Ku-ring-gai Council

Submission

Planning Legislation Updates – Amendments to the *Environmental Planning & Assessment Act 1979*

March 2017

Table of Contents

Executive Summary

The Department of Planning and Environment has recently placed on exhibition the Environmental Planning and Assessment Amendment Bill 2017, and supporting documents, which outline the proposed amendments to the Environmental Planning and Assessment Act 1979. The proposed amendments do not significantly change the current planning framework set by the EP&A Act 1979, however there are some important changes to the Acts objects and to the provisions and processes relating to community consultation, strategic planning, development assessment, certification and enforcement.

Ku-ring-gai Council is generally supportive of the Department's objectives to enhance community participation, promote strategic planning, increase probity and accountability and promote a simpler, faster process for all participants. However, there are a number of areas of concern regarding the amendments.

This submission focuses on Councils key areas of concern and support of the proposed amendments.

A summary of the key matters raised in this submission are as follows:

Amendments of concern to Council

- Concern regarding the removal of the term *'orderly and economic use of land*' from objects.
- Council does not support the mandatory 14 day public exhibition for all Development Applications. This would result in additional cost and time in the processing of minor applications. Councils should retain the discretion to waive notification requirements for minor applications.
- Standard format DCPs needs to be flexible enough to ensure that Councils local content and controls can be accommodated, particularly where those controls seek to preserve and enhance highly valued established area character.
- Each Council should decide, whether it wishes to establish a Local Planning Panel and what functions are to be exercised by the Panel.
- Local Strategic Planning Statements are not supported as they are a duplication of Councils existing strategic planning responsibilities under the Local Government Act 1993, create inconsistencies and confusion for stakeholders. A simpler approach would be to require additional information to be provided in the existing Integrated Planning and Reporting Framework.
- Having matters that can only be determined by local Council certifiers and allowing deferred commencement conditions are not considered suitable to be treated as complying development.
- Complying development should not be expanded to development types and building works that are not straightforward or low impact. These building works have the ability to permanently and cumulatively impact the established local area character, for example medium density housing and SEPP Education Establishments and Child Care Facilities.
- The proposed wording for construction certificates are to now be 'consistent' rather than 'not inconsistent' may result in less discretion for certifiers and require additional details to be provided at the DA stage.
- The ability for the NSW Land and Environment Court to declare CDCs and CCs invalid, may exacerbate issue of regularising unauthorised works. There is a need for a specific mechanisms and processes as building certificates are not the answer as they do not allow assessment of planning impacts, inadequate building assessment criteria and no ability to place conditions on certificate
- Completion of Works Compliance Certificate' should be renamed to either 'Completion of Works Certificate', 'Completion Certificate' or 'Final Inspection Certificate'.

- Difficult and impractical to allow planning agreements for complying development. There are concerns regarding on how they will remain voluntary, the proposed exhibition periods timeframes and the role of private certifiers as unconnected third parties.
- The Amendment Bill clarifies and strengthens the Ministers' power to make a direction regarding the methodology underpinning planning agreements. It is understood that this is intended to prevent excessive demands on the developer; however care needs to be taken to not effectively prevent additional works being permitted where these are genuinely agreed.

Amendments that require further information

- Many of the proposed amendments to the EP&A Act 1979 provide the power to make Regulations. The exhibition material notes that the supporting amendments to the Regulations will be within a forthcoming review of the EP&A Regulations 2000, but haven't been publically exhibited. The amendments to the EP&A Act 1979 and the amendments to the EP&A Regulations 2000 should be publically exhibited at the same time in order understand the full implications.
- There is lack of detail in the exhibition material around the Statement of Reasons, including the format, what is to be considered 'public notification' of the reasons and whether this will apply to refusal of applications as well as approval. Council has concerns regarding the implications of this requirement in terms of administration, procedure, resources, customer comprehension and legality.
- There is a lack of detail regarding the incentives for early consultation and it is unclear how this will occur and whether it will apply to all forms of development, who will be responsible for co-ordinating this step and how this action is to be incorporated into the assessment process. There is also a question of how this is to maintain integrity and transparency in the assessment process and how this would work with the mandatory minimum public exhibition requirements.
- The Compliance levy should include DAs and CCs, not just CDCs. Information should accompany the levy, which details both Councils and the Certifiers' responsibilities and functions in relation to compliance enforcement.

Amendment supported by Council

- Support for the new objects relating to design and heritage, however it is recommended the heritage object be rephrased to be more consistent with current heritage management practices in NSW legislation- *'To promote the conservation and management of places of heritage significance'* and '*good design'* needs to be defined.
- Support for Community Participation Plans and Principles but there are concerns regarding how the Community Participation Plans will be developed, their content, legal status and associated enforcement and consistency of Community Participation Plans across local government areas.
- Support for 5 yearly LEP reviews is supported as it is consistent with the Greater Sydney Commission proposed District Plan timing.
- Council support the proposal for a Subdivision Works Certificate.

Schedule 1 – Preliminary

Objects of Act

Overall, the new objects appear to be well intended and focused on evolving planning toward better social, economic and sustainable resource management decision making. Council has the following comments with regards to the new objects:

- ***Good Design***

Council supports the new object to promote good design in the built environment. By including good design as an object of the Act, it sets out that this is a consideration for all planning functions under the Act, not just for Development Assessment under s79C. The promotion of '*good design'* to an object of the Act may address the low threshold of suitability and acceptability of architecture and urban design that the current legislation and court culture has permitted in decision making. No definition has been included to outline what '*good design*' is. Without a proper definition it becomes ineffectual and easily misconstrued or abused. Its ambiguity and subjectivity removes certainty to outcomes not only for applicants but for consent authorities. The importance of '*good design'* cannot be over emphasised in light of the focus on complying development to speed up approvals of larger development types. Most DAs for building works are not designed by architects. These designers have no formal registration or accreditation requirements in NSW. Anyone can design buildings and there is no requirement to be qualified, have experience or any credentials. With regards to complying development, '*good design*' is not a factor and therefore contradicts this object and creates inconsistency with development outcomes in an area.

- ***Heritage***

Council supports the new object to promote the management of built and cultural heritage. However, the description of heritage in the objects fails to acknowledge all aspects of heritage identified and protected at the state and local government levels by the *Heritage Act 1977* and the Standard Instrument LEP, being for non-Aboriginal cultural heritage '*a building, work, place, relic, tree, object or archaeological site'.* A more inclusive definition for non-Aboriginal heritage would be *'places of heritage significance'.* Built heritage does not need to be differentiated in the description as it is encompassed within the definition in the Standard Instrument LEP *'Heritage significance means historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value.'*

The issue of defining and managing Aboriginal cultural heritage which incorporates intangible, tangible, natural and cultural heritage is currently being considered for reform with considerations being given to stand along Aboriginal cultural heritage legislation. The inclusion of Aboriginal heritage as a bracketed addendum to the types of heritage in the object may be construed as disrespectful to the communities involved in this process.

It is unclear what the phrase '*sustainable management'* means in terms of the Act and in the management of heritage. The *Heritage Act 1977* does not include the phrase, nor does the Burra Charter. The only other use of '*sustainable'* in the draft Bill is associated with ecologically sustainable development which is defined under the *Protection of the Environment Administration Act 1991* as *'requiring the effective integration of economic and environmental consideration in the decision making process'.* This phrasing is concerning as it may provide a catalyst for removing heritage based on economic grounds. This harks back to the Sydney demolitions of the 1960s and

1970s, where renewal and economic growth were cited as the priorities that resulted in the irreversible loss of Sydney's cultural heritage.

It is recommended that the phrasing of the object be more consistent with current heritage management practices in NSW legislation, such as:

"To promote the conservation and management of places of heritage significance"

- ***Protection of habitats***

The EP&A Act 1979 contains an existing object relating to '*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'.* The Amendment Bill removes reference to the protection of the *habitats* of threatened species and native animals and plants.

- ***Removal of 'orderly'***

The Amendment Bill removes the existing object relating to '*orderly and economic use of land*', which is to be replaced with '*timely delivery of business, employment and housing'*. There is a significant difference in the connotation of '*orderly*' and '*timely*'. The change to '*timely*' reflects the NSW Government focus on faster approval times; however the speed of approvals is not an indicator of rigorous assessment, sound decision making or good design and good planning outcomes. The exclusion of the word '*orderly*' is questionable, as this term is recognised by many in the planning industry as a cornerstone principle in justifying the for and against of development.

- ***Building regulation objectives***

It is noted that unlike the 2013 Planning Bill there are no 'building regulation' objectives proposed to underpin the direction of the legislation. These are considered fundamental to setting the framework, and without such objectives the current tensions between planning and building will persist. It is recommended that the following objectives from the 2013 Planning Bill be included:

'to promote health and safety in the design, construction and performance of buildings,

'to promote health, amenity and quality in the design and planning of the built environment'

Schedule 2 – Planning Administration

Community Participation Plans and Principles

Council supports the amendments which require the adoption of Community Participation Plans and Principles by all planning authorities.

Section 402 of the Local Government Act contains mandatory provisions for Council's preparation, content and exhibition of Community Strategic Plans. The Amendment Bill states that a Council need not prepare a separate Community Participation Plan if it includes all the matters required under Section 2.23 and Schedule 1 of the Bill and s402 of the *Local Government Act 1993*. The Bill requirements for Community Participation Plans do not alter Councils ability to prepare a Community Engagement Strategy specifically for the development of a Community Strategic Plan, under s402 of the *Local Government Act 1993*. This means that Council has the option of including

all engagement, consultation and notification requirements for both Community Strategic Plans and land-use planning, development assessment and development compliance matters in one community consultation document or alternatively preparing a separate Community Engagement Strategy and Community Participation Plan.

Council has some concerns regarding how the Community Participation Plans will be developed, their content, legal status and associated enforcement and consistency of Community Participation Plans across local government area as follows:

- ***Development and Content***

The exhibition material notes *'support for Councils in implementing this change will include the development of model plans and guidance material'.* It is not clear how the model plan will be created and if Councils will have input into the model plan. The plans need to be developed on the principles of social justice and equity. The plans need to identify a range of engagement methods that can be employed to reach required stakeholder groups.

- ***Definitions and Language***

Section 2.23(2)(e) states that *'community participation should be inclusive and planning authorities should actively seek views that are representative of the community'.* There is no information provided as to what the Department classifies as '*inclusive*' or '*representative'.* It is unclear whether the yet to be exhibited Regulations will provide further clarity as to what these terms will mean in practice. To deliver truly representative engagement that is inclusive can require significant resources, the exhibition material does not provide any information on how this will be resourced.

Many of the Community Participation Principles at 2.23(2)(a)-(h) include the use of the word '*should*'. This language sounds weak, replacement of the word '*should*' with '*must*' is recommended.

- ***Enforcement and Legal Status***

Section 2.23(2)(f) states that *'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'.* The term '*major development*' is not defined and further clarity is required whether this is intended to mean State Significant Development (noting that the Environmental Impact Assessment Improvement Project Discussion Paper October 2016 includes potential improvements to require proponent led community engagement early in the EIA process). There are questions regarding how the pre-application consultation by the proponent is to be measured and by who? There is no information provided about how a proponent is to prove that consultation has occurred (or not) prior to lodging the application, and if the consultation has not been undertaken before the lodgement – will this be grounds for rejection of the application?

Section 2.24(2) sets out that the validity of Community Participation Plans can be challenged in the Court within 3 months of the plan being published. There is no information provided as to when a Community Participation Plan is challenged, how will a judgment be made about its content, how a planning authority will defend the contents, and who will judge what is appropriate consultation for a local community in the Community Participation Plan, particularly when the exhibition material notes that *'Planning Authorities will have the flexibility to apply these* (Community Participation) *principles in the way that best suits their communities and types of development occurring in the local area.'*

- ***Consistency***

The exhibition material states that Councils will have flexibility in applying the Community Participation Principles. Concern is raised that this may bring an inconsistent approach to Community Participation. There should be a consistency between Community Participation Plans and their application across Councils. It is unclear whether Councils will be able to set their own levels of Community Participation, and what power the Department will have to ensure that Councils do set a high standard for Community Participation. Concern is raised that this could result in making those Councils with higher expectations of Community Participation more vulnerable to legal challenges against their Community Participation Plan if their requirements are higher than neighbouring Councils.

Mandatory Community Participation Requirements

The mandatory community participation requirements outline that every development application is to be publically exhibited for 14 days. This removes Council's ability to forego advertising of DAs that have no environmental impact will result in small-scale development applications that may not (presently) be notified (such as office and shop fit-outs, internal renovation of heritage building, minor changes of use, erection of retaining walls within a large property) to be required to go through the public exhibition process. This will add unnecessary delays and cost to DAs where advertising is not warranted. Council's should retain the ability to use their discretion to waive notification for minor applications.

Statement of Reasons

The Amendment Bill includes a new statutory requirement for consent authorities to provide a statement of reasons for each substantive development decision (e.g. why Council has decided to approve a DA). It is presumed the intent is to make decisions more transparent and to ensure greater accountability for all stakeholders in the assessment process. It is unclear how detailed such statement must be, however there are obvious flow on consequences from this requirement in terms of administration, procedure, resources, customer comprehension and legality.

It is unclear if this requirement is to apply to all development consents issued (the exhibition material uses the word '*determinations*') and whether this forms an actual part of the consent or is to supplement the notice of determination similar to an advising. It is unclear whether the statement is to be distributed to all those involved in the assessment process – the application, submitters, objectors and the like. It is also unclear whether this requirement will also extend to a refusal of a DA.

This requirement adds a step into the assessment and administration process and arguably a far more resource intensive one and would appear to add unnecessary complexity. There will be an obvious tension between drafting with generically applied reasons which may not address distinct differences in decisions against specific or tailored statements. No DA or assessment decision is the same and each is assessed on its own merits. Assessment timeframes and costs are likely to increase to accommodate this reform.

The requirement that there be statutory '*statement of reasons'* for every decision creates a whole new field on which local Councils, panels and the Department of Planning and Environment may make legal errors. If a written statement of reasons does not identify a '*mandatory relevant consideration'*, it makes it much easier for an environmental or community group to mount a legal challenge against the validity of development consent. Conversely, the consent is similarly open to a legal challenge if the formal written reasons include a legally irrelevant consideration. This will encourage the planning systems overly legalistic and litigation prone culture, and the administration and resource requirements surrounding such a requirement will intensity significantly.

S96 – Take into account reasons for original consent

The statutory 'reasons' for the granting of an original development consent is proposed to be a mandatory relevant consideration when considering proposed modifications to a development consent. The statement may also be a limiting and unreasonably inflexible factor in allowing further modifications, related development applications or reviews of a determination.

This results in an additional layer of consideration. The application for modification of a consent will need to consider the original reasons for the approval of a development – this will be relevant for the '*substantially the same development'* threshold test and the merit consideration of the application. This requirement may limit discretion and flexibility normally afforded to a consent authority and applicants, and may result in the consent authority being bound to refuse the application.

Some legal industry participants have suggested that if these requirements become law, proponents may prefer to deal with proposed changes via a development application rather than a modification application. Replacing current modification applications (for substantially the same development) with development applications is likely to add further complexity, time and resource intensity to the planning system.

Incentives for Early Consultation

The exhibition material and Amendment Bill foreshadow that regulations may be made requiring development proponents themselves to undertake community consultation before they can lodge a development application.

It is unclear how this will occur and whether all forms of development will require this step. It is also unclear as to who will be responsible for co-ordinating this step and how this action is to be incorporated into the assessment process. There is also a question of how this is to maintain integrity and transparency in the assessment process. It is also unclear how this would work with the mandatory minimum public exhibition requirements. This appears to be a doubling of costs and resources and it is unclear whether Council will be expected to provide the personal and contact details of affected parties.

It is recommended that early consultation be promoted as best practice, rather than a mandated requirement.

Schedule 3 – Planning Instruments

5 yearly LEP Check

Council supports the amendment to require all Councils to undertake a 5 yearly LEP Check against set criteria as it this is consistent with the Greater Sydney Commission proposed District Plan timing.

The exhibition materials outlines the proposed LEP check criteria at Box 4 on page 13 of the Summary of Proposals, however it is unclear whether this criteria is to be included in the Regulations.

Standard Format DCPs

The Amendment Bill includes a requirement for Council Development Control Plans to follow a standard format, with the Regulations to set out the '*form, structure and subject-matter'.*

As the Regulations have not been exhibited, Council cannot comment on the proposed standard format.

While there are benefits that a standard format DCP could provide, such as consistency and user navigation, there needs to be flexibility for Councils to ensure that local content and controls can be accommodated. This is particularly important where local DCPs have been developed as the result of extensive long term analysis, community consultation and research to contain standards that ensure the protection and enhancement of local character.

It is recommended that Councils are involved in the process and have input into the development of the standard format DCP.

Local Strategic Planning Statements

The Amendment Bills provisions relating to local strategic planning statements are not supported for the following reasons:

- ***Duplication with Integrated Planning and Reporting***

The Draft Amendment Bill duplicates many components of Sections 402, 404, 405 and 406 of the Local Government Act, relating to Integrated Planning and Reporting, by requiring similar content to those existing sections of the Local Government Act.

For example the local strategic planning statements will also apply to a whole local government area and require the following:

- Development of a long term vision for the council area
- Address of economic, social and environment issues
- Inclusion of long term goals and shorter term actions to achieve the vision for a council area
- Responses to State and regional plans and local planning policies
- Inclusion of monitoring and reporting on progress
- Prepared in consultation with the community.

- ***Inconsistencies with Integrated Planning and Reporting***

Local strategic planning statements will create inconsistencies with Council's established Integrated Planning and Reporting cycle under the Local Government Act as follows:

- Local strategic planning statements must have a 20 year time horizon for the planning statement's vision. This is inconsistent with the minimum 10 year time horizon set for Community Strategic Plans under Section 402 of the Local Government Act.
- Local strategic planning statements are required to be reviewed on a minimum 5 year cycle review linked to the 5 year review cycle for major LEP's. This is inconsistent with a council's four year planning and review cycle for IP&R documents, directly related to the governance and planning responsibilities for councils under the Local Government Act.

These inconsistencies will result in different cycles for local strategic planning statements and integrated planning and reporting documents.

- ***Resource Implications are not addressed***

The requirements for a local strategic planning statement does not address resource requirements to deliver the goals and actions in the statement.

The Integrated Planning and Reporting framework (Section 403 of the Local Government Act)includes mandatory resource planning requirements for councils as part of the preparation of Community Strategic Plans, four year Delivery Programs and one year Operational Plans. Resource planning includes preparation of a 10 year Long Term Financial Plan, 10 year Asset Management Strategy and a four year Workforce Strategy. This is essential to enable the delivery of Council's long term objectives and term achievements. In comparison, the details of how goals and actions in local strategic planning statements will be resourced and delivered through a council's established resource planning and budgets is not addressed through the Draft Amendment Bill or explanatory material.

- ***Additional Resource Demands are not addressed***

Preparation of local strategic planning statements will place significant additional resource demands on councils to develop the statement and monitor its outcomes. This includes:

- The community consultation, development and review cycle for development of local strategic planning statements being potentially outside and separate to existing timeframes and requirements for Council's Integrated Planning and reporting responsibilities
- Resourcing implications of the statement goals and actions, which may require amendment to and re-exhibition of Council's adopted Integrated Planning and Reporting documents
- The need to develop additional systems and procedures to enable regular monitoring of local strategic planning statement goals, actions and performance measures.

- ***Community Consultation not detailed***

Community consultation required to prepare local strategic planning statements is not detailed. The Amendment Bill and explanatory information do not provide information on how council should consult with the community and the resources likely to be required.

It is noted that Council is already required to undertake comprehensive community consultation as part of the preparation of a Community Strategic Plan under section 402(4) of the Local Government Act.

- ***Unclear Legislative status of Planning Statements***

The legislative status and purpose of local strategic planning statements is unclear in the Draft Amendment Bill provisions and will confuse planning decisions and rezoning's in local areas. The local strategic planning statements will be a stand-alone document and not form part of any local environmental plans. Explanatory material accompanying the Draft Amendment Bill states that:

'Once in place, the local strategic planning statements will inform rezoning decisions and guide development. Councils will be required to consider their statements when preparing planning proposals.'

A council's existing Community Strategic Plan and Delivery Program, prepared under the IP&R Framework, already informs local planning and rezoning decisions and guides development in local areas. Local strategic planning statements will add another planning level to council's current framework with the potential for inconsistencies and confusion between documents for stakeholders, including residents, businesses, developers and other government departments and agencies.

The existing Integrated Planning and Reporting Framework, under the Local Government Act, already effectively encompasses all proposed requirements for local strategic planning statements and can provide the Department of Planning's required 'mechanism for line of sight' from State and district plans to local strategic planning.

A simpler, more effective approach would be to require additional information to be provided in a council's existing Integrated Planning and Reporting Framework. This could readily occur through changes to the IP&R guidelines and manual.

Schedule 4 – Development Assessment and Consent

Powers for Minister to direct Council to form a Local Planning Panel

It is acknowledged that there are benefits to the establishment of Local Planning Panels (IHAPs) to provide independent expert advice either by providing recommendations to Council or to determine development applications on behalf of Council. However, the proposed amendment which gives the Minister power to direct a Council to establish a Local Planning Panel, the membership of panel and the functions of the panel is not supported. Each Council should decide whether it wishes to establish a Local Planning Panel and what functions are to be exercised by the Panel.

The matters that the Minister must take into consideration prior to directing a Council to establish a local planning panel are to be specified in the Regulations, and in this regard it is unclear in what circumstances the Minister can use this power.

Powers for Minister to direct delegations to Council staff

A new power of direction will allow the Minister to require that more planning functions are carried out by Council staff. It is unclear whether this will also result in having consistent delegations for what gets determined by Council staff and what get determined by Councils or Local Planning Panels across NSW.

Limiting Categories of development for which only Council Certifier can issue CDC and Complying Development Deferred Commencement Consent

No reference or the enabling complying development through the act should be included in these amendments. The statements are ambiguous and it is unclear what will fall under this umbrella this creates uncertainty regarding future development and inconsistency with other directions being issued such as District Plan requirements and State and Federal policies.

The Amendment Bill sets out that the Regulations may specify certain categories of development for which only a Council certifier is authorised to issue a CDC. However, the Regulations and detail of what categories of development this may include have not been publically exhibited. It is noted that in the recently exhibited Draft SEPP Educational Establishments and Child Care Facilities it is proposed that all applications for complying development certificates for school infrastructure be issued by Council certifiers.

The Departments reasoning for limiting categories of development to Council certifiers is that '*As complying development grows it may be necessary to put in place additional safeguards to ensure the appropriate consideration of proposals with greater potential to impact local values or sensitive areas'.* It is evident that complying development will be further extended to a wider range of development types and building works. It is illogical that developments that have the potential to impact on local values or sensitive area are being considered for complying development. These matters are far from 'straight forward' or 'low impact' – which is inconsistent with what complying development was intended for.

The Department also notes that the categories of development will be limited to *'where Councils are best placed to decide whether a complying development proposal meets the standard'.* The premise of complying development is that, if it meets the required standards it will be approved. This is a prescriptive approach, with no scope for merit assessment. Subsequently, it doesn't matter whether it is a Council certifier or a private certifier who issues the CDC – as they both are checking the development against the same set standards.

Having matters that can only be determined by local Councils and requiring deferred commencement conditions are not considered suitable to be treated as complying development.

Complying Development – Accreditation and Consistency

Further consideration needs to be applied to the accreditation scheme for practicing officers. Is a new level of Council accreditation intended to be implemented that will be responsible for the more complex development styles intended to be incorporated under the new legislation? Currently Council accredited certifiers are individually registered with the BPB, and each officer must meet appropriate standards of knowledge in regard to building control and technology. Generally persons engaged at Council as Development Assessment Officers do not share this same skill set, and the same may be said in reverse, not all Building Certifiers are skilled in the assessment criteria under the EP&A Act. Persons unskilled in building control would not be eligible to be accredited under the current BPB scheme.

It is also imperative that some consistency be brought to the two approval streams – CDCs and CCs. For building work they are both a form of 'building approval' and an applicant generally has the choice of choosing either path – yet they are treated different under the EP&A Regulation, for example, in terms of referrals and matters for consideration. It is noted that a number of building regulatory matters have crept into the Codes SEPP which is a planning instrument. It is questioned whether that this is an appropriate location, particularly since some development standards and conditions should be equally applicable to similar development is approved under a CC.

S96 Modification Applications – Retrospective Approval

The legislation currently allows a proponent to make a modification application to alter the terms of the development consent to recognise the unauthorised works. The proponent would also normally apply for a building certificate. If these were approved, there would be no point in requiring demolition.

The policy statement for the amendment suggests that the power to modify development consents has been eroded by the granting of retrospective approvals for works that go beyond the original consent. The legal effect of the proposed amendment is unclear. This will require the authorisation of the future use of illegally constructed works to be dealt with by a development application, rather than a modification application. This could result in a more cumbersome process.

Complying Development Compliance Levy

Council understands the proposed Complying Development Compliance Levy is intended to allow Councils to increase their compliance enforcement role. The reason for the proposal is understood, but clearly there is a need to accompany this with instructions to Councils and certifiers regarding what each parties compliance enforcement (and building control) responsibilities/functions are. For example, many Councils presently do not get involved in compliance enforcement where a private certifier is involved and in other cases the private certifier just issues a notice of intention and then passes the responsibility onto the Council to complete the compliance and enforcement action.

Council requests that this levy include Development Applications and Construction Certificates, not just work associated with Complying Development Certificates as proposed.

Health and safety impacts to trigger approval requirements

The Amendment Bill does not resolve this basic issue. Under the current scheme, it is the Environmental Planning Instrument that determines whether approval is required. The need for an approval is today based on planning criteria (e.g. environmental impacts) and not building criteria (e.g. health/safety impacts). The result is that no approval may be required for building changes, changes to existing regulated building services and systems, and sometimes changes of use with safety and or health impacts. The exception is a change of Building Code of Australia classification, however with the expansion of the application of alternative solutions, this concept is outdated.

Schedule 6 – Building and Subdivision Certificate

Consistency with Development Consent

The Amendment Bill outlines that the plans, specification and standard approved by a construction certificate would now have to be 'consistent', rather than 'not inconsistent' with the development consent. More work needs to be undertaken to provide a definition for the 'consistent ' test that would prevail in determining the validity of certificates issued by certifiers. This also means that there will be less discretion available to certifiers and industry professionals post approval. Whilst this will ensure certainty and accountability post approval, this will also potential burden applicants in the pre-approval or the assessment phase of the application. Additional detail and technical solutions may be required up front which could ordinarily be deferred. The imposition of conditions might have to be drafted in a more precise and administratively finite way, eliminating the exercise of future industry discretion.

The process of preparing 'for construction plans' would become more difficult, risker and costly. In effect, the details required to be provided up front at the DA stage will become more important in terms of assessment clarity, certainty and ensuring that matters generally deferred to the construction certificate stage can meet this '*consistent*' requirement.

Unauthorised works

This is a significant and growing concern for Ku-ring-gai Council. Unauthorised building work includes work carried out contrary to an approval and work carried out without approval. Councils are currently issuing building certificates to regularise unauthorised building work, since an Occupation Certificate cannot be issued. The Amendment Bill does not address this problem. The proposed amendments to allow the Court to declare a CDC and CC invalid may exacerbate the issue. In such circumstances what is the pathway forward? The Lambert Report and previous reviews have noted the need for a specific mechanism and process to regularise unauthorised work and that mechanism/process should not be the new building information certificate (which is the building certificate re-labelled). The building certificate has a number of shortcomings, including no requirement for assessment of planning impacts, the building assessment criteria are inadequate and there is no ability to condition the certificate.

It is important that unauthorised building work be subject to appropriate checks, because if it is non-compliant, inappropriate or simply inadequate, the community, unsuspecting purchasers, occupiers and others may suffer.

Occupation Certificates

The Amendment Bill indicates intended changes to the OC regime and mentions a completion of works compliance certificate as an alternative to an OC in certain circumstances. It is agreed that change is needed since there are a number of issues with the current OC regime. Council questions whether the alternative certificate should be referred to as a 'compliance certificate' since, there is a need for change to the compliance regime. Change its name to a 'completion of works certificate', a 'completion certificate' or a 'final inspection certificate' may be considered more appropriate and acceptable.

It is also unclear what is intended is a CDC or CC is declared invalid. Will this continue to prevent the issue of an Occupation Certificate?

Further detail is required on the scope of the intended changes, and Council requests that this include action on clarifying the tests for issue.

Directions by Principal Certifiers

It is noted that the Amendment Bill includes a power for certifiers to issue directions. It appears to provide no scope for a certifier to negotiate a solution with the owner or contractor – which is usual industry practice. It is questioned whether this is intended.

Clarity is also requested regarding whether it is intended that accredited private certifiers be responsible for both on-site and off-site non-compliance issues. Responsibilities for both private accredited certifier and the Council should be clearly stated in the legislation.

Compliance Certificates

Compliance certificates are generally not being issued. The industry has a reluctance to issue them for various reasons and hence certifying authorities are forced to rely on other forms of certification. In such cases it is unclear what statutory protection against liability for defective work there is for certifying authorities.

Subdivision Works Certificate

It is noted that this is a new certificate that will be required to be obtained before commencement of subdivision works, this proposal is supported. Presently Ku-ring-gai Council requires that a Construction Certificate be obtained. The relationship between the new subdivision works

certificate and the construction certificate is unclear and further clarification on this matter is required to ensure consistent practice across NSW.

Schedule 7 – Infrastructure Contributions and Finance

Planning Agreements for Complying Development

It is particularly difficult to see how this provision could work unless Council were to be the certifier in all such cases. Planning agreements must be voluntary – this includes on the part of local government as well as on the part of the developer. Local government should not find itself in the position of being coerced into accepting ad hoc works rather than monetary contributions towards larger items of infrastructure. Even streetscape works located directly outside a townhouse development, by way of example, should be delivered in an entire block from side street to side street due to issues with discontinuity of materials if a series of townhouse development is delivered over a period of several years.

Planning agreements tend to be for complex matters and have extensive exhibition periods inclusive of reporting to Council before and after exhibition. This is effectively a 2-3month process after the negotiation of the draft planning agreement is completed in principle. It would effectively be necessary for the planning agreement to be endorsed before the application for a CDC is made to the certifier, especially if there is a private certifier as a third party unconnected with the planning agreement. It is questionable if this is practical.

Minister directions as to how to determine public benefit under Planning Agreement

The Minister may, generally or in any particular class of cases, determine or direct any other planning authority as to the method of determining the extent of the provision of the public benefit to be made by the developer under a planning agreement. It is presumed that this is intended to prevent excessive demands on the developer. While this is understandable, care must be taken not to effectively prevent additional works being permitted where these are genuinely agreed.

The legislation permitting planning agreements has effectively subsumed other forms of agreement between a Council and a developer. In short, if it has the hallmarks of a planning agreement, then it is a planning agreement and is therefore duly bound by all its governing legislation, including directions.

It is not uncommon for major developers in control of large and significant sites to propose to undertake more extensive and/or higher quality work than envisaged by a baseline contributions plan. The relevant Council may be willing to accept such works subject to certain specifications that will ensure their future maintenance is not a burden on the larger community. This scenario would form part of a planning agreement, and include works over and above those required by the relevant baseline development contributions plan.

Alternatively, the location of a development may have a direct correlation to an item of infrastructure, such as a road, that is identified in a contributions plan, but the whole need for the road is not generated by that development. In this instance, the adjoining developer may deliver

the road but the cost is shared inclusive of contributions from other developments nearby who also give rise to the need for the road. Care must be taken that a developer is not precluded from undertaking work that may be substantially in excess of the contribution specifically arising from that site, if the planning agreement also contains mechanisms to fairly share that cost.

Effectively, the only way to have such a legal agreement is by way of a planning agreement. Precluding these works benefits no party to the matter – developer, Council, future residents or the existing community.

Inflation and Thresholds

The summary discussion paper foreshadows working with IPART concerning the costs of delivering local infrastructure. As part of this brief it would be timely to review inflationary mechanisms. Anecdotally, construction costs have significantly exceeded the relatively flat consumer price index in recent years. While most easily accessible index has value in its transparency, it is of concern if it fails to keep pace with the actual cost of delivering infrastructure over time.

The now 8 year old uninflated $20,000 threshold or 'cap' (still in 2009 $) should also be examined by IPART as this has multiple flow-on effects to local government in terms of type, quantum and quality of infrastructure that can be delivered and to the integrity of the contributions system itself.

Section 94A Contributions

The proposed amendments foreshadow the possibility of varying the rate of the percentage levy under s94A in growth areas. The current 1% of s94A contribution is best suited in areas experiencing slow or scattered growth or growth where nexus is difficult to define such as non-residential areas. The high activity commercial area of Chatswood is one that has been permitted a higher percentage levy.

The opportunity to make a case to vary the percentage is a valuable addition which could lead to greater use of s94A as distinct from s94, which is presumed to be the intention. This objective could fail, however, if restricted to high growth areas as implied by the use of the '*growth areas'* because s94A does not have the yield to extend to the purchase of high cost land in the Sydney Metropolitan area. Even at higher percentages, it is unlikely to provide for the acquisition of lan din the inner east, south or north.

Special Infrastructure Contributions for Complying Development

It is logical that complying development should be subject to the same provisions in terms of Special Infrastructure Contributions, noting that the number of areas subject to SICs in the future may be extended. However, Ku-ring-gai Council has previously made submissions concerning a number of issues that are anticipated to arise if CDCs are extended to medium density development. Nothing in this comment should be taken as subtracting to those concerns.

Possible Expansion of Special Infrastructure Contributions Areas

If it is the NSW Government's intention to expand Special Infrastructure Contributions Areas (SICs) into new areas, including for example, rapidly redeveloping and growing established areas, then it is important that extensive consultation and targeted costing is undertaken to include SICs alongside local infrastructure funding mechanisms. This is essential to understand the combined cost impact on development and, if this proves excessive, to fairly share and support any shortfall in the cost of delivering local and state infrastructure.

Environmental Planning and Assessment Act 1979 and consistency with state and federal directions

The amendments do not appear to have included an updated approach to social, economic and environmental issues in particular the amendments have not considered the long term protection of resources which are the forefront of numerous state and federal directions which are calling for a more integrated and considered approach to planning and the delivery of development, for example Greater Sydney Commission, Federal Government Green Cities policy, NSW Better Placed policy, NSW Office of Environment and Heritage Climate Change heat emission and rainfall polices.

Environmental Planning and Assessment Regulation 2000

A significant number of the proposed amendments to the Environmental Planning and Assessment Act 1979 will provide for the power to make Regulations, as follows:

- Community Participation Plans – the plans will have to be prepared in accordance with the requirements set out in the Regulation, such as exhibition timeframes. The Regulation will outline requirements for the content and process for developing community participation plans.
- Exploring Incentives for Early Consultation – the proposed amendment to the EP&A Act provides the power to make Regulations to encourage or require certain activities to be completed prior to lodging a Development Application.
- CDC Improved Information to Councils and Neighbours – Regulations to require certifiers to give copy of proposed CDC and plans to neighbours and Council prior to issuing CDC and after issuing CDC.
- Limiting Categories of Development to Council Certifiers – The Regulation will specify certain categories of development for which only a Council Certifier is authorised to issue a CDC.
- Compliance Levy – the proposed amendment to the EP&A Act provides the power to establish the compliance levy through the Regulations.
- State Significant Development conditions on development consent which require financial securities to fund decommissioning or rehabilitation of sites – The Regulations will set out the classes of development to which these types of conditions could be applied.

- Local Planning Panels – The considerations the Minister must take into account in issuing a direction for a Council to establish a Local Planning Panel will be specified in the Regulations.
- Model Code of Conduct for members of planning bodies, such as Planning and Assessment Commission, Regional Planning Panels and Local Planning Panels – a model code of conduct is proposed to be developed and will be adopted by the Regulations.
- Building Provisions – Regulations to allow accredited certifiers to place conditions on CDCs and CCs.

The exhibition material notes that the supporting amendments to the Regulations will be within a forthcoming review of the EP&A Regulations 2000, but haven't been publically exhibited. This makes it hard for Council and the community to provide considered comments on the proposed amendments as the detailed information on how the mechanics of these amendments will be implemented is not available. The amendments to the EP&A Regulations 2000 should be publically exhibited in order understand the full implications of the planning reforms.

Ku-ring-gai Council Community Information Session

Ku-ring-gai Council held a Community Information Session on 6 March 2017 on the proposed amendments to the *Environmental Planning and Assessment Act 1979.* The aim of the session was to provide the community an overview of these reforms on exhibition and to get their feedback.

The following feedback was received from members of the community:

- Concerned that the standard format DCP will not be able to accommodate controls which protect Ku-ring-gai's local values.
- There is no over-arching structure between the planning reforms, the North District Plan, the child care centre SEPP.
- Concern that the supporting amendments to the Environmental Planning and Assessment Regulation 2000 have not been made publically available.
- The statement of reasons for decisions applies to Development Applications but not to strategic planning.
- There is no community consultation requirements included for SEPPs.
- Concern that the local planning panels may affect Council involvement in development
- Community Participation Plan should ensure as much community participation at grass roots resident level as well as higher/strategic level.
- Concern how ESD will be impacted by planning reforms – concern that the objects only require to "facilitate" ESD
- Concern that biodiversity and environment will be impacted - the act needs to focus on the natural environment.

Council also encouraged community members to make their own submissions to the Department of Planning and Environment.