Urban Taskforce
AUSTRALIA

22 August 2011

Ms Yolande Stone
Director - Policy & Planning Systems
Department of Planning and Infrastructure
GPO Box 39
Sydney NSW 2001

Dear Ms Stone,

RE: Draft Planning Circular: "Calculating the genuine estimated cost of development"

Thank you for the opportunity to comment on the above document.

We understand that the purpose of the circular is to "advise" as to "what costs associated with a development proposal are to be considered when calculating or providing genuine estimated costs of works" under the *Environmental Planning and Assessment Regulation 2000*.

On reviewing the proposed circular, we have identified a number of worrying issues:

1. **The circular goes beyond the circumstances outlined in the ICAC report, the recommendation of the ICAC, and the provisions of the regulation**

   We are advised that the need for the circular arises from a recommendation of the Independent Commission Against Corruption (ICAC). We assume this is a reference to recommendation 4 of the *Investigation into the Corrupt Conduct of a Willoughby City Council Officer*, which says that:

   > That the NSW Department of Planning and Infrastructure prepares and makes public guidelines that specify which activities and what work associated with a development are to be used by planning authorities when calculating the estimated costs of works.[1]

   This recommendation arises from a matter where a council employee encouraged:

   - an applicant for a restaurant fit-out to value work at $100,000 when it was, in truth, likely to exceed $200,000; and
   - an applicant for a restaurant renovation to claim works cost $100,000 when, in truth, they were likely to cost $250,000 to $300,000.

   On both occasions, the purpose of the deceit was to reduce development application fees payable to council by several hundred dollars.

   The circular goes much further than would be warranted by the issues indentified in the ICAC report, and the even the ICAC recommendation itself. In particular, the circular:

   - imposes new requirements that would not reduce the likelihood of the sort of dishonesty identified by the ICAC;
   - instructs councils to act improperly and outside of the law;
   - will result in applicants paying more than they are actually obliged to;

[1] ICAC, *Investigation into the Corrupt Conduct of a Willoughby City Council Officer* (2011) 8.

- imposes new procedural steps with little real value; and
- wrong asserts that applicants do not have appeal rights.

Frankly, this is overkill. This planning circular goes beyond such a document's proper role. The job of this circular should be merely to explain the application of the regulation, not to introduce new requirements that go well beyond the scope of the current law.

2. <u>The circular goes beyond the recommendation of the ICAC, and even goes beyond the provisions of the regulation</u>

The circular says that:

> The cost of works should be based on the estimated 'market price' of works.

While the words "market price" appear in quotation marks, as if some authority is being cited, there is no indication of where the quote comes from. It does not come from the *Environmental Planning and Assessment Regulation 2000*, and nor, does it come from the case law.

The circular also says that the market price of works

> may not necessarily reflect the actual cost of the development to the applicant, for example, an applicant may source materials free or second hand and use their own labour (owner-builder).

However, under the *Environmental Planning and Assessment Regulation 2000* the fee is based on:

> the costs associated with the construction of *the building*, and ... the costs associated with the preparation of *the building* for the purpose for which it is to be used ... (emphasis added)[2]

The clause is quite clearly seeking an estimate of actual costs expected in relation to a *particular building*, not hypothetical costs for a generic building of the same type and design. There is nothing in the regulation to suggest that anything other than an estimate of *actual costs* should be used. A developer who is genuinely able to arrange for a building to be built at a cost that is below a hypothetical market cost should not be penalised. For example, an applicant who is also a builder is likely to have a lower overall construction cost than an applicant who will be hiring in a builder on commercial terms. Clear words in the regulation would be required if actual costs were to be ignored, in favour of hypothetical market costs.

The circular should seek an estimate of actual costs rather than hypothetical market costs. Where an applicant is genuinely able to build a building at lower than market costs, they should only pay fees on the *actual* costs they anticipate.

3. <u>Mandatory involvement of a quantity surveyor at $750,000 will only impose needless costs</u>

The circular says that:

> ... for development up to $750,000 a suitably qualified person such as a licensed builder, registered architect, or registered quantity surveyor may prepare the cost estimate to be included in the DA ... for development more than $750,000, a registered quantity surveyor should be required to determine the cost estimate based on a report.

This circular is thought to be necessary because of a single corruption case highlighted by the ICAC. It's worth noting that the instance of corruption identified in relation to development fees, were for projects whose true construction cost was in the range of $200,000 to $300,000. It is entirely unclear why this case should prompt a new requirement for a quantity surveyor to be involved in all developments exceeding $750,000 in value.

In any event, what is the significance of this figure? For example, a development of $1.5 million can be adequately and accurately estimated by a registered architect or licensed builder. This simply imposes additional and needless cost on the applicant. We note, for example, that

[2] cl 255(1)(a)-(b).

Liverpool Council does not ask for a cost estimate to be signed by a registered quantity surveyor unless the cost exceeds $2.5 million.

At the other end of the scale, is it truly necessary for a home owner to involve a licensed builder, registered architect, or registered quantity surveyor, to provide a costing just because they want to put in a skylight in their house in a heritage conservation area?

We would prefer that the Department avoid recommending the involvement of a particular expert at a particular monetary threshold. At the end of the day, if the information provided by the applicant is not credible, the council can disregard it, and make its own determination.

4. <u>The circular misdirects councils as to their power to reject an applicant's estimate</u>

The circular says that:

> All cost estimates should be reviewed using the indicators in the guides. If the DA cost variation is within 10 % of the determined cost, the estimate stated in the DA should be accepted. If the DA cost variation is more than 10%, the cost estimate should be determined by Council. The council may make its own determination of the estimated costs or require the applicant to engage with an independent quantity surveyor to review the cost report.

Under the regulation, the consent authority is obliged to use a "genuine estimate" provided by an applicant, unless it is satisfied that the estimated cost indicated in the development application is "neither genuine nor accurate".[3]

The circular is instructing councils to act outside of the law. The mere fact that a council's estimate of cost of works exceeds the applicant's cost by 10 per cent does not establish that the applicant's figures are not "genuine or accurate". There may a whole of range of very good reasons why costs are different from those estimated by council, including the possibility that they are a very cost-efficient builder themselves. **The current test of 'genuineness and accuracy' cannot and should not be displaced with a '10 per cent test'.** If this test were allowed to go ahead, quite aside from any legal issues, there would be a significant new administrative burden on councils and applicants. We doubt that the additional administrative burden could be justified by any supposed additional revenue.

Where professionals are involved, and put their name to costs, councils should <u>not</u> be encouraged to lightly set them aside. It is a serious matter to suggest that registered architects, quantity surveyors and so forth have been deceitful, unprofessional or incompetent.

Additionally, **there is no power under the regulation for the council to "require" an applicant to "engage with an independent quantity surveyor to review the cost report".** Council may *request* that such a thing take place, but the applicant is free to decline the request. Under the law, the onus is on council to establish grounds for an opinion that the applicant's estimate of costs is not "genuine and accurate". Where a council raises legitimate concerns an applicant is likely to voluntary submit additional information, but where council is merely applying a rote formula, applicants will be entitled to decline to provide further information and instead point to the existing expert information already provided.

5. <u>The circular wrong asserts there is no appeal from a council determination of fees</u>

The circular says that:

> There are no appeal provisions in the regulation as to what Council determines is the estimated cost.

This statement seems to ignore the *Environmental Planning and Assessment Act 1979*, which says:

> An applicant who is dissatisfied with the determination of a consent authority with respect to the applicant's development application (including a determination on a review under section 82A) may appeal to the Court within 6 months ... [4]

[3] cl 255(2).

The only way that the circular can be correct, is if "a determination of fees after development application has been made" (under clause 256 of the Regulation) is not "determination of a consent authority with respect to the applicant's development application". Additionally, the *Land and Environment Court Act 1979* provides that:

> In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.[5]

The case of *Parkes v Byron Shire Council*[6] confirmed that where a determination of a development application is able to be appealed, a function or discretion which the council had in respect of the subject matter of the appeal may also be exercised by the Court. In that case, it was the power of the council to reject a development application 'at the counter', but the principle would apply equally to a "determination of fees after a development application has been made" by the council.

Accordingly, **the circular should <u>not</u> assert that there is no appeal for a council's determination of fees, and instead advise that such an appeal right <u>is</u> available.**

6. <u>The cost of the fit-out should only be included when the fit out is authorised by the development application</u>

The circular and the regulation suggest that the cost of works for calculation of the development application fee should include

> the costs associated with the preparation of the building for the purpose for which it is to be used (such as the costs of installing plant, fittings, fixtures and equipment).[7]

However, such matters will often be the subject of a separate development application, on which, a separate fee will be payable. At the time of a given development application, the detail of the fit out may not be known, or determinable. In which case, any estimate may be nothing more than sheer speculation.

In such a situation, **where the fit out is not the subject of a development application, the circular should advise that the cost of the fit out should not be included in the calculation of the development application fee.**

7. <u>There are problems with the information to be routinely sought from development applicants</u>

The circular says that:

> costs stated in the DA are to be a genuine and accurate estimate of the cost of development ...

This is not correct. The relevant legal requirement is for the applicant to produce a "genuine estimate" of the relevant costs.[8]

We note that the circular includes an attachment A, which is a form seeking detailed information as to the cost of a development. On the face of it, the planning circular is asserting that the completion of this form is a requirement ("On the application form, the following information should be provided ..."). This assertion is not supported by law. **Only the consent authority can mandate a form for use in making a development application, and they cannot be compelled to do so by circular.**[9] The most that the circular can seek to do is recommend that consent authorities include this material is part of their development application form.

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[4] s 97(1).
[5] s 39(2).
[6] (2003) 129 LGERA 156.
[7] cl 255(1)(b).
[8] Schedule 1(1)(h); cl 255(1)-(1B).
[9] cl 50(1)(b).

However, we observe, that for many development applications, the provision of this level of detail will be overkill. It will alienate many development applicants. In any event, for larger developments, applicants will routinely include such information in supporting material in order to give consent authorities comfort that their estimates are genuine. **There is no real need for a particular form to be generally or recommended by the Department of Planning and Infrastructure.**

Furthermore, the use of the recommend form will result in people overstating their estimated costs of development.

For example, the form asks applicants to nominate a "margin". We can only guess what is meant by this phrase.

If it is a reference to the developer's profit, then its inclusion is clearly wrong, as developer's profit is not a "cost of the development", but is, in fact, the money left over from the development process after all the costs have been deducted from the revenues.

If the reference to "margin" is a reference to an allowance for cost blow-outs, then it also has no role in the form. The applicant is obliged only to supply a genuine estimate of the costs of works, and not to speculate what costs could hypothetically rise to if there are unanticipated problems.

if the reference is to a builder's margin then this will not be relevant when the builder is also the applicant. In other instances the builder's margin would be reflected in the per square metre costs, etc separately sought in the form.

Either way the "margin" row should be deleted.

The phrase "change of use" also should not appear in such a form. There is no cost incurred in the mere change of use. The costs that are reportable are actual costs of modifying, building or demolishing the premises. These will be separately accounted for.

For demolition works, professional fees are not relevant (only "the costs of demolition" are relevant).[10] For other professional fees to be included, they must form part of "the costs associated with the construction of the building" or "the costs associated with the preparation of the building for the purpose for which it is to be used".[11] **Any form should highlight that professional fees in relation to demolition and professional fees that relate to non-construction components of the development process are not to be included.**

The circular includes a list of five different guides/manuals. Some of those guides relate to costs e.g. *Rawlinson's* and others are manuals which deal with the method of applying a cost management technique. The use of some editions has been limited. For example, why is only the use of the 2010 *Rawlinson's* appropriate?

Surely, if professionals are to be involved in preparing estimates of costs, there is no need to set out the reference material that they may use in order to carry out their work?

References to the specific professional resources that might be used by quantity surveyors, architects or builders in costing works should be deleted.

Attachment B is apparently drawn from Reed Construction Data's *Cordell's Housing Building Cost Guide* and the Australian Institute of Building Surveyor's *Guide to Building Costs*. These figures will change over time. Unless the Department intends on re-issuing the circular frequently, it is probably best that this information not be included.

8. <u>The circular wrongly makes reference to construction certificates and complying development certificates</u>

The circular refers to cost estimates being used as a basis for fees for construction certificates and complying development certificates. Whether certifying authorities elect to use building cost estimates as a basis for their fee structure is not relevant to the *Environmental Planning and Assessment Regulation 2000* or the Department of Planning and Infrastructure. A competitive

[10] cl 255(1B).
[11] cl 255(1)(cl 246

market exists amongst certifying authorities, and they are free to structure their fees based on their own definition of cost estimate, or on factors that are irrelevant to the actual costs of work.

The circular should make no reference to construction certificates or complying development certificates.

Furthermore, the same section of the circular says that fees are based on the "estimated cost of the completed project". This is not correct. Both statutory costs of non-statutory charges based on project cost relate to the costs to complete works or a project. This is different from the "cost of a completed project" which is represents the value of the project to the end-user.

9. <u>The circular confuses the provisions for development application fees and section 94A fees</u>

The circular does not sufficiently distinguish between the different statutory basis for the calculation of development application fees, versus section 94A fees.

Development application fees are calculated by reference to the "genuine estimate of the construction costs of the work",[12] while section 94A fees are calculated with reference to the "proposed cost of carrying out the development".[13] The "costs of development" is a broader concept than the costs of particular works - that's why the section 94A provision contains a detailed list of exclusions, and why such a list is not necessary for development application fees.

For example, the cost of marketing a development is a 'development cost' (in the plain English sense), but not part of the 'construction cost'. Neither scheme is intended to include marketing costs. The development application fee regime achieves this outcome by concentrating on 'construction cost', while the section 94A regime does this by expressly excluding marketing costs from the development costs calculation.[14]

Nonetheless, the circular confuses the two approaches. For example, the heading is *Calculating the genuine estimated cost of development* which is an amalgam of the section 94A provision and the development fee application provision (the former being "proposed cost of *development*" while the latter is "*estimated* cost" of works).

If the circular is to deal with *both* the development application fee provision and the section 94A provision, it needs to more sensitively differentiate between the two regimes.

We trust you find this information of assistance. We look forward to meeting with you to discuss this matter.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

[12] cl 255(1A).
[13] *Environmental Planning and Assessment Act 1979* s 94A(1).
[14] cl 25J(3)(c).