

Manager
Coastal and Natural Resources Policy
Department of Planning and Infrastructure

Our Ref: S149 Certificates

Contact: Ms Alexandra Macvean
Telephone: (02) 6591 7348

14 March 2014

Dear Sir,

**RE: DRAFT PLANNING CIRCULAR: COASTAL HAZARD NOTATIONS ON SECTION 149
PLANNING CERTIFICATES**

Council appreciates the opportunity to respond to the public exhibition of the abovementioned draft planning circular produced by the Department of Planning and Infrastructure.

Great Lakes Council has always sought to provide clear and comprehensive information regarding coastal risk and flooding, within the available planning instruments, to ensure that affected property owners are appropriately informed of the restrictions and hazards that may affect their land.

It is recognised that the intent of the Draft S149 Planning Circular is for both "current" and "future" risks to be clearly identified and this is a commendable within the provisions of a Planning Certificate.

Council does however have concerns with the general nature of the information provided; and the implications for Council to produce the level of detail in S149 notations recommended by the Draft Circular. These concerns are outlined within this submission and Council would welcome further discussion on these matters:

Legislative issues

Specifically, Council wishes to express its concern that the detailed information in S149 notations being recommended by the Draft Planning Circular, appears to be contrary to the existing requirements of the *Environmental Planning and Assessment Act 1979* and *Environmental Planning and Assessment Regulations 2000*.

The current legislative requirements specify that the information to be provided within a S149 Planning Certificate identifies:

- any adopted hazard policy, other than flooding, that applies to the land (EP&A Regulation, Sch.4 Cl.7); and
- any flood related development control that applies to the land (or development thereon) (EP&A Regulation, Sch.4 Cl.7A).

It is Council's view that, in order for the information in a S149 Planning Certificate to be provided with the content and format recommended in the draft circular, the Act and Regulations should be amended.

Terminology

The circular indicates that the only relevant coastal hazards are those associated with coastal erosion, tidal inundation, coastal inundation and coastal flooding. There is no clarification of how 'coastal flooding' is different to catchment flooding or how geotechnical hazards and long-term recession may also contribute significantly to coastal hazards.

These issues are further complicated by the statements made within the 4 February 2014 teleconference between the Department and affected Councils, during which it was indicated that while the coastal hazards referred to above may represent a 'current exposure' they do not necessarily represent 'future exposure'.

This statement implies that the impacts of projected sea level rise may not be the only distinguishing feature of 'future exposure' to coastal hazards and flooding hazards; and that coastal and flooding hazards are modelled and managed in the same way.

To this end, the recommendations and terminology used within the draft circular do not appear to be consistent with relevant terminology used within technical documents such as the:

- Floodplain Development Manual,
- Coastal Management Manual; or
- Coastal Zone Management Plans.

It is also unclear how the recommendations and terminology are to be applied in a manner consistent with the requirements of the:

- SEPP (Exempt and Complying Development) Code 2008 i.e. will a lot be deemed to be a flood control lot if it is in an area with 'future exposure' to flood? ,
- Standard Instrument Local Environmental Plan;
- Coastal Protection Act, or
- Building Code of Australia.

To this end it is strongly suggested that the DPI consider other legislation that determines "current" considerations for development assessment on land e.g. the BCA requires 50yr design life of a building or structure to be given consideration in a "current" development application

Resources

The resources and timeframes required to implement the recommendations of the draft circular and maintain the level of detail required, do not appear to have been adequately considered by the Department.

These issues are particularly relevant for regional coastal councils with extensive coastal waters, lakes, estuaries and river systems. These waterways may be subject to coastal erosion, coastal inundation, coastal recession, tidal flooding, riverine flooding and projected sea level rise and in certain locations any combination of these hazards at any given time.

On this basis, the fundamental premise of providing 'current' versus 'future' hazard advice, is that any Councils can readily determine, re-evaluate and up-date the 'current' level of risk a property may be subject to following an 'episodic event'.

The technical and personnel resources required to provide sufficiently accurate, reliable and complete information on this basis is beyond most regional coastal Councils.

Direct Implications for Great Lakes Council

In reviewing all relevant coastal hazard policy and flood related development control S149 notations currently used by Great Lakes Council to determine their compliance with the recommendations of the draft circular, it is clear that none of the current notations would comply.

In order to comply with the recommendations of the draft circular, significant additional work would be required to ensure that:

- Council's coastal erosion and flood modelling was sufficiently reliable to distinguish between 'current exposure' or 'future exposure' to hazards;
- the 'current' and 'future' timeframes were established in a manner consistent with relevant methodology and legislative requirements; and
- the 'current' and 'future' timeframes were then accurately incorporated into modelling and in the S149(2) and S149(5) notations; and
- a process of on-going review and up-dating was established to ensure their continued accuracy over time.

To require the on-going identification of such complex information in terms of both "current exposure" and "future exposure" creates not only conflict with the reporting requirements of the legislation, but an additional layer of complexity in generating and maintaining the information and the notations.

It is anticipated that the initial work to establish this information would take several months given current personnel and resource limitations and the on-going review and management requirements would be significant.

Consultation

During the teleconference on 4 February 2014 it was made clear that the Department is concerned about Councils providing:

- insufficient and unclear information in a S149(2); and
- providing excessive and unnecessary information in a S149(5).

But when questioned further on this, the Department representative admitted that they had not:

- asked any Council to provide examples of information actually provided within S149 Planning Certificates; or
- undertaken any research into how the data that is used to inform the relevant notations, is gathered, managed or maintained over time.

This Council would suggest that the recommendations within the draft circular are based on misinformation about what data Councils have available to inform notations; and a misunderstanding of how that information can be reported on a S149 in accordance with the Act and Regulations.

Legal

During the 4 February 2014 teleconference with affected Councils statements were made by representatives of the Department that no legal advice had been obtained on whether the suggested wording for notations within the draft circular is compliant with legislative requirements or defensible in court.

It is considered an unacceptable financial, administrative and legal burden for the Department to incorporate 'suggested' wording for S149 notations within a planning circular without any legal advice and then in the same circular, recommend that each affected Council to undertake independent legal advice before incorporating that notation within a legal document such as a S149 Planning Certificate.

Information within the Frequently Asked Questions document

Council is also concerned that some of the statements made within the FAQ document, appear to misconstrue the level of information, resources and expertise currently available to local government to implement the recommendations of the draft circular.

The FAQ information also has the potential to mislead members of the public who may be unaware of the legislative restrictions on what information must be reported in a S149 Planning Certificate, for example:

- S149 certificates currently issued by Councils are not required to detail "current and future hazards to the property" only to provide advice on whether a Council hazard policy affects the property;
- The statement "there has been a lack of clarity between current and future hazards" also implies that Councils are already required to report on this distinction which is not the case;
- 'Flood related development control' notations prepared in accordance with the Regulation only require Councils to indicate whether the land is subject to such a control - yes or no;
- Notations on "long-term hazards" produced by "some councils" are based on the most accurate, complete and reliable information available and the inference that additional information may be available but not reported upon is considered to be misleading;

Council is concerned that the use of statements such as "not at risk from the hazard now" is very subjective. Statements using "now", "immediate" or "current" imply 'today only' to some people, and anything beyond today is "future".

The 2012 report may have "found that NSW has the expertise - in government, academic and research institutions and the private sector - to adapt and interpret global models and develop more precise local models" but little consideration was given by the government as to the ability of local government to resource, fund and implement studies to establish local 'benchmarks'.

This is particularly the case given:

- the limited resources within most Councils;
- the limited availability of private sector firms within the state;
- the time required to undertake the appropriate level of study; and
- especially the financial ability for regional coastal Councils to undertake these studies for the full extent of their coastal waters, lakes, estuaries and rivers.

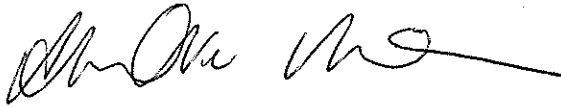
Furthermore, any indication that Councils should delay studies or take the 'do nothing' approach until local benchmarks are established, can only be considered to be out-of-step with best-practice, given the international information available on sea level rise.

Finally, in both the draft circular and FAQ document indicate that assistance is available from the NSW Office of Environmental and Heritage, Coastal Expert Panel and that Councils should "consider current research and technical advice from the Climate Change Adaptation Research Hub"; and "Compliance with the relevant section 117 Direction".

The information available from these organisations is limited in its application to Council policy and practice and the S117 Direction is not available to Council at this time. Therefore these recommendations are considered to misrepresent the level of assistance that is actually available to local government to implement planning instruments, notifications on S149 Planning Certificates or establishment of local studies and benchmarks.

Should you have any enquiries in relation to any matters raised within this submission, please contact Alexandra Macvean on 6591 7348.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Alex Macvean', followed by a long horizontal flourish.

Alexandra Macvean
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