SUBMISSION 3 March 2014

NSW Department of Planning & Infrastructure
Draft Planning Circular

Coastal hazard notations on Section 149 planning certificates

Coastal Residents Incorporated on behalf of its members residing in New South Wales coastal communities, submits its review of a draft planning circular proposed to provide advice to New South Wales (NSW) Councils on coastal hazard information placed on Section 149 Planning Certificates.

Coastal Residents notes that the draft planning circular is part of the NSW State Governments Stage One Coastal Reform agenda first announced in September 2012.

In the period from 2010 until today – almost 4 years –there have been promises and statements by members of the NSW State Government related to the management of the coastal zone that remain unfulfilled. They include:

Before being elected to government.

- In late 2010 the NSW State Liberal Opposition promised to repeal the amendments that were made to the Coastal Protection Act in October 2010

After being elected to government

- planned retreat would not be abolished for coastal zone management
- local communities would be provided with local relative sea level rise data as opposed to global average sea level rise data. (a recommendation of the NSW Chief Scientist)
- sea level rise benchmarks of the previous NSW State Government would be removed
- uncertainty would be replaced with certainty as property owners would be able to protect their homes against coastal hazards
- councils would be given clear and unambiguous advice regarding Section 149 planning certificate information related to coastal hazards

The draft planning circular does not support the fulfilment of these promises. It is ambiguous and in parts very contradictory. Such advice should be considered as misleading and it is requested that comments presented in our submission be provided to the NSW Crown Solicitor for review.

Where potential purchasers and current owners need to be warned regarding property at risk from coastal hazards, current or future, those hazards should not be simply noted on Section 149(5) Planning Certificates or Section 149(2) Planning Certificates.

Section 149 Planning Certificates have been misused and continue to be misused despite the NSW State Governments withdrawal of the NSW Sea Level Rise Policy. Most, **but not all,** NSW coastal councils have ignored the intention of the current NSW State Government and have acted on the advice of their insurers and their insurer's lawyers rather than in the best interests of those communities affected by their decisions. They continue to implement

sea level rise projections that are no longer supported by the NSW State Government and that do not reflect relative sea level rise along the NSW coastline.

The recent approved Gosford City Council Local Environmental Plan (LEP) recommends planned retreat in 6.2.5.1 (a) of the Development Control Plan. How can any community believe the NSW State Government when the Planning Minister claims an end to planned retreat and time limited development consent and just a few days later his own department approves an LEP that implements planned retreat.

What has happened to our public service that allows the legitimate concerns of communities to be continually ignored despite the election of political representatives who have promised reform?

It is incomprehensible that a lawfully elected State Government has been forced to stand by as coastal councils have ignored the removal of the State Sea Level Rise Policy and have persisted in adopting extreme global average sea level rise benchmarks for the purpose of imposing draconian blanket development controls or placing notations on planning certificates without fully or properly assessing the extent of the perceived risk first.

Many councils have reinstated these past benchmarks into their revised Sea Level Rise Policies which allows those councils to then use such projected data, known to have high levels of uncertainty, in the development of coastal zone management plans and flood studies.

The implementation of the precautionary principle in matters related to coastal hazards has become a principle demanding a “shoot first ask questions later” approach. An unsustainable strategy cultured by the coalition of the NSW State Labor Government and the Greens in an atmosphere of scaremongering and blame.

Inexplicably, people who live close to the ocean or estuarine rivers and lakes in regional areas are called “wealthy landholders” despite their homes generally being half the value or less of average homes in Sydney.

For the last four years at least, people who previously have lived in peace in low lying coastal areas or in beachside homes in regional areas have suddenly become rich home owners who must accept full responsibility for the damaging costs associated with rising sea levels caused by man-made climate change.

Communities that contribute to the wealth of the state and local government and contribute to an emergency services levy but who are denied support from state and local government when it comes to coastal hazards linked to climate change.

Instead, these coastal communities have been made responsible for projected sea level rise and damaged by the imposition of excessive and draconian legislation and policies:

- unreliable and uncertain sea level rise notations on planning certificates that resulted in 9000 Gosford Local Government Area (LGA) homes being condemned as “potentially” affected by sea level rise, later to be reduced to less than 4500 as a more accurate interpretation of the risk was developed;

- demands for planned retreat from community leaders such as the past State Member for Wyong David Harris who said “we have to draw a line in the sand” and argued that those property owners took the risk;
- the previous use of timed development consent by Wyong Council - if you wanted to build on your land below a flood planning level that included an additional 90cm for future sea level rise, you had to agree to the demolition and removal of your home within 40 years;
- Inaccurate, confusing and misleading “flood maps” that go far beyond a description of a 1 in 100 event and have resulted in home insurance increases of up to 1000% and devaluation of property
- the use of flawed and exaggerated maps by councils that do not accurately reflect the extent of a 1:100 flood event (2012 submission by Coastal Residents to NSW IPART)
- Lake Macquarie City Council declaring waterfront land that slopes down to the lake edge, as “high flood hazard” and affected by future sea level rise projections while not providing a map that clearly indicates the extent of the current 1 in 100 flood for Lake Macquarie
- Hazard lines on beachfront properties that use a calculation known to be flawed – ***the Bruun Rule*** – in combination with the most extreme projections for ***global average sea level rise*** – not local relative sea level rise as was promised by the NSW State Government
- Avoca Beach, one of the most stable beaches on the NSW Coast except for the damage caused by stormwater drains, has hazard lines through most homes but no evidence of erosion since the last study in 1995, only accretion;
- the Cardno report for Wollongong Beaches in 2010 could find no evidence of erosion – only accretion for all beaches;
- Belongil residents being forced to engage in a long running and costly legal battle just for the right to protect their properties and despite the offer by the NSW State Government of $300 000 to assist in constructing protection works. Now they face a quest by their local council to tear down the revetments that protect private property and a mix of private and public property and infrastructure behind those homes;
- residents at Lake Cathie having to wait endlessly as an eroded cliff face advanced on their homes and nearby an exaggerated claim that coastal erosion would remove a 10 metre high dune system for a distance landward of 80 metres was noted on Section 149(5) Planning Certificates;
- residents at Boomerang and Blueys Beach being forced to accept the constraint of timed development consent based on fictional, non-evidence based hazard lines, despite a coastal engineering report indicating that their beaches are accreting;
- permanent protection works are urgently required at Old Bar but the first application under recently amended legislation was rejected by the NSW Coastal Panel:
- Great Lakes Council attempted to place time limited development consent on one property at Jimmy’s Beach that would force the future demolition and removal of a home within 20 years.

It is time for recalcitrant coastal councils to be reined in and controlled. The proposed planning circular does not go far enough to provide the protection that is needed for coastal communities against the ideology that is embedded in local councils and protected by the anonymity of public service.

Coastal Residents does however recognise and understand the continuing endeavour of the NSW State Liberal Government to resolve the issue of current and future coastal hazards. This contrasts with the ideology of the previous NSW State Labor Government and its partners, the Greens, who are responsible for delivering a coastal management regime that offered no opportunity at all for NSW coastal communities to maintain their wellbeing as they adapt to climate change.

The following considerations are offered as a way of strengthening the stated intention of the NSW State Government to improve the management of the NSW coastal zone while also maintaining the wellbeing of existing settlements, a key recommendation of the Federal Productivity Commission report on barriers to effective adaptation to climate change.

Recommended strengthening of the draft planning circular:

Section 149 Planning Certificates

Rightly, concerns about coastal hazards should first be addressed by plans that mitigate or remove the risk of these hazards. Only Section 149(2) Planning Certificates should indicate that such plans are in place because only Section 149(2) Planning Certificates, must by law, be attached to contracts for the sale of land, not Section 149(5) Planning Certificates. It makes no sense to place such information on Section 149(5) Planning Certificate and essentially is a rouse designed to demonstrate good faith while actually achieving nothing at all. It is a way of appearing to act while doing nothing but the consequences are damaging for those affected.

The advice in the draft planning circular first recommends placing information on S149(5) Planning Certificates but qualifies this statement by asserting that such information must be factual and that ***"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."***

This advice is confusing and misleading but it does reinforce an argument against such advice being placed on Section 149(5) Planning Certificates.

The interpretation provided in relation to Section 149(5) also challenges decisions by judges in the NSW Court of Appeal where the term "affecting the land" in section 149(5) of the EP&A Act has been interpreted as matters affecting the land now and in the future but only where there is a policy, proposal or plan or actual scheme in operation that would have some affect if used within a comparatively short period of time. Not 40 years from the present as some councils have suggested.

Section 117 Directives

Section 117 cannot be used to direct councils in the development of coastal zone management plans (CZMP) which are legislated in the Coastal Protection Act. Coastal flooding may also be addressed by a coastal zone management plan.

The intention of the NSW State Government to return statutory powers to the minister in relation to the management of the NSW coastal zone is strongly supported but it is questionable that Section 117 directives can be made in relation to coastal erosion and possibly not in relation to coastal flooding and inundation where a CZMP is utilised.

All coastal zone management including Coastal Zone Management Plans, must be brought under the control of the Department of Planning and Infrastructure. Current proposals for changes to planning legislation provide an opportunity for such change to be introduced.

Otherwise the Ministers powers must be reinstated in the Coastal Protection Act.

Assessment of Future Coastal Hazards

The assessment of future hazards should not be the sole responsibility of a small number of council officers and contracted consultants. Local communities must also take part in the process of assessment from the commencement of studies through to the development of an adaptation plan that manages both current and future coastal hazards. Representatives of those communities that would be affected by coastal hazards must also be recruited to assist councils in such an important process of assessment.

The NSW State Government could greatly assist local coastal communities by developing the tools needed for councils to successfully engage affected property owners in a lengthy and comprehensive process of consultation with local government that results in an accurate and agreed assessment of current coastal hazards and future coastal hazards.

The focus must be on current hazards and solutions for current hazards would normally be designed with the worst case scenario in mind. Constant monitoring of current coastal conditions combined with regular reviews every 5 to 10 years would be sufficient in the short to medium term.

It would be agreed management options developed in this process that would inform Development Control Plans and allow NSW Councils to confidently place information on Section 149(2) Planning Certificates knowing that the wellbeing of local communities had been maintained while satisfying the “good faith” defence under Section 733.

Too many times we have seen councils embark on studies using NSW State Government grants and ratepayers funds where the study is initiated in secret. The consultants are briefed by council officers and the parameters are set without any oversight or involvement by representatives of communities that will be affected by the outcomes of the study.

When community representatives do become involved it is after the draft study document is completed. It is extremely difficult for any significant changes to be made at this stage. Committee members are sworn to secrecy, all documents are stamped confidential and from that point on, community representatives are unable to consult the community they represent

and explain what is being developed. It is only with the first exhibition of a draft that the broader community can become involved and only for the period of exhibition.

These are serious matters and it is wrong for affected communities to be excluded in this way. If it must take longer to do the job properly then that must be.

The transparency from the initial study through to the final accepted plan must be thoroughly transparent – but it is far from being transparent.

This process must become fairer and more transparent and councils must be informed through the planning circular that they must engage and consult with communities in a much more comprehensive and open manner.

Code of Practice and a Community Advocate

There is a need for a Code of Practice to guide Councils in the correct way to engage and consult communities on matters related to future and current coastal hazards and to assess the material that informs these studies and plans. Advice to councils in the proposed planning circular must refer to the need for councils to adopt an approved code of practice for community engagement related to coastal hazards.

There is also a need for an advocate who represents the interests of affected communities and the NSW State Government. Councils have access to public servants in state government agencies who often act as advocates for those councils or as expert witnesses in court hearings. There needs to be a balance and at this time the balance is unfairly weighted in favour of councils.

Ideally such an advocate would be a community representative with experience in issues related to coastal hazards and would be provided with the resources to oversight and review the development of CZMP's , studies, management plans and adaptation plans and information related to coastal hazards that is placed on Section 149 Planning Certificates.

A lot of public funds are being tipped into expensive studies and plans but we do not appear to be moving forward with the management of the NSW Coastal Zone.

Risk Categories

The planning circular has simply recycled much of the advice that was provided on the previous Planning Circular PS-11-001 Planning Circular and introduces new risk categories to be applied to land that are similar to those in the previous coastal protection legislation.

In the Coastal Protection Regulation 2011, Section 4, there was provision for three categories of risk: Risk Category 1 for current coastal hazards; Risk Category 2 for land not likely to be adversely affected now but likely to be affected by 2050; & Risk Category 3 not likely to be adversely affected now but likely to be adversely affected by 2100.

The previous legislation made it very clear that this was to be applied to land that was likely to be adversely affected and allowed the Minister to determine the category of risk applied.

The new but similar risk categories have simply been relocated from previous legislation to a planning circular while the Ministers previous ability to determine the risk category has been removed.

Likely to Be Adversely Affected

Changes made to the previous legislation that removed risk categories for current and future coastal hazards, removed the qualifying statement ***"likely to be adversely affected"***. This term should be reinstated and used in conjunction with the concept of ***evidence based data and information.***

It is a nonsense to simply identify land as having an exposure to a coastal hazard either now or in the future unless there is also a likelihood that such land will be adversely affected.

Many properties identified as affected by sea level rise projections will not be adversely affected if sea levels rise.

The revised planning circular increases uncertainty and will cause confrontation between residents and local councils as they grapple with determining what future risk there is and if land will be adversely affected by future coastal hazards.

Many properties may be exposed to a hazard but will not be adversely affected if sea levels rise. Around estuaries and enclosed waters they are properties that slope down to the water where any rise in sea levels will only impact on a small proportion of that land while beachfront properties that are currently protected by revetments or are protected by naturally occurring rock are also less likely to be adversely affected by future coastal erosion.

Evidence Based Data and Information

The term evidence based data and information must also be qualified as it has different meanings for scientists, council officers and lawyers and residents.

The NSW State Government promised to make high quality local sea level data available to communities.

This hasn't happened.

The NSW State Government has access to high quality sea level rise recording stations along the NSW Coast that could be used to identify sea level rise trends over a lengthy period of time.

NSW coastal communities have been forced to accept the selection of data that has no relevance for the NSW coastline other than as a comparison to how sea levels in NSW are responding when compared to global average data. Fort Denison and Newcastle recording stations are not accepted by NSW councils because they claim these stations are not fully

calibrated. Both have been fitted with Global Navigation Satellite System (GNSS) Continuously Operating Reference Station (CORS) to determine any land movement that must be taken into account but councils refuse to use data from these two stations despite the information they provide being used to contribute to international sea level rise data.

The logic is insurmountable and must be resolved.

Risk Mitigation & Property Protection

A further consideration must also be the potential to protect property if sea levels rise. Placing information on a planning certificate and saying that the land is exposed to a coastal hazard without assessing the potential to protect that land and without planning for future protection is a serious flaw.

At Wamberal Beach, the proposal for a revetment is sufficient to permit development seaward of hazard lines. Many of those beachfront properties are also currently protected by a range of ad hoc permanent protection works that according to a recently completed sub-action plan, will continue to protect them. The same applies at Collaroy Beach and Belongil where the majority of properties are already protected by revetments.

Beachfront properties at Boomerang Beach, Blueys Beach, Avoca Beach and Long Beach could also be protected by a range of permanent protection works if the need arises. If a plan were developed that allows permanent protection works to be constructed in the future, there would be no need to consider those properties as likely to be adversely affected.

Section 149(2) planning certificates would in these cases provide information about the hazard mitigation or protection that would have to be implemented in the future.

Consideration for State and Local Economies

The majority of properties that could be considered as exposed to current and future coastal hazards are in regional NSW along the coastal zone. They contribute to the state and local economies. Goods and Services Tax, stamp duties, land tax, EPA levies and a range of government service charges.

The NSW State Government does not understand how significant the impact of the NSW Sea Level Rise Policy and associated guidelines and legislation has been.

Properties that previously delivered land tax have finally fallen below the tax free threshold and continue to lag even further. Likewise council taxes and service fees on properties affected by sea level rise projections have slowly declined as property valuations fail to keep pace with inflation and values of unaffected properties. There has been a dramatic shift in total rates from waterfront and beachfront properties onto properties that aren't affected by SLR projections.

Only a fool would argue that there has been no impact on property values but more likely the argument is related to fear of future litigation and is simply denial. Lake Macquarie City

Council is a grand denier in the face of overwhelming evidence that property values have been affected by council policies.

Branding properties as possibly being affected by a flood by 2100 and then finding that more than half of those properties are not affected is the substance of future class actions on a massive scale.

Categorising a property as “high flood hazard” because floodwaters with a height from zero to 200mm may occur along a short section of a side boundary in 40 years’ time, is completely anal and highly damaging.

Stopping people from renovating their homes and stopping them from redeveloping their properties is also a one-way street to future litigation.

Regional areas already suffer from higher than average unemployment levels and when opportunities to redevelop existing developed property are stymied by people who claim they want to protect others from a 200mm flood in 40 year time, there will never be a change in those unemployment levels.

The draft planning circular does not warn councils of these financial impacts or the social impacts of their decisions.

Elderly and infirm people become extremely concerned when there is a suggestion of some negative impact on their last remaining asset. They haven’t got the physical ability to recover their losses and they don’t have the time to wait until common sense prevails. The impact on retirees and the elderly has been devastating in many cases.

Many small and micro-businesses rely heavily on the wealthier residents in regional areas to spend their wealth on home improvements, renovations, swimming pools and just minor maintenance such as repainting. Many regional areas also have higher than average youth unemployment.

The impact on local communities creates a knock-on effect that filters throughout the whole LGA. This message must be reinforced in any advice regarding information placed on S149 Planning Certificates.

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