mosman, North Sydney, Rockdale, Sydney City, Warringah and Willoughby are not.
- In the Hunter/Central Coast, Gloucester and Greater Taree are complete, but Cessnock, Gosford, Lake Macquarie, Maitland, Newcastle and Wyong are not.
- In the Northern region, Bellingen, Nambucca, Port Macquarie, Hastings and Tamworth are complete, but Ballina, Byron, Clarence Valley, Coffs Harbour, Kempsey, Kyogle, Lismore, Richmond Valley and the Tweed are not.
- In the Southern region, Albury, Coolamon, Temora, Tumbarumba, Upper Lachlan, Wagga Wagga, Wingecarribee and Wollongong are complete, but Bega Valley, Eurobodalla, Kiama, Queanbeyan, Shellharbour and Shoalhaven are not.
- In the Western region, Balranald and Mid Western are complete, but Bathurst, Bland, Dubbo, Forbes, Murray, Orange and Wentworth are not.

In theory the Standard Instrument was to deliver a simplified planning system for residents, businesses and councils, with a reduced number of zoning plans, less complex plans and a consistent approach to land use planning controls across NSW.

The promise of simpler plans was thrown out of the window in 2007, when wide-ranging amendments were made that guaranteed the document would be more prescriptive than most of the local environmental plans it was replacing.

Under the Standard Instrument, business and industrial land that was previously available for retail development, fast food outlets, large format hardware stores and office development faces prohibitions and/or heavier restrictions. Some residential land has also faced down-zoning (particularly from medium density to low density). Some land, particularly rural land, faces more restrictive environmental zonings. Some plans have proposed lower height limits and lower floor space ratios.

Standard Instrument-compliant LEPs are not simple or easy to comprehend, as was originally promised. For example, the City of Sydney's proposed new high prescriptive plan is 524 pages - longer than the NSW Occupational Health and Safety Act (92 pages), the state's Food Act (104 pages) and even the Stamp Duties Act (238 pages). Further changes were made in 2011 which further increased the degree of micro-regulation.

While the Urban Taskforce originally supported the Standard Instrument process (and we were involved with other stakeholders, in the preparation of the 2006 document) **the substance of today's Standard Instrument does not enjoy wide industry support.**

Of course, Standard Instrument reviews may lead to the favourable up-zoning of some land. This is important and is supported by the industry. However, this can take place with or without the Standard Instrument itself. The local environmental plans based on the pre-existing *Environmental Planning and Assessment Model Provisions 1980* are just capable of delivering development up-lift, if a decision is made to do so, as a Standard Instrument compliant LEP.

We continue to support strategic reviews of the development capacity in each local government area. However, our concern is that the Standard Instrument process has also delivered significant (and threatened) down-zoning of land. In many cases, Standard Instrument-compliant LEPs have been shown to be more prescriptive and bureaucratic than the ones they had replaced. **If the Standard Instrument is not improved, our preference would be more reviews to up-zone land to be implemented via amendments to existing local environmental plans.**

This submission identifies the flaws inherent in the Standard Instrument and sets out the changes that are necessary to ensure the process of converting pre-2006 LEPs to the new format is a sensible allocation of public resources.

While we support the idea of a review of the Standard Instrument, we also think the government should consider special arrangements to ensure that any pending rezonings are not slowed down by this review. Whenever a review is commenced, there is always a risk that public servants will down-tools and wait for an outcome. Given the length of time that even the swiftest reviews tend to take, the government should take firm steps to ensure that any pending rezonings are still quickly processed. That may mean proceeding with rezoning on a "spot" basis, rather than waiting for comprehensive plans to be finalised.

2. Productivity Commission report

In May this year the Productivity Commission handed the federal and state governments a road map for the reform of the nation's tired town planning laws. The report, *The Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, followed a year-long review.

The Productivity Commission's report identifies "leading practices" which could, if adopted in NSW, dramatically improve the efficiency and responsiveness of the state's planning system. The report observes that

> the New South Wales planning system was considered by business to be the most difficult to operate under.[9]

While the report has much to say about all aspects of the planning system, there are findings that are of particular relevance to any review of the Standard Instrument. The types of complex and arcane system of prohibitions and prescriptive rules that are found in the Standard Instrument are of special concern to the Commission. The Commission concluded that:

> broad and simple land use controls [are required] to ... reduce red tape, enhance competition, help free up urban land for a range of uses and give a greater role to the market in determining what these uses should be ...[10]

It found that prescriptive requirements

> make it hard for some innovative businesses to find suitable land and thus enter the market. More generally, they also work to prevent the market from allocating land to its most valued uses.[11]

The Commission highlighted how prescriptive planning instruments led to two outcomes often perceived by the community as undesirable:

> In the extreme, planning systems suffer, on the one hand, from planners who try to prescriptively determine how every square metre of land will be used and, on the other hand, from developers who play a strategic game of buying relatively low-value land and attempting to rezone it to make a windfall gain. The scope for both would be reduced if zoning definitions were broadened and zones and other development control instruments were defined in terms of broad uses rather than prescriptive definitions.[12]

In the Commission's view

> [i]f the prescriptiveness of zones and allowable uses were significantly reduced — particularly those relating to business definitions and/or processes — it would facilitate new retail and business formats to locate in existing business zones without necessitating changes to council plans to accommodate each variation in business model. It would also provide more flexibility to adjust residential developments to changing demographics and preferences.[13]

A multiple-use framework for each zone was favoured by the Commission because such a reform

> would increase competition by allowing a wider range of businesses and developers to bid for the same land, better harness the market in allocating land to its most valued use, and cater much more easily for innovations in business and service delivery without requiring rezoning. Reducing the need for rezoning would also deliver significant time savings in supplying land and approving developments. [14]

A particular concern of the Commission was the impact of current zoning controls on competition:

> Competition restrictions in retail markets are evident in all states and territories. They arise: from excessive and complex zoning; through taking inappropriate account of impacts on established businesses when considering new competitor proposals; and by enabling incumbent objectors to delay the operations of new developments.[15]

The Commission supported a revised planning framework that would

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[9] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Research Report Volume 1* (2011) XXXVIII.
[10] Ibid XVIII.
[11] Ibid XXXIV.
[12] Ibid XLV-XLVI.
[13] Ibid XLVI.
[14] Ibid.
[15] Ibid XVIII.

> eliminate impacts on the viability of existing businesses as a consideration for development and rezoning approval ... [16]

The report also supported the clear guidance and targets in strategic plans. Nonetheless, plans should be

> allowing flexibility to adjust to changing circumstances and innovation (so long as good engagement, transparency and probity provisions are in place) ...

Our views are consistent with the findings of the Productivity Commission and explain what its policy conclusions should mean for the Standard Instrument and local environmental plans generally in NSW.

3. Outright prohibition on retail and business uses

In addition to the Productivity Commission's detailed analysis of planning, zoning and development assessment systems completed in May (referred to above), the Productivity Commission's has recently released draft report on the retail sector.

Amongst the key points of this report are the following:

> [I]f there is a scarcity of appropriately zoned retail space (that is, some retail stores are excluded from the area because of insufficient space), or there are large numbers of prescriptive requirements which unjustifiably restrict competition, planning and zoning can have a harmful effect by creating local retail monopolies.
>
> To minimise the anti-competitive effects of zoning, policy makers need to ensure that areas where retailers locate are both sufficiently large (in terms of total retail floor space) and sufficiently broad (in terms of allowable uses, particularly those relating to business definitions and/or processes) to allow new and innovative firms to enter local markets and existing firms to expand.
>
> A number of overseas studies have examined the impact on the retail industry of some land use restrictions that prevent the establishment of new large format stores. These studies suggest that preventing the development of larger stores lowers retail productivity, reduces retail employment and raises consumer prices.
>
> Overseas evidence also suggests that some land use restrictions raise property prices in residential and commercial markets by constraining the quantity (and location) of available space. These empirical results are useful directional proxies for the impact of planning and zoning controls on domestic retail property values. [17]

This report says that

> Local governments should significantly reduce prescriptive planning requirements to facilitate new retail formats locating in existing business zones and ensure that competition is not needlessly restricted.[18]

It explains that prescriptive requirements can

> make it difficult for new retailers (especially those with new business models) to find suitable sites and thus enter the retail market. At the same time, they also prevent or delay existing retailers from modifying or expanding their businesses — foregoing potentially higher returns and/or incurring higher costs by having to conform with regulatory requirements.
>
> In the current retail environment, where there is increasing competition from online retailers, and changing consumer preferences more generally regarding their shopping experience, the extent to which planning regulations should be used to restrict new businesses entering markets, or even to preserve existing activity centres, is increasingly problematic. To prevent such developments, that are perhaps more closely matched to evolving market requirements, may undermine the ability of retailers to respond to consumer preferences and thus accelerate the decline of existing centres.[19]

In the same report the Commission found that:

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[16] Ibid XLVII.
[17] Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry: Draft Report* (2011)199
[18] Ibid XXXV.
[19] Ibid 203.

> Broadening the zones — for example, by limiting [the use of] industrial areas [zones] to only narrow high-impact industrial uses and creating broad employment zones which can include commercial, light industrial, retail and even high-density residential where appropriate — and reducing prescriptive land use conditions will free up land and make it available to its most valued uses ...[20]

The Commission said that:

> Only high impact industrial businesses would [need to] be located separately because of their adverse effects on other land users or because planning outcomes are improved through their location near major economic infrastructure.
>
> Broader zones would remove the artificial distortions created by the current planning and zoning system both within retail (general retail and bulky goods) and between retail and other businesses (such as commercial and light industrial).[21]

Set out in this section are the problems with NSW's businesses and industrial zones that would need to be addressed, if the state is to effectively respond to the Productivity Commission's report.

3.1 Narrow range of retail and business uses in lower-order centres

The current Standard Instrument authorises local council to permit only a narrow range of retail and business uses in so-called "lower-order" centres.

An example of this problem appears in the Penrith Local Environmental Plan 2010.22 In this plan, neither "retail premises" nor "shops" are generally permitted uses in a village zone. Only "neighbourhood shops" are permitted. Likewise the Camden Local Environmental Plan 2010 expressly prohibits "retail premises" whilst allowing only neighbourhood shops. These are not isolated examples.23

In the Standard Instrument a "neighbourhood shop" is the most widely permitted category of retail establishment. However the term "neighbourhood shop" can be misleading, because the Standard Instrument gives it very narrow meaning. In fact the definition has been amended in substantive respects three times since the Standard Instrument was first prepared in 2006. Its current definition (inserted in February 2011) is extremely tight - much more limited than even the previous (very restricted) definition.24 A "neighbourhood shop" is defined to be

> premises used for the purposes of selling general merchandise such as foodstuffs, personal care products, newspapers and the like to provide for the day-to-day needs of people who live or work in the local area, and may include ancillary services such as a post office, bank or dry cleaning, but does not include restricted premises.

The definition is focused on the sale of "general merchandise". The courts have previously said that a distinction can be drawn between "speciality" and "general merchandise" and that the definition of "general merchandise" is satisfied where a range and variety of product lines are offered for sale by retail.25 As a result it will be difficult, if not impossible, for a shop that will specialise in a particular range of goods to be approved.

Shops such as a DVD store, florist, chemists, tobacconists, butcher, or baker are likely to be regarded as retailers of "speciality merchandise" rather than "general merchandise". If they were to seek to establish themselves in a village zone in Penrith or a neighbourhood centre zone in Camden a rezoning would be required. In practice, the costs of such an exercise would be too great, and therefore the business could not proceed.

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[20] Ibid 208.
[21] Ibid 222.
[22] See also the *Draft Greater Taree Local Environmental Plan 2008*.
[23] For example, consider *Lane Cove Local Environmental Plan 2009* and *Wingecarribee Local Environmental Plan 2010*.
[24] The previous definition allowed speciality stores, such as chemists, butchers and bakers, because they sold "small daily convenience goods". The new definition requires the shop to sell "general merchandise", that is, it precludes specialisation.
[25] *Hastings Co-operative Ltd v Port Macquarie Hastings Council* [2009] NSWLEC 99.

This bureaucratic red tape is ludicrous. If an area, such as a village zone or a neighbourhood centre, is suitable for a convenience store (subject to development consent) why shouldn't it be suitable for a chemist, a tobacconist, or the like?

Additionally, to continue our Penrith example, "business premises" are also banned in Penrith's village zone. This means that locals are unable to set up a shopfront to engage in a profession or trade that provides services directly to members of the public. As a result local communities will be deprived of internet access facilities, hairdressers, video libraries and dedicated banks, post offices and dry cleaners. Why is it appropriate to have banking services provided as an ancillary service in a convenience store, but unlawful to open a bank branch as a standalone service?

Strangely, in the neighbourhood centres of local government areas such as Lane Cove, Camden and Wingecarribee, retail premises (or shops) are prohibited, but "business premises" are permitted. This means that in the same urban centre, hairdressers, beauticians, tax agents, costumes and formal wear hire shops, key cutters and engravers, video libraries, dry cleaners are permissible, but antique shops, baby supplies shops, bicycle shops, cake shops, jewellery shops and musical equipment shops are prohibited.

Where is the public interest in prohibiting these low impact uses? What distinction is drawn between these different shopfront services that necessitates such harsh regulation? None of these retail and business types are inconsistent with the character of a small-scale urban centre.

Furthermore, the Standard Instrument limits the floor area of all neighbourhood shops, which makes it impossible for even a moderate scale supermarket to be established.26 This limits the opportunity for competition, ensuring that the community pays more than they should. Limiting the opportunity for a competitive retail environment (by restricting the type of goods sold and/or limiting floor area) robs the community of the opportunity to access a wide variety of competitively priced grocery items in their locality.

What this prohibition really means is that people need to drive further to satisfy their general grocery and shopping needs. The argument that limiting floor area and seeking to control the type of goods sold from retail premises, by way of plan, does not stand up to scrutiny. Local amenity can be properly and appropriately considered at the development application stage. Limiting retail by way of a statutory plan does little more than protect existing retail landlords.

Recommendation 1

The Land Use Table in the Standard Instrument should be amended so that "retail premises" and "business premises" are mandatory permissible uses in Zone B1 Neighbourhood Centre, Zone R4 High Density Residential and Zone RU5 Village.

Retail and business premises should be permitted (with consent) in such zones. The merits of individual proposals can be considered at the development assessment phase.

3.2 Lack of retail and business uses in employment zones

Many statutory plans do not permit "retail premises" and/or "business premises"27 in business development and enterprise corridor zones.28 Some plans, such as the Ryde Local Environmental Plan

[26] cl 5.4(7).
[27] Other than bulky goods premises, landscape and garden supplies, hardware and building supplies
[28] For example, the *Greater Taree Local Environment Plan 2010*.

2010 or the Wollongong Local Environmental Plan 2009 do not allow "retail premises" in the business park zone.29

Business development zones, business parks and enterprise corridors are intended to be centres of employment. These environments function best when people working in these areas have somewhere to go to shop and socialise before work, at lunch time and after work.

Those working in a business development, business park or enterprise corridor zone should be entitled to have lunch in a restaurant, get a haircut or visit a local hotel after work. Surely these uses go hand-in-hand with business activity?

A prohibition on shopfront premises really means that people need to drive further to satisfy their shopping needs. Planning rules should be encouraging behaviour that reduces vehicle kilometres travelled, not reinforcing old-style separations of land use that force people to drive further.

Recommendation 2

The Land Use Table in the Standard Instrument should be amended so that "retail premises" and "business premises" are mandatory permitted uses in Zone B5 Business Development, Zone B6 Enterprise Corridor and Zone B7 Business Park.

In February 2011, a new definition of "high technology industry" was added to the Standard Instrument to allow councils to distinguish between politically attractive ("high technology") light industries and other light industries.

The more broadly defined "light industries" is a mandatory permitted use in the General Industrial, Light Industrial, Enterprise Corridor and Business Park zones. However, in a zone such as the Business Development zone (where all light industries should be permitted) it is now open to a planning authority to only allow "high technology industry".

Planning authorities should not be able to sterilise 'boring', everyday, job creating development, merely in the hope that something more politically attractive will emerge.

Recommendation 3

The definition of "high technology industry" should be deleted from the Standard Instrument and "light industry" should be included as a mandatory permissible use in the Business Development zone.

3.3 Large format retail unwelcome in industrial zones

Standard Instrument-compliant local environmental plans generally do not permit retail premises or business premises in light industrial zones.30 Sometimes food and drink premises, landscape and garden supplies, service stations are permitted, and very occasionally bulky good premises and "hardware and building supplies" are allowed, but almost always retail premises generally are prohibited.

[29] However, "business premises are allowed, meaning that travel agents, amusement parlours, and internet cafes are allowed, but office equipment shops, bookshops and plumbing supplies shops are prohibited.
[30] For example, see *Greater Taree Local Environment Plan 2010*.

This means large format grocery stores, such as Costco, are prohibited in light industrial areas. Large format business supplies retailers, such as Officeworks, or large format hardware suppliers, such as Bunnings, will often have great difficulty in finding sites. Smaller retail supermarkets, such as Aldi, also end up being excluded.

The 2005 Sydney Metropolitan Strategy offered a sensible approach to this issue. The Metropolitan Strategy stated that retailing in industrial areas should be permitted when it has operating requirements akin to industrial uses.31 There was also a promise of a new approach to reinvigorate employment lands, including flexible zonings for industrial and commercial activities.32

However, the statutory plans that have been exhibited since the 2005 Metropolitan Strategy have not implemented this provision. There is potential to include a wider range of retail activities in industrial areas without jeopardising industrial activities. At the very least "bulky goods premises" and "hardware and building supplies" should be mandatory permitted uses in industrial zones.

We note that the Victorian Government recently announced that the retailing of bulky goods will be allowed in that state's industrial zones. The state's Planning Minister, Matthew Guy, told parliament on 30 August 2011 that:

> We will not be banning bulky goods retailing in industrial areas. We will be removing floor space requirements on restricted retail centres and ... we will also be amending the definition of 'restrictive retail' to ensure that business can continue to grow in those bulky goods centres around Victoria. ...
>
> It is quite an odd situation that until the Baillieu government's reforms, in certain zones if you had 500 square metres of space, you could sell lights, but if you 499 square metres of retail space, you could not sell a light -- bizarre. ... the Baillieu government means business on job growth in Victoria.[33]

Recommendation 4

At the very least, "bulky goods premises" should be added as a permitted use in Zone IN1 General Industrial and Zone IN2 Light Industrial.

Ideally, Costco-style development should also be permitted by permitting "retail premises" as a permitted use.

In February 2011 the Standard Instrument was amended to further limit land uses in industrial zones further limited by a new zone objective. The new mandatory zone objective for the industrial zones, exhorts consent authorities to "protect" the land for industrial uses. This is clearly intended to make it even more difficult for job creating development such as bulky good retailing, hardware stores or fast food outlets in this zone. This makes little sense.

Further limiting the economic activity that can take place in industrial zones is neither good planning nor good economics.

[31] NSW Department of Planning, *City of Cities: Sydney's Metropolitan Strategy – Supporting Information* (2005) 105, B4.1.2.
[32] Ibid 63, A1.4.2.
[33] Hon. M. J. GUY. "Planning: retail zoning", *Victoria Legislative Council Hansard* (30 August 2011).

Recommendation 5

The mandatory zone objective for industrial zones, inserted into the Standard Instrument in February 2011, should be removed. This would mean it will not be mandatory for all consent authorities to consider whether new development in industrial zones will "protect" land for industrial uses.

3.4 Entertainment facilities no longer a mandatory permitted use in key zones

As a result of changes made in February 2011, the definition of "business premises" no longer includes entertainment facilities, such as night clubs or cinemas. This means, for example, that they are no longer mandatory permitted uses in the enterprise corridor zone.

This does not make any sense, given that such entertainment facilities may not have significantly different impacts from the other mandatory permitted uses in this zone, such as garden centres, hardware and building supply wholesalers or retailers, light industries, warehouses and distribution centres.

The exclusion of entertainment facilities from business areas is illogical and should reversed.

Recommendation 6

The definition of "business premises" should be returned to its pre-February 2011 state, and include entertainment facilities.

4. Too many single use zones

Planning authorities in NSW perceive themselves as protecting the community from the market. They often fall prey to the pitfall of seeking to stop the market doing from what it does, without asking why the market is acting in a particular way and whether the public interest is served by preventing the market from working.

We draw the Department's attention to the NSW Government's own *Guide to Better Regulation*.[34]

> Government action is commonly justified on the basis of responding to market failures or imbalances. It is important to determine whether there is a need for government to be involved, or whether the problem will be solved through market forces or by existing regulations at the State or Commonwealth level.[35]

As the guide makes clear:

> Competitive markets:
>
> • provide the most efficient means of allocating resources to maximise the benefits to the community
>
> • ensure the goods and services that consumers demand are produced efficiently, and
>
> • encourage innovation and broader consumer choice.

[34] NSW Department of Premier and Cabinet, *Guide to Better Regulation* (2009).
[35] Ibid 11.

> 'Market failure' has a very precise meaning in economics. It does not simply mean dissatisfaction with market outcomes. It refers to a situation when a market left to itself does not allocate resources efficiently. Where market failure exists, there is a potential role for government to improve outcomes for the community, the environment, businesses and the economy.
>
> Governments may intervene to change the behaviour of businesses or individuals to address market failure or to achieve social and environmental benefits that would otherwise not be delivered. Government intervention is not warranted in every instance of market failure; in some cases the private sector can find alternative solutions. ...
>
> Externalities are costs or benefits arising from an economic transaction received by parties not involved in the transaction. Externalities can be either positive (external benefit) or negative (external cost). The existence of externalities can result in too much or too little of goods and services being produced and consumed than is economically efficient. For example, where the cost of producing a good does not include its full costs, say in relation to environmental damage, then a negative externality is said to exist. This results in the good being over-produced (and under-priced).[36]

This extract explains that regulatory intervention may be necessary if:

- there is serious prospect that the market will not factor in negative externalities; and
- these costs are likely to outweigh the positive benefits created through normal market process.

When local environmental plans are finalised under the Standard Instrument, little consideration is given to the actual need for a wide range of land uses to be prohibited. If the NSW Government's *Guide to Better Regulation* were to be applied there would be fewer single-use zones, and more multiple-use zones.

Regretfully, *Guide to Better Regulation* and the so-called 'modernised' planning instruments favour single use zoning. This is evidenced by the proliferation (in the new standard-instrument compliant plans/draft plans); for example:

- medium density zones that do not permit residential flat buildings;[37]
- neighbourhood centre zones that do not allow purely-residential flat buildings or multi-dwelling housing (terraces and townhouses);[38]
- local centre zones without purely-residential flat buildings or multi-dwelling housing (terraces and townhouses);[39]
- commercial core zones without purely residential flat buildings or multi-dwelling housing;[40]
- enterprise corridor zones without residential flat buildings;[41]
- business development zones that do not permit retail premises;[42]
- light industrial zones that do not permit retail premises or bulky goods premises;[43]
- business parks that do not permit retail premises or bulky goods premises;[44]
- neighbourhood centre zones without retail premises;[45]
- village zones without retail or business premises; and[46]
- high density residential zones without retail premises;[47]

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[36] Ibid 29-30.
[37] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[38] See for example the land use table the *Ryde Local Environmental Plan 2010*.
[39] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[40] See for example the land use table the *Canada Bay Local Environmental Plan 2008*.
[41] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[42] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[43] See for example the land use table the *Ryde Local Environmental Plan 2010*.
[44] See for example the land use table the *Ryde Local Environmental Plan 2010*.
[45] See for example the land use table the *Lane Cove Local Environmental Plan 2010*
[46] See for example the land use table the *Penrith Cove Local Environmental Plan 2008*.
[47] See for example the land use table the *Lane Cove Local Environmental Plan 2009*.

Tragically, the Standard Instrument, as originally conceived, did not have many of these problems. For example:

- offices were to be permissible in every business development zone;
- apartments were to be allowed in every medium density zone; and
- retail premises were to be permitted in every enterprise corridor zone.

All this changed when the government gazetted surprise amendments to the Standard Instrument, just before Christmas in December 2007.

Also in December 2007 an amendment was gazetted to the Standard Instrument which changed the definition of shop-top housing. The effect of this amendment was to ensure that only convenience type shops could go in on the ground floor of a mixed-use development (rather than, say, a supermarket, speciality stores or service-providers) in:

- Zone R1 General Residential;
- Zone R3 Medium Density Residential;
- Zone R4 High Density Residential; and
- Zone B1 Neighbourhood Centre.

A zone like the Standard Instrument's mixed-use zone (as originally conceived) offers a market friendly means of accommodating high intensity employment and residential uses in single zone.[48] That is, once the decision has been made that the infrastructure of an area is suitable for high intensity uses, it does not matter what mix of uses ultimately emerges. This can be managed through market processes. A mixed-use zone, properly implemented,[49] allows this to happen. (The Standard Instrument's mixed-use zone was single out for special praised and identified as a "potential leading practice" by the Productivity Commission.)[50]

Other zones that could offer a more flexible approach are the enterprise corridor zones (if modified) where office, retail, residential and light industrial uses could be flexibly mixed, and the business park zone (where retail, office and light industrial uses could be able mixed, if the Standard Instrument were appropriately amended).[51]

The benefits of multiple-use zoning (articulated in the Urban Taskforce/Roberts Day report *Liveable Centres*)[52] are often not realised because of planning criteria that requires authorities to be 'certain' that they can deliver sector based targets for commercial office, residential, etc. When land is able to be used flexibly for different uses, planning authorities *do* lose control as to the precise use of the land. This is ultimately in the public interest because it allows the market to do what it does best – deliver the product that delivers the greatest value to the economy and community.

In the greater scheme of things, there is little risk that, for example, housing will displace commercial development across a region, or conversely that retail will displace housing. All will ultimately find their place based on the relative need to the community (as expressed through their economic value).

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[48] If residential flats and multi-dwelling housing were reinstated as a mandatory permissible use in the mixed-use zone.

[49] By "properly implemented" we are referring to a mixed use zone that does not contain backdoor means of discriminatory against different high intensity uses. An example of such discrimination is offered by the *Burwood (Town Centre) Local Environmental Plan 2010*, which zones for mixed uses, but then has discriminatory floor space ratios based on whether the use is retail;/commercial or residential.

[50] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Research Report Volume 1* (2011) 352.

[51] This approach does not necessarily require the abolition of zones from the Standard Instrument. However, it is true that under a multiple-use approach, the permissible uses table for some zones would become similar. Nonetheless there would be differences in zone objectives. In the event that the review sought to remove or reduce mandatory zone objectives, then it might be desirable to reduce the number of zones in the Standard Instrument. Under this scenario, zones would reflect a range of permissible uses, with intensity being regulated by height or floor space ratio controls.

[52] The report is available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=2375>.

Too many planning authorities view zoning as an exercise in dividing up a fixed amount of development across different geographic areas. They frequently fail to appreciate that by implementing restrictive zoning, the economic and social value of development, and the overall level of development activity, is reduced.

If there is a concern that by rezoning land to allow a mix of uses in same locality, there will be less land available for high density residential uses, just rezone some more land for higher density residential. There is no actual shortage of land in NSW – just a shortage of land zoned for some key uses (such as retail, higher density residential and greenfield development).

The use of multi-use zones should be encouraged, to avoid sterilising land in the event that the market does not seek to develop some or all of the land made available by, for example, a light industrial zone that only authorises a very narrowly defined list of "light industrial" uses.

Recommendation 7

The mandatory permissible uses in the land use table in the Standard Instrument should be broadened so that there is a greater focus on multiple use, rather than single use, zoning.

This will involve:

- neighbourhood centres zones permitting retail premises; permitting purely-residential flat buildings and multi-dwelling housing (terraces and townhouses);
- enterprise corridor zones permitting residential flat buildings;
- medium density zones permitting residential flat buildings;
- local centre zones permitting purely-residential flat buildings and multi-dwelling;
- commercial core zones permitting purely-residential flat buildings and multi-dwelling housing.
- business development zones permitting retail premises;
- light industrial zones permitting retail premises and bulky goods premises;
- business parks permitting retail premises or bulky goods premises;
- village zones permitting retail and business premises; and
- high density residential zones permitting retail premises.

The definition of "shop top housing" should be returned to its pre December 2007 state so that any retail premises could go into a ground floor of a mixed-use development in "General Residential", "Medium Density Residential", "High Density Residential" and "Neighbourhood Centre" (obviously development consent will still be required)

It's important to understand that while we advocate for mixed-use development to be permissible, we do not suggest that it should be mandated. That is, the Standard Instrument should allow, wherever possible, a mix of commercial, residential and retail development in a single zone, and even in a single building. However, the planning system should not try to force developers to build any kind of product.

There is an increasing tendency by many planning authorities to force residential developers to build retail space on the ground floor, even when the developer believes it is unlikely that the space will be adequately tenanted.

If there is insufficient demand for retail space, developers are still forced by such rules to build ground floor retail space that can be empty and underused, leading to a ghost town atmosphere in the local streetscape. It is far better that developers be allowed to populate empty land with the vibrancy of a

residential neighbourhood than leave it bare because of a lack of demand for retail space. Similarly, forcing developers to build retail space that they know will be vacant (in order for the developer to get the benefit of residential space above) is a waste of resources and will do nothing to create a vibrant streetscape.

For example, the *Greater Taree Local Environmental Plan 2010* says that any residential development in the neighbourhood centre, local centre, commercial core and the mixed-use zones must be "shop top housing". That is, residential development can only take place if it is above or attached to retail or business premises.

This is not an an isolated example. The Urban Taskforce commissioned Stephen Moore (a well credentialed expert in urban design and town planning and principal of Roberts Day) to prepare the *Liveable Centres* report in response to the restrictive treatment residential development has been given in recent local environmental plans.[53]

Mr Moore examined the first 13 Standard Instrument-compliant LEPs. This report shows that eleven of the plans prohibit purely-residential buildings in centres, forcing a mix of residential and non-residential uses in every building within a centre.

This problem will partly be addressed by mandating a greater range of permitted uses, as per the previous recommendation. It will also need to be addressed by amending zone objectives which effectively require a mix of uses within a single building.

Recommendation 8

That a provision be inserted in the Standard Instrument as follows:

When building or place comprising two or more different land uses is permitted (with or without consent) a building or place that does not comprise of all of the land uses permitted, but includes one or more of those land uses, is also permitted on the same basis.

5. Zone objectives that stop permissible development

Even if a given development is permissible under the land use table in a plan, it can easily be refused if it is inconsistent with the zone objectives.

Plans prepared in-line with the Standard Instrument[54] require a consent authority to have regard to the objectives for development in a zone.[55] This makes a zone objective an incredibly important factor in the development assessment process.

For example, residential flats may be permissible in an areas, but if the zone objectives provide for the existing character of the area to be maintained (and the existing character is low-density residential) residential flat development is unlikely to be approved.

[53] The report is available on the internet: <http://www.urbantaskforce.com.au/LiveableCentres.php>.
[54] That is the Standard Instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006*.
[55] Cl 12 of the Standard Instrument, the *Standard Instrument (Local Environmental Plans) Order 2006*.

5.1 Use of zone objectives to protect businesses from competition

The Productivity Commission found that

> In most jurisdictions, there is considerable scope for competitors of a proposed development to use planning rules as a basis for objecting to developments and/or appealing development decisions.[56]

In NSW, the objectives for several key zones in the Standard Instrument expressly legitimise this practice.

The key Land and Environment Court case, which deals with the operation and effect of zone objectives clauses designed to protect centres from business competition, is *Almona Pty Ltd v Newcastle City Council.*[57]

In this matter, Justice Pearlman, of the NSW Land and Environment Court, heard a merits appeal from a decision by Newcastle City Council to refuse an application for the "establishment of bulky goods retail, hardware and retail plant nursery" in Kotara, about seven kilometres from the Newcastle central business district.

The site was zoned as light industrial 4(a) under the *Newcastle Local Environmental Plan 1987*. The site was directly opposite a large shopping complex known as Garden City.

A key issue related to the LEP. One of the applicable zone objectives was to allow commercial, retail or other development only where it is

> ... unlikely to prejudice the viability of existing commercial centres; ...

The permissibility of a proposed development depended upon it being consistent with that objective.[58]

The council argued that the development could not satisfy the zone objective and therefore should be refused.

Justice Pearlman rejected the developers' argument that the carrying out of the development would only be inconsistent with the zone objective if there was a real chance or possibility that the proposed development will bring into question the existence of the Newcastle CBD.

Instead Justice Pearlman ruled that the zone objective permitted

> only those developments which do not negatively affect the maintenance and reinforcement of the life or existence of existing commercial centres, of which the Newcastle CBD is, in the terms of the relevant planning instruments, of a higher order or paramount.
>
> [A] proposed development is permissible *if there is no real chance or possibility* that it will disadvantage or detrimentally affect the life or existence of existing commercial centres. In this case, the existing commercial centre in question is the Newcastle CBD which itself enjoys some paramountcy over other centres (italics added).

The proposed development would have placed other businesses in the region under competitive pressure, including those in the Newcastle CBD. That means, the project did not comply with the zone objective, and the Court refused the development application. On this occasion it did not matter, but analogous provisions existed in the regional environmental plan and the development control plan – and these too would have stopped the development dead in its tracks.

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[56] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments: Productivity Commission Research Report Volume 1* (2011) XVIII.
[57] [1995] NSWLEC 55.
[58] That follows from cl 12(3) of the LEP which obliged the council not to grant consent to the carrying out of development unless the council is of the opinion that the development is consistent with the objectives of the relevant zone. It also follows from the specific wording contained in zone 4(a), cl 3 of which provides that the only development which is permissible with consent is development for a purpose "... which, in the opinion of the Council, is consistent with the objectives of this zone ...".

This case shows how zone objectives, that seek to support the viability of centres, operate to exclude the entry of new businesses that offer any "real chance" of competition with incumbent centre-located businesses. It's worth noting that the decision of Justice Pearlman made it clear that a "centre" is defined by reference to business and commercial zones, not the presence of any particular infrastructure. That is, it is lines on paper that drives the process rather than the fundamentals of good planning.

Regretfully there are numerous examples of expressly anti-competitive provisions of this kind, in both the statutory plans in the small number of more recent plans, prepared in compliance with the Standard Instrument.

The zonings under the plan set out to prevent competition businesses located in certain zones from competing with businesses in "centres". Centres are not defined in the Standard Instrument, so it is presumably the intention to protect the business located in the "centres" identified in regional and subregional strategies from competition.

5.1.1 Business development zone

In the Standard Instrument the zone B5 "Business Development Zone" permits retail, but its objective is to

> enable a mix of specialised retail uses that require a large floor area and warehouse uses in locations which are close to, and which support the viability of, centres.

So developments that do not support the viability of centres, such as those with the potential to attract customers away from centres, will not satisfy the objectives of the zone.

The Department of Planning says this about the intended use of business development zones:

> This zone is generally intended for land where employment generating uses such as offices, warehouses, retail premises (including those with large floor areas) are to be encouraged. The zone supports the initiatives set out in the Metropolitan Strategy *City of Cities: A plan for Sydney's future* (NSW Government 2005) but might also be suitable for application in urban areas in regional NSW.
>
> The zone may be applied to locations that are located close to existing or proposed centres, and which will support (and not detract from) the viability of those centres.[59]

So, even though the government's strategic policies envisage the use of these zones in areas with infrastructure sufficiently robust to support offices and retail, businesses that might compete with centres cannot be established in these areas.

Incidentally, the Zone B5 Business Development was, in 2006, much broader. The zone objective is now limited to "bulky good premises that require a large floor area" – whereas originally the zone objective related to "retail" generally without reference to the floor area. The amendments made since 2006 have significantly reduced the flexibility that was previously available.

5.1.2 Enterprise corridor

Zone B6 "Enterprise Corridor" exists to promote businesses along main roads and to encourage a mix of compatible uses. It is also intended to enable a mix of employment (including business, office, retail and light industrial uses) and residential uses. However, it is also an objective of the zone to

> To maintain the economic strength of centres by limiting retailing activity.

So, developments concerned with retail are discouraged in zone B6.

[59] Department of Planning, Practice Note PN06-022, 12 April 2006, "Preparing LEPs using the Standard Instrument: standard zones" 4.

Enterprise corridor zones benefit from passing traffic (over 50,000 vehicles per day).[60] The Department of Planning says that

> [t]he zone is generally intended to be applied to land where commercial or industrial development is to be encouraged along main roads such as those identified by the Metropolitan Strategy *City of Cities: a plan for Sydney's future* (NSW Government 2005).[61]

Enterprise corridor zones have been proposed for Victoria Road, Parramatta Road, the Pacific Highway, Anzac Parade, Pittwater Rd, Canterbury Rd and Gardeners Rd.[62] These areas all have excellent infrastructure which can fully support high intensity uses such as offices and retail development – yet retail development which may put businesses in centres under competitive pressure is to be "limited".

5.1.3 Light industrial

In December 2007 the objectives for Zone IN2 Light Industrial were amended so that development in these areas must now "support the viability of centres". This means retail developments, such as bulky goods facilities, will be much harder to locate in light industrial areas, even if "retail premises" or "bulky goods premises" are included in the list of permitted uses for a particular local environmental plan. We are in possession of internal Department of Planning documentation (obtained through a freedom of information request) which says that this change was made at the instigation of the Shopping Centre Council and the Property Council – organisations that represent the interests of major incumbent retail landlords.

The above discussion shows how the Standard Instrument creates areas where businesses are unable to be established if they would provide competition to businesses in established centres.

[60] Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 35.
[61] Ibid.
[62] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 31; Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 34.

Recommendation 9

The anti-competitive provisions of the NSW Government's Standard Instrument should be removed. Namely:

- in a "Business Development Zone" retail, office premises and other uses should be permitted, even if it would provide competition to businesses located in established centres; and
- in "Enterprise Corridor" ; "Business Park"; "General Industrial"; and "Light Industrial" zones retail and other uses should be permitted even if it would provide competition to businesses located in established centres.

This means, in the Standard Instrument's Land Use Table:

- in a "Business Development Zone" the existing zone objective ("[t]o enable a mix of business and warehouse uses, and bulky goods premises that require a large floor area, in locations that are close to, and that support the viability of, centres.") should be amended by deleting the words: "in locations that are close to, and that support the viability of, centres";
- in an "Enterprise Corridor Zone" the existing zone objective ("[t]o maintain the economic strength of centres by limiting retailing activity") should be deleted;
- in a "Business Park" the existing zone objective ("[t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area") should be amended to omit the words "to meet the day to day needs of workers in the area"; and
- in a "Light Industrial" the existing zone objective ("[t]o encourage employment opportunities and to support the viability of centres") should be amended to omit the words "support the viability of centres" and the existing zone objective ("[t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area") should be amended to omit the words "to meet the day to day needs of workers in the area".

A direction should be inserted into the Standard Instrument ensuring that additional zone objectives are not inserted by councils to have the same effect as the above deleted provisions.

5.2 Prohibition on medium sized and large retail and business uses

In the Standard Instrument's "Zone B1 Neighbourhood Centre" the zone objective is

> [t]o provide a range of *small-scale* retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood (emphasis added).

A subjective phrase such as "small-scale" should never have appeared in a statutory plan. The term "small-scale" is vague and undefined. True supermarkets or large format stores range from 1,500 square metres (six checkouts) for a typical Aldi or IGA Supa store to 2,500 to 3,500 square metres (12 to 16 checkouts) for a full-line Woolworths, Coles, Franklins or Superbarn. So, in industry terms, a small scale supermarket will have a floor area of 1,500 square metres. However, some government and local council planners have been known to argue that a store of 700 square metres is a larger retail establishment – an idea that is rejected by both industry and consumers.

The *Liverpool Local Environmental Plan 2008* takes the extra step of banning shops with a gross floor area of more than 1,500 square metres.[63] So clearly, a supermarket of 2,000 square metres – which would still

[63] Clause 7.25.

be small by industry standards – will be prohibited in Liverpool's neighbourhood centres. However, the fact is, even a "supermarket" of 1,000 square metres may be deprived of development consent, because of the objective that supermarket retailing must be "small". There is nothing in the *Liverpool Local Environmental Plan 2008* which says that a supermarket of 1,500 square metres satisfies the "smallness" criteria set out in the neighbourhood centre zone objectives.

The reference to "small scale" in the zone objective should be removed. By depriving local consumers from full-line supermarkets, locals will be forced to drive further to access lower cost groceries and those that are unable to drive will be deprived of the full-range of groceries that are only available at full-sized supermarkets.

Recommendation 10

In the Standard Instrument's "Zone B1 Neighbourhood Centre" the zone objective should amended to omit the words "small scale". Height and/or FSR controls are sufficient to control the bulk and scale of development, a subjective prohibition imposed through use of the words "small-scale" is inappropriate.

5.3 Zone objectives that "encourage" some development

A local environment plan is a legal document prohibiting and permitting activities. It can do nothing to "encourage" a particular class of development, except when it does so by disadvantaging other forms of development. This is well understood by consent authorities who frequently use the word "encourage" to signal that a particular form of development might be approved, while other forms of development are likely to find approval difficult.

For example, the *Ryde Local Environmental Plan 2010* includes an objective for its commercial core and business park zone:
To encourage industries involved in scientific research and development.
The Standard Instrument requires that this zone objective be considered when development applications in the commercial core zone are considered by consent authorities.[64] This zone objective obliges and empowers a consent authority to consider refusing a development because it does not involve scientific research and development. Such a refusal would be a loss to the community of Ryde, the broader Sydney community and the state as a whole, because it may prevent Macquarie Park from reaching its full potential. It may undermine the substantial investment the state has made in this locality as a transport hub. The reality is that Macquarie Park is best developed by allowing the market to determine the kinds of businesses that are located there – with appropriate controls over building form.

Zone objectives that "encourage" certain types of development, implicitly "discourage" other forms of development, even if those other forms of development a permitted uses in a zone. Through the use of "encourage" objectives, state government set strategic planning objectives can be undermined by local councils.

[64] Clause 2.3(2).

Recommendation 11

A direction should be inserted in the Land Use Table of the Standard Instrument prohibiting the use of the word "encourage" in any additional zone objectives not already mandated by the Standard Instrument.

This would not prevent zone objectives that explain the clear purpose of the zone, for example: "To provide for the housing needs of the community within a high density residential environment".

5.4 Compliance with the Departmental practice note

In September 2009 the Department of Planning published an LEP practice note titled "Local environmental plan zone objectives" (PN 09–005).[65]

This practice note advised council that:

- in many instances there will be no need for a council to add any additional zone objectives;
- aspirational objectives for the local government area that are supported by policies or provisions outside of the LEP (e.g. community consultation process, development assessment procedural matters, desired urban design outcomes or building development standards) should not be included;
- adding numerous local objectives could undermine the purpose of the zone;
- objectives should not describe development control matters that are addressed through a development control plan, e.g. design requirements, setbacks, building envelope, site analysis or construction standards;
- language in zone objectives should be avoided when it is open to subjective interpretations, e.g. "well-designed", "high quality", "liveable", "economically sound" or a vague phrase such as "creating a sense of place".

The practice note is an excellent document, and the Department deserves praises for such a well written and clear explanation of good practice in the drafting of plans. Regrettably, local environmental plans that have been published since this practice note was issued have not consistently complied with it.

This practice note should be given teeth – this means its requirements should be elevated so that they are formally set out in the Standard Instrument itself. This is possible under the Act, which expressly provides that the Standard Instrument may contain requirements or guidance as to the form or content of non-mandatory provisions.[66] The contents of the practice note are so important, they should be directly incorporated into the instrument in this way.

Some provisions can be expressed as directions (such as prohibitions on the use of words like "well-designed", "high quality", "liveable", etc), while others will need to be phrased as material for "guidance".

[65] <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=T%2f5w%2brIJIWc%3d&tabid=249>.
[66] s 33A(7).

Recommendation 12

The Standard Instrument should be amended to implement the Department of Planning's practice note 09-005 on local objectives in zones.

A direction should be inserted prohibiting the use of the phrases "well-designed", "high quality"', "liveable", "economically sound", "creating a sense of place" or their synonyms in additional (non-mandated) zone objectives or other non-mandatory provisions.

A direction should be inserted prohibiting additional zone objectives or clauses dealing with design requirements, setbacks, building envelope, site analysis or construction standards.

A direction should be inserted prohibiting additional zone objectives or clauses requiring consideration of matters the same as, or substantially the same as, the matters set out in section 79C of the Act.

A guidance provision should be inserted advising that development control matters that are addressed through a development control plan should not be referenced in zone objectives or other additional provisions.

A guidance provision should be inserted advising that if the same local objectives are being considered for several zones it may be best to include the overarching issue as an overall aim of the plan.

6. Floor space ratios are being misused

A common defence of floor space ratios is to state that they are:

- to provide an appropriate correlation between the size of a site and the extent of any development on that site;
- to establish the maximum development density and intensity of land use, taking into account the availability of infrastructure and the generation of vehicle and pedestrian traffic; and
- to ensure buildings are compatible with the bulk and scale of the existing and future character of the locality.[67]

If the above statements are a legitimate justification for the imposition of maximum floor space ratios on a site, then it is difficult to comprehend why development types of a similarly high intensity should be given different floor space ratios in the same locality.

For example, while the *Burwood Town Centre Local Environment Plan 2010* does permits residential development within the town centre, it imposes a significant floor space penalty on such development. For example, a maximum floor space ratio (FSR) of 6.0:1 is permitted in the town centre, but residential FSR in the same location is restricted to 2:1. This will severely impact the feasibility of residential development in this location and will potentially stall investment and urban renewal.

In high density residential zones, the *Ryde Local Environmental Plan 2010* sensibly excludes residential flat development and multi-dwelling housing from the floor space ratio requirements but applies it to shop top housing. In this case the rule penalises retail development and confers disproportionate market power on the owner(s) of nearby retail land that is not so burdened.

[67] *Wollongong Local Environmental Plan 2009* cl 4.4.

This level of regulation and prescription of uses is unnecessary and must be avoided. For instance, if market conditions mean that non-residential development is not viable at a particular point in time, floor space ratio penalties may prevent any urban renewal in a given area from proceeding.

On the other hand, if residential and non-residential uses are treated equally, residential development can contribute to urban renewal when commercial or retail development is not viable.

The bulk and scale of a building is the same, whether its internal use is residential, commercial, retail or mixed-use. If a planning authority is concerned about the external building form, this can be dealt with by a development control plan, and does not need to regulate the internal use of a building. For example, a residential building can be built in the appearance of a commercial building (see the Regent Place development for example). Similarly, a supermarket can be in a mixed-use development underground, and have no external visual impact.

Traffic impacts can be assessed in development assessment in the context of a particular proposal. However, we note that floor space ratio is a reasonable proxy for likely pedestrian and motor vehicle traffic, and that, in broad-brush terms, the impact of commercial and residential development of the same ratio are likely to be similar.

Recommendation 13

The existing direction in clause 4.4 in the Standard Instrument should be revised to prevent floor space ratios from discriminating between uses in the same zone.

7. Arbitrary caps on the floor space for certain developments

As a result of amendments made in December 2007, the Standard Instrument sets a maximum floor area for different types of development, regardless of:

- the merit of individual proposals; or
- the capabilities of local infrastructure or the nature of local suburbs.

For example, the Lane Cove Local Environmental Plan 2009 (applying mandatory provisions of the Standard Instrument) sets a maximum floor space for neighbourhood shops at 300-400 square metres (depending on whether the shop fronts a local or regional road).[68] In the Penrith Local Environmental Plan 2010 the limit is 200 metres. [69] In the Liverpool Local Environmental Plan 2008 it is 100 square metres.[70]

Surely what matters to the community are the bulk and scale of developments and off-site noise and traffic impacts? Bulk and scale issues can be dealt with by height or floor space ratio restrictions. Noise and traffic impacts can be objectively addressed as part of the development assessment process.

In the Liverpool Local Environmental Plan 2008 additional local provisions have been inserted banning shops with a gross floor area of more than 1,500 square metres.[71] In the same plan, retail and bulky goods premises in the enterprise corridors zone is severely restricted. A clause prohibits development that would result in the total gross floor area of all retail premises (other than timber and building supplies, landscape and garden supplies or vehicle sales or hire premises) in a single building being more than 8,000 square metres.[72] Of course, such a restriction could properly arise from a development

[68] cl 5.4(7).
[69] cl 5.4(7).
[70] cl 5.4(7).
[71] cl 7.25.
[72] cl 7.22.

assessment, but it is impossible to see how such an arbitrary restriction can be imposed by a zoning plan, with no particular proposal on the table.

Recommendation 14

The Standard Instrument's clause 5.4(4), (6)-(8) should be deleted and a direction should be inserted to ensure that no additional local provisions can be inserted which restrict the floor space of a development.

The existing provisions in relation to height and floor space ratio should be sufficient to deal with bulk and scale at a zoning level.

8. Mandatory use of non-discretionary development standards

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 and development control plan is not any assurance of development approval.

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 provided with discretion as to the application of these standards.

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.

Unfortunately, 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 a guaranteed minimum development potential for that land.

What this really means is that, yet again, the current planning system in NSW does not provide any certainty for an investor. Land acquisition decisions, development potential of land and land value cannot be determined with confidence.

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. 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". Impact-assessable development is more complex.

Western Australia has also adopted a similar approach to residential development. Detailed 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.[73] 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"[74].

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".[75] 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.[76]

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.[77]

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.[78]

Non-discretionary development standards would be useful for establishing a "safe" space for regulators. Regulators are conservative and risk averse. They will create a development envelope which a regulatory can be satisfied, in all cases, and will present little risk of adverse community outcomes.

While they will acknowledge that it may be possible to design projects that have no adverse community outcomes as part of an non-discretionary scheme, they will be nervous about losing the ability to veto such projects, because there is no specific proposal are on the table, and they will be concerned at the possibility that some proposals may not ultimately be successful.

For example, they might provide for a floor space ratio of 2.5:1, whilst being prepared to admit that in some circumstances a 3:1 floor space ratio could be acceptable (for example, if the developer was able to demonstrate that the development would generate less traffic that would normally be expected for a 3:1 development). However, only the 2.5:1 would be included in any as-of-right code, because the planner would be concerned about creating a "loophole" in the non-discretionary

[73] Western Australian Planning Commission 2002 Planning Bulletin # 55
[74] Western Australia Planning Commission http://www.planning.wa.gov.au/WAPC+statements/769.aspx [Accessed 30 June 2009]
[75] s 79C(2)-(3).
[76] s 79C(2).
[77] 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*.
[78] s 79C(3).

approval system that could be "exploited" by a developer. So we acknowledge that a range of development outcomes that might present no adverse outcomes would not be permitted under as-of-right schemes.

This does not make non-discretionary development standards undesirable, so long as a merit/impact assessable scheme is still available, unconstrained by arbitrary rules, running alongside the non-discretionary development standards.

Such a regulatory structure gives the holder capital flexibility. Those owners of capital with a low appetite for regulatory risk who wish to present less imaginative proposals can take advantage of the non-discretionary development path. Those with a greater ability to accommodate some regulatory risk with innovative proposals would be able to pursue a full merit assessment outside of the non-discretionary development standards.

In short, the key is to offer a two track system for large scale urban development.

Firstly, one that offers the simplicity of black and white rules, but does not accommodate innovation, or development that was not envisaged or properly considered when plans were prepared.

Secondly, a system that offers merit assessment, with more uncertain outcomes, based on the strength of the case that the proponent is able to advance.

A two-track system provides for both flexibility (for imaginative, innovative development) **and certainty** (for predictable and anticipated development).

While we see wide potential for "non-discretionary" development standards to be used to provide a 'safe space' for developers and regulators in 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;[79] and
- any development proposal that meets any development standards 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.[80]

[79] See clause 29(1) of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* for an example of a similar provision.
[80] 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.

Recommendation 15

The Standard Instrument should be amended as set out below.

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 development proposal that meets any development standards 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.

9. Development control plans will undermine the new LEPs

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

We are aware we are not alone on this front. The *Metropolitan Plan for Sydney 2036* says that:

> LEPs should be complemented by DCPs; both need to allow for more development potential than demanded at any one time. Although the current zoned land in existing areas across Sydney has theoretical potential to deliver much of the housing needed, the greater challenge is to ensure enough housing is actually built and more new development takes place ... DCPs should reflect the Metropolitan Plan objectives. They will not conflict with LEPs or have requirements that render the controls set out in LEPs unachievable (bold added).[81]

We appreciate the clear wish of the Department, but implementing this measure will require more than an aspirational statement. It will require clear regulation of and limitations on the use of development control plans.

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 out.

However, in *Zhang v Canterbury City Council*[82] 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.[83]

[81] NSW Department of Planning, *Metropolitan Plan for Sydney 2036* (2010) 118.
[82] (2001) 115 LGERA 373
[83] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 386-7 (Spigelman CJ); Meagher and Beazley JJA concurred. I agree with Spigelman CJ.

In that matter, a consent authority declined to apply a restriction in a development control plan, because it could see no evidence why it would be useful.[84] However, it taking what might be regarded – to a lay person - as a common-sense approach, the consent authority ran afoul of pre-determined DCP 'standards' which required no evidence of their efficacy. The Court concluded that an evidence-based approach could only be supported if there were no "standards" which the decision maker had to take into account.[85] 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" ....[86]

This approach is now routine and has been applied for developments as varied as multi-unit residential development;[87] late night trading of entertainment venues;[88] alterations to individual dwellings;[89] and industrial premises.[90]

The Court of Appeal recently re-affirmed the *Zhang* approach and said the case had "authoritatively considered" this issue.[91] The Court of Appeal made it very clear a decision-maker was

> not entitled to take the view that the standards set by the DCP were inappropriate for reasons of general policy.[92]

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 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.93

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.94 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

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[84] *Zhang v Canterbury City Council* [2001] NSWCA 167 [76]; (Spigelman CJ); Meagher and Beazley JJA concurred.
[85] Ibid.
[86] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 387 (Spigelman CJ); Meagher and Beazley JJA concurred.
[87] 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].
[88] For example, see *Moonlight City Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 1004 [23].
[89] For example, see *Pietranski v Waverley Council* [2009] NSWLEC 1278 [17].
[90] For example, see *Botany Bay City Council v Premier Customs Services* Pty Ltd [2009] NSWCA 226 [5] (Macfarlan JA).
[91] For example, see *Botany Bay City Council v Premier Customs Services Pty Ltd [*2009] NSWCA 226 [24] (Macfarlan JA).
[92] *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA 226 [27] (Macfarlan JA); Ipp JA and Hoeben J concurred.
[93] *North Sydney Council v Ligon 302 Pty Ltd [No. 2]* (1996) LGREA 23.
[94] L Stein, *Principles of Planning Law* (2008).

> 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.[95]

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.[96]

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 scope of matters that can be covered by a development control plan (DCP).[97] 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 will 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 sizes and ceiling heights.[98] 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.

A similar approach has also recently been proposed by the O'Farrell Government in relation to state significant development.[99]

The scope 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;

[95] Ibid76-77.
[96] *Reg v Wicks* [1998] AC 92.
[97] The power is conferred by section 74E(3) and section 74C(5)(b)
[98] *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.*
[99] *State Environmental Planning Policy (State and Regional Development) 2011* cl 11.

- 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 or scale where height and/or floor space 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 efficient requirements (BASIX is sufficient).

Secondly, development controls plans should not contain prohibitions, only development standards.[100]

Thirdly, the application of development standards in development control plans should be modified so that any development standard set out in a development control plan should not be applied when:

- it is unreasonable or unnecessary in the circumstances of the case;
- it confines the intensity of a development and, as a result, development (identified by an environmental planning instrument as desirable) will not take place in a reasonable period because it will not be economically feasible;[101] or
- the consent authority is satisfied, either inherently or by the passing of time, that the development standard would bring about an inappropriate planning solution, including an outcome which conflicts with other policy outcomes adopted at a State, regional or local level.[102]

[100] This point is informed by SEPP 1.

[101] See *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). Consider also the practice in the US: If the board (of variance) can reasonably conclude that a zoning regulation practically destroys or greatly decreases the value of a price of property, it may vary the terms of the ordinance ...": *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).

[102] This point is informed by the planning principles articulated in *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472

Recommendation 16

Firstly, the government should use its powers to immediately limit the scope of matters that can be covered by a development control plan (DCP).

Secondly, development controls plans should not contain prohibitions, only development standards.

Thirdly, the application of development standards in development control plans should be modified so that any development standard set out in a development control plan must not be applied when:

- it is unreasonable or unnecessary in the circumstances of the case;
- it confines the intensity of a development and, as a result, development (identified by an environmental planning instrument as desirable) will not take place in a reasonable period because it will not be economically feasible; or
- the consent authority is satisfied, either inherently or perhaps by the passing of time, that the development standard would bring about an inappropriate planning solution, including an outcome which conflicts with other policy outcomes adopted at a State, regional or local level.

We also note there is a special need to create a state environmental planning policy to reduce the discretion of local councils to effectively block development envisaged by local environmental plans by arbitrarily reducing car parking entitlements.

Such a policy should set minimum car parking entitlements for different categories of permitted uses, and only permit councils to impose lower car parking entitlements when it is justified by an objective expert traffic study. Of course, such a policy should not preclude an applicant for putting forward a proposal with little or no car parking, where the applicant can demonstrate that such parking is not required (e.g. where public transport is plentiful).

Recommendation 17

There needs to be a state environmental planning policy to reduce the discretion of local councils to effectively block envisaged development by arbitrarily reducing car parking entitlements. Such a policy should set minimum car parking entitlements for different categories of permitted uses, and only allow councils to impose lower car parking entitlements when it is justified by an appropriately objective traffic study. Of course, such a policy should not preclude an applicant for putting forward a proposal with little or no car parking, where the applicant can demonstrate that such parking is not required (e.g. where public transport is plentiful).

10. New heritage provisions

10.1 Aboriginal places of heritage significance

As a result of changes made in February 2011, the existence of an "Aboriginal place of heritage significance" is no longer automatically to be disclosed in the heritage map of an LEP. Instead it may be hidden in a heritage study adopted by council and not expressly mentioned in an LEP

at all. What's more the heritage study only needs to disclose the "general location" of the place.

This means that development on private land may be restricted, but the existence of the restrictions will not be identifiable by examining the LEP. Even if a property owner or purchaser is made aware of the heritage study, and is able to get access to it, it may only describe the "general location" of the place, creating significant uncertainty as to which areas are actually protected.

This change also enables councils to sterilise private property rights and confer Aboriginal heritage protection on a location without state government approval (because it is not longer essential for the LEP to be amended). Contrast this with European heritage protection which (appropriately) still requires State Government approval.

There is no requirement for councils need to be judicious in their declaration of "Aboriginal place of heritage significance". A location may be designated an "Aboriginal place of heritage significance" solely because of its contemporary significance to the Aboriginal people. Such places are now possible in a wide variety of both urbanised and rural locations. They may freely be designated by councils over public (including state government) and privately owned land. There is a risk that the process of identifying Aboriginal places of heritage significance will be politicised and become a tool to stop particular development applications.

We are quite amazed at this deliberate attempt to make the planning system more opaque.

We note that the Department of Planning have not made the change in error - we flagged these very same issues in our submission in 2010, and again drew the matter to their attention in early 2011. The changes have been made in apparent full knowledge of the implications.

The Department's deliberate decision to reduce the access that property owners and property purchasers have to information about restrictions on their use of their own land will increase the importance of "section 149" planning certificates (which are used in property valuation and conveyancing). 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).[103]

Planning certificates must, under the law, disclose the existence of any conservation area (however described).104

Until now, "places of Aboriginal heritage significance" are disclosed because they formed part of declared heritage conservation areas. The Department's February changes mean that the re-named "Aboriginal places of heritage significance" areas are no longer part of the existing system of "heritage conservation areas". They are, however, still a type of conservation area (it's the substance, not the form, which governs the disclosure requirements for a section 149 certificate).

We are concerned that the Department of Planning has not advised local councils of the need to amend their systems so that they are still disclosing the existence of "Aboriginal places of heritage significance" as a type of conservation area on planning certificates. We note that deficiencies in planning certificates have the potential to cause significant conveyance issues and also place councils at risk of legal liability.

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[103] NSW, *Parliamentary Debates*, Legislative Council, 21 November 1979, 3387 (Paul Landa).
[104] *Environmental Planning and Assessment Regulation 2000* Schedule 4 cl 2(g).

We are also concerned that the Department may be contemplating further regulation amendments to weaken planning certificates, possibly removing the requirement to disclose the existence of conservation areas (in the generic sense) such as "Aboriginal places of heritage significance". Such a move will significantly heighten the regulatory risk of valuing and declaring land in NSW. It is likely that such a move will hit land valuations generally.

Recommendation 18

The changes made in relation to the Standard Instrument in relation to "Aboriginal places of heritage significance" in February 2011 should be reversed, and in particular, environmental planning instruments should clearly disclose all "Aboriginal places of heritage significance" that are to receive protection under the Environmental Planning and Assessment Act, as should all section 149 "planning certificates".

10.2 Aboriginal objects

An "Aboriginal object" is any deposit, object or other material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of an area of NSW, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal background.105

There is no time limit on the definition of an Aboriginal object. That is, it may be 5 years old, 10 years old or 50 years old. There are very many such objects in existence.

The sweeping nature of this definition has not gone unremarked by the judiciary. Justice Basten has said (in reference to the substantively identical National Parks and Wildlife Act definition):

> Clearly the definition is deliberately formulated in broad terms which are apt to catch *anything in physical form* which bears witness to the presence of Aboriginal people anywhere within New South Wales (emphasis added).[106]

Previously an Aboriginal object needed to be specially named in an LEP to warrant protection under the LEP. Prior to February 2011, (outside of a "place of Aboriginal significance") a "heritage item" was defined to include an Aboriginal object, but only if it was:

- shown on the LEP's heritage map as a heritage item;
- the location and nature of which is described in a schedule to the LEP; and
- specified in an inventory of heritage items available at the office of the Council.

(Development that impacts on heritage items is subject to special additional rules.)[107]

As a result of the changes made in February all "Aboriginal objects" are now treated as heritage items, even when they have not been specifically named in an LEP. There isn't even a need for such objects to be fixed to the ground. Household furniture, garden implements, etc are all covered. This means, for example, that development consent is now required to move household furniture that provides evidence of the Aboriginal habitation of an area.108 We anticipate that these new provisions will greatly assist the Environmental Defenders' Office and

[105] Standard Instrument Dictionary.
[106] *Country Energy v Williams; Williams v Director General National Parks and Wildlife Service* [2005] NSWCA 318 [29].
[107] cl. 5.9 and cl. 5.10.
[108] Standard Instrument cl 5.10(s) read in conjunction with the definition of "Aboriginal object" in the dictionary.

others who wish to mount third party legal challenges against new development on technical grounds.

Until now, the Environmental Planning and Assessment Act has only extended protection to known, identified and mapped objects. It has been the role of separate legislation - the National Parks and Wildlife Act 1974 - to protect unmapped objects.

For greenfield development, where there is a likelihood that Aboriginal objects may be present, it is normal for an archaeological study to be carried out and a permit to be sought from the Department of Environment and Climate Change under the National Parks and Wildlife Act 1974. Where this is an issue it will be dealt with as integrated development under Part 4.109

The distinction between the two legislative regimes has now been obliterated. Both now purport to do the same job. That is, confer protection on all Aboriginal objects, whether they are presently mapped or not. Why do we have two legislative regimes doing the same thing?

It is very strange that the Department of Planning should widen the protection extended by an LEP to such a very large category of unknown items. We alerted the Department to the problems this would cause in our submission in 2010, but the Department decided to proceed despite our concerns.

It is also important to note that, under the new provisions, where a DCP has extended protection to vegetation (as tree preservation orders have done in the past) it is no longer possible for a permit to be issued to remove a tree that bears evidence of Aboriginal habitation of an area, except in a limited narrow set of circumstances. There is no legal requirement that the evidence is historic. That is, the tree may bear very recent markings evidencing Aboriginal habitation of the area and still be given this special protection.

We cannot understand why all trees bearing the evidence of Aboriginal habitation of an area (including contemporary habitation) should now be treated the same by the Standard Instrument. Surely such provisions should have been restricted to historical, rather than contemporary markings on trees (if required at all given the existence of other statutory protections)?

Recommendation 19

The changes made to the Standard Instrument in relation to "Aboriginal objects" in February 2011 should be reversed."

10.3 Aboriginal places of heritage significance

As a result of changes made in February 2011, items that have not been listed as state heritage items, but have been publicly exhibited as proposed such items in a heritage study by council, will now receive formal protection under the LEP. This will result in the further politicisation of the heritage listing processes, as councils scramble to assemble state heritage nominations as means to block new urban development.

This will result in the state government been dragged into a wider range of controversies than necessary.

[109] *Environmental Planning and Assessment Act 1979* Part 4 Division 5.

Recommendation 20

The pre-February 2011 position should be restored in relation to items that have been publicly proposed state heritage items, but not nominated as such items.

11. Flexibility when controls are unreasonable or unnecessary

11.1 Clause 4.6 does not faithfully reproduce SEPP 1

Clause 4.6 of the Standard Instrument is intended to fulfil the function of *State Environmental Planning Policy No 1—Development Standards* ("SEPP 1"). SEPP 1 does not apply to land covered by a Standard Instrument-compliant LEP.[110]

SEPP 1, and clause 4.6, serve an important public policy purpose. It is no accident that the very first state environmental planning policy was one that ensured that development standards are flexible. The Department of Planning itself stated in 1989:

> As numerical standards are often **a crude reflection of intent**, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small, in others it may be numerically large, but nevertheless be consistent with the purpose of the standard (bold added).[111]

The underlying purpose of SEPP 1 has not been faithfully translated into the new clause 4.6 of the Standard Instrument.

Standard Instrument-compliant LEPs contain significant carve-outs from clause 4.6. As a result all such LEPs make it impossible for development standards be varied in relation development as varied as:

- bed and breakfast accommodation;
- home businesses;
- industrial retail outlets;
- farm stay accommodation;
- kiosks;
- neighbourhood shops;
- roadside stalls; and
- secondary dwellings.[112]

The *Environmental Planning and Assessment Model Provisions 1980*, which the Standard Instrument replaced, had no carve outs from SEPP 1.

Furthermore the Standard Instrument limits ability for the SEPP 1-style mechanism to be used in relation to the subdivision of land in ten different zones.[113] The Standard Instrument also prevents the SEPP 1-style mechanism from being invoked in relation to BASIX requirements.[114]

[110] Standard Instrument cl 1.9(2).
[111] Department of Planning, *Planning Circular B1* Ref 80/10541 (1989).
[112] Standard Instrument cl 1.4.6(8)(c).
[113] Standard Instrument cl 1.4.6(6).
[114] Standard Instrument cl 1.4.6(8)(b).

Specific LEPs finalised under the Standard Instrument have prevented clause 4.6 from applying to provisions, such as:

- the height of buildings;[115]
- minimum lot sizes and strata subdivision in general residential and medium density residential zones;[116]
- development of river front land; [117]
- maximum floor areas; [118]
- caps on the overall number of lots;[119] and
- rules on sun plane protection.[120]

By excluding the SEPP 1 mechanism so readily, and in such wide variety of cases, **the planning system is formally declaring that some development standards must be rigidly applied even when they are unreasonable or unnecessary in the circumstances of a case.** To us, this is indefensible. Surely any good planning system must be prepared to vary prescriptive rules when it can be shown that, in a particular context, the rules are unreasonable or unnecessary.

The SEPP 1 mechanism is not easy to invoke. There are plenty of safeguards. There is no need to fear it.

The way that SEPP 1 works has been extensively analysed by no lesser authority than Justice Preston, Chief Judge of the Land and Environment Court. His decision, *Wehbe v Pittwater Council,*[121] has been cited or applied on 51 separate judgments of the Land and Environment Court since it was made in 2007.

Wehbe v Pittwater Council explains the requirements that must be followed if an objection (by an applicant) under SEPP 1 is to be upheld.

> First, the Court must be satisfied that "the objection is well founded" ... The objection is to be in writing, be an objection "that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case", and specify "the grounds of that objection" .... The requirement ... that the consent authority be satisfied that the objection is well-founded, places an onus on the applicant making the objection to so satisfy the consent authority ...
>
> Secondly, the Court must be of the opinion that "granting of consent to that development application is consistent with the aims of this Policy ..." .... This matter is cumulative with the first matter .... The aims and objects of SEPP 1 ... are to provide "flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of ...[certain] objects specified in... the Act". ...
>
> Thirdly, the Court must be satisfied that a consideration of the matters [relating to Director-General's concurrence] .... justifies the upholding of the SEPP 1 objection.... The matters ... are:
>
> (a) whether non-compliance with the development standard raises any matter of significance for State or regional environmental planning, and
>
> (b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.[122]

The requirement that a development standard is "unreasonable or unnecessary in the circumstances of the case" can be established by any one of the following grounds:

[115] *Ryde Local Environmental Plan 2010* cl 4.6(8)(ca).
[116] *Albury Local Environmental Plan 2010* cl 4.6(8)(ca).
[117] *Albury Local Environmental Plan 2010* cl 4.6(8)(ca).
[118] *Liverpool Local Environmental Plan 2008* cl 4.6(8)(ca).
[119] *Penrith Local Environmental Plan 2010* cl 4.6(8)(ca).
[120] *Wollongong Local Environmental Plan 2009* cl 4.6(8)(ca).
[121] [2007] NSWLEC 827.
[122] *Wehbe v Pittwater Council* [2007] NSWLEC 827 [38]-[40].

- the objectives of the standard are achieved despite non-compliance with the standard;
- the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- the development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; or
- the compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.[123]

It is important to understand that the dispensing power under SEPP 1 is not a general planning power to be used as an alternative to the plan making provisions of the Act.[124] SEPP 1 cannot be used as a means to effect general planning changes throughout a local government area.[125]

Given the extensive safeguards that are clearly embedded in SEPP 1, there is no basis for the Standard Instrument itself, or for LEPs prepared under the Standard Instrument, to exclude the SEPP 1-style mechanism from operating.

Recommendation 21

That either clause 4.6 be deleted from the Standard Instrument, and SEPP 1 be allowed to apply, or clause 4.6 be amended to more closely resemble SEPP 1.

Furthermore, Standard Instrument cl 4.6(6) and (8)(b)-(c) be deleted, as well as clause 4.6(ca) wherever it appears in Standard Instrument compliant local environmental plans.

11.2 Ensuring that unreasonable and unnecessary prohibitions are dealt with fairly

NSW's environmental planning instruments are not known for their rationality. You do not need to take our word for it. Consider these comments, set out in a recent decision of the Court of Appeal:

> [I]t has ... been said with some justification that a search for logic and consistency within planning instruments is often doomed to fail. As has been explained by Tobias JA, to seek "planning logic in planning instruments is generally a barren exercise" ...Why one use is permissible and another similar use is prohibited will often be a matter of speculation. ...[126]

Little has been done to address the inconsistency and irrationality of environmental planning instruments despite these comments and other mounting evidence of serious problems. In the past Part 3A was, in part, used as a tool by the government to overcome the serious problems in the complex regulatory system imposed by incoherent environmental planning instruments.

If we are to meet the needs of a fast growing population and a dynamic market economy we will need to see a significant shift in planning practice. In short, we must allow more development in areas of high demand that are well serviced with necessary infrastructure and in close proximity to jobs and services.

[123] *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[49].
[124] Ibid [51].
[125] Ibid.
[126] Hastings Co-operative Ltd v Port Macquarie Hastings Council [2009] NSWCA 400 [39] (Basten J with Allsop P agreeing).

Such locations will not only enable additional housing and employment needs to be met, but will at the same time provide opportunities for the creation of vibrant, healthy and liveable urban communities.

Unfortunately, our experience with local environmental plans (the most common form of environmental planning instruments) is that these ideal locations are being overlooked. These locations are not being zoned appropriately to urban development.

The most common scenario is where the zone is broadly correct, but through some accident of definitions, or lists of permissible uses, and obvious or sensible land use has been prohibited.

A case in point is the absence of low-rise apartments as a permissible use in medium density residential zone in the *Liverpool Local Environmental Plan 2008,* despite the zone objectives:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment....
- To provide for a concentration of housing with access to services and facilities.
- To provide for a suitable visual transition between high density residential areas and lower density areas. ...

Another example is offered by the *State Environmental Planning Policy (Western Sydney Employment Area) 2009*, where the general industrial zone includes a zone objective:

> To provide for small-scale local services such as commercial, retail and community facilities (including child care facilities) that service or support the needs of employment-generating uses in the zone.

However, neither "community facilities", "child care facilities" nor "business premises" are listed as permitted uses in the land use table.

In other instances, the actual zoning of the land does not make sense, in the context of surrounding land uses, or local, state or regional planning policies:

- areas that should be zoned urban are zoned rural, despite the presence of more than adequate public infrastructure and the absence of environmental concerns;
- areas that are zoned industrial, should be zoned for commercial or retail development, due to the presence of high quality and underutilised infrastructure and the convenience of a site to the residences of customers and workers;
- areas are zoned for commercial uses, but are subject to arbitrary floor space caps that prevent development applications being dealt with;
- areas are zoned for low density or industrial uses when clearly more dense residential development would deliver a positive planning outcome.

There needs to be more flexibility in this system, without the need for the convoluted and complex rezoning process to be followed, for the most minor of problems. This is particularly important when the potential for development is identified outside the technical limits of a given zone, but nonetheless, is consistent with clearly articulated strategic planning directions, or even the zone objectives.

Some interstate jurisdictions are more flexible about approving development outside of an existing statutory plan. For example, Queensland's *Integrated Planning Act 1997* has historically included the option for consent authorities to issue "preliminary approvals" which may override planning schemes. The new *Sustainable Planning Act 2009* continues these provisions.[127]

The inherent limitations and inflexibilities from rigid statutory planning in NSW must be overcome. An applicant should be entitled to make, and have determined, a development application (including a 'concept' staged development application) even if the development is prohibited by a statutory plan.

[127] See cl 242 – a "preliminary approval" is one kind of development application and can override a planning scheme. It may be appealed under cl. 461.

The consent authority (which would normally be a council, a joint regional planning panel or the Land and Environment Court) should have the power to approve a development application that is inconsistent with the zoning of land.

The benefits of this reform are clear:

- a more streamlined process with a reduced need to pursue rezoning (and therefore a part-implementation of the Productivity Commission's findings);
- applicants whose development application are denied (or not dealt with) by a council or a panel can have the merits of their matter dealt with by the Land and Environment Court;
- the ability for planning authorities to use planning agreements to extort disproportionately high 'voluntary' levies from developers prior to rezoning decisions will be reduced (because of the presence of a right to a merits appeal); and
- bureaucratic rules confining particular uses to particular zones will come second to clearly articulated strategic planning policies.

This change can be achieved in a variety of ways. For example SEPP 1 or clause 4.6 could be extended. Alternatively a new provision could be inserted in the Standard Instrument. Whichever way it is achieved, we think it should work as follows:

- The consent authority must be satisfied that that the prohibition is either:
  - unreasonable or unnecessary in the circumstances of the case; or
  - would, inherently or by the passing of time, bring about an inappropriate planning solution, including an outcome which conflicts with other policy outcomes adopted at a State, regional or local level.
- The consent authority must take into consideration the public benefit of maintaining the prohibition adopted by the environmental planning instrument.[128]

There should be no carve-outs from this provision. Given the government's emphasis on handing power back to local communities, we should be confident that consent authorities, under the supervision of the Land and Environment Court, can manage these provisions sensibly. Where state government interests are affected, the relevant government agencies will inevitably be consulted by council as part of the development application process. They have an opportunity to comment, and if the matters comes before the Court, to intervene.

[128] *Wehbe v Pittwater Council* [2007] NSWLEC 827 [38]-[40].

Recommendation 22

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- The consent authority must take into consideration the public benefit of maintaining the prohibition adopted by the environmental planning instrument.

12. Further information

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

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