Urban Taskforce
AUSTRALIA

Fixing town planning laws

Identifying the problems and proposing solutions

Submission by the Urban Taskforce to the Productivity Commission in response to its issues paper: *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*

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The Urban Taskforce is a non-profit organisation representing Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with both government and the community.

Executive Summary

This submission sets out the views of the Urban Taskforce Australia, to assist the Productivity Commission with its inquiry into planning, zoning and development assessments.

While the Urban Taskforce Australia is a national organisation, this particular submission focuses specifically on NSW. We have chosen to do so because it is the near universal view in our industry that the planning system in NSW is the worst in Australia. It's worth briefly providing some information to illustrate this.

Until 2007, NSW was the nation's number one state for building activity – this shouldn't have been surprising given that it's Australia's largest state. However, in 2007, Victoria stole NSW's title.[1] Victoria has never looked back. In the last financial year, for every dollar spent by builders in NSW, $1.20 was spent in Victoria.[2] While NSW accounts for 33 per cent of the population, it makes up just 24 per cent of Australia's building activity.[3]

The lack of building activity carries high social costs. In the last financial year, work started on 52,000 new Victorian private sector homes, while in NSW work only started on 26,000 homes.[4] The housing undersupply is the main reason why rents in the inner suburbs of Sydney have been increasing at nine times the rate of inflation.[5] Rents for three bedroom homes in outer suburban Sydney have increased by 30 per cent in the last three years.[6] In fact, rents for three bedroom homes across NSW have been increasing by an average of 9 per cent a year over the last three years.[7]

The disparity in housing production is not a recent phenomenon. NSW is out of step with other states too. In fact, NSW produces less new housing per head of population than any other state or territory in Australia. In the last four calendar years, NSW has had the lowest levels of dwelling commencements in Australian Bureau of Statistics record-keeping history, each year setting a new record low.

The period of decline in NSW directly correlates with major changes in the state's planning system:

- the extension of the complex and highly discretionary "development application" process to cover approvals that were previously dealt with as simpler technical "building applications" (following the abolition of building applications in 1998);
- the rate of genuine land release slowed to a virtual trickle under the weight of Premier Bob Carr's declaration that "Sydney-is-full";
- a state infrastructure charge was introduced and local development levies were massively increased – with frequent and ambiguous amendments to the levies policy taking place on many occasions since;

[1] Australian Bureau of Statistics, *8755.0 - Construction Work Done, Australia, Preliminary, Jun 2010.*
[2] Ibid.
[3] Ibid.
[4] Australian Bureau of Statistics, *8750.0 - Dwelling Unit Commencements, Australia, Preliminary, Jun 2010.*
[5] Housing NSW, *Rent and Sales Report Issue 92.*
[6] Housing NSW, *Rent and Sales Report Issue 92* and *Rent and Sales Report Issue 80.*
[7] Ibid.

- the *Integrating Land Use and Transport - A Planning Policy Package* was introduced in 2001[8] - heavily restricting opportunities for new retail development, entertainment facilities development, business services premises and office premises;
- the NSW Court of Appeal re-interpreted the planning law, declaring that local council development control plans must be the "focal point" for decision-making in 2001;[9]
- the introduction of *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development* in 2002 introduced new amenity based requirements to apartment development, unique to NSW, in addition to the requirements of the Building Code of Australia;
- in 2003 the NSW Court of Appeal declared that environmental planning instruments are not the only documents that can be used to block new development, and that a consent authority is able to refuse permissible development by referring to a wide range of material outside the formal planning processes on "public interest" grounds;[10]
- the long-standing ability to re-develop sites under existing use rights, without a rezoning, was substantially removed by regulation changes in 2006;[11]
- the state legislated to allow the property interests of private businesses to be effectively reserved for a public purpose without compensation in 2006;[12]
- a Metropolitan Strategy was prepared and finalised (in 2006), but not implemented in any meaningful way, leaving a policy vacuum;[13]
- the "standard instrument" (which set out a template for local environmental plans) was re-written to reduce opportunities for urban development in 2007;
- legislation was passed in 2009 allowing private property to be compulsorily acquired for the purposes of re-sale, without requiring the original owner to be compensated for any development uplift;[14] and
- more than 40 new listings were made to the list of critically endangered species and ecological communities, more than 110 new listings were made to the list of endangered species, populations and ecological communities and more than 170 new listings were made to the list of vulnerable species and ecological communities.[15]

More than any other part of NSW, the problems of the planning system have had their greatest impact on Sydney. No Australian capital city approves less new homes per head of population than Sydney. In the last financial year, just 43 new homes were approved for each group of 10,000 residents in Sydney, compared with 106 homes in Perth, 103 homes in Melbourne and 77 homes in Brisbane.

Given the major differences between state planning systems, and the difficulty of dealing with each planning system in any depth in a single document, we have elected to focus on the NSW planning system, whilst making some comparisons to interstate and international practice. We believe that elements of the NSW planning system exist in other states, but no other states are unfortunate enough to possess all of the problems embedded into the NSW planning environment.

Some of themes identified in this submission can be summarised as set out below.

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[8] Which incorporated *Right Place for Business and Services* and *Improving Transport Choice* and *was enforced Local Planning Direction 3.4*.
[9] *Zhang v Canterbury City Council* (2001) 115 LGERA 373.
[10] *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 [81].
[11] *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006* and the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007*.
[12] *Environmental Planning and Assessment (Reserved Land Acquisition) Amendment Act.*
[13] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 23.
[14] *Land Acquisition (Just Terms Compensation) Amendment Act 2009*.
[15] Amendments to schedules 1,1A and 2 of the *Threatened Species Conservation Act 1995*. The Act forms part of the planning system by reason of numerous provisions in the *Environmental Planning and Assessment Act 1979*, including ss 5A; 5B; 5C; 5D; 79B;79C; 96; 110C, 111 and 112. These figures are an understatement because they do not include species listed in schedules 4, 4A and 5 of the *Fisheries Management Act 1994*.

High regulatory risk and lack of respect for property rights

Not only has the *Environmental Planning and Assessment Act 1979* constantly been subject to revision, hundreds of environmental planning policies, development controls plans, strategic policies, development assessment policies, contributions plans and levy determinations can profoundly affect development and are amended on an almost daily basis.

Several years will usually pass from the point of acquiring an interest in a potential development site to the final sale of the developed product to the customer. The fluid and ever widening legislative environment has deprived the development industry of any protection from more onerous obligations once they have irrevocably committed to a development site. In fact diligent developers must now factor in an unusually high risk premium for developing NSW because of this uncertainty.

Aside from the risks of the law being changed, the application of the law as it stands is a highly subjective and politicised process that can be extremely unpredictable. A decision-maker who wants to refuse development consent is literally blessed with an unending array of rules, policies, strategies and ordinances which can be relied upon to justify a "no". A decision-maker who is minded to approve a development must navigate a complex and internecine maze of conflicting, overlapping, vague and rambling documents. It is not surprising that the Act is the most heavily litigated piece of legislation in NSW.

The commonly understood concepts of property no longer clearly apply in NSW, such as:

- the right to own land without uncompensated expropriation by government;
- the right to develop land in accordance with its existing uses;
- the right to develop land in accordance with its zoning; and
- the right to be free from arbitrary, unreviewable, (and even retrospective) levies.

The solution is to:

- introduce new statutory objectives for the planning system, based around the principles of:
  - supporting the state's economy;
  - promoting ecologically sustainable development;
  - promoting liveable communities;
  - managing impacts on public infrastructure; and
  - promoting private investment by respecting property rights;
- impose new rules to limit bureaucratic and political games by ensuring that development that meets standards is entitled to approval;
- force consent authorities to deal with matters promptly, within a deemed-to-comply timetable;
- reduce uncertainty by clearly defining the matters that can be considered in the development assessment process; and
- ensure that a private property owner is properly compensated for expropriation of land use rights by the government.

High development levies

Nineteen local councils have been given NSW Government approval to exceed a $20,000 "cap" on local council charges and are levying as much as $80,000 a home.

Seven councils are still imposing a levy of $50,000 or more on new homes. Yass Valley Council has the state's highest levy with an impost of $80,000 per home. Sydney's highest-taxing council is Pittwater, where the charge is now $62,000 a home.

Camden Council charges $59,000 a home while Ku-ring-gai and The Hills both charge $54,000 a home. Hawkesbury Council levies new homes at a rate of $51,000 each while Shoalhaven Council charges $50,000. Twelve other councils are charging well above the state government's $20,000 cap, including Blacktown ($44,000), Campbelltown ($41,000), Leichhardt ($40,000), Wyong ($35,000), Liverpool ($31,000) and the City of Sydney ($27,000). The NSW government's so-called cap of $30,000 is ineffective, with exemptions in place for a wide range of current and future levies.

The most recent cross-jurisdictional data on the relative size of development levies is provided by a 2009 study by the AEC Group.[16] The AEC report pinpoints the average Queensland local council development levy at $22,300 per home. It reports that the low-end of the range is $10,000 a home and the high end of the range is $40,400 a home. It's evident that the key growth councils in NSW are, in many cases, levying well above even the high end of the Queensland counterparts.

A study by the consultancy firm Integran examined Victorian greenfield areas and concluded that, for a residential lot yield of 15 dwellings per hectare, infrastructure contributions per lot excluding state infrastructure contributions could equate to approximately $14,500 per dwelling.[17] Victorian levies are a mere fraction of the equivalent NSW charges.

In the Western Sydney growth centres, new homes are burdened by a state government levy of $11,000 each, which is set to rise to $17,000 each by June 2011. The levy is the same, irrespective of the value of the property.

By way of comparison, there has been considerable controversy in Victoria about the introduction of the new growth areas infrastructure contribution on Melbourne's fringe. This levy amounts to around $6,000-$7,000 a home lot, close to one third of the anticipated June 2011 Western Sydney levy.

The solution is to:

- reduce and reform the highest local council development levies in Australia; and
- redesign state infrastructure contribution levies so that economic distortions are reduced and there is greater transparency.

An undersupply of development sites

In any given region - even without zoning restrictions - there are likely to be few suitable sites ripe for large scale residential, retail or commercial development. This in itself will give property owners significant market power when negotiating with developers. However, when strategic policies and zoning controls sterilise the majority of the few viable sites, the very small number of property owners remaining are in possession of greatly increased market power.

Hence zoning and strategic policy restrictions reduce competition amongst property owners, and therefore increase the price of land available for large development projects. The higher the price, the greater the likelihood that developers will either be forced to pay more than they should for a site or that the transaction will simply not proceed because the project would not be viable.

In any event, NSW's major planning strategies have largely remained unimplemented, including:

- the plans for Sydney's North West and South West Growth Centres where only a handful of the promised 181,000 new dwellings are underway;
- the Metropolitan Strategy's promise of 460,000 extra homes within the existing footprint of Sydney – actual home construction will fall short of 2013 targets by at least 27 per cent;

[16] AEC Group, *Benchmarking of Infrastructure Charges Queensland High Growth Councils and Selected Interstate Examples: Amended Final Report: November, 2009* (2009).
[17] Integran, *Infrastructure Charges Comparison Report: Report prepared for Gold Coast City Council* (2009).

- a Metropolitan Strategy goal of 7,500 hectares of new employment land – with only 2,300 hectares of industrial land rezoned in the outer region and only a fraction of the 11,000 hectare Western Sydney Employment Lands Investigation Area rezoned;
- the Lower Hunter Strategy – where major project approvals have been struck down on technicalities.

One reason that NSW has missed out on so much development in recent years is that the ultimate purchaser of developed land is often not able to afford to cover the cost of zoning-induced land price inflation. The evidence also suggests that the more marginalised groups in society are more heavily hit by zoning restrictions.

The solution is to:

- reform the template being used in the preparation of new local environmental plans - so it genuinely promotes good urban outcomes and reduces over-regulation; and
- progress the rezoning of land for development as promised in numerous strategies and give proponents Queensland-style appeal rights when rezoning proposals are unreasonably refused or delayed.

A lack of support for state and regionally significant projects

Most local councils lack expertise in assessing complex state and regionally significant development projects and generally take too long to approve large development applications. The net result drives investment away from NSW.

The current legal benchmark to decide development applications is between 40 and 60 days, however, the NSW Government's figures for 2008-2009 show that an application for a project of more than $5 million in value is stuck in council bureaucracy for an average of 230 days. This compares with an average of 74 days for all development applications.

Projects valued at more than $20 million now take an average of 324 days to process, up from 286 days in the previous year. Development applications worth $30 million or more now take an average of 370 days to be dealt with - up from a previous figure of 300 days. The projects that will inject more than $50 million in the economy now take 384 days to process, up from 315 days in the previous year.

While there are many competent and hardworking officers in local government planning departments, most council planners do not often have the opportunity to assess projects in the $50 million to $100 million range. The lack of familiarity with projects of this scale, and the inevitable involvement of state government agencies as concurrence/referral authorities, makes the assessment process convoluted and time consuming.

The solution is to improve the handling of state and regionally significant projects by improving the expertise of those assessing the applications.

The reinforcement of landlord oligopolies

The planning system restricts competition amongst the owners of commercial and retail land for tenants. It does this by expressly requiring new development proposals for commercial offices, retail facilities and entertainment facilities to demonstrate that they will not impact on the market share of incumbent players. The net result of these policies is that the rents for some business tenants are much higher than they need to be. The major beneficiaries of such policies are the property owners in the favoured centres.

The solution is to remove the ability of bureaucrats and politicians to second guess the market and/or take into account the loss of trade that might be suffered by existing businesses as a result of new development.

1. Introduction

Following agreement at recent meetings of the Council of Australian Governments (COAG) and the COAG Business Regulation and Competition Working Group, the Commonwealth Government has asked the Productivity Commission to undertake a study into Australia's land planning, zoning and development assessment systems.

In May this year the Productivity Commission released this issues paper *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* to assist individuals and organisations to participate in the study.

1.1 This submission focuses on NSW

This submission sets out the views of the Urban Taskforce Australia, to assist the Productivity Commission with its work. We have had regard to the specific questions raised by the Commission in the issues paper, but also have addressed other matters that we have considered relevant.

While the Urban Taskforce Australia is a national organisation, this particular submission focuses specifically on NSW. We have chosen to do so because it is the near universal view in our industry that the planning system in NSW is the worst in Australia. It's worth briefly providing some information to illustrate this.

Until 2007, NSW was the nation's number one state for building activity – this shouldn't have been surprising given that it's Australia's largest state. However, in 2007, Victoria stole NSW's title. [18] Victoria has never looked back – in the last financial year, for every dollar spent by builders in NSW, $1.20 was spent in Victoria.[19] While NSW accounts for 33 per cent of the population, it makes up just 24 per cent of Australia's building activity.[20]

The lack of building activity carries high social costs. In the last financial year, work started on 52,000 new Victorian private sector homes, while in NSW work only started on 26,000 homes.[21] The housing undersupply is the main reason why rents in the inner suburbs of Sydney have been increasing at nine times the rate of inflation.[22] Rents for three bedroom homes in outer suburban Sydney have increased by 30 per cent in the last three years.[23] In fact, rents for three bedroom homes across NSW have been increasing by an average of 9 per cent a year over the last three years.[24]

The disparity in housing production is not a recent phenomenon. Nor is NSW only out of step with Victoria. NSW produces less new housing per head of population than any other state or territory in Australia. In the last four calendar years, NSW has had the lowest levels of dwelling commencements in Australian Bureau of Statistics record-keeping history, each year setting a new record low. It's likely that 2010 will break that trend, but only by the strength of a massive 5,000 dwelling public housing expansion program which has only been made possible by an almost complete exemption of public housing from the NSW planning system and development levies. (When assessing the impacts of the planning system on housing construction it would be mistaken to look at all dwelling production, given that public housing over the last 18 months has been entirely produced outside the normal planning rules that would apply to any entirely private sector project).

[18] Australian Bureau of Statistics, *8755.0 - Construction Work Done, Australia, Preliminary, Jun 2010.*
[19] Ibid.
[20] Ibid.
[21] Australian Bureau of Statistics, *8750.0 - Dwelling Unit Commencements, Australia, Preliminary, Jun 2010.*
[22] Housing NSW, *Rent and Sales Report Issue 92.*
[23] Housing NSW, *Rent and Sales Report Issue 92* and *Rent and Sales Report Issue 80.*
[24] Ibid.

Figure 1: Private sector dwellings commenced during the 12 months to June each year – Australia (ABS)

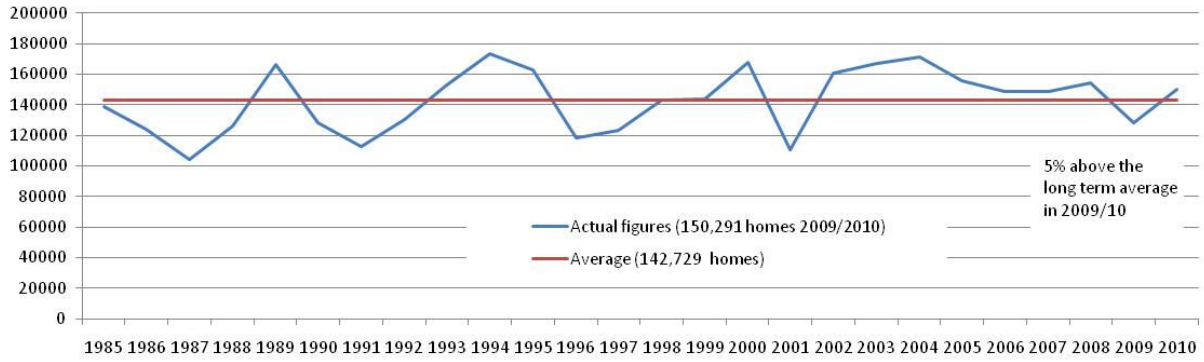


Figure 2: Private sector dwellings commenced during the 12 months to June each year – NSW (ABS)

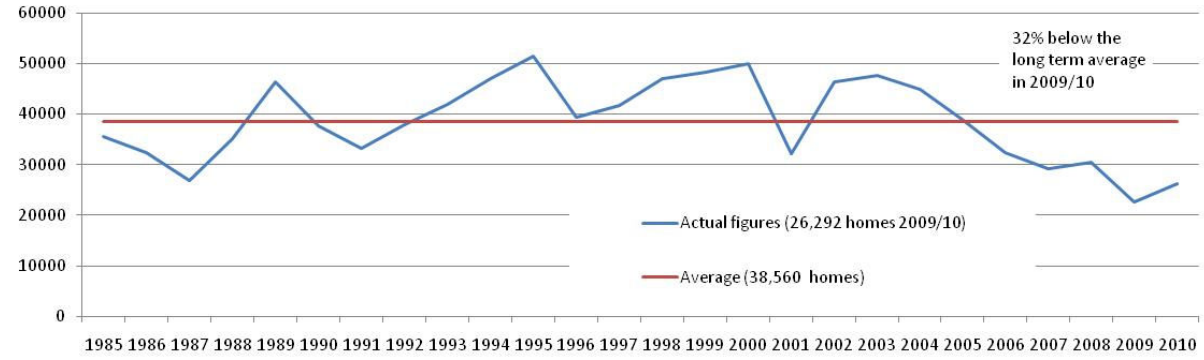


Figure 3: Private sector dwellings commenced during the 12 months to June each year – Victoria (ABS)

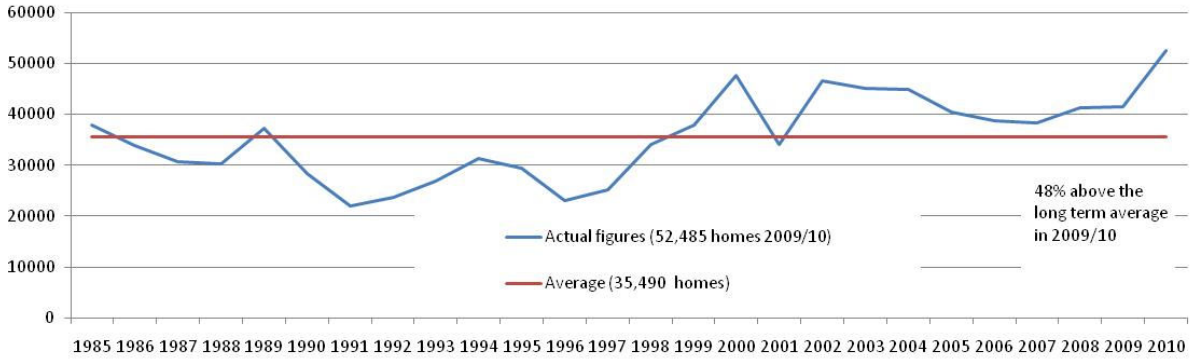
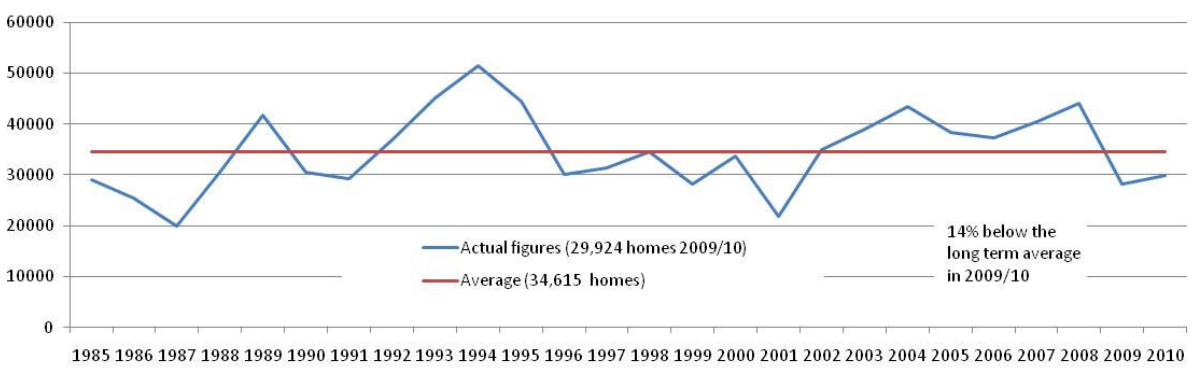


Figure 4: Private sector dwellings commenced during the 12 months to June each year – Qld (ABS)



Figures 1-4 benchmark private sector housing production over the full available ABS data set from the financial years ending 30 June 1985 through to 30 June 2010. The above figures show that private sector housing production in NSW has been in decline since 2002/2003, but has unquestionably been in severe difficulty since 2004/2005. This decline was not mirrored either in Victoria or Queensland. It shows that the absolute level of private sector housing construction starts (ignoring the different population bases) in both Queensland and Victoria exceeded that of NSW.

The period of decline in NSW directly correlates with major changes in the state's planning system:

- the extension of the complex and highly discretionary "development application" process to cover approvals that were formally dealt with as simpler technical "building applications" (following the abolition of building applications in 1998);
- the rate of genuine land release slowed to a virtual trickle under the weight of Premier Bob Carr's declaration that "Sydney-is-full";
- a state infrastructure charge was introduced and local development levies were massively increased – with frequent and ambiguous amendments to the levies policy occurring and on many occasions since;
- the *Integrating Land Use and Transport - A Planning Policy Package* was introduced in 2001[25] - heavily restricting opportunities for new retail development, entertainment facilities development, business services premises and office premises;
- the NSW Court of Appeal re-interpreted the planning law, declaring that local council development control plans must be the "focal point" for decision-making in 2001;[26]
- the introduction of *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development* in 2002 introduced new amenity based requirements to apartment development, unique to NSW, in addition to the requirements of the Building Code of Australia;
- in 2003 the NSW Court of Appeal declared that environmental planning instruments are not the only documents that can be used to block new development, and that a consent authority is able to refuse otherwise permitted development by referring to a wide range of material outside the formal planning processes on "public interest" grounds;[27]
- the long-standing ability to re-develop sites under existing use rights, without a rezoning, was substantially removed by regulation changes in 2006;[28]
- the state legislated to allow the property interests of private businesses to be effectively reserved for a public purpose without compensation in 2006;[29]
- a Metropolitan Strategy was prepared and finalised (in 2006), but not implemented in any meaningful way, leaving a policy vacuum;[30]
- the "standard instrument" (which set out the policy approach for local environmental plans) was re-written to reduce opportunities for urban development in 2007;
- legislation was introduced allowing private property to be compulsorily acquired for the purposes of re-sale, without requiring the original owner to be compensated for any development uplift;[31]
- more than 110 new listings were made to the list of endangered species, populations and ecological communities; more than 40 Schedule new listings were made to the list of critically endangered species and ecological communities; and more than 170 new listings were made to the list of vulnerable species and ecological communities.[32]

[25] Which incorporated *Right Place for Business and Services* and *Improving Transport Choice* and *was enforced Local Planning Direction 3.4*.
[26] *Zhang v Canterbury City Council* (2001) 115 LGERA 373.
[27] *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 [81].
[28] *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006* and the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007*.
[29] *Environmental Planning and Assessment (Reserved Land Acquisition) Amendment Act.*
[30] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 23.
[31] *Land Acquisition (Just Terms Compensation) Amendment Act 2009*.
[32] Amendments to schedules 1,1A and 2 of the *Threatened Species Conservation Act 1995*. The Act forms part of the planning system by reason of numerous provisions in the *Environmental Planning and Assessment Act 1979*, including ss 5A; 5B; 5C; 5D;

More than any other part of NSW, the problems of the planning system have had their greatest impact on Sydney. As figure 5 shows, no Australian capital city approves less new homes per head of population than Sydney. In the last financial year, just 43 new homes were approved for each group of 10,000 residents in Sydney, compared with 106 homes in Perth, 103 homes in Melbourne and 77 homes in Brisbane.

Figure 5: Homes approved, per 10,000 residents; financial year 2009-2010 (ABS)

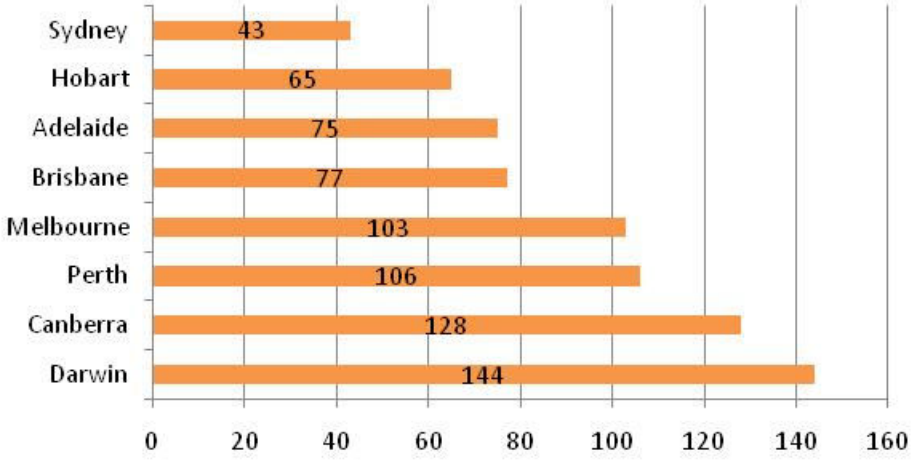


Figure 6: Homes approved per 10,000 residents; Sydney; year ending 30 June 2003-2010 (ABS)

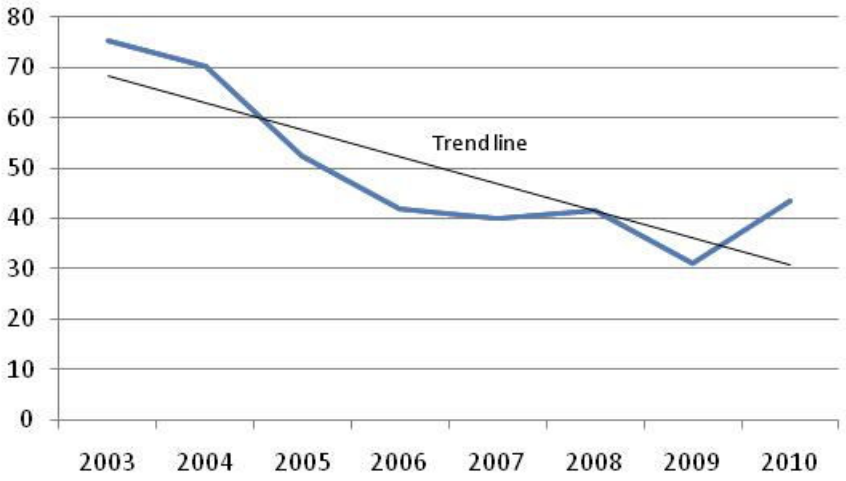


Figure 6 illustrates how the number of homes approved per 10,000 Sydney residents each financial year has plummeted from 75 in 2002/2003 to 43 in 2009/2010. It's worth noting that the Australian Bureau of Statistics does not produce capital city approvals figures that distinguish between public and private sector housing approvals. As a result this graph includes the surge of public housing approvals (outside of the NSW planning approval process that applies to the private sector) as part of the national economic stimulus. Therefore, the minor recovery between 2008/2009 (31 dwelling approved for 10,000 Sydney residents) to 2009/2010 (43 dwellings approved) would be overstating the extent of the private sector recovery in Sydney.

Given the major differences between state planning systems, and the difficulty of dealing with each planning system in any depth in a single document, we have elected to focus on the NSW planning system, whilst making some comparisons to interstate and international practice.

79B;79C; 96; 110C, 111 and 112. These figures are an understatement because they do not include species listed in schedules 4, 4A and 5 of the *Fisheries Management Act 1994*.

We believe that elements of the NSW planning system exist in other states, but no other states are unfortunate enough to possess all of the problems embedded into the NSW planning environment.

1.2 Allan Fels report: *Choice Free Zone*

In 1995 the NSW Government entered into the *Competition Principles Agreement* with the Commonwealth Government. The agreement stated that legislation should not restrict competition, unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.[33]

The NSW Government committed itself to a program of legislative competition reviews. Each review was required to:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction; and
- consider alternative means for achieving the same result including non-legislative approaches.[34]

However, in 2002, some seven years later, the NSW Government advised the National Competition Council that it had not listed the *Environmental Planning and Assessment Act* for review under the Competition Principles Agreement.[35] This meant, unlike hundreds of other pieces of legislation, the *Environmental Planning and Assessment Act* ("the Act") escaped any serious review of its impact on competition.

In the absence of a full scale competition review of the Act, the Urban Taskforce commissioned former ACCC Chairman, Professor Allan Fels, to examine some of the most anti-competitive portions of the current planning system – the regulation of retail development. The report was released in May 2008.[36] It concluded that shoppers are paying far too much for their groceries because of restrictive out-of-date planning laws. Professor Fels found that an overhaul of the state government's centres' policy would allow greater competition, leading to consumers paying up to 18 per cent less for basic food items and up to 28 per cent less for other household products. Professor Fels warns that under the present planning regime

> governments appear to be up-holding anti-competitive processes that elsewhere would potentially considered to be contravening the *Trade Practices Act*.

The report by Professor Fels was the most detailed analysis of the impact of planning policies on retail competition ever produced in Australia. It supported the role of the planning system in protecting the community from congestion, noise and the loss of cultural and environmental assets. However, it was very critical of planning laws that are protecting existing retail landlords from the threat of competition. It found that new supermarkets and larger food stores are being denied the opportunity to compete with existing shopping centres. Less choice means higher prices for groceries and everyday household goods. Other key points of the Fels *Choice Free Zone* report were as follows:

- Reform of the system could amount to $78 billion in extra income for the NSW economy and $296 billion Australia-wide.
- It would also be a boom for employment, delivering 147,000 jobs nationally and 47,000 jobs in NSW.

[33] cl 5(1).
[34] cl 5(9).
[35] National Competition Council, *National Competition Policy Legislation Review Compendium* (5th edition 2004) 3.21.
[36] A Fels; S Beare & S Szakiel, *Choice Free Zone* (2008). Available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=1519>.

- The report argues against present planning laws which effectively restrict supermarkets to established centres, resulting in traffic congestion and restrictive trade.
- Major retail landlords in existing shopping centres were taking between 17 and 21 per cent of retail turnover as rent. This compares with 9 to 12 per cent in other countries.

Professor Fels said that retail developments should be encouraged outside established shopping centres, easing the transport burden and encouraging more "pedestrian friendly" communities.

1.3 *Going Nowhere* and *Deny Everything* reports

While restrictions on retail development are the most obvious anti-competitive feature of the NSW planning laws, no serious competition review of the *Environmental Planning and Assessment Act 1979* ("the Act") can stop there.

That's why, in April this year, the Urban Taskforce released *Going Nowhere* which was prepared by respected economic forecaster BIS Shrapnel and has been published by the Urban Taskforce.

The key findings of the report were that:

- the Sydney Metropolitan Strategy has not delivered;
- the new targets for housing policy will not be delivered without reform;
- the collapse in property development has seriously harmed the NSW economy;
- NSW is not well positioned to manage the ageing of its population;
- we need to get housing construction back to 1990s levels.

1.3.1 The 2005 Sydney Metropolitan Strategy has not delivered

The Metropolitan Strategy sought to deliver 245,500 extra homes for Sydney between 2004 and 2013. The actual number of additional homes for Sydney is likely to be between 160,000 and 180,000 – falling short of the original targets by more than 27 per cent.

The dearth of new homes in Sydney is having a profound social impact. Only 64 per cent of Sydney households own their own home – down from 70 per cent at the beginning of the decade. Sydney's level of home ownership is now lower than every Australian capital city, bar Darwin. In contrast, Brisbane's level of home ownership has increased from 63 per cent to 68 per cent.

That's an extra 45,000 Sydney households renting, instead of owning. It adds up to an extra 70,000 households renting state-wide. This report shows that, with an extra 10,000 new homes a year, it might have been possible to give NSW residents the same access to home ownership they enjoyed in 2001/2002.

1.3.2 The new targets for housing policy will not be delivered without reform

In March 2010 the NSW government upped its targets for new Sydney housing - from 24,600 new homes each year to 26,550 dwellings a year.

These numbers envisage a return to development levels not seen since the 1990s, but no matching reforms to the planning system and levies regime are on the table.

The gap between actual housing supply in recent years and the near-term projections are greatest in the most affordable parts of Sydney. In the local government areas where land is expensive, supply is falling short of government targets by about 10 per cent. For the other local government areas the supply of new homes is falling short of government targets by 36 per cent.

The bottom line is that the latest targets for apartments and townhouses are more difficult to achieve in those suburbs where prices are more affordable. Higher income earners, buying in expensive areas are in a better position to pay home prices that reflect the excessive costs imposed by the planning system and development levies.

On the other hand, middle and low income Sydneysiders can't afford to pay those kinds of prices, so the much needed new homes in affordable areas simply aren't being built. If government policy remains unchanged the Metropolitan Strategy will be no more than a rear vision mirror. The Strategy will serve to remind us of what Sydney could have had if we retained the policy environment of the 1990s, when NSW housing production was strong.

1.3.3 The collapse in property development has seriously harmed the NSW economy

Over the past five years, Australia has had a 'three-speed' economy. While Queensland and Western Australia have led the way, NSW has lagged well behind Victoria and South Australia. The roots of NSW's economic weakness lie in its residential property market. Relatively weak population growth has been the key distinction of the NSW economy.

The 'Sydney-is-full' policies of the then state government saw a spike in residential property prices from 1999 to 2003 leading to the rapid slowing in NSW population growth. *Going Nowhere* shows that while population growth in NSW was very weak from 2002 to 2006, it was solid in Victoria, averaging 1.3 per cent compared to just 0.7 per cent in NSW.

From 2003 to 2009, Victoria's economy substantially outperformed NSW with average annual economic growth at 3.3 per cent in Victoria, compared to 1.7 per cent in NSW. Average annual job growth was 2.1 per cent in Victoria, compared to 1.4 per cent in NSW. Of all the states, NSW economic growth per capita was slowest at just 0.8 per cent a year.

Population growth tends to encourage per capita economic growth itself. It makes more sense to invest in infrastructure in high growth areas, with greater economies of scale.

1.3.4 NSW is not well positioned to manage the ageing of its population

Unlike the rest of Australia, beyond 2020 the annual projected increase in NSW's retiree population will exceed the rise in the workforce population.

Not only is NSW not gaining employment age workers from other states, it is also losing people from its current work pool. Increased overseas migration to NSW would help the state fund public services and maintain a sufficiently large labour force. That's because overseas immigrants are, on average, younger than those already here. Their presence in NSW can help reduce the imbalances that would otherwise arise.

However, it's our inability to produce enough homes that has led to a sharp fall in the NSW share of overseas migration. Prior to the dramatic rise in property prices in the late 1990s and early 2000s, NSW maintained a steady share of national net overseas migration, at about 42 per cent.

Over the past decade, the NSW share of overseas migration has fallen substantially, settling at about 30 per cent over the past three years.

1.3.5 We need to get housing construction back to 1990s levels

NSW was at record low levels of housing construction, and there would inevitably be some recovery, even without reform by the government.

The issue is not whether or not there will be an increase in home construction – we can't stay at rock bottom forever so a recovery of some sort is inevitable. The issue is, will the recovery in home

construction be strong enough to address NSW and Sydney's fundamental social and economic problems?

The business as usual approach will merely return the rate of housing construction back to the 2000s average. In this event, Sydney's annual supply of extra homes would only reach 17,000 and the state's annual supply would only increase to 29,000 homes.

At this level of construction, the NSW economy would be set for another extended period of performance below the national average. *Going Nowhere* finds that, at the very least, NSW must get housing supply back to the performance levels of the 1990s and meet the new targets of the Metropolitan Strategy.

This means we need a minimum annual average supply of about 25,000 extra homes for Sydney and 39,000 extra homes for NSW. While this scenario – which requires a doubling of the current rate of housing construction - will alleviate housing shortages somewhat, it is a second best outcome.

Going Nowhere finds that NSW might recover the share of national overseas migration that has been taken by Queensland by boosting its annual construction of extra homes to 48,000 each year beyond 2015. This is two-and-a-half times the 2009 level of housing construction.

The NSW Government targets fall short of this goal. *Going Nowhere* finds that the 'no reform' option will leave the state's economy up to $8.3 billion worse off by 2035. The NSW budget would lose between up to $2.5 billion in revenue by 2020, and up to $10.5 billion in revenue by 2028.

1.3.6 Twelve point plan

Going Nowhere sets out a twelve point plan for reform to:

1. introduce new statutory objectives for the planning system, based around the principles of:
   - supporting the state's economy;
   - promoting ecologically sustainable development;
   - promoting liveable communities;
   - managing impacts on public infrastructure; and
   - promoting private investment by respecting property rights;
2. impose new rules to limit bureaucratic and political games by ensuring that development meeting pre-determined standards is entitled to approval;
3. force consent authorities to deal with matters promptly, within a deemed-to-comply timetable;
4. reduce uncertainty by clearly defining the matters that can be considered in the development assessment process;
5. ensure that a private property owner is properly compensated for removal of land use rights by the government;
6. reduce and reform the highest local council development levies in Australia;
7. redesign state infrastructure contribution levies so that economic distortions are reduced and there is greater transparency;
8. emulate Victoria by introducing stamp duty concessions for off-the-plan home purchases;
9. reform the template being used in the preparation of new local environmental plans - so it genuinely promotes good urban outcomes and reduces over-regulation;
10. progress the rezoning of land for development as promised in numerous strategies and give proponents Queensland-style appeal rights when rezoning proposals are unreasonably refused or delayed;

11. improve the handling of state and regionally significant projects by improving the expertise of those assessing the applications; and
12. remove the ability of bureaucrats and politicians to second guess the market and/or take into account the loss of trade, that might be suffered by existing businesses, as a result of new development.

The 12 point plan was expanded upon in the related report *Deny Everything* which sets out the necessary reforms to the planning system in detail.[37]

1.4 NSW Government's own reports

A report commissioned by the NSW Government has exposed the dysfunctional nature of the state's planning system. The report *Residential building activity in Sydney* was prepared for NSW Treasury by economic consultants Applied Economics.[38] It was completed in May 2010, although it only became publicly available in September 2010 as a result of a freedom of information request by the Urban Taskforce. The report has been annexed to this submission.

The report finds that planning processes are slow and lengthy. The report finds that the demand for extra housing in Sydney is likely to be between 25,000 and 50,000 dwellings per year, compared with the 15,000 produced in 2007/2008.[39] The experts who authored the report found that these housing targets are not achievable without "significant policy changes" by government.[40]

The report gave the state government a clear choice. It says the government can pursue a low population policy, by accepting low levels of housing production and using escalating house prices and rents, and increased congestion as means of driving people away from Sydney, or the state government can make policy changes to get housing construction more in-line with Sydney's requirements and the construction levels of other states.[41] The report acknowledges that a restrictive housing policy would also have negative impacts on economic growth and incomes in Sydney and NSW.[42]

The government-initiated investigation found there is a "lack of commitment" by some state agencies to development, which resulted in restrictions on building activity.[43] It concluded that in the last 10 years "only a small amount of land has been rezoned for housing".[44] The study found that "[l]ocal government agencies tend to favour and produce restrictive land use plans which limit the application of capital to land".[45]

The report makes it clear that "the planning process is full of vague and ill-defined statements",[46] leaving developers exposed to subjective, uncertain and unpredictable decisions. A lack of public infrastructure, particularly transport infrastructure, is also identified as a problem.[47]

It found that it is difficult for anyone to develop land that is already divided into relatively small parcels amongst many owners.[48] Most land recently released and rezoned in the western fringes of Sydney are composed of lots of around two hectares and ownership is spread thinly amongst a wide group of

[37] The report is available online: < http://www.urbantaskforce.com.au/attachment.php?id=3195>.
[38] <http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0004/18562/GIPA_11_21_Report_Building_Activity_Peter_Abelson_Sept_2010_dnd.pdf> at 22 September 2010.
[39] Applied Economics, *Residential Building Activity in Sydney An Overview and Seven Case Studies: Prepared for NSW Treasury* (2010) 6.
[40] Ibid.
[41] Ibid 6-7.
[42] Ibid 7.
[43] Ibid 75.
[44] Ibid 5.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Ibid 6.

people. The report concluded that government policy has been discouraging development in areas where there is one owner.[49]

The report confirms that the state of residential development in NSW is dire; it observes that:

- since 1999-2000, the number of new homes in NSW has halved – falling from 32,000 homes to 15,000 homes in 2007-08;[50]
- between 2005/6 and 2007/8, fewer than 4,000 new houses a year were added to Sydney's housing supply;[51] and
- since the late 1990s, the value of NSW's residential construction activity has fallen from 36 per cent of Australian output to just over 20 per cent.[52]

A second report released by the NSW Government on 17 September 2010 also independently confirmed that the state's planning system is in desperate need of reform. The report, *The NSW Economy in 2020*, was prepared by Access Economics and released by the NSW Government's Industry and Investment Department.[53]

It said there is a "need to reinvigorate microeconomic reform agendas" and highlights the "particular need" to ensure

> that planning policies and regulations are able to ameliorate pressures associated with expected population growth.[54]

The report says more reform is needed "if the various pressures are to be met in an orderly manner".[55] It also says there must be

> responsive adjustments of regulation and the planning framework especially with regards to both the release of land and re-development of brownfield sites.[56]

1.5 Anti-competitive features of the planning system

1.5.1 Reducing the number of developable sites

The planning system restricts competition amongst property owners willing to sell their land for development by limiting the supply of appropriately zoned land. It is well understood in the urban development industry that, in Sydney, there is a very clear shortage of land zoned for high density residential uses (in the inner and middle ring suburbs), for single-home residential development (fringe suburbs) and for retail uses. There can also be shortfalls in land zoned for high intensity employment uses, particularly business parks where office, retail and bulky goods premises are permitted. On the other hand there is an oversupply of industrial land in some locations (such as South Sydney).

Planning authorities often fail to realise how limited the supply of land is – even without their zoning and strategic policy restrictions.

One issue that naturally limits the availability of land is fractured ownership. Where the ownership of land is fractured into a number of small parcels it may be very difficult and expensive to undertake the complex negotiations and resources required to assemble the land into a site large enough to support

[49] Ibid.
[50] Ibid 11.
[51] Ibid.
[52] Ibid 17.
[53] < http://www.business.nsw.gov.au/NR/rdonlyres/57EDFA77-D284-4D16-87BA-1DAAF2A6DEAA/0/nsw_economy_2020_20100917.pdf > at 17 September 2010.
[54] Access Economics, *The NSW Economy in 2020,* viii.
[55] Ibid 95-96.
[56] Ibid 121.

a major development. In one example cited by an academic study,[57] there was need to unify land originally in five different ownerships for a retail development. Four of these were successfully acquired in a reasonably timely way by negotiation, but the fifth site was a restaurant where the land owner refused to accept a valuation approximating the one obtained by the developer. The restaurant owners – aware of their market power since the remaining four landholders had been locked in – demanded and received a payment of three times the valuation in return for their land. In another example cited by the same study, it took two-and-half years to assemble 37 different ownerships to form an eight hectare development site for commercial and retail development.[58]

During protracted negotiations of this kind, the developer faces significant interest (or opportunity) costs to finance the expenditure necessary to keep the project on-foot while practiced negotiations continue.[59] Unsurprisingly the above-mentioned study concluded that other developers would be deterred by these experiences and is likely to look to develop less problematic sites. That is certainly our experience in NSW; it is very difficult, if not impossible, to attract equity capital to a proposed development site where the ownership has not been unified.

In a study undertaken in Aberdeen and Nottingham in the United Kingdom 80 sites were identified using broad criteria as possible development locations for major retail development.[60] On detailed investigation 12 of the 80 sites offered the potential for development of this kind. However, this list was whittled down to four, once sites with fragmented ownership, ground contamination or past planning refusals were taken into account. However, of these four sites, only one site met the strategic planning direction that required a truly central location for major retail development. This study is consistent with the experience of developers in NSW, where the majority of viable sites for high-demand uses are not available because of zoning restrictions and unhelpful strategic policies put in place by the government and/or local councils.

The key point here is that in any given region of the metropolitan area, even without zoning restrictions, there are likely to be few suitable sites ripe for large scale residential, retail or commercial development. This in itself will give property owners significant market power when negotiating with developers. However, when strategic policies and zoning controls sterilise the majority of the few viable sites, the very small number of property owners remaining are in possession of greatly increased market power.

Hence zoning and strategic policy restrictions reduce competition amongst property owners, and therefore increase the price of land available for large development projects. The higher the price, the greater the likelihood that developers will either be forced to pay more than they should for a site or that the transaction will simply not proceed because the project would not be viable.

The common refrain from planning authorities whenever this issue is raised is that the developer simply needs to 'cop a haircut' and get on with development at a lower margin. This perspective is deeply flawed. Modern capital is very mobile. It flows to wherever it gets the best return. A local developer will not be able to secure capital for a NSW development if he/she cannot offer the rate of return that is available for investments of a similar risk profile in other states or countries. In order to ensure that a market rate of return is still achieved, a developer will need to increase the price paid by the ultimate purchaser of the developed land.

One reason that NSW has missed out on so much development in recent years is that the ultimate purchaser of developed land is often not able to afford to cover the cost of zoning-induced land price inflation. For example, the buying power of home owners is dictated by interest rates and their borrowing capacity (which is a function of their income and bank credit policies). There is a clear ceiling to how much they can pay for a new home. In the NSW metropolitan area home prices

[57] D Adams, A Disberry, N Hutchison and T Munjoma (2002) "Retail Location, Competition and Urban Redevelopment", *The Services Industries Journal*, 22:3, 135-148, 145.
[58] Ibid.
[59] This will include employee cost, environmental, architectural, planning and legal consultancies. Additionally payments to landholders may have to be progressively made in order to secure option agreements as negotiations are finalised.
[60] D Adams, A Disberry, N Hutchison and T Munjoma (2002) "Retail Location, Competition and Urban Redevelopment", *The Services Industries Journal*, 22:3, 135-148.

consistently track the borrowing capacity of purchasers because the supply of new homes is so poorly relative to underlying demand.[61] Essentially, people are paying as much as they can afford to for new homes.

1.5.2 Directly preventing landlords from competing for tenants

The planning system restricts competition amongst the owners of commercial and retail land for tenants. It does this by expressly requiring new development proposals for commercial offices, retail facilities and entertainment facilities to demonstrate that they will not impact on the market share of incumbent players.

The stated reason for restrictions of this kind is to force development into locations where infrastructure is underutilised (a "centre"). In short, if you locate your new development in a centre, there will be no need to prove your development will not steal someone else's business. On the other hand, if your business is not in a centre you may still proceed with the development, but only if you can show (through an economic consultant's report) that your development will not detract from the existing trade of incumbent businesses in a centre.

Such measures are contrary to the public interest for three key reasons.

Firstly, banning a development in one locality does not necessarily mean the development will proceed in the planning authority's preferred location. Often there will be sound commercial reasons why the developer has decided not to develop on the land nominated by the planning authority. This could be the price demanded by the property owner, but also could be due to factors such as the existing levels of road congestion, travel time for the likely customer base, car parking limitations, lack of pedestrian traffic, etc. Important projects, and therefore economic and social benefits, are likely to be lost to the community as a whole.

Secondly, action of this kind by a planning authority confers excessive market power on landholders in the authority's preferred location. With few or no landholders competing against each other, landholders do not need to price their land competitively to attract a development proposal. They are also more likely to let a developer walk away when they believe the planning system will prohibit the same development happening anywhere else within the local region. They will have the view that it is only a matter of time until the need for the given development (such as a supermarket) is so great, that a developer will have to pay the inflated prices the landholder is seeking. Even if this turns out to be true the community will lose out on social and economic benefits while the development is delayed. Ultimately the customers of a delayed shopping centre will also end up paying more at the cash register in order to pay back the inflated price charged by the landholder.

Thirdly, while the planning authority may feel that infrastructure is being underutilised at their preferred development location, this does not mean that infrastructure is being fully utilised at the developer's preferred location.[62] In any event, one of the reasons it is attractive to develop outside the existing network of major centres, is that the roads at many of these locations are already heavily congested.

These policies have also become much more elaborate than the simple explanation given above. Much of this submission is devoted to analysing the existing policies in area in some detail, but it's worth briefly highlighting some key points:

- definitions of centres are arbitrary – many areas with excellent infrastructure are not designed as centres because
  - they were politically inconvenient,
  - government planners have not completed the work to formally assess infrastructure capacity, or

[61] This issue is discussed in P Cheshire and S Sheppard, "Land markets and land market regulation: progress towards understanding", *Regional Science and Urban Economics* 34 (2004) 619-637, 630-633.
[62] See for example the detailed explanation in D Adams, A Disberry, N Hutchison and T Munjoma (2002) "Retail Location, Competition and Urban Redevelopment", *The Services Industries Journal*, 22:3, 135-148.

- they simply weren't considered when the maps were prepared;

- not all centres are equal – an elaborate artificial legal hierarchy of centres has been constructed that bears little relationship with infrastructure quality or capacity and has more to do with political or historical factors, as consequence a "higher-order" development in a "lower-order" centre, gets treated as an "out-of-centre" development even though it is no such thing (see for example case study 7 in the Appendix);
- corridors may have the same quality of infrastructure as centres, but do not get included in strategies for ideological and/or political reasons.

The net result of these policies is that the rents for some business tenants are much higher than they need to be. The major beneficiaries of such policies are the property owners in the favoured centres.

1.5.3 Directly preventing businesses from competing with each other

In a market economy consumers should be in charge. That means they ultimately decide whether or not new retail facilities are necessary, not government planners.

Businesses seeking to establish themselves in a new location may be denied the opportunity to directly compete with other businesses for unnecessary restrictive centres policy listed above, or other restrictions included in a statutory plan.

There is clearly a negative perception in the community on the degree of retail competition in Australia. Choice conducted a survey of more than 1,000 consumers in February 2008 – 64 per cent of consumers said there was not enough price competition for groceries.

The established centres so favoured by the planning rules are already generally each dominated by an existing shopping centre landlord. Evidence aired at the Australian Competition and Consumer Commission (ACCC)[63] reveals the restrictive mentality of shopping centre owners when it comes to securing anchor tenants such as supermarkets.

Second-string chains such as Franklins or Aldi rarely get a look in. Shopping centres go straight for the big two. Martin James, the general manager of development leasing for centre operator Colonial First State Property, laid it bare at the ACCC inquiry:

> We would be choosing someone that from our research and from our knowledge of the market ... would generate the largest sales ... and typically that is Woolworths and Coles.

This creates a catch-22. Smaller chains cannot compete or increase market share because they just cannot get into major shopping centres. Smaller chains are prevented from opening down the road because of "centres policy" planning laws that concentrate on major shopping centres in select areas, banning or limiting competitors in surrounding suburbs.

By setting a limited number of shopping centres as the gateway to new major chain supermarkets, the overall access of the community to major chain supermarkets is reduced.

The Bureau of Infrastructure, Transport and Regional Economics (BTRE) carried out an Australia-wide study in which it collected over 80,000 prices in 132 locations, from major cities to the most remote areas. The outcome of the study was detailed in the Bureau's submission to the ACCC's grocery prices inquiry. The Bureau looked at grocery prices in places that weren't within easy reach of a major chain supermarket. This is not small group - in fact half of non-metropolitan Australians are in this situation.

These consumers were found to pay an average 20 per cent premium in prices, although once adjustments are made for differences in the size of the local populations, the price premium paid by consumers without ready access to a major chain supermarket was 17 per cent.

[63] Documented in the transcripts of the *ACCC inquiry into the competitiveness of retail prices for standard groceries.*

The Economist Intelligence Unit cost of living survey found that, in 2007, prices in Sydney for food staples were on average 22 per cent higher in mid-priced stores than in large format stores.[64] For household and personal care products the prices were even higher - between 33 and 39 per cent more expensive on average.

The evidence clearly shows that large format chain stores are delivering groceries to Australian households cheaper than smaller independent stores. This should not come as a surprise. Large format chain stores have the benefit of scale in their supply chain, with an increased ability to negotiate on behalf of their customers, with international food manufactures. They have the capacity to run a just-in-time distribution operation with high frequency delivery of packaged and fresh food to supermarkets, reducing the need for storing merchandise on site and increasing the likelihood that the full range of products will be available. A larger floor space means that the cost of many fixed overheads is defrayed over a greater sales volume.

The BTRE's study did find that independent stores appear to compete with the major chains on price in some locations, but more often competed on other factors, such as variety, opening times and service. Chances are, if consumers are paying too much for groceries, it is because of a lack of large format grocery stores, rather than the presence of one.

In a United Kingdom study it was argued that scarcity in developable land for retail purposes raises costs and requires greater levels of sales in order to provide an acceptable return on capital invested.[65] For example, if a site for a large food store costs £15 million (around £3.5 to £4 million per hectare), a supermarket of 3,700 square metres sales area would require sales of around £10,600 per square metre in order to provide an acceptable return on investment. If land costs were only one third of this amount, the store only needs to generate £6,300 per square metre. In such a situation there would be scope to build extra space, or (over a sufficiently large area) extra stores. Higher land costs, driven by land scarcity, mean less stores, and requirement for the stores that are built to provide higher net revenue than would otherwise be required. This creates an artificial need for less cost-competitive stores to meet the zoning-induced gap. Ironically, those very same stores (small format retailing) are often able to avoid the zoning and development assessment restrictions that large format stores face.

If Australian households are to have access to lower cost groceries we must question any regulation which might limit or prevent new large format stores. We must also question any regulation that might hinder efforts by new-entrant grocery chains – such as Aldi - to set up large format stores in competition with the dominant players.

The ACCC has been told that Coles is merely a tenant at 97 per cent of its supermarkets and Woolworths is a tenant at 98 per cent of its stores. In his evidence before the ACCC Grocery prices inquiry, John Schroder, chief executive officer of major shopping centre owner Stockland Retail said that

> in the middle of dense urban Sydney .... where there is an under-supply of supermarkets ... we'll drive up the rent. In fact, in some cases, depending on what the research tells us, we'll almost bid the space out.

As this evidence suggests when the planning system constrains supermarket sites it is handing increased market power to a limited number of land owners. Consumers will bear the burden of increased rent through the prices they pay.

The planning system is not just limiting the growth of existing supermarket chains in NSW. It also limits potential for new entrant retailers to establish themselves in the NSW market. There are three basic strategies that can be used for a foreign retailer to enter a new domestic market:

- an investment strategy where a foreign company buys all or part of an existing retail chain;
- a multinational strategy where a company developers new outlets through fully or part owned affiliate, which adapt their operation to the local market; and

[64] A Fels; S Beare & S Szakiel, *Choice Free Zone* (2008) 62-64.
[65] C Guy (1995) "Retail store development at the margin", *Journal of Retailing and Consumer Services* Volume 25-32.

- a global strategy where the foreign company reproduces its home market outlets in the new market.[66]

Town planning constraints have been identified in the academic literature as being a key factor in the selection of market entry mode strategy.[67] Where there are flexible planning controls and a ready supply of land, a company is more likely to want to expand through the expansion of new stores.[68] If there is strong control over development and/or a difficult land market, the company is more likely to expand through the purchase of an existing retailer. Case studies are available to illustrate how restrictive centres policy have prevented new entrant retailers from establishing new competing businesses in the United Kingdom and western Europe and instead forcing them to enter new national markets by acquiring existing businesses.[69] The acquisition of an existing retailer by a foreign company, in itself, does nothing to increase the number of stores competing in the NSW economy. Town planning policies should not act as a barrier preventing new retailers from setting up in NSW.

1.5.4 Regulatory risk as a barrier to entry

Since NSW's central body of planning legislation – the *Environmental Planning and Assessment Act 1979* - came into effect in 1980 it has been one of the most hotly contested bodies of law NSW or Australia has ever seen. It has been amended on 122 separate occasions – an average of four amendments a year. However, this only tells a fraction of the story. Important provisions that seriously affect property rights are dealt with by regulation – the current regulation which was introduced in the year 2000 has been amended on 101 separate occasions since then – an average of 11 times a year.[70] Additionally there are 326 environmental planning instruments currently in force, as well as an additional 147 "deemed" environmental planning instruments left over from the pre-1980 legislative regime.[71] There are hundreds of development controls plans – of which no central list exists. The numerous environmental planning instruments, development controls plans, strategic policies, development assessment policies, contributions plans, ministerial directions and levy determinations that can all profoundly affect development potential are amended on an almost daily basis, often with no regard to the investment decisions developers have already made in reliance on the existing rules.

Several years will usually pass from the point of acquiring an interest in a potential development site to the final sale of the developed product to the customer. The fluid and ever widening legislative environment has deprived the development industry of any protection from more onerous obligations once they have irrevocably committed to a development site. In fact diligent developers must now factor in an unusually high risk premium for developing NSW because of this uncertainty.

Quite aside from the risks of the law being changed, the application of the law as it stands is a highly subjective and politicised process that can be extremely unpredictable. A decision-maker who wants to refuse development consent is literally blessed with an unending array of rules, policies, strategies and ordinances which can be relied upon to justify a "no". In fact, in 2003 the NSW Court of Appeal declared that environmental planning instruments are not the only documents that can be used to block new development, and that a consent authority is able to refuse otherwise permitted development by referring to a wide range of material outside the formal planning processes on "public interest" grounds.[72] This decision is now regularly cited by both consent authorities and the courts when relaying on a wide range of obscure material to justify saying "no" to an otherwise permissible development.

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[66] W Salmon and A Tordjman (198), "The internationalisation of retailing", *International Journal of Retailing*, Vol. 4 No 2, 3-16.
[67] N Alexander, *International Retailing* (1997) 289-91.
[68] C Guy, "Internationalisation of large-format retailers and leisure providers in western Europe: planning and property impacts", *International Journal of Retail and Distribution Management*, Vol. 29, No. 10 (2001) 462,461, 455.
[69] Ibid 456-459.
[70] <www.legislation.nsw.gov.au>, accessed 26 June 2009.
[71] The full list is available as the Table of environmental planning instruments and is published by the office of the Parliamentary Counsel <http://www.legislation.nsw.gov.au/lif/epis.pdf>.
[72] *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 [81].

A decision-maker who is minded to approve a development must navigate a complex and internecine maze of conflicting, overlapping, vague and rambling documents. It is not surprising that the Act is the most heavily litigated piece of legislation in NSW.

This situation has become so serious, that commonly understood concepts of property no longer clearly apply in NSW, such as:

- the right to own land without uncompensated expropriation by the state;
- the right to develop land in accordance with its existing uses;
- the right to develop land in accordance with its zoning; and
- the right to be free from arbitrary, unreviewable, (and even retrospective) levies.

Sovereign risk is a very real issue when dealing with planning issues in NSW. This has reduced the volume of development activity and the supply of developed product. It reduces competition amongst landlords (because they do not need to be concerned about the risk of new significant product becoming available) and amongst businesses whose format is dependent on new purpose-built facilities.

Nonetheless is important to distinguish regulatory risk from market risk. The planning system should seek to minimise the former, but avoid tampering with the latter. That is, the planning system *should* seek to provide certainty to the private sector by having clear rules, simple processes, swift processing times and low predictable costs. It should *not* be the role of the planning system to provide certainty to investors in one location, by giving them assurance that they will be protected from competition in other nearby locations. Planning systems should reduce regulatory risk, but not market risk.

Regretfully, rules are often put in place in the planning system to protect sections of the private sector from *market* risks. All this will do is provide certainty for oligopolistic landlords and provide few options for those seeking to satisfy unmet market demand. Reformed planning systems should focus on minimising unnecessary *regulatory* risks.

1.5.5 Competitive neutrality

Competition between different businesses developing or marketing like-for-like products is affected by the failure to respect the principles of competitive neutrality.

As a result there is a reduced willingness for private capital to develop certain activities (such as "affordable housing") unless it is in a joint venture agreement with agencies/companies that benefit from favourable treatment. The financial, political, technical and other limitations on organisations that are able to benefit from the planning system's favourable treatment represent a break on the ability of private enterprise to participate in affected segments of the development market. The perception that the principles of competitive neutrality will be further eroded also asks as a disincentive to invest in other areas of development in NSW.

The presence of government owned development companies, competing against private developers, creates a perception, if not reality, that private developers will be treated less favourably by regulators than a government owned developer. The risk of government owned developers developing homes for private sale at less than commercial internal rates of return also create disincentives for private sector developers to become active in market segments where government owned developers have a strong presence.

2. The objectives of the planning system

2.1 The current objectives

As per legislative practice, the *Environmental Planning and Assessment Act 1979* sets out its objectives. These objectives are significant because they are used by the courts to test the validity of decisions made under the Act and interpret ambiguous provisions of the law. Accordingly, they are an important touchstone for any public official charged with making a decision on a development application or contemplating the making or an amendment of an environmental planning instrument or a policy or plan sanctioned by or under the Act.

Objectives of the *Environmental Planning and Assessment Act* are:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

(iii) the protection, provision and co-ordination of communication and utility services,

(iv) the provision of land for public purposes,

(v) the provision and co-ordination of community services and facilities, and

(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and

(vii) ecologically sustainable development, and

(viii) the provision and maintenance of affordable housing, and

(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

The most charitable thing that can be said about these objectives is that they are a product of their era. Although they have been amended on an ad-hoc basis three times, there has been no single overall review of these objectives since the Act was passed by Parliament in 1979.[73]

2.1.1 Modern economic concepts

Concepts such as employment, competition, business productivity and living standards do not rate a mention. This is not surprising, because the significance of these issues in the public policy debate did not emerge until the late 1980s and early 1990s. The legislation merely shows its age when it overlooks these policy principles. More recent legislation routinely refers to such concepts.[74]

[73] Section 5 was amended in 1995, 1996 and in 1999.
[74] For example: *Air Transport Act 1964* s 4A; *Electricity Supply Act 1995* s 43EB; *Fair Trading Act 1987* s 60C; *Liquor Act 1982* s 54BA; *Motor Accidents Compensation Act 1999* s 5; and the *Water Industry Competition Act 2006* s7; Fair Work Act 2009 (Cth) s3.

2.1.2 Co-ordination and orderly development

The objects of the *Environmental Planning and Assessment Act* include the encouragement of

> the promotion and co-ordination of the orderly and economic use and development of land...[75]

The word "orderly" means

> arranged or disposed in order, in regular sequence, or in a tidy manner.[76]

The concepts of "orderly" and "co-ordination" are expressed to be desirable for their own sake. The objects of the Act do not explain why these concepts are important. As a result planning authorities regularly cite these words as evidence of their authority to attempt to dictate the location and nature of future private sector investment, without offering a sound public policy justification for that intervention.

Despite planning authorities' rhetoric they are not actually able to "encourage" or "control" development at all. All they are able to do is either prohibit or permit development, or make the process of securing approval for a permitted activity harder or easier. None of these processes will lead to development taking place in accordance with planning authorities' wishes in the absence of a profit sufficiently high to attract equity capital.

Planning authorities attempt to overcome this barrier and secure "orderly" development by prohibiting alternative development (within a region) that may be more profitable than the authorities' favoured development. This practice is most apparent when more profitable development would be in direct competition to the favoured development. This would occur for example, when the development of a given residential subdivision will deliver housing that is more affordable and/or better located than the residential subdivision favoured by planning authorities. It also would occur when a retail development in a busy transport corridor will offer more convenience and lower priced shopping than in a congested "centre" favoured by a planning authority.

In *some* cases the prohibition of competition can improve the returns available to a developer and therefore increase the likelihood of investment taking place in accordance with planning authorities' wishes. This occurs if an artificial undersupply of land is created via legislative decree. It is well established that zoning can and does create such undersupplies of land.[77] If this occurs, it comes at the cost of the ultimate purchaser of the development land.

That's because the restriction on competition imposed by planning authorities boosts returns to the developer by allowing the developer to command a higher price from the ultimate purchaser of developed land. If the ultimate purchasers are home buyers, they will bear the burden of the anti-competitive restriction through higher mortgage payments over the ensuing decades. If the end use purchaser of the developed land is a shopping centre landlord, the inflated purchase price will be recovered from retail tenants, in particular the small business operating speciality shops and less established supermarkets.[78] In turn, the customers of those shops will need to pay more for their goods and services in order to cover the higher overheads of the small businesses concerned. The academic literature has studied this phenomenon in-depth.[79]

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[75] s 5; *National Resources Management (Financial Assistance) Act 1992* (Cth) s3(3); and *International Air Services Commission Act 1992* (Cth) s3.

[76] *Macquarie Concise Dictionary*, 4th ed. (2006) 853.

[77] N Wallace, "The Market Effects of Zoning Undeveloped Land: Does Zoning Follow the Market?* *Journal of Urban Economics* 2&301-326 (1988), 307-326.

[78] Speciality stores and less established supermarkets benefit substantially from associating with it higher-order stores such as major chain supermarkets and department stores (anchor tenants). The high-order stores are often able to benefit from rental cross-subsidies as a result. Developers of shopping centres offer land parcels to high-order stores at rates substantially less than those available to lower-order stores: Ghosh, A. (1986) 'The value of a mall and other insights from a revised central place model', *Journal of Retailing*, 62, 79-97.

[79] See, for example, J Henneberry, T Mcgough and F Mouzakis "The impact of planning on local business rents" *Urban Studies* (2005) 42:3; 471 -502.

However, in our observations prohibiting potentially competing development in a less favoured area will not significantly increase the likelihood of development activity in the preferred area. Obviously developers need to recover the anticipated costs, including debt finance costs, to make their developments viable. They also need to pay back those that have sunk equity into a project and ensure that those equity investors receive a rate-of-return commensurate for the risk they have taken.[80] Equity investors, when making decisions to invest, rank the projects that are competing for their investment. This ranking process is not specific to one geographic area of Sydney, or even NSW or Australia. Projects from all over the world are competing for the investment of individuals and firms operating across national boundaries.

Merely because NSW chooses to pass laws reducing the profitability of some less favoured developments, does not necessarily mean that the investment money will flow to potential development nearby that is still permitted. The fact that planning authorities assume this to be the case only reflects their (flawed) parochial view. The next ranking projects (in terms of return commensurate with risk) may not be in the same region, or even in NSW. The modern mobility of capital means that there is no particular likelihood that regulatory restrictions in one location will force investment into another nearby location.

Such restrictions may have made more sense in the 1970s when capital markets were heavily constrained by geography. However *global* capital markets for real estate have developed over the last 15 years. A high net worth individual living in NSW no longer needs to invest just in NSW. Similarly, willing equity investors based in China are no longer obliged to invest in their own country. NSW property development has not fully benefited from this liberalised flow of capital, because its regulators are not conscious that the truisms of the 1970s have little value today.

In any event, even if "orderly" development was able to be achieved, it is an idea that was built around the outward development pattern associated with greenfield development. The concept of "order" arises in this context, because the idea of developing land closest to the city first and the gradually moving out sounds superficially attractive. However, in Sydney, since 2005, 60 to 70 per cent of new housing development is supposed to be within the existing urban footprint.[81] Even in the Hunter, the government aspires to accommodate as much as 25 per cent of new housing within existing urban areas.[82] Infill development, by definition, tends to be a lot less "tidy" or "orderly". Development tends to be opportunistic, based around the availability appropriate sites.

Even in relation to greenfield development, the concept of "orderly" sequential development has suffered a few blows. Despite the government published goal for 60 to 70 per cent of Sydney's growth to be met through infill development, in 2006/07 it accounted for 85 per cent of development.[83] In the last five years infill production averaged 83 per cent of new dwelling and greenfield averaged 17 per cent.[84] These figures have occurred despite that fact and the planning authorities proudly boast that there are 66 greenfield release areas with a total potential of 108,180 dwellings - 14.4 years' supply.[85]

Planning authorities have "released" areas for new urban development but the planned development has not taken place. The areas selected for land release, such as Edmondson Park, have not been possible to commercially (i.e. profitably) develop. In the case of Edmondson Park the big cost item is the expensive process of unifying a large number of fragmented five acre sites into a single development site. Other nearby (but slightly further out) precincts, which do not have that cost burden, have not been released, because that would not have been "orderly".

[80] By definition equity investors take the highest risk and so, assuming the project goes to plan, get higher rates of return than say, senior debt financers and mezzanine debt financers.
[81] As per the *City of Cities: Sydney Metropolitan Strategy* published by the NSW Government.
[82] NSW Department of Planning, Lower Hunter Strategy (2006) 5.
[83] NSW Department of Planning, *Metropolitan Development Program 2007/08 Report* (2009) 31.
[84] Ibid 28.
[85] The Hon. Kristina Keneally MP, NSW Minister for Planning, Media Release: "New Land and Housing Report Good News For Sydney" (5 April 2009).

Planning authorities have been left mystified as to why their efforts to restrict the supply of land for greenfield development to "orderly" locations has not led to development in those locations. This problem is not unique to NSW; international research suggests that there is little connection between planning strategies and the actual locations where housing is built.[86]

A report commissioned by NSW Treasury *Residential building activity in Sydney* (annexed to this submission) found that most land recently released and rezoned in the western fringes of Sydney is composed of lots of around two hectares and ownership is spread thinly amongst a wide group of people.[87] The report found that it is difficult for anyone to develop land that is already divided into relatively small parcels amongst many owners.[88] The report concluded that government policy has been discouraging development in areas where there is one owner.[89] The report said that:

> Government policy discourages development of areas that are in consolidated ownership but which are separate from existing developed areas and that are likely to incur high infrastructure costs. This may be appropriate but the evidence base is slim(underlining added).[90]

From an equity investors point of view the answer is simple – plans and strategies are predicated on the assumption that equity investors have no choice as to what they should do with their money. They are mistaken. There are more profitable development opportunities elsewhere.[91]

Aside from lost economic activity, the pursuit of "orderly" development rather than economically-efficient development has significant social costs. To quote the Department of Planning:

> The main effect of supply of land in greenfield areas will be to free up housing and sites in existing urban areas to help satisfy the total annual demand for additional housing ...[92]

Prophetically, the NSW Government's 2006 Metropolitan Strategy warned that

> [i]f no new land was to be released for urban development, the proportion of new dwellings to be built in existing areas of the city would increase to 90 per cent in the next 20 years. This would put great pressure in Sydney's existing suburbs and character and would potentially further reduce housing affordability.[93]

Forget 20 years – despite the government published goal for 60 to 70 per cent of Sydney's growth to be met through infill development, in 2007/08 (the most recent Metropolitan Development Program figures) 84 per cent of dwelling production was in existing urban areas.[94] This meant that greenfield development accounted for just 16 per cent of Sydney's new housing supply.[95] These figures have occurred despite that fact and the planning authorities proudly boast that there are record levels of land supply.

It is difficult for planning bureaucracies to put themselves in the shoes of private enterprise and it is usually not possible for them to reliably assess what developments will be viable and what developments will not be attractive.

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[86] B Needham and R Lie (1994) "The public regulation of property supply and its effects on private prices, risks and returns", *Journal of Property Research*, 11:3, 199 – 213, 211; JRUE (1977) *Planning and land availability*, Joint Unit for Research on the Urban Environment, University of Aston in Birmingham; G. Bramley (1993) Land use planning and the housing market in Britain: the impact on house building and house prices, *Environment and Planning A*, 25, 1021-51.

[87] Applied Economics, *Residential building activity in Sydney* (2010) <http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0004/18562/GIPA_11_21_Report_Building_Activity_Peter_Abelson_Sept_2010_dnd.pdf> at 22 September 2010.

[88] Ibid 6.

[89] Ibid.

[90] Ibid.

[91] Home buyers won't pay more because they can find cheaper home elsewhere – whether it be an apartment or townhouse in an infill location, older housing stock in an established suburb near the urban fringe or a new free standing house in suburban Queensland or Melbourne.

[92] NSW Department of Planning, *City of Cities: A Plan for Sydney's Future* (2005) 126.

[93] Ibid 133.

[94] Ibid 134,C1.3.1.

[95] NSW Department of Planning, *Metropolitan Development Program 2007/08 Report* (2009) 28.

At best the concept of "orderly" and "co-ordinated" development is well intended, but difficult to implement. At worst, the concept undermines the proper functioning of the market economy, because it encourages planning authorities to overrule the business judgment of the private sector and to assume the pretence that it can dictate where private investment will go.

The planning system should facilitate development where it is economically efficient do so, and planning rules should also seek to prevent development only where it is necessary due to shortfalls in essential public infrastructure, biodiversity and/or heritage concerns.

2.1.3 Public involvement and participation

The objective for "increased public involvement and participation" is dated. The Act certainly provides for increased public participation when compared to arrangements that existed prior to 1980. However, there is not, and cannot be, an ever increasing level of public participation in urban development. There is a point where attempting to increase public participation further effectively requires the nationalisation of private sector urban development activity.[96]

Development approval can be described as a "closed system decision making process."[97] Such a system is characterised by a defined set of stakeholders that can directly influence the outcome of a decision.[98] 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.[99] 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.

This closed system approach tends to exclude consideration of the interests of future residents, neighbouring local government areas and non-resident third parties.[100] This approach becomes particularly problematic when communities are faced with accommodating innovative development proposals.[101]

By their nature, innovative proposals break from traditional existing patterns of development.[102] 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.[103] Growth management and consistency requirements create a presumption against change.[104]

Planning authorities will reduce their own legal risks if they continue to enforce the status quo, but considerable litigation and judicial review if they pursue policies that favour spontaneous or unanticipated changes.[105]

In any event, public participation is now a standard feature of almost all modern natural resource/land management legislation. Most modern legislation contains provisions for public participation without regarding it as such a novel concept that it needs to be spelled out in the legislative objectives.

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[96] For example, the government's reforms to exempt and complying development scaled back the concept of public participation, because in many instances the rights of one person to participate in a development decision may infringe on the right of another person to expect a decision on their development to be made quickly and efficiently in accordance with the appropriate rules.

[97] S Staley, "Markets, smart growth and the limits to policy", *Smarter Growth* (2001) 201-217.

[98] Ibid.

[99] 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.

[100] Ibid.

[101] Ibid.

[102] Ibid.

[103] Ibid.

[104] Ibid,

[105] S Staley and L Gilroy, "Smart Growth and housing affordability: Lessons from statewide planning laws", *Policy Study No 287*, Reason Foundation, Los Angeles.

2.1.4 No respect for property rights

There is no mention of the rights or role that property owners may have in the planning system in the Act's objects.

Institutionally modern zoning presumes that all land uses are illegitimate unless and until local or state government designates them as legitimate.[106] When a development application is made, the applicant is merely asking for the relaxation of a restriction contained in a local environmental plan and does not under current law have any property right to carry out development.[107]

Alternative approaches, for example "natural rights theory," hold that most uses are legitimate until specifically shown to be illegitimate, most often because they threatened the community's health or moral interests or the property rights of their neighbours.[108] This kind of framework allows for greater innovation and change than the existing planning approach in NSW.

The Australian, and in particular, the NSW planning system, combines the regulatory controls of both the United States (statutory zoning) and the United Kingdom (high discretionary development approvals – known as "development control").[109] For this reason, criticisms of both the US and UK planning systems are also relevant to planning in NSW.

The UK planning system, on which NSW law is closely based, has been described as

> ... the last vestige of the post WWII vision of state planning and control still left intact. Indeed, in many ways it is not just intact but enhanced in its powers of control.[110]

It doesn't have to be this way. Alan Evans is Professor Emeritus and Director of the Centre for Spatial and Real Estate Economics at the University of Reading Business School. He is a well-published author on the economics of land use planning. He was the co-author of *Bigger Better Faster More: Why some countries plan better than others*.[111] This paper considers the deprivation of property rights inherent in the UK planning system (which is imitated in this respect by the NSW planning system) and compares it with law in Germany.

The paper does conclude that the German planning system is both complex and comprehensive.[112] However, it is observed that there are three factors that work in favour of development, in comparison to the UK/NSW approach. The first one is a principle which derives from Article 14 (Guarantee of Property) of the *Basic Law* (essentially the national constitution) and is called *baufreiheit* (the freedom to build). The *Basic Law* states that "[p]roperty and the right of inheritance shall be guaranteed," but also says that the "content and limits" of these wide-ranging rights shall be defined by laws enacted by the legislature. In terms of planning and building law, this means that everyone is entitled to a permission to build on their property as long as there is no explicit legal rule against it.

Although this may sound restrictive given the complexity and depth of German planning, it also means that once an area has been assigned a given planning character (e. g. "residential area") the question whether a permission to build will be granted is no longer a matter for discretion by a public official. On the contrary, if the proposed building fits into the plan, permission *has* to be granted and if the local authorities deny it then a court will enforce it.

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[106] 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.
[107] L Stein, *Principles of Planning Law* (2008) 13.
[108] 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.
[109] This issue is discussed in P Cheshire and S Sheppard, "Land markets and land market regulation: progress towards understanding", *Regional Science and Urban Economics* 34 (2004) 619-637, 627.
[110] P Cheshire, "Unpriced regulatory risk and the competition of rules: Unconsidered Implications of land use planning", *Journal of Property Research* (June-September 2005) 22(2-3), 225-244, 228.
[111] A Evans and O Hartwich, *Bigger Better Faster More* (2005).
[112] Ibid 16.

The paper quotes Professor Michael Hauth, an expert on planning and construction law:

> The freedom to build is a part of the constitutionally guaranteed definition of property and ensures the right to build on one's plot of land and to use or realise it. The right to build is therefore not assigned or granted to the property owner by the public law.[113]

The paper observes that a land-use planning system like the UK's *Town and Country Planning Act* (e.g. NSW's *Environmental Planning and Assessment Act*) would be considered unconstitutional and struck down by the German Federal Constitutional Court.

Germany is not alone in this approach. In Pennsylvania in the United States, a line of court decisions beginning with the *Girsh Appeal* in 1969 has given strong recognition to property rights in the context of town planning laws.[114] As a result, Pennsylvania law holds that developers cannot be unreasonably denied the opportunity to construct higher density development in areas where there was a sufficient market.[115] Local government that acted against this requirement could be subject to a "builder's remedy" where developers may be granted injunctive relief in the form of a specific court-mandated authorisation to build on a particular site.[116] A court order of this kind is more than a mere invalidation of a planning scheme; it actually conferred a positive authorisation to build on a specific site.[117] Under the current NSW law it is inconceivable for a NSW court to issue such an order in defiance of a local environmental plan.

The impact of Pennsylvanian property rights law on residential development and housing affordability was assessed in a peer-reviewed academic article in 2004, using New Jersey (which followed a command/control, rather than property rights model) as a comparison.[118] The study found that a Pennsylvania location led to a predicted increase of 20 per cent in the share of townhouses constructed between 1970 and 1990 and an increase of 13 per cent in apartments.[119] The Pennsylvanian approach was associated with a "richer mix of alternatives to [traditional low density] housing development" than the nearby state of New Jersey.[120]

2.2 Alternative objectives for the Act

We submit that planning legislation should be about five key principles.

Firstly, the planning system should support the development of NSW and by so doing provide employment opportunities, permit competition, support business productivity, raise living standards and improve the competitiveness of the state's economy.

Secondly, the planning system should promote of ecologically sustainable development – as defined in the 1992 *Intergovernmental Agreement on the Environment*. The concept of "ecologically sustainable development" requires:

- environmental protection;
- the integration of economic and environmental decision-making;
- inter-generational equity in decision-making;
- the application of the precautionary principle; and

[113] Michael Hauth, *Vom Bauleitplan zur Baugenehmigung*,7th ed.) (2004) 6, translated in A Evans and O Hartwich, *Bigger Better Faster More* (2005) 16-17.
[114] Levine J, *Zoned Out: Regulation, Markets and Choices in Transportation and Metropolitan Land-Use* (2006) 133.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] J Mitchell, "Will empowering developers to challenge exclusionary zoning increase suburban housing choice?", *Journal of Policy Analysis and Management* 23(1): 119-34.
[119] Levine J, *Zoned Out: Regulation, Markets and Choices in Transportation and Metropolitan Land-Use* (2006) 136.
[120] Ibid.

- respect for biodiversity.[121]

Thirdly, the planning system should promote liveable communities, meaning:

- neighbourhoods should be permitted to be diverse in use and populations, with appropriate restrictions on the location of heavy industry;
- people should be free to choose their preferred method of transport, whether it be car, public transport or walking;
- development controls (other than enforcement of building standards) should exclusively deal with the external appearance of the built form, in particular: the relationship between buildings; buildings and the streetscape; and buildings and open space;
- building standards should be about safety and structural integrity based on objective information and assessment.

Fourthly, the planning system should manage development whose public infrastructure requirements exceed the capacity of existing local infrastructure, by providing:

- where public funds are available - a clear mechanism to determine which projects will proceed in accordance with the available public funds; and
- where no public funds are available - a mechanism for a private sector proponent to voluntarily contribute to the costs of expanding the public infrastructure to accommodate the requirements of the development.

Finally, the planning system should promote private investment in the development of NSW by enshrining a respect for property rights as a fundamental tenet of planning law. This means:

- land owners should enjoy, free from legislative intrusion, the right to use and develop their land subject only to constraints objectively justified by principles two, three and four above;
- all decisions made by public officials that deny a land owner the right to develop his or her land must be based on objective information, and where information is inadequate (and the precautionary principle is to be applied) rigorous risk assessment;
- applicants should have the right to seek a review of adverse decisions through a just, quick and inexpensive merits appeal or review by an impartial third party;
- land owners should bear the costs of actions from which they individually derive private benefit and wider community (through the government) should bear the costs of actions involved in the supply of public-good benefits that are demanded by, and benefit, the community;
- changes which may reduce the development potential of land (such as down-zoning and heritage listing) must necessarily lead to compensation to affected land owners for any reduction in the value of land;
- the predictability of decision-making should be improved by dramatically reducing the number and breadth of strategies, policies and guidelines – the only such documents that should be considered are the final policies either approved by the state government or expressly provided for by an environmental planning instrument in relation to a specific area (e.g. a master plan);
- legislation, statutory instruments and policies should be designed so that the vast bulk of development envisaged is capable of being approved without the need for a subjective judgment by a consent authority;
- innovative and non-standard development should not be prohibited merely because it was not envisaged at the time a plan is prepared and should still be capable of being approved without the need for changes to statutory plans – in such cases there is room for some degree of subjective decision-making, although rights to a just, quick and inexpensive review/appeal should remain; and

[121] The *Environmental Planning and Assessment Act 1979* 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*.

- the duplication and inconsistencies between different state government agencies; the state and the commonwealth should be removed.

This means the planning system cannot and should not be about ideology. For example, it should not be about creating communities of economic homogeneity as a goal in itself. It should not require the separation of land uses when the separation is not well justified by objective facts. It should not be the vehicle for reshaping society in accordance with the latest fad. Town planning laws should never be viewed as the central lever to overcome endemic social problems.

As the report prepared for the NSW Treasury says:

> Market forces should guide planning and development but not dominate it. Councils should use planning controls to meet specific environmental objectives but be cautious about using them for social engineering objectives (underlining added).[122]

2.3 The statutory role of the Minister for Planning

Section 7 of the Act gives the Minister for Planning responsibility for

> ... promoting and co-ordinating environmental planning and assessment for the purpose of carrying out the objects of this Act and, in discharging that responsibility, shall have and may exercise the following functions: ...
>
> (c) to promote the co-ordination of the provision of public utility and community services and facilities within the State,
>
> (d) to promote planning of the distribution of population and economic activity within the State,
>
> (e) to investigate the social aspects of economic activity and population distribution in relation to the distribution of utility services and facilities ...

This role for the Minister does not recognise any role for market forces. It instead assumes that the Minister is solely responsible for the planning of population distribution and economic activity within NSW.

The 1970s was an era where, in public policy circles, it was still a credible proposition that government could determine the locations and scope of population growth in different regions. This thinking led the Whitlam Government to embark on ambitious, expensive and spectacularly unsuccessful schemes to direct population growth to particular localities.

In 1973 Albury-Wodonga and Bathurst-Orange were designated as growth centres. It was said that Albury-Wodonga would become a second Canberra. Neither became the great inland centres envisaged by the Whitlam government.[123] It is the most notable failure of planned/forced population growth.

The *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy* ("the Metropolitan Strategy) said that Sydney will need an extra 640,000 new homes between 2004 and 2031. This was based on the assumption that there would only be 980,000 extra residents added to the city between 2006 and 2031. However, revised population figures issued in October 2008 said that at least an extra 1.4 million residents will now be added in the same period.[124] This figure is almost 50 per cent higher than the 2005 plan.[125]

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[122] Applied Economics, *Residential Building Activity in Sydney An Overview and Seven Case Studies: Prepared for NSW Treasury* (2010) 7.
[123] For example, it was planned to increase the population of Albury-Wodonga to 300,000 by 2000. Currently the population of both cities is well under 100,000.
[124] NSW Department of Planning, *New South Wales State and Regional Population Projections, 2006-2036: 2008 release* (2008).
[125] The Urban Taskforce estimates that more than 930,000 new homes will now be required by 2031, although we note that the NSW Government has retained its policy goal for only 640,000 new homes, despite the increased population pressure.

The dramatic escalation in Sydney's population forecasts illustrates the unreliability of strategic plans that stretch out more than a year or two into the future. However, these long-term plans, as wrong as they invariably are, have a profound impact on cities because there is a tendency to prohibit anything not required by the strategy. If the strategy underestimates the required housing - and housing growth in excess of the strategy has prohibited by a statutory instrument – a shortfall in supply arises and housing becomes less accessible and less affordable.

Effective demand for housing by home-buyers is determined by a whole range of variables, including employment, the availability and cost of finance, and expectations of the rate of return from alternative investments.[126] These issues also affect the supply side. Forecasts on the supply side are also impacted by the lack of consistent and complete data on land supply in the pipeline (particularly infill land), uncertainty about the rate of conversion from raw land to serviced lots and actual dwellings and the production capacity of the construction industry.[127]

It is not possible for the government to dictate population growth and distribution in defiance of above factors.[128] It is not possible for government to produce strategies which can accurately anticipate these inputs more than one or two years in advance (and even then the projections are unreliable due to the variability of market conditions). It's also not possible to anticipate these factors five, ten or twenty years in advance. Yet the current planning system has a tendency to prohibit, by statutory instrument, all that is outside the strategy, suggesting a naive belief in the accuracy of the crystal ball used to prepare such strategies.

For example, in 2008 the Urban Taskforce criticised elements of the draft local environment plan for Lane Cove for not taking sufficient advantage of opportunities to provide pedestrian friendly compact living communities around public transport nodes. Lane Cove Council Council's defence for the failure to permit greater residential growth around public transport and town centres was that the plan "was required to be prepared in order to satisfy residential and employment growth targets under the Metropolitan Strategy for Sydney".[129] This is the dominant view by councils and even key officers within the Department of Planning. Planning authorities believe that they can reliably predict the future and will prohibit activities they regard as unnecessary as a matter of course. Regretfully, the development activities that are prohibited, with the benefit of hindsight, often subsequently turn out to have been necessary. This necessitates time-consuming and politically contentious changes to the law (rezonings) to accommodate specific projects as an almost routine feature of the planning system.

We would propose that section 7, relating to the role of the Minister, be simplified to remove matters that do not require explicit statutory authorisation (e.g. the carrying out of research), recognise the limitations of government power and to better reflect the market nature of the economy.

[126] National Housing Supply Council, State of Supply Report: Report 2008 (2009) 9.
[127] Ibid.
[128] As is envisaged by the existing section 7(d) of the Act.
[129] Correspondence from Mr Peter Brown, General Manager, Lane Cove Council to the Urban Taskforce 18/11/2008, ref: 41811/08.

3. The economic test

3.1 Explaining the economic test

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, analysed the relationship between the planning law and competition in his work: *Principles of Planning Law*, published by Oxford University Press.[130] The following overview draws on his analysis.

Section 79C(1) of the Act provides that

> 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: ...
>
> (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, (emphasis added) ...

Thus, the law currently provides that the consideration of "economic impacts" is a necessary part of the development assessment process. This begs the question: if a new development is proposed for an area and it will compete with existing development, is there an obligation for the economic impacts of this competition to be considered? For example, if a new video store will place market pressure on the already over abundant existing video stores, does the planning system have a role to play?

The underlying principle in relation to the relevance of economic considerations in planning is that:

> Town planning is not concerned with general economic regulation or the rationalisation of product; rather it is concerned with the pattern of land use and with promoting consistency between various uses of land. Town planning provides a fetter on our free enterprise market system, but it is not designed to replace that system with a form of centralised decision-making.[131]

Originally, in NSW, courts and tribunals followed this approach when applying town planning laws. For example, in 1958 it was stated by Justice Sugarman that

> [a]ttempts to regulate the number of businesses of some particular kind to be carried on in an area having regard to the assumed needs of its population may be found to amount to an essay into the field of general economic policy of a kind which was not intended to be entrusted to local councils.[132]

So far so good. In 1962, however, Justice Hardie found that

> ... [T]he area in which the subject land is situated is adequately – in fact more than adequately – supplied by existing services stations; that the capacity of these stations, most of which are modern and up-to-date, is only partially used, and that the demands in the area ... can be met for the present and reasonably foreseeable future by the existing service stations.[133]

The use of the planning system to prevent excessive concentrations of a given development type in an area was also applied in the context of factories in 1965.[134]

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[130] L Stein, *Principles of Planning Law* (2008) 178-187.
[131] *Shell Company of Australia Ltd v City of Frankston* (1983) 8 APA 126, 135, cited in *Pacific Seven Pty Ltd v City of Preston* (1986) 24 APA 56; *Eighty-First Killenaule Nominees Pty Ltd v City* (1987) 31 APA 32.
[132] *Neptune Oil Pty Ltd v Ku-ring-gai Municipal Council* (1958) 3 LGRA 316, 321 per Sugarman J.
[133] *Total Oil Products (Aust) Pty Ltd v Sydney City Council* (1962) 8 LGRA 217, 220.
[134] Pioneer Concrete (NSW) Pty Ltd v Hornsby Shire Council (1965) 11 LGRA 310.

The legal relationship between economic consequences of a use and the regulation of competition was clarified in 1979 in a landmark decision by the High Court: *Kentucky Fried Chicken Pty Ltd v Gantidis*.[135] In this case Justice Stephen found that competition issues were relevant to the concept of amenity:

> If the shopping facilities presently enjoyed by a community or planned for in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical or financial causes, and if the resultant community detriment will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning.
>
> It does not cease to be so because of the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However the mere threat of competition to existing businesses if not accompanied by a prospect of a resultant overall effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration (underling added).[136]

This case establishes that a rule that the "mere threat of competition" is not a reason to refuse development permission, but a very significant loophole left open. The loophole says a development proposal that reduces "the extent and adequacy of facilities available to the local community" may be refused. The test, as Justice Stephen articulates, is whether the anticipated reduction in "shopping facilities" will "be made good by the proposed development itself".

Under this case regulation of competition, for its own sake, is not possible under town planning laws, but regulation of competition, as a means of protecting community amenity, *is* permitted.[137]

It is not clear what degree of impact is necessary before there is sufficient negative effect to the community. For example, in one decision, the retrenchment of an existing petrol station's staff was said to result in an overall determinant.[138]

It was stated by Justice Stein in the NSW Land and Environment Court that the economic test required a consideration as to whether the economic effect of a development would upset a retailing hierarchy in terms of the optimal distribution of the various forms of shopping opportunities. He also asked whether or not the proposal would "destabilise the economic viability" of other shopping centres".[139]

In the seminal case of *Fabcot Pty Ltd v Hawkesbury City Council*[140] Justice Lloyd explained how courts should use the *Kentucky Fried Chicken* principle when applying NSW planning law:

> The *Trade Practices Act 1975* (Cth) and the *Fair Trading Act 1987* (NSW) are the appropriate vehicles for regulating economic competition. Neither the Council nor this Court is concerned with the mere threat of economic competition between competing businesses. In an economy such as ours that is a matter to be resolved by market forces, subject to the *Trade Practices Act* and the *Fair Trading Act*. It is not part of the assessment of a proposal under the *Environmental Planning and Assessment Act* for a consent authority to examine and determine the economic viability of a particular proposal or the effect of any such proposal on viability of a competitor ...
>
> It seems to me that the only relevance of the economic impact of a development is its effect 'in the locality'; that is to say, in the wider sense described in *Kentucky Fried Chicken Pty Ltd v Gantidis* (underlining added).[141]

The NSW Land and Environment Court case turned on a predecessor provision to the current section 79C. The Court went on to block a new supermarket on the evidence of an expert witness that there

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[135] (1979) 140 CLR 675.
[136] *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675, 687 (Stephen J). Gibb, Mason and Aickin JJ concurred.
[137] *Connelly J in Zieta No. 59 Pty Ltd v Gold Coast City Council* [1987] 2 Qd R 116; *R v City of Salisbury; Ex parte Burns Philp Trustee Co Ltd* (1986) 42 SASR 557, 559; examples are found in L*ewiac Pty Ltd v Errenmore Pty Ltd and Ors* [1994] QPLR 70; *Zylmans v Council of The Shire of Cook and Anor* [1993] QPLR 28.
[138] *Smith v Brisbane City Council* (1980) 2 APA 72.
[139] *Lakeside Plaza Pty Ltd v Legal & General Properties No2 Ltd (*1992) 76 LGRA 60.
[140] (1997) 93 LGREA 373.
[141] *Fabcot Pty Ltd v Hawkesbury City Council* (1997) 93 LGREA 373, 377.

would be a 10 to 15 per cent decline in non-supermarket trading in the Windsor town centre if the proposal for a supermarket outside that town centre was to proceed:

> ... [T]he out of town, stand-alone supermarket now proposed will to a significant extent break the synergy or nexus between supermarket and non-supermarket shopping in Windsor. To "marginalise" the non-supermarket businesses ... would clearly put at risk the viability of those businesses. The effect would be as described in *Kentucky Fried Chicken Pty Ltd v Gantidis*: The facilities presently enjoyed by the community in Windsor would be put in jeopardy by the proposed development and the resultant community detriment would not be made good by the proposed development itself.

If the facilities in Windsor were being enjoyed so much by the community, why would members of the community stop shopping there? The approach outlined in this case has become the standard way of dealing with new retail developments, in councils, at the Department of Planning and in the Land and Environment Court.[142]

In *Cartier Holdings Pty Ltd v Newcastle City Council*[143] Justice Pearlman (as she then was) reviewed *Fabcot Pty Ltd v Hawkesbury City Council*[144] in the context of revised (and still current provisions) set out in section 79C. Justice Pearlman said that

> ... the phrase 'economic impacts in the locality' is to be understood in an environmental and planning sense. Hence I would agree with Lloyd J in [*Fabcot*] that the economic impact of a proposed development upon private individual traders is not per se a proper environmental or planning consideration... It would be unwise to attempt to categorise the type of economic impact which would properly fall to be considered under s 79C(1)(b), for, of course, each case depends upon its own facts, but it is clear, in my opinion, that the section does not require the consideration of economic impact on individual competitors, except to the extent that any impact upon individual competitors, or competition generally, demonstrates economic impact in the locality as an environmental or planning matter (underlining added).[145]

Those that wish to defend the status quo will usually cite the general rule so clearly articulated by Justice Lloyd, without highlighting the exception equally well articulated by Justices Stephen, Lloyd and Pearlman. In practice the exception is a very broad one, allowing the impact of new retail, entertainment and office development to be considered where there is a risk that existing business/landlord may be impacted.

According to Leslie Stein, author of the *Principles of Planning Law*:

> The test of jeopardy in *Kentucky Fried Chicken* is a resultant overall adverse impact on the extent and adequacy of facilities; it does not mean that the facilities will cease to operate but there is, overall, an adverse effect. It must then be shown that, as a matter of economic analysis impacts can be unacceptable even though they do not put another shopping centre in jeopardy of closing down. ...
>
> In all planning cases in which shopping centres are concerned, the principles of *Kentucky Fried Chicken* will be used as the fulcrum to balance competing interests. Even though competition alone is not relevant it will be examined in detail in order to assess the overall impact on the locality. It will be necessary for the court or tribunal to decide on the level of impact by speculating how many shops will gravitate to the new centre and how many patrons will abandon the existing facilities. The evidence will be that of shopping centre experts who track the expected turnover per square metre and the viability of the existing centre. In the end it is all about competition and nothing more, because it is not possible to determine the exact effect on an existing commercial centre (underlining added). [146]

A difficulty with the test laid out in the *Kentucky Fried Chicken* case is that a planning authority must decide whether there will be numerically more or less retail and commercial premises if the development goes ahead. This in turn will require an economic study to see if the new business will

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[142] For example: *Bongiorno Hawkings Frassetto & Associates v Griffith City Council* [2007] NSWLEC 551; *Woolworths Ltd v Wyong Shire Council* [2005] NSWLEC 400; *GWH Buildings Pty Ltd v Great Lakes City Council* [2004] NSWLEC 557; *Centro Properties Ltd v Warringah Council* (2003) 128 LGERA 17; *Agostino v Penrith City Council* (2002) 123 LGERA 305; and *Jetset Properties v Eurobodalla Shire Council* [2007] NSWLEC 198.

[143] (2001) 115 LGERA 407

[144] (1997) 93 LGREA 373.

[145] *Cartier Holdings Pty Ltd v Newcastle City Council* (2001) 115 LGERA 407 [34].

[146] L Stein, *Principles of Planning Law* (2008) 186.

undermine the viability of existing businesses. If studies show this to be a risk of development, the development can be refused because there will (allegedly) be less (not more) businesses in the area if the development proceeds. Case study 3 in the appendix sets out just how complex the routine process of assessing for competitive impact is.

We do not argue that the test is an incorrect application of the law as it stands. We argue the law is wrong and should be changed. The issue is not the numerical amount of retail and commercial premises in the area. One big supermarket can put out of business two smaller supermarkets. Is that bad? Not if the smaller supermarkets are out of business because they were more expensive, shoddily run, had little investment and generally offered poor service. By going out of business the land occupied by the inefficient small supermarkets becomes available for re-development. It's possible a new competitor to the big supermarket may arise. Or some other attractive service for the local community that is able to compete on its own merits may be set up (for example a higher end gourmet food store, which competes on quality, rather than price). The benefits of competition are visible through good services, efficient pricing, innovation and investment. These things cannot be accurately measured by any legal test.

Competition may be present even if there is only one business in an area. The key issue is whether it is easy for rivals to be set up. The threat that other businesses may establish themselves will often be sufficient incentive for a business to offer goods, services and value to its customers.

The *Kentucky Fried Chicken* approach fails to acknowledge:

- the development (or threat) of new property assets competing with existing property assets is an inherently positive thing for society, that should be encouraged for its own sake; and
- that a shopping centre will not necessarily cease trading merely because a business or businesses experience financial difficulties due to competition.[147]

The above discussion has explained how the statutory economic test allows a development application to be refused on the basis that it will put competitive pressure on businesses located in a centre and therefore (supposedly) put the provision of services in a centre at risk.

We believe that the planning system is not equipped to assess the costs and benefits of increased competition, and that any attempt to do so is likely to result in inefficient economic outcomes and will disadvantage ordinary consumers. For this reason we have long argued that section 79C should be amended and a provision inserted into Part 3A so as to exclude consideration of this issue in the development assessment process. We have also argued that rules regarding rezoning decisions (through section 117 directions and/or changes to Part 3 of the Act) should be revised to prevent similar problems arising in that context.

3.2 NSW's proposed Competition SEPP

3.2.1 Considering loss of trade in development assessment decision-making

In July 2010 the Department of Planning publicly exhibited a draft *Competition State Environmental Planning Policy* ("the Competition SEPP").[148] This document includes a proposed new clause which related to the "economic test" discussed above:

> **9 Loss of trade etc for other commercial development**
>
> (1) The likely impact of proposed commercial development on the commercial viability of other commercial development is not a matter that may be taken into consideration by a consent authority for the

[147] Channel nine is still available to the public despite the fact that its owner (Bond Media) experienced severe financial difficulties in the 1980s; the cross city tunnel is still operating, despite the severe financial difficulties faced by its developer (which led to its forced sale in 2007).

[148] <http://www.planning.nsw.gov.au/DevelopmentAssessments/Onexhibition/PreviousOnExhibition/PreviousOnExhibitionDraftPoliciesandPlans/tabid/466/language/en-US/Default.aspx> at 17 September 2010.

purposes of determining a development application under Part 4 of the Act to carry out the proposed development.

(2) However, any such likely impact may be taken into consideration if the proposed development is likely to have an overall adverse impact on the extent and adequacy of facilities and services available to the local community (having regard to the likely impact on existing facilities and services and the facilities or services to be provided by the proposed development).

(3) Likely impacts referred to in this clause include likely loss of trade.

The intent of the authors of clause 9 of the draft SEPP appears to have been to codify the *Kentucky Fried Chicken* case.

Table 1 compares the provisions of the clause with the provisions of *Kentucky Fried Chicken*, *Fabcot* and *Cartier Holdings.* The thrust of each point is the same.

Table 1: Comparison clause 9 of the Draft Competition SEPP with the provisions of *Kentucky Fried Chicken, Fabcot* and *Cartier Holdings*.

	Clause 9	***Kentucky Fried Chicken***	***Fabcot***	***Cartier Holdings***	**Analysis**
9(1)	The likely impact of proposed commercial development on the commercial viability of other commercial development is not a matter that may be taken into consideration by a consent authority for the purposes of determining a development application under Part 4 of the Act to carry out the proposed development.	[T]he mere threat of competition to existing businesses if not accompanied by a prospect of a resultant overall effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration.	Neither the Council nor this Court is concerned with the mere threat of economic competition between competing businesses. In an economy such as ours that is a matter to be resolved by market forces ... It is not part of the assessment of a proposal under the Environmental Planning and Assessment Act for a consent authority to examine and determine the economic viability of a particular proposal or the effect of any such proposal on viability of a competitor...	[T]he economic impact of a proposed development upon private individual traders is not per se a proper environmental or planning consideration ...	Clause 9(1) establishes a general rule which applies in relation to **commercial development**, while *Kentucky Fried Chicken* applies to **businesses** generally, *Fabcot* refers to **competing businesses** and *Cartier Holdings* refers to **private individual traders**. Clause 9(1) refers to the **likely impact** on **commercial viability**, while *Kentucky Fried Chicken* and *Fabcot* talks of the **mere threat of competition** and *Cartier* speaks of the **economic impact**.

	Clause 9	***Kentucky Fried Chicken***	***Fabcot***	***Cartier Holdings***	**Analysis**
9(2)	However, any such likely impact may be taken into consideration if the proposed development is likely to have an overall adverse impact on the extent and adequacy of facilities and services available to the local community (having regard to the likely impact on existing facilities and services and the facilities or services to be provided by the proposed development).	If the shopping facilities presently enjoyed by a community or planned for in the future are put in jeopardy by some proposed development... and if the resultant community detriment will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because of the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development.	[T]he only relevance of the economic impact of a development is its effect 'in the locality'; that is to say, in the wider sense described in *Kentucky Fried Chicken Pty Ltd v Gantidis*.	It would be unwise to attempt to categorise the type of economic impact which would properly fall to be considered under 79C(1)(b), for, of course, each case depends upon its own facts, but it is clear, in my opinion, that the section does not require the consideration of economic impact on individual competitors, except to the extent that any impact upon individual competitors, or competition generally, demonstrates economic impact in the locality as an environmental or planning matter.	Clause 9(2) creates an exception to the general rule in relation to **facilities and services**; for *Kentucky Fried Chicken* it is for **present and planned shopping facilities.** *Cartier* is non-specific. For clause 9(2) the exception is invoked when there is a **likely overall adverse impact**, while the *Kentucky Fried Chicken* applies when situations of **jeopardy**, *Cartier* applies to **any impact**. Clause 9(2) evaluates the impact by reference to **existing facilities and services** and the **facilities or services to be provided by the proposed development**, while *Kentucky* asks whether resultant community detriment **will not be made good by the proposed development itself.** Clause 9(2) speaks of the **local community** while *Kentucky* refers to **a community,** *Fabcot* refers to **the locality,** *as does Cartier.*

	Clause 9	*Kentucky Fried Chicken*	*Fabcot*	*Cartier Holdings*	Analysis
9(3)	Likely impacts referred to in this clause **include** likely **loss of trade**.	... whether that jeopardy be due to **physical or financial causes** ...		upon **individual competitors**, or **competition** generally	Clause 9(3) targets **loss of trade** and other unspecified impacts. Kentucky embraces **physical or financial causes** while *Cartier* relates to, but is not limited to, **competition.**

While different language is used across the three cases and clause 9, the basic principles are clearly identical.

As it stands, the proposed new clause 9 appears to merely preserve the status quo and will do little to stop anti-competitive decisions. In particular, clause 9(2) retains the current anti-competitive loophole which allows local councils to consider the impact of new businesses on the trade of existing businesses.

There is nothing wrong with planning rules that protect the community from a new business development that will generate too much traffic or destroy the visual amenity of an area, but there is something wrong with blocking a new business because it will compete with existing businesses.

Under the existing case law, many new retail outlets have been stopped by local councils, and the Land and Environment Court exercising its merits jurisdiction, because of the risk that they will compete with existing businesses. **We have included a wide range of typical case studies on developments that have been blocked in the Appendix to this submission.** This new state policy will allow this existing anti-competitive conduct to continue. It seems nothing will change.

We draw little comfort from the assurance that the competitive impact of a new business will only be considered when there may be an "overall adverse impact on the extent and adequacy of local community services". This giant loophole is not new; it is copied from the existing law, and it authorises almost all of the anti-competitive decisions already routinely made under the current town planning laws.

It means that any groups of businesses impacted by a new entrant will continue to use planning laws to block the competition, by claiming that increased competitive pressure may drive existing businesses away. This objection is often made and it is difficult to disprove, particularly when most local councils have little appreciation of the importance of competition.

The current situation is untenable, and we hope that real reform would still happen. The current mega-shopping centres littering NSW are not the product of consumer choice, but a result of anti-competitive town planning laws that limit smaller-scale retail competition. As the current shopping centres become increasingly congested and expensive, consumers will demand real reform.

In terms of the specific language, we need to make several points.

Firstly, clause 9(1) has been limited to "commercial development" which has a special definition (in clause 7) and is narrower than the concept of "businesses" or "competitors" in the existing law. **We think that, like the existing case law, any provisions of this kind should simply apply to business activity generally.**

Secondly, we note that clause 9(2) can only be invoked when a development is likely to have an overall adverse impact. A casual reader might assume "likely" to mean more often than not (i.e. more than 50 per cent chance of occurring). However in *Almona Pty Ltd v Newcastle City Council*[149] the Court considered the words

> ... *unlikely* to prejudice the viability of existing commercial centres (emphasis added); ...

The Court ruled that:

> [A] proposed development is permissible *if there is no real chance or possibility* that it will disadvantage or detrimentally affect the life or existence of existing commercial centres (italics added).

So "likely" will mean "any real chance or possibility". This is an extremely low threshold for the invocation of clause 9(2). If clause 9(2) is to proceed the word "likely" should be substituted with the phrase "a high degree of probability".

[149] [1995] NSWLEC 55.

Thirdly, the idea of "overall adverse impact" blocks any effective competition. Competition inherently requires an adverse impact on those who are exposed to it (all businesses are better off in the absence of competition, but the same cannot be said for their customers).

We are disappointed that the proposed clause 9 does little more than codify existing case law. The Department of Planning's main justification for this approach seems to be an assertion that there is uncertainty in the current law, and clause 9 will remove that uncertainty. Department officials appeared to be concerned that ambiguity in the case law was leading to competitive impacts on individual businesses being overtly considered in development assessment even when there was no argument accepted about a reduction in the availability of facilities to the public. This surprised us, because we have not been aware of such a case (covert, unlawful, consideration happens all the time, but changes to the law won't eliminate that).

We think the NSW Department of Planning should be using a Competition SEPP to reform the law, rather than merely codify 31 years of bad law.

In our view, there is a great deal of uncertainty when seeking to develop retail, business and entertainment premises. However, that uncertainty does not arise because of a lack of clarity about the relevant legal principles. The uncertainty arises because there is no objective way a decision can be made as to whether or not new development will lead to a net loss of shopping facilities in a community. The inherent subjectivity of this decision-making process breeds a perception of uncertainty.

That's because (as case study 3 in the Appendix clearly shows) the decisions are based on studies of both existing unmet retail demand and projected future retail demand. Different experts will come to different conclusions, if for no other reason that predicting the future is an extremely uncertain science. These studies have the following inherent problems:

- Any assessment of the demand depends on a series of assumptions and that some assessments can be highly sensitive to the assumptions that are made. It is often not possible to decide which assumptions are correct and as a result, different experts may come to different conclusions about the level of demand.
- Floorspace demand assessments are partially based on population projections. Population projections can be subject to quite significant revisions over time, based on the uncertainty of key inputs, such as immigration levels, interstate and interregional migration, fertility rates, mortality rates, household size and housing supply. Population projections are not intended as predictions or forecasts, but are illustrations of growth and change in the numbers of households and families which would occur if certain assumptions hold. There is no way of measuring the probability of the assumptions' accuracy. For example, recent immigration figures have significantly exceeded the estimates laid down by demographers and were not anticipated in retail studies.
- The Australian Bureau of Statistics copes with the inherent uncertainty of population projection by providing 72 multiple alternative projections (each of which it readily concedes may be incorrect),[150] however the Department of Planning typically releases and relies on a single projection, creating a misleading impression of certainty, when no such certainty exists.
- Floorspace demand assessments are also partly based on the historical behaviours of consumers at given levels of income. The actual levels of income may be more or less than originally projected, and consumer behaviour may change (particularly in response to new technology, formats, competition or services) in ways that are inconsistent with historical averages. The dynamic impact of innovative market activity remains unaddressed.
- The composition of individual households – mainly the balance between households occupied by individuals, family and group households has the potential to significantly change – this will impact on retail consumption patterns over time. For example, in recent years a mini-baby boom has

[150] Australian Bureau of Statistics, 3222.0 - *Population Projections, Australia, 2006 to 2101*.

been underway. This was not anticipated by demographers, and therefore not included in retail studies that pre-dated the boom.

- Assessments of anticipated supply will often be inaccurate because of a lack of consistent and complete data on floorspace supply in the pipeline (particularly infill land), uncertainty about the rate of development and the production capacity of the construction industry.
- The particular needs of new entrants and their willingness to compete head-to-head with incumbent retail players is unlikely to be reflected in any analysis prepared prior to the new entrant seeking to establish themselves in the market.

This uncertainty will be addressed if the planning system refrains from trying to estimate the competitive impact of new businesses on existing businesses. In part, this will be achieved by deleting clause 9(2) from the draft SEPP.

It remains a mystery to us why clause 9(1) is only to be applied to decisions under Part 4 of the Act and not Part 3A (which related to the assessment of large projects, relevantly, commercial, residential and retail projects of value exceeding $100 million). It is an even bigger mystery to us that there is no proposal to ensure that the same kinds of decisions that might be prohibited under Part 4 are not also prohibited in the zoning process (see section 4 below).

3.2.2 Considering economic viability in development assessment decision-making

The proposed clause 8 of the draft Competition SEPP is set out as follows:

> The commercial viability of proposed commercial development is not a matter that may be taken into consideration by a consent authority for the purposes of determining a development application under Part 4 of the Act to carry out the proposed development.

The clause does not have our support in its current form. Indeed, **this clause would be extremely harmful and make the NSW planning system utterly unworkable.**

We have always sought rules preventing consent and planning authorities from demanding proof that a developer's project is commercially viable and second guessing the commercial judgment of a developer.

Our view is consistent with the traditional view of the planning system, which held that a planning authority

> exercises no paternalistic view or avuncular jurisdiction over would-be developers to protect them from their financial follies.[151]

However, this view has not prevailed.[152] For instance, in NSW, the Land and Environment Court has held that a consent authority (or the Court on appeal) may take into account the economic viability of the proposed use of the site in determining a development application, as a matter of the "public interest', even when the applicant had no desire to have such information considered.[153]

In our view, planning policy and law *should* assume that a developer who is prepared to risk their own money on a project, should be entitled to do so, without having to justify their commercial judgment to the public service, politicians or the courts. While clause 8 might well achieve that end, it is far too broadly phrased.

[151] *J Murphy & Sons Ltd v Secretary of State for the Environment* [1973] 2 All ER 26, 31; qualified in *Hambledon and Chiddingfold Parish Councils v Secretary of State for the Environment* [1976] JPL 502.
[152] *City West Housing Pty Ltd v Sydney City Council* [1999] NSWLEC 246 [142]-[143].
[153] *Patra Holdings Pty Ltd v Minister for Land and Water Conservation* [2001] NSWLEC 265 [16]:

As a result **it will achieve many other, undesirable, outcomes**. In particular, it seeks to extinguish *R v Westminister City Council, Ex parte Monahan*[154] which has been applied in the context of NSW planning law by both the Land and Environment Court and the Court of Appeal.[155]

Why is that a problem? *R v Westminister City Council* is a crucial decision. It makes it clear, that under existing planning law, a consent authority is lawfully able to consider whether desirable development is not economically feasible, and apply planning requirements so as to ensure that such development is still able to take place. The current law allows planning authorities to depart from utopian planning visions, in order to ensure that appropriate development is actually financially robust and is able to proceed. **If clause 8 was to be introduced in its current form, a consent authority would be precluded from considering a submission from a developer to modify proposed conditions of consent when the argument is based on the economic viability of proposed development.**

We have urged the Department of Planning to study closely these extracts from the comments of Lord Justice Kerr in *R v Westminister City Council* which articulately and clearly explain why it may be necessary for a planning decision to be influenced by the need to ensure that project is still feasible:

> **Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world.** It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. **Virtually all planning decisions involve some kind of balancing exercise.** A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, i.e., related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation (bold added).[156]
>
> Suppose that an urban authority had a policy of requiring the use of green tiles - which are substantially more expensive than others - in areas of residential developments bordering on the countryside. If a developer who wished to erect an otherwise highly desirable housing estate claimed that this would be uneconomic if green tiles had to be used, then the authority would clearly not be bound to reject his application out of hand. It would be bound to consider it on its merits, although it might well be highly sceptical about the assertion that the economic viability of the project would founder if green tiles had to be used. But if, after proper consideration, this were indeed the conclusion reached on a basis which would not admit of a charge of irrationality, then there could be no question about the validity of a decision which permitted the use of red or black tiles in the circumstances.[157]

As the Court of Appeal has said in the context of cases dealing with an application by a developer to vary a consent condition which precluded car parking charges:

> If a planning authority can impose a condition regulating the circumstances in which [parking] charges can be levied, it would be absurd to suggest it cannot consider the economic impact of imposing or varying such a condition.[158]

The Court also said that

> as is illustrated by the judgment of Kerr LJ in *R v Westminster City Council; Ex parte Monahan* [1989] 3 WLR 408 at 425 ... the imposition of a condition may involve financial constraints on the economic viability of a

[154] [1990] 1 QB 87.
[155] *City West Housing Pty Ltd v Sydney City Council* [1999] NSWLEC 246 [139]; *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [36] (Basten JA with Giles and Santow JJA agreeing).
[156] *R v Westminister City Council, Ex parte Monahan* [1990] 1 Q.B. 87,111 (Kerr LJ).
[157] Ibid 113.
[158] *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [38] (Basten JA with Giles and Santow JJA agreeing).

particular development, which may be of significance in particular circumstances. At the very least, such a consideration will not necessarily fall outside the boundary of "planning" considerations ...[159]

The Court of Appeal's approach was applied in *Health Projects International Party Limited v Baulkham Hills Shire Council*[160] where Commissioner Moore (as he then was) accepted the evidence that the revenue the company was seeking to obtain from paid parking (via a variation to a development consent) was a matter of financial significance for the applicant.

Of course, this case law is also clear that an ability of a consent authority to consider such factors does not necessarily mean that hardship factors, personal to an applicant, will influence every planning decision.[161]

The recent case law on this issue is just plain commonsense and must not be displaced by the proposed clause 8 of the draft SEPP.

[159] Ibid.
[160] [2008] NSWLEC 1477 [25].
[161] *Hill v Blacktown City Council and the Minister Administering the Environmental, Planning and Assessment Act 1979, Pluijmers and Anor v Blacktown City Council and the Environmental, Planning and Assessment Act 1979* [2008] NSWLEC 203 [28]-[29]

4. Planning strategies

4.1 Strategies need to be implemented

In recent years the NSW Government has excelled at preparing strategies, but their implementation has been seriously lacking.

4.1.1 Residential development

Progress in implementing the 2006 Metropolitan Strategy was examined in *Going Nowhere*. Actual Sydney housing supply from 2004 to 2013 will fall well short of the 245,500 dwelling target identified in the 2005 Metropolitan Strategy. The actual number for the 2004 to 2013 period is likely to be between 160,000 and 180,000.

Going Nowhere observes that, without significant reform, the rate of housing construction is likely to increase from current record lows – back to the 2000s average. This is well below the 1990s average, which would be necessary for Metropolitan Strategy targets to be achieved. Returning the rate of housing construction to the 1990s levels requires the current record low rates of housing commencements to be doubled.

The shortfall will be substantial for both greenfield and infill locations.

In greenfield areas, NSW Department of Planning data indicates that Sydney lot production averaged 2,250 from 2004/05 to 2008/09. This rate of lot production is well below the 2005 Metropolitan Strategy's objective level for new housing supply in greenfield areas of 7,000 to 8,000 per annum. The plans for Sydney's North West and South West growth centres have largely gathered dust, with only a handful of the promised 181,000 new dwellings underway.

In infill locations, the Department of Planning worked to short-term targets hidden from the public and the development industry. The Metropolitan Strategy promised 460,000 extra homes within the existing footprint of Sydney by 2031, but the secret targets only allowed for rezoning for 103,000 extra homes in existing areas by 2013. These targets were obtained by the Urban Taskforce through freedom of information laws.

If these secret targets had been met, a third of the way into the strategy we would have only 22 per cent of the promised new homes. The really hard rezoning decisions were secretly deferred into the never-never. The internal targets were set so low that there was never going to be enough housing available to keep up with demand.

On a regional basis the secret targets for the first third of the 2006 strategy were stark:

- in the Northern Beaches, only 2,100 extra homes were to be provided by 2013, a mere 12 per cent of the 2031 goal of 17,300 homes;
- in the Lower North Shore a meagre 5,800 extra homes were to be provided by 2013, only 19 per cent of the 2031 goal of 30,000 homes;
- in the Inner West, just 7,700 extra homes were to be provided by 2013, merely 26 per cent of the 2031 goal of 30,000 homes;
- in the Eastern Suburbs, a paltry 5,700 extra homes were to be provided by 2013, just 28 per cent of the 2031 goal of 20,000 homes;
- in the Central Western suburbs around Parramatta, only 17,500 extra homes were to be provided by 2013, just 18 per cent of the 2031 goal of 95,800 homes;
- in Hornsby, only 3,100 extra homes were to be provided by 2013, 28 per cent of the 2031 goal of 11,000 homes;

- in the North West, just 7,300 extra homes were to be provided by 2013, a derisory 9 per cent of the 2031 goal of 80,000 homes; and
- in the South West, only 6,400 extra homes were to be provided by 2013, a mere 12 per cent of the 2031 goal of 53,000 homes.

The policy commitments of the Metropolitan Strategy that have not been delivered include:

- Housing targets for centres were to be based on sound analysis of housing capacity and housing needs ... there are now upper limits placed on the residential density of each centre which are not based on objective information.[162]
- The range of smaller centres across Sydney, the town, villages and neighbourhood centres were primarily to be planned locally ... instead the number of centres has been locked in at a subregional level and there are prescriptive rules that discourage necessary development in these localities.[163]
- There was to be a detailed Centres Reinvigoration Report by 2006 ... no report was released.[164]
- There was to be business improvement districts declared to make physical improvements to streetscapes ... none declared.[165]
- There was to be increased connectivity, particularly rail transport, to specialised centres ... no major new firm transport plans – for rail or anything else - have commenced for the specialised centres.[166]
- There was supposed to be a review of the *Strata Scheme Management Act* to facilitate the redevelopment of strata titled properties ... no review released.[167]
- Retail activity was to be concentrated in centres, business development zones and enterprise corridors ... there were abrupt changes to the Standard Instrument made just before Christmas in December 2007 – the new rules discourage and limit retailing in business development zones, enterprise corridors and local centres.[168]
- Some types of retail development, such as "bulky goods premises", were still going to be permitted in industrial areas ... those same abrupt changes to the Standard Instrument in December 2007 now prevent any new retail in these areas.[169]
- There was going to be a Stronger Corridors Initiative covering the North Sydney to Macquarie Park and City to Airport corridors ... no such initiative has eventuated.[170]
- There was going to be a land use and development plan for the M5 corridor ... no such plan released.[171]
- There was a promise to implement a Parramatta to City corridor plan ... not implemented.[172]
- Subregional strategies were to designate future renewal corridors through subregional planning ... no corridors designated.[173]
- Housing development was to be concentrated around centres corridors... but the planned program of updating local environment plans is behind schedule and shows no sign of delivering the necessary development potential.[174] In 2006, the government promised that 155 new plans would be in place by 2011, but it has now revised that commitment with a new, less ambitious, timeline for the finalisation of just 67 plans. Of the 12 comprehensive LEPs originally promised for completion by March 2008, only two (Liverpool and Muswellbrook) were finalised. Of the 54 comprehensive LEPs

[162] Department of Planning, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy – Supporting Information* (2005) 96 [B2.1.], [B2.1.1].
[163] Ibid 93 [B1.1.1].
[164] Ibid 98, [B3.1.3].
[165] Ibid 99, [B3.2].
[166] Ibid 102, [B3.4].
[167] Ibid 103, [B3.4.2].
[168] Ibid 104, [B4.1].
[169] Ibid 105, [B4.1.2].
[170] Ibid 109, [B5.1.1].
[171] Ibid 110, [B5.2.2].
[172] Ibid 112, [B6.].
[173] Ibid 114, [B6.2.1].
[174] NSW Government, *City of Cities: A Plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005)120.

that were originally to be in place by March 2009, only three were finalised (Canada Bay, Gosford and Goulburn Mulwaree). None of the LEPs finalised for Sydney delivers on the strategic intent or the specifics of the Metropolitan Strategy, and based on the current Standard Instrument it is highly unlikely that they will do so.

- Subregional strategies were supposed to designate one kilometre wide "renewal corridors" for higher density housing and commercial development following major transport... not one renewal corridor is designated. It's impossible to see how the Metropolitan Strategy will now deliver on its target for over 30 per cent of new housing in existing areas to be in the three most significant corridors covering Parramatta to the City, the City to the Airport and North Sydney to Macquarie Park.[175] The Department of Planning appears to have walked away from the idea of increased development in corridors and have informally replaced it with a 'centres only' approach.[176]
- Extra development will be allowed in new or existing areas with "good services and infrastructure" ... development is heavily constrained by the existing urban form, rather than the capacity of local infrastructure.[177]
- There is supposed to be an average of 7,000 to 8,000 lots per year developed in the North West and South West growth centres over the next 25 years ... only a handful of new homes have been built as a result of the creation of these two growth centres.[178]
- 60 to 70 per cent of new housing is supposed to be in existing urban areas.[179] With negligible house production in the outer suburbs of Sydney in 2007/08 (the most recent Metropolitan Development Program figures), 84 per cent of dwelling production was in existing urban areas.[180] The Metropolitan Strategy itself warns that providing 90 per cent of Sydney's housing needs in existing areas "would put great pressure in Sydney's existing suburbs and character and would potentially further reduce housing affordability".[181]
- The supply of land available for development is always supposed to exceed market demand "to ensure that land values are not unreasonably raised and lower the intended level of development"[182] ... but the supply of land for detached housing in outer suburban Sydney and for medium and high density housing in the inner ring suburbs of Sydney has fallen well short of demand and has contributed to very high land acquisition costs that make new development unviable. The shortfall is acute not only in residential development, but also in retail development. In "economic corridors" stretching from the airport through the CBD to North Sydney there is a shortfall in the supply of zoned land for office use.
- There was supposed to be "fairness" by planning for housing to be concentrated near to, or accessible to, shopping, jobs and services at prices that match the capability of Sydney's residents to pay ... Sydney has become one of the world's least affordable places to live and the planning system is not providing the opportunity for enough new homes to put a downward pressure on prices.[183]
- The NSW government was supposed to identify centres for renewal where underutilised infrastructure will be renewed as a priority ... the government has not designated any areas in any of its 10 draft subregional strategies.[184]
- There was a promise to assess and evaluate Government sites for redevelopment ... a large number of government sites lie idle and underutilised, particularly the airspace of rail corridors.[185]
- There was a promise to "address economic competitiveness with a focus on private enterprise as the main economic driver in a competitive economy" ... but ministerial orders were issued in July 2007

[175] Ibid 114 [B6.2.].
[176] Ibid 114, [B6.2.1].
[177] Ibid 120
[178] Ibid 133 [C1.1.].
[179] Ibid 134,[C1.3.1].
[180] NSW Department of Planning, *MDP Report 2008/2009*, 79.
[181] Ibid 133.
[182] Ibid 123.
[183] Ibid 120.
[184] Ibid 143 [C3.1].
[185] Ibid 144,[C3.1.4].

which undermine the operation of a competitive free-market economy in the provision of retail services to the public.[186]

- There was a promise that new employment lands will be strategically located close to the labour force and linked into the transport network ... yet the overwhelming bulk of the 11,000 hectare Western Sydney Employment Lands Investigation Area, with its potential for $2 billion in employment land development, still lies idle.[187]
- There was a promise that white collar jobs would be permitted to help renew old industrial areas ... but the December 2007 changes to the Standard Instrument prevent office development in light industrial areas.[188]

While the 2005 Metropolitan Strategy was not perfect, it was a reasonable document. **Most of the problems with urban planning in Sydney do not lie in the text of the Metropolitan Strategy, but in the failure of the Department of Planning and local councils to properly implement it.** Given this, we are concerned that the bulk of the *Metropolitan Strategy Review: Sydney Towards 2036*[189] ("the discussion paper") is focused on re-writing the Metropolitan Strategy rather than identifying and responding to the failure in implementation.

In the Hunter, the Lower Hunter strategy has been seriously undermined by the NSW government's admission that its approvals of the 7,200-home Huntlee New Town and the Catherine Hill Bay projects were invalid based on technical flaws in the approval process.

4.1.2 Employment lands

The Metropolitan Strategy set an overall target of 4,000 to 7,500 additional hectares of employment land. Since the Metropolitan Strategy was finalised only 2,300 hectares of industrial land has been zoned in the outer region, the area best placed to provide new employment lands.

There is a clear need to plan for the release of significant additional employment lands if the Metropolitan Strategy's goals are to be met, yet work on the promised "rapid release" of 11,000 hectares of employment land known as the Western Sydney Employment Lands Investigation Area has stalled.[190]

The Employment Land Development Program has not been established, as promised in the government's March 2007 action plan.[191] Similarly, the promised "annual report" on employment lands has never been published and the promised Employment Lands Ministerial Advisory Committee has not been set-up.

4.2 Integrated Land Use and Transport planning package

Local Planning Directions issued under section 117 of the Act in July 2007 state that

> A draft LEP shall locate zones for urban purposes and include provisions that give effect to and are consistent with the aims, objectives and principles of:
>
> (a) Improving Transport Choice – Guidelines for planning and development (DUAP 2001), and
>
> (b) The Right Place for Business and Services – Planning Policy (DUAP 2001).[192]

These two documents are clearly very important.[193]

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[186] Ibid 40.
[187] Ibid 40.
[188] Ibid 67, [A1.9.1].
[189] NSW Department of Planning, *Metropolitan Strategy Review: Sydney Towards 2036: Discussion Paper* (2010).
[190] NSW Treasury, *Budget Paper No. 3 – Budget Estimates 2008-2009*, 17-5.
[191] NSW Department of Planning, *Employment Lands for Sydney: Action Plan* (2007).
[192] *Local Planning Directions*, Direction 3.4(4) issued Section 117(2) of the *Environmental Planning and Assessment Act 1979*, direction issued 19 July 2007.

4.2.1 Definition of centres

Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development describes a centre as

> containing the highest appropriate densities of housing, employment, services, public facilities within an acceptable walking distance - 400 to 1000 metres - of major public transport nodes, such as railway stations and high frequency bus routes with at least a 15 minute frequency at peak times.[194]

Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy identifies preferred locations for large-scale office development and higher order retail, entertainment, commercial and public facilities.[195] Since then the list of major centres in the ILUT has been superseded by the list of strategic centres set out in the 2005 Metropolitan Strategy.[196] This strategy defines 25 current centres and eight emerging strategic centres as part of the NSW Government's 25 year strategy.[197] No specific process is identified for the designation of any further emerging strategic centres in the future.

A list of smaller centres ("local centres") across Sydney is also being identified for additional jobs and dwellings over the life of the Metropolitan Strategy.[198] These have been listed in a series of draft subregional strategies.

Given that an estimated 85 per cent of shopping trips made into existing centres are by car, rather than public transport, it is unclear why new retail sites should be exclusively located in areas serviced by public transport. This preludes the location of retail in, say, business parks, where those employed on site might choose to walk to, or catch a shuttle bus to, the local shopping facilities. It would also preclude locating a shopping centre on a major corridor experiencing a high volume of traffic. Shopping centres in such locations can divert cars from the narrow streets of already heavily congested centres such as Burwood and Chatswood.

4.2.2 Investment in centres favoured

The policy sets out to influence investment decisions in favour of centres:

> Centres with a mix of land uses are well established in existing urban areas but their success relies on continued investment. Investment confidence must be cultivated through consistent decision-making that supports centres. This approach enjoys widespread appreciation by the community and business sectors.
>
> Retail, intensive entertainment and other commercial development should be located in town centres, preferably with high frequency rail or bus services. The scale and density of development should match centre public transport service levels. Similarly, the trade area of services, including retail, should match the reach of the public transport network.[199]

The policy's understanding of basic economics is extremely poor. It does not distinguish between regulatory risk and market risk. In a free market economy, investment decisions are risky. The presence of risk does not preclude an investment decision from taking place. Instead, an investor will seek

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[193] They have a curious history, because they were released by the government as drafts, in the *Integrated Land Use and Transport* (ILUT) planning package, which was never formally agreed to by cabinet. Yet these two policies have been formalised and do apply by reason of the above direction, even though the related draft *SEPP 66 - Integration of Transport and Land Use* has been withdrawn.

[194] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport*: *Improving Transport Choice - Guidelines for Planning and Development* (2001) 9.

[195] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 8.

[196] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.

[197] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 23.

[198] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 93.

[199] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* (2001) 27.

returns, consistent with the risk. Only if the risks outweigh the expected retains will the investment decision not take place.

We are not aware of any convincing economic analysis that demonstrates that existing centres are so unattractive to consumers that they will only attract investment with a system of regulatory protection.

The policy goes onto to say that

> concentrating activities lets people make a single trip for a range of purposes.[200]

It is not hard to demonstrate that this statement is not correct. Most importantly it ignores the significant trips that are already going to be taken by most households, irrespective of the concentration of activities in centres.

For example, most households will undertake one or more of the following trips on a daily or weekly basis:

- travelling to work by car, and returning home;
- dropping children at school and picking them up again;
- taking children to sports games; and
- travelling to neighbouring suburbs, or even different parts of the city to visit friends, family.

These trips, by themselves are single purpose. More single-purpose car trips are made necessary by concentrating retail in places that are:

- away from areas (such as business parks, light industrial areas and other centres of employment) where people are working;
- away from major arterial roads such as Victoria Road, Parramatta Road, the Pacific Highway, Anzac Parade, Pittwater Rd, Canterbury Rd and Gardeners Rd where people are already travelling; and
- away from local schools, sports fields and other community facilities.

Even when shopping is combined with some of these trips, more kilometres have to be travelled (because of the need to divert off the direct route).

The Department of Planning says that its 2006 Metropolitan Strategy incorporates the principles of the *Right Place for Businesses and Services* policy.[201] In describing the policy the Department said that it

> aimed to eliminate proliferation of retail in industrial areas, and included locational criteria for emerging retail forms.[202]

This approach is not only bad economics; it reflects an outdated planning approach that fails to acknowledge the modern needs of communities.

This old approach regards the separation and regulation of different land-uses as crucial, rather than regulation of the scale of buildings. This approach is out-of-keeping with modern developments in planning which emphasise that the planning system should concentrate on:

- the "form" (shape/configuration) of a structure; and
- the relationship of buildings to each other, to streets and to open spaces,

rather than trying to micromanage the uses that different pieces of land may be put.[203]

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[200] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport*: *Improving Transport Choice - Guidelines for Planning and Development* (2001) 8.
[201] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.
[202] Ibid.
[203] See A Duany, E Plater-Zyberk and J Speck *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* (2000).

Business parks and business development zones are intended to be centres of employment. These environments function best when people working in these areas have somewhere to go to shop and socialise before work, at lunch time and after work. Preventing retail in these areas:

- reduces opportunities to get a good mix of commercial and retail uses, and
- reduces the opportunity to have transit and pedestrian oriented communities.

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. Pedestrian-oriented amenities such as retail and cafes should not be discouraged or prohibited in any centre of employment, including light industrial zones, business development zones, neighbourhood centres and business parks.

Compact, mixed-used areas, making efficient use of land and infrastructure, make good planning sense. They create more attractive, liveable and economically strong communities. They facilitate a development pattern that supports pedestrian based communities and reduces dependence on motor vehicles by putting employees' daily needs within a short walk of work.

4.2.3 New centres

The Right Place for Businesses and Services acknowledges the possibility that there may be a need for new centres:

> New centres are required in expanding urban areas, and they may also be needed in existing areas because of significant population growth or social trends.[204]

However, the criteria for identifying new centres is unclear, referring back to text on locating development which substantively exhorts consent authorities to locate development in centres, rather than setting out criteria that would assist in creating new centres.[205]

The Right Place for Businesses and Services states that

> [r]etail is essential to the activity and viability of most centres because of its dominance of economic activity and relationship with personal and other services. ... Supermarkets and large specialist and department stores have an important role in anchoring a broad range of shopping and other services and thereby allow single multi-purpose trips. Retail proposals should be accommodated in centres to allow choice and free pedestrian movement. Ideally, a single retail property should not comprise the whole centre so as to allow for new market entrants and competition and avoid the unnecessary creation of new centres. It is particularly important for decision makers to be consistent and fair because of the competitive nature of the industry. [206]

This paragraph talks about the "unnecessary" creation of new centres. It is a policy statement that would be very much at home in a policy document of the former Soviet Union's State Planning Commission (Gosplan). Imagine if we had a law in place to ensure that we had no more petrol stations than 'necessary' or no more video stores than 'necessary'. Who decides what's necessary?

In our market economy, it should be consumers who ultimately decide whether or not new retail facilities are necessary, not State government planners. If an existing retail facility is doing a poor job of servicing consumers, or is charging its tenants excessive rents, which is reflected in artificially high prices to consumers, then an entrepreneur should be free to establish a new competitor retail facility. Our market economy tells us that even the threat of a new facility can be effective in ensuring that incumbent retail property owners invest in their assets to keep them fresh and work to keep costs down.

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[204] Department of Urban Affairs and Planning and Transport NSW, Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy (2001) 8.
[205] Ibid.
[206] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 6.

However, these planning rules protect incumbent landlords from that necessary competitive threat by ensuring there are no "unnecessary" retail facilities.

The policy effectively prevents a new single retail property comprising a whole centre. This is actually anti-competitive rather than pro-competitive for two reasons.

Firstly, in almost all existing incumbent centres there is an existing dominant incumbent retailer occupying the key site(s) with little prospect of other sites becoming available (reinforced by zoning and the drafting of subregional strategies).

Secondly, by definition, private sector proponents are only able to advance proposals for new centres based on their projects *they* are seeking to develop. This policy effectively precludes the private sector from successfully initiating the creation of a new centre under the planning system and therefore leaves the creation of new centres as entirely a matter for the bureaucracy. Given that the bureaucracy has, to date, been eager to 'protect' consumers from any oversupply in retail property assets (which would actually benefit consumers), it is unlikely that they will take the initiative to establish new centres.

In the absence of a designated new centre, you may assume that the private sector might be able to propose a new retail facility, outside of the official centres. But this is prevented too. The policy declares that:

> Development on isolated, stand-alone sites is generally not acceptable. However, alternatives may be acceptable when a net community benefit can be clearly established.[207]

The location of bulky goods retailing is given marginally more flexibility with recognition that it may not always be realistic to locate bulk good retailing in centres:

> When it is not realistic for bulky goods outlets to be in centres, they should be located in one or two regional clusters to moderate travel demand and allow for public transport accessibility. Existing clusters should be reinforced. If justified, new clusters should be in areas that would indirectly support major centres and link to public transport corridor. [208]

The percentage of people who go to a bulky goods retailer on public transport is exceptionally low. Almost by definition, people overwhelmingly (more than 95 per cent) travel to these centres by car. After all, they are bulky goods centres. Have you ever tried to take a new flat screen television home on the train?

To determine whether a new cluster is justified or whether a development proposal is suitable for a cluster location, the following issues, additional to the net community benefit criteria, must be assessed:

- the economic and social impact on existing and planned centres;
- the demand for the amount of floor space for trading bulky goods and the potential impact any oversupply would have on existing centres;
- the degree and potential of short and long-term accessibility by public transport;
- the effect on the demand for travel and impact of increased traffic to the arterial road network;
- where industrial areas are proposed to be used, the operational and access needs of existing and future industry and the impact on property prices for industrial development.[209]

Here again we see the obsession with preventing an "oversupply" and considering the economic impact on existing centres. Additionally there is an inappropriate policy to seek to depress the price of industrial land by prohibiting the conversion of that land to its most efficient economic use.

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[207] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 5.
[208] Ibid.
[209] Ibid.

An oversupply of a particular good or service is beneficial to consumers because it means lower process and better services, as those who are supplying the service compete fiercely by:

- cutting costs (sometimes accepting lower profits); and
- innovating (e.g. new formats, new add-ons services) to distinguish themselves from their competitors.

Sometimes an oversupply can create the sort of shake-up that every industry needs from time-to-time. Complacent businesses can be placed under pressure, and even exit the market, while innovative new businesses take their place.

In the *Choice Free Zone* report by Professor Allan Fels, it was stated that the freedom to reconfigure retailing was responsible for productivity growth in the United States retail sector.[210] In the material cited by the report all the retail productivity growth that occurred in the US in the 1990s was due to new establishments, not existing stores. The majority of retail productivity growth in the US was driven by existing firms that close unproductive stores and store formats and open new ones. Retail productivity growth has been much higher in US than in Australia. In fact, *Choice Free Zone*, given the observed differences in productivity growth in international studies, the potential gains to retail productivity from a more flexible planning system in Australia could reasonably be considered to be in the range of 1 to 1.5 per cent per annum. As a result more flexible planning policies for retail development could add up to $78 billion in extra income for the NSW economy and $296 billion for the national economy.[211]

A centre will not 'die' merely because a particular business, such as an aging stale shopping mall, is unable to compete with a fresh new competitor in a neighbouring suburb. Perhaps the management of the mall may change; the ownership may change. A new owner may choose to invest in the shopping mall, or redevelop the asset to meet a market demand that is not being addressed.

For example, who, 25 years ago, could foresee that the decline of strip shopping would herald a new use for the thousands of retail shops sitting outside of the new shopping malls? The emergence of restaurant districts of Leichhardt, Crows Nest, etc was not predicted, but nonetheless was made possible by the inability of the traditional retailers in these areas to compete with new innovative retail formats.

Academic research has identified that local retailers can and do modify their business model's response to increased competition by (for example) big box retail. For many independent retailers, a key method of competing with large format stores is differentiation.[212] That is, providing specialised products that cater to particular needs in way that a large format store cannot. This necessarily involves providing a higher level of services and product knowledge.[213] In relation to books, in response to increased competition from a large-format store, a bookstore may re-stock based around a highly specialised product line. [214] This approach may benefit consumers by increasing the diversity of books available in the local community. Similarly independent toy stores may respond to a new discount department store by choosing to focus on high quality educational toys. Consumers again win because they kind a wider choice and better service.

The Metropolitan Strategy supporting information says that a 'net community benefit test' applies where local environment plans

> have not yet been modified as a result of subregional planning or other spatial planning which identifies zones for future trip generating activities (retail and commercial) using section 117 [ministerial] directions.[215]

[210] A Fels; S Beare & Szakiel, *Choice Free Zone* (2008) 98-99.
[211] Ibid 3.
[212] K Jones and M Doucet, "Big-box retailing and the urban retail structure: the vase of the Toronto area" *Journal of Retailing and Consumer Services* 7 (2000) 233-247, 246.
[213] Ibid.
[214] Ibid.
[215] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.

Under the 'net community benefit' test (which is able to be applied by a council during a rezoning process):

> proposals must ensure that there will be no detrimental effect on public investment in centres and that private investment certainty in centres is maintained. They should also be able to provide the same performance as a centre, with suitable accessibility to:
>
> • manage travel demand
>
> • utilise public transport
>
> • moderate car use. ...
>
> In determining the net community benefit or cost, the following assessment criteria must be considered:
>
> • the degree to which the policy and its objectives can be satisfied
>
> • the proposed level of accessibility to the catchment of the development by public transport, walking and cycling
>
> • the likely effect on trip patterns, travel demand and car use
>
> • the likely impact on the economic performance and viability of existing centres (including the confidence of future investment in centres and the likely effects of any oversupply in commercial or office space on centres ...)
>
> • the amount of use of public infrastructure and facilities in centres, and the direct and indirect cost of the proposal to the public sector
>
> • the practicality of alternative locations which may better achieve the outcomes the policy is seeking
>
> • the ability of the proposal to adapt its format or design to more likely secure a site within or adjoining a centre or in a better location.
>
> Any proposal to rezone land for trip-generating businesses or services should conform to a local strategy which incorporates the policy objectives.[216]

This test is impossible to meet. The formulation that there must be "private investment certainty in centres" strongly mitigates against allowing any business under the net community benefit test that may increase the market risk to landlords in existing centres. That is, existing oligopolies (to quote the Productivity Commission)[217] are enforced.

In any event, the nominal flexibility of the net community benefit test ends when a local environment plan is modified as a result of a subregional strategy. This means an examination of the Metropolitan Strategy and the (still draft) subregional strategies under it is necessary to see if there is any flexibility for new centres or centre-like development outside of existing centres.

The Metropolitan Strategy identifies eight emerging strategic centres.[218] In the first three draft subregional strategies, for example, there are no future centres identified and no clear process to permit future centres to emerge. The only reference to new local centres in the Metropolitan Strategy (which is reproduced in identical terms in each of the three draft subregional strategies) is the statement that "new centres may be possible if transport services improve". There is no provision in these strategies for new centres to be recognised:

- when it can be demonstrated that existing transport services can accommodate the demands of a new centre; or
- when it is apparent that there is a community need for a new centre even though transport services have not improved; or
- when it can be argued that the increased competition generated by a new centre will be beneficial to consumers.

[216] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 5.
[217] Productivity Commission, The Market for Retail Tenancy Leases in Australia (2008).
[218] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 23.

4.2.4 Consideration by competition inquiries

UK Competition Commission

In the United Kingdom the Competition Commission considered the impact on supermarket competition of planning policies similar to those set out in the ILUT policy package. *The Supply of Groceries in the UK market investigation: Provisional findings report* found that:

> An inevitable consequence of a plan-led system that seeks to meet these overarching objectives is that grocery retailers are not able to open a new larger grocery store in any location of their choice. That is, the planning system will, quite deliberately for the purposes of meeting its objectives, act—to some extent—as a barrier to entry and/or expansion for larger grocery stores..[219]
>
> ...[W]e consider that... for larger grocery stores, the planning system constrains overall entry and also acts in favour of the existing national-level grocery retailers, while controlled land holdings are likely to be impeding entry into a number of areas of high concentration ... [220]
>
> We provisionally find that a combination of one or more of the following features prevent, restrict or distort competition in certain local markets for the supply of groceries by larger grocery stores: ....
>
> ... The planning regime (in particular, PPS6 in England, SPP8 in Scotland, PPS5 in Northern Ireland and MIPPS 02/2005 in Wales), and the manner in which the planning regime is applied by Local Planning Authorities, acts as a barrier to entry or expansion in a significant number of local markets:
>
> (i) by limiting construction of new larger grocery stores on out-of-centre or edge-of-centre sites; and
>
> (ii) by imposing costs and risks on smaller retailers and entrants without pre-existing grocery retail operations in the UK that are not borne to the same extent by existing national-level grocery retailers. [221]

Australian Competition and Consumer Commission

In August 2008 the Australian Competition and Consumer Commission (ACCC) found that competition in grocery retailing was being limited by town planning laws. The *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* concluded that zoning and planning regimes act as an artificial barrier to new supermarkets.

The ACCC found that the limitation on competition was "potentially impacting on competition between supermarkets". The ACCC said that

> [T]he centre's policy... is likely to lead to a greater concentration of supermarket sites in the hands of the [major supermarket chains] ... In particular, such policies, by limiting opportunities for new developments, contribute to increasing the level of concentration in the retail grocery sector.

The ACCC recommended that

> zoning and planning polices, and, in particular, consideration of individual planning applications, should have specific regard to competition issues - specifically, whether proposed developments would assist in facilitating the entry into an area of a supermarket operator that is not presently operating in the area.

Productivity Commission

Also in August 2008 the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords. Its inquiry report: *The Market for Retail Tenancy Leases in Australia* found that zoning and planning controls can:

- limit competition and erode the efficient operation of the market for retail tenancies;
- give extra negotiating power to incumbent landlords and retail tenants;

[219] Paragraph 25.
[220] Paragraph 30.
[221] Paragraph 47.

- particularly advantage owners that have control over large amounts of retail space located some distance from competitors and their tenants; and
- disadvantage businesses that wish to gain access to additional space.

The Commission also found that

> some positive economic rents are extracted from consumers as the overall supply of retail space has been restricted.

This means that consumers are paying the price of restrictive planning laws.

The Commission recommended that:

> While recognising the merits of planning and zoning controls in preserving public amenity, States and Territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.

In support of this recommendation the Productivity Commission's report said that:

> The retail market operates within the confines of zoning and planning controls. While such controls can have merit in preserving public amenity and contributing to the cost-effective use of public infrastructure, their application can limit competition and erode the efficient operation of the market for retail tenancies. They restrict the number and use of sites, can confer some negotiating power on incumbent landlords and retail tenants, and restrict commercial opportunities of others. Zoning and planning controls can particularly advantage owners that have control over large conglomerations of retail space located some distance from competitors and their tenants. They can also disadvantage businesses that wish to gain access to additional space.
>
> In addition, the Commission considers that there is scope to increase retailing opportunities and competition in the retail tenancies market for the benefit of new entrants to the sector and consumers more generally. While recognising the merits of zoning and planning controls in enhancing public amenity and economising on the use of public infrastructure, the application of such controls restrict the availability of retail space and can reduce competition. The Commission therefore suggests that State and Territory governments examine the potential to relax those zoning and planning controls that unduly restrict the availability of retail space and the conditions under which it is utilised. ...
>
> Landlords, in particular those who own larger shopping centres, do not operate in a perfectly competitive market for the provision of retail space. Due to zoning restrictions, high set-up costs and geographic factors (such as the population size that is required to support large retail concentrations), owners of retail concentrations such as shopping centres compete in an oligopolistic fashion with other landlords.
>
> This type of competition suggests that some positive economic rents are extracted from consumers as the overall supply of retail space has been restricted. This restriction leads to a net loss in economic surplus, which can also be viewed as a market failure.
>
> Further, to the extent that some anti-competitive pressure is created by rents paid, this should be diminished given sufficient competition between shopping centres, as centres will compete with one another to attract consumers and tenants. These competitive pressures can be diminished by restrictions on the number of centres that can be built (through zoning restrictions), and if so, appropriate attention should be given to reducing such restrictions. ...
>
> A number of retail developments have also emerged outside of current planning regulations, and potentially offer competition to existing retail centres (box 10.5). The distinction between bulky goods zoning (which allows a certain type of retailing) and general retailing, appears arbitrary, especially if sufficient public infrastructure exists to support retailing at the bulky good sites. ...
>
> Despite this, these types of restrictions do influence the quantity and location of retail space available and are likely to affect competition in the retail market. ...
>
> The Commission recommends further regulatory changes over the medium term (two to five years) in order to lower administration and compliance costs for governments and businesses operating with retail tenancy regulation and explore opportunities to reduce planning and zoning constraints on the supply of retail space."

In response to the Productivity Commission's findings the Federal Government's said:

> The Commonwealth considers that unwarranted restrictions resulting from some planning and zoning regulations can influence the quantity and location of retail space available and therefore competition in the retail market ...Improvements to competition will not only improve the landlord-tenant relationship in shopping centres, but may also have positive flow-on effects for consumers through greater choice and lower product prices.

4.2.5 Withdrawal of the ILUT policies

The ILUT policies severely undermine the operation of a free-market economy in the provision of retail services, office development and entertainment facilities. They discourage multi-purpose trips because they ignore the significant trips that are already going to be taken, by most households, irrespective of the concentration of activities in centres.

The reasons why planning authorities are ill-equipped to assess, predict and provide community needs are summarised well in an academic paper by Dr Sam Staley, Director of Urban and Land Use Policy for the Reason Foundation in Los Angeles and a Senior Fellow at The Buckeye Institute for Public Policy Solutions in Columbus . In *Urban Planning, Smart Growth, and Economic Calculation: An Austrian Critique and Extension* Dr Staley explained that:

> [F]ormal public planning [is] inherently incapable of collecting or processing the information that would be socially relevant. Producers (and by extension planners) are faced with a "knowledge problem," understanding what consumers want and finding the most efficient means for producing those goods and services. Knowledge itself is comprised of two components: articulate and inarticulate (Lavoie 1985). Articulate knowledge represents the tangible expression of wants and preferences. This is the kind of information that could be gleaned from market surveys, focus groups, or interviews with buyers. Moreover, this is information that can be objectively measured. In the residential housing market, objective information could include criteria such as the size of a preferred house in square feet, the number of bedrooms, the size of the lot, access to shopping or work in time or linear miles, etc.
>
> The more important component, however, is inarticulate or implicit knowledge. While consumers may be able to express certain aspects of their preferences, other key ingredients may not be articulable. Often, customers will buy a product based its look or feel and an expectation about whether that product will satisfy their needs. Some of this inarticulate knowledge may be aesthetic; other aspects may be functional. In the real-estate market, how a house sits on a lot may have important impacts on the perception (or expectation) of privacy, or its functionality (e.g., steep driveways in winter climates). Similarly, objective criteria may not be able to capture key aspects of a neighborhood that are important to future residents and consumers.
>
> Actual buying behavior reflects a complex interaction of articulate and inarticulate knowledge. Part of the consumer's decision reflects an assessment of measurable tradeoffs—how much lot is the consumer willing to trade off for the size of a house? Other parts of the decision are inarticulable or unknowable—will this house serve the needs of a growing family?
>
> These are tradeoffs that consumers make based on objective information, experience, expectations about future events, and personal preference. Inarticulate knowledge is the source of most uncertainty in the market and the primary component of its dynamic nature. Articulate knowledge by its very nature can be measured and, in theory, be forecasted with a reasonable degree of precision.
>
> Market prices serve as an intermediating data point that provides summary information to consumers about products (and potential revenue for producers). (Horwitz 1998) The decision to purchase (or produce) a product depends on a synthesis of our understanding of preferences as well as hunches, "feelings," and judgements based on inarticulable information from experience. Economic preferences can only be known when they are "revealed" through their decisions about what to buy and for how much. The inarticulate knowledge cannot be replicated in formal planning, and thus accurate predictions or forecasts about consumer buying patterns are virtually impossible.
>
> Markets, in contrast, are capable of processing this knowledge because of the dynamic institutional context in which consumer information is processed. Money prices provide a commonly accepted metric that intermediates between entrepreneurs and consumers who can act only on partial information. Money facilitates these transactions because it is tangible, has a commonly accepted value (under a stable monetary regime), and is fungible. Thus, movements in prices emerge as reflections of the subjective values of consumers and producers about goods and services available in the market (Horwitz 1998).

> But the information provided by market transactions in not completely transparent. On the contrary, entrepreneurs are constantly looking for market opportunities "missed" by others (Kirzner 1973). Thus, the market process is an institution of discovery, where buyers and sellers are constantly assessing what customers want, what consumers are willing to pay for, and what production methods most effectively and efficiently provide those goods and services (Hayek 1978). The dynamism of the market process allows the revealed preferences of consumers to be incorporated into future decisions on both the producer and consumer side of the ledger. The market is disciplined by the profit and loss system (absent third-party intervention such as a government).[222]

The *Right Place for Business and Services, Improving Transport Choice* and *Local Planning Direction 3.4* should be withdrawn.

4.2.6 A new centres and corridors policy

In April 2009 the Department of Planning released a *Draft Centres Policy*[223] which is apparently intended to replace the *Right Place For Businesses and Services* and *Improving Transport Choice*. The Urban Taskforce has made a detailed submission in response to the draft and we will not attempt to restate our criticisms here.[224] Very briefly, we don't think the draft, as it stands, is a great improvement. If this document was to be finalised without serious revision it will entrench the current situation. It has been more than a year since it was exhibited and we are not confident that the Draft Centres Policy will ever be finalised.

In any event, key paragraphs within the *Draft Centres Policy* would lead to:

- a rationing of floorspace;
  - the draft policy introduces a new floorspace quota system (called "Floor Space Supply and Demand Assessment" – FSDA) which will ration floorspace out amongst landlords across NSW;
- a focus on centres at the expense of corridors;
  - the draft policy abandons the Metropolitan Strategy's equal emphasis on developing centres and corridors and deprives the metropolitan area of important land for commercial and retail uses;
- continuing protection of existing businesses from competition;
  - the draft policy enshrines the obligation of planning authorities to consider the impact of new development proposals on existing businesses;
  - the draft policy cements the practice of prohibiting development for inappropriate reasons (i.e. reasons other than the local impacts of the development);
  - the draft policy attempts to reduce the market risk for developments in favoured locations – strengthening existing oligopolies;
- adoption of an inappropriate "net community benefit" test;
  - the draft policy identifies suitability criteria which (with the exception of the last dot point) are an excellent basis to make rezoning decisions, but then fails to give the criteria a key place in decision-making; and
  - the net community benefit test should be deleted from the document altogether.

However, make no mistake; the Urban Taskforce supports a centres approach, as part of a re-invigorated (pro-competition) centres and corridors policy. This would allow all retail, office and entertainment development to be permitted where infrastructure allows for it and where vehicle kilometres travelled will be reduced.

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[222] Samuel Staley, Urban Planning, "Smart Growth, and Economic Calculation: An Austrian Critique and Extension", *The Review of Austrian Economics*, 17:2/3, 265–283, 2004, 274-275.
[223] NSW Government – Department of Planning, *Draft Centres Policy: Planning for Retail and Commercial Development* (2009).
[224] Our submission is available on the internet: < http://www.urbantaskforce.com.au/attachment.php?id=2518>.

This means the NSW planning system should:

- allow all kinds of retail and business premises in enterprise corridors and renewal corridors;
- allow all kinds of retail and business premises in all kinds of centres
- recognise current bulky goods centres as centres;
- allow retail with operating requirements, akin to industrial uses (i.e. large floor plates), in light industrial areas; and
- allow bulky goods premises in light industrial areas.

4.3 Draft subregional strategies

The ILUT planning package (centres policy) described above means, that the formal identification and categorisation of centres will govern, if when and how new retail facilities are to be developed. The subregional strategies will prescribe a list of smaller centres ("local centres") across Sydney for the life of the Metropolitan Strategy (i.e. until 2031).[225]

Ten subregional strategies have been released by the Department of Planning in draft form. The Urban Taskforce has undertaken a detailed analysis of the North-East, Inner North and East subregional strategies. We concluded that they fail to pay any significant attention to the retail needs of Sydney over the next 25 years. Our submission to the Department shows that the Sydney metropolitan area will need an additional four million square metres of occupied retail space by 2031 - a 50 per cent increase over current levels.

Where retail is mentioned in the draft strategies, it is usually in the context of preventing it or capping it. For example, in the case of local centres, the prescriptive hierarchy proposed, will strangle the growth of vibrant retail communities. The limitation of "villages" to one "small" supermarket and banning supermarkets in "small villages" and neighbourhood centres is outdated 1950s planning. Town centres are limited to one "small" shopping mall – they're banned altogether in other local centres.

Enterprise zones are proposed for a wide range of areas – but the retail is specifically limited – increasing the number of single purpose car trips and unnecessarily contributing to traffic congestion.

Only the strategic centres are free from express rules limiting retail growth. But we firmly believe any plan that tries to provide for all of Sydney's retail growth in the strategic centres is doomed to failure. Perhaps that's why, even in the strategic centres, the draft strategies only provide for a tiny proportion of Sydney's needs over the next 25 years.

Our submission to the Department of Planning shows the North-East, Inner North and East will need another 893,000 square metres of shopfront space over the next 25 years, including 51 new supermarkets. Yet all three draft strategies, taken together, only promise 100,000 square metres of additional shop-front space – and only in Chatswood and Bondi Junction. These subregional strategies only plan for 11 per cent of what the community will need.

In any event, the strategic centres are to be burdened with new rules that have the potential to cripple their capacity to support retail growth in the future. The foreshadowed metropolitan parking policy threatens to impose a command and control approach on parking in and around strategic centres. This will limit the value of strategic centres for any form of retail where the use of a car is considered desirable by the community (bulky goods, large family grocery purchases, etc).

[225] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 93.

4.3.1 Local centres

The Metropolitan Strategy proposed a hierarchy for "smaller centres and places".[226] The draft sub-regional strategies use an amended hierarchy for "local centres".[227]

All of the local centre classifications heavily fence in the capacity for retail services in the local centres to grow in line with community need.

For example, town centres have only one "small" shopping mall, and just one to two supermarkets. Villages may only have a single "small" supermarket. Small villages cannot have any supermarkets at all. This ban was not included in the Metropolitan Strategy released by the NSW Government in 2005.

Neighboured centres are only permitted five shops – and the radius for a neighbourhood centre has been cut back to as low as 150 metres (it was 200 metres in the Metropolitan Strategy).

There is a repeated emphasis on "small" retail facilities.

4.3.2 Application of the local centres hierarchy

The nature of the restrictions on retail inherent in the hierarchy can be illustrated by examining how the hierarchy has been applied by the draft subregional strategies, to everyday communities in the North East, Inner North and East.

Table 1: Proposed "villages" that currently have more than the mandated one supermarket.

Sub-regional strategy	**Village**	**No. of supermarkets**	**Names of supermarkets**
North East	Avalon	2	Franklins, Food for Less
	Balgowlah	2	Franklins, Food For Less
Inner North	Crows Nest	2	Franklins, Woolworths
East	Hillsdale	2	Franklins, Woolworths
	Paddington, Oxford Street	2	IGA. There is also a Woolworths on Glenmore Road - a one minute walk from Oxford Street
No. of excess supermarkets		**5**	

Table 1 shows that at least five of the proposed "villages" already have two supermarkets, which is, in itself, inconsistent with the definition of a village. This is by no means an exhaustive examination. There may be other inconsistencies of a similar kind with other "villages".

[226] Ibid 31.

[227] Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 139; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 139; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 128.

Table 2: Proposed "small villages" that currently have a supermarket not permitted by the proposed Department of Planning classification.

Sub-regional strategy	Small village	No. of Supermarkets	Names of supermarket(s)
North East	Frenchs Forest	1	Woolworths
Inner North	Boronia Park	1	Woolworths Metro
	Coxs Rd, North Ryde	1	Franklins
	Putney	1	IGA
	Willoughby	1	IGA
East	Vaucluse & Old South Head Road	1	Franklins
No. of excess supermarkets		**6**	

Table 2 shows that at least six of the proposed "small villages" already have a supermarket, which is again inconsistent with the definition of a "small village". This is by no means an exhaustive examination. There may be other inconsistencies of a similar kind with other "small villages".

The Urban Taskforce's analysis of the recently released draft North Subregional Strategy is not yet complete.

However, it seems some of the problems with these earlier draft subregional strategies also appear in this draft subregional strategy. For example, Cherrybrook, St Ives and Turramurra are named as villages, which may only have one "small supermarket", but each currently has two supermarkets.

Lindfield and Berowra are named as "small villages" (which are not supposed to have any supermarket), yet both already have a supermarket. The draft subregional strategy is currently being reviewed by the Urban Taskforce and a detailed submission will be made to the Department of Planning.

4.3.3 No new centres, no upgraded centres?

With some limited exceptions, no clear mechanism is given in the subregional strategies on how centres will grow and be upgraded in the hierarchy over the next thirty years. The only new town centre flagged in the first three draft subregional strategies is Mascot Station. Otherwise the classification of the various kinds of centres appears to be based largely on the current condition of the centres (although as tables 3 and 4 show, there are some reductions in retail capability).

There is a brief acknowledgement in the definition of neighbourhood centres, that there may be new neighbourhood centres in the future – but no such acknowledgement for small villages, villages, town centres or strategic centres.

4.3.4 "Draft" sub-regional strategies are already in force

While the Department, in many verbal discussions, has conceded much of the language in these documents is inappropriate, they were not revised. They remained drafts with no particular status until, suddenly, on 1 July 2009, the government elevated these draft strategies to have the same standing to other approved regional strategies in rezoning matters.

This was achieved through the publication of "Director-General's requirements" for the preparation of planning proposals.[228] The Director-General's requirements for planning proposals, says that a request

[228] The Director-General's requirements are set out in 3 (A-D) in Figure 3 of the *Guide to preparing local environmental plans*. The guide is available at this internet location: <http://www.planning.nsw.gov.au/lep/pdf/guide_preparing_local_environmental_plans.pdf>.

for a rezoning, that is inconsistent with draft subregional strategies, will be treated as a "strategy-inconsistent" rezoning. Such a request will face greater hurdles, require more studies and is less likely to be successful. Many "strategy-inconsistent" rezoning requests are now blocked by many councils up-front, on the basis of the Director-General's published requirements.

Hence, as is often the case in NSW planning, draft documents have been elevated to the status of final documents without cabinet-level approval.

4.3.5 Translation of subregional strategies into statutory plans

It has already become very clear that the draft subregional strategies will heavily influence the content of statutory plans.

For example, the *Lane Cove Local Environmental Plan 2009* attempts to faithfully translate the NSW Government's draft subregional strategies into reality. The plan says it is an objective for the Lane Cove town centre

> [t]o ensure that this centre functions as a Town Centre in the hierarchy of Inner North Sub-region retailing.[229]

The "hierarchy of lower North Shore retailing" can only be taken to mean the hierarchy of centres outlined in the subregional strategy along with centre typology and radii. This is nothing less than a defacto incorporation of the subregional strategies, directly into a statutory plan. Courts will only be able to apply and make sense of this requirement by reference to the subregional strategies and are empowered by this provision to apply them direct, when determining development applications.

What this really means, is that growth in this centre will be limited with the objective of maintaining the position of Lane Cove, relative to other centres in the subregion. This approach is not responsive to community needs. In particular, it fails to recognise that restricting development in one locality will not necessarily mean the same level of development will occur in the favoured location. Development opportunities are likely to be lost to the community as a whole.

How will this work? Well, Lane Cove has been defined as a "town centre" under the applicable draft subregional strategy. "Town centres"

> have one or two supermarkets, community facilities, medical centre, schools, etc. Contain between 4,500 and 9,500 dwellings. Usually a residential origin than employment destination. Radii – 800m

Therefore, because Lane Cove already contains its quota of supermarkets, a decision-maker is obliged to have regard to the objectives for a zone, when considering development applications. An additional supermarket would be inconsistent with the objectives for the zone and therefore is unlikely to be approved.

If there was any doubt about interpretation of the reference to the hierarchy, in the objective for Lane Cove town centre, it would be cleared up by reference to the aims of the *Lane Cove Local Environmental Plan 2009*.[230] Clause 1.2(d) says

> in relation to economic activities, to provide a hierarchy of retail, commercial and industrial activities that enable the employment capacity targets of the Metropolitan Strategy to be met, provide employment diversity and are compatible with local amenity, including the protection of the existing village atmosphere of the Lane Cove Town Centre...

In another example, *Burwood Local Environmental Plan (Burwood Town Centre) 2010* says that the plan aims

> to provide a planning framework for the Burwood Town Centre consistent with its status as a major centre ...[231]

[229] *Lane Cove Local Environmental Plan 2009, Part 2,* Land Use Table.
[230] Section 25(3) of the Environmental Planning and Assessment Act makes it clear that if a provision of a local environment plan is genuinely capable of different interpretations, that interpretation which best meets the aims stated in that instrument is preferred.

This suggests that an aim of the LEP is to implement the "summary" for a "Major Centre" set out in table 7 of the *Draft Inner West Subregional Strategy* (page 47).

This table says a "Major Centre" is a

> [m]ajor shopping and business centre serving immediate subregional residential population usually with ***a*** full scale shopping mall, council offices, taller office and residential buildings, central community facilities and a minimum of 8,000 jobs [bold emphasis added].

The subregional strategy, if applied (directly or indirectly) by statutory instruments, has the potential to inappropriately limit competition and consumer choice. The reference to "***a*** full-scale shopping mall" discourages the development/expansion of a competing shopping mall to the existing dominant mall in the town centre.

[231] cl1.2(2)(a)

5. Prescriptive planning controls

5.1 Plenty of prescription, but little certainty

In NSW, generally speaking, all land is zoned under an environmental planning instrument. The zoning for most land is set out in local environmental plans, although, some land will be zoned under state environmental planning policies.

However, these environmental instruments do not merely describe a zone – they may classify the same land in wide variety of ways, and multiple overlays (maps) typically apply to a single parcel of land variously setting out permissible uses, height controls, floorspace ratio controls, flooding constraints, acid sulphate soil issues, etc. In many instances controls in environmental planning instruments can be highly specific and prescriptive. The degree of prescription can sometimes lead people to believe, that a development, that complies with the prescriptive rules in an environmental planning instrument is entitled to an approval.

In *Lloyd v Robinson*[232] 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.[233]

There is no 'right' to an approval, even if, on the face-of-it, an approval complies with the applicable development controls.

The mere fact that a zone might declare a particular use as "permissible" may not be helpful to an applicant. In *BGP Properties Pty Ltd v Lake Macquarie City Council*[234] the then Chief Judge McClellan declared that:

> In the ordinary course, where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development of any site. ... **[T]he fact that a particular use may be permissible is a neutral factor** .. (bold added)[235]

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 t..., 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,
>
> (c) the suitability of the site for the development,
>
> (d) any submissions made ...,

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[232] (1962) 107 CLR 142.
[233] *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].
[234] [2004] NSWLEC 399.
[235] *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] NSWLEC 399 [117].

(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.[236]

For example, in *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd*[237] the Court of Appeal struck down a consent granted by the Land and Environment Court for a residential development that complied with the *Liverpool Environmental Plan*. The basis for the decision was that the 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;
- the existing and likely future amenity of the neighbourhood; and
- necessitated that the development be refused, as a matter of law.

Justice Coles 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.[238]

This means it is open to a consent authority to refuse development approval, even when the application complies with relevant development controls (see also case study 1 in the appendix to this document).

The policy justification for this approach is best summarised by Leslie Stein, a barrister and former Chairman of the Western Australian Town Planning and Appeal Tribunal and former Chief Counsel to the Sydney Metropolitan Strategy in *Principles of Planning Law*, published by Oxford University Press.[239] 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. [240]

The risk that an apparently complying development will be refused is inherent in every development application. This necessitates some degree of "lobbying" for even relatively minor household extensions, by applicants, town planners, architects or (where there is legal uncertainty) lawyers. 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 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

[236] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]
[237] (1996) 90 LGERA 68
[238] *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd* (1996) 90 LGERA 68, 77.
[239] L Stein, *Principles of Planning Law* (2008).
[240] Ibid 127 -129 .

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.[241]

The wide discretion given to planning authorities, and their demonstrated willingness to use it, ensures that applicants and their consultants must actively engage with decision-makers.

It's worth noting that even when development is likely to be approved, there is a risk that conditions may be imposed that frustrates the ability of the proponent to actually carry out the development.[242] An applicant must not only seek for an approval, they must ensure that no unacceptable conditions are imposed.

There is a well established body of case law documenting excessively harsh use of regulation to deprive owners of the benefit of their land.[243] While such actions might be overturned on a merits appeal, in the Land and Environment Court, pursuing this avenue is expensive and time-consuming.

The current planning system in NSW combines the worst of the United States and United Kingdom systems. We have adopted the rigidity of United State zoning laws, but have not accepted their approach to approvals where there is a presumption that – if building codes are met – development that is in-line with a zone will be approved. We have instead picked-up the United Kingdom system of planning approvals, where the consent authority has wide discretion to approve or not approve, but we have overlooked the fact that the UK does not have a rigid system of zoning.

For instance, a developer may prepare a development proposal for a residential flat building within a high density residential zone. The proposal might be designed to comply with development standards contained in the local environmental plan and/or development control plan. Despite this, the planning authority is not obliged to grant consent. The consent authority is provided with discretion as to the application of these standards.

A local environmental plan may state a maximum height or floorspace ratio (FSR), but a developer cannot use these standards with certainty when preparing a development feasibility assessment or making a decision to purchase land.

Unfortunately, under current planning regulation, the situation exists that even if a development proposal complied with, say height and FSR controls, the consent authority is still able to "scale back" the development and apply a lesser height or FSR under the guise of improved design or amenity outcomes. A development standard, stated in a local environmental plan or development control plan, is therefore little more than a statement of development potential and not a guaranteed minimum development potential for that land.

What this really means is that, yet again, the current planning system in NSW does not provide any certainty for an investor. Land acquisition decisions, development potential of land and land value cannot be determined with confidence.

To encourage investment in land development, the developer needs to be provided with a "bankable" statement of development potential. While NSW does not currently provide for such certainty an alternative system can be devised.

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[241] Ibid 132 -133 .

[242] *Finlay v Brisbane City Council* (1978) 36 LGRA 352.

[243] Cited in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63 [145] (Callinan J): *Prentice v Brisbane City Council* [1966] Qd R 394; *Brisbane City Council v Mareen Development Pty Ltd* (1972) 46 ALJR 377; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170. A commission of inquiry (conducted by Bennett QC and established on 3 October 1966 by the Governor in Council of Queensland) inquired into the planning activities of the Brisbane City Council, a planning authority under Queensland enactments. The report of the Inquiry was made on 10 April 1967. It recorded many instances, not only of aggressive, but also of highly unreasonable and unlawful conduct by the Brisbane City Council in imposing conditions on subdivisional approvals or in refusing approvals altogether: see Queensland, Bennett QC, *Report of the Brisbane City Council Subdivision Use and Development of Land Commission*, June 1967 at 68–72; *Finlay v Brisbane City Council* (1978) 36 LGRA 352; *Corsi v Johnstone Shire Council* (1979) 38 LGRA 316; *Carroll v Brisbane City Council* (1981) 41 LGRA 446; *Allsands Pty Ltd v Shoalhaven City Council* (1993) 78 LGERA 435; *Trehy & Ingold v Gosford City Council* (1995) 87 LGERA 262; *Western Australian Planning Commission v Erujin Pty Ltd* (2001) 115 LGERA 24; *Ben-Menashe v Ku-ring-gai Municipal Council* (2001) 115 LGERA 181.

The Queensland planning legislation provides a good model. The *Sustainable Planning Act 2009 (Qld)* includes a number of provisions that would encourage investment.

For instance, the Act 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.

Should the applicant wish 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". Impact-assessable development is more complex.

Western Australia has also adopted a similar approach to residential development. Detailed 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.[244] 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"[245].

The *Environmental Planning and Assessment Act 1979* already provides for something similar to code assessable development, although the concept is described as "non-discretionary development standards" and it is rarely invoked at the present time.[246] 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.[247]

Whilst the Act, does not expressly prevent a consent authority from refusing a development application outright, when it complies with a non-discretionary development standard, such provisions can be inserted into an environmental planning instrument.[248]

An environmental planning instrument may also 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.[249]

The current system of non-discretionary development standards are only applied in relation to a narrow range of development types, predominantly in the not-for-profit and government sectors.

We see wide potential for "non-discretionary" development standards to be used, to remove regulatory risk from development in NSW.

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[244] Western Australian Planning Commission 2002 Planning Bulletin # 55
[245] Western Australia Planning Commission http://www.planning.wa.gov.au/WAPC+statements/769.aspx [Accessed 30 June 2009]
[246] s 79C(2)-(3).
[247] s 79C(2).
[248] 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*.
[249] s 79C(3).

We note that our view is shared by the Federal Government's National Housing Supply Council that has stated that it

> is keen to see planning reform encompass greater strategic direction and more as-of-right development ...[250]

5.2 Development control plans

Development control plans (DCPs) are formalised policies by councils, expressly adopted to guide decision-making when individual projects are assessed. Unlike environmental planning instruments, they are not supposed to be law. Traditionally, development control plans were merely one factor for consideration in a complex decision-making process. It was customary, and expected, that many developments would be approved even when they did not comply with the letter, or even spirit, of a development control plan.

This was common practice, in part, because it recognised that development control plans were not particularly robust documents. They had often been prepared without the involvement of developers and therefore often ignored the needs and requirements of the end-users, of developed property assets. Consent authorities traditionally felt comfortable in approving development contrary to the provisions of a development control plan when they felt a good case could be made.

However, in *Zhang v Canterbury City Council*[251] the NSW Court of Appeal held that

> The consent authority has a wide ranging discretion - one of the matters required to be taken into account is "the public interest" - but the discretion is not at large and is not unfettered. [The DCP] had to be considered as a "fundamental element" in or a "focal point" of the decision-making process.[252]

In that matter, a consent authority dealt with a proposal for a brothel, on the basis that the impact on land affected by the presence of a brothel had to be demonstrated.[253] However, in taking what might be regarded to a lay person as a common-sense approach, the consent authority ran afoul of pre-determined DCP 'standards' which required no such evidence. The Court concluded that this approach could only be supported if there was no "standards" which the decision-maker had to take into account.[254] It was said that

> evidence, or rather the absence thereof, about actual effects [of development], was not entitled to determinative weight, without regard to the presumptive "standard" ....[255]

While *Zhang* was about a brothel, this approach is now routine and has been applied for developments as varied as multi-unit residential development;[256] late night trading of entertainment venues;[257] alterations to individual dwellings[258] and industrial premises.[259]

The Court of Appeal recently re-affirmed the *Zhang* approach and said the case had "authoritatively considered" this issue.[260] In this recent case the Court of Appeal made it very clear a decision-maker was

> not entitled to take the view that the standards set by the DCP were inappropriate for reasons of general policy.[261]

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[250] National Housing Supply Council, *2nd State of Supply Report 2010* (2010) xiv.
[251] (2001) 115 LGERA 373
[252] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 386-7 (Spigelman CJ); Meagher and Beazley JJA concurred. I agree with Spigelman CJ.
[253] *Zhang v Canterbury City Council* [2001] NSWCA 167 [76]; (Spigelman CJ); Meagher and Beazley JJA concurred.
[254] Ibid.
[255] *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 387 (Spigelman CJ); Meagher and Beazley JJA concurred.
[256] For example, see *Longhill Projects Pty Ltd v Parramatta City Council* [2010] NSWLEC 1040 [19]; *Planit Consulting v Tweed Shire Council* [2009] NSWLEC 1383 [57]; *Moore v Kiama Council* [2009] NSWLEC 1362 [51]; *Skyton Developments Pty Ltd v the Hills Shire Council* [2009] NSWLEC 1299 [39].
[257] For example, see *Moonlight City Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 1004 [23].
[258] For example, see *Pietranski v Waverley Council* [2009] NSWLEC 1278 [17].
[259] For example, see *Botany Bay City Council v Premier Customs Services* Pty Ltd [2009] NSWCA 226 [5] (Macfarlan JA).
[260] For example, see Botany Bay City Council v Premier Customs Services Pty Ltd [2009] NSWCA 226 [24] (Macfarlan JA).

It seems odd to us, that a development control plan should be the "fundamental element" in, or a "focal point" of decision-making, when it is merely one of nine specific heads of consideration, nominated by section 79C(1), and each of these considerations is likely to conflict with each other and require a significant balancing act. We clearly cannot disagree with the Court of Appeal as to the interpretation of the existing law, but we do take issue with appropriateness of the law. We think it needs to be changed.

In fact, as the law stands, if development standards in a DCP are not inconsistent with a local environmental plan, they can effectively prohibit a development - even when the local environmental plan allows an application to be made for the development.[262]

It's worth contrasting the differing approaches between NSW and Queensland. In Queensland, the presence of a code creates a legally enforceable right, for a development applicant, to insist on the approval of their proposal, provided it satisfies the code (and the applicant is still entitled to a merit assessment in the event that the code is not complied with). In NSW, it is unlikely that any proposal inconsistent with a DCP will get serious consideration, while there is no legal certainty that even proposals that are consistent with a plan will be approved.

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, commented on the subject of 'standards' in his work: *Principles of Planning Law*, published by Oxford University Press.[263] Stein observed that

> [i]t is always the case that a discretion to vary creates an exception that is applied in limited circumstances; there is a tendency to gravitate to the rule. The origin of the development standard and questions of whether it is based on a sound town planning principle, or whether better standards could be found, are no longer considered in the application of the standard; the standard is free of any philosophy or principle. ... [T]he reason behind the rules should require examination in particular cases.
>
> The tendency towards rigid enforcement of rules expressed as development standards is perhaps the most frustrating and destructive aspect of planning.[264]

No lesser authority than the House of Lords (in its capacity as the highest court in the United Kingdom), in another context, has challenged the kind of rigid thinking that now dominates development assessment in NSW:

> [H]ard and fast rules should have no place when deciding questions of practical convenience. There is a place for guidelines, and for prima facie rules, or residual rules. But circumstances in individual cases vary infinitely. If convenience is the governing factor, then at some point in the system there should be space for a discretionary power, to be exercised having regard to all the circumstances.[265]

In NSW **the fact, that a development control plan can both effectively prevent the goals of a local environmental plan being achieved and considerably devalue land, should be a cause for public concern.**

The solution is straightforward.

Firstly, the state government should use its powers to immediately limit the scope of matters that can be covered by a development control plan (DCP).

Secondly, development control plans should not be proscriptive.

Thirdly, development control plans should only be one factor for consideration in development assessment and that it should be given no special weight above other factors of consideration.

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[261] *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA 226 [27] (Macfarlan JA); Ipp JA and Hoeben J concurred.
[262] *North Sydney Council v Ligon 302 Pty Ltd [No. 2]* (1996) LGREA 23.
[263] L Stein, *Principles of Planning Law* (2008).
[264] L Stein, *Principles of Planning Law* (2008) 76-77.
[265] *Reg v Wicks* [1998] AC 92.

Finally, a development applicant should be entitled to argue, that the requirements of a development control plan will adversely impact on the feasibility of a development envisaged by the local environmental plan. If established, the consent authority should be obliged to modify or set aside the requirements of the development control plan. We note that other jurisdictions allow such arguments to be made.[266]

5.3 Too many extraneous polices

The *Environmental Planning and Assessment Act* confers incredible, wide-ranging powers on regulators to effectively make new laws without any reference back to Parliament. It is one of the most unaccountable areas of government in existence – for example - nowhere else does a draft plan – which lacks any formal approval by government – effectively deprive people of the use of their land or property.[267]

This became an obvious problem from 2003, when in a NSW Court of Appeal decision (*Terrace Holdings Pty Ltd v Sutherland Shire Council)*[268] it was said that

> Nothing in the Environmental Planning and Assessment Act stipulates that environmental planning instruments are the only means of discerning planning policies or the "public interest". For one thing, the government is not the only source of wisdom in this area. A consent authority may range widely in the search for material as to the public interest.[269]

In that case, a local environmental plan that was only in draft form at time a development application was lodged was given significant weight as was other policies not yet finalised by government. This decision has been relied upon on many occasions since to reject development that complied with development controls, because of extraneous draft policies, studies, etc, that have never been formally incorporated into environmental planning instruments or development controls. Case study 1 in the appendix is one such example, but there are many more, too numerous to detail here.

This creates enormous uncertainty. A developer who is looking to undertake due diligence and acquire land in NSW, cannot assume approval will be issued merely because development is permitted under applicable environmental planning instruments and development controls plans. The reality is a developer will not know what studies or polices (draft or finalised) are likely to be thrown at him or her until the site is acquired and the developer is sitting before the consent authority as a proponent. The risk of the development being refused because of unanticipated policies, studies, etc is great and must be factored into any purchase price offered by the developer. This will often result in a purchase price below the expectations of the incumbent land owner (and below the land value derived by reference to the land's existing use). As a result, desperately needed development simply does not take place.

The predictability of decision-making should be improved by limiting the range of government documents that may be considered, in the development assessment process, to strategic planning documents approved by the NSW Government, finalised environmental planning instruments, finalised development controls plans and technical guides approved by the NSW Minister for Planning.

5.4 Environmental planning instruments

NSW's environmental planning instruments are not known for their rationality. You do not need to take our word for it. Consider these comments, set out in a decision of the Court of Appeal just last year:

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[266] "If the board (of variance) can reasonably conclude that a zoning regulation practically destroys or greatly decreases the value of a price of property, it may vary the terms of the ordinance ...": *Culinary Institute of America v Board of Zoning Appeals of City of New Haven et al*, 143 Conn 257, 262 (1956) 121 A 2nd 637 (1956).
[267] *Terrace Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195.
[268] (2003) 129 LGERA 195.
[269] *Terrace Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195. (2003) 129 LGERA 195, 209-210 (Mason P, Speigel CJ and Ipp JA agreeing).

> [I]t has ... 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. ... It may be conceded that there is no obvious logic in permitting a general store, but not other forms of shop. Nevertheless, the promotion of logic and consistency provides no sound basis for a court to rewrite a planning instrument.[270]

Little has been done to address the inconsistency and irrationality of environmental planning instruments despite these comments and other mounting evidence of serious problems.

5.4.1 Narrow range of retail and business uses in lower-order centres

The current Standard Instrument permits local council to allow only a narrow range of retail and business uses, in so-called "lower-order" centres. An example of this problem appears in the *Penrith Local Environmental Plan 2010*.[271] In this plan, neither "retail premises" nor "shops" are generally permitted uses in a village zone. Only neighbourhood shops are permitted, however these are defined to be

> retail premises used for the purposes of selling *small daily convenience goods* such as foodstuffs, personal care products, newspapers and the like to provide for the *day-to-day needs* of people who *live or work in the local area*, and may include ancillary services such as a post office, bank or dry cleaning, but does not include restricted premises (emphasis added).

This means a shop in a village zone (other than on those specifically listed sites) must:

- sell "small daily convenience goods";
- ensure the purpose of the goods are to satisfy day-to-day needs; and
- be directed to people who live or work locally.

In short, shops of any size are banned in neighbourhood centres if their purpose is to sell large grocery items, clothing, music, home-wares or electrical goods.

A florist who wants to set up shop in a neighbourhood centre will have to argue that flowers are a "small daily convenience good" and "satisfy day-to-day needs" of locals. A small shop that sells iPods, mobile phones and personal radios will be banned. As will a baby clothes shop.

Additionally, "business premises" will also be banned in the village zone. This means that locals will be unable to set up a shopfront to engage in a profession or trade that provides services directly to members of the public. This means local communities will be deprived of internet access facilities, hairdressers, video libraries and dedicated banks, post offices and dry cleaners. Why is it okay to have banking services provided as an ancillary service in a neighbourhood shop, but unlawful to open a bank branch as a standalone service?

Where is the public interest in prohibiting these low impact uses? None of these retail and business types are inconsistent with the character of a centre.

Furthermore, the Standard Instrument limits the floor area of all neighbourhood shops, which makes it impossible for even a moderate scale supermarket to be established.[272] This 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 and/or limiting floor area) robs the community of the opportunity to access a wide variety of competitively priced grocery items in their locality.

What this prohibition really means is that people need to drive further to satisfy their general grocery and shopping needs. The argument that limiting floor area and seeking to control the type of goods

[270] Hastings Co-operative Ltd v Port Macquarie Hastings Council [2009] NSWCA 400 [39] (Basten J with Allsop P agreeing).
[271] See also the *Draft Greater Taree Local Environmental Plan 2008*.
[272] cl 5.4(7).

sold from retail premises, by way of plan, does not stand up to scrutiny. Local amenity can be properly and appropriately considered at the development application stage. Limiting retail by way of a statutory plan does little more than protect existing retail landlords.

Retail and business premises should be generally permitted (with consent) in business zones and urban centres. The merits of individual proposals can be considered at the development assessment phase.

5.4.2 Lack of retail and business uses in employment zones

Many statutory plans do not permit "retail premises" and/or "business premises" (other than bulky goods premises, landscape and garden supplies, timber and building supplies) in business development and enterprise corridor zones.[273] For example, *Ryde Local Environmental Plan 2010* does not even allow "business premises" in the business park zone!

Business development zones, business parks and enterprise corridors are intended to be centres of employment. These environments function best when people, working in these areas, have somewhere to go to shop and socialise before work, at lunch time and after work.

Those working in a business development, business park or enterprise corridor zone should be entitled to have lunch in a restaurant, get a haircut or visit a local hotel after work. Surely these uses go hand-in-hand with business activity?

A prohibition on retail premises 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.

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use for employment purposes.

5.4.3 Large format retail unwelcome in industrial zones

Many industrial zones recently published statutory plans to not permit retail premises or business premises in light industrial zones.[274] Sometimes food and drink premises, landscape and garden supplies, service stations, timber and building supplies are permitted, and occasionally, bulky good premises are allowed, but almost always retail premises, generally, are prohibited.

This means large format grocery stores, such as Costco, are prohibited in light industrial areas. Large format business supplies retailers, such as Officeworks, or large format hardware suppliers, such as Bunnings, will often have great difficulty in finding sites. Smaller retail supermarkets, such as Aldi, also end up being excluded.

The 2006 Metropolitan Strategy offered a sensible approach to this issue. The Metropolitan Strategy stated that, for example, retailing for bulky goods might be permitted in industrial areas.[275] There was also a promise of a new approach to reinvigorate employment lands, including flexible zonings for industrial and commercial activities.[276]

However, the statutory plans that have been exhibited since the 2006 Metropolitan Strategy have not implemented this provision. There is potential to include a wider range of retail activities in industrial areas without jeopardising industrial activities.

At the very least, "bulky goods premises" should be added as a permitted use in Zone IN1 General Industrial and Zone IN2 Light Industrial. Costco-style development should also be permitted by permitting "retail premises" as a permitted use, with an appropriate supporting zone objective.

[273] For example, the *Draft Greater Taree Local Environment Plan 2008*.
[274] Ibid.
[275] NSW Department of Planning, *City of Cities: Sydney's Metropolitan Strategy – Supporting Information* (2005) 105, B4.1.2.
[276] Ibid 63, A1.4.2.

5.4.4 Promote multiple-use zoning

The NSW planning system is inherently reluctant to zone for a mix of uses. This is now out-of-keeping with international best practice. The NSW system favours single use zoning, evidenced by the proliferation (in the new standard-instrument compliant plans/draft plans), for example:

- business development zones that do not permit retail premises;[277]
- light industrial zones that do not permit retail premises or bulky goods premises;[278]
- business parks that do not permit retail premises or bulky goods premises;[279]
- neighbourhood centres zones without retail premises;[280]
- village zones without retail or business premises; and[281]
- high density residential zones without retail premises;[282]

Tragically, the Standard Instrument (the document that established the template for local environmental plans), as originally conceived, did not have many of these problems. For example, offices were to be permissible in every business development zone, apartments were to be allowed in every medium density zone and retail premises were to be permitted in every enterprise corridor zone. All this changed when the government gazetted surprise amendments to the Standard Instrument, just before Christmas in December 2007.

Also in December 2007 an amendment was gazetted to the Standard Instrument which changed the definition of shop-top housing. The effect of this amendment was to ensure that only convenience type shops could go in on the ground floor of a mixed-use development (rather than, say, a supermarket) in:

- Zone R1 General Residential;
- Zone R3 Medium Density Residential;
- Zone R4 High Density Residential; and
- Zone B1 Neighbourhood Centre.

The use of multi-use zones should be required - to avoid sterilising land in the event that the market does not seek to develop some or all of the land made available and maximise the opportunities for new retail development.

5.4.5 Zone objectives that stop permissible development

Even if a given development is permissible under the land use table in a statutory plan, it can easily be refused, particularly if it is inconsistent with the zone objectives

Plans prepared in-line with the Standard Instrument[283] requires a consent authority to have regard to the objectives for development in a zone.[284] This makes a zone objective an incredibly important factor in the development assessment process.

The key Land and Environment Court case, which deals with the operation and effect of zone objectives clauses, that frustrate new retail and commercial premises development, is *Almona Pty Ltd v Newcastle City Council.*[285]

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[277] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[278] See for example the land use table the *Draft Ryde Local Environmental Plan 2008*.
[279] See for example the land use table the *Draft Ryde Local Environmental Plan 2008*.
[280] See for example the land use table the *Draft Lane Cove Local Environmental Plan 2008*.
[281] See for example the land use table the *Draft Penrith Cove Local Environmental Plan 2008*.
[282] See for example the land use table the *Draft Lane Cove Local Environmental Plan 2008*.
[283] That is the Standard Instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006*.
[284] Cl 12 of the Standard Instrument, the *Standard Instrument (Local Environmental Plans) Order 2006*.
[285] [1995] NSWLEC 55.

In this matter, Justice Pearlman, of the NSW Land and Environment Court, heard a merits appeal from a decision by Newcastle City Council to refuse an application for the "establishment of bulky goods retail, hardware and retail plant nursery" in Kotara, about seven kilometres from the Newcastle central business district.

The site was zoned as light industrial 4(a) under the *Newcastle Local Environmental Plan 1987*. The site was directly opposite a large shopping complex known as Garden City.

A key issue related to the LEP. One of the applicable zone objectives was to allow commercial, retail or other development only where it is

> ... unlikely to prejudice the viability of existing commercial centres; ...

The permissibility of a proposed development depended upon it being consistent with that objective.[286] The council argued that the development could not satisfy the zone objective and therefore should be refused.

Justice Pearlman rejected the developers' argument that the carrying out of the development would only be inconsistent with the zone objective if there was a real chance or possibility that the proposed development would bring into question the existence of the Newcastle CBD.

Instead Justice Pearlman ruled that the zone objective permitted

> only those developments which do not negatively affect the maintenance and reinforcement of the life or existence of existing commercial centres, of which the Newcastle CBD is, in the terms of the relevant planning instruments, of a higher order or paramount.
>
> [A] proposed development is permissible *if there is no real chance or possibility* that it will disadvantage or detrimentally affect the life or existence of existing commercial centres. In this case, the existing commercial centre in question is the Newcastle CBD which itself enjoys some paramountcy over other centres (italics added).

The proposed development would have placed other businesses in the region, under competitive pressure, including those in the Newcastle CBD. That means, the project did not comply with the zone objective, and the Court refused the development application. On this occasion it did not matter, but analogous provisions existed in the regional environmental plan and the development control plan – and these too, would have stopped the development dead in its tracks.

This case shows how zone objectives, that seek to support the viability of centres, operate to exclude the entry of new businesses that offer any "real chance" of competition with incumbent centre-located businesses. It's worth noting that the decision of Justice Pearlman made it clear that a "centre" is defined by reference to business and commercial zones, not the presence of any particular infrastructure. That is, it is the lines on maps that drive the process, rather than the fundamentals of good planning.

Regretfully, there are numerous examples of expressly anti-competitive provisions of this kind, in both the statutory plans and in the small number of more recent plans, prepared in compliance with the Standard Instrument.
The zonings under the plan set out to prevent competition businesses, located in certain zones, from competing with businesses in "centres". Centres are not defined in the Standard Instrument, so it is presumably the intention to protect the business, located in the "centres" identified in regional and subregional strategies, from competition.

[286] That follows from cl 12(3) of the LEP which obliged the council not to grant consent to the carrying out of development unless the council is of the opinion that the development is consistent with the objectives of the relevant zone. It also follows from the specific wording contained in zone 4(a), cl 3 of which provides that the only development which is permissible with consent is development for a purpose "... which, in the opinion of the Council, is consistent with the objectives of this zone ...".

Business development zone

In the Standard Instrument the zone B5 "Business Development Zone" permits retail, but its objective is to

> enable a mix of specialised retail uses that require a large floor area and warehouse uses in locations which are close to, and which support the viability of, centres.

So developments that do not support the viability of centres, such as those with the potential to attract customers away from centres, will not satisfy the objectives of the zone.

The Department of Planning says this about the intended use of business development zones:

> This zone is generally intended for land where employment generating uses such as offices, warehouses, retail premises (including those with large floor areas) are to be encouraged. The zone supports the initiatives set out in the Metropolitan Strategy *City of Cities: A Plan for Sydney's future* (NSW Government 2005) but might also be suitable for application in urban areas in regional NSW.
>
> The zone may be applied to locations that are located close to existing or proposed centres, and which will support (and not detract from) the viability of those centres.[287]

So, even though the government's strategic policies envisage the use of these zones - in areas with infrastructure sufficiently robust to support offices and retail, businesses that may compete with centres - cannot be established in these areas.

Incidentally, the Zone B5 Business Development was, until recently, marginally broader. Since December 2007 the zone objective has now limited retail to "specialised retail" – a limitation of this kind was not previously considered necessary. It reduces the flexibility that was previously available.

Enterprise corridor

Zone B6 "Enterprise Corridor" exists to promote businesses along main roads and to encourage a mix of compatible uses. It is also intended to enable a mix of employment (including business, office, retail and light industrial uses) and residential uses. However, it is also an objective of the zone to

> Maintain the economic strength of centres by limiting retailing.

So, developments concerned with retail are discouraged in zone B6.

Enterprise corridor zones benefit from passing traffic (over 50,000 vehicles per day).[288] The Department of Planning says that

> [t]he zone is generally intended to be applied to land where commercial or industrial development is to be encouraged along main roads such as those identified by the Metropolitan Strategy *City of Cities: a plan for Sydney's future* (NSW Government 2005).[289]

Enterprise corridor zones have been proposed for Victoria Road, Parramatta Road, the Pacific Highway, Anzac Parade, Pittwater Rd, Canterbury Rd and Gardeners Rd.[290] These areas all have excellent infrastructure which can fully support high intensity uses such as offices and retail development – yet retail development, which may put businesses in centres under pressure, is to be "limited".

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[287] Department of Planning, Practice Note PN06-022, 12 April 2006, "Preparing LEPs using the Standard Instrument: standard zones" 4.

[288] Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 35.

[289] Ibid.

[290] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 31; Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 34.

Light industrial

In December 2007, the objectives for Zone IN2 Light Industrial were amended so that development in these areas must now "support the viability of centres". This means retail developments, such as bulky goods facilities, will be much harder to locate in light industrial areas, even if "retail premises" or "bulky goods premises" are included in the list of permitted uses in a particular local environmental plan.

We are in possession of internal Department of Planning documentation (obtained through a freedom of information request) which says that this change was made at the instigation of the Shopping Centre Council and the Property Council – organisations that represent the interests of major incumbent retail landlords.

The above discussion shows how the Standard Instrument creates areas where businesses are unable to be established if they would provide competition to businesses in established centres.

The anti-competitive provisions of the NSW Government's Standard Instrument should be removed. Namely:

- in a "Business Development Zone" retail, office premises and other uses should be permitted, even if it would provide competition to businesses located in established centres; and
- in "Enterprise Corridor" ; "Business Park"; "General Industrial"; and "Light Industrial" zones, retail and other uses should be permitted even if it would provide competition to businesses located in established centres.

This means, in the Standard Instrument's Land Use Table:

- in a "Business Development Zone" the existing zone objective ("[t]o enable a mix of business and warehouse uses, and specialised retail uses that require a large floor area, in locations that are close to, and that support the viability of, centres") should be deleted and the following instead inserted: ("[t]o enable a mix of retail, business and warehouse uses");
- in an "Enterprise Corridor Zone" the existing zone objective ("[t]o maintain the economic strength of centres by limiting retailing activity") should be deleted;
- in a "Business Park" the existing zone objective ("[t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area") should be amended to omit the words "to meet the day to day needs of workers in the area"; and
- in a "Light Industrial" area the existing zone objective ("[t]o encourage employment opportunities and to support the viability of centres") should be amended to omit the words "support the viability of centres" and the existing zone objective ("[t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area") should be amended to omit the words "to meet the day to day needs of workers in the area".

A direction should be inserted into the Standard Instrument ensuring that additional zone objectives are not inserted by councils to have the same effect as the above deleted provisions.

5.4.6 Prohibition on medium sized and large, retail and business uses

In the Standard Instrument's "Zone B1 Neighbourhood Centre" the zone objective is

> [t]o provide a range of *small-scale* retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood (emphasis added).

A subjective phrase such as "small-scale" should never have appeared in a statutory plan. The term "small-scale" is vague and undefined. True, supermarkets or large format stores range from 1,500 square metres (six checkouts) for a typical Aldi or IGA Supa store to 2,500 to 3,500 square metres (12 to 16 checkouts) for a full-line Woolworths, Coles, Franklins or Superbarn. So, in industry terms, a small scale supermarket will have a floor area of 1,500 square metres. However, some government and local

council planners have been known to argue that a store of 700 square metres is a larger retail establishment – an idea that is rejected by both industry and consumers.

Case study 8 is the perfect illustration as to how a phrase "small-scale" can be used to block development. In that case, a supermarket that was well located in a planning sense (in a dense urban environment, within walking distance of two railway stations) was rejected because there was a risk it was large enough to provide a service to people who did not live in the immediate area. The proposed development was permissible and complied with numerical density controls.

The *Liverpool Local Environmental Plan 2008* takes the extra step of banning shops with a gross floor area of more than 1,500 square metres.[291] So clearly, a supermarket of 2,000 square metres – which would still be small by industry standards – will be prohibited in Liverpool's neighbourhood centres. However, the fact is, even a "supermarket" of 1,000 square metres may be deprived of development consent, because of the objective that supermarket retailing must be "small". There is nothing in the *Liverpool Local Environmental Plan 2008* which says that a supermarket of 1,500 square metres satisfies the "smallness" criteria set out in the neighbourhood zone objectives.

The reference to "small scale" in the zone objective should be removed. By depriving local consumers from full-line supermarkets, locals will be forced to drive further to access lower cost groceries and those that are unable to drive will be deprived of the full-range of groceries that are only available at full-sized supermarkets.

5.4.7 Examples of anti-competitive zone objectives in pre-2006 statutory plans

The vast bulk of the local environmental plans in force today are not prepared under the 2006 Standard Instrument. While in theory all local environmental plans are to be replaced in the near future this has proven to be an extremely slow process. Our expectation is that a majority of the statutory plans, for the foreseeable future, will not be in the Standard Instrument format.

That's why it's important not to overlook the pre-2006 plans.

The first example offered is the zone objective for the business development area zone in the *Shoalhaven Local Environmental Plan 2005* says that the zone is to provide for

> a strategic development area providing both for a variety of uses and for varying combinations of such uses including higher density residential, commercial and tourist combinations but not including ordinary retail uses that would compete with the local retail centre (underlining added).[292]

Even though the zone clearly contemplates high intensity uses – and therefore the infrastructure for the area presumably is capable of supporting such uses –competition with the businesses in the local retail centre is not permitted.

The *South Sydney Local Environmental Plan 1998* says, of the Moore Park Supa Centre site

> development must not be carried out on land to which this clause applies for the purpose of the retail sale of objects which generally have a high return per unit floor area such as perishable commodities, groceries, clothing, alcohol, fashion accessories or other basic consumer goods (with the exception of bulky goods). ...
>
> The Council must not grant consent to an application for consent to carry out development referred to in this clause unless it is satisfied that the proposed development will not detrimentally affect: ... the range of services offered by existing shops located in any nearby business centre (underlining added) ....[293]

The site, which is well located to road transport infrastructure, enjoys considerable patronage from the region, yet is barred from hosting businesses that may compete with nearby business centres. Shoppers

[291] Clause 7.25.
[292]Clause 9, zone 3(g).
[293] Cause 8.

visiting the Moore Park Supa Centre cannot buy their full needs there and must instead make secondary trips to other locations.

In *Canterbury Local Environmental Plan No 140* the zone objectives for one zone with main road frontages are

> to allow low density retail, display, commercial and office development which does not ... significantly compete with or detract from existing retail centres within the Area (underlining added).[294]

So businesses are not to be permitted if they are in competition with businesses located in retail centres, *even* when they are low density retail or office uses.

The *Wyong Local Environmental Plan 1991* provides a centre support zone whose objective says the area is to

> to provide opportunities for development having relatively low traffic-generating characteristics but not high turnover shops and offices that might more properly be located in the Business Centre Zone (underlining added).[295]

So, even if a high turnover shop is able to demonstrate it will have low traffic impacts, it will not satisfy the requirements of this zone objective.

In the *Hastings Local Environmental Plan 1987*, in relation to the neighbourhood centre zone, there is an objective

> to ensure that the neighbourhood centres are viable and not in competition with one another and are compatible with a hierarchy of business centres (underlining added).[296]

The traditional public policy presumption that competition is healthy has been completely turned on its head in the Hastings area!

5.5 Limiting development to preserve a centres hierarchy

Many recent standard-instrument compliant statutory plans attempt to introduce and/or maintain a centres hierarchy. Such provisions typically restrict commerce, limit choice and will often hamper the evolution of centres.

AN example is offered by the *Greater Taree Local Environmental Plan 2010* which states an objective for a neighbourhood centre as

> [t]o strengthen the local community and *support the role of the local centres* (emphasis added).

A local centre has an objective

> [t]o strengthen the local community and *support the role of Taree central business district* (emphasis added).

The commercial core zone has an objective

> [t]o reinforce the role of Taree central business district as *the major regional centre* (emphasis added).

Determining if a development proposal is "supporting" or "reinforcing" the role of centres, means asking whether or not businesses, located in a 'subsidiary' centre, will compete with businesses in a larger centre. Furthermore, including objectives such as these will introduce more uncertainly to the

[294] Clause 8
[295] Clause 10, Zone No 3 (b).
[296] Clause 32A.

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 role of a higher order centre.

In a final example, the *Ryde Local Environment Plan 2010* includes an objective for its mixed-use zone

> [t]o create vibrant, active and safe communities and economically sound employment centres.

Is it truly necessary or appropriate to instruct a consent authority to consider whether a development contributes to the creation of "economically sound employment centres"?

The objective may require a consent authority to refuse a development because it will undermine some other employment centre. The objective may also lead to a consent authority refusing a development application because local traders allege that the development will push them out of business and therefore economically weaken the centre. In our market economy, *consumers* should be in charge. That means that consumers ultimately decide whether or not new retail, entertainment or office development should proceed.

6. Spot rezoning

6.1 An excess supply of zoned land should be encouraged

The Metropolitan Strategy says that

> [t]he supply of land available for development should always exceed market demand to ensure that land values are not unreasonably raised and lower the intended level of development.[297]

This is a very sound principle. Unfortunately, it is rarely followed in practice by decision-makers operating within the NSW planning system:

- when non-statutory strategies are prepared;
- when changes are to statutory plans (environmental planning instruments) are considered; and
- in relation to development applications for office development, retail development and entertainment facilities.

Planning authorities will frequently require for proponents to demonstrate whether there is a "shortfall" in land supply in a particular market or sub-market. Often a proponent will be required to commission a detailed supply and demand analysis/justification to show the existence of a "shortfall".

This requirement is inconsistent with the Metropolitan Strategy and the market-base nature of the Australian economy. The presence of excess supply of zoned land is important to provide competition and choice for business and consumers. For example, a land owner who is sitting on undeveloped land, waiting for a better price, is given disproportionate market power by a regulatory system that prevents other land owners from offering their land for sale in competition.

In the case of retail development, consumers benefit when retailers in one area keep their prices low, to ensure that new competing retail developments are not built to undercut them. Even if zoned land is not actually developed, the threat of competition is often enough to foster efficient economic outcomes and lower prices.

One reason that planning authorities are often reluctant to rezone land is a concern that an excess supply of land will lead to a collapse in land value. However, this concern is misplaced. Prices in the property market are determined by prices in the second-hand market, because at any given point in time, the overwhelming number of properties on the market, are existing stock.[298] A change in the public regulation of the supply of property will therefore affect prices only marginally at first, and that effect will continue and increase only if regulation is maintained for an extended period of time (i.e. many years).[299]

The main legitimate justification for the prohibitions imposed by planning laws relate to the adequacy or inadequacy of publicly provided infrastructure for a particular form of development. Regretfully, planning authorities generally think that the main reason for a ban is that a particular kind of development is "not required" or "already oversupplied". Whether they are right or wrong in a particular case (and they're often wrong) is irrelevant. The issue is, or should be, whether the infrastructure exists or will exist to support the proposed development.

For this reason, a demand and supply analysis should have no relevance in the development assessment process if the appropriate zoning is already in place. In a strategic planning exercise, it should have no relevance if the infrastructure is already in place (as is often the case in infill/brownfield

[297] Department of Planning, *City of Cities: A plan for Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 123.
[298] B Needham and R Lie (1994) "The public regulation of property supply and its effects on private prices, risks and returns", *Journal of Property Research*, 11:3, 199 – 213, 202.
[299] Ibid,.

locations). It may be necessary in strategic planning, when the government needs to make a decision about investing limited public funds in new infrastructure, to facilitate urban development – this is most likely to arise in relation to greenfield development.

Planning authorities frequently consider whether rezonings (such as a nominated annual residential lot release per year) will impact "unreasonably" on other existing or planned land release within the same market or sub-market on the development of centres or employment lands in the vicinity.

It is impossible for a public authority to assess whether an impact is "unreasonable". In the market economy it is in the public interest for competitors to have impacts on each other. This is how prices are kept low and services standards, desired by consumers, are maintained.

There is no way that a government agency or council can decide whether an impact is "unreasonable" and nor should they. That kind of value system belongs in a 1970s Eastern bloc economic system, rather than in Australia in the 21st century.

6.2 Spot rezoning processes

In NSW, even if the standard (instrument) local environment plans are implemented everywhere (which is unlikely) there will still be 34 zones, prescribing in great detail, different uses that may be permitted in different zones. Many of these zones are very similar – for example, it is not entirely clear why an area might be a "business development zone", but not a "light industrial zone", "mixed-use zone" or "enterprise zone".

A development which involves a non-permitted use cannot be approved unless the land concerned is first rezoned. As rezonings are entirely at the discretion of the council, the Department of Planning and the Minister for Planning, "spot" rezoning requests are often arbitrarily denied, or held-up for years.

Spot rezonings usually involve a change of zoning for a single site, or additional permitted uses and/or development controls that relate to the development of that site. The Department of Planning has been trying to reduce the number of spot rezonings. They have said that reducing the number of amended LEPs in the planning process limits the administrative load on councils and the Department. However, the department has recognised that some spot rezonings have planning merit.

This kind of clarity necessarily requires the ability for a landholder to exclusively profit from the use and the development of their land.

NSW has difficulty in attracting investment in recent years, in part because of the enormous discretion wielded by planning authorities. Property rights form the basis of our economic system; investment cannot and will not take place unless there is clear unambiguous title to property. One of the most arbitrary elements of the planning system relates to the spot rezoning process.

There is no recognised application process for a spot rezoning. There is no timeline which councils must adhere to – delays by councils are not even measured in the local government performance reports. Most significantly, there is no independent merits appeal of decisions. Planning authorities are free to arbitrarily refuse rezonings – even those that are clearly consistent with published strategies – without any right of appeal to the aggrieved landholder/developer. This means that any person looking to acquire land in NSW for redevelopment will need to factor in huge regulatory uncertainty if any kind of rezoning is required.

Many spot rezonings are made necessary by the outdated nature of the existing statutory plans. While efforts are being made to modernise statutory plans, the need for spot rezonings will continue to remain strong, for three key reasons.

Firstly, progress on the implementation of the comprehensive plans are tortuous and already massively behind schedule. We are not confident that these plans will be completed in a reasonable timeframe.

It would be a mistake to rely solely on the new comprehensive plans as a mechanism to reform the planning system, because frankly, we do not think many of these plans will ever be finalised.

Secondly, even when plans are finalised they don't necessarily deliver what was promised at the beginning of the process.

For example, Ryde Council has been allowed to finalise the Ryde *Local Environmental Plan 2010* to replace the embarrassingly out-of-date *Ryde Planning Scheme Ordinance*.[300] Instead of a 1979 planning ordinance, Ryde now has a shiny modern looking plan. However, in truth, there has been very little actual modernisation going on. The process has been divided into three stages. The apparently contemporary plan is merely stage one, the real reform required to update the plan won't happen until stage three. We are not convinced that stage three will happen quickly, if it all. Stage three will require Ryde Council to make politically tough decisions and we're not sure that they will be prepared to do that. Ryde council will free themselves of the ignominy of having a 1979 planning ordinance, but without the tough planning decisions.

Another example is Liverpool's recent finalised local environmental plan. Years after the Liverpool to Parramatta Bus Transitway was finalised, we see that much of the adjacent land is still zoned for low density residential development. The principles of the much promised transit orientated development have not been fully implemented.

Thirdly, the statutory plans are truly not looking forward 10 or 20 years. We are told that each plan, once finalised, will be updated every five years, so only the next five years' needs to be addressed. Given that many existing statutory plans have gone for decades without being reviewed, and the current reviews are taking many years to complete, we are sceptical that their promised subsequent five year reviews will happen. It seems likely that whatever statutory plans come out of the current process will, generally speaking, be there for another decade or two. Hence they will soon be out-of-date. The time taken to prepare them (and the rapidly evolving market conditions) suggests that many will be outmoded by the time that they are finalised.

Fourthly, there is often no logic or coherence to the restrictions and prohibitions set out in statutory plans. A recent decision the NSW Court of Appeal said that "a search for logic and consistency within planning instruments is often doomed to fail".[301]

Despite the importance of spot rezoning, local councils are frequently obstinate and difficult when progressing requests by proponents for rezoning. Often these requests are entirely consistent with State and regional strategic directions, but nonetheless, fail to attract the necessary consideration by councils.

There needs to be more flexibility in this system. This is particularly important when the potential for development is identified outside the technical limits of a given zone, but nonetheless, is consistent with state, regional and sub-regional strategies.

Some interstate jurisdictions are more flexible about approving development outside of an existing statutory plan. For example, the Queensland's *Integrated Planning Act 1997* has historically included the option for consent authorities to issue "preliminary approvals" which may override planning schemes. The new *Sustainable Planning Act 2009* continues these provisions.[302]

The inherent limitations and inflexibilities from rigid statutory planning in NSW must be overcome. An applicant should be entitled to formally apply for either:

- a preliminary approval – which only needs to briefly outline the proposed development; or
- a development approval,

[300] This ordinance is so old it pre-dates the Environmental Planning and Assessment Act which commenced in 1980.
[301] Hastings Co-operative Ltd v Port Macquarie Hastings Council [2009] NSWCA 400 [39] (Basten J with Allsop P agreeing).
[302] See cl 242 – a "preliminary approval" is one kind of development application and can override a planning scheme. It may be appealed under cl. 461.

even if the development is prohibited or discouraged by a statutory plan.

The consent authority should have the power to approve, conditionally approve or reject the application. A conditional approval, refusal or deemed refusal should be capable of being appealed to a joint planning review panel (however the council representatives should not be permitted to sit on the panel when the appeal is being made against a council decision). Principles and directions articulated in approved strategic documents would inform any appeal of this kind.

The panel would be able to submit a justification report supporting the rezoning to the Department of Planning. The panel would be obliged to deal with the matter in a set statutory timeframe.

For example, an applicant proposes to develop rural zoned land for a residential estate and the land is shown on a strategic plan as forming part of a future urban growth corridor. If the council fails to support a rezoning, the joint regional planning panel should have an obligation to consider the matter in the council's place.

Another example may be where an applicant is seeking a rezoning to permit "retail premises" in an industrial zone or for reconfiguring a lot to subdivide land to a density in excess of that provided for in a given zone. In both these examples the panel could only deal with the matter if it was satisfied that the proposal is consistent with state, regional or sub-regional strategies.

The benefits of this reform are clear:

- a more streamlined process than the current system of "spot" rezonings;
- the ability for planning authorities to use planning agreements to extort disproportionately high 'voluntary' levies, from developers prior to rezoning decisions, will be reduced'
- applicants whose development application are denied (or not dealt with) by a council can have the merits of their matter dealt with by the joint regional planning panel; and
- bureaucratic rules confining particular uses to particular zones will come second to state and regional strategies.

NSW has accepted the need for greater flexibility to permit uses of land outside of the formal zoning contained in a statutory plan. Projects approved under Part 3A are not subject to local environmental plans.[303] A recently introduced system of "site compatibility certificates" permits a limited range of development to proceed, despite the zoning of the land.[304] However, these limited reforms do not apply to the great bulk of potential job-creating development. Additionally, there is no right to a merits appeal when an application for a site compatibility certificate is denied by a decision-maker, or when a Part 3A application has been made subject to a review by the Planning Assessment Commission.

It is important to note that, irrespective of other reforms, spot rezoning cannot be done away with as long as there is any form of zoning system in place. An additional flexible process for deciding matters quickly without a formal rezoning (with appeal rights) would be welcome. Such a process would reduce the need for spot rezoning, but not eliminate it.

[303] *Environmental Planning and Assessment Act 1979*, s75R(3).
[304] *State Environmental Planning Policy (Infrastructure) 2007* cl 18, cl 57 and cl 63C; *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* cl 24.

7. Development assessment

7.1 Predictability and flexibility

We strongly believe that the predictability of decision-making in the planning system needs to be improved. In part, this can be achieved by dramatically reducing the number and breadth of strategies, policies and guidelines which are considered in zoning and in development assessment. Decision-makers should only be allowed to consider final policies either approved by the state government or expressly provided for by an environmental planning instrument in relation to a specific area (e.g. a master plan).

Legislation, statutory instruments and policies should be designed so that the vast bulk of development envisaged is capable of being approved without the need for a subjective judgment by a consent authority. Unfortunately, it's often the case that statutory instruments are written in such a way that amendments are inevitable. The need for these amendments is often predictable, even at the time a plan was put in place. If something is clearly contemplated, then it should be possible for a framework to be put in place to allow for its swift approval against objective criteria.

However, we are the first to acknowledge that no-one has a crystal ball. No-one, including the government and its planners, is blessed with perfect information. There is always potential for innovative development proposals to arise that fall outside the parameters of a given planning document.

Innovative and non-standard development should not be prohibited merely because it wasn't envisaged at the time a plan is prepared. Such development should still be capable of being approved either:

- without the need for changes to statutory plans; or
- through a simple process of spot rezoning.

In such cases there *is* room for some degree of subjective decision-making, although, rights to a just, quick and inexpensive review/appeal should remain. Examples of this approach exist in the current planning system in a limited form.

For example, clause 4.6 of the Standard Instrument permits a consent authority, with the concurrence of the Director-General of the Department of Planning, to give an approval that departs from development standards – such as height controls or floor space ratio restrictions. This provision is designed to apply in circumstances where:

- compliance with the development standard is unreasonable or unnecessary; and
- there are sufficient environmental planning grounds to justify contravening the development standards.

However the flexibility of these provisions is limited. They cannot permit a development if the relevant "use" has been prohibited in a land use table in a statutory plan – even if a particular prohibition can be demonstrated to be unreasonable or contrary to the public interest. From time-to-time the courts have found that a wide range of other blanket rules imposed by statutory plans are not "development standards", and therefore incapable of being waived, irrespective of their unreasonableness.[305]

Additionally, the process used to invoke the existing limited flexibility provisions is cumbersome. The consent of the Director-General of the Department of Planning must be obtained and the government

[305] See for example *Agostino & Anor v Penrith City Council* [2002] NSWLEC 222.

is introducing an unwieldy objector appeals process, which will act as a disincentive for developers to pursue innovative proposals.[306]

7.2 A lack of support for state and regionally significant projects

7.2.1 Council delays

Most local councils lack expertise in assessing complex state and regionally significant development projects and generally take too long to approve large development applications. The net result drives investment away from NSW.

The NSW Government's *Local Development Performance Monitoring Report 2008-2009*. reveals that an application for a project of more than $5 million in value is stuck in council bureaucracy for an average of 230 days. This compares with an average of 74 days for all development applications.

Projects valued at more than $20 million now take an average of 324 days to process, up from 286 days in the previous year. Development applications worth $30 million or more now take an average of 370 days to be dealt with - up from a previous figure of 300 days. The projects that will inject more than $50 million in the economy now take 384 days to process, up from 315 days in the previous year.

Councils are wilfully ignoring the current legal benchmark – which is between 40 and 60 days to decide development applications.[307]

Despite the rhetoric about getting the planning system working again, the situation has deteriorated for those wanting to invest large sums in NSW. These delays can increase the cost of building new homes and business premises by 15 per cent – through extra interest payments on debt and through the money tied up in unproductive capital.

While data from 2009-2010 is not yet available, anecdotal evidence suggests that the recent introduction of joint regional planning panels has not reduced the time it takes to handle large projects. In part, this can be attributed to the fact that the assessment work for these projects is still being carried out by the same council staff who were previously preparing reports for councillors. Whilst there are many competent and hardworking officers in local government planning departments, most council planners do not often have the opportunity to assess projects in the $50 million to $100 million range. The lack of familiarity with projects of this scale, and the inevitable involvement of state government agencies, as concurrence/referral authorities, makes the assessment process convoluted and time consuming.

7.2.2 Reduction in the scope of Part 3A

The Part 3A process allows the approval of large projects to be handled by an expert team in the NSW Department of Planning, instead of local council staff. It also allows the Department of Planning to override other state government agencies and make final decisions more holistically.

The NSW Government has quietly denied "Part 3A" status to 14 major residential, commercial and retail development projects worth $1.8 billion between July last year and February this year, according to documents obtained by the Urban Taskforce through freedom of information laws. The value of the private sector projects admitted into Part 3A was far less than the value of projects that were refused access to the major development regime.

The government had effectively closed the Part 3A door to most large private sector residential, commercial or retail developments. It seems the political controversy has had an impact, with government more reluctant to accept new projects into the Part 3A system.

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[306] This proposed new process will take place under the new secion79AA to be inserted by the *Environmental Planning and Assessment Amendment Act 2008*.
[307] *Environmental Planning and Assessment Regulation 2000*, cl 113.

Until mid-2009, any residential, commercial or retail project could be declared as a Part 3A project, so long as its value exceeded $50 million and the Minister for Planning decided that the project was of state or regional significance.

However, in July the government then changed the rules so that residential, commercial or retail projects with an investment value of less than $100 million would be shunted off to local councils to assess, under the supervision of panels. The new rules also abolished the need for the Minister to decide whether individual projects were of 'state or regional' significance. Instead, the only test of whether a project becomes Part 3A is now its value - $100 million or more theoretically being enough to deem a 'major development'.

Internal departmental documents obtained through a freedom of information request reveal that under the new rules 14 projects, with a total value of $1.8 billion, have been refused Part 3A status. These refusals were made without any formal merit assessment under planning legislation.

Six projects were in the $50 million to $100 million range and were ineligible under the new, tighter rules, however, eight projects were valued at more than $100 million. These projects total $1.4 billion in value; the largest single project was worth $290 million.

Until 2009, Part 3A was known as one of the few parts of the NSW planning system that was vaguely functional. There is now a risk that large residential, retail and commercial projects will be left without access to any fast-track development process.

The continuing debate between government and opposition about Part 3A has become irrelevant for many developers. It is hard to take NSW seriously, when you're told a proposal for a $290 million project isn't worthy of full assessment and public exhibition as a major development.

The staff of the proposed Sydney Metropolitan Development Authority should prepare development assessment reports and liaise with state government agencies for matters before joint regional planning panels in Sydney, in lieu of local council staff. This would require a change to the Environmental Planning and Assessment Act.

The criteria for Part 3A status should, once again, embrace projects valued between $50 million and $100 million, provided that these projects are of state or regional significance. This would require a change to the State Environmental Planning Policy (Major Development).

7.3 Presumption in favour of development approval

Section 79C(1) of the Act 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 (unless the Director-General has notified the consent authority that the making of the draft instrument has been deferred indefinitely or has not been approved), and
>
> (iii) any development control plan, and

(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), that apply to the land to which the development application relates,

(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,

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

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

This ready-made list fosters a check-list approach by consent authorities. Failure to have regard for some part of section 79C is a common feature of legal challenges to the validity of development consents. As a result, consent authorities are keen to impose detailed documentary requirements on proponents dealing with every nuance of section 79C, even when the consent authority is privately of the opinion that some or all of the requirements are balderdash and irrelevant to the application at hand. By its very nature, the public sector is risk averse, and will want to put a proponent through no end of red tape if that's what it takes to minimise the risk of a successful challenge to the validity of a planning approval.

One advantage of Part 3A (used for very large commercial, retail and residential developments valued at $100 million or more) is that the requirements for consideration are not set out in a prescriptive list in the Act. It's therefore possible for the consent authority (either the Minister or the Planning Assessment Commission) to only consider – and require documentation for - the matters that are genuinely relevant to the application. Part 4 would benefit from the same approach.

Additionally, section 2.1.4 makes the case that the planning system needs to have a respect for the right of property owners to use and develop their land. For such right to have effect, the onus should be reversed so that, in the absence of a specific rule prohibiting development (such as a prohibition in a statutory plan), it should be presumed that development will be approved. This would still allow a consent authority to refuse a development permitted under a statutory plan – but, if they do so they would need to have sound information to back up their decision (for example, an unmanageable risk to public safety).

7.4 Deemed approval for development consents

We advocate the introduction of "deemed-to-comply" or "deemed approval" periods rather than "deemed refusal" periods. The Queensland Government's new planning legislation, the *Sustainable Planning Act 2009*, introduces a system of deemed approvals for some categories of development.[308]

Deemed approval periods are a vastly superior method of ensuring that consent authorities allocate the necessary resources to (and appropriately manage) their development assessment functions. Without deemed-to-comply periods, consent authorities lack incentives to quickly deal with development applications.

A 'deemed-to-comply' period for development application, means a development consent is deemed to be given if no refusal has been issued in a set period. An appropriate timeframe would be as follows:

- 10 days for complying development;
- 20 days for development applications not requiring exhibition;
- 40 days for small scale development;

[308] Clauses 330-333.

- 60 days for medium scale development; and
- 90 days for development equivalent to designated development.

7.5 Code assessable development

Code assessable development should be introduced for high density development in the general residential, high density residential, mixed-use, local centre, commercial core, business park and enterprise corridor zones. Existing provisions of the Act for non-discretionary development (section 79C(2)) can be utilised for this purpose (see section 5.1 above for more detail).

8. Development levies

8.1 The burden of levies

Those that argue for levies are mistaken if they believe that developers bear the costs of new or increased developer charges.

Modern capital is very mobile. It flows to wherever it gets the best return. A local developer will not be able to secure equity capital for a NSW development if he/she cannot offer the rate of return that is available for investments of a similar risk profile in other states or countries. In order to ensure that a market rate of return is still achieved, a developer will either reduce the amount of money he or she pays for undeveloped land, or increase the price paid by the home buyer.

It is not often possible, in practice, to pay less for undeveloped land for several important reasons. Many developers have already acquired the land and factored in all the charges known about at the time of purchase – in these cases it is too late to adjust the price paid to landowners for new or increased charges, yet the development cannot proceed unless the necessary rate of return can be earned. There has been no stability in NSW's policy on development levies at any point in the last 10 years and the policy framework remains uncertain and laden with risk today.

There is also a natural floor to land price, below which the owners of undeveloped land will not move.[309] This floor does, in part, reflect the opportunity cost for other uses of the land – such as rural lifestyle blocks (in greenfield) or low density housing (in brownfield). This is a major factor preventing the development of fragmented land parcels, say, on the edge of Sydney.

Even when, development of land is the highest and best use in the long-term, in the short and medium term those expectations may not be realisable. When land holders are very patient, hold minimal debt and/or originally acquired the land at very low prices, they may be prepared to wait years or decades before they decide to sell their land. Our experience to date, is that such land owners have no difficulty in waiting for prices to rise to the level consistent with their expectations. Economic models eliminate the short and medium term, and simply look at the long term. This may ignore the fact that the long term could be a 20 year plus horizon. That kind of delay in development would carry enormous social and economic consequences.

In this debate, economic purists tend to overlook the disproportionate market power given to the landowners by planning laws. For this reason, landholders are often able to resist developers' efforts to pass the cost of development charge onto them through a lower land acquisition cost. Land owners enjoy disproportionate market power because appropriately zoned land (both in greenfield and brownfield areas) tends to be drip fed by the planning system into the market.

This generally means there is only one party left who must pay for an increased developer charge – the home buyer (or commercial/retail/industrial end user).[310]

However, often a home buyer cannot afford a new or increased levy. That's because there is a ceiling on the price that home buyers are able to pay, i.e. their borrowing capacity. The maximum amount that home buyers are able to borrow is, in turn, based on their income. Without increases in income, home buyers are unable to pay more for new homes. As a result, any project, which cannot be

[309] F E Huffman, A C Nelson, M T Smith and M A Stegman, "Who bears the burden of development impact fees?" *Journal of the American Planning Association* (1998) 54, 59-55.

[310] CJ Delaney and MT Smith, "Impact fees and the price of new housing: an empirical study", *American Real Estate and Urban Economics Association Journal* (1989) 17, 41-54; CJ Delaney and MT Smith, "Pricing implications of development exactions on existing housing stock", *Growth and Change* (1989) 20, 1-2; L D Singell and J H Lillydahl, "An empirical examination of the effect of impact fees on the housing market", *Land and Economics* (1990) 22, 431-438; M Dresch and S M Sheffrin, "Who pays for Development Fees and Exactions", *Public Policy Institute of California* (1997).

delivered at a price home buyers currently can afford, simply doesn't get built.[311] An increase in costs from a new developer charge cannot be passed onto a home buyer until home buyers' borrowing capacity increases enough to pay for the levy.

Where a portion of the market can afford to pay the levy, developers may need to release serviced lots (or stage higher density development) more slowly so as to ensure that the price does not fall below the threshold necessary to recover development levies.

8.2 Local council infrastructure charges

In NSW a major source of funding for local government are the rates and charges. The amount that can be raised fundamentally impacts on local government's ability to provide infrastructure and services. Since 1977, council rates in NSW have been regulated by the state government based on a philosophy that was to encourage restraint and exercise control over expenditure. This approach relied upon state government regulation that "pegged" rates each year to a maximum amount.

Local councils are being asked to do more with less funding, and councils across the state are being forced to make some very hard decisions when it comes to service and infrastructure provision. Without appropriate funding, local councils are either forced to leave existing infrastructure to deteriorate, not provide additional services and/or facilities or seek an alternative source of revenue.

Finding an alternate source of funding has been the preferred option of local councils and unfortunately, the preferred vehicle has been development levies. Development contributions are being relied upon to fund a significant proportion of local infrastructure and services. In some cases, the provision of local infrastructure is being provided entirely by development levies of some type. This type and level of taxation on development has, without doubt, caused a slowing of development activity, particularly in the residential sector, which has contributed to the current collapse in NSW private sector property development.

It has been widely reported that

> without the extra income the councils will have to let rundown facilities deteriorate further, or appeal to federal and state governments to bail them out.[312]

There are already numerous councils who are carrying an infrastructure backlog that far exceed their ability to fund. Council rates don't come close to providing the funds needed to meet current service and infrastructure needs, let alone meeting future needs.[313] The additional funding from the upper tiers of government has not been forthcoming and the ability to raise additional funds through rate increases has been constrained, hence local governments have sought private funding for public infrastructure.[314]

The Federal Government's independent economic advisor, the Productivity Commission, prepared a report titled *Assessing Local Government Revenue Raising Capacity*. It revealed that Baulkham Hills Shire Council, Mosman Municipal Council and Willoughby City Council had each admitted that rate pegging creates an incentive to increase fees and charges, as an alternative source of revenue to rates.[315] We have heard the same admission on many occasions in our discussions with council representatives.

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[311] A Skaburskis and M Qadeer, "An empirical estimation of the price effects of development impact fees", *Urban Studies* (1992) 5, 653 – 667. This study found that lot prices were increased by 1.2 times the value of the development impact fees. This was attributed to the delay in development by the introduced of a fee, which led to a rise in prices.

[312] Grennan, H. *Sydney Morning Herald July 29, 2008* accessed from http://www.smh.com.au/articles/2008/07/28/1217097148488.html

[313] Dollery, B., Wallis, J. & Allan, P. (2006) The Debate that Had to Happen But Never Did: The Changing Role of Australian Local Government, *Australian Journal of Political Science,41:4,553 — 567*

[314] Cannadi, J. & Dollery, B. (2005) An Evaluation of Private Sector Provision of Public Infrastructure in Australian Local Government. Australian Journal of Public Administration. 64 (3): 112-118.

[315] Productivity Commission (2008) *Assessing Local Government Revenue Raising Capacity*: *Productivity Commission Research Report April 2008* 112

There is no denying it: rate pegging has made councils reliant on developer contributions to supplement income for the provision of infrastructure and services.

This is most obvious in the growth areas of Sydney where pressure for additional infrastructure and services is at its greatest. For example, the draft section 94 plan exhibited for North Kellyville proposed a contribution of up to $50,700 per dwelling. Contributions have been used by some councils to stop development in an area by imposing massive taxes, that make it impossible for projects to make a commensurate return on risk.

Regretfully, in NSW there is a very broad basis for councils to recover their costs through developer charges. The Productivity Commission has found that:

> New South Wales and Victoria appear to have the most flexible legislative arrangements for accessing developer contributions, with legislative scope to levy for a broad range of economic and social infrastructure needs (such as public transport, child care centres, libraries, community centres, recreation facilities and sports grounds) beyond basic infrastructure. Other jurisdictions may not have scope to apply a levy for these facilities.[316]

The recent "reforms" to section 94 contributions do little to narrow the scope of the projects that can be funded by these charges. In fact, more than 90 per cent of the funds currently raised by these charges will continue to be raised under the new regime. Any (limited) savings are not being passed back to developers – instead councils are simply increasing the contribution required for those matters that are permissible.

The so-called $20,000 per lot "cap" has failed.[317] Nineteen local councils have been given NSW Government approval to exceed the "cap" on local council charges and are levying as much as $80,000 a home. In June 2010 the NSW Government announced that the cap was to become a hard cap, and all levies were reduced to $20,000 a home. In a back-flip, this decision was, in substance, almost completely reversed, in September 2010.

Seven councils are still imposing a levy of $50,000 or more on new homes. Yass Valley Council has the state's highest levy with an impost of $80,000 per home. Sydney's highest-taxing council is Pittwater, where the charge is now $62,000 a home.

Camden Council charges $59,000 a home while Ku-ring-gai and The Hills both charge $54,000 a home. Hawkesbury Council levies new homes at a rate of $51,000 each, while Shoalhaven Council charges $50,000. Twelve other councils are charging well above the state government's $20,000 cap, including Blacktown ($44,000), Campbelltown ($41,000), Leichhardt ($40,000), Wyong ($35,000), Liverpool ($31,000) and the City of Sydney ($27,000).

The most recent cross-jurisdictional data on the relative size of development levies was provided by a 2009 study by the AEC Group.[318] The AEC report pinpoints the average Queensland local council development levy at $22,300 per home, it reports that the low-end of the range is $10,000 a home and the high end of the range is $40,400 a home. It's evident that the key growth councils in NSW are, in many cases, levying well above, even the high end of the Queensland counterparts.

A study by the consultancy firm Integran examined Victorian greenfield areas and concluded that, for a residential lot yield of 15 dwellings per hectare, infrastructure contributions per lot, excluding state infrastructure contributions, could equate to approximately $14,500 per dwelling.[319] Victorian levies are a mere fraction of the equivalent NSW charges.

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[316] Productivity Commission (2008) *Assessing Local Government Revenue Raising Capacity*: *Productivity Commission Research Report April 2008* 172.
[317] The "cap" was announced by the then Premier of NSW, Nathan Rees, in a media release: "Premier announces plan to kick-start housing construction", 17 December 2008.
[318] AEC Group, *Benchmarking of Infrastructure Charges Queensland High Growth Councils and Selected Interstate Examples: Amended Final Report: November, 2009* (2009).
[319] Integran, *Infrastructure Charges Comparison Report: Report prepared for Gold Coast City Council* (2009).

Local council levies in infill/brownfield areas should be capped to a fixed percentage of construction costs (1 per cent). This percentage rate is consistent with the intent of the original legislation.[320]

In greenfield areas, local councils should be prohibited from imposing any charge themselves and instead, their infrastructure works should be funded by the state, drawing on the revenue it received from a percentage-based levy state infrastructure contribution proposed below.

In the event that this is unacceptable to the government, the next best solution is for local council levies in greenfield areas, to be genuinely capped by the state government (not the meaningless $20,000 "cap" now in force). This levy would still only be payable on the final sale of land, along with any state infrastructure contribution. The payment could be made to the Office of State Revenue by the developer, who would in turn, pass it onto the council.

The levy will only be paid once on each parcel of land sold (i.e. no further levy will be payable on subsequent re-sales). Land sales between developers prior to the issue of a subdivision certificate will not attract the levy (i.e. it will only be payable once lots are actually subdivided and sold individually).

Councils should be given greater freedom to use their broader rate base to fund the costs of infrastructure and population growth. This will require either the abolition, or relaxation, of rate pegging. In the absence of council amalgamations, there may also need to be a mechanism to allow rate-payers in councils, with relatively modest growth projections, to contribute to the cost of infrastructure provision in council areas, with extremely high levels of anticipated growth.

In 2007 the NSW government promised that the Minister for Planning or his/her delegate would approve section 94/section 94A plans and amendments to plans.[321] The government has failed to deliver on this commitment. Instead it has only required the Minister to approve items that do not fall into a very broadly defined list or above $20,000. This approach has created incentives for many councils to increase their levies to just short of $20,000, in the knowledge that they have a green light from the state government.

As local environmental plans need to be signed off by the Minister or delegate, all local council contributions plans need a similar check and balance, otherwise the intent of a local environment plan can be too easily defeated by a punitive contributions plan.

8.3 State infrastructure contributions

8.3.1 Western Sydney

In the Western Sydney growth centres, new homes are burdened by a state government levy of $11,000 each, which is set to rise, to $17,000 each, by June 2011. The levy is the same irrespective of the value of the property.

The market price for housing, commercial, retail and industrial property is set with regard to similar properties in the vicinity and elsewhere. If the costs imposed by a rigid formula, and flat dollar fee per lot or hectare are too high, land production is sterilised.

The viability of any land release effort may be seriously undermined by an infrastructure charge that is set in isolation of market conditions and the final sale price of land. Additionally, the existing system of flat charges is not related, either to the actual cost of infrastructure in a particular region, or the capacity of the land to bear the charge.

Greenfield sites would be better served by a percentage levy on the final sale price of land. This will ensure that in areas where the market price is lower, the burden of the charge is proportionally lower.

[320] *City of Sydney Act 1988; Environmental Planning and Assessment Regulation 2000.*
[321] See the NSW Treasury presentation to stakeholders, October 2007 and the Department's own planning circular released in November 2007.

A flat charge artificially exaggerates the cyclical nature of the market. When property prices fall, a fixed dollar (flat) charge does not fall (unlike some other costs, such as marketing and some construction costs). This leads to a disproportionately rapid fall-off in investment in difficult market conditions. Conversely, when property prices are rising, development activity will be higher than normal. Government taxes and charges should not accentuate the boom and bust of the property cycle, but should act in a stabilising way to get a more even spread of economic activity over time.

A major difficulty with the existing system of charges has been that the payment is required too early in the development process. Even when the charges are affordable, the timing of the payment makes financing very difficult. The developer does not have sufficient real estate available to secure the debt made necessary by the charges. The financing distortion can be removed, if the charges that are payable only fall due when the developer actually receives final payment, for the developed land from the end-user. In December 2008, the government announced that developers would have the right to defer payment of the state infrastructure contribution, but the necessary "determination" giving effect to this decision, has still not been published.

The legal burden for the payment of the percentage levy will fall on the developer, and the payment will be paid on the transfer of title (that is, at settlement)**.** This arrangement takes advantage of the government's existing revenue collection machinery. The developer will pay the levy amount to the Office of State Revenue and the purchaser will pay the stamp duty owed. The levy will only be paid once on each parcel of land sold (i.e. no further levy will be payable on subsequent re-sales). Where a home or other building has been constructed on the land prior to sale, the sale amount will be discounted by the construction cost of the building. Land sales between developers prior to the issue of a subdivision certificate will not attract the levy (i.e. it will only be payable once lots are actually subdivided and sold individually).

The actual dollar amount raised, by any percentage greenfield levy, needs to be a great deal lower than the $17,000 per home lot, that will apply in the Western Sydney growth centres by June 2011**.** The ability of the market to sustain a given revenue target should also be factored into decisions about the percentage level, rather than just the costs of the infrastructure.

By way of comparison, there has been considerable controversy in Victoria about the introduction of the new growth areas infrastructure contribution on Melbourne's fringe. This levy amounts to around $6,000-$7,000 a home lot; close to one third of the anticipated June 2011 Western Sydney levy.

It is also important that the new scheme has the conventional checks and balances. This means, any percentage rate set by the government should either be set under a regulation that is subject to parliamentary review and (potential) disallowance, or independent oversight of the Land and Environment Court. Additionally, a requirement to pay a particular state infrastructure contribution should be able to be disallowed or amended by the Land and Environment Court on appeal because it is unreasonable in the particular circumstances of that case.

For each region/sub-region/area (however defined) to be levied, there should be a requirement for a publicly available plan, akin to the current section 94 contributions plans required of councils.

8.3.2 Defacto state infrastructure contributions

Since 2007 the NSW Government has been progressively introducing a new defacto state infrastructure contribution regime outside of the growth centres.[322] These new local environment plan provisions, grant rezonings, but make the rezonings less meaningful because a new arbitrary power is created for the Department of Planning to impose infrastructure charges, without even the threadbare safeguards of the existing state infrastructure contribution statutory framework.

[322]For example see: *Camden Local Environmental Plan No 74—Harrington Park* cl 38; *Hawkesbury Local Environmental Plan 1989* cl 55; *Maitland Local Environmental Plan 1993* cl 55; *Parry Local Environmental Plan 1987* cl 41; *Tamworth Local Environmental Plan 1996* cl 55; *Wyong Local Environmental Plan 1991* cl 42G.

For example, the new requirements mean that development approval for a rezoned land use cannot be given by the local council unless the Department of Planning signs off on a financial contribution to transport, education, health and emergency services, normally provided by the state. [323]

By using local environmental plans (LEPs) to impose compulsory infrastructure levies, key provisions of the existing scheme are circumvented, in particular:

- The Minister is not obliged to make a determination of the level of development contributions up-front. Instead the Director-General of the Department of Planning makes a decision on compulsory charges specific to each individual development application. This reduces the transparency and certainty. The lack of up-front information acts as a disincentive to invest.
- There is no obligation on the government to publicly exhibit the proposed charges or consult with land owners or other relevant stakeholders. Again, this increases the perception that charges are arbitrary.
- There is no express obligation for the contribution to be "reasonable".
- There is no obligation to identify a special contributions area or any similar area to which the contributions relate.
- There is no requirement that the funded infrastructure be within a particular area.
- There is no requirement for the decision on the quantum of charges to be made publicly available.

We ask the government to commit to implementing its system, of compulsory infrastructure charges, through express provisions in the *Environmental Planning and Assessment Act*, rather than local environmental plans. This should involve adopting the percentage-based framework set out above; in addition to the accountability provisions extended by the statutory framework for state infrastructure contribution levies and section 94 contributions.

No local environmental plans should be able to require arrangements for the payment of unspecified monies, prior to the lodgement of a development application.

8.3.3 "Voluntary" planning agreements

"Voluntary" planning agreements have become another means of legalised extortion by public authorities when a developer is endeavouring to secure a rezoning.

The original policy rationale for voluntary planning agreements remains sound. Planning agreements are designed to be a mechanism by which a developer can address a planning authority's legitimate infrastructure concerns. Prior to the introduction of legislative provisions for planning agreements there was no easy mechanism for developers to volunteer to pay for infrastructure vital to securing a value-creating rezoning. The policy rationale for such agreements is not changed by the proposal for a percentage-based state infrastructure contribution.

Nonetheless, voluntary planning agreements are being increasingly misused by local councils intent on revenue raising. In particular:

- Development standards (floorspace ratios, height, etc) are being kept artificially low, so as to routinely force a rezoning, a departure from the requirements of a development control plan or application of *State Environmental Planning Policy No 1- Development Standards*. This creates an opportunity to demand the signing of "voluntary" planning agreements.
- Land owners are punished, for not agreeing to planning agreements, by the imposition of low value zones. For example – the imposition of a primary production zone when surrounding land has been rezoned for urban purposes.
- Permissible uses are being kept narrow in scope in some areas, again, to force rezonings and create a need for developers to enter into "voluntary" planning agreements.

[323] *Parry Local Environmental Plan 1987* cl 41.

There must be a credible right of appeal on spot rezoning decisions, possibly involving a regional panel, **when a proponent is able to argue that the rezoning is consistent with a published strategy**. This is necessary to avoid the use of planning agreements to extort disproportionately high 'voluntary' levies, from developers, prior to rezoning decisions being made.

9. Competitive neutrality

Planning authorities in NSW appear to feel that the *NSW Government Policy Statement on the Application of Competitive Neutrality*, released in 2001, does not apply to them.[324] This policy statement is of great significance. It has been implemented under the *National Competition Policy and Related Reforms Agreement* – an intergovernmental agreement between the federal government and each state government.

The competitive neutrality policy means that government businesses must operate without net competitive advantages over other businesses, as a result of their public ownership. For example, if a public authority is developing regular housing for sale on the open market, it is unquestionably, operating a "business" within the meaning of the policy.

This policy was designed to stamp out the competitive advantages government business enjoyed from immunity from regulatory requirements. As the policy itself states

> The benefits of adopting competitive neutrality reside in developing fairer and more cost reflective pricing policies and production in line with market requirements. These in turn should provide a basis for better resource allocation decisions throughout the economy and higher Gross Domestic Product growth than would otherwise occur.

The NSW government policy also requires government business activities to be subject to "corporatisation principles". Among other things, these principles affirm the business must "operate within the same regulatory framework as other businesses". The same rules should apply to the public and private sectors when they develop housing.

9.1 Discrimination against private sector developers

The planning system has traditionally been blind to the identity of the applicant. That is, characteristics which are personal to the applicant have not normally influenced a decision as to approval or approval conditions.

In February 2009, the NSW Government announced that it will streamline town planning rules for "social housing" projects. The NSW Government also released a planning circular (PS 09–007) which says the changes are about "affordable housing". The concept of "affordable housing" is much wider than "social housing". However, the published rule change is much broader than the government's original announcement, or subsequent planning circular suggested.

The new rules, as published, waive local environment plan requirements for the development of residential flats and multi dwelling housing. They say that development may take place, despite any provision of a local environment plan, although development consent is still required. The new rules also waive any requirement for car parking. They also state consent must not be granted without a compatibility certificate from the Director-General of the Department of Planning. Additional provisions include "density bonuses" allowing bigger and bulkier developments than provided for under the normal rules.

We would welcome a reform of this kind, without reservation, if it applied equally to all developers. This kind of reform is exactly the sort of change we have been seeking for some time (although we query the need for a site compatibility certificate).

However, the rules only apply to homes developed by or on behalf of public authorities, non-profit housing providers or by a joint venture partner with Housing NSW. A wide range of government agencies could potentially use these new provisions - including Landcom, the Redfern-Waterloo

[324] See http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0007/3868/tpp02-1.pdf.

Authority, Sydney Harbour Foreshores Authority, the State Property Authority, the new Sydney Metropolitan Development Authority, local councils, any government department, as well as not-for-profit organisations such as City West Housing. There is no requirement for land to be in existing government ownership. These organisations will be free to bid for sites with zoning problems in direct competition with the private sector.

The new provisions do not require that any of the development be limited to social housing or rental or affordable housing – and nor should they.

We support making housing more affordable and the best way to do this is to increase the available supply. These reforms will overcome rezoning difficulties and will help boost the development of new homes. In particular, it is good policy to allow higher density developments, within 800 metres of all Sydney transit stations, regardless of the zoning of the land. After all, this merely implements the Government's own Metropolitan Strategy. However, there is no case for these rules to be limited to non-profit developers or government developers such as Landcom or the new Sydney Metropolitan Development Authority.

These special rules are an admission that the existing system is not working for government and non-profit developers. However, the same could be said for private sector projects. We believe the state government should give both public and private housing developments the same support.

These are permanent changes to the planning law and seek to give non-profit and government developers, preferential access to sites with zoning problems, in the vicinity of train stations. While it's true right now, that private sector developers have less access to capital than government developers, this situation will not last forever. It's a mistake to respond to a transitory economic situation and make permanent changes to our law, discriminating against the private sector.

State governments should be doing everything possible to encourage private sector development activity. The NSW Government should be telling the investment community that the private sector is welcome, in these important urban renewal sites, near transit stations. There is no reason why approvals for housing, developed by the government for private rental and sale, should be fast tracked, while private sector projects wallow in red tape.

9.2 Discrimination against private sector when setting levies

The NSW Department of Planning has prepared, but not yet finalised, draft determinations for special infrastructure (SIC) contributions in Western Sydney, Warnervale and Wyong.

The document appropriately exempts neighbourhood shops and government schools in the residential zones from the special infrastructure contribution levy, but proposes to impose the residential SIC levy on childcare centres, group homes, community facilities, non-government schools, places of public worship; bed and breakfasts and boarding houses.

Like neighbourhood shops and government schools, such development should be exempt from the levy.

Government run child care centres and schools will not be faced with a levy, but private facilities will. This raises serious policy issues about support for private education. The proposed approach is inconsistent with public positions favoured generally by government, at a state and national level.

9.3 Discrimination against private landlords and providers of community facilities

The standard instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument") include "community facilities" as a mandatory permissible use in the following zones:

- RU5 Village;
- R1 General Residential;
- R3 Medium Density Residential;
- R4 High Density Residential;
- B1 Neighbourhood Centre;
- B2 Local Centre;
- B3 Commercial Core;
- B4 Mixed Use;
- B6 Enterprise Corridor; and
- RE2 Private Recreation.

"Community facilities" are defined to be

> a building or place:
>
> (a) owned or controlled by a public authority or non-profit community organisation, and
>
> (b) used for the physical, social, cultural or intellectual development or welfare of the community,
>
> but does not include an educational establishment, hospital, retail premises, place of public worship or residential accommodation.

If the local council was to build and operate a gym, charge a fee to participate and make money from the operation it would be both a 'business' and a "community facility". This would be allowed even in a zone where business premises were not a permissible use, merely because the facility was owned by the council. Even more shockingly, if the council merely owned the premises and rented them to a commercial business they would be equally permissible. Yet a private individual who would want to run the same kind of business on private land within the same zone would be barred from so doing.

The definition of "community facilities" should be narrowed so it excludes any commercial activity.

9.4 Government-owned property developers

The presence of government owner development companies, competing against private developers, creates a perception, if not reality, that private developers will be treated less favourably by regulators than a government-owner developer. The risk of government owned developers developing homes for private sale, at less than commercial internal rates of return, also creates disincentives for private sector developers to become active in market segment where a government owned developer has a strong presence.

10. Confiscation of property rights

NSW has had difficulty in attracting investment in recent years, in part, because of the enormous discretion wielded by planning authorities. The planning system, with its arbitrary decision making and unpredictable levies, has weakened the link between land ownership and the ability to create value by developing land.

A lack of respect for property rights is endemic in NSW, but there have been recent deliberate actions taken by the NSW Government to expressly reverse longstanding statutory protections safeguarding property rights. However, before we get into the detail of these three recent changes it is worth clearly setting out the value of property rights.

Firstly, we note that property rights are, unquestionably, human rights. Most major human rights documents set out to protect private property rights.[325]

Secondly, as has been stated by the United States Supreme Court, the right not to be deprived of property prevents the government

> from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[326]

Thirdly, there are strong economic arguments for high-level and serious protection of property rights. Economist, Frank Michelman,[327] asks

> [w]hen a social decision to redirect economic resources entails painfully obvious opportunity costs, how shall these costs ultimately be distributed among all the members of society? Shall the losses be left with the individuals on whom they happen first to fall, or shall they be "socialized?[328]

Michelman argues that losses should be socialised when it would be either inefficient or unjust to allow the government to take the property without compensation. The principal economic explanation for the compensation requirement is that otherwise the government would take an inefficiently large amount of property -- that is, the price system provides an efficient discipline on the government's "consumption" of private property.[329] Both efficiency and fairness are also invoked to limit the ability of government to expropriate property of politically vulnerable groups and individuals.[330]

There has been an increasing tendency for NSW to use town planning laws as a mechanism for seizing private property rights and using the rights for public purposes, without compensation. Three recent and current examples are set out below.

10.1 Taking land for a public purpose, but giving no compensation

Section 27 of the *Environment Planning and Assessment 1979* (NSW) was introduced with the Act in 1980 and remained unamended until 2006. During that period the section relevantly provided as follows:

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[325] For example, see: article 17 of the *Universal Declaration of Human Rights* adopted by the United Nations General Assembly in 1948; article I, §10 and the fifth and fourteenth amendments to the United States *Constitution*; the Canadian Expropriations Acts; article 1 of the *European Convention on Human Rights* which, in the United Kingdom, has been adopted through the *Human Rights Act 1998*; Section 25 of the South African *Constitution; and* Section 51(xxxi) in the Australian *Constitution.*

[326] *Armstrong v. United States*, 364 US 40, 49 (1960).

[327] *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) (succinctly explained and analysed In Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 Harv. L. Rev. 997 (1999)).

[328] *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967), 1169.

[329] *Comparative Constitutional Law: United States/Canada*, 7th ed. 6-1.

[330] Ibid.

> Where an environmental planning instrument reserves land for use exclusively for [public] purpose…that environmental planning instrument shall make provision for or with respect to the acquisition of that land by a public authority…

The policy basis for the section is fairly obvious. That is, if land is required for a public purpose, then the financial burden of fulfilling that purpose should fall on a public authority rather than the private land owner, who happens to own the land at the time.

Without the section, land could be sterilised for future public purposes and the private land owners could do nothing but continue to be responsible for the land, bear all costs of the land (including rates and taxes) and wait to see whether any public authority would ultimately wish to acquire the land.

In 2006 the *Environmental Planning and Assessment (Reserved Land Acquisition) Amendment Act* commenced. In essence, the law was amended so that an owner, whose land had been reserved exclusively for a public purpose, could only require that land to be acquired in limited circumstances. Under the revised rules, an owner can only require the government to acquire (and therefore pay for land rendered useless by government decree) if the owner is able to establish that they would suffer hardship if it was not acquired.

The net result is that the underlying policy rationale for the original law is set aside, unless the owner can establish "actual hardship". The law makes it very difficult for a corporation to satisfy the hardship test – even though corporations are owned by people who have a legitimate right to expect their property rights will be respected.

The fundamental principle should be that where land is required for a public purpose, it is the owner who should be entitled to have the authority to either remove the reservation, or acquire the land.

It's worth noting that if there was constitutional protection for private property rights,[331] as there is in the United States, no Australian government would have the power to expropriate private land through a rezoning. According to the United States Supreme Court:

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved...--We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land ...[332]

10.2 Stealing the existing use rights of landholders

"Existing use" rights are a landowners' right to continue a land-use or operate a business that pre-dates current planning controls.

Such provisions provide stability and certainty to property ownership. Without strong, existing use rights, every new planning scheme is retrospective – potentially shutting down existing businesses or throwing people out of their homes. In the absence of existing use rights, governments are free to rezone (for example), high density residential land to low density; or commercial offices to light industrial. Strong existing use rights give a purchaser of land protection from arbitrary changes in a planning scheme that could either prohibit the current land-uses on a site or steal away the future development potential of a site. In essence, these provisions give a land purchaser some assurance about what they're purchasing.

Until 2006, NSW law allowed existing land-uses (such a business or a home) to be enlarged, expanded or intensified, altered, extended, rebuilt, or be changed to another use, including a use that would

[331] While there is some constitutional restraint on the Federal Government under section 51(xxxi) of the Constitution, this does not extend to state governments.
[332] *Lucas v South Carolina Coastal Council*, 505 US 1003; 112 S. Ct. 2886; 120 L. Ed. 2d 798 (1992), Scalia J.

otherwise be prohibited under the Act.[333] Existing use rights arise when the use of a site is prohibited by a planning scheme introduced after the 'use' commenced on the land.

While development consent was still required for 'existing use' re-development, the approval could be granted even if it was prohibited by a planning scheme that was made after the existing use right arose.[334] It was even possible to totally re-build buildings, in accordance with existing use rights, even though a planning scheme had prohibited the given use after the existing use rights arose.[335]

In 2006 and 2007, the NSW Government changed the law to dramatically narrow the scope of existing use rights for landholders.[336] These changes meant such changes to use are now prohibited outright if they:

- involve anything more than minor alterations or additions;
- involve an increase of more than 10 per cent in the floorspace;
- involve the rebuilding of the premises;
- involve a significant intensification of that existing use; or
- relate to premises that have a floorspace of 1,000 square metres or more.

What's more, an existing commercial use that had been subsequently prohibited by a planning scheme could only be changed to another commercial use (and not to a prohibited light industry or residential use). Similarly, an existing light industrial use could be changed to another commercial or light industrial use, but not a prohibited residential use.[337]

Aside from the fact that the changes were an outrageous, retrospective, interference in the rights of many thousands of landowners across NSW, they were completely unnecessary. The previous law had required that a development application could be lodged and dealt with on its merits. That previous law still provided plenty of scope for a consent authority to deny development approval if a new proposed land-use (put forward under existing use rights) was inconsistent with good planning principles.[338]

This is no academic debate. NSW planning schemes can and are changed to the detriment of the existing development potential of a site.[339] Any investor in NSW must now factor in the risk that development potential of land could be stolen overnight through a rezoning without compensation for any loss of value.

The *Environmental Planning and Assessment Regulation* provisions on existing use rights should be returned to their pre-2006 state.

10.3 Expropriation of private land for commercial development without proper compensation

In 2008, the NSW Government amended the *Transport Administration Act 1988*. It created a new government corporation, "Sydney Metro". One of the powers assigned to this new corporation was the power to compulsorily acquire land. Unusually, it was given the express power to acquire land for future

[333] Cl 41, *Environmental Planning and Assessment Regulation 2000* published in Gazette No 117 of 8.9.2000, p 9935.
[334] Ibid cl 42 and cl 43.
[335] Ibid cl 44.
[336] *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006* and the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007*.
[337] *Environmental Planning and Assessment Regulation 2000*, cl 41(1) (as amended by the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007)*.
[338] *Bonim Stanmore Pty Ltd v Marrickville Council* (2007) 156 LGERA 12
[339] For an example of down zoning in action see *GPT Re Limited v Belmorgan Property Development Pty Ltd* [2008] NSWCA 256.

sale, lease or disposal.[340] This power could be used when Sydney Metro was acting as a developer, including in the development of new retail and commercial premises.[341]

The effect of the *Land Acquisition (Just Terms Compensation) Act 1991*[342] was that the market value, paid as compensation to a property owner, may be discounted. The compensation would be discounted if there was any increase in value that could be attributed to the "public purpose" for which the land had been compulsorily acquired.[343] That applies, even when the "public purpose" is the acquisition of land for sale, for the purposes of property development.

This allowed the Sydney Metro authority to compulsorily acquire private land for development, arrange for a rezoning from government while the land is in the authority's hands, and then on-sell that land to third parties; pocketing the uplift in land value as a result of the rezoning.

Last year, Parliament passed the *Land Acquisition (Just Terms Compensation) Amendment Act 2009*.

The effect of this bill is that councils will have wide flexibility to acquire land for the purposes of re-sale to someone else. There is now, nothing stopping them from deciding to acquire, for example, land zoned for detached houses, with the express purpose of rezoning the land for retail development and pocketing the uplift in value.

We argue for an alternative approach which would require very different legislation from the two examples cited above.

When land is compulsorily acquired for commercial development:

- Landholders must be entitled to genuine just terms of compensation.
- Landholder compensation must be valued based on the rezoned value of the land, following the granting of the final development approval, in connection with the urban renewal project. That is, any consequent land value uplift must flow to the landholder, rather than the acquiring state government authority.
- The actual transfer of title from the original landholder should not take place until the rezoning is completed and the development application is approved. This will permit a proper basis for striking a just terms land value. In the event that the landholder wishes to exit ownership early in the process, before these matters are finalised, they should be entitled to compensation based on what is known at the time and a subsequent additional payment based on the final increase in land value, arising from the additional permitted development potential.

This change requires an amendment to the *Land Acquisition (Just Terms Compensation) Act 1991*.

The model, proposed by the Urban Taskforce, exists elsewhere. In the United Kingdom, where planning approval is granted for additional development on acquired land, within ten years after a valuation date, the land owner is entitled to the difference between the amount actually received and the amount the landowner would have received if the approval had been in force when:

- the notice to compulsorily acquire was issued; or
- (in the case of a sale by agreement under the threat of compulsory acquisition) at the date of the sale contract.

10.4 Down-zoning

Down-zoning occurs when the state government changes a statutory plan to reduce the future development potential of a site.

[340] Section 55E.
[341] Sections 55C and 55D.
[342] Section 56.
[343] *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* [2008] HCA 5.

For example, in one recent documented case, a site that permitted large-scale retail development was down-zoned to only permit retail of 400 square metres.[344] The decision to reduce the development potential of the site, was taken after a developer had announced its intention to build a new shopping centre.

Down-zoning represents yet another method of stealing someone's property rights. If the right to develop land is to be given and taken at the whim of the state, there will be very little incentive to buy land and invest the vast amounts of cash necessary to submit a development application.

Down-zoning which reduces the development potential of land, must necessarily lead to compensation to affected landowners, for any reduction in the value of land.

Queensland legislation can be used as a model in this respect (*Sustainable Planning Act 2009*, Chapter 9, Part 3). This change requires an amendment to the *Environmental Planning and Assessment Act*.

10.5 Heritage listings

In November 2008, Ashfield Council voted to list an unexceptional 1970s townhouse complex as a heritage site, despite the objections of some residents. [345] In 2007, Parramatta Council attempted to heritage list 12 ordinary 1960s and 1970s homes in Toongabbie and Epping.

Owners of heritage listed homes face the devaluation of their property by tens of thousands of dollars. They are also burdened by new restrictions – meaning it is extremely expensive, if not impossible, to undertake even minor renovations – such as modifying the kitchen, changing internal walls, or installing a pay TV aerial. Heritage listings don't just affect the listed property – they can affect neighbours too.

Once a single property in a street is heritage listed, neighbouring properties can be blocked from making changes to their homes, that alter the streetscape.

Heritage listing can and does occur without the consent of a property owner. No-one in NSW is safe – suburban homes and large sites are all able to be listed as heritage sites, without compensation for loss of land value. The risks of an unwanted heritage listing on a development site (or in the vicinity of one) is yet another unquantifiable regulatory risk, which makes investing in NSW less attractive than in other jurisdictions.

The best way of protecting the rights of property owners, is to pay 'just terms' compensation when decisions are made to acquire private property. This isn't a radical idea – it's what the law provides just across the border in Queensland.

In Queensland, the *Queensland Heritage Act 1992* allows an owner to be entitled to claim compensation if their property is listed in a local heritage register.[346] A provision of this kind, would address many of the ongoing problems with the local heritage system, here in NSW.

The then NSW Minister for Planning, the Hon. Kristina Keneally MP, once advised us that the Queensland heritage compensation provisions may have only been invoked twice in the last 10 years.[347] While this point was made to support the proposition that such compensation provisions are unnecessary, we argue that it proves the reverse.

The principal economic explanation, for the compensation requirement is that, with such a requirement, the government would take an inefficiently large amount of property -- that is, the price

[344] *GPT Re RE Limited v Belmorgan Property Development Pty Limited* [2008] NSWCA 256.
[345] They are located at 32 Chandos St, Ashfield.
[346] s 124.
[347] Correspondence to the Urban Taskforce, 30 May 2009.

system provides an efficient discipline on the government's "consumption" of private property.[348] The low level of actual compensation payments in Queensland, combined with anecdotal evidence from developers operating in that state, suggests that, when public authorities there are confronted with the need to actually pay the economic cost of a heritage listing, they are less likely to pursue listings that generate such costs.

Conversely, in NSW, the only brake on the exercise of heritage listing powers is politics. So long as heritage listings do not cause political problems, public authorities are free to keep making them. They may continue in this approach, irrespective of how expensive they may be to the economy (the costs exclusively falling on private property owners). Politically unpopular groups, such as property developers, and passive groups such as individual home owners, are likely to be the greatest victims of politically-driven heritage listings.

A further means of protecting the rights of property owners is to provide for an independent review, to give affected property owners a right of appeal against council decisions to list their home or other property as 'heritage'. This was recommended by an independent review commissioned by the NSW Government and chaired by Ms Gabrielle Kibble, a former Director-General, of the Department of Planning. This option involved allowing the appointment of a planning arbitrator to rule, on a dispute between a property owner and a council, as to whether a proposed local heritage listing should proceed.[349] This option was not adopted by the NSW Government.[350]

NSW should adopt the Queensland model, where an owner is entitled to claim compensation for the entry of a place in the heritage register and introduce a landowners' right of appeal against decisions to make heritage listings, as per the 2008 Kibble review.

This change requires amendment to the *Environmental Planning and Assessment Act*, the *Heritage Act* and the *National Parks and Wildlife Act*.

[348] *Comparative Constitutional Law: United States/Canada*, 7th ed. 6-1.
[349] *Report of the Independent Expert Panel A Review of the NSW Heritage Act 1977* (2007), page 49.
[350] While section 170, to be inserted by the *Heritage Amendment Act 2009*, allows a council to refer a disputed heritage nomination to an advisory panel, this is no substitute for an appeal. The council is not obliged to make the referral, it appoints the panel, and it is free to ignore the advice it receives.

11. The response of urban policy-makers to the affordable housing crisis

The COAG Reform Council recently highlighted the connection between the constraints on housing supply and home affordability in its recent report *National Affordable Housing Agreement: Baseline performance report for 2008-09*. The Reform Council said

> there is strong evidence of a disconnect between supply and demand in the housing market, resulting in a shortage of supply that has led to an increase in housing costs.[351]

According to the report, 28 per cent of homes sold Australia-wide are affordable to moderate-income households. Melbourne, with its robust housing supply, has the highest proportion of homes affordable to moderate-income households – at 39 per cent - while in Sydney only 26 per cent of homes sold were affordable to moderate-income households.

Reduced affordability has contributed to falling levels of home ownership. In the twelve years to 2006/2007 the proportion of the community who were owner-occupiers fell from 71 per cent to 68 per cent.[352] This significant decline has hit key sections of our community particularly hard.

For example, home ownership in the 25 to 34 year old age group plummeted from 52 per cent to just 43 per cent. In the 35 to 44 year old band, home ownership dropped from 72 per cent of households to 65 per cent. In the 45 to 54 year old age group the level of home ownership fell from 82 per cent to 76 per cent.[353]

The COAG Reform Council has observed that:

> Home ownership is associated with many benefits for households ... . These can include financial benefits such as lower real housing costs over a lifetime and wealth accumulation through a growth asset. Owning a home can also bring social and cultural benefits such as a sense of family and belonging, security, control and privacy, and is linked to improvements in health and educational attainment.[354]

In this context urban planning policy-makers have considered special measures to boost housing affordability. Regretfully, there seems to be an insufficient recognition that the lack of affordability is caused by a systemic mismatch between the demand for ,and supply of, housing.

11.1 The Affordable Housing SEPP

In NSW, the state government has sought to address affordability concerns via a new environmental planning instrument, the *State Environmental Planning Policy (Affordable Rental Housing) 2009* ("the Affordable Housing SEPP").

The SEPP included:

- new provisions permitting low rise medium density housing in walking distance of rail, light rail, public ferries and some bus services - where at least 50 per cent of the housing is rent controlled for 10 years and managed by a community housing provider;
- "density bonuses" for apartment development in areas where apartments are already permitted - where between 20 to 50 per cent of the housing is rent controlled for 10 years and managed by a community housing provider; and
- new provisions facilitating a new style of boarding houses and secondary dwellings.

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[351] COAG Reform Council, *National Affordable Housing Agreement: Baseline performance report for 2008-09* (2010) xviii.
[352] Australian Bureau of Statistics, *2007 -08 4130.0 Housing Occupancy and Costs Australia* (2009); Australian Bureau of Statistics, *1995-96 4130.0 Housing Occupancy and Costs Australia* (1997).
[353] Ibid.
[354] Ibid 61.

The relaxation of some prohibitions on more compact home development near public transport was a sensible, long promised, move. New higher density, pedestrian friendly, communities around quality public transport will be crucial to Sydney's growth in the coming years. However, the central provisions of the Affordable Housing SEPP only benefit those in public housing and tenants of community housing organisations. The policy will not help tenants leasing directly from private landlords and does nothing to help those who want to make the transition to home ownership. . It does not go far enough and is only a partial implementation of the NSW Government's Metropolitan Strategy.

The policy, in theory benefits a very large group of people, but most low and middle income renters will get nowhere near the new homes made available under this policy. For example, 62 per cent of all single people renting a home in Sydney – that's 77,000 people – would theoretically be eligible to rent homes built under this scheme. A significant 24 per cent of couples with no children renting in Sydney – living in 21,000 homes – would be eligible for this scheme. At least 69 per cent of single parent families renting in Sydney – living in 51,000 homes – are entitled to be housed by the scheme. In theory somewhere between 31 per cent and 60 per cent of couples with children renting in Sydney – between 32,000 and 61,000 homes – can demand access to this new 'affordable' housing.

While this "affordable housing" scheme is a step forward, only a tiny fraction of 210,000 eligible Sydney households could ever benefit from it. That is because the scheme's focuses on rent control, and the exclusion of affordable housing for owner-occupiers, meaning that investment in the scheme would be modest. Returns on the investment in rent controlled housing are unlikely to match returns in comparative investments with a similar risk profile. Private funding will, accordingly, be attracted elsewhere. This is a niche policy, which sees, at best, a small amount of additional development to accommodate some lucky renters.

We agree with the COAG Reform Council observation that

> housing affordability is to be addressed ... by improving the operation and effectiveness of the mainstream markets for renters and home buyers.[355]

The Affordable Housing SEPP's focus on rent control housing operated by charities and public housing, means that the SEPP has almost no impact on this "mainstream market". The complete absence of affordability measures directed to assist aspiring owner-occupiers is particularly surprising.

11.2 Making rental housing more affordable

Planning laws have been contributing to housing affordability problems by:

- preventing or limiting the construction of new medium and high density housing in areas where it is most in demand;
- restricting the availability of greenfield land for the development of detached housing; and
- imposing massive development levies on greenfield development and lower, but nonetheless burdensome, levies on brownfield development.

Supply-side measures are the key to boosting affordability for both renters and home buyers. Tackling these issues will improve affordability for everyone. Any policy solution must boost overall home supply and help both those looking for rental housing as well as those aspiring to own their own home. Nonetheless, the Urban Taskforce does see the value in specific policies aimed at improving rental affordability, as part of a broader reform effort.

There are four ways to make rental housing more cost effective:

1. Increasing the supply of new housing generally by removing restrictions on the development of new homes that developers want to build and home buyers/investors want to buy.
2. Reducing the cost of developing and building rental housing.

[355] Ibid xvii.

3. Government subsidies for the rents of residents in a certain class of housing. The Commonwealth's National Affordable Rental Housing Scheme is an excellent example of this approach.
4. Cross-subsidisation - by making other housing more expensive; with the more expensive component being used to subsidise the "affordable" component.

The Urban Taskforce believes the biggest impact can be made on the largest scale through the first and second points. For example, government should release residential land for development for detached housing on multiple fronts. This will boost competition between different land-owners and developers. Government should also more readily permit the development of new compact, pedestrian-friendly, mixed-use neighbourhoods in inner and middle ring suburbs. This would bring together new apartments, workplaces, shopping, and recreation areas within walking distance of public transport infrastructure and in the vicinity of major transport corridors.

The third policy point above – subsidies from government - can also be a valuable tool. However, **subsidies that are funded by levies or restrictions on other forms of housing are grossly inequitable, and will lead to a decline in overall housing affordability.**

The fourth policy point above, **cross-subsidisation, is an entirely <u>inappropriate</u> mechanism to attempt to improve housing affordability.**

11.3 Affordable housing levies

Many advocates of some types of "affordable housing" policies believe that new levies on development activity can be used to fund the development. Those that argue for levies are mistaken if they believe that either the developer or original land holder ultimately bears the costs of new or increased developer charges (see section 8.1 above).

It is crucial that no new "affordable housing" levies not be imposed. Such levies are a contradiction in terms.

In NSW such ineffective levies exist in several local government areas under a state policy: the *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)*. These existing levies have produced almost negligible levels of "affordable" housing production.

The Sydney City Council has also proposed a new system of levies, allegedly to boost housing affordability

The City's released draft "affordable housing" strategy argues for an extra 8,000 new properties to be built over the next 20 years. Rents will be capped and regulated by the government. Of these, 2,000 properties are to be paid for by a levy on newly-built homes. Home buyers will end up paying a massive amount in levies to subsidise the Council's rent control scheme. As much as $900 million may need to be raised by this new tax. The plan taxes young families struggling to buy a home of their own to subsidise those who are renting. Not all renters benefit – only those lucky enough to win a place in one of council's rent control homes. Many will miss out.

It's entirely appropriate that government and local councils take action to help renters – but the last thing they should be doing is introducing new taxes on home buyers. There's no such thing as a free lunch. You cannot create thousands of new homes with subsidised rental unless someone is paying for them – and the City of Sydney wants owner occupiers to bear this burden. Any subsidies for struggling renters should come from the government, not from other home buyers.

11.4 Density bonuses will reduce the supply of housing and increase the costs of home buyers

Some groups regularly propose the use of density bonus for apartment development if some or all apartments are sold or rented below market rates. NSW's Affordable Housing SEPP adopts this approach, although its impacts are intended to be limited to properties developed for the purpose of rental.

There is no valid reason why an apartment building of a particular bulk and scale should be more acceptable to the planning system if it is subject to a rent control scheme or sold cheaply. The policy rationale of floor space ratios is to:

- ensure the intensity of development is aligned with infrastructure; and
- ensure that the bulk and scale of buildings is appropriate to the streetscape and in keeping with physical form of the surrounding community.

A bonus scheme like this utterly undermines this rationale.

A bonus scheme of this kind simply encourages planning authorities to scale back proposals for increased floor space, to take into account the availability of the bonus. That is, if 2:1 is thought to be appropriate in a particular street because of nearby parkland, and low-rise buildings, planning authorities will adjust the intended floor space ration to 1.5:1, to ensure that any rent control developments are still in keeping with the surrounding urban form. **Any bonus scheme is likely to reduce the amount of housing available** because:

- less homes will be developed under a rent control scheme or cap on the sale price of apartments than if the same floor space ratio had been available for new home development for sale at market rates (it is well established that price controls reduce the amount of supply of a regulated item); and
- apartment buildings developed outside the scheme will be subject to more restrictive floor space ratios than would have applied if the bonus scheme had not existed.

A reduction in the housing supply means higher prices for home buyers and renters who are not fortunate enough to be tenants in a rent controlled property or win the right to buy a home whose sale price has been capped below the market level.

We don't have to go far to find examples of this approach. Byron Shire Council has been consulting publicly on an affordable housing policy.

This policy offers a "bonus" in return for a financial payment to fund "affordable housing". However, there is no real bonus because the council is setting its floor space ratio a low 0.4:1 and then offering a "bonus" of 0.1. This gives a total density of 0.5:1 - a very modest density for medium density development. In fact, the existing residential dwelling floor space ratio in Byron Shire is currently 0.5:1. The proposed total floor space ratio is equivalent to that existing under the current local environment plan.

Density-bonus schemes generally involve local councils "low-balling" development controls for less favoured uses, to ensure that development is steered to the favoured use. The low-balled development control is typically, in substance (taking into market factors and the feasibility of development) a prohibition. If the development of the favoured use is not viable, the site will typically remain undeveloped.

In a report by council officers on the future North Sydney local environmental plan, they said the introduction of a council floor space bonus scheme

> may require artificially scaling back controls for the North Sydney Centre to provide the "space" for bonuses.[356]

Environmental planning instruments should not accord different land uses of a similar intensity with different floor space or height entitlements within the same zone. **Floor space ratios should not be linked to any rent control scheme or any cap on the sale price of new homes.**

In any event, in many, if not most cases, a bonus floor space ratio is unlikely to result in additional apartment densities. This is because height controls and site coverage rules already often prevent existing floor space ratios from being fully utilised.

11.5 Preferential development rights for non-profits or public authorities

Some proponents of "affordable housing" argue that the influence of the private sector needs to be reduced in the production of new homes, and instead there needs to be a much stronger role for public authorities and not-for-profits. NSW's Affordable Housing SEPP is an example of this approach.

This argument suggests that these not-for-profit organisations should be able to access additional income through preferential development rights under the planning system, which they can then use to finance their social housing program. This is achieved by creating a more generous regulatory environment for public authorities or not-for-profits seeking to purchase prime development sites close to transport infrastructure. These preferential development rights may include the right to build apartments in an area where apartments are banned, or the right to an additional floor space ratio.

Such proposals invariably would allow public authorities or non-profits the ability to undertake developments in which:

- some or all of the housing can be sold off in the open market in direct competition with private sector developers; and/or
- newly developed housing is initially designated as social or regulated housing, but individual homes can be sold off later as unregulated housing.

This kind of policy restricts competition and choice. It will have the effect of either:

- reducing the price obtained by land owners for potential apartment development sites (by banning private sector "for-profit" developers for bidding on the same terms of others); and/or
- requiring home buyers to pay more for their new home than they should, because the developers of apartments will be artificially restricted to a smaller pool.

In effect, this policy is nothing more than a disguised subsidy for certain housing providers. The burden of the subsidy is borne by a small class of land owners and home buyers, which is neither equitable nor justifiable. Such subsidies should come from the broader tax base. **Providers of regulated or social housing should not be entitled to build unregulated housing** (or housing that can be readily converted to unregulated housing) **in circumstances where such construction is currently banned by law.**

Even if any rules required all of the developments to be built and remain as regulated or social housing on land close to transport infrastructure, it would still not be justifiable because:

- such land has already been generally identified as appropriate for higher densities – so a special rule for regulated or social housing will come at the expense of home buyers and other renters; and

[356] North Sydney Council Item PD06 Planning & Development 28/06/10, *Report to General Manager Planning & Development Committee*, authored by Brad Stafford, Senior Strategic Planner & Alex Williams, Strategic Planner.

- if there is any special regime for regulated or social housing, the business sector should have the opportunity to develop sites for social or regulated housing on an equal footing with not-for-profit organisations.

Any special development rules for regulated or social housing should not come at the expense of the broader housing needs of the community. Any opportunity to develop regulated or social housing should be equally available to the private sector – the law should not discriminate between non-profit and for-profit organisations.

12. Further information

The Urban Taskforce is available to further discuss the issues outlined in this submission.

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Appendix: Case studies

1. Permissible supermarket within walking distance of public transport refused consent

The Village Mcevoy Pty Limited v Council of the City of Sydney (No 2)[357]

In this matter, Justice Pepper heard a legal challenge against a decision by a Land and Environment Court Commissioner, to refuse development consent to an application for a four level building envelope, with a mix of commercial and retail uses and 470 car parking spaces. The building was to include a full-line supermarket. Development of this type was permitted in the existing mixed-use zone.

The new building was to be located within and at the western edge of Green Square about 850 metres from the town centre and roughly equidistant between Erskineville and Green Square railway stations.

While not cited in the case, the Department of Planning's *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* describes a centre as

> containing the highest appropriate densities of housing, employment, services, public facilities within an acceptable walking distance - 400 to 1000 metres - of major public transport nodes, such as railway stations and high frequency bus routes with at least a 15 minute frequency at peak times.[358]

This development is clearly within an easy walk of a wide range of current and planned high density residential development and convenient public transport. It would have helped create a vibrant, pedestrian friendly, compact community.

The locality in which the proposed site is situated is predominantly developed with industrial and mixed-use developments. Residential development exists to the north beyond the site.

Justice Pepper found that the Commissioner's decision was lawful. The critical consideration in the determination of the application before the Commissioner, was the strategic planning context and the fact that the Green Square town centre is to be "the major commercial, retailing, cultural and entertainment centre within that area". The impact on the Town Centre therefore needed to be assessed and its importance was not to be "underestimated". The developer's economic evidence was that the proposed development would not affect the City of Sydney's "Retail Hierarchy", because there would be a sufficient retail spend, to support it without affecting the town centre. While the Commissioner described this evidence as "compelling", it was nevertheless, found to be incomplete and that "significant concerns remain regarding impacts of the proposal on the Town Centre itself, in the context of the adopted strategy "more broadly".

The Commissioner found that the planned town centre would be "put in jeopardy" by the proposed development. While the Commissioner "doubted" that the proposal would completely undermine the role of the Town Centre, the Commissioner was not confident that the proposal would be able to make good the resultant "community detriment". (Apparently competitive pressure and the lower prices and better service it brings, is a detriment, rather than something positive).

The Commissioner stated that the proposal was a threat to the Town Centre's commercial success "in part because the land market will react unfavourably if private investment is undermined by ad hoc competing developments" resulting in "significant community costs" and adversely affecting the "primacy and vibrancy of the Town Centre". Thus "these concerns point to the need to ensure that the present investments in it, are not put at risk, especially during the start-up phases".

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[357] [2010] NSWLEC 17.

[358] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport*: *Improving Transport Choice - Guidelines for Planning and Development* (2001) 9.

Of course, this logic overlooked the fact that free markets are full of commercial risk for the average entrepreneur. The mere existence of a risk, of competitive pressure is not, in itself, a reason not to proceed with investment, if someone is confident about their business, their effectiveness and the quality of their offer. This approach, followed by the Commissioner, and upheld by Justice Pepper, rewards and encourages businesses which offer poor service and charge high prices; because businesses will be safe in the knowledge that their competition will be prevented from establishing nearby.

2. Shopping centre approved because it is not a competitive threat

Lakeside Plaza Pty Ltd v Legal & General Properties No2 Ltd[359]

In these proceedings, a development consent had been granted, by a council, for proposed extensions to a shopping centre known as the Bay Village, at Bateau Bay on the New South Wales Central Coast.

The owners of Lakeside Plaza, a shopping centre at The Entrance, some four kilometres from Bateau Bay, initiated legal proceedings - alleging that the Council had failed to properly address its statutory obligation, to consider the economic effect of the proposed development, on the existing retailing area at The Entrance, including the Lakeside Plaza Shopping Centre.

Justice Stein held that there was a statutory requirement, under the 'economic impacts' test for

> the consideration of the economic effect of the proposed development on the existing retailing centre at The Entrance, which is acknowledged to be in the locality. In my opinion the decision-maker *is required* to consider the economic effect of the development on the existing retail centre at The Entrance, including Lakeside (emphasis added)[360]

His honour then went on to find that

> It is apparent to me that the decision-maker considered that the economic effect of the development, by the provision of additional floor space, would not upset the retailing hierarchy, including The Entrance Shopping Centre. ...
>
> The conclusion, that the extension to Bay Village would not upset the established retailing hierarchy, ... [The proposal will not] effectively destabilise the economic viability of a shopping centre of the size of The Entrance.

The incumbent shopping centre landlord, failed in his attempt to have the development consent set aside. However, it only failed because the council was able to demonstrate that it considered the potential, for the expanded shopping centre, to place the shopping district in The Entrance under competitive pressure. Had there been a risk of increased competition, the decision might easily have gone the other way.

This case encouraged developers to ensure their proposals, for new and expanded shopping centres, did not compete with existing shopping centres.

3. Warring consultants reports on the impact on existing traders

Schroders Australia Property Management Ltd v Shoalhaven City Council and Anor[361]

In this matter, Shoalhaven City Council had issued a development consent for a Nowra Woolworths retail development, comprising a supermarket, a discount department store, specialty shops, a

[359] (1992) 76 LGRA 60
[360] *Lakeside Plaza Pty Ltd v Legal & General Properties No2 Ltd* (1992) 76 LGRA 60, 65-66.
[361] [1999] NSWLEC 251.

community centre, and associated car parking, streetscaping and landscaping - it was to be known as the Nowra Marketplace.

There were already two other comparable shopping centres in Nowra. One of them was Nowra Mall (containing a Coles supermarket), extensions to which were already the subject of a development application, which was ultimately granted. The other shopping centre was Nowra Fair, which was owned by Schroder Australia.

Schroder challenged the validity of the development consent in the Land and Environment Court. The decision is a useful illustration of the routine processes that needs to be followed to get a new retail development approved in NSW.

The economic effect was regarded by the council as a relevant consideration in deciding the development application. As a result, the proponent, Fabcot, lodged with the council an economic impact assessment prepared by Jebb Holland Dimasi (JHD) which examined the economic impact under two scenarios - first, if Nowra Marketplace alone proceeded, and, secondly, if both Nowra Marketplace and the extensions to Nowra Mall proceeded. The JHD report concluded that

> by the year 2000 there would be ample market scope for both proposals to trade successfully, without any significant impact on the current trading performance of existing retailers at Nowra Fair or in the Nowra CBD.

BBC Consultant Planners lodged with the council, on behalf of Schroder, a detailed submission opposing the Nowra Marketplace development. Annexed to that submission was a KPMG report entitled "Nowra economic impact assessment" prepared by KPMG Management Consulting. The KPMG report concluded that, the likely economic impact of the Nowra Marketplace would be a "blighting" of the existing retail heart of Nowra. The KPMG report also contained detailed criticism of the material in the JHD report.

The council's planning services manager reviewed the JHD report, the KPMG report and a third economic report, prepared by Leyshon Consulting and concluded that all three reports were unreliable.

Council then engaged Intergrowth Property Group to provide an economic overview and to assess the JHD report and the Leyshon report. In its report, Intergrowth considered that the CBD was likely to be adversely affected by the Nowra Marketplace development and it outlined a number of economic consequences, if that development was to proceed.

A further report, commissioned by the council, reviewed the JHD report, the Leyshon report and the Intergrowth report, and then concluded:

> In summary, the proposal in its present form would seem likely to have adverse social and economic effects on the Nowra Town Centre. Locating Woolworths Market Place outside the designated strategic development zone creates a donut effect which has the potential to polarise shoppers' patterns at the eastern and western ends of the Nowra Town Centre to the detriment of existing traders.

Coles Myer Ltd then wrote to the mayor and all councillors, setting out its concerns with the economic impact of the Nowra Marketplace development, and urging the council to carefully consider all the relevant information.

In the court proceedings, Justice Pearlman observed that the JHD report, the Leyshon report and the KPMG report were contradictory, in the sense that their respective predictions, as to the social and economic effect of the Nowra Marketplace, were different.

The council had been supporting the development of a Woolworths' shopping centre for over five years and was of the view, that this position outweighed the social and economic impacts identified by the GSA report and the Intergrowth report.

Justice Perlman found that the council did properly consider the social and economic effects of the proposed development in the locality, and was entitled to give more weight to its support for a

Woolworths' development, than the documented economic costs of that development. Significantly, there was no suggestion that it would have been wrong for the council to rely on some of the adverse economic studies, as a reason to refuse the development application, had it been minded to do so.

4. A supermarket in Wyong – anti-competitive rules fine

Woolworths Limited v Wyong Shire Council & Ors[362]

The applicant lodged a number of development applications with Wyong Shire Council from October 2003, for the construction of a supermarket and other uses of a site.. None of these were approved by the Council.

In April 2004, a competitor lodged a development application for a supermarket on another site. The competitor's application was approved by Wyong Shire Council.

Under the *Wyong Local Environmental Plan* ("the LEP') all the development applications related to land zoned as an urban release area. A "local shopping centre" was permissible in the zone subject to certain limitations, including that only one centre was permissible in Wadalba and Blue Haven.

The LEP's provisions meant that the applicant's application for a rival local shopping centre could not be approved. As a consequence, it launched a legal challenge arguing that the LEP's limitation (that there could be only one local shopping centre) was invalid.

The applicant argued that the limitation to a single shopping centre was invalid because it was not a bona fide attempt to exercise power under the *Environmental Planning and Assessment Act*. They said that the primary operation and effect of the restriction was the protection, of other retail development in the area, from the threat of competition. The applicant submitted that the protection of retailers from competition is not an end or object within the scope of the *Environmental Planning and Assessment Act*. The applicant said that restriction in the LEP does not take, as its reference point, any actual use or development of land, nor does it take as its reference point, any assessment of the needs of the locality, nor the continued viability of retail facilities in the locality.

The applicant claimed, that the effect of the limitations was to immunise the person, holding the consent, from the threat of competition. By taking the grant of consent as its reference point, the applicant said that "protectionism" was unconnected with the statutory objects of the Act.

Wyong Shire Council claimed that the LEP was made for a proper purpose, namely the preservation of a hierarchy of retail centres between regional, district, neighbourhood and local areas. This purpose was generally reflected in the *Wyong Shire Council Retail Centres Strategy Plan 1996* ("the Retail Centres Strategy Plan"). The Retail Centres Strategy Plan included several objectives, one of which was about "protecting the integrity of existing major centres, to the extent that they continue to perform a useful community function".

The Council argued that the limitation was not a protectionist provision. Rather, it operated to enable a retail centre to be established in Wadalba, to prevent the expansion of retail centres that might exceed the environmental capacity of the land.

The Council also argued that even if the effect of the limitation is protectionist, its purpose is not. In any event, the Council argued, it was in the public interest that such prohibitions are available to ensure that the local shopping centre consent is implemented for the benefit of the community.

The NSW Land and Environment Court found that the objects of the *Environmental Planning and Assessment Act* provide wide powers to a council and to the Minister for Planning, to prepare and make

[362] [2005] NSWLEC 400.

an LEP, which controls development. The Court said that a broad prohibition, on a second local shopping centre in Wadalba, is a legitimate purpose under the Act.

5. A bulky goods retail outlet in Warringah Council will compete

Centro Properties Limited v Warringah Council & Anor[363]

Centro Properties Limited commenced court action to invalidate a 2002 development approval, from the construction of bulky goods retail outlet, shops, restaurants and associated parking, granted by Warringah Council.

The development application proposed the erection of a multi-tenancy bulky goods centre, with ancillary access roads, signage and landscaping, comprising proposed uses of bulky goods shops, and restaurants. The development was to be located in Austlink Business Park.

Since 1999, Centro had been the owner of a shopping complex in nearby Warriewood (just over eight kilometres away), which included two supermarkets and a discount department store.

The local environment plan (LEP) permitted bulky goods shops, other shops and restaurants as appropriate development for the Austlink Business Park.

Centro argued that the Council had failed to consider economic impact in the locality.

Specifically, they said that the council had not properly applied section 79C(1)(b) of the *Environmental Planning and Assessment Act* which imposes a mandatory relevant consideration, to consider the likely impacts of the development on economic impacts in the locality.

Since the proposed development comprised a large bulky goods retail centre, together with retail shops comprising 4 per cent of the proposal, the Court said it was plain that economic impacts in the locality were a relevant consideration and an essential part of the issues to be considered.

The Court found said that the "economic impact in a locality (for example, marginalising other developments in the locality that provide a facility presently enjoyed by the community) is a proper consideration to be taken into account, as a matter of town planning".

The Court said, that the absence of specification of the proposed uses within bulky goods shops, combined with the numerous small tenancy areas, would lead to the bulky goods retail centre functioning, in practice, as a retail shopping centre.

The Court observed that the Council considered the market share, which the proposed development might successfully attract, but did not consider the impacts that attraction might have elsewhere. The Court said that section 79C requires consideration of the impacts of the proposed development on the locality, not the success of the proposed development.

Centro argued, the council's staff had asserted, that there would not be any significant impact on the viability of other centres in the Warringah local government area, without any evidence.

The Court upheld Centro's argument. It found that since:

- there was no information addressing the issue, before the Council;
- the proposed development potentially draws trade from a large area, including areas well outside the local government area; and
- there is no assessment of the likely uses within the bulky goods component of the proposed development, because the development application does not nominate those uses,

[363] [2003] NSWLEC 145.

the consent should be invalidated.

The Court said that "it is not adequate to say that because no similar development exists in this area, that the Council can be assumed to know what the impact on traders in the locality, is likely to be."

Such information was "essential for the proper consideration of the development application."

6. A bulky goods outlet, next to an existing shopping centre, will compete with Newcastle CBD

Almona Pty Ltd v Newcastle City Council[364]

In this matter, Justice Pearlman, of the NSW Land and Environment Court, heard a merits appeal from a decision by Newcastle City Council to refuse an application for the "establishment of bulky goods retail, hardware and retail plant nursery" in Kotara, about seven kilometres from the Newcastle central business district.

The local environmental plan zone objective

The site was zoned as light industrial 4(a) under the *Newcastle Local Environmental Plan 1987*. The site was directly opposite a large shopping complex known as Garden City.

A key issue related to the LEP. One of the applicable zone objectives was

> to allow commercial, retail or other development only where it is ... unlikely to prejudice the viability of existing commercial centres; ...

The permissibility of a proposed development depended upon it being consistent with that objective.[365]

The council argued that the development could not satisfy the zone objective and therefore should be refused.

Justice Pearlman rejected the developers' applicant argument, that the carrying out of the development would only be inconsistent with the zone objective, if there was a real chance, or possibility, that the proposed development would bring into question the existence of the Newcastle CBD.

Instead, Justice Pearlman ruled what the zone objective permitted

> It permits only those developments which do not negatively affect the maintenance and reinforcement of the life or existence of existing commercial centres, of which the Newcastle CBD is, in the terms of the relevant planning instruments, of a higher order or paramount.
>
> [A] proposed development is permissible if there is no real chance or possibility that it will disadvantage or detrimentally affect the life or existence of existing commercial centres. In this case, the existing commercial centre in question is the Newcastle CBD which itself enjoys some paramountcy over other centres.

Having established that the threshold was much lower than the one argued by the developer, Justice Pearlman considered the economic and planning evidence before her.

An economist, appointed by the council, had undertaken an exhaustive field audit of every shop in Newcastle, Lake Macquarie, Port Stephens, parts of Cessnock and parts of Maitland over the previous 12 months. He estimated the impact, of the proposed development upon directly competing shops,

[364] [1995] NSWLEC 55.

[365] That follows from cl 12(3) of the LEP which obliged the council not to grant consent to the carrying out of development unless the council is of the opinion that the development is consistent with the objectives of the relevant zone. It also follows from the specific wording contained in zone 4(a), cl 3 of which provides that the only development which is permissible with consent is development for a purpose "... which, in the opinion of the Council, is consistent with the objectives of this zone ...".

that is, bulky goods retail shops in the Newcastle CBD, would be immediate losses of trade in the range of 7 to 13 per cent.

The council expert also carried out a survey of local shopkeepers, who were asked about their viability if they were affected by a loss in sales. The result of this survey, was that 58 per cent of those surveyed said they could not afford to lose between zero and 5 per cent of their current sales. A further 23 per cent could not afford to lose between 5 to 10 per cent of their current sales. Thus, he concluded, a total of 81 per cent of traders in the Newcastle CBD in shop categories, which would be directly affected by the proposed development, could not afford to lose up to 10 per cent of their current sales. The expert conclusion was that there would be substantial hardship incurred by many retailers in the Newcastle CBD and many of those traders would close their shops.

He also concluded that there would be "blighting" where large vacant retail shops lead to a blighted appearance of the retail precinct, which dissuades shoppers and potential shopkeepers, and results in adverse flow-on of the impact.

An economic expert, appearing for the developer, said that between 5 per cent and 10 per cent of total available bulky goods retail expenditure is likely to be redirected from existing centres to the proposed development. He concluded that impact will be dispersed over a wide range of centres and a number of retailers, principally in the Newcastle CBD, Hamilton/Broadmeadow, department and discount departments stores in Charlestown, Garden City and Bennetts Green. He said that, no single centre, nor any individual retailer, would experience a severe impact from the proposed development. Hence he concluded that the proposed development would not prejudice the viability of any existing commercial centre, either in the Newcastle local government area or in adjoining local government areas. However, he did concede that a retailer could go out of business and therefore cause the "blighting" effect.

Justice Pearlman favoured the evidence of the council expert but went onto to say:

> [I]t perhaps does not matter too much whose evidence is accepted, because both experts concluded that there would be an impact from the proposed development upon the Newcastle CBD which might force some retailers to close their businesses and cause blight in the west end area. Whilst some doubt was cast … upon the accuracy of … [the] survey of local retailers, it does tend to reinforce a conclusion that there would be a detrimental impact upon retailers in the Newcastle CBD.

Justice Pearlman also made it clear that

> [e]ven if [the zone] objective … is an undesirable policy objective, and I express no opinion on the matter, it nonetheless is clearly the basis upon which the permissibility of the proposed development depends …

Which confirms the Urban Taskforce's consistent argument; once these matters are law, all inquiry, as to their appropriateness, tends to get thrown out the window.

The proposed development's inconsistency with the zone objective, was fatal to the development application, however, for the sake of completeness, Justice Pearlman considered whether other plans would also block development.

<u>The local environmental plan overall objective</u>

The local environmental plan included an objective for the whole plan, in relation to "retailing and commerce"

> to maintain and reinforce the role of the Central Business District as the Hunter Region's major commercial, administrative, cultural and entertainment centre …[366]

Justice Pearlman found that the development proposal was contrary to the plan aim.

[366] Cl 2(2)(c)(i).

The regional environmental plan

The council argued for refusal of the development approval because of provisions of the *Hunter Regional Environmental Plan 1989*. The plan said:

> The Newcastle central business district *should be promoted* as the major commercial, retail and service centre in the region, comprising a wide range of office and entertainment facilities and establishments providing high quality goods and services. [367]

Justice Pearlman found that the development proposal was contrary to the regional environmental plan. Her decision in this respect illustrates how apparent 'soft' phrases like 'promotion' are given 'hard' means like 'prohibition' in the NSW planning system.

Development control plan

The council said that the proposed development is inconsistent with the objectives, goals and policies specified in paragraphs 1, 2 and 16 of the *City of Newcastle Development Control Plan Number 1* which said:

> 1 The goals, objectives and policies of the Newcastle Central Area Strategy Plan and Structure Plan are affirmed and supported by this Plan.
>
> 2 Recognising the primacy of Newcastle Central Business District as the Regional Centre, promote the consolidation and development of existing business centres within the City to achieve a balanced development of each, according to its role and appropriate level of function, justified by potential demand generated within the trade area ...
>
> 16 Support the consolidation of existing business centres by preventing the uncontrolled dispersion of retail, business and commercial activities into zones other than recognised business zones, for example by careful monitoring of retail developments in industrial zones ..." (underlining in quoted text)

Justice Pearlman found that the development proposal was contrary to the development control plan.

In this case study, there was no argument or consideration about the issues of infrastructure capability, urban amenity or reduction in vehicle kilometres travelled. Indeed, it would have been difficult to successfully mount such a case, because the proposed bulky goods retail facility was right next to an existing shopping centre. In the end, the development proposal was unable to proceed solely because of the risk of increased competition to other businesses.

7. An extension of a fruit and vegetable store

Agostino & Anor v Penrith City Council [2002] NSWLEC 222

In this case study, the applicant operated an existing fruit and vegetable store in Llandilo. Llandilo is a rural area with residences and paddocks dominating street frontages. Properties adjoining the site are used for residential and rural activities including grazing and horticulture. Llandilo Village is situated at a distance of 1.4 kilometres from the store and includes a supermarket, post office and produce store.

The fruit and vegetable store had a gross retail area of 150 square metres. It was located on a 2 hectare site with an 82 metre long street frontage. A 200 square metre rural shed used for storage and packaging of products was situated adjacent to the store. The store is serviced by a car park having 32 marked parking spaces and a 9 metre wide driveway.

The store owner lodged a development application to increase the retail area of the store from approximately 150 square metres to 286 square metres. The application also proposed the addition of a "deli counter". Such a section was to be used for the retail sale of a range of products currently offered

[367] Cl 20(1).

for sale including ready-made pasta, bread and dairy products such as milk. The store owner also wanted to sell cheese from the deli counter. Cheese was not within the range of products already authorised for sale from the store under the original planning approval.

Penrith City Council refused the development application and it was appealed to the Land and Environment Court.

The local environment plan (LEP) had an exhaustive list of all goods which may be retailed from the store. The Land and Environment Court rejected the application to sell cheese, because it was not listed as an item permitted for sale in the LEP. The Court also rejected the application to increase the size the retail floor area, because it exceeded the limit imposed under the LEP (150 square metres).

The refusal was given, despite the fact that the Court agreed that the extension of the building (as proposed in the application) would not adversely impact the rural character of the surrounding locality. The Court said the existing store was located on a large block of land and positioned to the left side of the block when viewed from the street frontage. It said that the proposed extension would locate the store more evenly on the site and would not adversely impact on the scenic quality of the landscape.

The Court said, it would have granted the extension in size of the building if it were able to determine this issue on its merits. However, the Court went onto to say that it would have still rejected the proposed increase in the range of retail items, proposed by the applicants and the addition of a deli counter, even if the LEP had not already expressly prohibited the change.

The Court said, that the increased range of goods proposed to be sold, would alter the character of the "fruit and vegetable store" to a vegetable store and delicatessen, akin to a convenience or general store". The LEP contains a prohibition upon general stores being located within three kilometres of one another. An existing general store is distanced approximately 1.5 kilometres from the applicants' premises.

The Court also said that the economic impact of increasing the product range of the store would adversely affect the supermarket at Llandilo Village. The testimony of the proprietor of the village's supermarket included the argument that a substantial component of the local trade, attracted to Llandilo Village, would be diverted to the store if it were permitted to retail items typically found in a convenience or general store.

The Court said the potential loss of the valuable service, which the Llandilo Village supermarket provides the community, was an important planning issue. The Court said that both the Llandilo supermarket and the store provide important but distinct services to the Llandilo community and the approval of the deli counter and conferring the right to sell cheese would "disturb the present balance".

8. Supermarket in a centre not "small-scale" enough

Artro Management Pty Limited v Council of the City of Sydney[368]

Situated on the corner of Erskineville Road and Gowrie Street Newtown, a short distance from the Newtown railway station, is a single storey industrial building known locally as "the hive". It was vacant and was in a generally poor condition. It was constructed around 1943.

An application was made to partially demolish the building, excavate the site and construct a two-storey, plus basement building that would retain much of the building's existing character. The new building was to contain a gross leasable floor area of about 200 square metres, of which about 1,900 square metres would be used for a two-level supermarket, with pedestrian access off Gowrie Street. The remainder of the floorspace would be utilised for a single specialty shop at ground level with access off Erskineville Road.

[368] [2009] NSWLEC 1007.

Despite its Newtown address, being located on the south side of the railway line and being proximate to the Erskineville business area, the site could just as easily be described as being in Erskineville

The application was advertised and about 260 letters of objection plus a petition containing about 4,500 signatures was received. Among other things the petitioners said that

> Erskineville is already well served by supermarkets and another supermarket is not needed. ... Existing retailers will also be adversely affected.

The council refused the development application and that decision was appealed to the Land and Environment Court, where it was dealt with by Commissioner Bly.

Under the local environmental plan, the site was zoned "Mixed-Uses" and the proposed development was permissible. However, as is standard, consent could not be granted unless the proposal was consistent with the zone objectives. The zone objectives highlighted the need to avoid adverse impacts on residential amenity and relied upon particular provisions of development control plans, for specific impact mitigation measures.

Under the development control plan (DCP) the site was part of the "Urban Village of Erskineville". DCP says, the planning intent for the area, among other things is for

> [a] range of small-scale shops, offices and cafes compatible with the urban village character of the surrounding area.
>
> Development that meets the needs of the local community and encourages social interaction.

Commissioner Bly accepted expert economic evidence that there was an undersupply of supermarket floorspace in the Erskineville/Newtown area, based on a comparison of available sales and existing supermarket/grocery store floorspace. This was calculated to be around 8,000 square metres. He found that about 40 per cent to 50 per cent of the sales of the proposed supermarket, would come from an area bounded by a radius of 500 metres from the proposed store, the balance was likely to come from a wider catchment.

Commissioner Bly agreed that there is no reason why there should not be a supermarket in the Erskineville Urban Village Centre:

> [I]ndeed an appropriately sized supermarket would ... anchor the centre and improve its vitality and sustainability to the benefit of the local community. ... However in the light of the provisions ... the DCP it is clear that a supermarket in the order of 2,000 m2 cannot be described as a small-scale shop, particularly by comparison with the average size of shops in the village and even by comparison with other supermarkets in the area that have areas of around 1,000 m2. ...
>
> It is therefore plain that, the proposed supermarket's total turnover will be generated by a population living in a catchment that is considerably larger than the local catchment. ...
>
> It can be accepted that a local shop will still attract non-local customers, but what cannot be accepted in the light of the requirements of the DCP is a relatively large shop that is designed to accommodate a trade area well beyond the local catchment. ...
>
> There can be little doubt that the proposal will enliven surrounding streets by generating additional pedestrian activity and meet the shopping needs of the local community. It is also likely that it will provide a support function for the Erskineville Road Shopping Precinct and be of some commercial benefit of the other shops, but these matters are not sufficient to overcome the planning intent of the DCP to encourage a range of small-scale shops for the local population. ...
>
> A supermarket is permissible with consent in the Mixed-Use zone and, in this location would have commercial and social benefits for the Urban Village of Erskineville. The redevelopment of the existing dilapidated buildings would benefit the area and would probably even be a catalyst for further redevelopment. However, these benefits are not sufficient to overcome the fundamental concerns ... .

The Court refused development consent.

In that matter, a DCP requirement, that a "shop" be small-scale, outweighed the other benefits that a development offered and meant that an acknowledged undersupply of retail services, within the region, remained unaddressed. That was despite the fact that the development was in a recognised "centre", within walking distance of a wide range of high quality public transport.

In theory, a "supermarket" is permitted in Erskineville, but that decision and the planning rules on which it was based means, its only likely to get an approval if its 1,000 square metres or less. True supermarkets or large format stores range from 1,500 square metres (six checkouts) for a typical Aldi or IGA Supa store to 2,500 to 3,500 square metres 12 to 16 checkouts for a full-line Woolworths, Coles, Franklins or Superbarn. So, in industry terms, a small scale supermarket will have a floor area of 1,500 square metres. 1,000 square metres would not be regarded by the industry as a genuine supermarket and would not have the necessary sale volume to defray its fixed costs in the way that a proper supermarket could - that it would be unable to offer the lower-cost groceries that the public expects from a genuine supermarket.