



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: SW:lb:EP&D:462149
Direct line: 9926 0202

30 June 2011

Mr Marcus Ray
Director
Assessment Systems and General Counsel
Department of Planning & Infrastructure
GPO Box 39
SYDNEY NSW 2001

Email: daniel.howard@planning.nsw.gov.au

Dear Mr Ray,

Draft Centres Design Guidelines

The Law Society's Environmental Planning and Development Committee (Committee) appreciates the opportunity to comment on the Draft Centres Design Guidelines (draft Guidelines).

Focus of Comments

The Committee does not see its role as to provide detailed commentary on the numerous planning matters raised in the draft Guidelines. Rather, the Committee sees its role as to assist government in identifying issues and solutions to ensure a level playing field for participants in the planning system and greater certainty and consistency in the planning framework.

General Comments on Method of Implementation

The Committee is concerned at what it perceives to be the piecemeal implementation of policy. The same general concerns were raised by the Committee in its letter dated 22 May 2009 commenting on the Draft Centres Policy. A copy of that letter is enclosed.

The Committee advocates the provision by government of a complete package of centres policy, design guidelines and activity centres information together. This will ensure that all the material will be:

- integrated;
- consistent; and
- presented in a timely and clear way to all stakeholders.

To implement different parts of a centres policy, even the draft Guidelines, without doing so in conjunction with other parts of the policy, is to risk fragmentation.

Some examples of this fragmented approach appear below:

1. The draft Guidelines do refer to the Draft Centres Policy although it is unclear whether and in what form that Policy will be made.
2. Clause 2.2 of the draft Guidelines refers to "hierarchy of centres". The context of that reference is not clear in the light of the previous document associated with Draft SEPP 66 "Right Place for Business". The latter document is still being quoted as government policy in the Land and Environment Court.
3. The draft Guidelines also refer to the identification of new centres. Again, the relationship between the Metropolitan Plan for Sydney 2036, the Draft Centres Policy and indeed, the Draft Competition SEPP, is unclear.

Such references in the draft Guidelines only serve to cloud, not clarify, government policy intent.

These are only intended to be general comments on the structure of the policy itself and its relationship with other aspects of published guidelines, whether draft or otherwise.

The Committee welcomes the opportunity to discuss the method by which it is proposed to implement the draft Guidelines and Centres Policy generally.

Yours sincerely



Stuart Westgarth
President



**The Law Society
of New South Wales**

170 Phillip Street, Sydney NSW 2000
Australia; DX 362 Sydney
Tel (02) 9926 0333 Fax (02) 9231 5809
ACN 000 000 699 ABN 98 696 304 966
www.lawsociety.com.au

Our Ref: JC:ljb:1292660
Email: ljb@lawsocnsw.asn.au
Direct Line: 9926 0202

22 May 2009

BY EMAIL: david.birds@planning.nsw.gov.au

The Director
Policy, Planning Systems and Reform
NSW Department of Planning
GPO Box 39
SYDNEY NSW 2001

Dear Sir

THE DRAFT CENTRES POLICY PLANNING FOR RETAIL AND COMMERCIAL DEVELOPMENT

The Law Society's Environmental Planning and Development Committee ("Committee") appreciates the opportunity to comment on the Draft Centres Policy.

Focus of comments

The Committee does not intend to provide a detailed commentary on the numerous planning questions raised as part of the consultation draft. Rather, the Committee sees its role to assist government in identifying issues, and possible solutions to ensure a level playing field for participants in the planning system, and greater certainty and consistency in the planning framework. This will lead to better outcomes and less cost to both government and the public. It is in that light that these comments are provided. As a result, the Committee has not provided answers to all the 21 consultation questions. The comments principally relate to those areas where the Committee has identified a lack of certainty or a concern which could lead to confusion.

General Comments on Method of Implementation

A threshold concern arises out of the document title "Draft Centres Policy – Questions and Answers April 2009". The Committee notes that a decision on how to implement the policy, once the Department has decided it is "right", has yet to be made (see Question 4). The Committee encourages the Department to utilise the provisions of existing legislation to implement the policy, namely, a State Environmental Planning Policy ("SEPP"). The Committee is concerned that if any other legislative tool available is utilised, that will lead to uncertainty in both delivery and implementation.



The Law Society of
New South Wales is a
constituent body of the
Law Council
of Australia



It is useful to recall the experience with draft SEPP 66. When exhibiting the Integrated Land Use and Transport Package ("ILUT") in 2001, the statutory instrument accompanying that package was SEPP 66. Clause .3(2) of that SEPP required that the ILUT Package be taken into account when preparing environmental planning instruments, and certain other planning documents. However, the SEPP has never been made.

More recently, Planning Circular PS 08-013 issued in November 2008 stated that the Draft SEPPs need no longer be taken into account if they were more than 3 years old. However, that did not apparently mean that the underlying Policy documents no longer applied. Indeed, the questions and answers provided with the Draft Centres Policy note that the current Centres Policy is comprised (among other documents) of one of the ILUT Packages – "The Right Place for Business" document. However, it is unclear how that document is in force (to use the words of Draft SEPP 66) when the Draft SEPP 66 itself is no longer to be taken into account. This has led to considerable debate in assessment of current applications, particularly in the Land and Environment Court. While the Committee appreciates there is a current s.117 direction to Councils still applicable to two of the documents forming part of the ILUT package (including the Right Place for Business), the position remains unclear so far as the public is concerned.

The purpose of that explanation is to ask that once the Centres Policy be adopted, it take the form of an instrument recognised under Part 3 of the Environmental Planning and Assessment Act 1979 ("the Act") as that will have several benefits:

- (a) members of the public will be advised of its existence ;
- (b) councils, upon issuing a certificate under section 149 of the Act, must provide advice of the existence of that instrument as required by section 149, and clause 279 and Schedule 4 of the Regulations under the Act.
- (c) further, the public would be appraised of the existence of the Draft Centres Policy had that draft taken the form of a Draft Statement of Environmental Policy (subject to resolution of the wording of the draft Part 3 Regulation).

By not using the legislative path available to it under the Act, the policy intentions (draft or not) are unclear to any member of the public wanting to enquire of the potential effect of such policy, as expressed in environmental planning instruments, on a particular parcel of land.

The Committee's comments in relation to the specific questions set out in the Draft appear in the attached table.

Conclusion

The Department is to be applauded for this initiative and the Law Society would welcome particularly the opportunity to discuss the method by which it is proposed to implement the policy, once finalised.

If you wish to discuss the matters raised in this submission, please contact Ms Liza Booth, Executive Member of the Committee by telephone to (02) 9926 0202 or by email to ljb@lawsocnsw.asn.au .

Yours faithfully



Joseph Catanzariti
President

	Summary of Consultation Questions	Law Society Submission
1.	Are these the right principles to guide retail and commercial development?	The Committee does not intend to comment on the appropriateness of individual planning policy. However, there does appear a tension between Principle 3 and Principle 4. Principle 3 suggests that the market is best placed to determine the need for retail and commercial development. However, the planning system is to ensure that the supply of available floor space accommodates that market demand. If demand is to be determined by a floor space analysis undertaken by government (either local or State), then these appear to be inconsistent statements.
2.	Is this the appropriate planning framework for corridors? What development should be permitted in corridors?	No comment.
3.	Does the policy framework contain the right elements? Are there elements that should be added or removed?	<p>On page 5 of policy under the heading "Planning Framework", the following statement is made:</p> <p><i>"Once adopted, this policy supersedes the policy on retail and commercial development in the metropolitan, regional and sub-regional strategies, and in the Integrated Land Use and Transport Package".</i></p> <p>The Committee's general comments, as set out in the covering letter are relevant here. Further, it is noted that the various strategies already prepared have mapped, in considerable detail, the desired outcomes and actions plans for each region and sub-region. There needs to be clarity as to how the Centres Policy, when implemented, is to effect these changes in typology</p> <p>The question and answer document (Question 4.) notes that one of the current Centres Policy documents is the Standard Instrument for local environmental plans. As the roll-out of comprehensive LEPs adopting the standard instrument appears to be taking significantly longer than expected (there only 3 gazetted at the time of writing), clarity on how the framework operates as individual councils are in transition to that Instrument, needs to be provided.</p>

	Summary of Consultation Questions	Law Society Submission
4.	Does the centres typology contain too many centre types, not enough centre types or is it about right?	The policy notes that the purpose of the typology is to give an indication as to the " <i>likely future range of services, activities and externality to be expected</i> " in each centre type. As a result, the nomenclature is very important. Unfortunately, different wording is used in previous strategies and a methodology to translate one to the other needs to be provided. Otherwise, this will lead to confusion.
5.	Are floorspace supply and demand assessments (FSDAs) the right approach to assessing retail and commercial floorspace demand? Who should be responsible for undertaking FSDAs and how often?	The Committee makes no comment on the appropriateness or otherwise of the FSDAs in their own right. However, the role that such assessments will play in the planning system is unclear. So long as the assessments do nothing more than inform strategic direction, the Committee has no objections. However, if they become another layer for individual development assessment, then they cut across the orderly implementation of planning policy itself. For example, if a development application has to demonstrate not only compliance with the merit assessment of 79C but also come within the thresholds established for the FSDAs, that would appear to considerably dilute the role of the merit assessment itself. At the very least, FSDAs must precede the comprehensive local environment planning process adopted by each council.
6.	<p>Is the interim retail target set at the right level?</p> <ul style="list-style-type: none"> ▪ Should councils be able to use existing information to set interim retail targets before an FSDA has been produced? ▪ Are interim commercial floorspace targets required? If so, at what level should they be set? 	No comment.
7.	Is the approach of identifying a large area of land supported? Are there other suitability criteria that should be included, or criteria that should be omitted?	The Committee is concerned with the reference to s.28 provisions of the <i>Environmental Planning and Assessment Act</i> ("the Act"). It is not clear how a council would identify such provisions unless approached by the landowner concerned.

	Summary of Consultation Questions	Law Society Submission
8.	Should a more flexible approach to the policy framework be adopted in regional areas? Are there other areas, such as some parts of Western Sydney, where a similarly flexible approach might apply?	No comment.
9.	Should the B1 (Neighbourhood Centre) zone be removed?	No comment.
10.	Should the B5 (Business Development) zone be amended? What would be an appropriate name for the B5 zone?	No comment.
11.	Should the name of the B6 (Enterprise Corridor) zone be changed so not to be confused with Economic, Renewal and Enterprise Corridors in the strategies?	Yes, the use of the same wording to describe different categories should be avoided.
12.	<p>When should general retail be a permitted use in enterprise corridors?</p> <ul style="list-style-type: none"> ▪ What forms of retail could be permitted in the zone? ▪ Should there be a floorspace limit for all or only certain shops and showrooms, or at all? 	No comment.
13.	Is this the appropriate planning framework for business parks and the B7 (Business Park) zone?	No comment.
14.	Are these the appropriate exceptions to retail and commercial development in industrial zones? Are there others? Should retail generally be excluded?	No comment.
15.	What is the right approach to heights and floorspace ratios in different types of centres and settings?	No comment.

	Summary of Consultation Questions	Law Society Submission
16.	Should multi-dwelling housing and residential flat buildings be mandated as permissible uses in the B4 (Mixed Use) and 2 (Local Centre) zones?	No comment.
17.	Does the definition of "retail premises" need refining to better define the range of land uses it includes and the hierarchy of those subordinate land uses?	No comment.
18.	What land uses should be included / excluded from the group terms "shop" and "retail premises"? Why?	No comment.
19.	Is the Net Community Benefit Test the right approach to rezoning? Are there other criteria that should be used to assess rezoning proposals? What guidance should be provided to stakeholders to enable them to assess proposals under the criteria identified?	<p>The interaction of FSDAs, existing Local Environmental Plans and the proposed Net Community Benefit Test (proposed to be established as a gateway requirement) suggests that there are likely to be significant difficulties with rezoning in the case of under supply. This is for the following reasons:</p> <ol style="list-style-type: none"> 1. The requirement to first demonstrate there are no suitably zoned sites within the existing centre is an exhaustive process. It would rarely be possible to demonstrate that there are no suitably zoned sites in any centre as a range of factors lead to whether sites are suitable for redevelopment. This is always difficult to difficult to establish in practice. 2. The second stage, demonstrating an edge of centre location, suffers from a similar difficulty. 3. As a result, justifying an out of centre location by demonstrating a Net Community Benefit is unlikely to be achieved if the first two steps are inflexibly applied.

	Summary of Consultation Questions	Law Society Submission
19 cont		4. The delay in implementation of the standard instrument across most council areas (see answer to Question 3) will also lead to more in-centre locations utilising this methodology. That is another reason that the interaction of these various policy tools, FSDAs, Net Community Benefit Test and the new centre typology particularly, are likely to lead to confusion, especially in the transition phases. If the Department has confidence in its Centre Policy intent and the metropolitan strategy and sub-regional strategies which are consistent with it, then that is yet another reason for utilising a SEPP as a paramount document, particularly to encourage economic growth. Not doing so, as is argued in our covering letter, is likely to lead to considerable uncertainty and therefore, more litigation.
20.	Is there support for ensuring the impact on individual businesses is not considered in the merit assessment process?	The Committee considers it is impossible to generalise as to whether or not the impact on individual businesses can or should be considered. Notably, the Department has issued a Discussion Paper on economic impact where this matter is addressed.
21.	Is there more that can be done to prevent businesses using objections to delay, or increase the costs of the planning process for their competitors?	<p>The Committee's concern relates to the underlying assumption that a competitor may not have sound grounds for objecting to a particular development proposal. The fact that an objector may be motivated to achieve a competitive advantage does not eliminate the requirement that all applications must be assessed on merit. If, for example, an objector is able to establish that the parking generation rates of a particular commercial proposal are wrong (whether by preparing their own data which establishes this conclusion or by analysis of the applicant's own data) then the fact that the objector is a competitor is irrelevant if the objection is well-founded.</p> <p>What needs to occur is that the planning system should be sufficiently robust to ensure that applications are dealt with on their merits and that spurious objections are dealt with as such. To require an assessment Officer to engage in a preliminary or further step of identifying a competitor, is in the Committee's view, inappropriate and unfair. This is</p>

	Summary of Consultation Questions	Law Society Submission
21 cont		<p>especially the case when the open standing provisions of the Act, embodied in s.124, are considered. This right ensures that decisions are transparent, and due process is followed.</p> <p>In that regard, the Committee is aware of proposed s.79C(1A) of the Act, yet to be proclaimed, disentitling certain objections on the basis of securing a direct or indirect commercial advantage. It is to be hoped that the regulations do not provide that this provision is left at large.</p>