THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM;ljb

Direct Line: 9926 0202

17 September 2010

Ms Christine Underwood
Business Regulation Benchmarking
Planning, Zoning and Development Assessment
Productivity Commission
PO Box 1428
CANBERRA CITY ACT 2601

Email: planning@pc.gov.au

Dear Ms Underwood

Business Regulation Benchmarking – Planning, Zoning and Development Assessment.

The Law Society of New South Wales would like to register its interest in this study and would welcome the opportunity to make a submission to the Exposure Draft which is anticipated in October 2010.

The Issues Paper has been considered by the Law Society's Environmental Planning and Development Committee (Committee). While the Committee proposes making more detailed comments on the Exposure Draft, some general comments are set out below.

As noted in the Issues Paper, planning laws require trade offs to be made between social, economic and environmental needs and planning and zoning must necessarily also manage interactions with a wide range of interest groups and other requirements and systems.

Key Legislation

The Issues Paper notes that while the stated purpose of legislation covering planning differs between jurisdictions, each provides a broad framework for co-ordinated, orderly, effective and/or strategic processes in the use and development of land.

In New South Wales, the key legislation is the *Environmental Planning and Assessment Act 1979* ("*EP&A Act*"). A copy of the objects set out in section 5 of that *Act* is enclosed. The objects themselves represent to some extent the competing interests in planning law.

On the one hand, there is the need for the orderly and economic use and development of land and on the other, the protection of the environment, ecologically sustainable

development and the provision of increased opportunity for public involvement and participation in environmental planning and assessment.

The terms of reference of the study refer to "planning laws and zoning laws and practices" which *unjustifiably* restrict competition and best practice approaches that support competition. This is further defined in the paper on page 16: "At issue, is whether competition is restricted by more than that necessary to achieve optimal community allocation and uses". Any view on this issue will be subjectively influenced by which stakeholder group the commentator belongs to or represents in the system.

Zoning

Zoning had its origins in government attempts to deal with the worst excesses of industrialisation and the need to separate incompatible land uses.

A number of studies have indicated that community support for zoning in New South Wales is widespread as decisions to buy land require certainty as to the uses to which the land can be put and certainty as to the permissible uses of nearby land (e.g. if one is to establish a chicken farm, it would not be desirable to locate it next to a sewerage treatment plant).

One issue that has arisen in recent times in New South Wales is the argument by various stakeholders that there an insufficient supply of land zoned "Business" and that this has tended to restrict competition. There have been a number of well publicised instances of attempts to carry out what some commentators argue is in reality retail development on land zoned for industrial use, as such land can generally be acquired more cheaply than land zoned "Business".

There may be a case for expanding the supply of land zoned "Business". This should, of course, not be done in an ad hoc way, but as part of a properly planned process, bearing in mind the object of "the orderly and economic use and development of land".

There are also issues regarding ecologically sustainable development as land zoned "Business" has generally been located so that it is proximate to public transport nodes and existing centres of population.

Development Assessment

What constitutes "unnecessary red tape" is in the eye of the beholder. It is however an unfortunate fact of life that the planning system in New South Wales has become increasingly complex to the stage where some commentators are recommending repeal of the *EP&A Act* and its replacement with a completely new *Act*.

Government Land Agencies

The Committee is particularly concerned to ensure that Government land organisations, such as Landcom, which have access to particular advantages do not have an unnecessarily greater role in land development- it should be on an equal footing with the private sector. For example, any agencies that have compulsory acquisition powers could have an unfair competitive advantage. This is all the more so if these land agencies engage in Public Private Partnerships or joint ventures with the private sector.

General Comments

There may be no "one size fits all" solution. Care must be taken that in promoting competition, unintended consequences do not arise.

In 1998, the *EP&A Act* was amended to remove the requirement for building approval and replace it with a construction certificate. Private certifiers were introduced to compete with councils in the area of building regulation.

The unintended consequence of these amendments (which was with the express aim of increasing competition) are still being felt and despite further legislative amendments since 1998, some commentators (including local councils) still believe that the system has flaws which diminish the achievement of the objectives of the *EP&A Act.*

Please contact Ms Liza Booth, Executive Member, Environmental Planning and Development Committee on (02) 9926 0202 or by email to liza.booth@lawsociety.com.au if you wish to discuss the Committee's comments.

Yours sincerely,

Mary Macken
President