



Productivity Commission:
Performance Benchmarking of
Australian Business Regulation -
Planning, Zoning and Development
Assessments

Submission by the Council of the City of Sydney
19 July 2010

This submission is intended to inform the Productivity Commission's report on the Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments.

The City welcomes the Productivity Commission's review of the NSW planning system's performance in terms of promoting competition between businesses and encouraging the development of efficient cities. In particular, the City urges the Commission to investigate the NSW Government's recent policy response to the ACCC's *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (July 2008).

With the intention to promote competition between retailers, recent State planning policy has promoted a significant departure from the current centres planning strategy by promoting the decentralisation of retail development and by proposing to diminish councils' ability to specify appropriate locations for types of retail development in local planning instruments.

The aim of this submission is to:

- Outline the benefits of centres policy
- Discuss the City's planning strategies which rely on centres policy; and
- Highlight the impacts of the proposed NSW Government policy on local strategies and ultimately the City's liveability.

The final section of the submission identifies other topics which may be of interest as part of this review and invites the Commission to utilise the City's resources and expertise in these matters.

Centres policy

Centres policy describes the planning approach where major retail development is encouraged to locate in identified mixed use centres where they can be supported by residential populations, complementary businesses and services and supporting community and transport infrastructure. The result is an urban framework that reduces vehicle trips, supports small business, promotes social interaction and results in vibrant public spaces.

In summary, the benefits of a strong centres policy are:

- Centralising major retail anchors in centres supports small businesses, who prefer to co-locate with major attractors (like supermarkets) to benefit from the high volume of shoppers that they attract. New market entrants also rely strongly on the established retail base of a centre. The greater the volume of shoppers to a centre the greater the probability that sales of all tenants within that centre will increase;
- Importantly, centralised retail reduces the required number of trips by private vehicle. Firstly, because there are many retailers, services and community facilities in one central location, people who still choose to drive to the supermarket will partake in other activities without having to drive to separate locations. Secondly, centres are planned to be the focus of investment in public

transport. Thirdly, centres can be located near denser neighbourhoods to ensure a maximum number of trips to a centre are on foot or by bicycle.

- It provides certainty for proponents and residents about where retail and business will be located. People can purchase houses or invest in businesses based on the strategies in place. This in turn should increase investment;
- It allows for effective investment in infrastructure. State and Federal Government can invest in public transport, health, education and social infrastructure near centres where it will be best patronised. Councils can focus investment in public domain and other community facilities where it will provide maximum investment.
- It allows for the protection of public investments. For example, ensuring a major centre is developed at Green Square will protect investment in the currently underutilised Green Square Station.
- It creates new neighbourhoods in renewal areas that need a 'heart'. Major retail developments in centres generate pedestrian activity which creates a safe and friendly public domain. On the other hand, it places major retail development in centres where negative impacts (such as traffic or noise) can be better managed.
- Community and cultural facilities that are located near core retail will also benefit from the activity they generate and have higher rates of utilisation.

The NSW Government's *Metropolitan Strategy* also describes the benefits of concentrating activities in centres as follows:

- *"Improved access to retail, office, health, education, leisure, entertainment and cultural facilities and community and personal services;*
- *Encouraging collaboration, healthy competition and innovation amongst businesses from clustering;*
- *making better use of existing infrastructure; and*
- *Promoting sustainable transport and healthier communities by giving more people the option of taking public transport, walking and cycling and enabling people to carry out a number of activities in one location."*

The benefits of centres planning are also recognised overseas. In December 2009 in the Department for Communities and Local Government in the United Kingdom issued *Planning Policy Statement 4: Planning for Sustainable Economic Growth* to inform local government plan-making. The Policy provides clear instructions for planning for successful, sustainable centres, including the identification of the desired centres hierarchy in the necessary plans and setting floorspace thresholds for development outside of the nominated centres.

In the City of Dublin, the local planning strategies face different challenges. To protect the economic well being and sustainability of existing centres, a maximum 3,000 sqm cap applies for new supermarkets. The *Retail Planning Guidelines for Planning Authorities* (January 2005) state that *"based on this analysis and experience elsewhere in Europe the principle of applying a floorspace limit on food store development is well founded"*.

The City of Sydney's planning strategies for sustainable centres

Centres policy is particularly important in creating sustainable networks and communities in a renewal area as large as Green Square. The vision for Green Square is for a series of transit-oriented mixed use communities that promote environmentally and socially sustainable living. At the centre of Green Square is to be a new Town Centre; identified as a 'planned major centre' in the *Metropolitan Strategy* and the new heart of the southern areas.

To achieve this vision, the City has identified a series of smaller village centres around the major centre that will provide local shopping opportunities. Village centres are located on planned future transport corridors and within close proximity to residential populations and other open spaces and community infrastructure.

Creating new centres can be difficult in renewal areas, and experience is showing that full-line supermarkets are the 'glue' for new centres and a valuable commodity in creating desired networks and creating desired capacity for public transport infrastructure. Supermarkets and other key attractors provide extensive public benefit and economic benefits in the right locations.

Centres policy also allows for effective public investment because transport and infrastructure efforts can be focussed in centres where maximum public benefit will be achieved and where Council can assume a certain density of people and businesses. The centres strategy for Green Square is based on thorough research of retail markets and is designed to result in adequate retail floorspace for the population at the build-out of Green Square (2021).

The overwhelming benefits of the retail strategy justify appropriate planning controls to implement the strategy.

In Green Square, the City is achieving a centres framework by only permitting supermarkets in the appropriate centres. Retail development outside of centres is to be 'minor', which includes smaller supermarkets, markets and all shops which meet the day to day needs of the residents and workers. The City is applying this policy as a result of an exhibited strategy that was endorsed by Council and the Central Sydney Planning Committee (CSPC) in 2008. The endorsed strategy will inform the preparation of the City's comprehensive Local Environmental Plan (LEP) and Development Control Plan (DCP).

To date, the City's policy approach has been successful in defending the refusal of three inappropriate retail centres developments at the NSW Land and Environment Court (see *ROI Properties Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 1096; *The Village McEvoy Pty Limited v Council of the City of Sydney (No 2)* [2010] NSWLEC 17; *Humphrey & Edwards v City of Sydney* [2009] NSWLEC 1075).

In order to clarify this policy approach, it is intended that the City's consolidated LEP will contain planning controls that permit all retail development in centres, but limit retail outside of centres to that with a maximum floorplate of 1000 sqm. A 1000 sqm cap is required because the NSW Government's mandatory Standard LEP Template only provides land use definitions for 'shops', 'neighbourhood shops' and 'retail premises'. A cap is required to distinguish between supermarket development and other retail premises larger than a corner store. The introduction of 'supermarket' as a land use term in the Standard Template would potentially allow for the removal of the proposed 1000 sqm cap.

NSW Government: A shift away from a centres policy approach

In recent times the NSW Government has become particularly interested in removing perceived planning 'barriers' for new development and propose changes to the planning system which will, amongst other things:

- Encourage retail development in more out-of centre locations;
- Remove Councils' ability to 'cap' the size of shops in certain areas;
- Mandate the permissibility of 'shops' in all land use zones, including residential and industrial zones; and
- Amend the centres typology in the Metropolitan Strategy to be more 'flexible'.

It is understood that these measures are intended to result in more retail development, thereby increasing competition and reducing the price of groceries and other goods and services. The Better Regulation Office and the Department of Planning have released several discussion papers and draft policies that all represent a significant and undesirable move away from a centres policy approach (i.e. clustering of major retail attractors in centres near other mixed uses and public transport), which is fundamental to the existing *Metropolitan Strategy* and the City's own planning strategies.

Of particular concern are the *draft Centres Policy* (April 2009) and the *Economic Growth and Competition through the Planning System* (April 2010).

The *draft Centres Policy* appears to support a centres planning approach in line with the NSW Government's *Metropolitan Strategy*. While the objectives of the draft Policy call for centralised retail and the creation of vibrant centres, the recommendations of the draft Policy include a planning framework for councils and the Department of Planning to rezone land for out-of-centre retail development. The draft policy also promotes a market-driven approach to retail planning, rather than careful planning for environmental, social outcomes. The City submitted a response to the draft policy which outlines its objections in more detail. A copy of the City's submission is attached for your information.

The more recent *Promoting Economic Growth and Competition through the Planning System* (April 2010) was a discussion paper also released by the Department of Planning. The Paper makes a number of recommendations which are in direct contradiction to its prior centres planning approach as detailed in its own *Metropolitan Strategy* and the *draft Sydney City Subregional Strategy*. The recommendations also have the potential to directly contradict the proposed City Plan controls. Each recommendation and the City's response is detailed below.

1. *That a Competition State Environmental Planning Policy (SEPP) be developed to clarify that competition between individual businesses is not in itself a relevant planning consideration.*

Economic impact in terms of competition between individual traders is not a planning consideration (*Fabco Pty Ltd v Hawkesbury City Council* 1997). It is a planning consideration however, where a proposed development has a negative impact on the economic well being and sustainability of a centre (such as the GSTC and the Ashmore Precinct) as a whole and results in a net community loss that the new development cannot make good (*KFC v Ganditis* 1997).

A SEPP that clarifies the intent of 79C of the *EP&A Act* in assessing the economic impact of a development proposal is welcomed if it is only to clarify how this clause is currently being applied by the Land and Environment Court. It is submitted that the proposed Competition SEPP should not attempt to re-write the provisions of the Act or the relevant case law.

2. *The proposed Competition SEPP will render any restriction on the number of a particular type of retail store or any proximity restriction contained in a LEP or DCP invalid.*

Under this recommendation, it would not be permissible to place a cap on certain types of retail in a particular zone in the City Plan LEP. The Paper states that these controls are 'anti-competitive' and must be removed. It is proposed to use such a cap in the City's consolidated LEP in order to capture supermarket development in centres, where they provide maximum public benefit (and in accordance with Council's endorsed and exhibited *Green Square and Southern Retail Study 2008*). A 1000 sqm 'cap' on retail premises is proposed in certain parts of the southern renewal areas in the City where there is no established centres framework and opportunity to place large attractors near dense residential areas and public transport corridors.

The proposed Competition SEPP would mean that this proposed control would be invalid and the City's LEP would have no effect in controlling the size of retail premises in inappropriate locations. There is no evidence or research that such a significant imposition of local planning controls would have a positive impact and there is no indication of what outcomes are being sought.

There is no assessment of the negative impacts these changes would have for small business. Allowing supermarkets to pull out of existing centres and develop in cheaper, out of centre locations, will be to the detriment of smaller businesses in existing centres that rely on supermarkets' high shopper volumes. Shoppers will be encouraged to drive to out-of centre locations and do all of their shopping with one retail provider. Where supermarkets will be now able to develop out of centre will also have a negative impact on small, local shopping strips.

There is no assessment of the effects the proposed Competition SEPP will have on public transport patronage and aims to reduce trips by private vehicle. This impact can be assessed in terms of financial and social impact as well, and this needs to be investigated.

There is no assessment of the social costs of the Competition SEPP, where the proposed decentralisation of retail must impact the vibrancy of centres and decrease social interaction.

3. *Increase opportunities for competition by allowing more types of shops into centres that currently only permit "neighbourhood shops".*

The City's consolidated LEP proposes to limit retail development in Residential and Industrial Zones to 'neighbourhood shops' only. Larger shops are not considered appropriate in these zones and for this reason smaller businesses (particularly food retailers that can not compete evenly in centres) flourish in these areas. The NSW Government's planned changes will permit larger shops in these zones, which will:

- Generate land use conflict;

- Affect residential amenity;
- Encroach on industrial lands
- Impact on small business;
- Draw activity away from planned centres; and
- Weaken planning and transport strategies that rely on strong centres.

Again, the impacts associated with such significant changes are yet to be assessed by the Department of Planning.

4. *Provide guidance on how to consider third party objections when assessing development proposals, including how to seek recourse for vexatious objections.*

Provided that the resulting guideline is accurate and consistent with the Act, then this guidance would be supported by the City.

5. *The Minister will issue a direction to councils under section 117 of the Environmental Protection & Assessment Act to ensure that, unless it can be justified on sound planning grounds, planning policies and instruments cannot apply retrospectively.*

It proposes that Councils, in determining development applications, cannot consider controls or policies that were introduced after lodgement. This creates a direct conflict within the EP&A Act itself. Section 79C of the Act says that policies and draft instruments must be considered in assessing development. This recommendation is not lawful and not supported by the City.

6. *The Minister for Planning to issue a direction that instructs councils to allow development that is inconsistent with DCP controls.*

The City's court experience shows that the inconsistent application of DCP controls weakens them generally, and therefore this recommendation is not reasonable, or consistent with the Act.

The total disregard for local planning policy is not linked to any demonstrated benefits.

In summary, the *Economic Growth and Competition through the Planning System* Paper represents significant detrimental impact on local planning policies without presenting a clear case for such changes. The abstract topic of 'competitiveness' has not been clarified and can not be measured. The objectives of the proposed reform are not clear. The proposed solutions have not been modelled. There has been no documented research or evidence to demonstrate that the recommendations will result in cheaper groceries, or that they will have a negative impact on local businesses, planning strategies and sustainability targets. These policies appear to be in direct response to elements within the property industry calling for more, cheaper out of centre land.

The timeline for the proposed Competition SEPP is unknown and it is also unclear whether a draft SEPP will be circulated for comment prior to gazettal.

The above two policies represent the NSW Government's reaction to the "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries (July 2008)", however they do not respond to the recommendations in this report. The ACCC report recommended that:

"all appropriate levels of government consider ways in which zoning and planning laws, and decisions in respect of individual planning applications where additional retail space for the purpose of operating a supermarket is contemplated, should have specific regard to the likely impact of the proposal on competition between supermarkets in the area. Particular regard should be had to whether the proposal will facilitate the entry of a supermarket operator not currently trading in the area."

This report instructs the NSW Government to consider ways the planning system could proactively increase competition, such as enabling new supermarket entrants. The report also found that leasing and planning laws are being misused by Coles and Woolworths against each other, and recommends investigation into these issues.

The *draft Centres Policy* and the *Promoting Economic Growth* Discussion Paper do not respond to the ACCC's recommendations. There has been no research into the supply of land for retail development in or out of centres. There has been no analysis of future retail demand (if population projections are realised) and how to accommodate this floorspace in a way that maximises public benefit. There has been no documented research or evidence to demonstrate that the NSW Government's recommendations will result in cheaper groceries, or whether they will have a negative impact on local businesses, planning strategies and sustainability targets. The proposed reforms are too significant to be implemented without thorough investigation of the impacts.

These policies also represent a contradiction to the State's own long-standing centres planning approach as set out in the *Metropolitan Strategy*. The NSW Government's draft *Sydney City Draft Subregional Strategy* provides the following actions for local government, which are actively being implemented through the City's planning controls and assessment process:

- *Action SCB1.1.1 – State agencies and City of Sydney Council to incorporate the established centre typology into their land use and infrastructure planning and Council's Principal LEP*
- *Action B4 – Concentrate retail activity in Centres, Business Zones and enterprise corridors*

Impacts on the City of Sydney's planning strategies

The City submits that removing councils' ability to focus retail development in designated centres will have significant impact on local planning strategies to form vibrant, well-serviced cities and ultimately on Sydney's liveability.

In the event that the NSW Department of Planning's "Competition SEPP" is implemented supermarkets and other large anchor retail development will be permitted throughout the wider Green Square area with the following consequences:

- The commercial success of the Green Square Town Centre relies on securing a critical mass of retail development in the planned major centre – both to attract people to the centre but also investment. The dispersion of retail development throughout Green Square will compromise the viability of the Town Centre, and therefore the range of community benefits (three public open spaces, a library, community centre and new Council offices) that are planned to be located there.
- The success of the Green Square Town Centre will also ensure the protection of significant public investment in the centre to date.
- Dispersed retail development will compromise the wider strategies contained in the *Metropolitan Strategy* and *Sustainable Sydney 2030*. The creation of strong successful centres is fundamental to these strategies.
- Dispersed retail development will result in increased trips by private vehicle because supermarkets will not be located near public transport infrastructure, nor will they be located with other businesses and facilities which promote multi-purpose trips.
- Allowing major retail development to locate outside of centres will have a negative impact on smaller businesses, which locate in centres in order to benefit from co-location with large attractors like supermarkets.
- Increased traffic congestion (caused by major retail attractors in under-serviced locations) will also result in amenity impacts and lost time and money.
- The Green Square retail strategy is based on research that was prepared in consultation with landowners and key agencies and then endorsed by Council and the CSPC. A forced departure from this strategy to centralise retail development is not in the public interest and is not consistent with public expectations.
- The consistent application of the Green Square and Southern Areas Retail Study has generated some certainty for landowners, investors and agencies. The inability to continue the implementation of the endorsed strategy will create uncertainty and slow investment.

Terms of Reference

The City welcomes any further opportunity to share information or answer questions for the Productivity Commission. In particular the City may be able to provide evidence on the following topics, as they relate to your terms of reference for this investigation:

Investigate 'processes in place to maintain adequate supplies of land suitable for a range of activities'

- To ensure an adequate supply of retail floorspace to 2021, the City commissioned the *Green Square and Southern Areas Retail Study 2008*, which has formed the basis of the centres strategy for Green Square. The City would be happy to brief the Productivity Commission on its implementation, as well the impacts it is now having in Green Square.
- The City also welcomes the chance to share its experiences in defending development refusals for out-of-centre retail development at the NSW Land and Environment Court and the significant weight placed on strategic planning documents in these proceedings.
- The City may also be able to provide evidence on how planning strategies are implemented through the suite of planning controls provided by the NSW Government's *Standard Instrument (Local Environmental Plans) Order 2006* and the shortcomings of this template for achieving centres policy.
- To coincide with each national census the City conducts a census of all floor space within the LGA, called the City of Sydney Floor Space and Employment Survey. It includes detailed information about industry, numbers of employees and composition of floorspace. It provides the City with an accurate data base upon which our research is based.

Investigate 'ways to eliminate any unnecessary or unjustifiable protections for existing businesses from new and innovative competitors'.

- The City can provide justification for protecting for the future Green Square Town Centre from retail competition in the immediate vicinity. The development of a Green Square Town Centre is being managed by the NSW Government's development agency, Landcom and the City of Sydney and much of the 19 hectare site is in public ownership. The Green Square Town Centre is on the brink of commencing development after more than 10 years of planning. The new centre requires substantial public infrastructure investment and the retail strategy to limit retail development outside of the centre is required to protect its viability and reduce investment risk. The City can provide further information about the planning process for the Green Square Town Centre and how it is planned to emerge as the major retail and community hub for the south of the City.

Cost benefit analysis required

The Productivity Commission's investigations would also benefit from undertaking a cost benefit analysis of centres policy in NSW: what will it cost NSW to decentralise retail development in economic, environmental and social terms? A cost benefits analysis of *Melbourne 2030* (a strategic framework) in 2008 confirmed that:

"the net community benefit generated by a strong centres policy are indeed substantial. Over 25 years, the implementation of Melbourne 2030 would deliver a present value (net) benefit of between \$25 billion and \$43 billion depending on what discount rate is used. Much of this net benefit is tied to successful intensification of employment and residential activity around major centres. A liberal retail location policy would run counter to this."

(Source: SGS Economics and Planning (2006) *Retailing Futures and Activity Centres Planning* -Discussion Paper for the Victorian Department of Sustainability and Environment.)