Urban Taskforce
AUSTRALIA

30 November 2012

Local Planning Panel Secretariat
Planning Operations Coordination Branch
Department of Planning and Infrastructure
GPO Box 39
SYDNEY NSW 2001

Email: localplanningpanel@planning.nsw.gov.au

Dear Sir/Madam,

Re: POSITION PAPER - Improving the implementation of the Standard Instrument Local Environmental Plan program

The Urban Taskforce has made many submissions to local councils and the NSW Department of Planning and Infrastructure expressing concern with the way that standard instrument local environmental plans are being drafted. We have also made two submissions to this Local Planning Panel expressing similar concerns with the implementation of standard instrument local environmental plans.

Our observations are that many local councils take 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compliant local environmental plan is simply a "consolidation" process, transferring existing controls from often outdated and irrelevant Planning Schemes into the standard instrument template. When councils take this approach it usually means that the council does not reconsider the appropriateness of existing zones, plan aims, zone objectives and development standards 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 long term vision for their locality and whether the existing planning controls enable the achievement of metropolitan and state planning objectives and targets.

It could be that this focus on the like for like transfer of existing controls into a new template is the cause of the bulk of complaints received by the Local Planning Panel from local councils. Because the standard instrument does not permit the inclusion of many of the councils antiquated and inappropriate regulations or loosely worded and subjective objectives, councils have difficulty accepting the standard instrument.

Our view is that many councils are actively frustrating the standard instrument implementation which adds to the many planning system induced impediments to development and economic growth.

It is of concern that since the commencement of the standard instrument process in 2006 that of 152 councils in New South Wales only:

- 96 (63%) councils have exhibited their SILEPs; and,
- 66 (43%) SI LEPs have been notified.

It is incredible that Eurobodalla Council took just over six years to make its SI LEP.

Local councils must be held accountable for such poor performance. It is an embarrassment to Government that after six (6) years the standardisation process continues to deliver such poor results.

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Where councils are found to be underperforming, actively frustrating State Government policy, the State must intervene, show leadership and take control of the implementation process.

Notwithstanding the above, the following are the Urban Taskforce comments on the *Position Paper - Improving the implementation of the Standard Instrument Local Environmental Plan program* ("the position paper")

1. The need for increased council autonomy and flexibility in the use of the SI LEP has not been justified

The position paper and supporting documentation advises that the Local Planning Panel was established to increase council involvement in the plan-making process and improve the flexible delivery of the standard instrument local environmental plan program. While we accept that Government may have a desire to improve community involvement in local planning, there is little evidence available to support the notion that the community is disengaged from the local planning process because of a lack of flexibility in the standard instrument template. It seems apparent to us that the cries for more flexibility in the form of the standard instrument come from those councils who simply object to being required to submit to a standard format. Furthermore, it is argued that their objections relate mostly to their inability to translate incongruous, absurd and unnecessary planning regulation into a logical plan template.

While the Local Planning Panel may have been established with the best of intentions, the Panel should have been investigating and reporting on councils intentionally frustrating the implementation process. The Local Planning Panel should have been investigating and reporting on the opportunities that the standardisation process has to offer and the avenues that the Government has to improve the rate of standardisation.

The Urban Taskforce is disappointed that the Local Planning Panel has been given the brief to investigate means of improving flexibility in the hope that this may coax recalcitrant councils into compliance.

The Planning Panel should by all means investigate means of making positive improvements to the standard template, but this should not simply be to improve local council acceptance. Improvements to the standard template should be driven by a desire to facilitate quality development, increased efficiency and clarity in the planning system.

The standard instrument was established to introduce consistency and clarity in planning laws across the state. However, the Local Planning Panel has recommended changes that will achieve the opposite. Allowing more zones, definitions and local clauses and removing group terms will simply further complicate an already complicated and inconsistent planning system.

2. The composition of the Local Planning Panel is not independent

The Urban Taskforce is concerned with the composition of the Local Planning Panel. While we have no objection to the individuals appointed to the Panel, there is an obvious absence of community and business representation on the panel. Those regulated are not part of the review process, making the process biased and flawed.

All members of the Panel are either from local government (3 members) or the Department of Planning and Infrastructure (2 members). The observers were from the Local Government and Shires Association and NSW Treasury. No community or business representatives were included on the Local Planning Panel or as observers.

We argue that the composition of the panel has severely biased the review and recommendations made to Government. A worthwhile review would have been one that included not only the regulators on the review panel, but also those that are regulated and those that must live with the results of the regulation.

3. Evidence of Panel consideration of stakeholder submission in relation to mixed uses is not apparent

Though we are of the view that the composition of the Panel was not representative, the Panel did open itself to submissions from key stakeholders. However, the position paper does not effectively address the submissions made, nor does it justify the Panel's decision to not adopt a recommendation. In most instances, the position paper is simply silent on the many stakeholder submissions. For instance, the position paper reports that:

> one key stakeholder felt there should be consideration of the inclusion of a future urban zone.
>
> Another key stakeholder argues that the SI LEP contains too many single use zones and where possible should seek to create a mix of commercial, residential and retail development in 'multi use' zones.[1]

The urban Taskforce strongly supports these recommendations and we are disappointed that the Panel has not provided commentary on these very valid suggestions. It is interesting to note that the Review of the NSW Planning System Green Paper suggests the introduction of a future urban zone and a mixed use zone/enterprise zone.

Furthermore, the position paper reports that

> The same stakeholder explains that the SI should allow a mix of commercial, residential and retail development in a single zone wherever possible, and even in a single building. However, the LEP should not force developers to build a particular type of product and as such, mixed use development should not be mandated, for example, in the case where the only residential development permitted in a neighbourhood centre is shop top housing.[2]

Again there is no discussion offered by the Panel in reply to this suggestion.

Zones that actually encourage mixed use development, in the right locations is widely accepted as a positive planning policy, yet the Panel seems to have simply ignored this critical matter and flaw in the Standard instrument implementation process.

We continue to argue that Local environmental plans can be drafted in a manner to provide certainty to the developer with respect to zone objectives, while also providing flexibility in proposing uses that will satisfy the zone objectives. 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 certainly 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).

Government should be seeking the preparation of planning schemes that permit the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. In an urban renewal context, compact, mixed-used areas, making efficient use of land and infrastructure, make good planning sense. They create more attractive, liveable, economically strong communities. They facilitate a development pattern that supports pedestrian based communities and reduces dependence on motor vehicles. In

[1] NSW Government Local Planning Panel 2012, *Position Paper: Improving the implementation of the Standard Instrument Local Environmental Plan Program*, 27 August 2012, Appendix A, p 1.
[2] Ibid

addition to enterprise and future urban release zones as suggested in the Green Paper, there will continue to be a need for industrial, rural and environmental protection zones. However, thirty-five zones as currently provided in the SI plus the additional zones suggested by the Panel is excessive. We understand that the Government is seriously considering a reduction in the number of zones, not an increase.

4. Evidence of Panel consideration of stakeholder submissions in relation to council inserted zone objectives is not apparent

The position paper advises that the Panel recommends that Council be given greater flexibility to insert additional zone objectives, yet key stakeholder submissions make a strong argument that council inserted zone objectives are poorly worded, confusing and also on many occasions anti-competitive.

We submit that in the majority of cases, the standard zone objectives are sufficiently clear and require no further elaboration. Our experience is that councils seem compelled to add additional objectives that may duplicate or confuse the standard objectives. We have also 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 mean different things in the hands of different decision-makers, yet the Panel has seen fit to recommend more flexibility for local councils when drafting zone objectives. We are already experiencing difficulty under the current system, clearing the way for further flexibility makes no sense and is a recipe for confusion, legal disputation and inconsistency.

The Urban Taskforce has also pointed out that councils may seek to use zone objectives to favour one permitted use over another. This was clearly demonstrated when Ryde inserted the additional objective in the commercial core and business park zones:

> To encourage industries involved in scientific research and development.

As we pointed out to the Panel in our submission, our concern with such an objective is 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.

The Panel has not provided any advice in the position paper on this matter and has not justified the recommendation for further flexibility for councils to insert zone objectives.

5. Evidence of Panel consideration of stakeholder submissions in relation to the anti-competitive treatment of retail not apparent

The Panel reports that a key stakeholder submitted that zone objectives can be seen as anti-competitive. We submit that 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.

If councils are given the freedom to add such zone objectives it will mean that even if a particular land use is permitted and meets the mandatory zone objectives, the 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.

Furthermore, determining if a development proposal is "supporting" the viability of centres is open to interpretation. Including objectives such as these will introduce more uncertainly 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.

If local councils want to support the viability of centres, they should be using the SI to permit a wide range of land uses in such centres. It is of concern that we need to argue for retail premises and business premises to be mandated uses in the B1 Neighbourhood Centre Zone, B5 Business Development Zone, B6 Enterprise Corridor Zone and B7 Business Park Zone. Business zones must permit a wide range of business land uses to ensure that these centres provide the necessary services for the community and to support the viability of the centre.

Similarly, the way that the SI is being used to restrict bulky good development in industrial zones is of significant concern and has not been adequately resolved. The Panel received a detailed submission on the difficulties experienced by bulky good retailers when seeking to establish new premises. The Panel was advised that the application of the SI by some local councils made it almost impossible to find new development sites. Limited zones are available and some bulky goods retailers are forced to rely on existing use rights to continue or expand operations. Key stakeholders suggested that there was a need to properly review the zones that bulky good premises are able to locate and that bulky goods should be permitted in light industrial zones.

For the panel to simply recommend that councils be given the right to determine where bulky good are permitted does not demonstrate that the Panel has properly considered this issue. We argue that uses such as bulky good and light industry have similar land and supporting infrastructure requirements and should be permitted in the same zone and locality.

Unfortunately, the position paper does not discuss the merits of this argument yet suggests that Councils be given the right to decide.

6. The use of Group terms provides for a streamlined SI

With the vast list of land uses included in the SI, the use of group terms provides the opportunity to limit the need to list every permissible or prohibited use within the land use table. The suggestion that group terms be highlighted in the SI is a valid suggestion, however, to suggest that their use be abolished altogether is not consistent with the desire to encourage simplification and streamlined SI.

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

Our submission to the Panel advised that many local environmental plan plans include matters that are better placed in development control plans. Matters such as urban design issues, traffic management, car parking and environmental management are matters for inclusion in a development control plan. These issues require an element of flexibility in their application and as such are more appropriately located in a guidance document, such as a development control plan. Equivalent flexibility to vary controls does not exist within a local environmental plan.

There is a reason that the SI included only the most critical development standards and it is unfortunate that the Panel has suggested that council be given the flexibility to include additional standards in the SI. Apart from the fact that this will increase complexity in the SI LEP, the ability for different councils to include different standards will completely defeat the purpose of standardisation. We will return to the days where there is no consistency between local government planning laws.

8. The "Exceptions to development standards" not considered by the Panel

We advised the Panel that Clause 4.6 - Exceptions to Development Standards was important and its use should not be limited. We argue that 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. 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".

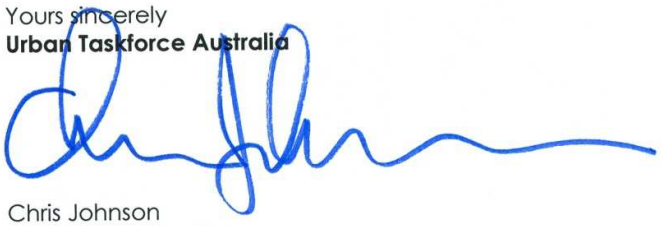
The process for the consideration of an exception to a development standard is rigorous and requires the consent authority and the Director General of the Department of Planning and Infrastructure to be satisfied that the non-compliance with the development standard can be supported on planning grounds 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.

This is considered a significant limitation in the drafting and implementation of the SI and we are surprised that the Panel has not provided commentary on this matter.

Notwithstanding any of the above, we appreciate that the Panel was formed and commenced its review process well before the release of the Government's Green Paper on planning reform. However, the position paper was released after the Green Paper. Hence we would have expected that the position paper would need to consider the submissions made by stakeholders and recommendations made by the Panel to be in the context of initiatives announced in the Green Paper. That is, the position paper should have included discussion on consistency of stakeholder submissions and Panel recommendations with the Green Paper.

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

Yours sincerely
Urban Taskforce Australia



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