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.

5 March 2014

Mr Robert Greenwood
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Blue Mountains City Council
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Katoomba, NSW 2780

email: submissiondlep2013@bmcc.nsw.gov.au

Dear Mr Greenwood,

F08616: Blue Mountains Draft Local Environmental Plan 2013

The Urban Taskforce considers the Blue Mountains local government area as unique. The locality presents great opportunities to residents and visitors to enjoy environmental quality that is world renown. The unique environmental attributes that attract many to the Blue Mountains also presents many challenges, particularly in the areas of natural environmental preservation, heritage conservation and the management of bushfire risk. We accept that the local Council must carefully balance the desires of current residents and accommodate growth while protecting the natural and built environment.

While we accept that the Council has a delicate balancing act to perform, we believe that the draft Blue Mountains Local Environmental Plan 2013 ("the draft plan") tries to do more than it's intended purpose. That is, the draft plan includes many zone objectives, clauses and standards that are unnecessary, inappropriate for inclusion in a statutory plan or simply wrong, discriminatory and anticompetitive. Clearly the Council has sought to translate its current Local Environmental Plan into a standard instrument without sufficient review or justification of the appropriateness of the existing controls. Furthermore, the complexity of controls and degree of prescription in the draft plan will deprive the Blue Mountains of investment and innovative solutions to meet the needs of existing and future residents. This level of regulation is simply overkill. Other than the City for Sydney we can think of no other NSW local environmental plan that even comes close to the level of regulation included in the draft plan.

This kind of regulation will see investment driven elsewhere, to places where development is encouraged and buildings aren't designed by public sector regulation. Blue Mountains Council should be trying to stimulate housing, retail and commercial development. Blocking urban development by over-regulating may win votes at council elections, but it is not in the interests of the broader community.

The draft plan is inconsistent with the intent of the standard instrument and inconsistent with LEP drafting guidelines issued by the Department of Planning and Infrastructure. The Urban Taskforce has reviewed the draft plan and objects to the draft plan in its current form because:

1. ***the R6 Residential Character Conservation zone is not needed.*** The application of R2 low density residential zone and use of a complementary development control plan would provide the Council with sufficient control over development without the need to introduce a new land use zone;

2. ***Council inserted zone objectives are not required.*** The vast majority of the Council inserted zone objectivities add little value or clarity and are often subjective in nature. The standard zone objectives are sufficient;

3. ***underrepresentation of R3 – Medium Density Residential Zone.*** All residential areas within 800 metres of centres serviced by rail and all areas within centres not serviced by rail should be zoned R3. Furthermore, previously zoned village housing/accessible housing area should be zoned R3;

4. ***minimum lot sizes will hinder urban renewal*** as the lot sizes required for dual occupancy and medium density development are overly generous.

5. ***Council inserted clauses relating to detailed design matters should be in a development control plan.*** For instance, controls such as variation in building height, site coverage, setbacks, preservation of period housing and the like should be removed from the draft plan and if absolutely necessary translated into a Development Control Plan;

6. ***the use of Clause 4.6 is unreasonably limited*** to provide adequate flexibility to Council and applicant to set aside development standards in certain circumstances.

7. ***clause 6.18 – consideration of character and landscape are detailed development control matters*** and should not be in the draft plan;

8. ***clause 6.19 – Period Housing Area controls should be placed in a development control plan***, not the Local Environmental Plan;

9. ***clause 6.20 - Design Excellence is highly subjective*** and is better places in a development control plan;

10. ***clause 6.21 – Active Street Frontages are better located in a development control plan***;

11. ***clause 6.22 - Sustainable resource management is not required.*** The BASIX SEPP and Environmental Planning and Assessment Act provides sufficient regulation;

12. ***clause 6.27 - Development in Industrial Zones is not necessary***. Section 79C of the Environmental Planning and Assessment Act provides sufficient direction when making a determination;

13. ***clause 6.28 - District Supermarkets – Shops in Zone B1 Neighbourhood and Zone B2 Local Centre should be deleted.*** This clause could be considered anticompetitive, preserves existing retail monopolies and limits the communities access to affordable goods and services;

14. ***clause 6.29 - Drive-in-take-away Food Outlets should be deleted*** as it is overly restrictive and denies the community and visitors access to fast food services; and,

15. ***Part 7 of the draft plan should be deleted*** and such detailed controls placed in a development control plan.

Our concerns are further detailed below.

1. R6 Residential Character Conservation Zone should be deleted

The careful use of the standard instrument R2-Low Density Residential zone, with the appropriately worded local zone objectives and a complementary development control plan would provide ample opportunity for Council to express the "uniqueness" of an area perceived to possess a special character. The Standard Instrument already has thirty-four (34) zones which provide the Council with great flexibility within a standard template. There is no justification for the introduction of a new zone unique to the Blue Mountains local government area. ***All reference to the R6 Residential Character Zone should be deleted from the draft plan. Furthermore, all areas zoned R6 within 800 metres of a town centre should be zoned R2 or R3.***

2. Council inserted zone objectives should be deleted

The standard instrument has zone objectives that are clearly worded, logical and actually mean something. These standard zone objectives provide sufficient understanding of the intention of the zone. While councils are permitted to add additional zone objectives, they should only do so to add value or clarity. Unfortunately in the following instances, the zone objectives do not achieve this. As is the case with the draft plan, the objectives are not appropriate, vague or subjective.

The Urban Taskforce has made numerous submissions to State and Local Government on draft local environmental plans. Our submissions have highlighted the importance of correct and consistent language when drafting local environmental plans, particularly in relation to plan aims and zone objectives. We have found many examples of councils inserting additional objectives to zones that add nothing to the standard objectives. In many cases the objectives added by council simply restate and/or reword the mandatory zone objectives or seek to include matters as zone objectives that are development control matters.

The NSW Department of Planning hold similar concerns with poor drafting practices displayed by many local councils. Their concern culminated in the release of a LEP practice note. Council will be aware that this practice note gives clear direction to Council 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;
- 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 standard) should not be included as a zone objective;
- Do not describe development control matters that are addressed through a development control plan in objectives, e.g. design requirements, setbacks, building envelope, site analysis or construction standards;
- Adding numerous local objectives could undermine the purpose of the zone. Councils should generally add no more than two or three local zone objectives where this is considered necessary;
- Councils should not add objectives where they only paraphrase mandatory 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]

While we appreciate that Council would like to translate as much as it can from its existing LEP to the draft plan, there are many instances where the LEP Practice note is not complied with. In this regard, the Urban Taskforce highlights drafting concerns as detailed below.

Council has inserted the following objectives to the ***R1 General Residential Zone***:

- To ensure that building form and design does not unreasonably detract from the amenity of adjacent residents or the existing quality of the environment by its scale, height, bulk or operation.

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

- To enhance the traditional streetscape character and gardens that contribute to the attraction of the area for residents and visitors.

These matters are considered development control matters and also matters that are to be considered pursuant to section 79C of the Act. These objectives are contrary to the Departments of Planning's practice note and should be deleted from the draft plan.

Council has inserted the following objectives to the ***R2 Low Density Residential Zone***:

- To ensure that development maintains and improves the character of residential areas, in a manner that minimises impacts on existing amenity and environmental quality.

- To allow a range of non-residential land uses that are consistent with the predominant scale and height of adjoining buildings and do not unreasonably detract from the amenity of adjacent residents.

These matters are considered development control matters and also matters that are to be considered pursuant to section 79C of the Act. These objectives are contrary to the Departments of Planning's practice note and should be deleted from the draft plan.

Council has inserted the following objective to the ***R3 Medium Density Residential Zone***:

- To ensure that residential development contributes to the streetscape and has a scale and character that is consistent with adjoining residential land uses and minimises adverse impact on the amenity of residents.

These matters are considered development control matters and also matters that are to be considered pursuant to section 79C of the Act. These objectives are contrary to the Departments of Planning's practice note and should be deleted from the draft plan.

All objectives for the ***R6 Residential Character Zone*** should be deleted as they relate to a zone that should not be included in the draft plan**.** Furthermore, all of the proposed objectives to the R6 Zone are considered development control matters and also matters that are to be considered pursuant to section 79C of the Act. **These objectives are contrary to the Departments of Planning's practice note and should be deleted from the draft plan.**

In the ***B1 Neighbourhood Centre Zone*** Council has added the objectives:

- To ensure that development contributes to the creation of a distinct village identity.

In the ***B2 Local Centre Zone*** Council has added the objective:

- To promote the unique character of each of the towns and villages of the Blue Mountains.

It is impossible to determine if a development "promotes the unique character of towns and villages of the Blue Mountains" because "unique character" is not defined in the plan, is subjective and aspirational in nature. Such zone objectives, if permitted to remain, are open to interpretation, misuse and will give rise to legal disputation.

Because there is nothing in the draft plan that identifies the "unique character" or "distinct village identity" this statutory requirement will leave it up to consent authorities to form their own opinion on this matter on an ad-hoc basis. This is an inappropriate provision for a statutory plan. The most appropriate means to define and give due consideration to such matters is to articulate what exactly the desired in the way of character in a development

control plan and then set development controls to encourage the development that is compatible with the future character of the area. It is not appropriate to seek to deal with such matters by way of zone objective.

Furthermore, these objectives are aspirational and subjective. What is development that contributes to the creation of a distinct village identity or unique character of each of the towns? How will this be measured or assessed objectively? Such objectives should only appear in a development control plan, if at all. **These objectives are contrary to the Departments of Planning's practice note and should be deleted from the draft plan**

In the ***B1 Neighbourhood Centre Zone*** Council has added the objective:

- To ensure that the non-residential uses are compatible with the residential uses and do not unreasonably affect the residential amenity as a result of factors such as operating hours, noise, loss of privacy, and pedestrian and vehicular traffic.

This objective seems to be at odds with purpose of a business zone. It places the needs of the residential land user above the non-residential / business land use. The intent of a business zone is to promote business. While we would strongly encourage mixed uses within a business zone, we do not support zone objectives within a business zone that would limit business activity.

Furthermore, the objective is also a **development control matter and a matter that is to be considered pursuant to section 79C of the Act. This objective is contrary to the Departments of Planning's practice note and should be deleted from the draft plan.**

In the ***B1 Neighbourhood Centre Zone and B2 Local Centre Zone*** Council has added the objective:

- To promote high quality urban design of built forms.

"High quality urban design" is a highly subjective phrase that is open to misinterpretation and/or misuse. If the Council's intent is to encourage a specific type or style of development then the appropriate location for such controls is within a development control plan. **This objective is subjective, a development control matter and a matter that is to be considered pursuant to section 79C of the Act. This objective is contrary to the Departments of Planning's practice note and should be deleted from the draft plan.**

In the ***IN1 General Industrial Zone*** Council has added the objective:

- To ensure that industrial development incorporates measures to mitigate operational impacts from noise generation or pollution on the sensitive environment of the Blue Mountains.

Minimising land uses conflict and preservation of amenity are core considerations set out by section 79C of the Act. The consideration of matters such as building design and environmental impact of development are also considered as part of the development assessment process. There is no need for these matters to be repeated as a zone objective.

Means of protecting the environment can be readily detailed in a development control plan and Council would expect that a statement of environmental effects lodged in support of an industrial development proposal would detail pollution minimisation and environmental protection strategies. **This objective is contrary to the Departments of Planning's practice note and should be deleted from the draft plan.**

Council has inserted the following zone objective in the ***IN2 Light Industrial zone***:

- To provide greater opportunities for the location and growth of small businesses, particularly those related to information technology and cultural industries such as arts and design based businesses and associated production.

This objective is not only subjective in nature, but is also difficult to understand. What is meant by "greater opportunities" is unclear and impossible to objectively assess because we do not know what we are comparing too. Greater opportunities than where? Furthermore, why is Council paying particular attention or favouring specific industries? Is council proposing to offer incentives to information technology and cultural industries to locate in its IN2 zones, or will council discourage industries other than information technology and cultural industries. **This objective is aspriational, subjective and will prove troublesome. Such an objective should be deleted from the draft plan.**

Council has inserted the following zone objective to the ***E3 Environmental Management Zone***:

- To protect the natural bushland buffer between towns, to avoid ribbon development and to conserve vistas of bushland obtained from public places and the Blue Mountains National Park.

An objective so broadly worded will be open to interpretation and liable to misuse. Conserving vistas of bushland obtained from public places and the National Park could effectively mean from virtually anywhere from within the local government area, particularly if the Council is to consider that a public place is to include roads. Furthermore, if the intent of this objective is to protect or manage areas with special aesthetic values and to limit development to only development that does not adversely impact upon those values, then the standard zone objectives are sufficient. Hence the Council insert zone objective at best merely repeats and rewords the standard instrument objective. **Such an objective is inconsistent with the Department of Planning practice note and should be deleted from the draft plan.**

Council has inserted the following zone objectives to the ***E3 Environmental Management Zone***:

- To ensure that the form and siting of buildings, colours, landscaping and building materials are appropriate for, and harmonise with, the bushland character of the areas.

- To encourage landscaping and regeneration of natural bushland in areas with sparse tree or canopy cover.

Site suitability for proposed development is a central concern of section 79C of the *Environmental Planning and Assessment Act 1979*. Core to the development assessment process is to ensure that a development proposal is able to be properly accommodated on a site and that such development can be properly and safely accessed by vehicles and pedestrians. The retention of natural features through a sensitive and responsive design, appropriate for the site is also a matter addressed by the development assessment process; a process that is guided by section 79C of the Act. There is no need to include such matters as a zone objective.

These objectives relate to detailed design matters that are ***development control matters and matters that are to be considered pursuant to section 79C of the Act. These objectives are***

contrary to the Departments of Planning's practice note and should be deleted from the draft plan.

3. Underrepresentation of R3 – Medium Density Residential Zone

All local government areas in the Sydney Metropolitan Area will be required to meet housing targets to meet expected population growth. Furthermore, all levels of government understand the need to provide more housing that is affordable and well located. In this regard, it is widely accepted that the greatest opportunity to meet housing needs, while preserving natural areas and encouraging sustainable transport usage is by way of infill development. Encouraging infill development is not only a sustainable means of meeting housing targets, but is also a very effective means of achieving urban renewal. Therefore, it is disappointing that a Council such as Blue Mountains Council who espouse conservation values and a desire to meet housing affordability goals would not see the value in promoting more infill development through the broader application of the R3 zone.

We argue that all residential areas within 800 metres of a B1 or B2 centre zone serviced by a railway station should be zoned R3 medium density and all residential areas within 400 metres of a B1 or B2 centre zone not serviced by rail should be zoned R3 medium density.

4. Minimum lot sizes will hinder urban renewal

As noted above, we argue that infill development and the resulting urban renewal is a sustainable and effective means of achieving housing targets to meet the needs of population growth. However, the Council has made this form a development difficult and relatively unattractive to the market. Along with an underrepresentation of R3 medium density zoning the Council has proposed overly generous minimum lot sizes for dual occupancy and multi dwelling housing.

For instance, where this form of development is permitted, the minimum lot sizes are:

- attached dual occupancy 900sqm
- detached dual occupancy 1100sqm
- multi dwelling housing 1300sqm

We argue that **dual occupancy (attached and detached),** being a very low impact form of infill development should be considered **no different to a dwelling house and be permitted on any lot that meets the minimum lot size for a dwelling house.**

Multi dwelling housing should be permitted on a lot of 1200sqm or greater.

5. Council inserted clauses relating to detailed design matters should be in a development control plan

Part 4 of the draft plan articulates development standards and the standard instrument provides more than adequate opportunity for the council to regulate development. Minimum lot size and subdivision controls, floor space ratio and height of buildings controls, when supported by well formulated and drafted development control plans are very effective and appropriate tools to manage development. This approach has been widely used in many local government areas with equally challenging environmental and heritage constraints with great effect. There is no need for Blue Mountains Council to simply seek to translate existing development controls from existing local plans into the standard instrument LEP.

In this regard we question the need for clauses such as:

- 4.4A - Site coverage; and,
- 4.4B - Setback for development in Zone R6 Residential Character zone.

These detailed controls should not be considered as principal development standards, rather these controls should be considered as development controls and be located in an appropriate development control plan. It should be noted that we object the clause 4.4B not only because it is a development control and should not be in a statutory plan, but also because the Urban Taskforce objects to the R6 Residential Character Zone outright.

6. Use of Clause 4.6 is unreasonably limited in the draft plan

The Council would understand that cluse 4.6 replaces SEPP 1 and in this regard, clause 4.6 should be made available to provide the Council and applicant with flexibility to deal with unforeseen circumstances. 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, Council is 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 clause 4.6 would permit. There is no public policy reason why Council 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 this regard, the Urban Taskforce objects to the following exclusions to the use of clause 4.6:

- (d) clause 4.1E (7) (which relates to the area of a development space within the E3 Environmental Management and E4 Environmental Living zones) as this cluse does not allow for unforseen environmental constraints and/or engineered solutions that enable suitable development for the location; and
- (f) clause 6.28 (which relates to the maximum gross floor area of shops within Zone B1 Neighbourhood Centre and Zone B2 Local Centre) as clause 6.28 is an anticompetitive clause and if permitted to remain in the statutory plan must be open to challenge. More comment on clause 6.28 is offered below.

Council must avoid limiting the application of clause 4.6. Unreasonable limitation could be to the detriment of the applicant, community and Council.

7. Clause 6.18 Consideration of character and landscape should not be in the draft plan

This objectives of this Council inserted clause is:

> to promote the design of residential properties that are consistent with, or enhance, the established character of the buildings, gardens and the streetscapes of the villages within the Blue Mountains.

In determining whether development contributes to the character of the locality, noting that character is not defined in the draft plan, the consent authority is to consider a number of matters such as:

> (a) the scale and massing of any proposed building, and
> (b) the use of building materials, including colours and finishes, and compatibility with the characteristics of the site and the locality, and
> (c) the building form and design, ensuring the building is articulated and varied, and provides a fine-grained residential built form and an individual dwelling identity and street address, and
> (d) the location of buildings on the allotment and the relationship of the building to the public street, and
> (e) the measures to minimise any potential impacts on the amenity of any adjoining residents, and
> (f) the activation of street frontages, which are to provide direct views from living areas, where possible, to the public street, and
> (g) the garden setting, which should establish a standard of presentation at least comparable with adjacent dwellings and parks or the immediate landscape setting.

All of these matters are detailed development control matters and have no place in the draft plan. If the Council is of a mind to define residential character and establish a means of assessing development suitability against character, then these matters should be detailed within a development control plan.

Clause 6.18 should be deleted from the draft plan.

8. Clause 6.19 – Period Housing Area should be deleted from the draft plan

The objectives of this Council inserted clause to identify and protect period housing by:

> (a) retaining and ensuring the traditional streetscape and character of older residential areas incorporating Victorian, Edwardian, Federation, Inter-War or Art Deco building styles that are an, and
> (b) preserving housing stock that pre-dates 1946 from demolition where these buildings are an important contributor to the traditional streetscape character, and
> (c) ensuring that new development complements the traditional streetscape character of the surrounding area.
>
> (2) This clause applies to land identified as 'Period housing area' on the Built Character Map.

The Urban Taskforce objects to this clause as it usurps proper heritage provisions. That is, if the Council is able to properly justify the heritage significance of precincts within the local government area, then clause 5:10 is the appropriate means of dealing with this matter. We suspect that the reason the Council has sought to translate these clauses from its existing LEP to the draft plan is that Council would not be able to justify the use of clause 5.10 and must rely on the use of draft clause 6.19 as a "back-door" heritage provision clause.

Heritage conservation is certainly a matter worthy of consideration and clause 5.10 of the standard instrument is designed to ensure that heritage matters are properly dealt with. Furthermore, design matters to ensure consistency with existing building and streetscape are most effectively guided by development control plans and should not appear in a local environmental plan.

Council's inserted clause 6.19 should be deleted from the draft plan.

9. Clause 6.20 - Design Excellence should be in a development control plan

The draft plan includes a design excellence clause that uses highly subjective wording providing the Council with complete flexibility to determine what is considered to be design excellence. For instance, in considering whether the development exhibits design excellence, the Council will have regard to:

- whether a ***high standard*** of architectural design, materials and detailing ***appropriate to the building type and location*** will be achieved,
- whether the form and ***external appearance*** of the development ***will improve the quality and amenity*** of the public domain,

These terms are highly subjective and should not appear in a local environmental plan. The appropriate location of detailed design excellence matters is a development control plan.

Clause 6.20 should be deleted from the draft plan and placed into a development control plan.

10. Clause 6.21 – Active Street Frontages should be in a development control plan

Council proposes the introduction of a clause regulating active street frontages in certain areas. While we acknowledge that street level activity is beneficial in certain locations this does not mean that government regulation can force this to take place when it is not commercially viable.

Main street exposure is important for the success of retail and commercial businesses. Streets and centres with high levels of pedestrian traffic are obviously prime locations for retail premises and such premises will naturally establish in these locations. There is no need for planning regulation, prescribing retail or other forms of non-residential development at ground level and/or prohibiting residential uses on the ground level. Generally speaking, non-residential uses will naturally want to locate in these areas.

If the objective for insisting on retail and business activity at ground level is to also enhance passive surveillance and public safety, forcing retail in non-viable locations will ensure that passive surveillance does not eventuate. That is, businesses will not go where they cannot survive. Therefore, insisting on active street frontages, regardless of exposure to clientele, in reality means that streets where retail is not viable remain empty and ghostlike.

It makes more sense to permit viable development at ground level that is designed in such a way to encourage street level articulation and multiple entries where appropriate, regardless of use. For example, if designed to be adaptable, a ground floor residence can be converted into a business or retail premises when there is a market for such business. Some of Sydney's most successful retail strips have been extended through the conversion of residential premises.

The Urban Taskforce believes that controls that relate to street level activity are not required, but if Council feels that it must have such controls, if appropriate, we argue that controls are better placed in a development control plan. Clause 6.21 should be deleted from the draft plan.

11. Clause 6.22 - Sustainable resource management is not required

As Council would be well aware, the *Environmental Planning and Assessment Act* requires the consideration of the principles of "ecologically sustainable development" in the decision

making process. The term, "ecologically sustainable development" is already extensively defined and detailed under the Act.

The concept of "ecologically sustainable development" already requires:

- environmental protection;
- the integration of economic and environmental decision-making;
- inter-generational equity in decision-making;
- the application of the precautionary principle; and
- respect for biodiversity.[2]

Therefore, the Council already has the authority and is obliged to consider ESD which includes sustainable resource management when making a determination of a development application. Furthermore, the existence of the BASIX SEPP reinforces the need to consider resource management when considering residential development. There is no need for added prescription as proposed in the draft plan.

Council should rely on the ESD provisions within Act and BASIX SEPP and must not introduce additional prescription in the form of clause 6.22.

12. Clause 6.27 - Development in Industrial Zones should be deleted from the draft plan

This council inserted clause seeks to ensure that reasonable measures are in place to reduce the impact of industrial activities on surrounding residential land uses. The clause requires that the Council consider matters including:

> (a) the relative building scale, bulk, design and height and the siting of the proposed development, and
> (b) the retention of acoustic and visual privacy of residents of properties in the residential zone, and
> (c) the hours of operation of the proposed development, and
> (d) levels of traffic generation of the proposed development, and
> (e) any noise, light, dust and odour nuisance likely to be generated by the proposed development, and
> (f) over-shadowing of, and retention of solar access by, properties in the residential zone.

These are all detailed development control matters that must be considered pursuant to section 79C of the Environmental Planning and Assessment Act. There is no need for these matters to be included in the draft plan.

Clause 6.27 simply replicates matters for consideration under the Act and therefore should be deleted from the draft plan.

13. Clause 6.28 - District Supermarkets – Shops in Zone B1 Neighbourhood and B2 Local Centre is anticompetitive and should be deleted from the draft plan

The mandatory zone objectives for zones Zone B1 Neighbourhood and B2 Local Centre are comprehensive and clearly set the purpose of these zones. The permissible land uses are also clear and appropriate for such business zones. However, the Council has proposed a clause that seeks to limit the size of shops in the majority of these business zones to 1500sqm. Obviously this clause has been introduced to the plan as an attempt to protect some form of centres hierarchy or a simplistic means of preserving existing character, whatever that

[2] The *Environmental Planning and Assessment Act 1979* already defines the phrase "ecologically sustainable development" to mean all of the things set out in section 6(2) of the *Protection of the Environment Administration Act 1991*. Section 11 of the *Interpretation Act 1987* makes clear that when the phrase "ecologically sustainable development" is used in a local environment plan, it has the same meaning as in the Act.

may be. As it stands, the Council inserted clause 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 clause will enable growth in centres to be limited. 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 and also other existing centres are protected from competition.

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. The Council may say that the objective of this clause is to preserve character, but what it really does is preserve existing monopolies and effectively denies the community access to full line supermarkets.

In the end, introducing a clause that limits floor space simply removes the opportunity for competition, ensuring that the community pays more than they should. Limiting the opportunity for a competitive retail environment robs the community of the opportunity to access a wide variety of competitively priced items in their locality. A limitation on shops 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.

The Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws.[3] It concluded that zoning and planning regimes act as an artificial barrier to new supermarkets.

The Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords.[4] The Productivity Commission also 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.[5]

In his report *Choice Free Zone*, Professor Allan Fels found that larger format stores offer basic food items for up to 18 per cent less and up to 28 per cent less for other household products. The Australian Government's Bureau of Infrastructure, Transport and Regional Economics found that consumers paid 17 per cent more when they did not have ready access to a large format grocery store.

The Council inserted clause 6.28 is considered overly restrictive and anti-competitive and should be deleted from the draft plan.

[3] Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008).

[4] Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (2008).

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

14. Clause 6.29 - Drive-in-take-away Food Outlets denies the community and visitors access

This Council inserted clause seeks to limit drive-in take-away food outlets to major non-highway locations. However, drive-in-take-away food outlets don't want to locate in non-highway locations. Hence in reality, the clause simply prohibits drive-in-take-away Food Outlets from the Blue Mountains local government area.

This clause robs the community and visitors access to a legitimate food offering and may also be considered anticompetitive as it simply protects to interests of existing food outlets by preventing new entrants to the market.

Anticompetitive clauses such as Clause 6.29 should be deleted from the draft plan.

15. Part 7 of the draft plan should be deleted

The entire Part 7 of the draft plan seeks to:

> retain the distinct character of each village within the Blue Mountains by providing specific precinct objectives for the development of land within nominated precincts

While the Urban Taskforce has serious concerns with Council's desire to freeze a locality in time or limit investment and progress into its town centres, it is argued that Part 7 should not be in the draft plan as it is a detailed development control matter that is better placed in a development control plan.

The LEP provides comprehensive zone objectives. These objectives articulate and describe the intension of the zone. The suitability of development is measured against the zone objectives. Furthermore, the LEP provides a detailed set of standards that must be adhered to. These standards seek to ensure that development meets the objectives of the zone and does not unreasonably interfere with local amenity. The opportunity to provide more detailed control is provided within a development control plan. Furthermore, the *Environmental Planning and Assessment Act* requires careful consideration of development proposals, to ensure that development is appropriate for the locality. There is already adequate controls in place to ensure development outcomes are appropriate to a locality without the need for the imposition of more controls as proposed in Part 7 of the draft plan.

The additional controls suggested are subjective and open to interpretation and may be used to limit or otherwise prohibit permissible development. These controls will simply cause confusion and disputation.

A standard instrument local environmental plan which includes appropriate aims and objectives, supported by a development control plan with simple development standards is sufficient. There is no need for additional controls as suggested in Part 7 of the draft plan.

Part 7 should be deleted in its entirety from the draft plan and transferred into a development control plan.

Notwithstanding any of the above, the Urban Taskforce wishes to highlight its concern with Council's significant departure from the standard instrument and insistence in translating much of its current LEP into the standard instrument. There are many instances where this translation is not appropriate and/or where the planning controls being translated are simply not necessary. While we accept that the Blue Mountains local area is special, the Blue Mountains Council is not the only local government that must deal with challenging environmental and heritage issues, while maintaining a standard instrument LEP. For instance, Ballina, Port Macquarie-Hastings and Port Stephens are faced with challenging environmental conditions unique to their locality and while we don't agree with

everything in their local environmental plans, we do recognise their efforts to adopt a standard template LEP without the level of prescription suggest by Blue Mountains Council. Even Leichhardt and the City of Sydney have been able to make the standard instrument work under extremely challenging circumstances. Again, while we don't agree with all that is within their plans, we must acknowledge their efforts to work with the standardisation process.

Furthermore, it seems that the Council has forgotten that the local environmental plan is only one component of the planning system. There are many other pieces of legislation that provide the assurances that the Council may seek. In fact, we would argue that the Environmental Planning and Assessment Act and Regulation, the Threatened Species Conservation Act and the many State Environmental Planning Policies provide ample opportunity to the Council to manage its environment without overly relying on their local plan.

The Urban Taskforce trusts that the Council will accept these comments as our contribution to the plan making process and we hope that they will be considered in the spirit in which they are offered. Should you require any further clarification of the content of this correspondence, please feel free to contact the Manager, Planning and Policy, Gilbert de Chalain on 9238 3937 or myself on telephone number 9238 3927.

Yours sincerely

Urban Taskforce Australia

Chris Johnson AM
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