

12 June 2014

Competition Policy Review Secretariat  
The Treasury  
Langton Crescent  
PARKS ACT 2600

Dear Sir/Madam,

## Competition Policy Review

The Urban Taskforce is pleased to make this submission to the Competition Policy Review Panel as our contribution to the Panel's investigation into the effectiveness of Australian competition policy. Our submission focuses on the unintended and adverse impact of planning, zoning and land use restrictions on competition and responds to the issues raised in *Chapter 2 – Regulatory Impediments to Competition*. The Urban Taskforce argues that the New South Wales experience is that **planning and zoning regulation do exert an adverse impact on competition**.

To a great extent the purpose of urban planning is to facilitate the provision of public and private services through the coordinated and efficient use of land. This seems to be a logical and worthy objective of planning. However, in New South Wales there is an over-reliance on exclusionary regulation that severely undermines this objective by impeding competition. We believe that the adverse impact of over regulation has the greatest affect on the retail sector of the development industry.

The Urban Taskforce argues that anti-competitive constraints imposed by planning regulation results in:

- barriers to entry from new competitors due to a lack of available sites; and,
- restrictions that reduce the flexibility of competitors to react to changes in demand or to compete with other retail stores.

The consequences of reduced competition results in:

- higher prices;
- reduced choice and convenience; and
- fewer incentives for innovation.

The Urban Taskforce hopes that this review results in significant changes to the planning system and legislation so that:

- competition is supported and encouraged;
- zoning schemes are flexible and permit a wide range of retail formats;
- development controls are not drafted to limit retail floor space as a means of prohibiting or favouring one type of retail format over another within zones where retail use is permitted; and,
- the threat of competition is not a matter for consideration by a consent authority when making a determination of a development proposal.

**1. Land use control should not extend to control over retail format**

Land use control is generally achieved by way of zoning and the development approval process. While the Urban Taskforce does not object to the use of zoning and the development approval process to manage land use, the way that the zoning and development approval process is being implemented is cause for concern.

Land use restrictions that require certain formats of stores, or define when, where and how certain stores may evolve, are likely to have the effect of reducing competition by impeding the entry of new competitors into the geographical market.

In some cases, the restriction on entry takes the form of a complete refusal of allowing competitors to establish due to presiding land use regulations. Alternatively, if competitors are able to establish themselves, land use regulations may place limits on the format of their operations (for example their scale). These policies will also reduce the level of competition within the market as the new competitors – and potentially the existing operators – are not able to take advantage of improvements in information technology in the operations associated with store format.

For instance, local planning authorities tend to adopt a myriad of land use zones with strict permissibility provisions. The implementation of these zones limit the variety of land uses permitted to the extent that in some cases, particularly in the case of large format retail, a suitable land use zone in an appropriate location cannot be found. Furthermore, the way that development assessment processes are being implemented, particularly with respect to the requirement of the consent authority to consider the economic impact of development results in a severe limitation in competition opportunity.

**2. Consideration of economic impact does not mean consideration of competition**

In New South Wales, section 79C of the *Environmental Planning and Assessment Act 1979* outlines the requirement for consent authorities to consider the economic impacts of a proposed development through the approval process. However, there is limited discussion on how these benefits are to be measured leaving the consent authority, mostly local council to adopt relatively unsophisticated measures of economic impact of new development. Often, local consent authorities find themselves hostage to objectors to development proposal who object to a proposal on "economic grounds". It is common place for retail development applicants to draw objection from nearby existing retail land uses on the bases of adverse economic impact including loss of trade. In many cases the result has been the refusal of developments that may have improved economic and community welfare.

Unfortunately it has become common for consent authorities to require applicants to submit economic impact statements with their development proposals even in cases where a retail development is consistent with land zone objectives, permissible within the land use zone and compliant with the relevant development controls. The consent authority finds itself in a position where it will rely heavily and unreasonably on an economic impact statement that will seek to demonstrate that a new retail entrant to a locality will not have an unreasonable impact on existing retailers as a means to deflect objection from competitors.

**3. The planning system is not able to consider costs and benefits of increased competition**

Notwithstanding the over reliance on economic impact assessment, we argue that the planning system is not equipped to assess the costs and benefits of increased competition. Unfortunately the current legislation provides the opportunity for courts and councils to consider competitive effects when assessing development applications. However, the application of competitive tests is highly complicated and there is a high probability that incorrect assessments have been and will continue to be made.

Establishing the competitive effects of a proposed development and the change in community welfare associated with this altered competition environment are two separate issues. It is highly possible that community welfare may be improved due to increased competition in local geographic markets, even if there is a change in the number, type and form of services provided in the area. Increased competition generally leads to reduced prices for goods and services and promotes a more dynamic business sector that is encouraged to innovate and evolve in response to market forces and technology advancements.

When economic tests are incorrectly applied in the planning process, placing undue emphasis on a static picture of the local economy (such as the current number and form of services) it is likely that incorrect assessments will be made, with the ultimate effect of reducing and inhibiting competition through rejection of development applications.

#### 4. Land use planning adversely impacts on productivity

Land use regulations, inefficient zoning requirements and restrictions on store formats can also have wide ranging impacts on economic output and productivity. By restricting the location of retail outlets or store formats, such regulations can have an influence on productivity growth by limiting or preventing:

- an existing retail store's ability to alter its format in response to changing technology;
- an existing retail store to expand its retail offer due to land use restrictions; or
- the ability of new stores to open in certain areas that would generate these productivity gains.

In reality, other than providing a planning system that considers the economic and efficient use of land and the preservation of amenity while encouraging competition, the planning authority should not be focusing on matters concerning competitive markets. Furthermore, there is no justification for insisting on economic impact assessment as justification for development that is permissible within a land use zone. Competitors should not be provided with the opportunity to object to new development proposals on the grounds of economic impact, particularly in relation to loss of trade due to a new entrant to the market.

#### Case Studies

The following case studies are real examples of planning regulation adversely impacting on competition. These examples demonstrate how the:

- development assessment process inappropriately considers competition as an adverse impact of new retail development; and,
- zoning and development control overtly discourages competition.

#### Case study 1 Proposed grocery store – Canley Vale (Western Sydney NSW)

This proposal is for the construction of an eight (8) storey mixed-use development consisting of two (2) levels of commercial/retail floor space with six (6) levels of residential above. Two (2) levels of basement car park is to be provided to service the development.

This proposal is permissible within the B2 – Local Centre zone. The objectives of B2 zone include:

- **To provide a range of retail, business, entertainment and community uses** that serve the needs of people who live in, work in and visit the local area.
- **To encourage employment opportunities** in accessible locations.

- To ensure that mixed use developments include an active street frontage by **locating business, retail and community uses at ground level.**<sup>1</sup>

Without question and confirmed by the local planning authority, this proposal meets the zone objectives and the proposal was clearly permitted within the zone. There was no need to amend zoning or development standards detailed within the local environmental plan. However, when this proposal was present to the local planning authority prior to formal lodgement, the local planning authority advised the application in writing that:

An Economic Impact Statement is required to be prepared and **demonstrate that there is adequate demand for additional commercial floor area** in the area. In this regard, the Economic Impact Statement **must demonstrate that the proposed expansion of the commercial space as a result of the proposal would not result in adverse impact upon surrounding business centres.**<sup>2</sup>

When questioned on this requirement, the applicant was advised that the proposal involved approximately 7600sqm of gross leasable floor area and that this amount of additional retail/commercial floor area would draw objection from existing retailers in the locality. Therefore the assessment of the development proposal would need to consider the potential for adverse impact on exiting business due to increased completion.

We argue that in this instance the need for economic impact assessment and consideration of completion is unnecessary and inappropriate. The proposal is located within an existing business centre, across land that is zoned for retail/commercial land uses. The proposal is permitted within the zone. In this case there is no justification for economic impact assessment, particularly as a means of deflecting objection to the proposal from competitors.

## **Case study 2 Proposed light industrial and highway retail development – Hoxton Park (Western Sydney NSW)**

This proposal sought approval from the local planning authority to develop land zoned IN2-light industrial in two stages. Stage 1 would see the front portion of the site developed to provide a range of take-away food and drink premises, fast food restaurants, convenience shopping and service station. The total gross floor area for retail for the entire development (stages 1 and 2) was a meagre 2950sqm. Stage 1, the subject of the development application only included 1600sqm of retail floor area.

The proposal was considered permissible in the IN2 Light Industrial zone. The objectives of the IN 2 zone are:

- To provide a wide range of light industrial, warehouse and related land uses.
- To encourage employment opportunities and to support the viability of centres.
- To minimise any adverse effect of industry on other land uses.
- **To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.**
- **To allow other land uses that are compatible with industry and that can buffer heavy industrial zones while not detracting from centres of activity.**<sup>3</sup>

It was argued that the proposed development satisfied all the relevant zone objectives of the zone. Furthermore, the IN2 zone permits numerous land uses and it was noted that permitted land uses within the zone include:

- neighbourhood shops;
- take away food and drink premises; and,
- service stations.

<sup>1</sup> Fairfield Local Environmental Plan 2013

<sup>2</sup> Record of Development Advisory Meeting of 6 May 2014

<sup>3</sup> Liverpool Local Environmental Plan 2008

A reasonable person would assume that the proposed development met the zone objectives and would be permitted with consent.

However, when the application was formally lodged and subsequently advertised, the proposal drew a number of objections. The most noteworthy and relevant to this review was the objection that was submitted by a high profile competitor located some four (4) kilometres from the development proposal. The competitor was frank in their objection and advised the local planning authority that they objected to the proposal on a number of grounds including:

- the potential to undermine the viability of existing and future local centres; and,
- the creation of an undesirable level of uncertainty among exiting retail centres in the locality.

In reality such objection is simply code for fear of competition. This objector was simply using the planning system to protect exiting market share. 1600sqm of retail floor area, located on a major road does not undermine the viability of local town centres. Highway oriented retailers do not wish to locate in local centres as such centres do not provide the opportunity for highway related services. It is nonsense to suggest that highway related retail would locate in a centre if provided to opportunity to do so.

The exiting planning system encourages competitors to manipulate provisions of the planning legislation to their advantage. Unfortunately, local planning authorities seem hesitant to challenge such objection and would prefer to rely on economic impact assessment and/or the courts to make a determination.

This development proposal was significantly amended to satisfy local planning authority requirements, largely based on objections received. The retail floor area was drastically reduced to a level where the proposal was no longer feasible and did not proceed.

The end result is that the:

- local community is denied choice;
- competition is discouraged; and,
- existing retail is able to manipulate the planning system to their advantage.

### **Case Study 3 City of Sydney Local Environmental Plan and Development Control Plan**

Like the majority of local councils in New South Wales, the Council of the City of Sydney prepared a new local environmental and development control plan. The plan was prepared to conform to the State Government standard environmental plan template and in this regard, the Urban Taskforce has no objection. However, the way that this Council has successfully introduced additional regulation to limit competition is of grave concern. For instance the mandatory zone objectives for zones B4-Mixed use and B7-Business Park are comprehensive, clear and do not require further clarification. However, the Council has inserted an additional objective which says:

- To ensure uses support the viability of centres.<sup>4</sup>

We argue that this objective was introduced to the 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

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<sup>4</sup> Sydney Local Environmental Plan 2012

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.

Including objectives such as these introduces 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.

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. We argue that the above zone objective is clearly one that has been introduced to ensure that new 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 outside of Green Square Town Centre and other planned centres

(1) This clause applies to land identified as Restricted Retail Premises 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 shops or markets 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.

The local plan also includes a limitation on "retail floor area" for neighbourhood shops. Council has suggested that an 80 square metre limitation be applied to neighbourhood shops. A limitation of 80 square metres is overly restrictive and makes it impossible for the establishment of a good quality convenience store.

There are many zones in the plan that prohibit retail premises. This means that the community working and living in these zones will be forced to rely upon "neighbourhood shops" to meet their basic shopping needs. Restricting retail floor area for these premises to 80 square meters will ensure that only very basic convenience goods will be sold, robbing the local community of easy access to a basic range of necessary goods. If Council was committed to providing easy and convenient access to a wider range of wholesome food and grocery items, then it should ensure that floor space limitations are reasonable and permit the establishment of business that can provide these goods and services to the community.

In the end, limiting floor space and 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.<sup>5</sup>

If the Sydney Local Environmental Plan is not sufficiently anti-competitive, then the supporting development control plan goes even further towards protecting existing retail interests. The development control plan seeks to reinforce a retail hierarchy in the Green Square area. The requirements of the plan are clearly devised to ensure that retail floorspace is rationed and only certain forms of retail, considered appropriate at this point in time, will be permitted. This approach to retail planning is not only short sighted but is also risky as it does not properly recognise the change in retail demand, shopping habits and preference that occurs over time.

Furthermore, we argue that any strategy that seeks to dictate and predict the retail environment is doomed. Those in the retail industry, who regularly invest in retail development, are not so arrogant to profess an ability to accurately predict the retail environment to such a level of certainty, where it is possible to predict not only the type of retail use, but also the number of each type that will be required in a locality. For instance, the development control plan includes the following table.

Table 3.3: Desired character of centres

Centre	Function	Appropriate retail uses
Major centre The Green Square Town Centre	The primary retail, commercial and community centre in the City South area. The range of retail and entertainment uses found in the Green Square Town Centre is to be greater than other centres and it should be the most highly-visited and vibrant centre.	A full range of retail uses aimed at attracting regional visitors, including full-line supermarkets, department stores, discount supermarkets, cinemas, markets, speciality shops, fashion, comparison shopping, homewares, convenience shops, fresh food, cafes, restaurants and bars.
Local villages Victoria Park Danks Street Ashmore Estate	Existing and future local village centres will meet local daily shopping in denser residential areas. These centres are to be accessible via public transport and bikeways and be supported by services and open space.	A reduced range of retail uses providing for the local area, including one full-line supermarket, one discount supermarket, speciality stores, homewares, convenience retailers, fresh food, cafes, restaurants and bars.
Small Village Botany Road, Rosebery	The small village will continue to service the convenience retail needs of local residents and workers. Additional speciality shops and services in this location will consolidate the small village as demand increases.	Retail uses that do not provide for a full range of groceries and food, but includes one small supermarket, speciality stores, convenience retailers, fresh food, cafes, restaurants and bars.
Neighbourhood Centre Dalmeny Avenue, Rosebery Future locations to be determined by demand	A neighbourhood centre is a group of more than three neighbourhood shops that provide convenience shopping within walking distance of homes and workplaces. They should not provide so wide a range of groceries and food that people do not need to visit a village centre or the major centre.  New neighbourhood centres may be developed where they are consistent with other planning controls and will not significantly detract from other centres. A neighbourhood centre is to be provided with minimal car parking spaces.	Approximately five neighbourhood shops, including delicatessens, hairdressers, newsagents, cafes and other speciality or food retailers.  small supermarkets (that are also minor retail development) may be appropriate in neighbourhood centres where they are consistent with other controls and planning strategies.

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

This above table indicates the rationing of retail floor areas among centres. For instance, the Local villages of Victoria Park, Danks Street and Ashmore Estate are entitled to

[a] reduced range of retail uses providing for the local area, including one Full-line Supermarket only, one Discount Supermarket only, specialty stores, homewares, convenience retailers, fresh food, cafes, restaurants and bars.<sup>6</sup>

Regardless of community need, the retail services permitted in this locality have been rationed. Whoever establishes the first supermarket is guaranteed a monopoly, delivered by restrictive, misguided and ill-informed planning controls. A similar level of prescription has also been applied to small villages, and neighbourhood centres.

Local planning controls should not be used to ensure an anticompetitive retail environment. The rules suggested in the development control plan will ensure that once established a business will have little incentive to provide increased choice and/or competitively priced goods and services. There is simply no incentive to compete.

Where is the public interest in prohibiting a free retail environment where retailers seek to attract customers by meeting customer need and the provision of competitively priced goods and services?

Council's plans will limit 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 and/or limiting floor area) robs the community of the opportunity to access a wide variety of competitively priced grocery in their locality.

The Urban Taskforce argues that a retail hierarchy forces people into their cars to drive further in search of goods and services that are not conveniently located. This goes against the most fundamental principles of environmental protection and sustainability.

Furthermore, by severely limiting the locations for bulky goods retailing means that large format grocery stores, large format business supplies retailers or large format hardware suppliers will often have great difficulty in finding sites. New entrant and independent retail supermarkets also end up being excluded.

As it stands, Council's plans will enable restriction of commerce, limitation of choice and will in all likelihood hamper the evolution of centres.

It is of great concern to the Urban Taskforce that a Council would unashamedly introduce development controls to intentionally limit growth, with the objective of protecting and ensuring greater growth in other centres.

It is interesting to note that these restrictive planning controls were introduced to implement the *Green Square and Southern Areas Retail Study 2008*, prepared by Jones Lang La Salle and Hassell. However, at the same time as this study was being finalised (August 2008), the Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws.<sup>7</sup> It concluded that zoning and planning regimes act as an artificial barrier to new supermarkets. In the same month the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords.<sup>8</sup>

In his report *Choice Free Zone*, Professor Allan Fels found that larger format stores offer up to 18 per cent less for basic food items 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.

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<sup>6</sup> Sydney DCP 2012. Table 3.3 – Desired character of Centres, p. 3.4-3.

<sup>7</sup> Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008).

<sup>8</sup> Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (2008).



Land use planning should seek to match urban development with community demands. It is important to recognise that community demands are not all commonly shared and can be quite diverse. Future demands are highly uncertain with growing populations, shifting social demographics and the development of information and other technologies. A complex regulatory environment is likely to inhibit adaptation and innovation in urban design and the provision of retail services.

Current zoning regulations are not adapting to keep pace with market forces. Increased population densities in inner city and inner suburban areas are relocating demand for retail and grocery services, while zoning regulations are impeding the development of these retail services, forcing them to locate in less than optimal sites, or reducing the scale on which they are able to operate. The restrictive effects of the zoning regulations is having a significant impact on competition.

I would welcome the opportunity to address the Competition Policy Review Panel and should the Competition Policy Review Secretariat have any further enquiries, please feel free to contact me on telephone number 92383927.

Yours sincerely  
**Urban Taskforce Australia**



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