

## **Submission to the proposed changes to the Environmental Planning and Assessment Act 1979**

Council is pleased to be provided the opportunity to comment on the proposed changes to the Environmental Planning and Assessment Act 1979 as exhibited between 10 January and 31 March 2017. It is encouraging that the current draft changes follow some of the intent of the previous White Paper that proposed significant changes to the Act some years ago.

The current Act has provided a satisfactory framework to the planning and development process for many years and it is agreed that there is no significant benefit to completely re-writing the Act. The current proposed changes propose some progressive updates to the Act, such as giving some legislative weight to strategic planning and increased community participation into the process at the appropriate (strategic) level of that process. Unfortunately some of the proposed changes have followed the old, authoritarian approach to Planning Instruments that impose, or overwrite, local controls with unrefined provisions that do not necessarily achieve the outcomes that are trying to be achieved, e.g., changes to Complying Development.

The following comments are provided on a general issue basis rather than specific comments regarding the legislation wording.

### **Community Participation**

The proposed changes to the legislation require Council to prepare a number of additional documents that do not currently exist in the format required. These include Community Participation Plan, Local Strategic Planning Statements, statements of reasons for decisions, etc. Council supports this intent to increase community participation in the planning process, particularly when that participation is in the strategic stages of the planning process. These documents and statements would provide additional opportunities for community input and transparency in Council's operations and decision making.

The preparation of these documents will take time and resources from Council which are currently stretched with other initiatives being addressed such as Fit for the Future, Integrated Planning and reporting timeframes and increased levels of development activity. The exhibition documents indicate that the Department of Planning & Environment (Department) will assist by producing guides and other template resources to assist in the preparation of these documents. This initiative by the Department is supported. However, the preparation of these templates must include input from a full range or all Councils to ensure that these templates do not impose unnecessary or onerous provisions on Councils for no particular improved outcome. Any other support from the State Government, such as grants or additional small levy on development by Councils, would also be of assistance.

Community participation is one of the most important parts of the planning process, but it must be linked to improved outcomes rather than simply "ticking a box" on community participation. The issues to be considered in this regard include;

Strategic Planning – This is the area where community input is most important, but it is the most difficult area to properly and appropriately engage with the community. Any template for this area should be heavily focused on a variety of approaches to include and engage the entire community. However, these approaches should also consider the resources available within Councils as some have access to greater resources for this work than others. Provision should be made in the Regulations for Council to recover these costs.

Local Development -The proposal to encourage or require certain developments to consult with neighbours in the early stages of a project is cautiously supported provided that it is undertaken appropriately and ensures that it does not raise expectations of neighbours that cannot be met.

In this regard there would need to be strict rules around this consultation by an applicant to ensure that there is no perceived coercing or bullying of neighbours

by the applicant or their representative. Similarly, this process should be clear in the outcomes and should not raise expectations of neighbours that the consultation gives them veto rights to a particular development.

**Complying Development** – The current and proposed provisions result in notification to neighbours and Council by a Private Certifier of the intent to issue a Complying Development Certificate and upon issue of same. The transparency intent of this provision is supported. However, in the past this has created an expectation on adjoining neighbours that this is an opportunity for them to make a submission to the Council in a similar manner as with Local Development.

The Regulations for this provision should carefully consider the intended and unintended outcomes of these actions and ensure that they are addressed. If not the intended outcome of transparency and confidence in the planning system will not be achieved and may in fact have an opposite outcome of lack of confidence in the system.

### **Standard Development Control Plan format**

The draft Bill is proposing the standardising of the format and provisions (optional) for the preparation of development control plans (DCP). The standardising of the format for planning documents has some merit and the introduction of the Standard Instrument (LEP) in 2006 has demonstrated that there are some benefits to this approach. However, as with the standard LEP provisions, this approach does have many negative outcomes and tend to reduce innovation in Planning Instruments and can result in the loss of relevant local provisions. These negativities can also result in undesirable and unintended design outcomes due to the relatively ridged Planning Instruments.

Council in part agrees, but with some reservations, to the introduction of a standard format for a DCP and the optional use of standard clauses for some common provisions as this can increase the understanding of those provisions. The main reservations or disagreement relate to the standardising of the format of a DCP and/or all provisions within the Plan as this will be detrimental to the tailoring of controls to address local conditions.

The lessons learned from the Standard Instrument (SI) should be referenced when considering this matter. The SI has resulted in some benefits to Councils and applicants in relation to format and some content of the SI. However, it is clear that the SI has resulted in land use classifications (which are rapidly changing with various industry sectors, such as retail, industrial, commercial and even residential) being forced into a ridged set of definitions and land use tables on a “best fit” basis rather than an ‘appropriate fit’ basis. This same formula for standardising DCP formats and provisions should not be followed.

There is some merit to standardising the DCP formats, but this should take into account the variety of approaches in DCPs, i.e., prescriptive, descriptive or performance based, and allow for flexibility on local provisions to mix these approaches. Similarly standard (optional) provisions in some areas may be helpful to some councils where the use of a general provision may suffice rather than a more detailed local provision being developed following the preparation of local studies.

### **Complying Development**

The draft Bill is proposing “improvements to the complying development pathway”. It is agreed that the current standards that apply to complying development may be seen as overly complex, particularly when considered in view of the target market for this development type. The proposed changes, followed by comments about each of those changes, are listed below:

- preparing a more user-friendly simplified Housing Code

#### *Comment*

This initiative is supported as the primary intent of Complying Development was to streamline simple development with minimal impacts. The current provisions have become too cumbersome as a result of trying to achieve Complying Development in too many areas with a

“one size fits all” approach. The review of the Housing Code should be informed by the original intent of providing for simple proposals with limited impact rather than attempting to force this development type in all areas.

- reviewing and simplifying development standards for greenfield areas
- developing simplified controls for inland areas and an Inland Code

*Comment*

This initiative is supported in that it recognises that there is a need for different provisions for different types and localities for Complying Development. It is felt that this intent should be broadened to better tailor Complying Development to appropriate areas.

- education program on exempt and complying development

*Comment*

This initiative is supported if the education program is developed and lead by the Department and is undertaken prior to any further changes of the provisions. Despite this development type being permitted since 1998 there is a very low understanding in various communities on what Complying Development is and what it is not. Any education campaign should be lead and instigated by the Department to ensure that the same message is given across the State. Local Government can then be assisted by the Department, via resources or other funding, to reinforce that message and provide the local component of that education.

- enhance the education of accredited certifiers in NSW

*Comment*

This initiative is supported. The education and oversight of accredited certifiers, both public and private, varies from area to area and lacks consistency of application and also suffers from a lack of trust and transparency to the general community. In the case of a Council certifier there is a formal process for oversight of the process in that issues can be addressed via the normal Council processes.

In the case of Private Certifiers there is a perceived lack of consistency in the community relating to application of standards and interpretation of processes as they vary from individual to individual. Whilst this will occur naturally, there is a need to improve the education of certifiers to narrow the gap of actual and perceived variations.

Any education program should be developed and implemented prior to any further changes or extension of exempt and Complying Development.

- enhancing the NSW Planning Portal to allow online lodgement of complying development certificates

*Comment*

Agree with initiative.

- expanding complying development to medium density development such as dual occupancies, terraces, townhouses and manor houses (two storey buildings that contain three or four dwellings)

*Comment*

This expansion is not agreed with if it is extended under the same processes as the existing Complying Development system. The current system utilises a SEPP that permits the development type at a zoning level and which incorporates a series of exemptions to that permissibility. This approach is a complex “one size fits all” approach with exemptions.

Should there be a desire to extend Complying Development into the medium density area then it needs to be on a more refined level that will permit the appropriate planning for infrastructure and services to be available for the locality. (The introduction of the SEPP provisions for

“Granny Flats” is an example of where this increased density in certain zones has not been consistent with the infrastructure and service planning for the locality).

Any approach should utilise a local strategic planning approach undertaken by Local Government which enables the appropriate areas to be identified or mapped to enable such development. If there is concern about the timing or identification of these areas then those concerns could be incorporated into any change to a SEPP that allows time and resources for Local Government to undertake that work prior to the introduction of changes to the scope of Complying Development.

- clarification in the Act where a complying development certificate (CDC) does not comply with the relevant standards in the State Policy it can be declared invalid

*Comment*

This initiative is supported. As mentioned previously there is a variety of interpretations of the current provisions and this is not helped by the current complexity and level of education around these matters. This results in problems in the areas of responsibility and jurisdiction that are costly and time consuming to remedy. Clarification of the relevant standards and State Policy would assist to rectify this.

- improve information distribution to Councils and neighbours about the receipt of the application and issue of the certificate

*Comment*

Whilst it is supported that increased information to neighbours and Councils will improve some situations, this is also likely to lead to the raising of expectations that cannot be met.

Currently Local Development is advertised/notified to neighbours and the expectation in these cases is that they can make a submission to change or potentially stop the development through Council processes. It is found that currently were Private Certifiers notify neighbours of a complying development neighbours complain to Council with the expectation that Council can modify or stop that development.

Any such change to these provisions needs to carefully consider the actual and perceived expectations and outcomes that may arise from those changes and ensure that any proposed changes do not result in an increased lack of confidence in the planning system.

- limit some sensitive categories to Council certifiers (to be defined in the Regulations)

*Comment*

This initiative is supported.

- new investigative powers for Councils to enforce complying development issued by private certifiers and the introduction of a compliance levy to support Councils in this role

*Comment*

This initiative is supported. There is currently a lack of clarity as to responsibility and powers in a Privately Certified development and when this is sorted out the process is costly and time consuming for Councils which have limited or no ability to recover those costs. Should such a change be proposed any compliance levy to support Councils in this role should be performance based for cost recovery and not be based on a set figure that bears no relationship to the actual cost of the process to Councils.

- allow 'Deferred Commencement' and the application of special infrastructure contributions (State levies) to complying development certificates.

*Comment*

It is agreed that contributions should be applied to Complying Development proposals to ensure that they contribute their share towards appropriate infrastructure. However, the application of “Deferred

Commencement” provisions to a Complying Development proposal is both inappropriate and unnecessary.

The original intent with the introduction of Complying Development was to deal with straightforward development proposals that would have minimal or no impacts on the locality. In these cases if the development complies with the relevant standards then it is approved with no merit assessment. The introduction of a “Deferred Commencement” provision also introduces a merit aspect to the assessment of a Complying Development proposal.

The current provisions of the Act allow for a proposal that does not meet the assessment criteria for Complying Development to be progressed via the Local Development pathway with provisions that allow for “Deferred Commencement” approvals. In this regard there is no need for such a change and any such change is introducing a hybrid of Complying Development which would, effectively, be a different development type under the Act.

#### *General Comments on Complying Development*

There is no 'In principal' objection from Council to complying development as this type of development allows minor development to be considered and approved in a more streamlined manner and the simplification of the current complex standards is welcomed. The following additional comments are provided:

1. Monitoring and regulation of certifiers, in particular private certifiers, should be strengthened immediately and prior to any further changes. The current system is administered by the Building Professionals Board and is lengthy and cumbersome with investigations taking months and sanctions imposed are, at times, insignificant and do not seem to deter further offending.
2. The operating parameters for private and Council certifiers should be equal in legislation in that currently Council operations are additionally controlled by other legislative standards that apply to only Councils and not to Private Certifiers.
3. Complying Development should use a more strategic planning approach rather than the current application of SEPP permissibility with exemptions. This would allow for more appropriate location of Complying Development proposals. More importantly it would allow for more appropriate planning of infrastructure and servicing to cater for such development.

#### **Regulations and Details should also be exhibited for comment**

The current exhibition documents relate to a draft Bill with explanation documents. The draft Bill outlines the proposed changes to the Act and from that the intent of the changes can be identified. However, much of the detail in relation to the way in which those changes are implemented would be set out in accompanying changes to the Environmental Planning and Assessment Regulations.

It is requested that the draft changes to the Regulations be placed on public exhibition for a similar timeframe and manner as the draft Bill in order to provide all relevant stakeholders the opportunity to consider the changes and make submissions for consideration.

#### **Statutory Fees require review**

The draft Bill and changes do not seem to address the issue of statutory fees for applications and certificates issued under the Act. The Act and Regulations set fees for matters such as development applications, building certificates, planning certificates and a large range of other operational matters under the Act. Whilst there is a case for the regulation of certain statutory dealings under the Act, there is a need for those fees set by Statute to be more regularly reviewed which consider a “fee for service” or a proper “cost recovery” model.

There is a need for a wholesale review of how fees are determined and applied as some matters may take hours of research and inspections by Council but the fee is set at an artificially low rate. As an

example an inspection for a building certificate for an inner city Council may take approximately 15 minutes of travel to attend the inspection. However, in rural areas, such as the Hawkesbury, travel time to an inspection may take one to one and a half hours to attend. As many of the related Certificates are issued for commercial dealings by the applicant such as property sales, etc., the fees set for Council to recover the costs are not commensurate with the importance of the document or the time taken to issue that document.

Any review of statutory fees within the Act and Regulations must consider realistic cost recovery and then retention of that realistic fee via annual fee adjustments linked to CPI or another cost index.

### **Fees and Penalties for Unauthorised Work should be reviewed**

The documents accompanying the draft Bill exhibition make reference to previous changes to the enforcement provisions in the Act. However, the previous and proposed changes have not adequately addressed appropriate penalties for dealing with unauthorised works and uses.

Whilst the Act and Regulations do address this issue via Orders provisions, etc., these usually relate to larger matters where an unauthorised use or work can be closed or removed. In many cases, particularly in the local context, these unauthorised uses or works were capable of being addressed if the appropriate application had been submitted. In these cases the Orders provisions are unlikely to require removal and are more likely to address the unauthorised works via a building certificate or retrospective approval of a use. However, this leaves the process open to abuse where some do not even attempt to obtain the correct consent and chose to retrospectively deal with the matters.

In relation to unauthorised works and penalties there is a real need for a more appropriate system that makes the option of obtaining approvals after commencing unauthorised works or uses much less attractive. This could be in the form of significantly greater application costs to regularise the unauthorised work and/or greater penalties. The current provisions in the Act do not adequately deal with these situations.

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