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Coastal hazard notations on Section 149 planning certificates

The purpose of this draft circular is to provide councils with guidance on section 149 planning certificate notations relating to coastal hazards.

Introduction

The NSW Government has identified a need to improve the way councils disclose coastal hazard information in planning certificates. References to coastal hazards in this circular include coastal erosion, tidal inundation, coastal inundation and coastal flooding.

Section 149 planning certificates

Planning certificates are a means of disclosing information about a given parcel of land. There are two types of planning certificates: section 149(2) planning certificates and section 149(5) planning certificates. The 'sections' refer to sections of the *Environmental Planning and Assessment Act 1979*.

A section 149(2) planning certificate is used to disclose matters relating to the land, including whether the land is affected by a policy that restricts the development of land. Those policies can be based on identified risks (EP&A Regulation 2000, Schedule 4, clause 7), and whether development on the land is subject to flood related development controls (EP&A Regulation, Schedule 4, clause 7A).

A section 149(5) planning certificate does not contain information relating to restrictions on development, however, it does allow a council to advise on other relevant matters affecting land. This can include historical, current or future issues.

Inclusion of a section 149(2) planning certificate in a contract for the sale of land is a mandatory part of the property conveyancing process in NSW. Section 149(5) planning certificates do not form part of the contract for the sale of land.

Section 149(2) and section 149(5) planning certificates may, however, be purchased by anyone, from the relevant council, at any point in time and for any purpose.

Identification of coastal hazards

The NSW coast is dynamic and complex. To understand and plan for coastal hazards, it is necessary to identify two key variables – long term mobility in the shoreline, such as shoreline recession, and the vulnerability of the shoreline to episodic events, such as beach erosion during a severe storm.

Information about the local land characteristics (such as its geomorphology) and the probability and consequence of storms, floods and similar events, can help identify the land and assets at risk. Such land is generally identified relative to the current position of the shoreline. If however the position of the shoreline changes, then the land and assets at risk will also change.

This means that coastal land may have a current exposure to a coastal hazard and/or a future exposure to a coastal hazard.

While these factors are taken into account when planning future land use, care needs to be taken when communicating that information.

In providing information on planning certificates it is important to clearly distinguish between:

- a current exposure to a coastal hazard; and
- a future exposure to a coastal hazard.

In the absence of such a distinction being made, the reader of a planning certificate may incorrectly interpret reference to future exposure as being an exposure that currently affects the land.

‘Current exposure to a coastal hazard’ describes situations where the land is currently at threat from a hazard. The hazard (e.g. coastal erosion) may or may not be present on the land, but the land is nonetheless currently exposed to the likelihood of that hazard expressing itself during a possible event (e.g. a storm). For example, land within an immediate coastal erosion area (based on a design event or a particular historic event) or land within a 1% annual exceedance probability flood area (1 in 100 year flood) would be land with a ‘current exposure to a coastal hazard’.

‘Future exposure to a coastal hazard’ refers to situations where the land’s exposure to the hazard will arise in the future, but the land is not at risk from the hazard today. Examples include land likely to be exposed to coastal erosion, flooding or inundation from projected sea level rise or as the result of long-term shoreline recession.

‘Future exposure to a coastal hazard’ is different to the probability of an event occurring. The probability of an event occurring, such as a 1 in 100 year flood, does not mean that the event will occur 100 years in the future. It means there is a 1% chance of it occurring this year. That is, the flooding event could occur today, next year, or in 50 years. If a property is exposed to the 1 in 100 year flood hazard today, then this is a ‘current exposure to a coastal hazard’. If a property is projected to be exposed to a 1 in 100 year flood hazard if sea levels rise to a certain point in the future, then this is a ‘future exposure to a coastal hazard’.

Section 149(2) planning certificates

Where a relevant policy does affect the land and the policy relates to a coastal hazard, then notations should:

- clearly identify the type of hazard, and
- identify whether the land has a current or future exposure to the hazard.

Current exposure to a coastal hazard

If a relevant policy applies to the land because of a current exposure to a coastal hazard, it is recommended that councils include a notation on the planning certificate in the following form:

‘This land has been identified in the [insert Council Policy] as having a current exposure to [insert type of hazard]. See Council for more information.’

Future exposure to a coastal hazard

If a relevant policy applies to the land because of a future exposure to a coastal hazard, it is recommended that councils include a notation on the planning certificate in the following form:

‘This land has been identified in the [insert Council Policy] as having a projected future

exposure to [insert type of coastal hazard]. See Council for more information.’

Section 149(5) planning certificates

Councils need to take reasonable care, in terms of content and timing, when disclosing information about current and future coastal hazards to the community.

Whilst the following principles are equally relevant to current and future hazards, the discussion focuses on future hazards to enhance clarity and understanding.

There are complexities in coastal processes and inherent limitations in the tools used for future coastal hazard analysis. The result is that the further into the future we seek to predict an outcome, the more uncertainty that is associated with the prediction.

Counter-balancing the need to disclose information as soon as possible is the need to avoid adverse property market and other impacts by the disclosure of information prematurely, or by disclosing information that lacks the necessary rigour and certainty.

This leads to three guiding principles when considering section 149(5) planning certificate contents dealing with land that may have an exposure to future coastal hazards:

- Firstly, if the information is not sufficiently accurate, complete and reliable, as supported by a competent process of assessment, then the information should not be included in a section 149(5) planning certificate.
- Secondly, if the information is considered to be sufficiently reliable then information should be included that alerts the reader to the known information.
- Thirdly, if the information is sufficiently reliable, then the council should adopt a policy or planning instrument that manages development on the land. This would then require disclosure of the policy on the section 149(2) planning certificate.

The section 149(5) planning certificate provides the opportunity for the council to advise of a known hazard during the time between the Council coming into sufficiently reliable knowledge regarding the existence and extent of that hazard and the council having the opportunity to develop and implement a policy or planning instrument to manage that hazard.

Care should be taken because disclosure of matters affecting land via a section 149(5) planning certificate relates to a particular parcel of land, and is intended for parties with a specific interest in that land. Councils should be aware of the indemnity from liability afforded them by the EP&A Act if they provide advice in ‘good faith’.

Councils intending to provide the community with ongoing and general advice about research and

analysis relating to coastal hazards should consider disseminating that information via the council website.

Coastal Hazards Policy Development

In order to facilitate a consistent approach to section 149 certificates for coastal hazards, it is essential for councils when developing a policy or planning instrument to manage a coastal hazard, particularly future exposure to a coastal hazard, to satisfy the following:

1. Use evidence based data and information
2. Consider current research and any technical advice from the Climate Change Adaptation Research Hub
3. Compliance with the relevant section 117 Direction

Note: A section 117 Direction will be issued to ensure compliance with an evidence-based approach and consistency in application of coastal hazard certificates along the coast by councils.

The need for detailed information

Councils are encouraged to ensure there is clear and full information available to the public and landowners about the nature of coastal hazards referred to in planning certificates. This may include information about the extent of exposure to that hazard and the time period within which that hazard is projected or modelled to arise. This information may be contained in policies, plans or maps or the council website.

Legal Advice

It is suggested that councils seek their own legal advice on the specific wording to be included on section 149(2) and section 149(5) planning certificates.

Further Information

Relevant legislation is available online at <http://www.legislation.nsw.gov.au>

For further information please contact the Department of Planning & Infrastructure's information centre on 1300 305 695.

Department of Planning & Infrastructure circulars are available from <http://www.planning.nsw.gov.au/circulars>

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Important note: This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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