Urban Taskforce
AUSTRALIA

12 November 2010

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Dear Ms Bell

Re: Supplementary Submission to the Performance Benchmarking Study for Australian Business Regulation: Planning, Zoning and Development Assessments

We wish to make a supplementary submission to provide some additional information that was not canvassed in our principal submission to your study.

The issue we would like to focus on is whether planning decisions can be 'depoliticised' and handed to a group of unelected officials at arm's length from the political process.

1. The nature of the planning system's rules and prohibitions

The modern planning system arose, in part, as a response to protests and civil disobedience campaigns of the 1970s. The planning system attempted to create a more ordered system to take into account the public's opinion of new development proposals. The philosophical underpinning of this approach is the idea of democratic deliberation of land use.[1] This is said to provide for more holistic decision-making practices and enable people to re-assert collective social control over urban development patterns; allowing for the widest consideration of the costs and benefits to society at large.[2] This is said to require a commitment to the notion of "consensus-building" and "citizenship" rather than "competition" and "consumerism" and involves a subordination of private markets to collective democratic control.[3] According to dominant urban planning theories, individuals may only be reconnected with their communities based on "voice" mechanisms that can transform peoples' values through a process of democratic deliberation in which the virtue of different ends is judged according to the articulation of the "best reasons".[4] While the consequences of this approach have been challenged,[5] almost every town planning system in Australia, the United Kingdom and the United States is built on this ideological foundation.

As a result, town planning is not merely a process of aligning urban development to infrastructure capacity. It has morphed into a system of regulatory control ostensibly directed to re-shaping urban communities based on a stated 'vision'. Therefore when we talk about "planning rules" we are rarely referring to regulatory impositions based on strictly objective criteria (as would be the case with engineering or building standards). What we tend to be talking about is rules that are informed by subjective responses to competing arguments about the ideal shape, look and feel of urban communities. This aspect of the planning system has become entrenched.

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[1] J Forester, *Planning in the Face of Power* (1989); P Healey, *Collaborative Planning* (1997).
[2] Ibid.
[3] P Healey, *Collaborative Planning* (1997)
[4] Ibid 216.
[5] M Pennington, "Citizen Participation, the 'Knowledge Problem' and Urban Land Use Planning: An Austrian Perspective on Institutional Choice (2004) 17:2/3 *The Review of Austrian Economics*, 213–231.

For this reason, many of the rules and prohibitions inherent in the planning system are a consequence of:

- public opinion; and/or
- the ideological or philosophical disposition of various decision-makers,

at the time that the rule was made. This has led to a lack of logic and consistency.

You do not need to accept our word for it; consider the recent words of the majority in the NSW Court of Appeal (Justice Basten, with President Allsop agreeing):

> [I]t has also been said with some justification that **a search for logic and consistency within planning instruments is often doomed to fail.** As has been explained by Tobias JA, **to seek "planning logic in planning instruments is generally a barren exercise"**: *Calleja v Botany Bay City Council* [2005] NSWCA 337; 142 LGERA 104 at [25]. Why one use is permissible and another similar use is prohibited will often be a matter of speculation. ... [In the present case it] may be conceded that there is no obvious logic in permitting a general store, but not other forms of shop (bold added).[6]

Leslie A Stein, a barrister and former Chairman of the Western Australian Town Planning and Appeal Tribunal and former Chief Counsel to the Sydney Metropolitan Strategy, reflected on matter in his work: *Principles of Planning Law*, published by Oxford University Press. Stein observed that:

> The object of town planning is the implementation of a plan to carry out goals that encapsulate and describe idealised future states. The goals reflect ideological orientations ... It is tempting for all regulators to speak of a 'sustainability agenda' because it summarises a set of indisputable goals ... the difficultly in the precise formulation of it components is secondary to the sentiments it evokes. ... [I]t is difficult to describe the 'policy' of planning: goals and values, in words of clear expression.
>
> Planners still envisage themselves to be agents of social change but their agenda of economic sustainable development or New Urbanism depend upon effective implementation in legal instruments. Unfortunately, the devices of the regulatory system are primarily designed as a means of control restriction and permissibility. The implementation of planning agendas by restriction does not necessarily encourage and promote; it often prevents and denies.[7]

Such rules and prohibitions lack the rigour of a technical standard. Unsurprisingly they can come under challenge when either:

- public opinion changes;
- the market demand for new development changes (e.g. the emergence of widespread consumer demand for apartment living in the largest capital cities); and/or
- the social and economic costs of a given restriction or prohibition have increased or have become more apparent.

The social and economic costs of rules originally imposed for subjective reasons often involve:

- inefficient use of public infrastructure;
- increased motor vehicle use;
- increased congestion;
- reduced competition in the retail sector;
- reduce competition amongst land owners to sell potential development sites to developers;
- an inadequate supply of housing in places of high demand;
- higher residential, retail and commercial rents; and
- lack of housing affordability.

[6] *Hastings Co-operative Ltd v Port-Macquarie Hastings Council* [2009] NSWCA 400 [39].
[7] L Stein, *Principles of Planning Law* (2008) 87-12.

In essence, planning decisions are subjective and will vary depending on how a decision-maker decides to weight the criteria used. The NSW Land and Environment Court itself recognised this reality when it observed that:

> [T]here is room for opinions to differ in weighing the same objective criteria. [8]

As long as public opinion or ideology is a guiding factor in setting planning rules and assessing projects against those rules, a high level of subjectivity will inherently exist in the system. It also means that rules will continue to be fluid because rules set by reference to public opinion or ideology will not stand robust scrutiny in the long run if/when it becomes apparent that they carry high social and economic costs.

For example, rules prohibiting apartment development, or only allowing low-rise apartment development, within the walking distance of high quality public transport services in Sydney, Melbourne, Brisbane or Perth are generally not tenable in a public policy sense. Ultimately such rules are likely to be set aside, as the costs of not doing so become increasingly apparent.

Similarly, formal and informal "urban growth boundaries" designed to prevent the outward expansion of major cities generally come under extreme pressure (as we have seen in Melbourne). This is because many members of the community are not truly prepared to give up on the idea of owning a detached house with its own backyard. Urban growth boundaries eventually place intolerable price pressure on that form of housing.

It will be development applicants (and their representatives) who highlight the social and economic costs of such arbitrary prohibitions to both government and the community. This has and will continue to contribute to a process where such rules are gradually revised to reflect modern community needs.

For this reason, the fact that planning rules are not stable and are subject to reasoned-argument and regular departure is evidence of the haphazard nature of existing rules and the inability to withstand robust scrutiny when high quality development proposals are put forward. Rigid rules are the enemy of good urban outcomes. To quote the *Principles of Planning Law* again:

> The tendency towards rigid enforcement of rules expressed as development standards is perhaps the most frustrating and destructive aspect of planning. [9]

2. The important role of discretion in the planning system

The exercise of discretion is a process that allows this robust scrutiny to take place and rigid rules to be varied. Every planning system does and should provide mechanisms where the existing rules can be questioned in the content of a particular proposal and varied where a sufficient case has been made out. The mechanisms vary, in each jurisdiction, but typically every Australian planning system allows for very wide direction to be exercised in a rezoning decision, and more limited (but nonetheless generous) discretion to be exercised in development assessment. A final category of decision-making involves the exercise of no or minimal discretion and generally this not available to more complex developments.

High level policy decisions - strategic planning/rezoning

Modern urban planning is notionally based around high level strategic planning for regions and major cities. Such strategic plans are normally non-statutory government or council policy documents. Nonetheless they are used to inform decision-making about zones and development controls in statutory plans.

For example, in NSW both rezoning under Part 3 (of the *Environmental Planning and Assessment Act*) and concept plan approval under Part 3A involve the exercise of a high-level policy function and are both, therefore, highly discretionary. The planning system could not work without the ability to modify environmental planning instruments (via rezoning or concept plan

[8] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]
[9] L Stein, *Principles of Planning Law* (2008) 76-77.

approval) given their highly prescriptive, illogical, inconsistent and frequently obsolescent, nature. Whether a rezoning is achieved under Part 3A or Part 3, the final decision-maker is, and always has been, the state's Minister for Planning.

It is extremely difficult to de-politicise this part of the process, because zoning plans are, in theory, the consequence of qualitative judgement calls made on behalf of the whole community. For example, how dense should high density housing be? What proportion of suburbs should be re-allocated for apartment development? Should supermarkets be permitted in a particular community? Which is more important – a high degree of solar access or park views? The practice of urban planning cannot offer any scientifically correct answers to such questions. Ultimately, the decision taken will reflect the valued laden opinions of *vocal* members of the public and the community leaders who drive the decision-making process.

Attempts to remove politics from this part of this process will generally fail as there is no 'science' for technocrats to apply. However **there is considerable value in reforming this part of the planning system to ensure that statutory rules truly reflect high level policies and do not stray into highly-detailed prescriptive controls.** If such controls are necessary at all, they should be considered for adoption at a development assessment (planning permission) level in the context of a specific project.

Lower level policy decisions - development approval/project approval/planning permission

Since strategic planning and the preparation of statutory rules will often happen in the absence of development proposals, a further level of decision-making comes into play when a specific proposal is advanced. At a distance, one might assume that development approval/planning permission is a purely technical function which simply verifies whether a project is consistent with the applicable zoning and development controls. However, this is not the case.

In *Lloyd v Robinson*[10] it was made clear that a town planning enactment

> ... at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss.[11]

Generally speaking, town planning enactments have not traditionally conferred a 'right' to an approval, even if, on the face-of-it, an approval complies with the applicable development controls.

For example, NSW section 79C(1) of the *Environmental Planning and Assessment Act 1979* requires the bulk of development applications (that is, all development applications processed under Part 4) to be assessed against a long and prescriptive list of considerations.

The provision is set out as follows:

> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
>
> (a) the provisions of:
>
> (i) any environmental planning instrument, and
>
> (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority ..., and
>
> (iii) any development control plan, and
>
> (iiia) any planning agreement ..., and
>
> (iv) the regulations ...,
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

[10] (1962) 107 CLR 142.

[11] *Lloyd v Robinson* (1962) 107 CLR 142, 154. See also *WA Planning Commission v Temwood Holdings Pty Ltd* (2004) 137 LGERA 232 , 251 [50], [51] and 268 [116]; [2004] HCA 63 [50], [51], [116]; *Bentley v Bgp Properties Pty Limited* [2006] NSWLEC 34 [66].

(c) the suitability of the site for the development,

(d) any submissions made ...,

(e) the public interest.

The effect of section 79C is that even when a particular development is expressly identified in a plan as "permitted", there can be no assurance of approval when an evaluation against vaguely expressed factors such as "social and economic impacts", "suitability of the site" and "the public interest" point to refusal. While objective information must form the basis of any decision made pursuant to section 79C, there is room for opinions to differ in weighing the same objective criteria.[12] Compliance with the requirements of the local environmental plan (LEP) and development control plan (DCP) is not any assurance of development approval.[13]

For example, in *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd*[14] the NSW Court of Appeal struck down a consent granted by the Land and Environment Court for a residential development that complied with the *Liverpool Local Environmental Plan*. The basis for the decision was that the proposed development was incompatible with existing development nearby. In that case a statutory requirement to consider:

- the social effect and the economic effect of the development in the locality;
- the relationship of that development to the development on adjoining land or on other land in the locality; and
- the existing and likely future amenity of the neighbourhood,

necessitated that the development be refused, as a matter of law.

Coles JA said that

> the correct legal approach to a consideration of a s 90 ... [a predecessor provision to section 79C] ... [is] that development consent should not be granted unless, having weighed the factors requiring consideration pursuant to s 90, it could be said, on balance, that consent should be granted.[15]

That is, **it is open to a consent authority to refuse development approval, even when the application complies with relevant development controls.**

In the *Principles of Planning Law* Stein observed that:

> The introduction of a system of development control [i.e. development assessment], by its very nature, implies flexibility with respect to the specific dictates of the plan. The fact that the plan is therefore not conclusive in its own right means that the final planning decision is recognised to be a matter of discretion rather than a fixed set of rules for the use of land. When planning legislation creates a system of development control, it accordingly has its intent to shift some of the planning power from the zoning provisions to a discretionary decision. At that point, the role of the development plan or planning scheme changes to one of guidance ... As development control is about present assessment of a proposal against the existing plan it implies that the plan, even though subject to a time-consuming planning process, is only a framework for development and the relationship between what is proposed and what exists must be resolved on a case-by-case basis. [16]

The risk that an apparently conforming development will be refused is inherent in every development application. To quote Stein again:

> ... [A] development application may involve complex planning questions that are not easily understood. As an example, a development application for a new house that blocks a neighbour's view requires a subtle analysis of the degree of interference, the consistency of the new house with others that have had the same effect, and the consequence of this decision on other possible applications. The absence of a policy framework or predefined standards means there is no anchor

[12] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]
[13] *Mobil Oil Australia Pty Ltd v Baulkham Hills Shire Council (No 2)* [1971] 2 NSWLR 314, 319; *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195, 209-210; *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] NSWLEC 399 [117]-[119].
[14] (1996) 90 LGERA 68
[15] *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd* (1996) 90 LGERA 68, 77.
[16] L Stein, *Principles of Planning Law* (2008) 127 -129 .

> for the reasoning that must follow. The resolution of the issue may then involve the views of planning officers informed by their own predilections, lobbying by neighbours or the applicant, an attempt by the applicant to redefined the application in light of objections, and other political influences all of which are obstacles to speedy resolution of the application.[17]

It's worth noting that even when development is likely to be approved, there is a risk that conditions may be imposed that will frustrate the ability of the proponent to actually carry out the development.[18] An applicant must not only seek an approval, they must ensure that no unacceptable conditions are imposed.

However, there is some (but not enough) balance to this process. While a consent authority may have wide discretion to refuse consent to a project that ostensibly complies with specific development controls, it is also possible that approval may be granted despite (some) inconsistent controls.

In NSW, development approval issued under Part 4 of the *Environmental Planning and Assessment Act* and project approvals under Part 3A are capable of overriding development standards laid down under environmental planning instruments.[19] This is necessary, given the highly prescriptive (and frequently irrelevant, outdated and poorly justified) nature of controls that were prepared in the absence of any specific development proposal. This discretion has been part of the Part 4 process since the *Environmental Planning and Assessment Act 1979* came into effect, and the system could not function without it.

In relation to local environmental plans, Part 4 allows standards to be varied in development assessment when the application of the standard would be "unreasonable or unnecessary in the circumstances of the case".[20] This can occur when:

- the objectives of the development standard are achieved even though a proposal does not comply with the standard; or
- it is established that the underlying objective or purpose is not relevant to the development proposal; or
- it is established that the underlying objective or purpose would be thwarted if compliance was required; or
- if it is shown that the development standard has been virtually abandoned by the Council's own actions in granting consents departing from the standard; or
- if it is established that the zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land.[21]

The Land and Environment Court laid down a planning principle detailing the circumstances where a consent authority may give little weight to a council's development control plan (a subsidiary document to a local environmental plan).[22] For example, a consent authority may give little weight to a development control plan if:

- the plan was adopted with little or no consultation;
- the plan has been selectively applied by council; or
- the plan would lead to an inappropriate planning solution, especially an outcome which conflicts with State, regional or local policies.

The wide latitude given to a consent authority to either refuse planning permission (despite compliance with specific controls) or grant planning permission (notwithstanding inconsistent controls) suggests that even the approval of individual projects carries with it a degree of policy

[17] Ibid 132 -133 .
[18] *Finlay v Brisbane City Council* (1978) 36 LGRA 352.
[19] See section 75R(3) in relation to Part 3A; see the *State Environmental Planning Policy No 1—Development Standards* in relation to part 4.
[20] *State Environmental Planning Policy No 1—Development Standards* cl 6.
[21] *Wehbe v Pittwater Council* [2007] 156 LGERA 446, 456-458.
[22] *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 [87] (McClellan CJ).

responsibility, albeit more confined that the high level policy making that occurs when strategic and plans are finalised.

No policy decisions - code assessable development/non-discretionary development standards

In Queensland the *Sustainable Planning Act 2009* refers to "code assessable" development.

The Act provides for the preparation and adoption of development "codes" that articulate the development standards that apply to land. Development proposals can be assessed for compliance against these codes. These development proposals are considered to be "code assessable applications" and the consent authority must determine a development application with regard to the applicable codes. If the development complies when assessed against the code, the authority is obliged to approve the application, whether or not conditions are required to achieve compliance. The development application can only be refused if the proposal does not comply with the code and conditions cannot overcome this deficiency. Code assessable development does not require public notification.

If the applicant wishes to seek approval for development that is outside of the development standards in the development codes, an alternative assessment pathway remains available. The applicant is able to demonstrate the merit of the proposal and argue that there is a case to approve the development application. This form of development is known as "impact-assessable development".

Western Australia has also adopted a similar approach to residential development. Development codes have been adopted for most forms of residential development and a local government should not refuse an application that meets the requirements of the code.[23] The residential codes have been the basis of the residential development assessment process of Western Australia since 1991. Their use is strongly supported by the community as the "codes ensure that buyers, builders and neighbours know what they are getting".[24]

In NSW the *Environmental Planning and Assessment Act 1979* provides for something similar to code assessable development, although the concept is described as "non-discretionary development standards".[25] 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.[26]

While the Act does not expressly prevent 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.[27]

An environmental planning instrument also may allow flexibility in the application of a non-discretionary development standard, in the same way that the Queensland system allows for non-complying "impact-assessable" development.[28]

Unlike Queensland and Western Australian NSW planning authorities have only rarely applied non-discretionary development standards.[29]

NSW does have a system of "complying development" which allows small scale renovations and single house construction to be approved by private sector certifiers if they comply with

[23] Western Australian Planning Commission 2002 Planning Bulletin # 55
[24] Western Australia Planning Commission, <http://www.planning.wa.gov.au/WAPC+statements/769.aspx> at 30 June 2009.
[25] s 79C(2)-(3).
[26] s 79C(2).
[27] For example, see: clause 30A of the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development*; clause 29 of the *State Environmental Planning Policy (Affordable Rental Housing) 2009*; and Part 7 of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*.
[28] s 79C(3).
[29] This exists in a limited form for some rent controlled housing and seniors living developments.

black-and-white non-discretionary standards. This system has no application to large-scale subdivision or higher density home development.

This last category of decision-making is merely technocratic and does not involve the exercise of any policy functions. However, it comes with the limitation that rigid or illogical rules must be applied. Therefore such **a low-discretion process is only appropriate if the applicant has the ability to op-put and pursue a higher discretion development application.**

3. <u>Political opposition often leads to development being blocked or scaled back</u>

At present a vast number of development proposals are defeated, not because of any objective problems with the proposal, but because of the opposition of existing residents who have a philosophical or vested interest in blocking new development. We aren't alone in making this observation. It is a political phenomenon that has been observed all over the world and is well documented in academic literature.

Development approval is a "closed system" decision-making process.[30] Such a system is characterised by a defined set of stakeholders that can directly influence the outcome of a decision.[31] Development systems become closed primarily through two factors – the basic preferences of local voting population, who tend to be averse to change, and the planning laws, which tend to magnify the preference of those resident voters.[32] Incumbent business operators, who play an important role for local government at election time, have strong vested interest in mobilising campaigns against new developments that may place them under competitive pressure.[33]

This closed system approach tends to exclude consideration of the interests of future residents, neighbouring local government areas and non-resident third parties.[34] This approach becomes particularly problematic when communities are faced with accommodating innovative development proposals.[35]

By their nature, innovative proposals break from traditional existing patterns of development.[36] Yet, planning procedures give the most weight to participants with an inherent interest in preserving existing development patterns, and the least to the future residents or the beneficiaries of community changes.[37] Growth management and consistency requirements create a presumption against change.[38]

Stein observed that:

> In the 'development control process', when an application is made for the commencement of a use and the physical development of land, the goals and assumptions that were integral to the initial [strategic] planning process and that are expressed in the policies are not usually reviewed at this time. This is because the emphasis in development control shifts, to a significant extent, from pure planning considerations to what is politically acceptable, and often an overwhelming criterion for that acceptability is whether what is proposed is congruent with existing development in that locality; the 'community interest' always appears to be served when the new development fits into the locality. [39]

The reality of government decision-making is that public policy considerations favouring an approval are often balanced against political issues favouring refusal. Often this is not apparent on the face of a decision, but there are, nonetheless, many clear examples of this on the public record.

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[30] S Staley, "Markets, smart growth and the limits to policy", *Smarter Growth* (2001) 201-217.
[31] Ibid.
[32] S Staley and EW Claeys, "Is the future of development regulation based in the past? Toward a market-oriented, innovation friendly framework", *Journal of Urban Planning and Development* (December 2005), 202-213, 203.
[33]A Fels, S Beare and S Szakiel, *Choice Free Zone* (2008) 38.
[34] S Staley and EW Claeys, "Is the future of development regulation based in the past? Toward a market-oriented, innovation friendly framework", *Journal of Urban Planning and Development* (December 2005), 202-213, 203.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ibid,
[39] Ibid 11.

Example 1: Sand quarry at Somersby

For example, in August 2009 the NSW government refused approval to a sand quarry at Somersby involving the extraction, processing and transportation by road of up to 450,000 tonnes of sand a year for a period of 15 years and progressive rehabilitation of the site. The quarry would have supplied construction sand for the Central Coast and the broader Sydney region.

The state government had convened an independent hearing and assessment panel which found that the project could proceed, subject to conditions. However the project was opposed by local MPs, and the Director-General recommended refusal based on "public concern" and "anxiety".[40]

Example 2: Melbourne's Windsor Hotel

In February this year the office of the Victorian Minister of Planning accidently leaked a communications strategy prepared by a ministerial media advisor to a journalist.[41] The document discussed stopping the redevelopment of Melbourne's Windsor Hotel, even though it was expected to receive a favourable report from an independent expert panel commission by the government. The basis for the planned blocking of the development would have been the community's views.

Example 3: Sydney City Council

For every two residents of the City of Sydney, five people work in the City. That's 429,000 workers compared to 166,000 residents. On top of this many thousands more visit the City every day and feel a deep and passionate commitment to it. In short, more than any other local government area, the public realm of the City of Sydney belongs to many more people than just its existing residents. Yet the Lord Mayor, Ms Clover Moore, has made her priorities as chair of the Central Sydney Planning Committee clear:

> I speak up for residents. I prepare submissions and advocate for residents affected by developments and construction. My Independent Team of Councillors at the City determines development and shares my commitment.[42]

The chairperson of a committee (charged with deciding development applications of $50 million or more) sees her role as being about the interest of existing residents. The chairperson defines that role in terms of the impact of developments and construction; rather than, say, affordable rents, housing choice, effective utilisation of the state's sunk investment in public transport, reducing congestion across the Sydney metropolitan area, etc.

Example 4: The views of residents are embedded in the planning system

The NSW Land and Environment Court, in *New Century Developments Pty Ltd v Baulkham Hills Shire Council*[43] made the following relevant comments on assessing the impact of development:

> Indeed... it is not difficult to envisage a development which causes such great offence to a large portion of the community that for that reason it ought not to be permitted on town planning grounds ... Such antagonism would amount to a detrimental social impact ... . [T]here is room for opinions to differ in weighing the same objective criteria. [44]
>
> [A] court would prefer views from residents which are based upon specific, concrete, likely effects of the proposed development. [45]

This decision has been cited and applied many times since by decision-makers in the planning system, including subsequent decisions in the NSW Land and Environment Court. Public opinion is accepted by the planning system as a legitimate input in the planning process. By saying that

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[40] < http://majorprojects.planning.nsw.gov.au/files/38831/Assessment%20Report.pdf> at 16 July 2010.
[41] < http://www.abc.net.au/news/stories/2010/02/26/2830806.htm?site=melbourne&section=news> at 16 July 2010.
[42] <http://www.clovermoore.com/main/?id=9> at 7 July 2010.
[43] [2003] NSWLEC 154 (Lloyd J).
[44] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]
[45] Ibid [63]

public opinion is an acceptable input, the courts are also accepting that planning is a political process.

4. Can politics be eliminated from planning decisions?

Whether or not politics can or should be eliminated from planning decisions depends on the nature of the planning decision and the level at which it is being made.

Local councils

The governance of Australia's top five cities, accounting for 57 per cent of our population, are dominated by a plethora of small borough councils. Each represents only a fraction of the relevant metropolitan area. Sydney has 43 separate councils, Melbourne 31, Brisbane 5, Perth 30 and Adelaide 19.[46]

The costs of a large development proposal are usually borne within a small local government area (e.g. increased traffic, some view loss, changed skyline, need for infrastructure investment by council, etc). However, the benefits are normally diffused across the metropolitan region (e.g. a better supply of affordable housing, increased ability to walk to and use public transport, less cars on the road overall, etc). In political terms, this creates strong incentives for small local councils to refuse development, because their electoral constituencies bear the costs, while the benefits are largely enjoyed by voters outside a council area.

Research has established that implementation of regional land use policies, such as increasing land use mix and residential density along a transport corridor is nearly impossible unless there is a significant shift in land use planning authority from local government to a higher level organisation.[47] This takes place, in part, to overcome the not-in-my-backyard view that inevitably emerges at a local level.

As a result, it is highly desirable that the involvement of local councils in the planning process be carefully circumscribed. In particular, mechanisms which reduce or remove local council politicians from development assessment processes are highly desirable. **Panels dominated by independent experts**, such as NSW's joint regional planning panels, **have the potential to ensure that development assessment decision-making is more in-line with regional planning objectives.**

Local politicians should continue to have a role in the strategic planning process for their area as such processes are high level policy functions which ostensibly are about realising a urban settlement pattern that is supported by the community. Nonetheless, local politicians cannot be given final say when there is likely to be adverse regional consequences from any decision they may make. In such circumstances, (in the absence of a true regional level of government) state government will need to have a pre-eminent role.

State government

It is often said that that government ministers should surrender their role entirely to planning commissions or other unelected government officials. For many larger projects, public policy imperatives may require a state government minister to be involved in the process.

When NSW's *Environmental Planning and Assessment Act* was introduced into the Parliament in 1979, the responsible minister, in his second reading speech, quoted Sir Henry Bland. Sir Henry has had delivered the second report of the board of inquiry into the Victorian public service into the organisational and administrative arrangements relating to conservation, environmental and land use planning. Sir Henry had stated:

> It is axiomatic that the closer the activities of Government touch the citizen and the more active individual broadly based and sectoral community groups are, the less it is practicable to delegate responsibilities to statutory agencies with a high degree of autonomous independence and the

[46] Commonwealth of Australia, *State of Australian Cities 2010* (2010) 124.
[47] Downs, A. 2005, Smart Growth: Why we discuss it more than we do it. *Journal of the American Planning Association. Vol. 71, No. 4, pp. 367-378.*

> greater is the need for political value judgments about the course to be followed and for political involvement in the decision-making process.
>
> This has the more force in a situation where community attitudes are in a state of flux, and political leadership is called upon to interpret new forces and to point the way to courses which they will have community acceptance. ...
>
> The principle of Ministerial responsibility for policy normally calls for no exposition. In this current case, the principle must be underlined. In the conservation, environmental and land use planning area there are no absolutes. There are divergent views as to what conservation and what protection of the environment comprehend. There are arguments galore as to how far land use planning can go. In the community, there is an infinite variety of responses as to the meaning and import of quality of life and as to the adjustments to and qualifications of the life styles individuals have been accustomed to or have aspired to that may be contemplated, let alone be acceptable. Maybe from this amorphous uncertainty and controversy, clarity on all issues will finally crystallize. Much progress has already been made in refining some areas of controversy, though the incompatibility of the objects that some espouse seems far from resolution. So, it must rest with Ministers and the executive to essay an interpretation of the community's purpose and to determine the policy to be followed. And that includes deciding the objectives to be achieved by the relevant administering agencies.[48]

At times, some people will argue that the planning system can be managed as an entirely de-politicised process as long as the planning controls are clear. This is true when strict compliance with clear rules requires approval, and there is no discretion to refuse approval based on unspecified merits. However, planning rules are often illogical, inconsistent or obsolete, and the exercise of discretion is frequently required. So, when discretion must be exercised in relation to major projects there is a prospect that unelected officials on planning commissions or tribunals will be uncertain as to how to respond to strong not-in-my-backyard campaigns by exercising their discretion to refuse a development. Such officials are not experienced in reading public opinion and may feel that they lack the mandate to vary planning rules. In such circumstances they may refuse a development which strongly serves the interests of the silent majority.

Where there are planning rules that limit the discretion of decision-makers to refuse development, and in particular limit the ability of decision-makers to make rules or refuse development by reference to public opinion, the need for political involvement is reduced. For example, there is no need for political involvement for code-assessment development in Queensland and complying development in NSW, but there is for rezoning decisions.

However, **there will always be a need to allow for departures from pre-determined planning controls to embrace innovative development, overcome obsolete rules or respond to unanticipated community needs. Any system must cater to this, and at times, decisions to vary rules will need to be made by state politicians as representatives of the community.**

Thank you for the opportunity to make these comments. We would welcome an opportunity to discuss these issues further.

Yours sincerely
Urban Taskforce Australia

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[48] NSW, *Parliamentary Debates*, Legislative Council, 21 November 1979, 3347-8 (Paul Landa).