

15 February 2012

Tony McNamara
Independent Chair
Local Planning Panel
NSW Department of Planning and Infrastructure
GPO Box 39
SYDNEY NSW 2001

Dear Mr McNamara,

Re: Key Stakeholder Forum – summary of issues

The Urban Taskforce has made many submissions to councils and the NSW Department of Planning and Infrastructure expressing concern with the way that standard instrument local environmental plans are being drafted.

Generally, the Urban Taskforce has been disappointed with the implementation of the standard instrument local environmental plans, particularly in cases where the local council takes the view that the preparation and adoption of a standard instrument compliant local environmental plan is simply a "consolidation" process, transferring existing controls from often outdated and irrelevant Planning Schemes into the standard instrument template. Unfortunately, when councils take this approach it usually means that the council does not reconsider the appropriateness of existing aims, objectives and controls as part of this process. Our experience is that the council will focus on a "like for like" transfer and will not reconsider its existing planning controls.

It is disappointing that the Department of Planning and Infrastructure supports this and permits the local council to use a "staged" approach to LEP standardisation as a means to avoid making real beneficial change to outdated and confusing terminology commonly found in old plans. Other than reformatting, nothing of real value is achieved. We argue that this is little more than a means of delaying what the standard instrument was intended to do. That is, to improve the quality and consistency of environmental planning instruments across NSW.

Though Councils adopting this approach advise that further revision will occur, we have little confidence that the promised subsequent steps in the planning process will ever eventuate.

Notwithstanding the above, the following is a summary of our concerns with the implementation of the standard instrument local environmental plans which we will expand upon for the consideration of the Panel.

1. Plan aims are not sufficiently clear

The Urban Taskforce is often concerned with the language used to articulate the aims of a plan. The wording of the aims is of legal significance. Unfortunately in many cases, the draft plans reviewed by the Urban Taskforce has revealed aims that are vague and subjective. We suggested that the councils be directed to only use expressions that already exist in law where there are well-established legal interpretations. For instance our comments relating on the draft Sydney LEP are that there was considerable opportunity to refine and simplify the aims of the plan for improved clarity whilst still achieving the same result.

We suggested that Council replaces the plan aim:

- to reinforce the role of the City of Sydney as a primary centre for Metropolitan Sydney and a preferred location for business, educational, cultural and tourist activities both within New South Wales and Australia and internationally,

with the following two aims

- (a) to reinforce the role of the City of Sydney as a primary centre for Metropolitan Sydney; and,
- (b) to support the City of Sydney as an important location for business, educational, cultural and tourist activities.

These aims are a rewording of the draft aim, however, by dividing the aim into two, clarity is improved. Furthermore, the suggestion that the City of Sydney is “preferred” by the regulatory system, raises the impression that the planning system should be discriminating against businesses that wish to locate outside of the City of Sydney. We trust that this is not the City's preferred outcome.

The plan aim

- (h) to support a range of existing and future mixed-use centres and to ensure that those centres remain viable,

says the plan to guarantee the “viability” of centres. It is difficult for planning bureaucracies to put themselves in the shoes of a private enterprise and it is usually not possible for them to reliably assess what developments will be viable and what developments will not be attractive.

We suggested that the plan aim (i) be reworded to simply state

- (i) to provide for a range of existing and future mixed-use centres.

The zone objective for the newly introduced Zone B8 Metropolitan Centre is, unfortunately, in desperate need of redrafting. For instance, the three clumsy zone objectives

- To recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia's participation in the global economy.
- To provide opportunities for an intensity of land uses that are commensurate with its global status.
- To permit a diversity of compatible land uses characteristic with its global status and that serve the workforce, visitors and wider community.

could be reworded to be less verbose and convey objectives clearly and in plain English.

If the objectives seek to convey that Sydney is a special, global centre and that a multitude of land uses must be permitted, then the zone objectives should be worded to say so.

The three objectives should be simplified to state:

- To recognise that Sydney is a global city;
- To provide development opportunities for buildings of a scale and land use intensity that is commensurate with the City's global status; and,
- To provide a mix of compatible land uses, including business, office, retail, residential entertainment and tourist uses that serve the workforce, visitors and wider community.

Plan aims and zone objectives must be clear, concise and be stated in such a way so that the achievement of aim or objective may be readily understood and tested.

2. The use of council inserted zone objectives that confuse or replicate standard zone objectives;

In the majority of cases, the standard zone objectives are sufficiently clear and require no further elaboration. However, our experience is that councils seem compelled to add additional objectives that may duplicate or confuse the standard objectives. Furthermore there are instances where the additional Council objectives try to introduce terms that seek to freeze the character of an area. This is of particular concern as we argue that localities must be able to change and evolve, both physically and culturally, without a disproportionate emphasis being given to what exists now at the expense of what a locality might be like in the future.

Successful places have evolved into their current state over a period of time. Inflexible planning controls are a recipe for artificially contrived places. For these reasons a plan should not attempt to freeze the current character of an area. An attempt to create a static environment

may lead an area to degrade, particularly if the original rationale for a locality's character loses relevance.

3. Subjective requirements and terminology that are not defined;

In a similar vein to poorly worded objectives and plan aims, we have noted a desire for some local councils to use subjective terms within the LEP. For instance, the draft Ryde LEP contained terms such as "high-quality" and "well-designed" within zone objectives. While this may sound good, terms such as these are entirely subjective and should never appear in a statutory plan unless they are given a specific meaning. Subjective words such as "high quality" and "well-designed" mean different things in the hands of different decision-makers – it is a recipe for confusion, legal disputation and inconsistency.

4. Overly prescriptive approach to zoning that limits flexibility and innovation;

Local environmental plans can be drafted in a manner to provide certainty to the developer while also providing flexibility. This is achieved with the careful drafting of zone objectives along with the removal or at least significant reduction of outright prohibitions. The developer is afforded certainty as the zone objectives are clear and meaningful, while being provided with the flexibility to consider any land use that satisfies the zone objectives. Not being limited to a list of permitted uses and even longer list of prohibited land uses provides a planning system that is responsive to changing community and market needs.

Unfortunately the manner in which zone objectives and prohibitions are currently being used severely limits the ability for new and innovative formats or land uses to locate in many areas. By having very specific permissibility tables and long lists of prohibitions means that any new and innovative land use, even if meeting zone objectives may require a rezoning prior to being considered.

Zones should not include a long list of prohibited uses. Rather, zones should contain clear objectives and a list of permitted uses. Any use that is permitted and complies with the relevant development standards should be entitled to an automatic approval (certainty). All other forms of development, not specifically listed as permitted should be considered against the zone objectives and subject to merit based assessment (flexibility).

5. Use of zone objectives that favour a permitted use over another permitted use;

The recently made Ryde LEP includes a Council inserted additional objective in the commercial core and business park zones:

To encourage industries involved in scientific research and development.

This objective has presumably been inserted because significant commercial core and business park zones are located in Macquarie Park and the draft Inner North Subregional Strategy has described Macquarie Park as a specialised centre due to the presence of Macquarie University.

Our concerns are that a local environmental 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 will be favoured, while other forms of development are likely to find approval difficult.

This objective means that developments can be refused because they do not involve scientific research and development.

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.

The commercial core and business park zone objectives “encouraging” developments connected with scientific research should not be included in a local environmental plan.

Furthermore, the business park zone includes an additional provision which says as a zone objective

[t]o provide a zone with strong links with Macquarie University and research institutions and an enhanced sense of identity.

This raises similar issues to the zone objectives discussed above. This objective means that each development will need to be assessed for its “strong links” with the university and research institutions. It would be possible for a consent authority to refuse development approval on the basis that such links are not sufficiently strong. This would ultimately undermine the significant public investment in this centre as a transport hub and strategic centre.

It is also difficult to imagine how a development will be able to show it contributes to a zone's “enhanced sense of identity”. Since a zone is a *legal concept* not a conscious being, it is hard to imagine how a development can improve any aspect of its self-awareness.

6. Inclusion of matters that would be more appropriately included in a development control plan;

Many local environmental plan plans include matters that are better placed in development control plans. For instance the draft Sydney LEP and the recently made Parramatta LEP contain car parking restrictions within the LEP. The most useful location for a car parking control is within a development control plan. If included in the development control plan, Council would be able to manage car parking provision and if appropriately drafted, a provision in the DCP could be devised where flexibility to provide more or less car parking could be considered upon provision of a robust argument from the applicant. Equivalent flexibility to vary controls does not exist within a local environmental plan.

Council's ability to make a comprehensive assessment of development proposal in relation to traffic management and car parking will be limited if car parking is included in a local environmental plan, placing Council and applicant at a considerable disadvantage.

Ryde LEP has include a low density residential zone objective

[t]o maintain on sites with varying topography the two storey pitched roof form character of dwelling houses and dual occupancy (attached) developments.

The reference to the “two storey pitched roof form character of dwelling houses” should not be in a local environment plan and if thought necessary by Council, should be included in a development control plan.

Furthermore, Council inserted a zone objective for the light Industrial zone that seeks

[t]o enhance the amenity of local areas through better building design, reduced hard-paved surfaces and landscaping.

This objective is yet another example of an objective that would be more suited to a development control plan. Furthermore, “better building design” is a subjective term, not easily defined and should not be used in a local environment plan. It may not always be possible to enhance the amenity of a local area – for example a development may merely maintain the amenity of an area. The reference that “reduced” hard-paving standards lacks a point of reference; reduced in comparison to what?

Ryde Council also lifted detailed land use and design controls from its previous *Ryde Planning Scheme Ordinance* and placed them into the plan as schedule 6. Schedule 6 contains a detailed listing of precinct controls and matters that will be considered when making a determination. The content of schedule 6 would be more appropriately placed in a development control plan because these matters relate to detailed centre design, site specific controls and a level of detail expected in an application to Council.

7. Anticompetitive restrictions placed upon retail;

The mandatory zone objectives for zones B4-Mixed use and B7-Business Park are comprehensive, clear and do not require further clarification. However, councils have a desire to insert an additional objective which says:

- To ensure uses support the viability of centres.

This was the case with the draft Sydney LEP. It seems that the Council feels that this objective must be introduced to its plan as an attempt to encourage a centres hierarchy. As it stands, the Council inserted objective will enable restriction of commerce, limitation of choice and will in all likelihood hamper the evolution of centres.

Even if a particular land use is permitted and meets the mandatory zone objectives, this council introduced objective will enable growth in centres to be limited with the objective of protecting and ensuring greater growth in other competing centres. This approach is not responsive to community needs. In particular, it fails to recognise that restricting development in one locality will not necessarily mean the same level of development will occur in the favoured location. Development opportunities are likely to be lost to the community as a whole.

Determining if a development proposal is "supporting" the viability of centres is open to interpretation. Including objectives such as these will introduce more uncertainty to the development determination process. That is, even applications for permitted land uses will be open to challenge by competitors on the grounds that the development does not "support the viability of centres".

In addition, the meaning of "viability of centres" is not clear and meeting the requirements of such an objective will be problematic. That is, how the viability of a centre assessed should be determined and which uses will support a centre's viability is open to speculation. The measure for viability is open to debate. Some would argue that viability should be measured on economic performance while others would seek a broader measure.

It is worth noting that the importance of correct and consistent language when drafting local environmental plans, particularly in relation to plan aims and zone objectives led the NSW Department of Planning and Infrastructure to release an LEP practice note. This practice note gives clear direction when drafting LEP aims and objectives. Specifically the LEP practice note advises that:

- In many instances there will be no need for a council to add any additional objectives;
- Do not repeat matters set out in section 79C—Evaluation of the Environmental Planning and Assessment Act 1979;
- Avoid using subjective language open to different interpretation, e.g. 'well-designed', 'high quality', 'liveable', 'economically sound' or a vague phrase such as 'creating a sense of place'.¹

The Department of Planning and Infrastructure practice note specifically notes that subjective language open to different interpretation should be avoided.

While we appreciate that Council has only inserted one zone objective, it is worth considering the impact of such an objective and the advice of the Department of Planning. In this regard, we argue that there is not a need to add the additional objective that seeks the consideration of the "viability of centres" because section 79C of the Environmental Planning and Assessment Act 1979 requires the consideration of

the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.²

Notwithstanding any of the above, it is noted that the Zone B4 Mixed Use applies to a large portion of the southern area of the Sydney Local Government Area in the vicinity of Green Square. The above zone objective is clearly one that has been introduced to ensure that new

¹ NSW Department of Planning 2009. LEP Practice Note – Local environmental plan zone objectives. PN 09-005. 10 September 2009.

² Environmental Planning and Assessment Act, 1979. 79C(b)

development in a mixed use zone, even if permitted, can be restricted to support the viability of centres. This zone objective is a clear example of how the planning system can be used to protect existing businesses located within existing centres from competition.

This protectionist principle is reinforced when reference is made to the Special Character Areas - Retail Premises Maps attached to the Plan. Sheets CL2_017 and CL2-018 of this series serve as good examples of the planning system being used to further restrict development and competition. These maps show a hatched overlay around an existing local centre. The hatched area sits across a mixed use zone that surrounds the centre. The meaning or impact of this hatched area is determined with reference to clause 7.23 of the Plan. This clause says:

Large retail development near Green Square Town Centre [local]

(1) This clause applies to land identified as Category 2 on the Retail Premises Map.

(2) The objectives of this clause are as follows:

- (a) to promote the economic strength of Green Square Town Centre and planned local centres by limiting large-scale retail development to those centres,
- (b) to support the provision of community facilities and infrastructure in the Green Square Urban Renewal Area.
- (3) Development consent must not be granted to development on land to which this clause applies for the purposes of retail premises with a gross floor area greater than 1,000 square metres.

The effect of this clause is obvious. Even where retail land uses are permitted, the incentive to invest in retail developments is discouraged by limiting the amount of floor area permitted in a location so that other existing and planned centres are protected from competition.

In the end, preserving a centres hierarchy 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 robs the community of the opportunity to access a wide variety of competitively priced items in their locality.

In February 2011 the Productivity Commission found that restrictive zoning can act to constrain competition in a number of ways including:

- reduced number of businesses in an area;
- reduced scope for new entrants; and,
- reduced diversity of products.

Furthermore, restrictive land use zoning results in longer travel times and increased cost of appropriately zoned land.³

8. Inappropriate restrictions placed on employment generating land uses within industrial zones to favour certain types of industry

A broader consideration of employment generating uses is urgently required. Employment generating uses are much more than the traditional industrial land use. Limiting industry and severely restricting other land uses that may not be seen as industry, in the traditional sense is defeating the purpose of an employment generating zone.

Fundamental to planning for employment generating land uses is the recognition that industrial uses are but one of many land uses essential to job creation. Successful planning for industrial land is predicated on a holistic approach to the supply of land for employment generating land uses.

The nature of industry has changed and will continue to change rapidly. Changes in manufacturing processes, introduction of new high tech industry and the rise of larger format retail means that land traditionally zone "industrial" must permit a variety of land uses, all of which are significant generators of employment opportunities. Hence, maintaining single use

³ Australian Government Productivity Commission Draft Research Report, Feb 2011. *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, pp.238-251.

industrially zoned land is rapidly losing relevance. This is not to suggest that heavy, potentially polluting industry should not be treated specially. However, lighter, cleaner, modern industry is compatible with other land uses and these uses should be able to co-locate within the same zone. In fact, this is the most effective means of achieving industry clustering. Permitting a variety of land uses within a zone enables a market response to business establishment and location selection.

We argue that the recognition of changing industry and a desire to meet the long-term needs of industry growth necessitates the abandonment of the many separate standard instrument land uses zones that permit various forms of employment generating land uses to be replaced with a single multi-purpose employment zone. A heavy industrial zone should remain as we agree there is a limited range of heavy industry that should remain isolated from other land uses.

We urge a move towards the development and implementation of a more flexible, multi-purpose employment zone.

9. The inappropriate use of the “Exceptions to development standards” clause to limit flexibility in applying certain development standards; and,

Clause 4.6 - Exceptions to Development Standards is important and its use should not be limited. The intention of this clause is to provide flexibility in the application of development standards and to provide better outcomes for and from a development proposal.

By prohibiting the use of clause 4.6, consent authorities are deprived from setting aside rules when their application would be unreasonable and/or there are sound planning grounds to do so. This is all that SEPP 1 or clause 4.6 would permit. There is no public policy reason why consent authorities should not have the ability to set aside development standards that are "unreasonable or inappropriate in the circumstances of the case".

The process for the consideration of an exception to a development standard is rigorous and requires the consent authority and the Director General of the Department of Planning and Infrastructure to be satisfied that the non-compliance with the development standard can be supported on planning grounds and is in the public interest. There is ample opportunity to ensure that a contravention of development standard is properly considered. It is for this reason that excluding standards from the operation of this clause is not warranted and potentially limits good development outcomes. IN the case of the draft Sydney LEP it excludes parts of clause 4.3 - Height of Buildings, Division 3 of Part 6 - Height of buildings and overshadowing and Division 1 of Part 7 - Car parking ancillary to other development. Many other Councils exclude the use of clause 4.6 to vary floor space maximums for land uses such as restaurants and food premises in industrial zones and neighbourhood shops.

Development standards such as these have the potential to limit good development outcomes, hence the opportunity to present a well considered environmental planning argument to the consent authority for a contravention of a development standard should be always available.

10. “Low-ball” FSR and Height standards.

The ability to access additional floor space ratios and or height for certain desired land uses is encouraging, provided base floor areas and heights are set at an appropriate level in the first instance. Our experience with floor space ratio and height “incentives” is that the base floor space areas and heights are set low (“low-balled”) with the hope that the desired land use will be provided in return for floor space concessions. In a report by council officers on the future North Sydney local environmental plan, they said the introduction of a council floor space bonus scheme

may require artificially scaling back controls for the North Sydney Centre to provide the "space" for bonuses.⁴

In the case of the draft Sydney LEP it is noted that a building in Central Sydney may be eligible for an amount of additional floor space (accommodation floor space) for certain uses. This additional floor space ranges from 150% to 600% in Central Sydney and 25% to 220% outside of Central Sydney (Green Square) above the base FSR. The reality is, however, that the base floor space ratio controls are most definitely set too low in the first instance.

The base floor space ratios set out in the plan are too low and should be revised and increased appropriately.

Notwithstanding any of the above the Panel also sought the opinion of the Urban Taskforce on whether standard instrument local environmental plans should include material or consider metropolitan strategies. We are of the view that local environmental plans should properly reflect the aims and targets contained in metropolitan and regional and subregional strategies. For instance, where a state level strategy clearly identifies areas where growth should occur, a local environmental plan must make allowance for this growth. It must appropriately zone land and set development standards to realistically enable targets set in state level strategies to be achieved.

We are keen to see an improvement in the drafting and implementation of Standard Instrument local environmental plans and we would be willing to work closely with the Local Planning Panel to address our concerns as a matter of priority.

Should you require any further clarification of the content of this correspondence, please feel free to contact me.

Yours sincerely
Urban Taskforce Australia



Chris Johnson
Chief Executive Officer

⁴ North Sydney Council Item PD06 Planning & Development 28/06/10, *Report to General Manager Planning & Development Committee*, authored by Brad Stafford, Senior Strategic Planner & Alex Williams, Strategic Planner.