

Submission
No 27

INQUIRY INTO THE APPROVAL OF THE DESIGNER OUTLETS CENTER - LIVERPOOL

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Subject:

Summary

SUBMISSION TO THE LEGISLATIVE COUNCIL

GENERAL PURPOSE STANDING COMMITTEE

NO.4

INQUIRY INTO APPROVAL OF DESIGNER

OUTLETS CENTRE, LIVERPOOL

Department of Infrastructure, Planning

and Natural Resources

11 August 2004

SUBMISSION

1. Executive Summary

1.1 *Government's reform agenda*

The Government established the Department of Infrastructure, Planning and Natural Resources, in 2003 to integrate and improve service delivery of land use planning, natural resources, transport and infrastructure. The Director General was appointed to drive a major reform agenda, particularly in natural resources and land use planning. Over the last year both the general community and the development industry alike expressed strong concern to government regarding the inconsistent and confusing land use planning controls and decision. The Government's reform agenda aims at bringing a strategic context to planning but particularly to ensure consistent and clear decisions in accordance with evidence based analysis and within the adopted policies.

The recommendations by the Director General in the Orange Grove case should be examined in the light of these changes.

1.2 *Outlet centre at Orange Grove*

The outlet centre currently operated by Gazcorp Pty Limited at the Orange Grove site, was granted development approval at delegated officer level by the then Liverpool City Council in November 2002. This approval was for a change of use for a large warehouse building from a bulky goods warehouse to a warehouse clearance outlet.

Liverpool City Council had previously granted development consent for the refurbishment of an existing industrial building and conversion into 8 units for bulky goods /warehousing (18 September 2001).

On the 14 November 2003, the Council as the certifying authority, issued a construction certificate for an internal fit out of the building as a warehouse clearance outlet. An interim occupation certificate was also issued by the Council on 24 November 2003.

Two courts: the Land and Environment Court (on 16 January 2004) and the Court of Appeal (on 31 March 2004) found the approval and the use unlawful. The developer chose to continue to act on Council's approval by constructing and operating the outlet centre notwithstanding the fact that legal proceedings were on foot. A

construction certificate for the internal fit out of the Orange Grove outlet centre was not issued until 14 November 2003. At this time proceedings had already commenced in the Land and Environment Court seeking a declaration that the development consent for the outlet centre was unlawful. The developer must have been aware of the risk that the Court would make adverse finding on the validity of the development consent and, as occurred, order the unlawful use to cease.

Contrary to statements made in the media, Justice Lloyd held that the breach of the EP& Act was **not** a 'mere technicality'. His Honour said that:

"The system of planning control in the State would be set at nought if a use of land which is prohibited by an environmental planning instrument is allowed to continue. The whole system of planning controls is dependent upon the orderly enforcement of environmental law."

1.3 Draft Amendment 92 – merit assessment with transparency & integrity

Draft Liverpool Local Environmental Plan 1997 (Amendment 92) (draft Amendment 92) proposed to make development for the purpose of an "outlet centre" at the Orange Grove site permissible with development consent, that is to provide the opportunity to retrospectively render legal a use found to be operating unlawfully by the Courts.

That there was an existing (although unlawful) outlet centre development on the Orange Grove site was not, therefore, a relevant consideration in the Department's consideration of draft Amendment 92.

Whilst this may be understandable, it is essential in such circumstances for the amendment to the LEP to be considered on its merit and only on its merit, i.e. irrespective of whether the use had already occurred or was continuing to occur. This is good administrative practice.

It was Liverpool Council that both granted a development consent that was found to be unlawful by the Court and was also the Council that proposed the draft Amendment 92 that would have changed the permissibility of the outlet centre and enabled it to rectify its earlier unlawful decision. In these circumstances it is inevitable that there will be either a real or perceived (or both) conflict of interest in Council's espousal of draft Amendment 92.

The test of analysis, transparency and integrity to be applied by the Department and the Director General, must be very high in such cases.

These factors were paramount in the Director General's consideration of Council's submission and Departmental advice. The Director General wanted to ensure beyond doubt that the merit assessment of the LEP amendment proposals is based on sound planning policy grounds and not as a mechanism for Council or others to mitigate against the financial (or other) implications that flow from a decision found unlawful but which had been acted upon by development interests.

1.4 Submission

The body of the Department's submission deals with relevant issues broadly applicable to the Committee's terms of reference. The following points are key considerations, particularly by the Director General, as to her advice to the Minister that it is open to the Minister not to adopt the draft amendment.

1. A Net Community Benefit has not been credibly demonstrated.

The Director General was concerned that activities at Orange Grove constituted a form of retailing that would compete with the Liverpool CBD. She was not convinced that it was more like a market as described in the S.69 report.

Supporting documentation by Council and its consultants did not conclusively establish a net community benefit. The Director General was particularly concerned about the lack of compelling, unequivocal evidence and the lack of independent validation of the information put forward by the Council by the Department. Hill PDA and Council claim a negative impact on Liverpool CBD of \$18 million, or -4.2% based on current projected turnover.

The Department's s.69 Report indicates, however, that submissions received in relation to draft Amendment 92 raised questions about the impact of the proposal on Liverpool CBD. A report by Urbis JHD indicated that the negative impact from an outlet centre on the Orange Grove site is more likely to be -10% to -13%, but that the potential negative impact could be as high as -20%. The Department raised concerns with Council earlier in the process. Neither the Departmental officers' report nor Council's consultant undertook a fresh analysis to bring an independent view.

Of relevance to the Committee's Terms of Reference, it is noted that any negative impact could not be justified, given that nearly 200 (or 7%) of retail jobs in Liverpool CBD were lost during the last census period (1996-2001) and that Council's Administrator had written to the Minister Knowles on 24 March 2004 requesting

funding for revitalisation of Liverpool CBD (and that \$200,000 had been allocated for that purpose).

2. The proposals under draft Amendment 92 to Liverpool LEP do not comply with the long established Centres Policy (see report and attachment). The Draft Amendment 92 does not promote Council's own objectives for retail development.

Encouraging the development of strong, diverse centres has been a long standing and consistently maintained planning principle and policy by successive governments. The historical context (see attachment) under: the County of Cumberland Scheme (1951); The Sydney Region Outline Plan (1968); Outline Plan Review (1980); the Centres Policy Discussion Paper (1985); Sydney Into Its Third Century: Metropolitan Strategy for the Sydney Region (1988); Cities for the 21st Century (1995); Draft Retail Policy (1996); Shaping Our Cities (1998); and Draft SEPP 66 – Right Place for Businesses and Services – all consistently advocate that retail activity be concentrated in centres. The use of land at Orange Grove for an outlet centre, a form of a retail activity, is not consistent and does not accord with those policies. The Director General's view that the Orange Grove outlet centre is a form of retailing was also held by Lloyd J in the Land and Environment Court. The site is not part of a centre, being more than 2km from Liverpool Station.

Importantly, the objectives stated in Council's own Retail Centre Hierarchy of "consolidating commercial and community activities in designated centres with access by public transport and open space networks" are not met by Council's own proposed Amendment 92. Neither the Council's report nor the Report prepared by Departmental officers offer valid arguments to the contrary of the above. It is further noted that the Government had just announced revitalisation initiatives for centres, including Liverpool CBD.

3. The Draft Amendment 92 is contrary to policy objectives of supporting public transport in centres

The Departmental officers' report acknowledges that draft Amendment 92 is inconsistent with the Government's policy as regards public transport accessibility to the Orange Grove site for retail activities. Evidence indicates a bus service which at best operates infrequently out of peak hours and not at all on Sundays. No certainty exists as to improvements to bus or other public transport to the site in the future.

In addressing its Terms of Reference, the Committee may also wish to note that there was an inconsistency between Council on the one hand deferring the Cross

Roads site, apparently on the grounds of a lack of Metropolitan Strategy guidance, and on the other hand endorsing the Orange Grove site in the absence of the same guidance. It is also noted that the public consultation process in relation to draft Amendment 92 and the Council officers' own analysis focussed on both sites.

1.5 Conclusion

In summary, the Director General was not convinced (and based on the above reasoning) that either the Council submission or Departmental officers' report, presented a thorough and convincing case in favour of draft Amendment 92. Inconsistencies with core policy considerations remained unexplained.

The Director General's advice to the Minister also took into account the state-wide implications of the decision should the draft amendment proceed. The Director General submitted the s.69 Report to the Minister that had been prepared by the Department, but also submitted to the Minister a memorandum which pointed out to the Minister that on planning grounds it would be reasonably open to the Minister not to make the plan. The Minister sought further information as to the Director General's concerns, and that information was provided to the Minister by the Director General. The Director General submitted a further memorandum highlighting the lack of planning merit in the case.

At this time, none of the tenants operating at the Orange Grove outlet centre, other than the food stalls, are permissible under the existing LEP controls. The Director General was concerned for the welfare of the workers at the Orange Grove outlet centre and recommended to the Minister that transitional arrangements for the outlet centre should be supported, including supporting any application to the Court for the orderly winding down of activities at the outlet centre to allow alternative employment opportunities and stock to be sold.

The Government has since initiated significant measures to assist the workers including the appointment of a special Business and Jobs Co-ordinator; the employment of Drake Australia to match vacant retail jobs in proximity to the Liverpool CBD with workers at the outlet centre; negotiations with the Australian Retail Association to advise traders at the outlet centre of available suitable space elsewhere and to advise on relocation issues.

2. The Planning Context

2.1 What is the permissible use of the Orange Grove site?

- The Orange Grove site is zoned Industrial 4(b) – Special under *Liverpool Local Environmental Plan 1997* (Liverpool LEP).
- The objectives of the Industrial 4(b) – Special zone are:
 - (a) to set aside sufficient land to be used primarily for a broad range of industrial land uses, and
 - (b) to permit a range of land uses which serve the industrial areas, and
 - (c) to permit retail development only where:
 - it is ancillary to and associated with an industrial use of land in the zone, or
 - it services the daily convenience needs of the local workforce, or
 - it is for the purpose of bulky goods retailing, or
 - it is a motor vehicle orientated land use,and only if it does not have an adverse impact on the viability of the business areas of Liverpool, and
 - to promote a high standard of urban design, particularly along arterial roads.
- Under this zoning bulky goods and warehouse development is permissible, but other retailing activity that are shops is prohibited (except where those shops offer ancillary services to workers on, and visitors to, the industrial zoned land).
- “Shop” is defined under the Liverpool LEP to mean a building or place used for selling items, whether by retail or auction, or for hiring or displaying items for the purpose of selling or hiring them (whether the items are goods or materials).
- The amendment of Liverpool LEP proposed under draft Amendment 92 therefore would allow retail development in the form of an outlet centre on the industrial zoned land at Orange Grove, as well as the retail use of a bulky goods outlet already permissible under the existing Liverpool LEP.
- While bulky goods outlets (a permitted form of development for the Orange Grove site under Liverpool LEP) are acceptable within industrial zones under

government planning policy (draft *State Environmental Planning Policy No.66 – Integration of Land Use and Transport* (draft SEPP 66)), other retail uses are not considered appropriate.

- Draft SEPP 66 notes that:

“This policy distinguishes between bulky goods outlets (which have a particular physical need for customer car access and parking) and other forms of retail, entertainment or commercial activity. Bulky goods are, by definition, large goods and should be located, if not in a planned centre, then in a regional cluster. Discount factory outlets and “big box” are forms of retail development that should be located in planned centres at an appropriate scale based on the policy The Right Place for Business and Services.

A component of retailing, such as clothes, food or beverages, is sometimes proposed to be included as part of a bulky goods outlet. Such outlets are not considered to be bulky goods outlets and are only acceptable under the Policy if they are within a planned retail centre.”

2.2 Current use of the Orange Grove site by Gazcorp is unlawful

- Gazcorp Pty Limited (Gazcorp) presently operates an “outlet centre” at the Orange Grove site under a development consent granted in November 2002 by Council officers as delegates of the former Liverpool City Council (before the sacking of the Council in February 2004 and the appointment of Ms Kibble as Administrator).
- Liverpool City Council had previously granted development consent for the refurbishment of an existing industrial building and conversion into 8 units for bulky goods /warehousing (18 September 2001).
- On November 2002 Liverpool City council granted development consent to Mosca P Serras Architects Pty Ltd for the change of use for a large warehouse building from a bulky goods warehouse to a warehouse clearance outlet.
- On the 14 November 2003, the Council as the certifying authority, issued a construction certificate for an internal fit out of the building as a warehouse clearance outlet. An interim occupation certificate was also issued by the Council on 24 November 2003.

- Justice Lloyd of the Land and Environment Court declared that the development consent was unlawful in *Westfield Management Pty Ltd & Anor v Gazcorp Pty Ltd & (2) Ors* [2004] NSW LEC 7 (16 January 2004).
- The issue in these proceedings was whether the use for which the November 2002 consent had been granted was permissible within the relevant zone under the Liverpool LEP. The Land and Environment Court decided that it was not and gave orders that the unlawful use as an outlet centre must cease.
- Justice Lloyd refused to exercise his discretion to allow the continued use of the Orange Grove site as an outlet centre, holding that the breach of the EP&A Act in the case was not a "mere technicality".
- His Honour went on to say that "*Section 76B of the EP&A Act clearly states that where an environmental planning instrument provides that specified development is prohibited on land, a person must not carry out the development on that land. The system of planning control in the State would be set at nought if a use of land which is prohibited by an environmental planning instrument is allowed to continue. The whole system of planning controls is dependent upon the orderly enforcement of environmental law.*" (at [18])
- The New South Wales Court of Appeal subsequently upheld the decision of Lloyd J in *Gazcorp Pty Ltd v Westfield Management Pty Ltd & Anor* [2004] NSWCA 63 (31 March 2004).
- Gazcorp was ordered to stop the Orange Grove site from being used as an outlet centre after 28 April 2004.
- Subsequent applications to the Court of Appeal mean that the unlawful use of the Orange Grove site as an outlet centre must now cease on 25 August 2004.
- Both the Land and Environment Court and the Court of Appeal have found that development consent for an outlet centre cannot be lawfully granted by Liverpool City Council under Liverpool LEP for the Orange Grove site.
- The making of draft Amendment 92 would have made it possible for the Council to grant such a development consent. As the Minister has refused to make draft Amendment 92, Liverpool City Council has no power to consider a development application for the Orange Grove site as an outlet centre that could legitimise the use.

- Gazcorp has now commenced proceedings against the Council for damages (reportedly \$80 million) arising from the Council's decision to grant of development approval for the outlet centre at the Orange Grove site.

2.3 What is Liverpool Local Environmental Plan 1997 (Draft Amendment 92)?

- Draft Amendment 92 as considered by the Department related to land at 12-16 Orange Grove Road, Liverpool (the Orange Grove site). The Orange Grove site is located at the south eastern corner of Viscount Place and Orange Grove Road (Cumberland Highway), Warwick Farm. The site is almost 1km from Liverpool CBD retail outlets and 1.8km from Warwick Farm Railway Station and almost 2.5km from Liverpool Railway Station. The Orange Grove Road site is located in the Industrial 4(b) – Special zone under Liverpool LEP. The Industrial 4(b) zone boundary is separated from the CBD business zone edge by 500m.
- Draft Amendment 92 proposed to allow development for the purpose of an "outlet centre" at the Orange Grove site by amending clause 4 of Liverpool LEP to introduce a new definition of "outlet centre" and to amend schedule 4 (Additional Uses) of the Liverpool LEP to permit an outlet centre not exceeding 14,500m² in gross floor area at the Orange Grove site.
- By including an outlet centre as permissible on the Orange Grove site in schedule 4 of the Liverpool LEP, the provisions of clause 10(13) of the LEP applied to such development.
- Clause 10(13) provides that despite any other provision of the Liverpool LEP, with the consent of the Council development may be carried out on the land specified in Schedule 4 for the purpose specified in connection with that land in that Schedule.
- "Outlet centre" was defined under draft Amendment 92 as *"a building or place:*
 - (a) that is comprised of at least 20 separately leased retail outlets, and*
 - (b) that is centrally managed, and*
 - (c) at which the majority of outlets offer stock for sale, the majority of which is surplus, out of season, seconds or samples, and*
 - (d) that does not contain any of the following:*

- (i) retail outlets used for personal services (including hairdressers, barbers, beauty parlours and the like),
- (ii) travel or real estate agencies,
- (iii) banks (except automatic teller machines),
- (iv) insurance or financial institutions,
- (v) newsagencies,
- (vi) supermarkets,
- (vii) department stores,
- (viii) outlets retailing fresh food or groceries (other than cafes or other food outlets for visitors to the centre where the food is to be immediately consumed)."

2.4 Submissions on draft Amendment 92

- Public involvement in the plan-making process is a fundamental object of the planning system established by the *Environmental Planning and Assessment Act 1979* (EP&A Act). Section 66 of the EP&A Act provides for submissions to be made by the public about draft local environmental plans.
- The form of draft Amendment 92 as exhibited amended Liverpool LEP to allow outlet centre development at both the Orange Grove site and a site at the Cross Roads. The Cross Roads site was later deferred from draft Amendment 92 under s.68(5) of the EP&A Act by the Administrator of Liverpool City Council.
- Submissions were received about both sites. The Council's City Development Report dated 13 April 2004 for draft Amendment 92 (annexed to the Council's s.68(4) Report to the Director General) summarises the six submissions that were made to Liverpool City Council objecting to draft Amendment 92. One submission was received by the Council in support of the amendment.
- The submissions opposed to draft Amendment 92 were received from:
 - Westfield Management Limited;
 - M&M Prpic (and signed by 10 others);
 - BOKA Investments Pty Limited;
 - Shopping Centre Council of Australia; and
 - Stockland.

- A further submission from the Shopping Centre Council of Australia was also received by the Council after the public exhibition period had closed.
- These submissions all raised concerns that the location of an outlet centre at either the Orange Grove or Cross Roads sites would have an adverse economic impact on retailers in the Liverpool CBD. The submissions also raised inconsistencies with draft SEPP 66.
- A later submission from Westfield claimed that the economic impact report prepared in relation to the use of the Orange Grove site as an outlet centre by Hill PDA did not demonstrate a net economic benefit to the community.
- Westfield also made submissions during the public exhibition that the Council had not fulfilled its statutory obligations under Part 3 of the EP&A Act in relation to the exhibition of draft amendment 92 (it asserted that the maps in the Council report and the maps exhibited were different) and notification of public authorities under s.62 of the EP&A Act (it asserted that the s.65 Certificate was not referred to the Department or other agencies prior to advertisement of the exhibition period). The City Development Report sets out the details of these submissions and the Report concludes in each case that the Council did not breach any of its statutory obligations under Part 3 of the EP&A Act.
- Westfield also requested that the Council arrange a public hearing in respect of draft amendment 92. The Council, however, considered that the issues contained within the Westfield submission were not of such significance to warrant a public hearing.
- In response to the assertions made in some of the submissions, however, Sydney Region West branch of the Department also sought separate assurance from the Council that it had complied with the provisions of Part 3 of the EP&A Act in relation to the preparation of draft amendment 92.
- On 13 May 2004 the Council wrote to the Department stating that *"The amendment has been processed appropriately and in accordance with the provisions of the Environmental Planning and Assessment Act. Legal advice was also sought on this matter and nothing in that advice indicates that the statutory provisions of the Environmental Planning and Assessment Act had been dealt with inappropriately."*
- Submissions were also received by Ministers Beamer and Knowles and the Department from the Shopping Centre Council of Australia (in relation to the

Orange Grove site), Orion Communications (in relation to the Cross Roads site) and Austexx (in relation to the Cross Roads site).

- Westfield also made a number of submissions in relation to draft Amendment 92 by letters to the Department in which it was asserted that draft Amendment 92 did not meet the net community benefit criteria set out under the Government's *Right Place for Business and Services* policy.
- These submissions were taken into consideration by the Department in preparing its s.69 Report.

2.5 Deferred matter – Cross Roads site

- Initially draft Amendment 92 included land at Cross Roads and the Orange Grove site. The proposal would have amended Liverpool LEP to:
 - rezone the land at Cross Roads to allow bulky goods retailing and operation of an outlet centre; and
 - allow the operation of an outlet centre at the Orange Grove site.
- It was a submission from AMP Henderson Global Investors proposing an additional bulky goods retailing and outlet centre at the Cross Roads site which led the Council to initiate draft LEP Amendment 92. The report to Council on the LEP amendment recommended that Council proceed to prepare an LEP amendment and to also include in that amendment changes that would permit an outlet centre at Orange Grove.
- Draft amendment 92 was exhibited by the Council from 17 December 2003 to 2 February 2004. At the time that it was exhibited, the amendment included the proposal for the Cross Roads site.
- On 13 April 2004 the Administrator of Liverpool City Council resolved to proceed with the making of draft Amendment 92 in so far as it related to the Orange Grove site. However she also resolved to defer the rezoning of the Cross Roads site to allow bulky goods retailing, and to allow an outlet centre at the Cross Roads until further advice was received from the Department. The latter resolution was against the advice of Council officers. It was not explained to the Department why the Administrator did not also apply this reasoning to the Orange Grove site given the policy issues it raises.
- The Council's Urban Renewal Co-ordinator also advised the Department by email that the Administrator had determined to defer the Cross Roads site from draft

Amendment 92 until such time as the Department's Metropolitan Strategy had been completed or at least progressed far enough to determine whether the Cross Roads proposal would be in conflict with, or consistent with the Strategy.

- Consequently, Liverpool City Council submitted draft Amendment 92 to the Director General under s.68(4) of the EP&A Act without the Cross Roads land.
- Following the deferral of the Cross Roads site from draft Amendment 92, AMP Capital Investors' proposed lessee for the Cross Roads site, Direct Factory Outlets Pty Ltd, also objected to the making of draft amendment 92 to the Minister, the Director General and the Regional Planning Coordinator through its lawyers (Gilbert and Tobin). These letters indicate that Direct Factory Outlet Pty Ltd considers the Council's decision to defer the Cross Roads site from draft amendment 92 was a breach of s.68(5) of the EP&A Act and the administrative law (in that it was unreasonable, failed to provide them with procedural fairness and took into account irrelevant considerations). Gilbert and Tobin's letter also stated that it may commence proceedings for judicial review of the Council's decision.
- On 6 May 2004 Direct Factory Outlets Pty Ltd (through Gilbert and Tobin) requested a written undertaking *"from DIPNR that it will not proceed to make any consideration under section 69 of the EP&A Act of Council's submission until Council has made a formal decision under section 68 of the EP&A Act to submit or not to submit the deferred matter to the Director General and the Minister"*.
- On 7 May 2004 the Department replied to this letter, noting Direct Factory Outlet Pty Ltd's submission, but declining to give the undertaking in view of the obligations of the Director General under s.69 of the EP&A Act (which are to furnish a report to the Minister on the draft local environmental plan as submitted by the Council under s.68 (4)).

3. The Policy Context

3.1 The “Centres Policy”

- The key policy to assess the merits of draft Amendment 92 is the “Centres Policy”.
- The Centres Policy is expressed in the *Right Place for Business and Services*, a document which forms part of a policy package accompanying draft State Environmental Planning Policy No 66.- Integrating Land Use and Transport. Draft SEPP 66 specifically requires Councils to take into account the *Right Place for Business and Services* when preparing environmental planning instruments such as local environmental plans (LEPs).
- The *Right Place for Business and Services* is the current manifestation of the Government’s long-standing policy to encourage development of strong centres.
- The policy explains why business and services which generate transport demand should be in locations that offer a choice of transport and encourage people to make fewer and shorter trips.
- The policy aims to encourage a network of vibrant accessible mixed use centres which are closely aligned with accessible public transport, walking and cycling.
- The objectives of the policy are to:
 - Locate trip generating development which provides important services in places that:
 - Help reduce reliance on cars and moderate the demand for car travel
 - Encourage multi purpose trips
 - Encourage people to travel on public transport, walk or cycle
 - Provide people with equitable and efficient access
 - Minimise dispersed trip generating development that can only be accessed by cars.
 - Ensure that a network of viable, mixed use centres closely aligned with the public transport system accommodates and creates opportunities for business growth and service delivery.
 - Protect and maximise community investment in centres, and in transport infrastructure and facilities.

- Encourage continuing private and public investment in centres and ensure that they are well designed, managed and maintained.
- Foster growth competition innovation and investment confidence in centres especially in the retail and entertainment sectors through consistent and responsive decision making.
- The key message of the *Right Place for Business and Services* is that business and services which generate transport demand should be in locations which offer a choice of transport and encourage people to make fewer and shorter trips. Dispersed locations cannot be accommodated without significant community and environmental costs.
- Responsive planning, consistent decision making and good design and management are needed to ensure that:
 - there are development opportunities in centres for Business and services;
 - community investment in infrastructure is protected; and
 - investor confidence in centres is maintained.
- NSW Government initiatives have led to improvements in air quality. If these improvements are to be maintained, state and local government agencies need to better manage people's travel needs and to provide viable alternatives to using the car. More effective integration of planning for transport with planning for future development of urban land can help moderate the growth in car use and support the community's investment in transport services.

3.2 Application of the "Centres Policy" to outlet centres

- A very important part of the *Right Place for Business and Services* is the strategy of locating trip-generating development in and adjoining accessible mixed-used centres.
- Retail development is a particular concern as shops typically generate high trip levels. Shops servicing more than a neighbourhood catchment should always be located in centres and be provided with pedestrian, cycling and public transport access. These locations should make the best use of road and public transport infrastructure. Liverpool City is classified as a major urban centre under the *Right Place for Business and Services*.
- Certain classes of retail development are identified as of particular concern under the *Right Place for Business and Services*. In particular, the policy requires that

"factory outlets" (outlet centres) should be treated like normal retailing outlets "unless they are genuinely ancillary to on-site manufacturing and used only occasionally". The policy notes that other forms of factory outlets, such as the one at Orange Grove, are simply shops seeking low rents.

- The policy states that factory outlets should therefore be encouraged to agglomerate in existing declining centres where they can play a positive role in their revitalisation.

3.3 Requirements of the Centres Policy for LEPs

- The *Right Place for Business and Services* requires that a draft LEP should only be submitted by a council to the Department if the draft LEP promotes this strategy.
- Development on isolated, stand-alone sites is generally not acceptable. Draft LEPs which promote such development *should not be submitted to the Department unless:*
 - that development is supported by a strategy prepared by the Council which reflects the policy objectives set out in the *Right Place for Business and Services*; and
 - a **net community benefit** for development in such a location can be clearly established.
- That is, 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; and
 - moderate car use.
- The *Right Place for Business and Services* clearly sets out the net community benefit criteria to be met for proposals for out of centre retail development. These are:
 - 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 on 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 centre;
- the practicality of alternative locations which may better achieve the outcomes the policy is seeking; and
- 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.

4. The Economic Context

4.1 *Current and future demand for employment land in SW Sydney*

- Demand and uptake of industrial land in SW Sydney (Liverpool, Campbelltown and Camden) has been high over the last decade. Between 1987 and 1997 on average between 30-35 ha of employment land has been developed per annum (ELDP).
- Based on population and employment projections, it is estimated that demand for employment land will increase 35-40 ha per annum (Hill PDA South-West Employment Lands Strategy).
- Ensuring the region can develop and preserve its current and future supply of employment lands will be important for the growth of the region's manufacturing employment and output.
- Encroachment of non-industrial activities such as retailing onto employment lands may negatively impact on industrial activities within the region.
- A 2002 retail property market report by BIS Shrapnel highlights the concern that outlet centres *"are likely to be limited in their capacity to expand as too many would cannibalise their traditional retail base in CBDs and regional shopping centres"*.
- The BIS Shrapnel report concludes that:

"A proliferation of factory outlet centres would clearly have significant impacts upon regional and subregional shopping centres. As their availability increases, they can lose their point of difference and simply become another centre within a network of centres. The tendency to overshoot a growth market and the subsequent oversupply of factory outlet spaces will tempt, if not force, owners and managers to fill it with "normal" retailers seeking cheaper rents, to the detriment of traditional shopping centres." (BIS Shrapnel (2002) "Retail Property Market Forecasts and Strategies").
- Retail trade is the major employer in Liverpool CBD. It accounts for nearly a quarter of the centre's jobs.

- Between 1996-2001, nearly 200 (or 7%) of retail jobs were lost in the Liverpool CBD. Liverpool CBD lost a significantly higher share of retail jobs than the average for Greater Western Sydney between 1996 and 2001
- Greater Western Sydney experienced a marginal growth in retail employment (0.08%), compared to negative growth of -7.3% for Liverpool CBD.
- The Outer South West (Campbelltown, Liverpool, Camden and Wollondilly) as a whole experienced relatively strong growth in retail jobs between 1996-2001 at 3.4% per annum and reaching over 19,000 retail jobs in 2001.
- Total jobs in this sub-region grew by 2.9% per annum between 1996 and 2001 to nearly 113,000 in 2001.

5. The Merit Context

- The Department's obligation in assessing the draft Amendment 92 (or any draft LEP) is to consider the merits of the draft instrument in the context of Government policy. It is not appropriate to simply respond to an existing development on site. When an amendment to a LEP is proposed which will enable the regularisation of an existing unlawful development, the merit assessment of the draft amendment must be particularly thorough, transparent and extensive.
- That there was an existing (although unlawful) outlet centre development on the Orange Grove site was not, therefore, a relevant consideration in the Department's consideration of draft Amendment 92.

5.1 *The Orange Grove proposal did not comply with the Centres Policy*

- In her memorandum to the Minister dated 8 July 2004, the Director General advised the Minister that use of the Orange Grove site as an outlet centre constitutes a retail activity (as Lloyd J found in the Land and Environment Court) and that retail use therefore competes with the existing Liverpool CBD.
- The concept of encouraging the development of strong, diverse centres has been a long-standing and consistently maintained Sydney Metropolitan planning principle. Successive centres policies and metropolitan strategies have required that retail activity be concentrated in centres in close proximity to transport (see appendix). This policy approach has been adopted by successive governments for over thirty years.
- The proposal under draft Amendment 92 to allow outlet centre development on the Orange Grove site is not supported by Government policy – in particular the *Right Place for Business and Services* incorporated into draft SEPP 66. Draft Amendment 92 is fundamentally inconsistent with the *Right Place for Business and Services* and draft SEPP 66.
- Draft Amendment 92 failed the key principle of containing retail development within an appropriate centre. Under the *Right Place for Business and Services*, Liverpool is a major centre. Any proposal to rezone land for trip-generating businesses should therefore have complied with a local strategy incorporating the policy objectives set out in the *Right Place for Business and Services*.

- Liverpool City Council developed strategy objectives for retail development in the *Liverpool City Council Structure Plan*, adopted 23 February 1998 and amended 14 December 1998. The overarching strategy for the Council's *Structure Plan* is to promote the Liverpool CBD as the vibrant south-west regional centre with major expansion of the CBD as the population increases, and for the CBD to be a node for public transport facilities.
- The objective stated in the *Structure Plan* for Liverpool's Retail Centre Hierarchy is "to consolidate commercial and community activities in designated centres with access by public transport and open space networks". Draft Amendment 92, therefore, does not promote the Council's own objectives for retail development.
- For these reasons, there was no question in the Director General's mind that draft Amendment 92 was fundamentally inconsistent with Government's core policy requirements.

5.2 Net community benefit

- Where a council prepares a LEP which does not comply with the requirements set out in *Right Place for Business and Services*, alternatives to the outcomes set out in the policy may be considered by the Council, but only where the Council is able to clearly establish with certainty and finality to the Department's satisfaction that there will be a *net community benefit* from the draft LEP. The Council must be able to show that the location of the out of centre development will be able to deliver the same (if not better) outcomes as if located in a centre in terms of suitable accessibility to manage travel demand, utilisation of public transport and moderation of car use.
- The proposal under draft Amendment 92 was put forward by Liverpool City Council to legitimise the use of an out of centre location for a factory outlet (simply a form of retail activity as classified under the *Right Place for Business and Services*).
- As such, under *Right Place for Business and Services* and draft SEPP 66, any merit analysis of the proposal made under draft Amendment 92 must proceed from the position that the Orange Grove location was an inappropriate location for outlet centre development because the Orange Grove site is not located within an existing centre.
- Under the policy, therefore, unless an overwhelming net community benefit of the development in that location could be shown, Orange Grove must remain an

inappropriate location for the development and the amendment to the Liverpool LEP could not be justified.

- In the Director General's view, the supporting documentation provided by Liverpool City Council as justification for draft Amendment 92 did not conclusively or adequately establish without doubt that a net community benefit would result from draft Amendment 92 on the criteria set out in the *Right Place for Business and Services*.
- In particular, the Director General was concerned that much of the information provided by the Council in support of the location of outlet centres at Cross Roads and Orange Grove was ambiguous and did not expressly address the net community benefit criteria set out in the *Right Place for Business and Services*.
- Liverpool City Council provided the Department with a report prepared by Hill PDA (a report commissioned by the Council to review the economic data put forward in support of development of outlet centres at Cross Roads and Orange Grove by Leyshon Consulting and Hirst Consulting) in support of draft Amendment 92. The Hill PDA Report concluded that a net community benefit would result from development of either site as an outlet centre and this conclusion was reflected in the s.69 Report prepared by the Department.
- It is relevant to the Committee's Terms of Reference to note, however, that the Department considered that there were a number of difficulties with Hill PDA's analysis of net community benefit. In particular:
 - the report was primarily an *economic* analysis, and did not sufficiently address other, equally important criteria in the Right Place for Business policy, especially the availability of transport to the sites; and
 - while the economic analysis focussed on the impact of outlet centre development at Cross Roads and Orange Grove on the Liverpool local government area, its conclusions in respect of the impact of those proposals on Liverpool centre were ambiguous and poorly supported.
- This concern was expressed twice by Departmental officers from Sydney Region West to the Council office, who requested further information on the net community benefit initially for the Cross Roads site, and later, for the Orange Grove site.
- Peter Hamilton, the Department's Principal Policy Advisor, Metropolitan Strategy, expressed the view that while the Hill PDA Report had addressed all the net

community benefit criteria it was with varying degrees of robustness and without a conclusion based on a comparison of the benefits and disbenefits.

- A supplementary report by Hill PDA was submitted by the Council purporting to address the net community benefit criteria for the Orange Grove site (the Cross Roads site by this time having been deferred from draft Amendment 92). The Director General, however, was not satisfied with the information provided by the Council, particularly in the light of Mr Hamilton's expressed reservations about the Hill PDA analysis.
- Of particular relevance to the Committee's Terms of Reference was the statement in the Council's report submitted under s.68(4) to the Department that the first Hill PDA Report had concluded that the initial outcome of outlet centre development at Orange Grove would be a negative impact on Liverpool CBD of \$18 million, or -4.2% based on current projected turnover. In light of the fact that the Administrator of Liverpool City Council had recently requested funding for revitalisation of the Liverpool CBD (and funds of \$200,000 had been provided by the Department for this purpose), the -4.2% impact on the Liverpool CBD would be significant; as census data indicates that nearly 200 (or 7%) retail jobs in Liverpool CBD were lost during the last census period.
- Other key matters which concerned the Director General were that:
 - The Council's s.68(4) Report did not address access by public transport – the only reference is made by the supplementary report from Hill PDA which made reference to a bus service which at best operates infrequently out of peak hour and not at all on Sundays; and
 - The Department's s.69 Report acknowledges the inconsistency with the Government's policy with respect to transport accessibility of retail activities, but suggests that there would be scope in the future for Council to negotiate improvements in public transport with the Developer of the site. The Director General considered that this conclusion did not provide adequate finality or certainty in relation to public transport matters.
 - The Director General found that the arguments that people would combine trips to the Liverpool CBD and the outlet centre at Orange Grove unsupported by any evidence and not compelling.
 - Comments in the s.69 Report that the bus services to the Orange Grove outlet centre could be improved were speculative. It is noted that the Orange

Grove site is not a site that will be served by the significant investment made by the Government in transport infrastructure in Western Sydney.

6. Decision-making Context

- It was necessary for the Department to request information which should have been provided by the Council with the Council's s.68(4) Report on at least four occasions. The Department had to undertake its own research to clarify the availability of public transport to the Orange Grove site.
- When the relevant Departmental file and the Department's s.69 Report came before the Director General, the Director General formed the view on the documents on that file and the s.69 Report that the information provided in support of the draft amendment was not persuasive and was inadequate in some respects. In particular, the Director General was not convinced that a proper and thorough "fresh view" analysis was undertaken by the Departmental officers.
- The Director General was also concerned with the tenor of the s.69 Report and much of the Departmental advice on which this report was based. The Director General considered that s.69 Report worked from the premise of seeking to legitimise an existing use of the Orange Grove site for an outlet centre, rather than assessing draft Amendment 92 in the context of strategic outcomes for Liverpool.
- The Director General considered that the Department's analysis never reconciled the discrepancies in the data from the various reports prepared in relation to draft Amendment 92, including the submissions that the Council and the Department received, or sought to independently validate that data.
- The Director General did not consider that all of the information relevant to the Minister's decision whether or not to make draft Amendment 92 had been provided by the Council and that the Department's s.69 Report as well as the Council's documents did not present a convincing merit case that draft Amendment 92 should be made.
- The Committee may also wish to note the following uncertainties in the statutory process for draft Amendment 92:
 - The s.68(4) Report from the Council did not explain why the Council had deferred the Cross Roads site. The Council explained to the Department that the Administrator was concerned to ensure that any amendments to the Liverpool LEP in relation to the Cross Roads site were consistent with the Government's Metropolitan Strategy. However, it was not explained to the

Department why the Administrator did not apply this reasoning in relation to the Orange Grove site.

- Council did not provide a copy of the strategy which would support the draft Amendment in accordance with the policy objectives set out in *Right Place for Business and Services*;
- It was necessary for the Department to seek further information from the Council in relation to the net community benefit of draft Amendment 92.

6.1 Delegations

- Under s.23 of the EP&A Act, any of the Director General's functions may be delegated (*inter alia*) to an officer of the Department or a Council.

Delegation to Councils

- The Director General's functions under s.65 (the issue of a s.65 Certificate to allow public exhibition of a draft LEP) are delegated to Councils in the case of many draft LEPs.
- On 19 February 1997 the Director General's functions (subject to the limitations and conditions set out in schedule 1 to the instrument of delegation) in relation to the issue of s.65 Certificates and making of s.69 Reports were delegated to a number of Councils (listed in schedule 2 to the instrument of delegation).
- A s.65 Certificate in respect of draft Amendment 92 was issued by the Acting Manager City Development of Liverpool City Council under that delegation.

Delegation to Departmental officers

- A standard delegation enables a Departmental Officer holding the grade of EPO2 or EPO3 – Regional NSW Planning or Metropolitan Area Management to furnish a s.69 Report to the Minister recommending approval and making of the plan without changes of substance, or refusal to make the plan and significant changes to the plan.
- On 4 June 2004 David Birds of the Sydney Region West branch endorsed a s.69 Report prepared by the Sydney Region West branch of the Department in respect of draft Amendment 92 on behalf of the Director General under the standard Departmental delegation.

- Under a Departmental protocol LEPs which deal with significant issues are to be endorsed by the Deputy Director General and plans which deal with strategic issues are to be endorsed by the Director General.
- In accordance with this protocol, on 16 June 2004 the s.69 Report for draft Amendment 92 was sent to the Director General, who then referred the Report back to the Executive Director, Metropolitan Land Use and Planning for his consideration.

6.2 Precedents

- In her memorandum to the Minister of 8 July 2004, the Director General noted specifically that the making of draft Amendment 92 may be inconsistent with a recent decision taken by the Department not to support a similar proposal in Tamworth. The Director General also noted that the Department had also recently joined with Blacktown Council to defend a refusal of bulky goods retailing near the Rouse Hill Regional Centre. The Director General noted in that memorandum the importance of consistently applying planning policies throughout the State.
- Examples of such consistent application of planning policy by the Department are submitted for the benefit of the Committee:
 - Draft *Gosford LEP 379* was proposed by Gosford Council to allow factory outlets at Kangoo Road Somersby. The draft LEP was refused by a former Minister for Planning in December 1999 because it proposed to allow out of centre retail development.
 - In 1996 Parramatta City Council requested the Minister to make a draft LEP in relation to land at Wellington Road and Ferndell Street, South Granville to rezone industrial land to 3(a) Business General to enable the development of a district retail centre. The Minister at the time decided not to make the draft LEP as the rezoning proposal was inconsistent with the objectives of the Retail Policy and the Metropolitan Strategy in that it did not support the existing retail hierarchy and the use of public transport. It was considered that the development would jeopardise the viability of existing nearby shopping centres situated along rail lines.
 - Proposed amendments to *Wollongong LEP* to:
 - (a) Rezone land from heavy industrial zone to business park - the Department advised the Council at s.54 stage (June 2004) that it would not support the

proposed amendment as it was not supported by a strategic review including its location and consequences and hence may have allowed bulky goods retailing and attracted uses from nearby centres; and

(b) Rezone land from light industrial to commercial – the Department advised the Council at s.54 stage (July 2004) that it would not support the proposed amendment as the plan could have undermined the Fairy Meadow commercial centre and possibly the Wollongong CBD.

- Draft *Tamworth LEP 1996 (Amendment No. 18)* proposed to rezone the West Tamworth Public School site and to insert special provisions to enable a development application to be considered by the Council for the expansion of Tamworth Shopping World. The Director General declined to issue a s.65 Certificate to enable draft Amendment 18 to be exhibited as the draft amendment essentially undermined the all previous planning strategies and provisions to both consolidate and protect the Tamworth CBD as the retail hub of Tamworth.
- A number of court decisions have also supported the Centres Policy, for example,
 - *Stadurn Pty Ltd v Blacktown City Council* NSWLEC 348 (2 July 2004) – This case considered the permissibility of a development proposal for a bulky goods warehouse granted by the Council. The *Right Place for Business and Services* identifies Rouse Hill as a major urban centre. Justice Pain accepted in her judgment in this case that future investment in the Rouse Hill Retail Centre could be threatened by the proposed development and that the public interest was best served by the promotion of the structured and planned approach originally set out in *State Regional Planning Policy No 19* and later in *Baulkham Hills Shire Development Control Plan No.33*. In addressing the public interest issues, Pain J took into account the provisions of the draft SEPP 66 package, and held that draft SEPP 66 should be taken into account in determining the permissibility of the development even although it is not yet in force.
 - *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* NSW LEC 150 (6 September 2002) – in dismissing the Applicant's appeal, Cowdroy J found that the proposal was adverse to the public interest. His Honour found that the proposed development was not appropriate for this kind of large scale bulky goods retailing because the proposal ran contrary to a number of State

Planning Policies which overwhelmingly supported the advancement of the existing retailing hierarchy. Cowdroy J held that the fundamental planning principles contained in draft SEPP 66 are matters which in the public interest are factor which should be taken into consideration.

- o *Woolworths Ltd v The Warehouse Group (Australia) Pty Ltd and Liverpool City Council* NSW LEC 350 (19 December 2003) – Lloyd J held that Woolworths was using premises zoned for bulky goods sales room or showroom for the retail use of a “shop” (which was not permissible in the zone).

6.3 Options

- On reviewing the s.69 Report for draft Amendment 92, the Director General therefore formed the view that not all the relevant information in relation the proposal under the draft amendment to the LEP had been considered in the s.69 Report and that the merit case for making draft Amendment 92 was not convincing. In particular, the Director General considered that a more detailed analysis was required, rather than a review of conflicting evidence. The Director General considered, therefore, that she could not support the conclusions drawn by the s.69 Report.
- The Director General sought legal advice from Corporate Counsel in relation to the options available to her in this circumstance. Corporate Counsel advised that the matter was an issue to be determined on planning merit, as there was no legal impediment to either refusing to make the plan or to making it.
- The Director General also sought further advice from Corporate Counsel on precedents where the Department had made an environmental planning instrument which would allow the regularisation of an existing development. Corporate Counsel advised that environmental planning instruments had been made in the past to rezone land to allow a use which was not permitted under the existing environmental planning instrument. Corporate Counsel gave some examples of such amendments (listed below). While these examples illustrate cases where amendments have been made to land use controls to allow an otherwise non-permissible use to proceed, none of these examples are factually similar to the Orange Grove site.
- The Director General was conscious that there was considerable expectation in some sectors of the community that draft Amendment 92 would be made, and

that concerns had been expressed about loss of jobs if the amendment was not made.

- The Director General considered her paramount obligation, however, was to provide advice to the Minister which would ensure that the fundamental integrity of the planning system and to consider land use from a state as well as a local perspective.
- In the Director General's view, any alternative advice would have constituted bad public policy and bad administration of that policy.
- The Director General therefore considered it to be appropriate to provide the Minister with a supplementary memorandum to the s.69 Report which set out her concerns about the draft LEP.

6.4 Outcomes

- The Director General was concerned for the welfare of persons working at the Orange Grove outlet centre and recommended that the Minister and the Department indicate support for any application to the Court by the Appellant for an orderly wind down of the existing centre to allow time for stock to be sold and for affected persons to be assisted to find alternative employment.
- The Minister has instructed John Dermody as Business and Jobs Co-ordinator to facilitate finding new jobs for the affected workers at the Orange Grove outlet centre. The Government has employed Drake Australia to match vacant retail jobs in proximity of Liverpool CBD with centre employees.
- Negotiations have been held with the Australian Retailers Association to advise Orange Grove traders of available suitable space and to assist them with relocation issues.