OUR REFERENCE T-14-08/03
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CUMBERLAND COUNCIL

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Planning Legislation Updates 2017
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001
Attn: Ms Alison Frame, Deputy Secretary Policy and Strategy

Also via email: legislative updates@planning.nsw.gov.au

Dear Alison,

CUMBERLAND COUNCIL SUBMISSION ON DRAFT ENVIRONMENTAL PLANNING AND ASSESSMENT BILL 2017

Please find attached Cumberland Council's submission on the above draft consultation bill. Please do not hesitate to contact Council's Strategic Planning Team (Monica Cologna 9735 1355; monica.cologna@cumberland.nsw.gov.au) should you wish to discuss further.

Yours faithfully,

MALCOLM RYAN
INTERIM GENERAL MANAGER

CUMBERLAND COUNCIL

Cumberland Council Submission

1. General Comments

Cumberland Council acknowledges the need for reform of the complex NSW planning system to improve plan-making processes and speed up development applications, and application referrals to other agencies. The objectives of many of the State government's proposed changes, including enhanced community participation, increased accountability in decision-making, updated exhibition requirements, and simpler, faster processes for all participants, are generally supported by Cumberland Council. However there are also a number of issues with the proposed changes.

Whilst reform which streamlines the planning approvals process is supported by Council, significant concerns are raised that many of the proposed changes are likely to result in a planning system that further erodes the role of councils and elected representatives in local planning decisions, and diminishes the rights of the community to have a say on the local developments. There is also concern that a number of the proposed changes appear to be driven by a desire to enable digitisation through the Planning Portal, rather than by genuine reform.

This submission outlines Cumberland's key concerns with the proposed draft bill amendments.

2. Key Issues

2.1 Community Participation Plans

All NSW councils and each planning authority under the EP&A Act will have to prepare a community participation plan (Schedule 2.1[1], clause 2.23(1), p 16 of the Bill). The proposed community participation plans will explain how the authority will engage the community in plan-making and development decisions, how the community can participate and provide their views, and how the community can access information about planning proposals and decisions. It is also proposed to update the current minimum public exhibition requirements.

Whilst the need for improved statutory and non-statutory mechanisms to enhance public engagement is supported, concerns are raised about the proposed introduction of a new dedicated section of the EP&A Act dealing with community participation. This appears to approach community participation as an end in itself, rather than as an essential element of the strategic planning and the formulation of planning instruments (Part 3 of the Act), and remains important for development and environmental assessment (Parts 4 & 5 of the Act).

Council considers it is not necessary or desirable to dedicate a chapter to community participation in order to emphasise its importance, instead it is sufficient to identify community participation as an object of the EP&A Act to identify its importance.

The current Act contains an object referring to community participation. That has been sufficient for the Courts to describe the right to participate in planning decisions as an "inviolable right", meaning that the right to be consulted is paramount and cannot be taken away without express words to the contrary. This has been particularly relevant in cases challenging the validity of development consents in circumstances where public notification is not been properly carried out.

It must also be recognised that genuine community participation (as opposed to consultation) is time consuming, which in turn would require additional assessment time.

The community participation principles outlined by the Department are a combination of substantive and procedural principles. Cumberland Council considers that principles should be listed as objects of the Act. The procedural principles should be used as an in-house guide in the formulation of the particular enabling provisions relating to community participation in the EP&A Act. Cumberland Council considers the following should be objects:

- The community has a right to be informed about planning matters that affect the community.

• The community should be given opportunities to participate in strategic planning as early as possible to enable community views to be genuinely considered.
• Community participation should be inclusive and planning authorities should actively seek views that are representative of the community.

Cumberland Council is unsure of the benefit in disengaging the public participation processes and procedures of these activities from the other processes and procedures relating to the same activities. Creating a new, separate process appears aimed more at increasing the 'perception' of the importance of public participation under the EP&A Act, rather than achieving any specific procedural improvements. It is also noted that whilst most councils already take advantage of social media tools for engagement purposes on a regular basis, a suite of user-friendly social media tools and examples would be welcomed. It is also recognised, that not all community members are digitally engaged, and other methods still form part of a necessary toolkit.

2.2 Strategic Planning at the Local Level

While the EP&A Act provides for strategic plans at the regional and district level, and for legal controls (through the LEP) at the local level, it does not require a strategic plan at the local level. Many councils prepare land use strategies to inform their Community Strategic Plans (under the Local Government Act) and their LEPs. There is an opportunity to establish a mechanism under the EP&A Act to complete the link in strategic planning from the regional to the local level, whilst simultaneously drawing on local values and priorities set out in Community Strategic Plans.

There are two key proposed changes to local plan-making requirements: community participation plans; and local strategic planning statements. Most councils already have some form of community participation plan, to enable them to prepare their community strategic plans). Cumberland Council is generally supportive of this however, is concerned that the proposed requirement to obtain signoff for local strategic planning statements (from the DP&E or the Greater Sydney Commission) would further reinforce an already top-down plan-making process.

The proposed amendments will also require councils to develop and publish local strategic planning statements in consultation with the community (Schedule 3.1[20], p 45 of the Bill). The statements will not be part of the LEP itself, but will help explain the LEP and development control plans. Cumberland Council raises concerns about the need for this additional, non-statutory layer, and instead suggests that a strategic statement of this nature could be incorporated via each council's Community Strategic Plan, rather than as an additional standalone policy.

2.3 Consultation Requirements

The intent of pre-DA consultation with neighbours is to improve the current system by removing the element of surprise. Whilst improved consultation around local development issues has merit, making this a mandatory requirement is considered problematic. Even if non-mandatory, this will be extremely difficult to administer, particularly if it were to be relied on or replace a more structured approach. In addition, a key issue in terms of consultation is how to better engage at the strategic level in a manner that gives the community confidence. The proposed pilot scheme to test this draft amendment is encouraged, and it is recommended that the pilot should include, as a minimum, councils in areas that are quite different demographically and spatially and should include areas of socio-economic disadvantage, far western NSW regional areas, areas with high non-English speaking backgrounds and areas with low internet usage.

Cumberland Council also raises concerns that early consultation process, as proposed, may be too onerous for small scale development. In addition, there is significant potential for this proposed early consultation, particularly with small scale proposals to result in disputes of a disproportionate scale without any independent or qualified party to moderate. There is also potential for inappropriate behaviours by applicants/neighbours including intimidation/bribes/deals. In addition, there is also a risk that that agreement could be reached on a proposed design that does not comply with planning controls and therefore will be problematic following lodgement. Professional council staff are considered to be best placed to assess applications objectively against planning controls as well as considering public submissions.

Reliance on the planning portal, or any internet based consultation would be inadequate in areas such as Cumberland, where a significant portion of the community does not have convenient access to the web, and/or are of non-English speaking backgrounds. A reduction in fees is also not supported as it is likely that Council will still need to undertake consultation, if the process was not properly undertaken by the proponent.

Concurrences and referrals also remain problematic at both the strategic and local planning level. There is reluctance on the part of local council to determine an application or proceed with a Planning Proposal without the concurrence or comment from relevant agency stakeholders. There is no overall system tracking of concurrences and referrals which enable consent authorities to track timeliness of response. It is suggested that the e-planning portal could be used to record and track referrals to government agencies to improve transparency and performance. Consistency in response from different state government departments is also problematic, and there is often confusion between a response to a planning proposal referral and a response to a DA.

Concerns are raised about the proposal to provide the Secretary of the Department of Planning and Environment the power to provide advice, concurrence or General Term of Approval. Similarly, there are serious concerns about the Secretary making a decision where there is a conflict in the advice of two or more agencies, as this ignores the potential for the application to be amended to be able to meet the requirements of each agency.

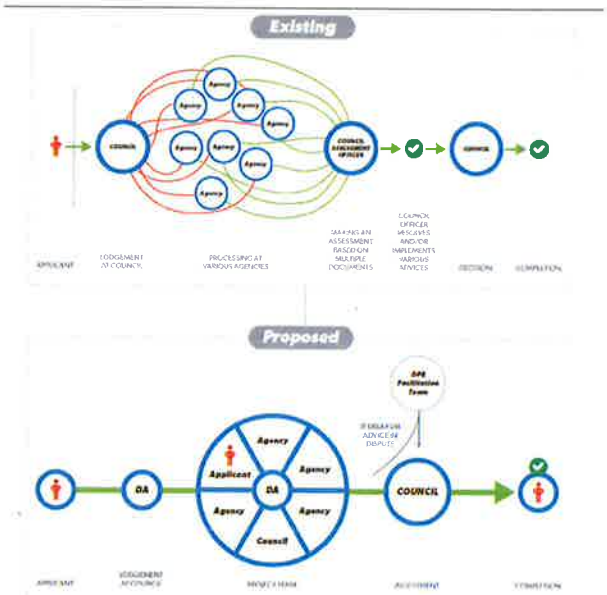

Figure 1: Existing and proposed concurrence and referral workflow

Figure 1 above (sourced from DP&E) indicates that the agency assessment process will change to result in a team approach between the applicant, council and the agencies. While this is not reflected in the actual changes proposed, it could represent a way forward where there are conflicts between the advice from different agencies. A meeting between all the agencies, the Department, Council and the applicant may allow the issue to be resolved. Involving all the agencies, would mean that any further changes do not have unintended consequences that would be unacceptable to another agency.

Council supports alternative options to achieve outcomes in a timely manner for planning and development processes such as:

- the use of technology via email or website where a council can lodge a proposal and supporting information for agency comment and receive feedback. This could save time, costs for councils and state agencies, and be efficient.
- a list of key state agencies and planning contacts would also be helpful to be made available for all councils when lodging submissions/proposals/applications via the Department of Planning's website which needs to be updated and maintained regularly.
- timeframe review for required commentary on an application or planning proposal given to the variation of a proposal's complexity and nature.

2.4 Standard DCP Format

It is proposed that the EP&A Act be amended to require a standard format for DCPs (Schedule 3.1[17], p 44 of the Bill), with the intent of achieving greater consistency across councils, and greater ease of use of the planning system and its controls.

Cumberland Council supports the regular review of all strategic and statutory plans. All strategic and statutory plans, State, regional, district and local, should be aligned so that there is a 'cascading' review cycle, where lower order plans are constantly informed by higher order plans and vice versa.

In relation to DCPs, the formulation of a non-mandatory template DCP by the State government (in close consultation with councils) is supported by Cumberland Council. This would provide a "toolbox" of standard provisions that could be adopted by local governments, particularly those with limited resources, which could be customised to suit local conditions.

However, Cumberland Council cautions against modifying the EP&A Act to remove the definition of DCPs as "Guidelines" and raise them to the level of mandatory standards or requirements that are quantifiable as "real" numerical and spatial development controls. The very essence of the DCP being a 'guideline' is in effect key to merit assessment.

Cumberland Council suggests that a non-mandatory template of DCP provisions should be incorporated into the Planning Portal. Each LGA is different, with different places, demographics, socio-economic circumstance, challenges and opportunities, and DCPs should reflect these differences.

Cumberland supports the preparation of some best practice/model clauses to support 'plain English' DCPs, however a mandatory, standard template for a DCP would take away the last remaining local policy under the EP&A Act that actually helps to support the concept that each place is distinctive.

2.5 Local Planning Panels

There are also amendments proposed to make local planning panels a regular feature of the planning system across local government areas, by:

- updating the provisions of the EP&A Act relating to IHAPs, and bringing all local planning panels under one framework.
- giving the Minister the power to direct a council to appoint a local planning panel where this is warranted to improve the quality and timeliness of planning decisions in the local area, or manage conflicts of interest or corruption.

The current IHAP provisions will be replaced with updated provisions on local planning panels (Schedule 2, Division 2.5, p 14-15 of the Bill). These will set basic rules about the constitution, membership and functions of local planning panels, and allow the application of consistent performance reporting requirements.

In the first instance, each council may decide whether it wishes to establish a local planning panel. The council will also determine which planning functions are to be exercised by the panel. To ensure all local planning panels operate under this single framework, any IHAPs or similar panels already established by councils will be transitioned to the new provisions. However, the criteria which the Minister can use to replace councillors with a local planning panel are unclear. Clarification is needed to prevent arbitrary decisions and/or political interference.

Cumberland notes that elected Councillors will be excluded from acting as the community representative on the proposed Local Planning Panels, which, as proposed, will comprise two experts and a community representative. The proposal to limit these panels to a total of three people, with one of these a community member, appears to concentrate power into the hands of a very few (Schedule 2, Division 2.5, p 14-15 of the Bill). A five member Panel, including a community member is considered preferable, as it would allow for a broader variety of expertise and more robust discussion on the matters before the panel.

Whilst the proposed local planning panels may have some shortcomings and require further clarification, Cumberland Council supports the role of expert panels for applications, particularly those that involve a significant financial investment, are controversial or seek to vary development standards. However, it is considered that Panels should not determine small-scale local development applications, which should continue to be dealt with under staff delegated authority. Introducing a panel into that process will unnecessarily extend the assessment time frame for the many DAs that are minor or conforming.

The new power of direction will also allow the Minister to require that more planning functions are carried out by the council staff. Increasing DA delegation to staff is supported; however, Council will still need a role in determining which kinds of decisions should be made by the Council/Panel.

2.6 Model Codes of Conduct for Planning Bodies

To ensure a common approach to the conduct of members of planning bodies, model codes of conduct are proposed. The model codes of conduct will be adopted by the EP&A Regulation, and will need to be incorporated in the codes of conduct adopted by the Sydney district and regional planning panels and local planning panels. The model codes of conduct will complement the statutory requirements by setting principles and practices for managing non-pecuniary interests in the event of a conflict.

2.7 Additional Council Compliance Powers

A new investigative power is proposed for councils (Schedule 9.1[2], clauses 9.33 and 9.34, p 86-87 of the Bill). Where a complying development certificate has been issued, councils will be able to issue a temporary "stop work" order on the project, to investigate whether it is being constructed in line with the CDC. Work will be able to be stopped for seven days, and the power will be limited to genuine complaints about non-compliant building work.

The government also proposes to establish a compliance levy to support councils in their role in enforcing complying development standards (Schedule 4.1[17], p 51 of the Bill). This would be part of the fee structure for complying development certificates, whether issued by a private or council certifier. It will also be made clear that the levy can extend to development applications.

The revenue from this levy will be remitted to councils to resource investigation and enforcement activity under the EP&A Act however it is unknown as to what the ramifications for those developments where no compliance actions are required.

Council generally supports these changes as they allow for improved community certainty that developers will be held accountable for delivering on promises. Certifiers will also be restricted from issuing complying development certificates for sensitive areas where the local impacts are more significant and require a development application instead.

The summary documents state that the planning legislation does not seek to include merit-based complying development, to which there was substantial opposition in the last round of changes. However, this section appears to be opening the way for CDCs on far more substantial development being assessed as complying development, when merit assessment in many cases would be more appropriate.

Concern is raised about the proposal to permit certain merit assessment complying development, starting with the Medium Density Housing Code, and then on to much more substantial development types. This is not supported, primarily because it is inconsistent with community expectations and with the documentation provided to support to the proposed amendments. Council also does not support the amendments to permit SIC charges and allow VPAs to accompany CDCs. It is unclear what kinds of applications would be considered 'sensitive' as the draft Bill leaves this to a future regulation (it is suggested that heritage, bushfire prone, threatened species/environmentally sensitive and flood prone land as a minimum are 'sensitive').

While it would be better for councils to consider sensitive categories of complying development, it is agreed that these types of developments should not be considered as complying development, and

instead a development application be required. Not all Certifiers (private or Council) are qualified to make merit assessments. Cumberland Council suggests that complying development should continue to be black and white proposals only, with anything more complex requiring a Development Application.

It is also noted that improved information for councils and neighbours may be considered onerous in regard to the level of additional neighbour notification that is being sort once a CDC is approved. The proposed change to only certain categories that a Certifier can consider for CDC is a deep concern and is not clear as to who would be accredited in Council to assess these "certain" categories. Is the Department proposing a two tier system and if so, would it not be the same as the current protracted system of DA & CC assessments?

In contrast to the above impacts, there are some provisions which could be of assistance to applicants for development. There is a proposed provision entitling the Planning Secretary to approve a development despite the absence of a concurrence or other approval (such as for roads or heritage areas), if the relevant agency delays its response. Further, the provision allows for the Planning Secretary to resolve inconsistencies between two or more conditions of those approval bodies by varying the approvals as necessary to avoid inconsistencies between the planning approval and other agency approvals, conditions will be able to be imposed that have effect until the approvals under other Acts are obtained

2.8 Additional Processes for State Significant Development

Many approvals of state significant developments, and previous part 3A proposals, have had conditions that are inconsistent, resulting in uncertainty both for the community and the developer. This problem will be exacerbated by seeking to drive faster determinations. It seems that some of the existing problems resulting from Part 3A approvals are now to be passed to Councils to deal with by allocating the modifications to councils.

2.9 Clarifying the Regulation of Major Projects

Council supports the ability to make conditions transferable, enabling the updating of conditions for monitoring and environmental audits and conditioning offsets and financial bonds. This could result in significant improved environmental outcomes and clarify responsibilities. It is requested that the potential to impose offsets and financial bonds be also considered for DAs that are not major projects, as severe or cumulative impacts are not limited to major projects.

Any standardisation of conditions should not prevent the inclusion of specific conditions that relate to a particular project. Increasing the use of peer review of EIA documents is supported. A process to capture and consolidate all changes, including conditions and compliance, is strongly supported.

Again the proposed changes seek to set targets to reduce assessment timeframes. The quality of the outcome is not improved by reducing or monitoring timeframes. There needs to be a greater concentration on the quality of the outcomes, rather than the time taken to make decisions. This is particularly important for larger and more complex projects.

2.10 Discontinuing Part 3A

The proposal to no longer allow modifications under s.75W is supported, however it is recommended that the 'two month' window option not be introduced, as it would likely lead to a raft of applications during that period.

There needs to be recognition that proposals for state significant development are likely to have a range of complex impacts and interrelationships. Seeking to halve the time that it takes to assess such developments is not only unreasonable, in terms of the workload of the assessors, but will result in poor outcomes.

Many approvals of state significant developments, and previous part 3A proposals, have had conditions that are inconsistent, resulting in uncertainty both for the community and the developer.

This problem will be exacerbated by seeking to drive faster determinations. It appears that some of the existing problems resulting from Part 3A approvals are now to be passed to Councils to deal with by allocating the modifications to councils.

2.11 Facilitating Infrastructure Delivery

Cumberland supports the requirement for concurrence from infrastructure authorities for Part 5 development.

2.12 Fair and Consistent Planning Agreements

Cumberland Council supports IPART's submission on planning agreements that a middle ground approach, where 50% of the profit can be taken through a value capture mechanism (a VPA), and applied to a public benefit.

Council also supports applying best practice to the application of **voluntary planning agreements** (VPAs), and the proposal to standardise the process and contents needs to be looked at very closely. It is important councils retain the power and flexibility to negotiate VPAs in ways that result in genuine benefit to communities. The law needs to remain neutral and fair so councils can negotiate outcomes that improve and maintain liveability in communities undergoing growth.

2.13 Clearer building provisions

The intent of the amendments is to bring together the key provisions relating to building regulation and certification into a single part of the EP&A Act (Part 6). The administration of this new consolidated part will be allocated to the Minister for Innovation and Better Regulation. This change will provide strong oversight of building laws by consolidating responsibility for building within one portfolio.

The changes to improve consistency between approvals and CCs are supported, however the new proposed user- friendly simplified Housing Code "explanatory diagrams" do not seem to relate to the accompanying text, and a review of this is recommended.

In general the revision amendments within the draft Bill need to be more carefully reviewed by the Department to ensure that they do not result in unintended anomalies. Examples of concern include the following:

- [1] Part 3 Heading.

The proposed note to Part 3 Planning instruments states: 'This Part deals with the following planning instruments: (a) strategic plans (comprising regional strategic plans, district strategic plans and local strategic planning statements), (b) environmental planning instruments (comprising State environmental planning policies and local environmental plans), (c) development control plans.' This is inconsistent with the definition of 'strategic plan' in s.75AA which would state (with proposed amendments: *'strategic plan* means a regional strategic plan or a district strategic plan.'

- Section 75AA Interpretation

This amendment proposes to: 'Omit "a plan" from the definition of *regional plan*. Insert instead "a regional strategic plan". This definition currently reads: *'regional plan* means a regional plan made under this Part'. It is assumed that the intention is actually to omit 'a regional plan' and replace it with 'a regional strategic plan'. However, this is already covered by amendment [16] Part 3B Strategic planning. This would appear to result in a somewhat confusing clause.

As there are numerous changes to the Act that, due to time and resourcing constraints that have not been fully reviewed and commented upon. In particular, the elements of the Act relating to Orders, Fire Safety Orders and Brothel Closure Orders have not been fully reviewed. Concern is raised as to proposed powers of Council to continue to issue fire safety orders furthermore, that in regard to cost recovery as the Compliance Cost Notice function is still subject to an appeal and subsequent cost recovery legal action. Cumberland considers that many of the changes will have an impact on the way Council administers the Act in the area of development compliance and building certification. In addition, another area that appears to have direct influence is the management of fire safety. The Act appears to be granting additional powers to the Fire Brigade to take on building fire safety in a manner

that Council currently has control over ie. Fire & Rescue NSW appear to be elevated to a position of being a regulatory authority. This could in turn impact on Council's management of local fire safety issues, complaints and associated compliance matters.

2.14 A New Design Object

The amendments include a new object in the EP&A Act, promoting good design in the built environment (Schedule 1.1, clause 1.4, p 3 of the Bill). The objects of an Act are a statement of Parliament's intention for the legislation. An object assists decision-makers to interpret how to exercise their statutory powers.

The Planning Act will be updated to include promotion of good design in the built environment to allow for consideration balanced with other parts of the Planning Act. Design is already a relevant consideration that may be taken into account by decision-makers. However, the design object, if implemented, will ensure that design is considered and balanced with the other objects of the EP&A Act.

It is proposed that the Office of the Government Architect will develop a design-led planning strategy, comprising incentives and measures to assist planning system users to achieve well-designed places. However, it is questioned whether this new design object will be adequate to result in good design outcomes. The intent of the reform is to 'elevate the role of design' while simultaneously extending the use of complying development to new more dense building forms, where design (if considered at all) is not required to be undertaken by qualified designers, and will be assessed by certifiers without experience in this area. However, there is a great reliance on non-legislative tools.

Conclusion

Cumberland Council is generally supportive of many aspects of the proposed reforms. In particular, Council is supportive of the State government's proposal to increase community consultation at the front end of the strategic planning process, however is concerned that this should not come at the cost of community input at the practical end, when it comes to local developments that affect neighbours the most.

Cumberland Council supports plans to address some existing issues with complying development, for example requiring developers to pay a compliance levy and strengthening enforcement powers to manage illegal work, however is concerned about the expanding the model to larger-scale development, particularly as certification does not allow neighbours to make comment until it is too late.

The removal of the retrospectivity functions of S96 will generate significant issues in the construction industry as it is very common for approved building designs to vary during the construction phase. The vast majority of these variations are typically minor, with S96 providing the Consent Authority with the ability to consider the amendments under 79C and either permit these works to be regularised or require them to be rectified via an enforcement action.

Whilst generally supportive of many of the proposed reforms, Cumberland Council raises concerns that some of the reforms are unlikely to prevent delays or resolve conflicts between State Government agencies, with particular implications for large integrated development applications. Concerns are also raised that some of the proposed reforms exclude vital community input, and that a number of the changes appear to be driven more by the desire to link everything through the Planning Portal, rather than by genuine reform.