



DRAFT PLANNING CIRCULAR – COASTAL HAZARD NOTATIONS ON SECTION 149 PLANNING CERTIFICATES

SUBMISSION TO NSW PLANNING AND INFRASTRUCTURE

Introduction

Pittwater Council welcomes the intent of the NSW Government to provide better guidance in regard to planning for and managing risks associated with coastal hazards through the release of the draft planning circular dealing with coastal hazard notations on section 149 planning certificates (Draft Planning Circular).

Council believes that there is merit in providing clearer and more complete information about the nature of coastal hazards to the public as well as landowners. As such Council is supportive of the proposal to distinguish between current and future exposures to coastal hazards when issuing disclosures on s149 planning certificates.

In doing so, however, Council foresees potential difficulties in satisfying the specific requirements of the Draft Planning Circular. Of particular concern is the need for coastal hazard assessments that inform disclosures on planning certificates, to be developed for local conditions using evidence based data and information.

A major difficulty for coastal councils is that at present there is very little climate change research or robust sea level rise projection data at a regional or local scale upon which coastal and flood risk assessments may be based.

Considerable disparity currently exists in the policies and development controls that councils have adopted to manage the risks associated with coastal hazards (not to mention the differences in methodologies used to define hazard extents and evaluate the associated risks to life and property).

In common, however, most coastal councils have utilised or adopted the sea level rise planning benchmarks as well as the planning horizons stipulated in the now revoked NSW Sea Level Rise Policy Statement (2009) for strategic planning, development assessment and coastal zone management purposes.

The differentiation between current and future exposure to coastal hazards on planning certificates may not be as important as the nominated design life that each council uses to determine as to whether hazard related restrictions and controls should apply to development approved today, yet such information is arguably a more important consideration for purchasers of coastal land.

Given the significant difficulties local government currently experiences in managing the complexities of a dynamic coastal zone, Pittwater Council questions as to whether the issues addressed by the Draft Planning Circular represent the highest priority amongst the outstanding matters to be resolved through the state government's coastal reform agenda.

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There would also appear to be more benefit in releasing such a circular in the context of better integrated, multi-agency guidance as a part of the Stage 2 Coastal Reform initiatives.

Far from providing coastal councils with greater confidence by way of clear and reliable guidance, the unco-ordinated and piecemeal release of amended legislation, new policies and technical guidelines in support of coastal reforms are more likely to result in greater confusion and duplication of effort for local government and less certainty for other coastal stakeholders.

The abovementioned matters, including issues that have particular relevance for Pittwater Council will be discussed in more detail in the submission that follows.

1. Defined Coastal Hazards

For the purposes of the Draft Planning Circular, references to coastal hazards include coastal erosion, tidal inundation, coastal inundation and coastal flooding. Other coastal hazards also have the potential to affect land and restrict development on land and will be exacerbated by the future impacts of climate change and sea level rise.

These hazards include the geotechnical hazard of slope and cliff instability as well as the hazard of instability of entrances to estuaries and coastal lakes and lagoons.

Sea level rise can be expected to alter entrance conditions and ocean boundary conditions directly with consequent impacts upon catchment flood extents. Increased rainfall intensity and co-incident flooding within the catchment due to extreme storm events will change exposure to coastal flood hazards over time. Modelling for this type of hazard is not routinely undertaken as a part of a coastal hazard or flood risk study.

Geotechnical hazards and entrance instability hazards of estuaries and coastal lagoons should also be included as coastal hazards for the purposes of the Draft Planning Circular. Guidance should be provided by the NSW Government as to how councils should address current and future exposures to these hazards.

2. Advice of the NSW Chief Scientist and Engineer

Whilst the NSW Chief Scientist and Engineer, Professor Mary O'Kane recommended that the NSW Government could look toward more regionally specific calculations that take into account specific sea level, topography, flood risk and other conditions along the NSW coast, her report also found that the science used to date to determine the (now revoked) benchmarks for sea level rise in NSW is adequate.

The removal of SLR benchmarks has left a strategic planning void in respect of coastal hazard management that coastal councils are now struggling to resolve. More time and better guidance from the State Government will be required if councils are to develop local projections for sea level rise based on evidenced based data and information in a consistent and defensible manner.

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Why has an appropriate framework for deriving updated sea level projections for NSW coastal locations not yet been established in accordance with recommendation 1(a) of the “Assessment of the science behind the NSW Government’s sea level rise planning benchmarks” report prepared by the NSW Chief Scientist and Engineer?

3. Interim or Transitional Arrangements.

The “Frequently Asked Questions” (FAQ) document released in support of the Draft Planning Circular indicates that a council may need to make interim or transitional arrangements until projections are formally adopted by the council. The FAQ goes on to suggest that councils can access expert advice and technical guidance to help them provide sufficiently accurate, complete and reliable information on s149 certificates.

These comments are confusing as there is currently little information available to coastal councils through the OEH or Coastal Expert Panel to assist them in preparing local sea level rise projections. Coastal councils have not been advised as to the capacity and operational functions of the recently established Climate Change Adaptation Research Hub nor has information been provided as to how Councils should contact and engage with the Hub.

As councils are obliged to make s149 disclosures on the basis of the best information available to them at the time of issuing planning certificates, what interim arrangements should councils put in place if they are currently relying on policies or flood related controls that are not based on local projections?

4. Technical Notes, policies and other material in support of the Draft Planning Circular

Council notes that the guide for coastal hazard mapping by local government, which was promised as a supporting action of the Stage 1 Coastal Reforms, has now been held over to be released as part of the Stage 2 Reforms. The Guide would have greatly assisted coastal councils in reviewing and updating hazard mapping and coastal risk assessments that inform policies and in turn s149 disclosures on planning certificates.

In the absence of such a guideline, councils that proceed to assess hazard exposures based upon interim benchmarks or their own locally derived benchmarks may find it difficult to demonstrate good faith for the purposes of s733 of the *Local Government Act 1993*, particularly if their local SLR projections are challenged.

The now revoked SLR benchmarks gave councils comfort that they could be seen to be acting in good faith if they based planning decisions on those benchmarks. Most coastal councils have received advice from their lawyers and/or insurers that they should continue to use the now revoked benchmarks in order that they do not fetter indemnity that may be available to them under the provisions of the *Local Government Act 1993*, *Environmental Planning & Assessment Act 1979* and the *Civil Liability Act 2002*.

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Recommendation 4 (Communication) in the Chief Scientist's report makes it clear that the science behind sea level rise and future projections together with local impacts needs to be explained in plain English to local councils and members of the public. This information should be provided as supporting documentation to sea level rise policies and should include s149 advice, Technical Notes and other material prepared by the NSW Government.

Why has the Draft Planning Circular been released in the absence of supporting sea level rise policies, Technical Notes and other material to improve communication to local government and the public as recommended by the NSW Chief Scientist and Engineer?

5. Notations on s149 Certificates

By way of the provisions of the *Environmental Planning and Assessment Regulation 2000*, a section 149(2) planning certificate is used to disclose matters relating to a given parcel of land. These matters include whether the land is affected by a policy of council that restricts development of the land (Schedule 4, clause 7) and whether development on the land is subject to flood related development controls (Schedule 4, clause 7A).

There is currently considerable scope for interpretation as to what constitutes a policy adopted by the council. For example, does the adoption of coastal or flood hazard mapping by Council for consideration in the assessment of development constitute a policy for the purposes of an s149(2) notation?

Coastal hazards such as tidal inundation and coastal inundation may well generate flood related controls in a council's DCP. How should a council separate the current and future exposures to these hazards in the absence of an adopted policy.

Councils require a clearer interpretation of what constitutes a policy for the purposes of Schedule 4, clause 7, of the EP&A Regulation, particularly where coastal hazards may generate flood related development controls in the absence of an adopted hazard policy.

6. Freeboard Incorporated into Flood Planning Levels (FPLs)

The NSW Floodplain Development Manual (2005) currently makes provision for "changes in rainfall patterns and ocean water levels as a result of climate change", to be included as a component of the freeboard incorporated into flood planning levels used to determine development controls.

Clarification on the use of freeboard to allow for sea level rise impacts was provided in the now revoked "Draft Flood Risk Management Guide – Incorporating sea level rise benchmarks in flood risk assessments", as was advice on projected increases in rainfall intensity of flood producing storm events associated with climate change.

As councils do not necessarily detail the constituent allowances included in the freeboard component of their FPLs, it remains open for landowners to assume that

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allowances for both sea level rise and increased storm intensity may have been included in the freeboard. This has implications in regard to the accuracy and reliability of current and future hazard disclosures provided by councils on s149 planning certificates.

Councils require clarification as to whether freeboard allowances should incorporate provisions for increased storm intensity and sea level rise as well as advice on how to address inconsistencies in information provided to landowners if this matter has not been considered in developing flood related controls.

7. Specific Wording on s149(2) and s149(5) Planning Certificates

The Draft Planning Circular recommends wording for notations in regard to disclosures about current and future exposure to coastal hazards that should be included on s149(2) planning certificates but concludes with a cautionary suggestion that councils should seek their own legal advice on the specific wording to be included on planning certificates.

Apart from the cost burden and duplication of effort entailed in each council seeking separate legal advice, a consistent approach to the wording of notations on planning certificates is unlikely to be achieved.

It is assumed that NSW Planning and Infrastructure has taken legal advice in regard to the Draft Planning Circular and the form of wording recommended for notations.

Could the legal advice obtained by NSW Planning and Infrastructure in regard to wording of notations on s149 certificates also be provided to all coastal councils?

Conclusion

Section 149 Planning Certificates assume relevance mainly at the time of purchase of a property. As such they are not an appropriate mechanism to keep the community informed of exposure to coastal risk, particularly when hazards may change over time or be exacerbated by the impacts of climate change.

Climate change impacts such as sea level rise result in slow, incremental changes that take place over very long periods of time. As a result, the community may find it difficult to observe and understand the implications of these changes.

Unless the supporting science and the need for appropriate action (irrespective of whether the harm is likely to occur at some time in the future) can be properly conveyed to landowners and the community, resistance to any risk management measures will continue in the mistaken belief that problems due to sea level rise impacts do not exist.

The release of the Draft Planning Circular in isolation without the necessary conversations with local government and the community and without policy backing and supporting information will do little to clarify the risks associated with coastal

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hazards or the actions necessary to manage the effects of climate change and sea level rise.

For the above reasons, Pittwater Council requests that the release of the Draft Planning Circular be delayed so that it may be properly integrated with the legislative, policy and technical guidance provisions that will be enacted as a part of the Stage 2 Coastal Reforms.