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ITEM 2 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 AMENDMENT

The NSW Department of Planning is seeking input into the draft Environmental Planning and Assessment Amendment Bill 2017, which proposes numerous amendments to the Environmental Planning and Assessment Act 1979.

Many of the proposed amendments are supported. However, certain proposals require additional consideration and further changes and/or detail to ensure the amendments will improve the NSW planning system. The draft submission recommends some changes to the draft amendments.

This report reviews the draft Bill and recommends that Council authorise the General Manager to finalise a submission to the Department.

RECOMMENDATION

1 The General Manager be authorised to finalise the submission to the NSW Department of Planning on the draft Environmental Planning and Assessment Amendment Bill 2017 (Attachment 1).

2 Copies of the submission be forwarded to the Secretary for the Illawarra and other Local Members of Parliament for information.

REPORT AUTHORISATIONS

Report of: Renee Campbell, Manager Environmental Strategy and Planning
Authorised by: Andrew Carfield, Director Planning and Environment - Future City and Neighbourhoods

ATTACHMENTS

1 Draft submission to Department of Planning on draft Environmental Planning and Assessment Act Amendments

BACKGROUND

The Environmental Planning and Assessment Act 1979 (EP&A Act) commenced on 1 September 1980 and has been in place for over 36 years. The provisions of the EP&A Act are supplemented by the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation). The Act and Regulations have been subject to over 150 major and minor amendments over the past 4 decades, including:

- 1998 – the introduction of private certification, exempt and complying development, and the removal of the Building Application process from the *Local Government Act 1993*;
- 2005 - the introduction of Part 3A for major developments; and
- 2011 – Part 3A was repealed and replaced with State Significant Development (SSD) and State Significant Infrastructure (SSI) pathways.

In 2001 the NSW Government published the PlanFirst White Paper which proposed major changes to the Act, but did not progress.

In July 2011, the NSW Government commenced a review of the EP&A Act and related legislation. This review was initially undertaken by Tim Moore and Ron Dwyer as Joint Chairs of an Independent Panel. A further review was then undertaken by the (then) NSW Department of Planning and Infrastructure which resulted in a Green Paper and subsequently, in April 2013, a Planning White Paper entitled *A New Planning System for NSW*.

On 24 June 2013 Council considered a report on the White Paper and draft Exposure Bill and resolved that:

1 *The draft submission on "A New Planning System for NSW – White Paper", Planning Bill 2013 (Attachment 1 to the report) be endorsed for finalisation by the General Manager and submission to the NSW Government, subject to –*

- *The inclusion of a request that the Planning Legislation address the matter of unfinished developments, by way of allocating maximum completion dates for construction works, which are determined through conditions of consent.*

2 *Council write to the NSW Independent Commission Against Corruption in order to seek that the Commission express an opinion to the NSW State Government on the draft Planning Bills.*

3 *As a matter of urgency, Council formally request that the NSW State Government extend the time for submissions by at least 14 days.*

4 *Council indicate, within the context of its response, the cost in preparing the submission.*

In November 2013 the draft Bill was not passed by the NSW Legislative Council and the draft legislation was abandoned.

On 10 January 2017 the (former) Minister for Planning released the following documents for consultation:

- Planning legislation updates – Summary of Proposals
- Draft Environmental Planning & Assessment Amendment Bill 2017
- Planning legislation updates – Bill Guide
- Planning legislation updates – Stakeholder Feedback (from consultation undertaken in 2016)

Councillors were advised of the draft legislation on 10 January 2017 and forwarded the link to the Department's website.

The documents were initially on exhibition until 10 March 2017 (2 months). Council officers requested a 1 week extension to enable a report to be considered at the Council meeting on 13 March 2017. Following the change of NSW Minister for Planning, the exhibition period was extended to 31 March 2017.

It is anticipated that the draft Bill will be supported by amendments to the Environmental Planning and Assessment Regulation 2000, or a new Regulation, but this has not been published.

A Councillor briefing on the proposed legislative changes occurred on 27 February 2017.

PROPOSAL

The draft legislation has been reviewed by Council officers, and a draft submission is attached (Attachment 1) for Council endorsement prior to submission to the NSW Department of Planning.

The EP&A Act has been amended some 150 times over the past 36 years and has become complex and confusing. Farrier describes NSW environmental law as "*like a jigsaw puzzle, but some of the pieces are missing, and many others are duplicated. When you think that you have come close as you can to putting it together, governments take some pieces away and add others*" (Environmental Law Handbook 2011 – p:viii). The EP&A Act contains the principal pieces of the puzzle.

The 2013 draft Bill proposed to replace the old Act with a new Planning Act. As noted, the 2013 draft Bill was abandoned and the Environmental Planning and Assessment Act 1979 remains. The current 2017 draft Bill proposes to make amendments to both the form and substance of the Act with the purported intent of making it easier to navigate and to build public confidence in the NSW planning systems' ability to deliver quality, cost effective planning outcomes.

Much of the Government's publicity on the proposed changes relates to improving housing affordability. However housing affordability is barely mentioned in the exhibition material. Housing affordability does remain an objective of the Act, however the draft legislation does not contain any additional provisions to directly promote housing affordability.

The proposed amendments in the draft Bill are contained in Schedules that reflect the proposed Parts. This report follows the proposed Act structure.

Part 1 Preliminary

Structure

The Act currently contains 12 active Parts, 3 repealed Parts for which some savings provisions still operate and 7 Schedules. It is proposed to simplify the Act into 10 Parts and 6 Schedules, as indicated in the following table. These changes to the form and structure of the Act are supported, as it will tidy up the Act and make it easier to read.

Current Act	Proposed
Part 1 Preliminary	Part 1 Preliminary
Part 2 Administration	Part 2 Administration
Part 3 Environmental Planning Instruments	Part 3 Planning Instruments
Part 3A (repealed)	Part 4 Development assessment and consent
Part 3B Strategic Planning	Part 5 Infrastructure and environmental impact assessment
Part 4 Development Assessment	Part 6 Building and subdivision certification
Part 4A Certification of development	Part 7 Infrastructure contributions and finance
Part 4B (repealed)	Part 8 Reviews and appeals
Part 4C Liability and insurance	Part 9 Implementation and Enforcement
Part 5 Environmental assessment	Part 10 Miscellaneous
Part 5.1 State significant development	
Part 5A (repealed)	
Part 6 Implementation and Enforcement	
Part 7 Finance	
Part 8 Miscellaneous	
Schedule 1 (repealed)	Schedule 1 Community Participation Requirements
Schedule 2 (repealed)	Schedule 2 Provisions relating to Planning Bodies
Schedule 3 Planning Assessment Commission	Schedule 3 will become “NSW Planning Portal and online delivery of services and information”
Schedule 4 Joint Regional Planning Panels	Omitted
Schedule 4A Development for which regional panels may be authorised to exercise consent authority functions of councils	Remains unchanged (renumbered?)
Schedule 5 Paper Subdivisions	This Schedule will be omitted and its provisions moved to the regulations under the Act.

Current Act	Proposed
Schedule 5a Special Contributions Areas	Remains unchanged (renumbered?)
Schedule 5B Planning Assessment Panels	Omitted
Schedule 6 Savings, transitional and other provisions	The current provisions of this schedule will be moved to the regulations under the Act. Schedule 6 will become: " Liability in respect of contaminated land".
Schedule 6A Transitional arrangements – repeal of Part 3A	This Schedule will be omitted and its provisions **amended** and moved to the regulations under the Act.
Schedule 7 Transferred provisions	This Schedule will be omitted and its provisions moved to the regulations under the Act.

Section numbering

Currently the Act contains 159 numbered sections, however some sections include 1 or 2 letters after the number e.g. 75AA-AL, 94EA-EM or 121A-ZS. The current numbering is as a result of amendments introducing new provisions, and trying to avoid renumbering other provisions. The consequence is that the Act is hard to read and reference.

The Bill proposes to renumber the sections in the Act within each Part, to reflect the Part, using the decimal system. For example, the first section 1 in Part 1 will become Section 1.1, followed by 1.2, 1.3 etc, and the first section in Part 2, will be numbered 2.1, followed by 2.2, 2.3 etc.

There may be some initial confusion about the sections being renumbered, but in the long term the change will make the Act easier to read, and easier to amend. Such changes have occurred in the past and the planning community have adjusted. For example, in 1998, section 79C Evaluation of development applications, replaced section 90 Matters for consideration. The changes to the section numbers are supported.

Objects of the Act

The objects of an Act are a statement of the Government's intention for the legislation. Objects are of paramount importance to both decision-makers and the Courts when it comes to how provisions within the legislation are to be interpreted, and the importance which is to be placed on certain, often competing, considerations. Significant changes to the objects of the EP&A Act are proposed by the draft Bill. The existing 10 objects are proposed to be condensed into 8. All references to utilities, community services and facilities and the provision of land for public purposes will be removed. Two entirely new objects are proposed to be inserted, one which seeks to elevate the role of design in changes to the built environment and another to promote the sustainable management of built and cultural heritage. The specific changes proposed are set out in full in Table 1 below.

Currently the objects of EP&A Act are:	**The proposed objects to the EP&A Act are:**
a. To encourage:	
i. The proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,	a. To promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

Currently the objects of EP&A Act are:	The proposed objects to the EP&A Act are:
ii. The promotion and coordination of the orderly and economic use and development of land,	c. To promote the timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing),
viii. The provision and maintenance of affordable housing	
iii. The protection, provision and coordination of communication and utility services.	-
iv. The provision of land for public purposes	-
v. The provision and coordination of community services and facilities	-
vi. The protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities and their habitats,	d. To protect the environment, including the conservation of threatened and other species of native animals and plants,
vii. Ecologically sustainable development	b. To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
b. To promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and	Remains unchanged (g)
c. To provide increased opportunity for public involvement and participation in environmental planning and assessment.	Remains unchanged (h)
	e. To promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage).
	f. To promote good design in the built environment

The replacement of the verb “to encourage” with the more definitive verbs of “to promote”, “to protect” is supported.

An object relating to Ecological Sustainable Development (ESD) was absent from the 2013 draft Bill, resulting in a lot of criticism. The retention of ESD in the objects of current Bill is strongly supported, however the term “to facilitate” could be replace with a stronger term such as “to promote” or “to require”.

The 2013 draft Bill included an object “to promote health, amenity and quality in design…” which has not been included in the current draft Bill, and could be considered for inclusion.

The draft submission suggests a number of changes to the proposed wording of the draft objects to ensure that conservation objectives relating to heritage, environmental quality, human health, biodiversity and agricultural land remain.

Minor Changes Definitions

The draft Bill proposes to make a small number of amendments to definitions, however most of these changes involve simply moving the definition to a different section of the Act (e.g. exempt development, subdivision of land) or simplifying the definition by removing a reference to another document (e.g. affordable housing). No substantial changes to definitions are noted from the exhibited information currently available.

Part 2 Planning administration

This part of the Act indicates the role of the Minister for Planning, the Planning Secretary, Planning Ministerial Corporation, Independent Planning Commission (currently called the Planning Assessment Commission), Sydney district and regional planning panels (currently called Joint Regional Planning Panel) and local planning panels.

Planning Bodies

The Independent Planning Commission (IPC), Sydney district and regional planning panels and local planning panels will be referred to in the Act collectively as planning bodies.

The IPC is proposed to replace the Planning Assessment Commission (PAC). It will be given a broad range of functions including, to hold a public hearing into any matter requested by the Minister, and can perform any function of a Sydney district, regional or local planning panel which the Minister requests that it exercise, to the exclusion of the panel. Whilst the IPC can still be required to advise the Minister in relation to any matter, and to determine State Significant and other development, it will no longer have a review function. The members which make up the panel will be appointed and changed at the Minister's discretion (Schedule 2, Proposed Division 2.3).

The Southern Regional Planning Panel is proposed to replace the Southern Region Joint Regional Planning Panel (JRPP). The Southern Regional Planning Panel (RPP) would cover the following local government areas:

> City of Albury, Bega Valley, Coolamon, Eurobodalla, Goulburn Mulwaree, Greater Hume Shire, Gundagai, Hilltops, Junee, Kiama, Lockhart, Queanbeyan-Palerang Regional, Shellharbour City, Shoalhaven City, Snowy Monaro Regional, Snowy Valleys, Temora, Upper Lachlan Shire, Wagga Wagga City, Wingecarribee, Wollongong City and Yass Valley.

Similar to the current JRPP, the RPP would consist of 3 members appointed by the Minister and 2 members appointed by the Council. It is suggested that similar to Council's IHAP, the Minister should appoint a pool of experts that can be drawn from depending on the type of development being considered.

The draft Bill would enable Council to establish a Local Planning Panel (LPP), which would replace Council's Independent Hearing Assessment Panel (IHAP). An LPP would consist of 3 members - an independent chair, an independent expert and a community representative.

Council's IHAP currently consists of 4 members – an independent expert chair, 2 independent experts and a community representative. The panel was established following significant community consultation and under the guidance of ICAC. Council's panel is based on a peer review, rather than a determinative model and has now been working very effectively for over 8 years – with all sensitive DAs being reviewed by IHAP and then determined by staff under delegated authority. Unlike other Council's, the IHAP has taken the politics out of DA determination, with only one DA being reported to Council in the last 5 years when the planning officer and IHAP recommendations disagreed.

Although the proposed provisions in the Bill relating to LPPs would appear to permit the panel to continue to perform a review role, there is scope for the Minister to issue a direction that it is to determine certain applications. The attached submission requests that sufficient flexibility be built into the Act to allow Council's IHAP to continue to function as it currently does and to retain its 4 members.

Community Participation Plans

The draft Bill proposes that a planning authority (which includes Council and the local planning panel) be required to prepare a Community Participation Plan (CPP), which will indicate how and when the planning authority will undertake community participation, when:

- Preparing and reviewing planning instruments (e.g. LEPs, Planning proposals and DCPs);
- Assessing development applications;
- Undertaking environmental impact assessments; and
- Preparing and reviewing development contribution plans and Planning Agreements

Schedule 1 of the draft Bill indicates that a CPP will be required to be publically exhibited for at least 28 days and then to be published on the NSW planning portal. There will be a presumption of validity if the CPP is not challenged in Court proceedings within 3 months after the plan is published.

Proposed section 2.23(2) provides that:

A planning authority is to have regard to the following when preparing a community participation plan:

a) The community has a right to be informed about planning matters that affect it.

b) Planning authorities should encourage effective and on-going partnerships with the community to provide meaningful opportunities for community participation in planning.

c) Planning information should be in plain language, easily accessible and in a form that facilitates community participation in planning.

d) The community should be given opportunities to participate in strategic planning as early as possible to enable community views to be genuinely considered.

e) Community participation should be inclusive and planning authorities should actively seek views that are representative of the community.

f) Members of the community who are affected by proposed major development should be consulted by the proponent before an application for planning approval is made.

g) Planning decisions should be made in an open and transparent way and the community should be provided with reasons for those decisions (including how community views have been taken into account).

h) Community participation methods (and the reasons given for planning decisions) should be appropriate having regard to the significance and likely impact of the proposed development.

Council will not be required to prepare a separate community participation plan (CPP), if its Community Strategic Plan (CSP), prepared in accordance with Section 402 of the *Local Government Act 1993,* covers the required matters.

Table 2 below sets out the minimum exhibition periods specified in the draft Bill and how this compares with current requirements:

	Minimum exhibition requirements	**Current exhibition requirements**
Draft community participation plans (Division 2.6)	28 days	NA
Draft regional or district strategic plans (Division 3.1)	45 days	45 days
Planning proposals for local environmental plans subject to a gateway determination (other than minor proposals that under the	28 days, or if a different period of public exhibition is specified in the gateway determination for the	Timeframe specified in Gateway determination, usually 28 days. Council often exhibits for longer, for example

	Minimum exhibition requirements	Current exhibition requirements
gateway determination are excluded from public exhibition) (Division 3.4)	proposal, the period so specified	to exclude the Christmas – New Year Period.
Draft development control plans (Division 3.6)	28 days	28 days
Application for development consent (other than for complying development certificate, for designated development or for State significant development)	14 days	14 days
Application for development consent for designated development	28 days	30 days
Application for development consent for State significant development	28 days	30 days
Application for modification of development consent that is required to be publicly exhibited by the regulations	The period (if any) determined by the consent authority in accordance with the relevant community participation plan.	As per requirements for original development application (minimum 14 days).
Environmental impact statement obtained under Division 5.1	28 days	30 days
Environmental impact statement for State significant infrastructure under Division 5.2	28 days	30 days
Re-exhibition of any amended application or matter referred to above required by or under this Schedule	The period (if any) determined by the person or body responsible for publicly exhibiting the application or matter.	As per requirements for original development application.

As can be seen, the minimum exhibition requirements in relation to designated development, State significant development and State significant infrastructure will be reduced by 2 days. However given that Councils appear likely to retain the flexibility, through individual CPPs, to maintain timeframes slightly above the minimum requirements, the draft submission does not raise any objections to these exhibition changes.

Providing and publishing reasons for decisions

As part of the proposed new community participation requirements, the draft Bill proposes that all consent authorities must include with their mandatory public notification of each determination of an application for development consent, the reasons for the decision (having regard to any statutory requirements applying to the decision), and how community views were taken into account in making the decision. It is understood that this requirement is aimed at decisions that are contrary to the report recommendations, so that the applicant and community will know the reasons.

This requirement will have some minor procedural implications for Council as an organisation. Notices of determination by way of refusal have for a long time been accompanied by 'reasons for refusal'. Over the past 12 months, Council's Development Assessment Team has provided the applicant with, and published on Council's website, the development assessment report upon which each determination is based. It is unclear at this stage whether the development assessment report will fulfil the proposed

requirement to provide 'reasons for the decision'. It seems likely that a standard format will be prescribed by the, yet to be exhibited, amended Regulations.

The requirement to provide and publish reasons for decisions will apply equally to determinations made by a Local Planning Panel (currently IHAP) and by Councillors at Council meetings. This will mean that when applications for development consent are determined at Council meetings and the decision is not in accordance with the assessing officer's recommendation, a list of reasons with reference to relevant statutory requirements and community views will need to be formulated and included as part of the meeting minutes.

Section 96 and 96AA will be amended to require that a consent authority take into consideration the reasons given by the consent authority (or the Court) for the grant of the consent sought to be modified.

The aim of this requirement to furnish reasons is to increase decision making transparency and consistency and presumably also to ensure that expressed community views are taken into account during the development assessment process. The reasons will also be required to be considered as part of any modification proposal. It is foreseeable that this change may potentially increase the opportunity for third party appeals of determinations, based on an alleged error of law (otherwise known as a class 4 appeal or judicial review). Under the proposed changes, objectors to a development will now have ready access to written reasons for approval which could potentially be used as evidence of an error of law being applied in the decision making process.

However, as discussed above, our Council has been publishing development assessment reports for each determination for some 12 months now and in this time; no class 4 appeals have been lodged in respect of our LGA. That said, third parties do have 3 months under the EP&A Regulations within which to lodge a class 4 appeal.

Community consultation by applicants

Section 23 of the amended Act will allow the Regulations to require applicants for development consent or other approvals to undertake community consultation in relation to their applications. The Department has indicated that this provision will only apply to larger development proposals, not dwelling houses. Council currently encourages proponents of development to consult with the owners of adjoining properties and to consider their comments prior to the lodgement of a development application. We support the principle that proponents should undertake consultation early in their design process. However, as the proposed amendments to the Regulations are yet to be drafted, it is unclear at this stage how a legislative requirement of this nature would work in practice. There may be some difficulty in notifying absent landlords, and Council cannot give out person's addresses under privacy legislation.

Part 3 Planning Instruments

This part of the Act currently deals with the preparation and amendment of planning instruments (State Environmental Planning Policies and Local Environmental Plans) and Development Control Plans (DCPs). The draft Bill does not propose many changes to this Part.

One significant change proposed is the requirement for Council to prepare and publish a local strategic planning **statement** and review it every 5 years.

The statement must include or identify the following:

a) the basis for strategic planning in the area, having regard to economic, social and environmental matters,

b) the planning priorities for the area that are consistent with any strategic plan applying to the area and any applicable community strategic plan under section 402 of the Local Government Act 1993,

c) the actions required for achieving those planning priorities,

d) the basis on which the council is to monitor and report on the implementation of those actions.

It is recommended that the statement form part of Council's Community Strategic Plan.

In addition, every 5 years Councils will be required to determine whether LEPs should be updated. At this stage there are no criteria in the draft Bill for Councils to use to perform this 'LEP check'. Councils are already required to perform regular reviews of LEPs to ensure their currency. This new provision merely formalises a 5 yearly review cycle. It does not mandate that after 5 years, an LEP must be updated. It is noted that Regulations are also required to be reviewed every 5 years, yet the EP&A Regulation has been in place since 2000.

The draft Bill also proposes standardising DCPs, by enabling the Regulations to publish requirements relating to their format, structure and subject matter. However, there is no information on what is proposed. It is understood that the standardisation of structure is to assist the loading of information on the NSW Planning Portal. The Department has indicated that it does not intend to regulation DCP content. It is anticipated that the detail will be in the draft Regulations. This issue is addressed in Council's draft submission. It is noted that DCP provisions can be overridden by the Code SEPP, and the proposed Medium Density Development Guidelines.

Other proposed changes to Part 3 mainly involve consequential amendments to reflect the renaming of the PAC and JRPP.

A lost opportunity is to review the process of preparing planning proposals and making and amending LEPs. The current process in NSW is complex and in need of review. LEPs are promoted as local instruments for local communities, but in reality they are State instruments prepared under the Act and Regulations. They are required to follow the State template (Standard Instrument), be reviewed by the Department's Gateway process, drafted by the Parliamentary Counsel's Office and approved by the Minister (or delegate).

When preparing a draft Planning Proposal, Council is required to consider the Act and Regulations, SEPPs, Regional Plans, various Ministerial Directions, Department of Planning guidelines, policies and guidelines from other agencies, Council's strategies and policies, as well as site constraints relevant to the specific proposal.

State and regional objectives are contradicted by the policies of other agencies. The Department is promoting a model to manage agency comments for integrated development. The same model could provide integrated comments on Planning Proposals. These matters are raised in the attached submission.

The draft Bill does not address contamination issues. Through the Code SEPP, buildings are able to be demolished without adequate consideration of contaminants, such as asbestos, lead and other heavy metals. The source of the contaminants is broad, and could include past land use, building materials, or the proximity to industrial developments or main roads.

Part 4 Development assessment and consent

This Part of the Act addressed development assessment, including exempt development, complying development and local development. The current development assessment framework is proposed to be retained. A number of new requirements are proposed.

<u>A broadening of section 117 direction powers</u>

The draft Bill proposes to give the Minister powers under section 117 relating to the determination of development applications which the Minster does not currently have. Traditionally, section 117 directions have been confined to the furnishing of information, the content of planning proposals and environmental planning instruments and issues relating to the timing of the performance of certain Council functions. The draft Bill proposes to broaden the Minister's powers to include an ability to determine when Council's function of determining development applications is to be exercised by a local planning panel or a delegate of council, and to further empower the Minister to stipulate the identity of the persons who may comprise the local planning panel or be the delegate of the council.

Council's draft submission requests further detail in the form of Draft Regulations which set out the circumstances in which this power can be enlivened. In addition, a minor change to the wording of the proposed subsection is suggested to ensure that specific people cannot be named by the minister (or

their delegate) to comprise a local planning panel or be the 'delegate of council' chosen to determine a particular development application.

Complying Development

The draft Bill proposes to permit deferred commencement conditions to be applied to Complying Development Certificates (CDC). It is understood that this will enable a CDC to be issued on a proposed lot in a new subdivision before the title has been registered, although work would not be able to commence until the lot has been registered. Council's submission does not object to this change.

Under the proposed amendments to Part 4, the validity of complying development certificates will be subject to legal challenge if proceedings are bought within 3 months of the issue of the certificate and the Court finds that the certificate authorises the carrying out of development for which a complying development certificate is not authorised to be issued. These changes allowing the validity of complying development certificates to be questioned, are supported. However, in practice, it may often not be until works commence that an irregularity is detected, and by this stage, the 3 month window may have closed.

The State / Department of Planning seems to be intent on expanding the range of complying development, as evidenced by the draft Medium Density Housing Code that Council considered on 12 December 2016. This intention appears to be somewhat at odds the simultaneous intent to elevate the role of design in planning and development decisions. Consequently, any proposed changes need to be carefully considered.

Private certification has been in place for 19 years, and is partially responsible for the decrease in confidence in the NSW Planning system. There are many examples of certifiers, issuing approvals beyond the development consent or where Council has refused a development application. The proposed Stop Work Orders on CDCs (discussed under Part 9 of this report) should also be available for construction certificates and construction subdivision certificates.

In addition, it is recommended that prior to issuing a CDC, the certifier be required:

- obtain a section 149 Planning certificate that indicates the zoning, planning controls and site constraints;
- ensure compliance with any DCP applying to that locality or place (separate from the development class controls); and
- ensure any section 88B restrictions on title are complied with.

In 2014 the former Minister for Planning appointed Michael Lambert to conduct an Independent Review of the *Building Professionals Act 2005* which establishes the Building Professionals Board (BPB). The BPB oversees certifiers. The review occurred in 2015 and the Government published its response in 2016. The implementation of the actions recommended by the review and supported by the Government, are being progressed separately to the current draft Bill.

Compliance Levy

The draft Bill proposes to establish a compliance levy to support Councils in their role in enforcing complying development standards. There are no details on the levy amount or how it will be distributed to Council. It is assumed that it will be a nominated amount per application which will go to the relevant local government area. This initiative is supported, as Council is the default organisation, that the community or a neighbour goes to if there is a problem with a development. A certifier may not even be from the local area, and could have difficulty in responding to complaints.

The draft Bill also includes provisions for Compliance Cost Notices which can be issued with Development Control Orders (discussed in Part 9 of this report). A compliance cost notice will enable Council to recoup expenses in monitoring and enforcing development control orders.

The introduction of a compliance levy to fund enforcement of development, and compliance cost notices are supported.

Modification of consents

In 2000, a precedent was set by the NSW Land and Environment Court in the case of *Windy Dropdown Pty Ltd v Warringah Council* which led to an erosion of the principle that development must only be carried out in accordance with the development consent. In that case, extra landfill had been placed on the subject land in breach of the conditions of the consent. Windy Dropdown applied for a section 96 modification and this was refused by Warringah Council who argued that the filling had already taken place and had substantially changed the character of the land from a naturally vegetated area to bare space. The Court permitted a retrospective modification approval under section 96 of the EP&A Act which legalised the works. The effect of this decision is that an application can now be made to modify a development consent which would extend the development consent to cover work already carried out.

Some Councils' have raised concerns that this has led to an increase in the number of developments that are being carried out other than in accordance with the conditions of development consent. Indeed, there is one recent, high impact example of this occurring on a prominent site in the Wollongong CBD where a developer raised the ground floor level of multi-story mixed use building in an attempt to avoid certain fire safety requirements. The practical result of this floor level increase was the loss of an effective interface between the building and the streetscape with long lasting negative public domain impacts being imposed on the community.

In response to these concerns, the Bill proposes a new subsection 3A to section 96 which provides that if, after the grant of development consent, any part of the development is carried out in contravention of the consent, the consent may not be modified (except to correct a minor error, misdescription or miscalculation) in order to authorise that part of the development. This amendment is supported.

However, it is foreseeable that following implementation of the proposed amendments, in an attempt to regularise unauthorised works, developers may shift their attention from section 96 to 149D, and apply for a building certificate instead.

Therefore, while Council officers support the proposed changes to provisions in the EP&A Act relating to the modification of consents, Council's submission strongly suggests that changes are also required to section 149D to give Councils the option of withholding the issue of a building certificate under the additional circumstance that development has been carried out other than in accordance with a development consent and for which council is entitled to take proceedings. Such an inclusion would, it is suggested, when taken together with the amendments proposed to section 96, act as a significant deterrent to the carrying out of illegal works. Additionally the fee for a Building Certificate could be substantially increased to act as a greater deterrent.

It is noted however that even as it currently stands, the issue of a building certificate does not operate to prevent Council from taking criminal proceedings under section 125 of the EP& A Act for failure to comply with conditions of consent.

Part 5 Infrastructure and environmental impact assessment

Current practice by public authorities is to consult with other agencies and State owned corporations for activities assessed under Part 5 of the Act (Review of Environmental Factors only - no Consent required), however there is no formal requirement to do so.

It is proposed to address this matter via the insertion of a new division into Part 5 to require concurrence or notification of public authorities to activities within future infrastructure corridors. The formalisation of concurrence and or notification requirements for Part 5 activities is supported so as to ensure inappropriate development does not occur within an infrastructure corridor that could have significant cost implications at a future time.

Part 6 Building and subdivision certification

Part 6 of the draft Bill addresses certification. Overall the changes proposed are generally consistent with current legislative requirements. The proposal provide better clarity and structure than the current framework. Notable amendments include:

- Introduction of a Subdivision Works Certificate. This is a similar certificate to a construction certificate (which is for building works), while the subdivision works certificate is for subdivisions.
- If a certificate is challenged within 3 months of issue and is deemed to not be consistent with the approval then that certificate is invalid. It is noted that there is in improvement in the revised wording that requires certificates to be 'consistent' with the approvals
- Certifiers are required to prepare a building manual when issuing an occupation certificate for more complex developments. This includes ongoing maintenance requirements by owners such as fire safety systems.

The proposed amendments are supported.

Part 7 Infrastructure contributions and finance

Part 7 of the draft Bill includes development contributions. Little change is proposed to section 94, Section 94A or Planning Agreements (apart from renumbering the sections). The Department has exhibited separately amendments relating to Planning Agreements, including a new draft circular and draft Ministerial Direction.

There are a number of changes in relation to Special infrastructure contributions, imposed by the State. One change proposed will enable the State to collect State infrastructure contributions from complying development.

Part 8 Reviews and appeals

Under the proposed changes to Part 8, a development consent will have effect on and from the date it is published on the NSW Planning Portal and is no longer required to be published in the local newspaper. The exception is a development consent for designated development which will take effect on and from the end of 28 days after the date it is published (unless the consent was granted following a public hearing by the IPC, in which case it will take affect from the day it is published). Such changes are not controversial, and will reduce the cost of publishing in multiple newspapers. It is noted that some Council's in rural areas, may not have access to weekly newspapers.

Council's IHAP was instituted some 8 years ago and its role as a review body for development applications is considered to have reduced the number of Class 1, merit based appeals lodged with the Land and Environment Court.

The new provisions relating to reviews are not substantially different to those currently in place and would not in themselves prevent Council from utilising a Local Planning Panel to conduct reviews as Council's delegate, in the same way that IHAP is currently being used.

The timeframes for merit based (Class 1) appeals for both development assessed under Part 4 and Certificates issued under Part 6, will remain the same: 6 months for the applicant and 28 days for an objector (the later appeal right only exists in relation to designated development). Similarly, no amendments are proposed to the timeframe for a judicial review of a decision under section 123 of the EP&A Act. This is specified in the EP&A Act Regulation and remains at 3 months from the date the determination is published.

Part 9 Implementation and enforcement

Enforcement of Undertakings

A new enforcement mechanism is proposed to be inserted into the Act which will allow the Planning Secretary to accept enforceable undertakings in connection with any matter in relation to which the Minister, Planning Secretary or a public authority has a function under the EP& A Act. The Planning Secretary can then apply to the Court for orders if the person who gave the undertaking has breached any of its terms.

In general, enforceable undertakings are particularly useful when there has been damage to the environment that needs to be repaired and/or mitigation measures are required to prevent further harm. In these situations, fines or the institution of criminal proceedings are inadequate. Further, enforceable undertakings potentially provide a faster and cheaper regulatory option than seeking orders for remedial works in the Court based on a breach of the Act. The *Protection of the Environment Operations Act* 1997, the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 all include provisions for similar undertakings. Enforceable undertakings are also widely used by WorkCover NSW/ Safework NSW.

However, the proposed amendments to the EP&A Act regarding enforceable undertakings in their current form do not give Councils the power to accept these undertakings. It is unclear at this stage whether this power is proposed to be delegated by the Planning Secretary to Councils. Further, additional provisions would be required in the Regulations relating to the form and registration of such undertakings, and allowing them to run with the land, in order for them to be used in practice. These matters are addressed in the attached submission.

Development Control Orders

From an enforcement perspective, the majority of the proposed changes are structural/terminology based and are supported. For example orders under s121B will now be called “development control orders” and some of the terminology is slightly different however, the way we use the orders will remain the same.

There will be a requirement for Council to update all of its templates and documentation as a result of these changes as well as some refresher training/induction to staff.

Stop Work Order (CDC)

Councils are the enforcement authority responsible for monitoring how development is carried out at the local level, and ensuring that it follows the rules.

This includes complying development where the certificate is issued by a private certifier. However, work on complying development can proceed very quickly. This leaves Council with limited time in which to investigate whether or not a Complying Development Certificate (CDC) is being followed.

It is proposed that where a CDC has been issued, Councils will be able to issue a temporary stop work order on the project, in order to investigate whether it is being constructed in line with the CDC. Work will be able to be stopped for seven (7) days, and the power will be limited to genuine complaints about building work not complying with a CDC. This amendment is supported.

It should be noted that resourcing may have an impact on the ability to investigate within seven (7) days of the issuing of the Order, however the proposed compliance levy (outlined below) may go some way towards addressing this issue.

Part 10 Miscellaneous

The amendments to this Part mainly relate to omission of the various Schedules and other numbering based, consequential amendments.

CONSULTATION AND COMMUNICATION

The draft Bill is being exhibited by the State from 10 January to 31 March 2017 by the NSW Department of Planning and Environment. The Department has held briefing sessions in Sydney and regional areas, including Wollongong.

Due the short exhibition timeframe, Council has not undertaken any community consultation. Council officers have reviewed newspaper articles and commentary prepared by other organisations to assist the preparation of a draft submission.

PLANNING AND POLICY IMPACT

This report contributes to the delivery of all six Wollongong 2022 goals.

It specifically delivers on core business activities as detailed in the Land Use Planning Service Plan 2016-17.

CONCLUSION

The Environmental Planning and Assessment Act 1979 (EP&A Act) and has been in place for over 36 years and is in need of review. The NSW State Government is exhibiting a draft Bill to update the structure of the Act, as well as revising some of the provisions, and adding new provisions.

It is recommended that Council endorse the attached submission to the NSW Department of Planning to enable Council to have input into the proposed amendments.

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Planning Legislation Updates 2017
NSW Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

Our Ref: Z17/37269
File: ESP-100.07.015
Date: 14 March 2017

Dear Sir/Madam

DRAFT ENVIRONMENTAL PLANNING & ASSESSMENT AMENDMENT BILL 2017

Thank you for the opportunity to comment on the Environmental Planning and Assessment Amendment Bill 2017. Wollongong City Council endorsed this submission at its meeting on 13 March 2017.

This submission is structured to reflect the structure of the draft Bill.

General Comments

The simplification of the *Environmental Planning and Assessment Act 1979* (EP&A Act) into 10 Parts, and the renumbering of sections using the decimal system within each Part, are supported as this will assist in the reading of the Act and any future amendments.

Many of the proposed legislative amendments are supported in principle. However, great care is required to ensure the amendments will not result in unintended consequences and will achieve the objective of improving the State's planning system.

Council has provided detailed feedback on proposals where further changes and/or additional detail is required to achieve the stated aims.

Part 1 – Preliminary

Objects of Act.

The objects of the Act are important, as they indicate the Government's intention for the legislation, and are used in legal proceedings to determine how provisions are interpreted. The re-writing of the objectives will change case law.

Council supports the use of the verbs 'promote' and 'protect' in place of the word 'encourage'. The following changes are suggested to some of the new and amended objects:

(a) It is submitted that the word "agricultural" be added after "State's natural".

(b) The continued inclusion of Ecologically Sustainable Development (ESD) in the objects of the EP&A Act is strongly supported. However the proposed wording appears to limit the ESD focus to the balancing of social, economic and environmental considerations. Whilst this is an important ESD principle, the definition of ESD adopted by the EP&A Act and reflected in national and international law, is much broader and incorporates other fundamental principles such as the fundamental importance of the conservation of biological diversity and ecological integrity, intergenerational equity

and the precautionary principle. The application of each and every principle in decision making is essential if ESD is to be achieved in practice. The current proposed construction of the object is likely to lead to a narrowing of the application of ESD considerations in decision making and potentially, lengthy and expensive legal arguments regarding the weight, if any, to be given to other ESD principles in the context of contentious planning and development proposals. It is suggested that verb should be stronger than 'facilitate'.

It is suggested that the object within the EP&A Act that relates to ESD should seek to 'operationalise' all of the principles which form part of the definition of the ESD adopted by the Act. This could be achieved through wording such as: "*To require the application of the principles of Ecologically Sustainable Development to planning and development decisions*."

(d) It is acknowledged that the current wording of section 5(a)(vi) is a stronger statement of intent than the 'environmental protection' object proposed by the draft Bill. However we note that there is potential to improve the wording of this object. To align with the *Biodiversity Conservation Act 2016* which recognises the importance of strategic landscape scale conservation, with specific references to biodiversity values and threatened species and ecological communities and habitats, Council offers the following alternative wording for clearer consistency between Acts:

"*The protection of the environment, including the conservation of biodiversity and biodiversity values encompassing threatened and other native animal and plant species, ecological communities, their habitats and linkages between habitats*."

(e) It is submitted that the words "conservation and" should be inserted before "sustainable management".

(f) The elevation of the role of design in the built environment is supported.

Council would also encourage the inclusion of an object which recognises the link between human and environmental health similar to the object previously included in the 2013 draft Bill.

Part 2 – Administration

Independent Planning Commission

Proposed section 2.10 Constitution of Commission for particular matters. Subsections (1) and (2) appear to be contradictory, and the meaning of the remaining subsections is difficult to interpret. Council submits that the Independent Planning Commission (IPC) should be constituted of not less than 3 members when exercising the functions of determining development applications and holding public hearings.

It is unclear why the IPC is excluded from the definition of 'Planning Body' in clause 15 of Schedule of the draft Bill.

Regional Planning Panel

The Minister should appoint a pool of experts to the Regional Planning Panel, rather than 3 members, that can be drawn upon depending on the nature of the development proposal being considered. Council has a pool of 15 members for its Independent Hearing and Assessment Panel (IHAP). The pool would also prevent delay in the assessment process if a panel member was not available.

Local Planning Panel

Council's Independent Hearing and Assessment Panel (IHAP) currently consists of 4 members, an independent expert chair, 2 independent experts and a community representative. The panel was established following significant community consultation and under the guidance of ICAC. The panel is based on a peer

review, rather than a determinative model and has now been working very effectively for 8 years – with all sensitive DAs being reviewed by the IHAP and then determined by staff under delegated authority. The IHAP has taken the politics out of DA determination, with only 1 DA reported to Council in the last 5 years when the IHAP and Council officers had opposing recommendations (and as required by the IHAP Charter in such circumstances).

Although the proposed provisions in the Bill relating to Local Planning Panels (LPPs) would permit the panel to continue to perform a review role, Council requests that sufficient flexibility be built into the Act to allow Council's IHAP to continue to function as it currently does and to retain its 4 members.

Part 3 Planning Instruments

Planning Proposals

Not reviewing and amending the current process of preparing planning proposals and making and amending LEPs is considered a lost opportunity. The current process in NSW is complex and in need of a review. LEPs are promoted as local instruments for local communities, but in reality they are State instruments prepared under the Act and Regulations. LEPs / Planning Proposals are required to follow the State template (Standard Instrument), be reviewed by the Department's Gateway process, drafted by the Parliamentary Counsel's Office and approved by the Minister (or delegate). When preparing a draft Planning Proposal, Council is required to consider the Act and Regulations, SEPPs, Regional Plans, various Ministerial Directions, Department of Planning guidelines, policies and guidelines from other agencies, Council's strategies and policies, as well as site constraints relevant to the specific proposal.

State and regional objectives are contradicted by the policies of other agencies. The Department is promoting a review process for agency comments for integrated development. The same team could provide integrated comments on Planning Proposals.

Contamination

The draft Bill does not address contamination issues which are currently arising in the context of complying developments. Through the Code SEPP, buildings are able to be demolished without adequate consideration of contaminants, such as asbestos, lead and other heavy metals. By way of practical example, the roof spaces of dwellings and commercial premises which surround industrial land uses (both past and present) or which are located along main roads; invariably contain a build-up on dust materials which pose a risk to public health when exposed or disturbed.

Development Control Plans

The standardisation of DCPs structure is supported, however the detail of what is proposed needs to be reviewed.. In order to facilitate meaningful community participation in planning and development decisions (one of the stated objectives of the reforms), DCPs need to retain their 'local' identity. People, both residents and tourists alike, value uniqueness in places. The social diversity of our communities and the diverse histories of our towns and villages necessarily require inherent flexibility in the planning framework which allows for local solutions to local needs and aspirations. Whilst Council does not object to efforts to increase consistency in the structure of DCPs across NSW, Council strongly objects to the proposed standardisation of subject-matter. Council is willing to work with the Department to trial a new format, given the variety of development types, site constraints and localities/character that occurs within the LGA.

Part 4 Development assessment and consent

Ministerial directions

Proposed clause 4, item [3](8) (on p.48 of the Draft Bill) seeks to give the Minister powers under section 117 relating to the determination of development applications which the Minster does not currently have. It may reduce confusion if section 117 itself is amended to give effect to the intention to broaden the Minister's powers. Council further submits that item [3], sub item 8 (on page 48 of the Bill) should be amended to insert the words "class of" before "persons". Such a change will ensure that specific people cannot be named to comprise a local planning panel, and allow Councils (such as Wollongong) who already have an established and well- functioning local panel (albeit under a different name) to continue the effective operation of their panels without disruption.

In addition, we request further detail in the form of Draft Regulations which set out the circumstances in which the new Ministerial power to determine when Council's function of determining development applications is to be exercised by a local planning panel or a delegate of Council, and to further empower the Minister to stipulate the identity of the persons who may comprise the local planning panel or be the delegate of the Council, can be enlivened.

Complying Development Certificates

Under the proposed amendments to Part 4, the validity of complying development certificates will be subject to legal challenge if proceedings are bought within 3 months of the issue of the certificate and the Court finds that the certificate authorises the carrying out of development for which a complying development certificate is not authorised to be issued. These changes allowing the validity of complying development certificates to be questioned, are supported. However, it is noted that in practice, it may often not be until works commence that an irregularity is detected, and by this stage, the 3 month window may have closed.

The proposed change to the threshold wording regarding the validity of certificates (proposed section 6.32 (b) on page 69 of Bill) to "are not consistent with", is strongly supported.

Amendments to section 96 - Modifications

Council supports the proposed new subsection 3A to section 96 which provides that if, after the grant of development consent, any part of the development is carried out in contravention of the consent, the consent may not be modified (except to correct a minor error, misdescription or miscalculation) in order to authorise that part of the development.

However, it is foreseeable that following implementation of the proposed amendments, in an attempt to regularise unauthorised works, developers may shift their attention from section 96 to 149D, and apply for a building certificate instead.

Therefore, Council strongly submits that changes are also required to section 149D to give councils the option of withholding the issue of a building certificate under the additional circumstance that development has been carried out other than in accordance with a development consent and for which council is entitled to take proceedings. Such an inclusion would, it is suggested, when taken together with the amendments proposed to section 96, act as a significant deterrent to the carrying out of illegal works, because it would help to ensure the achievement of the government's intention to preventing the granting of retrospective approvals. In this regard, a subsection to the following effect could be inserted after section 149D(1)(a)(iii):

(iv) *to take proceedings to prosecute for illegal works carried out other than in accordance with development consent.*

Additionally, it is submitted that the fee for a Building Certificate could be substantially increased to act as a further deterrent.

Certification

Private certification has been in place for 19 years, and is partially responsible for the decrease in confidence in the NSW Planning system. There are many examples of certifiers, issuing approvals beyond the development consent or where Council has refused a development application.

The proposed Stop Work Orders on CDCs should also be available for construction certificates and construction subdivision certificates.

In addition, it is recommended that prior to issuing a CDC, the certifier be required:

- obtain a section 149 Planning certificate that indicates the zoning, planning controls and site constraints;
- ensure compliance with any DCP applying to that locality or place (separate from the development class controls); and
- ensure any section 88B restrictions on title are complied with.

It is noted that the Government's responses to the Michael Lambert's Independent Review of the *Building Professionals Act 2005* are being progressed separately to the draft Bill. As the performance of certifiers directly impacts on the NSW Planning system, Council would like more regular updates on progress of implementation.

It is Council's view that increased professional standards and requirements together with increased supervision for certifiers is required to improve confidence in this area of the NSW planning system.

Compliance Levy

The introduction of a compliance levy to fund enforcement of development is supported. However there are no details on the levy amount or how it will be distributed to Council.

Part 5 Infrastructure and environmental impact assessment

The formalisation of concurrence and or notification requirements for Part 5 activities is supported so as to ensure inappropriate development does not occur within an infrastructure corridor that could have significant cost implications at a future time.

Part 6 Building and subdivision certification

The proposed amendments to Part 6 are supported. The separation of subdivision certificates from construction certificates (for building works) is supported. In fact, Council already separates building and subdivision, construction certificates because they are managed by different teams.

Part 7 Infrastructure contributions and finance and Part 8 Reviews and appeals

No comment

Part 9 Implementation and Enforcement

Enforceable undertakings

Council supports the introduction of 'enforceable undertakings' as an enforcement tool which offers an alternative to costly and drawn out legal proceedings. However, proposed section 9 (page 86 of the Bill) frames the new power as an ability of the Planning Secretary to accept undertakings.

In order for this to be a useful enforcement tool for local government:

- The power to accept a written undertaking will need to be extended to councils who are then authorised to delegate this authority to suitably qualified officers;
- The Act will need to enable the Regulations to provide for the form and manner in which the undertakings are to be written, executed (signed and witnesses etc), accepted and recorded/kept in a register;

- The undertakings will need to run with the land (in the same way as conditions of consent do) to ensure that the objectives of the mechanism cannot be thwarted by the sale of the subject land to a third party

Development Control Orders

The proposed amendments are supported.

Stop Work Order (CDC)

The proposed ability for Councils to be able to issue a temporary stop work order on a project, in order to investigate whether it is being constructed in line with the CDC, for 7 days in supported. The power will be limited to genuine complaints about building work not complying with a CDC. Work on complying development can proceed very quickly. This leaves Council with limited time in which to investigate whether or not a Complying Development Certificate (CDC) is being followed.

Part 10 Miscellaneous

No comment

Schedule 11 of draft Bill - Consequential amendments of other Acts and instruments

Under the proposed new Clause 17P, it is recommended that in accordance with the principles of ESD, the disciplines listed in subclause (2) be expanded to include “environmental science” and “ecology”.

Other issues:

It is unclear what is happening to Section 149 Planning certificates, or what they will be called.

The Summary of Proposals and Government press releases indicate that the draft amendments will improve Housing Affordability. It is unclear how the draft legislation will directly achieve this goal, as apart from the retention of an housing affordability object, and the clarification of a definition in Part 7, there are no new provisions relating to housing affordability. It is noted, that indirectly, improvements to the planning system may reduce delay and uncertainty which will benefit all applicants.

The Environmental Planning and Assessment Regulation 2000 is 16 years old and is also in need of review, especially to reflect the proposed amendments to the Act. It is further noted that according to the NSW Government legislation website, the Regulation is currently due to be automatically repealed under the Subordinate Legislation Act 1989 on 1 September 2017. Council would appreciate the opportunity to review the draft Regulations, especially as they will contain detail around how provisions in the draft Bill will be implemented.

If you require further information or clarification on Council’s submission please contact Council’s Director Planning & Environment, Mr Andrew Carfield on 4227-7284.

Yours faithfully

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