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Mills Oakley
ABN: 51 493 069 734

Your ref:
Our ref: AXGS/3196578

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Ms Carolyn McNally
Department of Planning and Environment
GPO Box 39
Sydney NSW 2001.

Partner
Aaron Gadiel +61 2 8035 7858
Email: agadiel@millsOakley.com.au

By email: info@planning.nsw.gov.au

Dear Ms McNally

**Proposed amendments to the Standard Instrument LEP:
Better planning for the NSW retail sector (April 2018)**

We act for Flower Power Pty Ltd (**Flower Power**).

We write to you in relation to the above document (**the DPE proposal**).

The DPE proposal has been released for public exhibition. This is a submission by Flower Power in response to the public exhibition process.

Flower Power made a submission to the Retail Expert Advisory Committee (**REAC**) on 6 July 2016. We acknowledge and appreciate the fact the committee and the Department of Planning and Environment (**the DPE**) have largely embraced Flower Power's key concerns.

Summary of this submission

Flower Power submits that:

- Flower Power supports the DPE proposal for a revised definition of 'garden centre', but suggests slightly revised alternative text.
- Flower Power presently operates 10 garden centres across Sydney.
- Bunnings is the dominant market player in garden centres in NSW.
- Bunnings was on a mission to destroy Masters and succeeded
- Flower Power is the only chain that has the potential to compete with Bunnings in the garden centre space.
- Now is the time for Flower Power to expand and re-position its stores to expose Bunnings to the maximum degree of competition.
- Flower Power has plans for a \$100 million upgrade program for its 10 Sydney garden centres over the next four years.
- The land use planning rules in NSW are, at present, too rigid. They cannot cope with the model that Flower Power must implement in order to be a competitive business — a garden centre based on the successful European model.
- While 'garden centres' are allowed in various zones, the current definition of 'garden centre' does not allow Flower Power to effectively respond to consumer-demand for a garden centre with a diverse product range.

- The issue is the extent to which Flower Power is entitled to include complementary land uses within its garden centres. At present, a 'garden centre' may only have complementary uses when they are 'ancillary'.
- Whether a given land uses is 'ancillary' to another is very subjective and uncertain.
- This legal uncertainty is addressed by the DPE proposal.
- There is considerable urgency. Flower Power has had to suspend its current expansion plans due to the present uncertainty. Flower Power is anxious that there not be any further delay in resolving this issue.
- The change to the definition of 'garden centre' would merely clarify a longstanding policy intention of the government.

Detail of this submission

1. The DPE Proposal and the Flower Power position

1.1 The current Standard Instrument definition of 'garden centre' is as follows:

garden centre means a building or place the principal purpose of which is the retail sale of plants and landscaping and gardening supplies and equipment. It may, if ancillary to the principal purpose for which the building or place is used, include a restaurant or cafe and the sale of any the following:

- (a) outdoor furniture and furnishings, barbecues, shading and awnings, pools, spas and associated supplies, and items associated with the construction and maintenance of outdoor areas,
- (b) pets and pet supplies,
- (c) fresh produce.

1.2 The DPE proposal is that the definition of 'garden centre' be amended to read as follows:

A building or place the principal purpose is the sale of:

- a) Plants; and/or
- b) Landscaping and gardening supplies and equipment.

A garden centre may also include a restaurant or cafés and the sale of any the following:

- a) Outdoor furniture and furnishings;
- b) Barbecues;
- c) Shading and awnings;
- d) Pools, spas and associated supplies;
- e) Items associated with the construction and maintenance of outdoor areas;
- f) Pets and pet supplies;
- g) Fresh produce.

1.3 Flower Power supports the above DPE proposal, but for the sale of clarity, and consistency with the drafting style of the Standard Instrument suggests the slight revised alternative text:

garden centre means ~~A~~a building or place the principal purpose is the sale of any one or more of the following:

- (a) ~~P~~plants; ~~and/or~~

(b) ~~L~~andscaping and gardening supplies and equipment~~;~~

~~A garden centre~~ and may also include ~~a~~ restaurants or ~~cafés~~ cafes and the sale of any one or more of the following:

(c) ~~O~~utdoor furniture and furnishings~~;~~

(d) ~~B~~arbecues~~;~~

(e) ~~S~~hading and awnings~~;~~

(f) ~~P~~ools, spas and associated supplies~~;~~

(g) ~~I~~tems associated with the construction and maintenance of outdoor areas~~;~~

(h) ~~P~~ets and pet supplies~~;~~ and

(i) ~~F~~resh produce.

- 1.4 The only suggested textual variation that needs to be explained is the change of 'a restaurant or cafés' to 'restaurants or cafes'.
- 1.5 It **should** be clear that a garden centre might have, for example, two eating outlets within the premises. Accordingly, Flower Power supports the DPE proposal to change 'cafe' to 'cafes'. However, the existing garden centre's use of the phrase 'restaurant or cafe' calls up a defined phrase in the Standard Instrument. The new definition should continue to call up this defined phrase. Accordingly, in Flower Power's submission **both** 'restaurants' and 'cafes' should be plural (noting that the Standard Instrument does not distinguish between restaurants and cafes).

2. Flower Power's operations

- 2.1 Flower Power presently operates 10 garden centres across Sydney. Six of the ten centres are located in western Sydney. Flower Power estimates that its market share accounts for 25.18 per cent of the NSW retail nursery market and 5.75 per cent of the total NSW garden market.
- 2.2 Flower Power is a strong competitor to Bunnings and (until recently) Masters. Bunnings was on a mission to destroy Masters and succeeded.
- 2.3 Now that Masters has closed down, Flower Power is the only chain that has the potential to compete with Bunnings in the garden centre space.
- 2.4 Flower Power has plans for a \$100 million upgrade program for its 10 Sydney garden centres over the next four years. This will respond to a consumer-preference for a garden centre that brings together the different products required for households who are pursuing an outdoor lifestyle. In particular, this means extending the traditional concept of a garden centre to embrace the sale of:
- (a) outdoor furniture and furnishings, barbeques, shading and awnings, pool equipment, spas, etc;
 - (b) tools and materials for the construction and maintenance of outdoor areas;
 - (c) pets and pet supplies; and
 - (d) fresh produce.
- 2.5 However, the land use planning rules in NSW are too rigid. They cannot cope with the model that Flower Power must implement in order to be a competitive business — a garden centre based on the successful European model.

- 2.6 While 'garden centres' are allowed in various zones, the current definition of 'garden centre' does not allow Flower Power to effectively respond to consumer-demand for a garden centre with a diverse product range.
- 2.7 The issue is the extent that Flower Power is entitled to include complementary land uses within its garden centres. At present a 'garden centre' may only have complementary uses when they are 'ancillary'.
- 2.8 In general terms, whether a proposed use of the premises (eg a pet shop) is 'ancillary', is likely to be influenced by matters such as floor space, staff numbers, retail turnover, shop configuration, etc. However, this is not an exhaustive list and there is no numerical standard. Even if one proposed development is fully litigated, to the extent that it is a decision based on a factual finding, it will not set a precedent for any further development. At the end of the day, the decision is a very subjective one.
- 2.9 If Flower Power is to avoid any legal uncertainty, it cannot — under the current rules — pursue the model concept of a garden centre based on the successful European model.

3. Public interest in a competitive market for garden centres

- 3.1 Masters has only recently exited the market. Now is the time for Flower Power to expand and re-position its stores to expose Bunnings (the dominant market player) to the maximum degree of competition. Flower Power is the only chain that has the potential to compete with Bunnings. If Flower Power cannot do it, no-one can. Mum-and dad-households will be the winners if there is competition between retail chains — and they will lose out if Bunnings can operate without any serious competitor. The NSW Government needs to reform the definition of 'garden centre' in its planning laws if the necessary competitive environment is to arise.
- 3.2 Regretfully, these issues are not new. *The Economic Structure and Performance of the Australian Retail Industry: Productivity Commission Inquiry Report* was published in November 2011. This report said (on page XIV) that:

Retailers operate under several regulatory regimes that restrict its competitiveness and ability to innovate. Major restrictions which need to be addressed are ... planning and zoning regulations which are complex, **excessively prescriptive**, and often **anticompetitive** (bold added) ...
- 3.3 The same report says (on page 215) that:

To minimise the anti-competitive effects of zoning, policy makers need to ensure that areas where retailers locate are ... sufficiently broad (**in terms of allowable uses, particularly those relating to business definitions and/or processes**) to allow new and innovative firms to enter local markets and existing firms to expand (bold added).
- 3.4 These issues were also picked-up the Federal Government's (Harper) *Competition Policy Review* in March 2015. Its final report raised concerns about how state land use planning systems are restricting competition. Among its recommendations was a call for reform so that planning rules 'that explicitly or implicitly favour particular operators' be removed (because such rules are anti-competitive).

4. What the REAC report says

- 4.1 The REAC report explicitly acknowledges the concerns Flower Power has raised about the scope of the current 'garden centre' definition.
- 4.2 It identifies as 'retail driver 9' (on page 67) the fact that:

Other uses will diversify its retail offers to support its business.
- 4.3 It accepts that the 'planning implications/rationale' is that:

Additional retail should be permitted which complements and supports core uses.

4.4 It says that:

A broader range of retail elements should [be] able to coexist with other compatible uses, for example, **including a coffee shop and/or food sales in a garden centre** (bold added).

4.5 Additionally, the more general findings of the REAC report are supported by Flower Power. In particular:

- (a) **'The supply of suitable land is singularly the biggest issue'** (REAC report, page 6).
 - (i) The land nominally made available for garden centres under current Standard Instrument zones is not made available for the European model of garden centres that Flower Power needs to adopt (other than by attempting to rely on the subjective and uncertain 'ancillary' uses test).
 - (ii) Areas of land that have a sufficiently permissive zoning (so as to unquestionably permit the European model) are in the midst of urban centres. It would be impossible to develop a garden centre in these urban centres (for reasons discussed more fully below).
- (b) **'The retail sector is experiencing significant change - what worked yesterday will not work for today and certainly not for tomorrow'** (REAC report, page 6).

'The planning system creates unnecessary barriers to business establishment and does not provide the flexibility to enable retailers to evolve and respond to changes in consumer demand and/or market conditions' (REAC report, page 6).

 - (i) The traditional rigid distinctions between different product categories no longer holds firm in the minds of consumers. In Europe, the format of a modern garden centre no longer reflects the 1980s approach that, until recently, was dominant in Australia. The contemporary European approach is illustrated by the floor plan for the Boston Grange Garden Centre (**figure 1**, below).



Figure 1: Floor plan of the Boston Grange Garden Centre, Brock, Preston, United Kingdom.

- (ii) As figure 1 demonstrates, the European model responds to a consumer-preference for a garden centre that brings together the different products required for households who are pursuing an outdoor-lifestyle. In particular, this means extending the traditional concept of a garden centre to embrace the sale of:
 - (A) outdoor furniture and furnishings, barbeques, shading and awnings, pools, spas, etc;
 - (B) tools and materials for the construction and maintenance of outdoor areas;
 - (C) pets and pet supplies; and
 - (D) fresh produce.
- (iii) The challenge for Flower Power is to remain a competitive choice to Bunnings. To this end, Flower Power has plans for a \$100 million upgrade program over the next four years. This will involve a comprehensive roll-out of this new integrated model of garden centre. A model concept for Flower Power's new refurbished garden centres is shown in **figure 2** below.

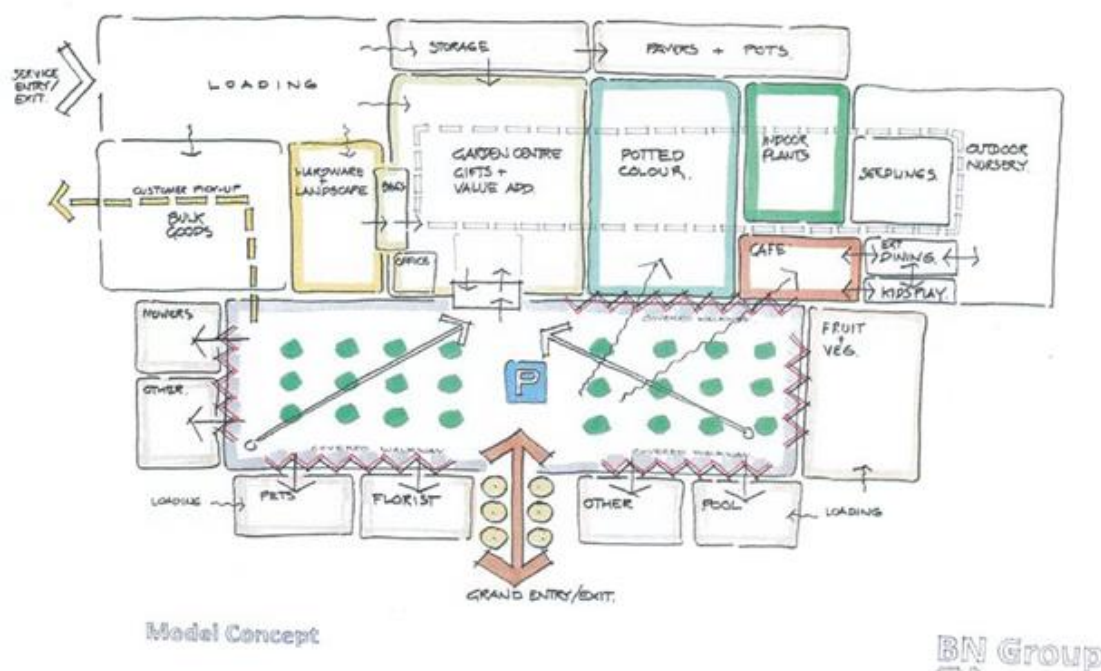


Figure 2: The model concept for Flower Power's new refurbished garden centres

- (c) **'Centres remain primary zones for day to day retailing... [c]omplementary business zones can accommodate other forms'** (REAC report, page 7).
- (i) The European model of garden centres is principally focused on the plants, landscaping, garden supplies and equipment. These items are not items sold in the course of day-to-day retailing.
 - (ii) To the extent that some items represent, say, weekly shops (such as fresh produce), there is no risk that any significant numbers of people will attend the garden centre solely for the purpose of buying such items.
 - (iii) In an October 2017 assessment prepared for Flower Power's new Enfield store (which will follow the European model), well-regarded economic and planning expert Peter Leyshon carried out an economic analysis. Mr Leyshon found that:
 - (A) The likely sales performance of the portions of the proposed premises devoted to fresh produce, pet supplies, pool supplies and a café will be subsidiary to the proposed retail sale of plants, landscaping, garden supplies and equipment in economic terms.
 - (B) The majority of the sales to be achieved by the proposed facility in its entirety will be generated by the retail sale of plants, landscaping, garden supplies and equipment. It is likely that the contribution made by the café, pool supplies, pet supplies and fresh produce will comprise less than 35 per cent of total revenue.
 - (C) Those proposed subsidiary uses would be viable at the location of the new Enfield store (being an out-of-centre location) only in association with a garden centre or other major attractor. That is, they would be unlikely to survive and prosper in their own right.

- (d) **'For some forms of retail centrality is not important'** (page 7).
- (i) For garden centres centrality is not important. For example, given the bulky nature of the key products sold, there is no prospect that any significant number of customers will access a garden centre by public transport.
 - (ii) Additionally, garden centres are more land-intensive (per dollar of turnover) than day-to-day retail formats. This means garden centres simply cannot be located in centres designated for general retail because:
 - (A) sufficiently large land parcels are not available; and
 - (B) in the rare circumstances that such parcels become available, a garden centre cannot compete with:
 - (I) less land intensive retail formats; and/or
 - (II) mixed use developments (which require the retail area to be contained **inside** the ground floor footprint of a development).
- (e) **'[M]odernise the standard instrument's definitions to reflect contemporary retail formats and technologies'** (page 8).
- (i) Flower Power supports a modernisation of the Standard Instrument definition of 'garden centre', generally as per the DPE proposal (see section 1 of this submission, above).
 - (ii) Key to the proposed change is the removal of the word 'ancillary'. This word is fraught with legal uncertainty.
 - (iii) A good case study is provided by Flower Power's recent development application lodged with Strathfield Council for a new Enfield store (DA 2016/132). The development application was lodged in August 2016. It was reported to the Council's independent hearing and assessment panel for determination in April 2017. The key unresolved issue was whether the fresh produce, pets, pool shop, etc were 'ancillary'. The application was deferred by the panel, and then ultimately refused by Strathfield Council (following the receipt of barrister's advice) in June 2017. The application was appealed in the Land and Environment Court and development consent was ultimately granted (as a result of mediation) in November 2017.
 - (iv) The delay and costs incurred as result of the confusion about what was 'ancillary' were commercially unacceptable to Flower Power. Flower Power cannot afford to repeat that experience with every new store that it must roll-out. If Flower Power were to do so, it would prevent or significantly delay its store expansion/renewal program.
 - (v) If the definition is not amended, Flower Power could not propose the model concept depicted in figure 2. If Flower Power does not do this, there is a good chance that lawyers acting for a local council or hostile third party would claim either or both of the following:
 - (A) the restaurant/café, fruit/vegetable, pool, florist, mower and pet shops are too significant relative to the retail sale of plants and landscaping and gardening supplies and equipment; or
 - (B) the fruit/vegetable, pool, florist, mower and pet shops are not sufficiently integrated into the rest of the premises.

- (vi) Flower Power is proposing to renew 10 stores. It cannot proceed with this program if it has to anticipate multiple legal arguments with consent authorities and numerous separate Land and Environment Court proceedings (with all of the consequent cost, delay and risk). The issue will be resolved if the 'garden centre' definition is modernised in-line with the DPE proposal (which merely reflects the general recommendation of the REAC report).
- (f) **'[I]t is important that any recommendations for planning and zoning reform should ensure that no operator or format has explicit or implicit competitive advantage or more importantly, the planning system is not used to significantly constrain supply capacity' (page 18).**
 - (i) At present the dominant player in the market — Bunnings — has not needed to adopt the European model of garden centre. It instead relies on co-locating its garden centre business with its hardware and building supplies business.
 - (ii) The current definitions of both 'garden centre' and 'hardware and building supplies' are precisely aligned to match the requirements of the Bunnings format. Bunnings enjoys an advantage over Flower Power, courtesy of the planning system.
 - (iii) Without change, the planning system will effectively prevent Flower Power (the only credible competitor to the garden supplies component of the Bunnings business) from providing an alternative to Bunnings.
 - (iv) Flower Power's request is that the 'garden centre' definition be altered, in a minor respect, so that it embraces both the Bunnings format and the format that any viable competitor (such as Flower Power) would need to adopt.

5. Action is needed now

- 5.1 Masters has only recently exited the market. It is now timely for the NSW Government to consider whether its policy settings expose Bunnings (the dominant market player) to sufficient competition.
- 5.2 The recently concluded Land and Environment Court proceedings (regarding the development application for Flower Power's new Enfield store) demonstrates that the issues that Flower Power are concerned about are real.
- 5.3 Flower Power is anxious that there not be any delay in resolving this issue. There is considerable urgency. Flower Power has had to suspend its current expansion plans due to the present uncertainty
- 5.4 The development application for Flower Power's new Enfield store was forced into Court — with the only material dispute being the permissibility of the 'ancillary' uses. Given that the plain misunderstanding within local government (as to the government's policy approach), a clarification by an amendment to the Standard Instrument is appropriate at this time.
- 5.5 Additionally, the DPE proposal's change to the definition of 'garden centre' would merely clarify a longstanding policy intention of the government.

In the meantime, please do not hesitate to contact me on 8035 7858 if you (or your officers) would like to discuss this matter.

You (or your officers) may also contact Flower Power direct. The internal Flower Power contact is Michael Spiteri. Mr Spiteri's phone number is 9601 4188 and his email address is m.spiteri@flowerpower.com.au.

Yours sincerely,



Aaron Gadiel
Partner

Accredited Specialist — Planning and Environment Law