Submission
No 11

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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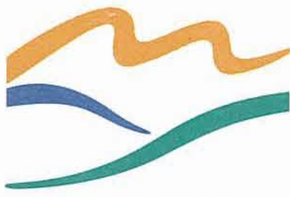

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4 December 2008

The Hon Tony Catanzariti MLC, Committee Chair
Standing Committee on State Development
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Catanzariti

Submission to the Legislative Council's Standing Committee on State Development Inquiry into the New South Wales Planning Framework

Thank you for the invitation to make a submission to the abovementioned Inquiry.

Penrith City Council supports reforms that will assist in the delivery of an improved planning system that benefits all stakeholders, including government, the community and developers.

The NSW planning system is nearly thirty years old and as a result of numerous amendments and inclusions to address arising issues, has become a complex and inefficient piece of legislation. Council's principal recommendation is that new planning legislation is required to replace the Environmental Planning and Assessment Act, 1979 (EPAA). The new legislation needs to provide a strategic focus on the promotion of sustainable development, address contemporary environmental and community issues and simplify the planning process.

Our detailed response is attached. Please do not hesitate to contact me if you have any questions regarding any of the issues raised in our submission.

Yours faithfully

Alan Stoneham
General Manager

Encl. Penrith City Council Submission the Legislative Council's Standing Committee on State Development Inquiry into the New South Wales Planning Framework.

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PENRITH
CITY COUNCIL
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Penrith City Council Submission To Inquiry into NSW Planning Framework

November 2008

1. Executive Summary

The Minister for Planning has asked the NSW Parliament's Standing Committee on State Development to conduct an inquiry into the New South Wales planning framework, in the context of national and international planning trends.

The Committee has invited Penrith City Council to make a submission to the Inquiry. Council believes that an improved planning system is necessary to ensure efficient and effective implementation of State, regional; and local strategies crucial for the continued and sustainable development of the State.

The NSW planning framework is based on the *Environmental Planning and Assessment Act 1979* (EPAA). It is nearly thirty years old and as a result of numerous amendments and inclusions to address arising issues, has become a complex and inefficient piece of legislation. Council is of the view that a new EPAA is required to provide a strategic focus on the promotion of sustainable development, address contemporary environmental and community issues and simplify the planning process.

Penrith City Council recommends:

1. The State Government, in partnership with local government, the development industry and relevant stakeholders, develop a new Act to replace the EPAA based on the following principles:
    - A focus on strategic outcomes underpinned by the triple bottom line elements for long-term sustainability. These need to be supported by an efficient and effective planning process;
    - Promotion and coordination of responsible, sustainable development to deliver quality outcomes;
    - Recognition of contemporary environmental concerns including the implications of climate change and the inclusion of strategies to respond to this issue;

- Retention and implementation of a streamlined State, Regional and Local planning hierarchy which recognises strategic policy directions;
- Reducing complexity through the development of planning strategies and statutory processes tailored to the scope, scale and significance of the planning issue;
- Embracing community consultation and participation as fundamental components of the planning system;
- Recognition of Local Government's primary rôle in planning for the local area;
- Integration and coordination of natural resource management with the planning process. This would see a significant streamlining of the array of State and Federal environmental protection legislation and the removal of present duplication;
- Recognition of the need to attain an appropriate balance between the rights of individuals and the wider public interest.

2. The Commonwealth Environment Protection & Biodiversity Conservation Act (EPBC), the NSW Threatened Species Conservation Act (TSC) and Section 5A of the Environmental Planning and Assessment Act be amended to:

   - remove unnecessary duplication and protect areas of high biodiversity value; and
   - encourage wider use of Biodiversity Certification as the strategic mechanism to conserve the State's threatened species, populations and ecological communities and their habitat.

3. Provisions, reflecting those measures being developed in the NSW Climate Action Plan, be incorporated in the EPAA to require and guide consideration of climate change impacts in the preparation of environmental planning instruments and the assessment of specific development proposals;

4. The current provisions of the EPAA requiring assessment of the social and economic impacts of development remain appropriate considerations and provide an appropriate backdrop for the proper consideration of competition issues;

5. The NSW Government request the Commonwealth Government to amend the Commonwealth Airports Act 1996 to:

- directly specify core aviation activities that fall within its jurisdiction and hence the Commonwealth's approval role; and
- provide a more rigorous approval process for non-aviation development on Commonwealth controlled airport lands that:
  a. provides a level of security, community consultation, planning assessment, and developer contribution equivalent to that applied to similar developments under State and local planning systems; and
  b. ensures that non-aviation developments on Commonwealth airport lands are consistent with respective State and local planning strategies.

6. The EPAA be reviewed to provide greater delineation between the development assessment and construction processes;

7. The provisions of the EPAA, various nationally adopted Standards and Codes and other relevant legislation governing planning and construction activities be integrated, simplified and aligned; and

8. That State Government, in consultation with local government and the development Industry examine alternative mechanisms for the equitable funding of infrastructure in a manner that will enhance new housing affordability.

2. Background

The *Environmental Planning and Assessment Act 1979* (EPAA) is the main statutory vehicle guiding planning outcomes in NSW. The EPAA provides a comprehensive three tier planning system, allowing for state, regional and local plans, as well as outlining the development assessment process. Whilst the EPAA attracted considerable support upon its introduction, nearly thirty years of amendments, case law and the proliferation of other natural resource management legislation has meant that the planning regime in NSW is, to say the least, complex and becoming increasingly inefficient

Council's submission to the recent Department of Planning's discussion paper on improving the NSW planning system in November 2007 noted that the reforms' focused on process and did not recognise that the quality of an outcome is at least as important, if not more so, than the speed at which it is delivered. Council's submission also argued that the drafting of a new Act, rather than continually revising the existing legislation would enable simplification of the system in a much more coordinated way than was possible with the recent reforms.

Penrith City Council supports reforms that will assist in the delivery of an improved planning system that benefits all stakeholders, including government, the community and developers.

3. Introduction

The Minister for Planning has asked the NSW Parliament's Standing Committee on State Development to conduct an inquiry into the New South Wales planning framework, in the context of national and international planning trends.

The Committee will particularly consider the implications of the Council of Australian Governments (COAG) reform agenda for planning in New South Wales, climate change and natural resource issues in planning and development controls, and the duplication of processes under relevant

Commonwealth and NSW legislation. Other issues for deliberation include the appropriateness of considering competition policy issues in land use planning and development approval processes in NSW, regulation of land use on or adjacent to airports and the implications of the planning system on housing affordability.

4. Council Response to the Terms of Reference

Issue A

The need, if any, for further development of the NSW Planning legislation over the next five years, and the principles that should guide such development

Commentary:

As stated above, the EPAA is dated, complex and process orientated legislation. The myriad of amendments made to the legislation over this time not only adds to this complexity, but also impacts on its legibility and usefulness. The preferred alternative is to draft and introduce a new act which encapsulates recent changes in planning practise and current issues in planning which were unknown with the original planning legislation was first drafted, e.g., climate change, sustainability – economic, social and environmental, and environmental (biodiversity) protection.

The new legislation would also provide a strategic focus on the promotion of responsible sustainable development and address contemporary community issues. Above all, it must simplify the planning process to efficiently achieve quality outcomes.

Retaining the consultation process for all aspects of the plan-making process, including State environmental planning policies, is critical to maintain community participation and support of the outcome.

Fundamentally, a planning framework is needed that enables the creation of an environment in which human habitation and associated activities are effectively reconciled with the need for responsible natural resource

management, cultural heritage and long term sustainability. Of necessity, that would require a strategic focus to the planning system that allows participation of those affected by proposals for change. The planning system should not be simply about development control.

The State Government has introduced major strategic policies relating to the growth of Metropolitan Sydney and its subregions. However, none of these significant planning directives were given statutory recognition under the current provisions of the EPAA. To ensure effective recognition and implementation of these important strategies guiding urban growth in Sydney, there should be greater flexibility in the planning legislation to enable their recognition as a principal policy initiative.

Over time, there has been a growing recognition by the State and Australian Governments to give effect to legislative controls over management of the natural environment. The result has been a wide range of Acts which have generated various overlaps and contradictions. It will be fundamental in a review of the planning framework to ensure that the duplication of legislation affecting natural resource management in NSW be eliminated.

A further issue relates to achieving an acceptable reconciliation of the often competing objectives of public institutions and private individuals in relation to land use and development decisions. Although this could ultimately be difficult to achieve, better direction is required in relation to attaining an appropriate balance between the rights of individuals versus the wider public interest.

Recommendation:

The State Government, in partnership with Local Government, the Development Industry and relevant stakeholders, develop a new Act to replace the EPAA based on the following principles:

- A focus on strategic outcomes underpinned by the triple bottom line elements for long-term sustainability. These need to be supported by an efficient and effective planning process;
- Promotion and coordination of responsible, sustainable development to deliver quality outcomes;
- Recognition of contemporary environmental concerns including the implications of climate change and the inclusion of strategies to respond to this issue;
- Retention and implementation of a streamlined State, Regional and Local planning hierarchy which recognises strategic policy directions;
- Reducing complexity through the development of planning strategies and statutory processes tailored to the scope, scale and significance of the planning issue;
- Embracing community consultation and participation as fundamental components of the planning system;
- Recognition of Local Government's primary role in planning for the local area;
- Integration and coordination of natural resource management with the planning process. This would see a significant streamlining of the array of State and Federal environmental protection legislation and the removal of present duplication;
- Recognition of the need to attain an appropriate balance between the rights of individuals and the wider public interest.

Issue B

The implications of the council of Australian Governments (COAG) reform agenda for planning in NSW.

Commentary:

On March 26 2008, the Council of Australian Governments made a commitment to a comprehensive new microeconomic reform agenda for Australia. The agenda has a particular focus on health, water, regulatory

reform and the broader productivity agenda[1]. It was agreed that all levels of government would:

- Develop a proposal for a more harmonised and efficient system of environmental assessment and approval to ensure there is no duplication in assessment or approval requirements between Commonwealth and State and Territory schemes
- Work to develop approvals and bilateral agreements where efficiencies can be achieved in meeting the requirements of the *Environment Protection and Biodiversity Conservation Act 1999*
- Improve development assessment processes to provide greater certainty and efficiency in the development and construction sector by reducing regulatory burdens and delays including maximum uptake of electronic development assessment processing nationally,
- Review processes that apply to the Building Code of Australia (BCA) and remove unnecessary state-based and local government variations to the BCA and to establish a nationally consistent approach to licensing and accreditation in the building industry.

The identified areas of reform are all significant matters in terms of underpinning a more efficient planning system and should result in overall benefits to the community and other stakeholders. As such, they appear worthy of support in principle.

There are distinct overlaps between the COAG reform agenda and the identified need for a major overhaul of the NSW planning system and in particular the EPAA. Many of these issues are common to the concerns raised by the development industry, local government and the wider community in relation to the difficulties being experienced with the growing complexity of the EPAA and the duplication in existing legislation at both State and Federal level. Much of the COAG reform agenda could be effectively delivered in a major review of the EPAA in so far as NSW planning legislation is concerned.

[1] Council of Australian Government Meeting, Adelaide 26 March 2008 Communique

Recommendation:

The State Government, in partnership with Local Government, the Development Industry and relevant stakeholders, develop a new EPAA to implement COAG reforms based on the principles outlined in Issue A above.

Issue C

Duplication of processes under the Commonwealth Environment Protection and Biodiversity Act 1999 and NSW planning, environmental and heritage legislation

Commentary:

There is legislative duplication in assessing the impact of development/planning proposals on threatened or endangered flora and fauna. Both the Commonwealth Environment Protection & Biodiversity Conservation Act (EPBC) and the NSW Threatened Species Conservation Act (TSC) require consideration of this issue in the preparation and/or assessment of development proposals.

Both Acts have their own tests or guidelines to establish significance. Both tests are similar in nature, the EPBC Act considers "matters of national significance" and the TSC Act considers this issue at a state level. A proponent is required to address the 'biodiversity' impact of their proposals under both pieces of legislation. This is of particular relevance in Western Sydney where, for example, Cumberland Plain Woodland is listed under both pieces of legislation. The legislation and/or development planning and assessment processes should be amended to avoid unnecessary duplication.

The TSC has also introduced the concept of Biodiversity Banking (BB), a voluntary mechanism, as an alternative to the established 7 part test as a means to assess impacts on the conservation of threatened species. BB is predicated on the loss of biodiversity in one area subject to saving it in another. However, it does not prevent development of high conservation

areas, the loss of biodiversity of irreplaceable value, nor require like for like offsets. Further more, BB does not apply where the Government has imposed, or allowed payment of a conservation levy, or where the proposal is being assessed under Part 3A of the EPAA.

Biodiversity Certification (BC) seeks to protect threatened species at the strategic planning stage rather than on a site by site basis. Biodiversity must be maintained or improved for certification to be granted. Certification may be granted for part of a local environmental plan (LEP) or individual species, depending on the quality of available data. Certification can switch off the need for additional threatened species site-level assessment and is a potential means for addressing the short comings of BB. This enables clear decisions to be made on where development can be practically established in the early planning phases which is of significant benefit in the subsequent development decision making process.

The need for quality data to inform the BC process trends to limit the practical application of BC to spot rezonings and specific land releases. Application across larger areas such as a significant component of a local government area cannot be easily managed due to the resource (finance & expertise) limitations of local government. Financial and professional support from Government is required to maximise the use of BC.

Recommendation:

The Commonwealth Environment Protection & Biodiversity Conservation Act (EPBC), the NSW Threatened Species Conservation Act (TSC) and Section 5A of the Environmental Planning and Assessment Act be amended to:

- remove unnecessary duplication and protect areas of high biodiversity value; and
- encourage wider use of Biodiversity Certification as the strategic mechanism to conserve the State's threatened species, populations and ecological communities and their habitat.

Issue D

Climate change and natural resources in planning and development controls

Commentary:

Climate change is expected to have significant impacts on local communities in Australia. These impacts include water scarcity, more frequent and intense storms, sea level rise, erosion and flooding, all of which place increasing burden on existing infrastructure and demands for future infrastructure.

On March 10 2008, the Premier announced that NSW will develop a Climate Change Action Plan to focus its efforts The Plan is expected to be completed in mid 2009 and will involve:

- working with the building industry to consider whether current design standards for homes in storm and flood prone areas are strong enough to withstand harsher weather events in the future;
- working with local councils and planners to respond to the impacts of long term sea level rise;
- readying ourselves for more intense and frequent bushfires;
- Planning to support the elderly and vulnerable - particularly those with chronic heart and lung disease - to cope with the expected increase in heatwaves. This could involve expanding our understanding of heat related illness and developing prevention and health promotion programs;
- preparing our economy for the challenges and opportunities that will come in a carbon-constrained economy;
- ensuring we look after our natural environment as the climate changes, especially vulnerable areas like the alpine region;
- ensuring that our agricultural communities have the technology and science they need to adapt to changing weather patterns.

The EPAA Act does not specifically require consideration of, or provide guidance with respect to the implications of climate change in the preparation of environmental planning instruments or assessment of development proposals. It has been left to the Courts to establish such principles. The

NSW Land & Environment Court has held that climate change is a consideration of ecological sustainable development (ESD), an object of the EPAA and has overturned development approvals on the basis that the impacts of climate change were not considered in assessment of a number of significant proposals.

Specific provisions, reflecting those measures being developed in the NSW Climate Action Plan, need to be incorporated within a new EPAA to require and guide consideration of climate change impacts in the preparation of environmental planning instruments and the assessment of development proposals.

Recommendation:

Provisions, reflecting those measures being developed in the NSW Climate Action Plan, be incorporated in the EPAA to require and guide consideration of climate change impacts in the preparation of environmental planning instruments and the assessment of specific development proposals.

Issue E

Appropriateness of considering competition policy issues in land use planning and development approval processes in NSW

Commentary:

The NSW Government's competition policy seeks to provide a more open and integrated market that limits anti-competitive conduct.

The EPAA is not an instrument to prevent competition in the market place or to protect private commercial interests, but amongst other things, is an instrument that seeks to promote the interests of the public and the economic and orderly use and development of land.

The objects of the EPAA are supported by Section 79C which requires assessment of the likely social and economic impacts of development in the

locality. Case law has, over time, provided a significant degree of guidance as to how this issue should be implemented through land use planning and the development approval processes. In arriving at development decisions, Council as the consent authority must make a distinction between the public interest and the private commercial interests associated with any proposal. As a general rule, the broader public interest is to be preferred over the private interests of commercial operators. In this regard, the Courts have arrived at the fundamental tenet that the prospect of competition is not a relevant town planning consideration in relation to a development proposal, unless there is likely to be a net loss of public benefit.

Consideration of competition policy in land use planning needs to have its foundation in seeking to ensure the social and economic welfare of the community and not in the promotion of private commercial interests.

Recommendation:

The current provisions of the EPAA requiring assessment of the social and economic impacts of development remain appropriate considerations and provide an appropriate backdrop for the proper consideration of competition issues;

Issue F

Regulation of land use on or adjacent to airports

Commentary:

Regulation of land use on or adjacent airports is at issue where the airport falls under Commonwealth jurisdiction via the Airports Act 1996, as is the case with Sydney and Sydney West (Badgerys Creek) airports. Development on such airports is covered by Commonwealth legislation, whilst development adjacent to the airport is covered by State and Local legislation.

There is no doubt that the development of aviation facilities at the major capital city airports around Australia is of national significance and should fall

under Commonwealth control. However, the issue of what comprises core aviation activities as opposed to other commercial activities is becoming increasingly blurred given the privatisation of airport operations and the desire of those entities to expand economic opportunities.

It is reasonable to expect that non-aviation related development should continue to be subject to and accord with State and local planning strategies governing similar development beyond and adjacent to an airport.

The Commonwealth Airports Act should directly specify core aviation activities that fall within its jurisdiction and hence the Commonwealth's approval role. In addition, a more rigorous approval process should be provided for non-aviation development on Commonwealth controlled airport lands that:

- Provides a level of security, community consultation, planning assessment, and developer contribution equivalent to that applied to developments under State and local planning systems; and
- Ensures that non-aviation developments on Commonwealth airport lands are consistent with respective State and local planning strategies.

Recommendation:

The NSW Government request the Commonwealth Government to amend the Commonwealth Airports Act 1996 to:

- directly specify core aviation activities that fall within its jurisdiction and hence the Commonwealth's approval role; and
- provide a more rigorous approval process for non-aviation development on Commonwealth controlled airport lands that:
    a. provides a level of security, community consultation, planning assessment, and developer contribution equivalent to that applied to similar developments under State and local planning systems; and

b. ensures that non-aviation developments on Commonwealth airport lands are consistent with respective State and local planning strategies.

Issue G

Inter-relationship of planning and building controls

Commentary:

This issue raises the following three aspects:

1) Need for delineation between planning and building approval processes
Planning reforms introduced in 1999-2000 shifted the focus of assessment of applications to carry out development and merged the two assessment processes of concept and construction into one. This also removed the ability to impose conditions on construction certificates. These changes have resulted in the necessity for building construction assessment to form a significant component of development assessment and the need for a much higher level of detail to be provided to enable a determination, increasing applicant costs and assessment times.

There would be merit in having an opportunity to be able to apply conditions to a construction certificate, or alternatively moving to a dual assessment process which would result in simplification of DA assessment to compliance with LEPs, DCPs and other EPAA section 79C criteria quantifying the compliance and merit of a proposal.

A more flexible planning system would compliment the 2008 NSW planning reforms which increase delineation between the assessment and certification processes.

An examination of the role of conditions of consent and their relevance to the type of approval being sought could also improve the efficiency of the approval process if:

a) Development consent conditions focus on the operational aspects of the use of the site and ongoing management of the premises; and
b) Construction Certificate conditions focus on the physical works with finalisation upon issue of an occupation certificate.

2) *Planning controls which require building performance greater than required by the Building Code of Australia.*

State and Federal legislation has mandated building standards which are inconsistent with those required by the nationally adopted Building Code of Australia (BCA).

An example of this inconsistency is found in the recently exhibited draft NSW Housing Code, prepared by the Department of Planning in response to the recent amendments to EPAA. The Code aimed to provide a uniform set of minimum standards for Complying Development for single storey dwellings on lots over $600m^2$ across NSW.

The Code proposed that as a minimum standard, any room with a width 4.5m or greater should have a minimum ceiling height of 2700mm. The minimum standard required by the BCA is 2400mm. This 2700mm ceiling height has also been adopted for various types of residential development in the planning controls of a number of Councils across NSW. The aim of the control is to provide improved amenity to these living spaces.

The BCA adopted provision for ceiling heights has a scientific and historical basis and has survived a number of reviews of the Code. It may be that the 2400mm ceiling height standard is becoming redundant and requires review, however it is not appropriate that a determination with such significant implications to the housing industry should be made in an ad hoc way and result in conflicts between the standards required by planning and building controls.

Consistency across the planning and building approvals process is essential in providing certainty to all stakeholders.

Further inconsistencies can be identified when considering disability access requirements. The BCA requires compliance with Australian Standard 1428.1. However, the development may also be required to comply with the NSW Disability Services Act 1993 and the Commonwealth Disability Discrimination Act 1992 which have different more subjective requirements. Compliance with the BCA does not guarantee compliance with these Acts.

Further complications are added by the ability of an applicant to apply for an exemption from BCA access controls on "unjustifiable hardship or impediment to the development" grounds. In these cases the application must be heard by the Human Rights Commission.

This issue is further exacerbated in that State Environmental Planning Policy "Housing for Seniors or People with a Disability 2004" does not correlate with requirements of Australian Standard AS 4299 – Adaptable Housing. This Australian Standard is also not referenced by the BCA.

The variety and inconsistency of legislation concerning this issue has led to uncertainty, unnecessary conflict and the need for judicial intervention in the planning and development process. It is essential that the legislation and processes in this area be integrated and simplified to provide the desired development outcome and improved process efficiency.

3) Uniform Construction of Planning and Building Controls

Planning legislation, environmental planning instruments, Australian Standards and the BCA are all documents referenced in the preparation, submission and assessment of applications for development.

The format, language and mechanisms for assessment and demonstration of compliance within all of these documents vary greatly. These variations

translate into a need for specialist knowledge in each to navigate through the application and approvals processes.

In depth review of the planning and construction approval framework is required to provide a simplified and similar format, structure, language, and control mechanisms across the various documents.

Recommendation:

That:

1. The EPAA be reviewed to provide greater delineation between the development assessment and construction processes; and
2. The provisions of the EPAA, various nationally adopted Standards and Codes and other relevant legislation governing planning and construction activities be integrated, simplified and aligned;

Issue H

Implications of the planning systems on housing affordability.

Commentary:

There are numerous factors that impact on new housing affordability in the State, including government taxes and charges, local and state developer contributions, agency infrastructure charges, construction and materials costs and land prices.

Both the State Government and the development industry have recently expressed concerns over the impact of State and local developer contributions is having on housing affordability, particularly in the urban growth areas in Metropolitan Sydney.

In September 2007 the NSW Urban Taskforce reported that infrastructure charges in the Growth Centres amounted to $110,000 per residential lot, $16,000 per residential lot in Queensland, $14,000 per residential lot in

Victoria and $614 per residential lot in Perth[2]. This has a significant impact on new housing affordability and is a significant comparative cost disadvantage for new housing development in the State.

In response to this issue, the State Government has recently reduced State infrastructure charges for development in the North West and South West Growth Centres and has also approved new legislation which limits the infrastructure items for which contributions can be sought at the local level. We are awaiting release of the regulations and the introduction of these new requirements.

However, this reform does not go far enough in addressing decreasing housing affordability. The planning legislation retains a focus on developer contributions. If there is to be a serious review into how housing development can be supported and accelerated, a new regime for funding urban infrastructure will need to be examined that draws in opportunities beyond developer obligations, including higher levels of government funding.

There is a need for the State Government, in consultation with local government and the development industry, to continue to examine alternative mechanisms for the funding of infrastructure associated with the delivery of new housing. That would see a make equitable distribution of infrastructure changes between all three levels of government and the private sector. Implicit in this is a continuing commitment from the Commonwealth Government to provide substantial funding for major urban infrastructure, as well as creating an environment conducive for local government to be able to rise funding for capital works. That would of necessity require a major review of local government rate pegging arrangements which are currently a major impediment to council becoming more active in funding urban infrastructure.

In addition, there would seem to be advantage in the Government's review of its current taxation policies relating to land and housing development as a

[2] What Infrastructure – A report into how infrastructure levies are crippling land release in Western Sydney, prepared by the NSW Urban Taskforce September 3, 2007

complementary suite of measures which could enhance new housing affordability and funding equity.

Recommendation:

That State Government, in consultation with local government and the development Industry examine alternative mechanisms for the equitable funding of infrastructure in a manner that will enhance new housing affordability.