Urban Taskforce
AUSTRALIA

The Urban Taskforce represents Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environments to engage in constructive dialogue with government and the community.

19 December 2013

The Hon. Brad Hazzard MP
Minister for Planning and Infrastructure
Level 33 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister,

Implementing planning policy that supports housing production without new legislation

The Urban Taskforce has been vocal in its support of the planning reform process and we made submissions on the Green and White Papers expressing general support for the package of reforms. We particularly supported the strong focus on code assessment, reducing the number of land use zones, rationalising infrastructure contributions and the introduction of Strategic Compliance Certificates. Unfortunately, the Planning Bill has not yet cleared parliament and we argue that the suggested amendments to the Bill will significantly reduce its effectiveness and cannot be supported by the Urban Taskforce in its current form. However, the Green and White Papers outline changes to the planning system that do not require the introduction of new legislation and we say that their proper implementation would achieve much for the development industry and delivery of urgently needed housing. In this regard we provide a brief outline of initiatives that such be pursued.

1. Further clarification of the role of Development Control Plans

Local council development control plans (DCPs) are a key reason for a lack of development in NSW. The intension of development control plans as providing guidance and merely being one factor for consideration in a decision-making process has been lost. 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. Consent authorities traditionally felt comfortable in approving development contrary to the provisions of a development control plan when there was clear justification for variation.

However, after a number of landmark court cases, the status of development control plans was elevated to almost the status of a local environmental plan. Council commenced the strict enforcement of the plans and departure from the plans, even where there were clear and reasonable planning grounds discouraged.

Thankfully the Government introduced amendments to the Environmental Planning and Assessment Act 1979 clarifying the role of DCPs to be flexible guidelines which complemented the controls provided by a local environmental plan. The amendment returns the status of DCPs to their original purpose as a guideline and confirms the status of LEPs as the primary statutory planning document for an area—providing the permissibility of land uses in a particular zone and principal development standards (for example, height, floor space ratios and subdivision standards). The amendment clearly reinforces that the provisions contained in a DCP are not statutory requirements and are for guidance purposes only.

Furthermore, under the changes if a development application:

- complies with the provisions of a DCP, a consent authority is not able to apply more onerous standards; and,
- does not comply with provisions in a DCP, a consent authority must be flexible in the way it applies the controls and also allow for reasonable alternative solutions to achieve the objectives of those standards.

The very useful and urgently need changes commenced on 1 March 2013, yet local councils continue to apply DCPs as if they were inflexible statutory plans. In fact, we are advised that in some cases statutory planning officers of the Council seem oblivious to the changes and/or local councils simply refuse to implement the law preferring to force the applicant into costly litigation and delay.

We urge the Government to take decisive action to ensure that recalcitrant consent authorities be held accountable. ***Further direction to local councils is urgently needed to reaffirm the status and function of development control plans.***

2. Rationalisation of land use zones and land use flexibility

The Government has been advised of the Productivity Commission investigation into planning, zoning and development assessment that a more flexible approach to zoning that responded to the continually changing market place was required. The Productivity Commission supported broad based land uses over prescriptive definitions. Unfortunately the manner in which zone objectives and prohibitions are currently being used within the NSW planning system severely limits the ability for new and innovative formats or land uses to locate in many areas. Having very specific permissibility tables and long lists of prohibitions mean that new and innovative land use, even if meeting zone objectives, may require a rezoning prior to being considered.

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.

The Green Paper suggested the inclusion of an Enterprise zone and the White Paper initiative to reduce the number of standard instrument zones to from thirty five (35) to thirteen (13) and the removal of land use zones that are only applicable to specific local government areas was strongly supported by the Urban Taskforce.

We strongly argue for zoning rationalisation and this can be achieved without a new Planning Act. ***The Government simply needs to amend the Standard Instrument Order to achieve zoning rationalisation.***

3. Strategic Compatibility Certificates

The planning system must balance bureaucratic plan making with private sector knowledge and ability to make projects happen. For this reason there must be provision in the planning system for flexibility to respond to market demand. The Urban Taskforce fully supported the use of a Strategic Compatibility Certificate to enable projects that meet higher level

strategic plans to be considered. However, we argued that the use of Strategic Compatibility Certificates should not be a temporary measure as suggested in the White Paper and Planning Bill. This system should be a permanent feature of the NSW Planning System.

While Strategic Compatibility Certificates were included in the Planning Bill, the same outcome could be achieved without the need for new legislation. The existing planning system provides for the issue of ***site compatibility certificates*** (SCC) and the drafting of a new State Environmental Planning Policy permitting the wider use of such certificates could be a means of ensuring that development proposal consistent with a state plan, such as the Metropolitan Strategy for Sydney, can still be considered even if prohibited by a local environmental plan.

Two (2) state environmental planning policies use site compatibility certificates to encourage suitable development and because the Department of Planning oversees the issuing of SCCs their use can be restricted to cases where local environmental plans are prohibiting worthwhile development form occurring.

State Environmental Planning Policy (Infrastructure) 2007 (the Infrastructure SEPP) provides for the SCC as a mechanism to facilitate additional uses, co-location and redevelopment of State land and certain other land, if the proposed development is compatible with surrounding land uses. Under the SEPP, a development may only proceed to the stage of lodgement of a development application if the Director General has issued an SCC for the site once he or she is of the opinion that the development concerned is broadly compatible with the surrounding land uses.

Under State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (the Seniors Housing SEPP) SCC are also issued as a means of facilitating appropriate development even if inconsistent with a local environmental plan. It is noteworthy that this mechanism was introduced to support a Statewide policy of providing housing for seniors and for people with a disability. The same argument could be made with respect to implementing the Metropolitan Strategy which seeks to encourage housing in appropriate, well serviced locations.

The Government does not need to rely upon a new Planning Act to introduce a means of overriding local environmental plans that are inconsistent with state policy. A SEPP could be drafted formalising the Governments policy and supported by a SCC mechanism development consistent with a higher order state plan could be permitted even if inconsistent with a local plan.

4. Code Assessable

The development industry requires certainty. Code assessable development was a means of providing certainty. Unfortunately, the inclusion of code assessment in the new Planning Act has proved problematic. However, the Government has the ability to achieve some of the benefits of code assessment within the existing planning system via the use of non-discretionary development standards and/or the further expansion of the Codes SEPP.

The Government must understand that a system such as code assessment is needed because a development proposal in New South Wales that complies with the standards included in a local environmental plan can still be refused. The consent authority is free to refuse the application based on considerations that are not expressly detailed in the plans. 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.

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 that does not rely on the introduction of code assessable development.

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". 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.

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 removing regulatory risk from the planning system.

Recently the Government expanded the Codes SEPP to include industrial development not exceeding 20,000sqm to be considered as complying development. The Codes SEPP could be expanded to include say residential flat buildings not exceeding 25 metres within appropriate zones and locations to be considered as complying development.

We strongly supported Code Assessment and this should be clearly in the new Planning Act. However if this is not to eventuate, then ***the wider use of non-discretionary development standards and/or the expansion of the Codes SEPP within the existing planning system should be pursued***.

5. Joint Regional Planning Panels

The Green Paper was strong on removing politics from the planning and development assessment process and the White Paper encourages councils to establish independent hearing and assessment panels. We believe that assessment should be by independent panels or council staff without the involvement of politicians.

Furthermore, Joint Regional Planning Panels (JRPP's) comprising state appointees and local government representatives should remain the determining authority for regionally significant development. As they cover a larger area than individual councils, a JRPP has the distinct advantage of being able to take a "bigger picture" view of how growth is managed and are less likely to be swayed by local NIMBY activism.

The resources afforded to the JRPP should be significantly increased to ensure the efficient consideration and determination of regionally significant development. It is essential that a JRPP be provided with its own staff, a proportion of which could be sourced from local councils and the State Planning Department.

The Urban Taskforce believes that the JRPP's should determine all development subject to State Environmental Planning Policy 65 and all development above $5 million (excluding land costs). This means that 99% of all applications will still be determined by local councils.

6. Reviews

The two (2) review mechanisms introduced in October 2012 in relation to the gateway process are considered to be a worthy inclusion to the existing planning system. We are aware of many cases where requests for spot rezoning of land are ignored, arbitrarily rejected or delayed without any good reason by the local council. There is clearly a need to introduce a process that independently and transparently reviews pre-gateway and gateway determinations. However, the administrative process remains unclear to the applicant. The way that the Department of Planning and Infrastructure screens requests for review remains highly subjective and discretionary and for this reason we suggest that the ***Department publish clear guidelines and adopt timeframes for the completion of the review process***. Furthermore, the applicant must be afforded the opportunity to put their case to the Department prior to a determination.

7. One stop referral for concurrences and approvals

The streamlining of concurrences should be pursued and we support the principle that development applications that require concurrence, referrals and approvals should be subject to one stop referral system. For these development applications we agree that the Director–General should undertake the functions of the concurrence or referral agency or issue general terms of approval to the consent authority. While this system had been included as part of the new Planning Bill, the same can be achieved within the existing planning system. ***A streamlined, one stop referral and concurrences system can be implemented without a new Planning Act.***

8. Declaration of Urban Activation Precinct requires strengthening

The Urban Activation Precinct process is generally supported by the Urban Taskforce. However, we argue that the declaration process lacks clarity or force. We say that once the Department of Planning has identified an area as an urban activation precinct, its declaration should be confirmed by way of State Environmental Planning Policy similar to the Growth Centres SEPP.

Should you require any further clarification of the content of this correspondence, please feel free to contact me on telephone number 9238 3927.

Yours sincerely
Urban Taskforce Australia

Chris Johnson AM
Chief Executive Officer

cc. Sam Haddad,
Director General,
Department of Planning and Infrastructure
GPO Box 39,
Sydney NSW 2001