

28 March 2017

Planning Legislation Updates 2017
NSW Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

Our Ref: 2017/048075

Dear Sir/Madam

Submission on draft Environmental Planning & Assessment Amendment Bill 2017

Thank you for the opportunity to comment on the draft Environmental Planning & Assessment Amendment Bill 2017, and for granting Council an extension of time to respond.

The proposed amendments provide a great opportunity to improve the NSW planning system. Northern Beaches Council (Council) supports the majority of the proposed amendments, and in particular:

- Increased community participation requirements.
- Local planning panels.
- Enhancing the role of the NSW planning portal.
- Measures to ensure that Local Environmental Plans and State Environmental Planning Policies are kept up to date.
- A standardised format for development control plans.
- The concept of local strategic planning statements.
- New thresholds for regionally significant development.
- Constraints on the use of section 96 applications.
- Proposals to prohibit private certifiers from issuing certain kinds of compliance certificates.
- Increased power for Councils and the Courts to enforce compliance with complying development certificates and construction certificates.
- Proposals to review the infrastructure contributions system.

However, Council remains concerned about a number of aspects of the proposals, including:

- Many of the detailed requirements will be in Regulations, which are not currently available for public comment.
- The absence of additional funding to assist Councils in implementing the reforms.

- The removal of references to threatened species in the objects of the EP&A Act.
- The 14 day mandatory public notification period for all development applications.
- The additional administrative burden of preparing reasons for decisions on development applications separate from standard council reports and development determination notices.
- The apparent onus on Council to upload development consents and approved plans to the NSW planning portal before to make them operational.
- Increasing the power of the Secretary of the Department of Planning & Environment to give advice, concurrence, or approval on behalf of another state agency if there are delays or conflicts in providing advice to Council on planning functions.
- The three month time limit to challenge the validity of a Complying Development Certificate.
- Allowing deferred commencement conditions, special infrastructure contributions and voluntary planning agreements in conjunction with Complying Development Certificates.
- Allowing persons other than accredited certifiers to issue compliance certificates for aspects of building work.

Please find attached Council's detailed comments on the Environmental Planning and Assessment Amendment Bill 2017.

We eagerly await the opportunity to review the draft Regulations that will accompany the Bill.

Should you have any enquiries in relation to Council's submission, please contact Maxine Szeto, Senior Strategic Planner on (02) 9942 2932 who will be happy to assist.

Yours faithfully



David Kerr
Executive Manager Strategic Land-Use Planning

Detailed comments on Environmental Planning and Assessment Amendment Bill 2017

Reference	Support	Concern	Recommendation
Schedule 1 Preliminary			
Objects of the Act (p.3) <i>cl.1.4</i>	Elevation of design and heritage.	No reference to threatened species and ecologically endangered communities (EECs) and their habitats. The conservation of biological diversity is often given a lower priority to other considerations such as development, infrastructure and recreation. The inclusion of threatened species and EECs and their habitats is vital to ensuring that biodiversity values continue to be considered as part of land-use planning, particularly by the NSW Land and Environment Court. The planning system does not adequately protect listed threatened species and native vegetation.	Amend the objects of the Environmental Planning and Assessment Act 1979 (EP&A Act) to include reference to threatened species and EECs and their habitats.
Schedule 2 Planning administration			
Functions of the Commission (p.10) <i>cl.2.9(3)(c)</i>		Whilst acknowledging the intention to expedite the approval process, increasing the power of the Secretary of the Department to give advice, concurrence, or approval on behalf of another state agency, if there are delays or conflicts in providing advice to Council on planning functions has the potential to result in key issues being disregarded and inappropriate development being approved.	Criteria and procedures for the exercise of this authority should be specified in more detail in regulation, failing which, the power should be removed.

Reference	Support	Concern	Recommendation
Sydney district and regional planning panels (p.12-14) <i>Div.2.4, cl.2.13</i> <i>Schedule 2, cl.11, cl.20</i>	Consolidation of provisions governing administration of panels. Special provisions for panel members regarding coastal protection works – Appointment of a member who has expertise in coastal engineering or coastal geomorphology.	Drafting of cl 20 regarding composition of district and regional planning panel in the case of coastal protection works is ambiguous.	Review drafting of cl 20 regarding composition of district and regional planning panel in the case of coastal protection works
Local planning panels (p.14, 26-31) <i>cl.2.17(2), cl.2.18(1), cl.2.20(5), cl.2.27</i>	The concept of local planning panels to provide independent advice on local government planning functions. This approach will increase transparency in decision making, integrity and reduce corruption risks. It is noted that Council has adopted an independent assessment panel to determine certain planning applications.	Implementation of local planning panels is optional. All Councils should establish local planning panels to reduce corruption risks associated with Councilors determining development applications. Annual reporting requirements should not apply unless panels are mandatory. Disclosure of pecuniary interests is only required where “...the interest appears to raise a conflict with the proper performance of the member’s duties...” . This test is too subjective. Clarification is required on whether panel members will be appointed by an elected Council or the General Manager or staff. The provision of an annual report to the Planning Secretary will place another administrative burden on Council. Additional funding from the State	Ensure local planning panels are mandatory for all Councils. Delete cl 27(1)(b) (Disclosure of pecuniary interests) from the criteria that must be met before disclosure is required i.e. any pecuniary interest should require disclosure. Review detail on operational matters e.g. local planning panels in legislation. Council has significant in-house expertise regarding the operation and management of local panels and would like to assist with identifying common issues or areas for inclusion.

Reference	Support	Concern	Recommendation
		government will assist Council in implementing this statutory requirement. Clarity is needed on responsibility of insurance for panel members and this should be articulated in the legislation. For example, are panel members covered by the organisation's insurance for public liability, professional indemnity or workers compensation whilst performing their duties? That is, are they considered to be employees or contractors whilst undertaking these duties?	
Community participation (p.15-21) Schedule 1, cl.6, cl.19 cl.2.21(2), cl.2.23(4), cl.2.24, cl.2.27.	Mandatory requirements to prepare community participation plans (CPPs). Council places a high priority on engagement with the community and has an adopted Community Engagement Policy and Framework. The proposed community participation principles align with good practice community engagement and are consistent with Council's Community Engagement Policy and Framework (which covers all of Council's functions).	Requiring all development applications to be notified for a minimum of 14 days will increase housing approval times. Some developments which have little impact and could be done as complying development except for issues such as heritage or flooding should not be notified. Public notification of reasons for decisions on development applications and how community views were taken into account will be an additional burden on Councils if it is in addition to Councils standard DA assessment report (which includes these matters) Public notification of certain decisions and reasons for the decision should be done online or via the NSW planning portal. Public notification via other means e.g. newspaper will slow down processing of applications and place an additional financial burden on Council.	Apply community participation requirements to the planning agreements process. Remove minimum 14 day notification period and require councils to specify requirements in community participation plan (similar to proposal for modification of consent). Allow public notification of reasons for decisions and how community views were taken into account to take the form of Council's standard DA report. Require all public notification to be undertaken on the NSW planning portal or Council's website.

Reference	Support	Concern	Recommendation
	Publication of CPPs on the NSW planning portal will provide certainty for the community. Limiting challenges to CPPs to within three months of publication gives certainty to Councils. Periodic review of CPPs.	Linking of CPPs with section 402 of the Local Government Act 1993 i.e. Community Strategic Plans (CSPs) is inappropriate as CSPs deal with community engagement at a much higher level, with consideration of the quadruple bottom line for integrated resource, asset and human resources decisions that a local government will make over a ten-year period. The Regulations will need to clarify if the reports on the implementation of CPPs need to be reported in Council's Annual Report (consistent with Integrated Planning and Reporting framework) or elsewhere. Staff resource burden to implement these requirements.	Remove cl.2.23(4) which links CPPs with CSPs. Clarify whether reports on the implementation of CPPs need to be reported in Council's Annual Report. Additional funding is provided to Councils to implement community participation requirements.
Schedule 3 Planning instruments			
NSW planning portal (p.36-37)	Enhancing the role of the NSW planning portal to centralise and improve online planning services for the community.	Administrative burden. Ensuring Council's information technology and systems can integrate efficiently and effectively.	Additional funding is provided to Councils to implement internal process reviews to link with the NSW planning portal.
Planning proposal authority (p.43) s.55	Planning proposals to give effect to Local Strategic Planning Statements (LSPS).		

Reference	Support	Concern	Recommendation
Review of environmental planning instruments (p.44) s.73	Five-yearly review of State environmental planning policies and local environmental plans against set criteria.	The proposed criteria for 5 year LEP reviews do not link with the strategic planning statement . The main test of an LEP should be whether it continues to meet the goals and objectives of the strategic planning statement.	Amend proposed criteria for 5 year reviews of LEPs to focus on continued compliance with the strategic planning statement.
Development control plans (p.44) s.74E(2A)	Standardised format for development control plans (DCPs) to be developed in consultation with Councils. This will improve the readability of all DCPs and assist Councils who have multiple DCPs to provide a single, user friendly document.	The development of the standardised DCP format must consider local character and context.	Extensive Council consultation is undertaken and the standardised DCP format is publically exhibited for comment prior to finalisation.
Local strategic planning statements (p.45) s.3.#	The concept of LSPS.	Preparation of an LSPS prior to the creation of a local housing strategy, as required by the draft District Plans currently on exhibition by the Greater Sydney Commission, would not be appropriate. Any LSPS should be consistent with Council's broader strategic planning and community strategic plan, and any other studies and strategies undertaken.	The Regulations to require LSPS to be prepared once Councils have completed a local housing strategy as required by the draft District Plans. Council requests that any further work on LSPS is undertaken in consultation with Council.

Reference	Support	Concern	Recommendation
Schedule 4 Development assessment and consent			
Complying development certificates (p.49-50) s. 85A, s.4.#	Regulation-making power to provide that complying development certificates (CDCs) for certain categories of development can only be issued by a Council certifier, as specified in the Regulations. CDCs that do not comply with relevant standards can be declared invalid by the Land and Environment Court.	The current application of CDCs in or adjacent to environmentally sensitive areas is an issue. Private certifiers are generally not equipped to assess the adequacy of environmental management controls. For example, threatened species and management of water quality. The concept of a "Deferred commencement " CDC is inconsistent with the "checklist" complying development pathway and has the potential to result in even more non-compliant development as land owners and developers proceed with work without meeting deferred commencement requirements.	The Regulations should specify that the following categories of complying development can only be certified by a Council certifier: threatened species developments (e.g. developments requiring Flora and Fauna Assessments, Species Impact Statements and Environmental Impact Statements); developments in proximity to waterways ; and, development on bushfire prone land with the requirements for establishment of an asset protection zone and/or a bushfire attack level (BAL) or 'BAL 40' or 'flame zone' rating.
Regulations – Part 4 (p.51) s. 105	Compliance levy for CDCs, with remittance provided to Councils to support their compliance role, whether the CDC is issued by Council or private certifiers.		
Modification of consents (p.51) s. 96(3A), s. 96AA	Section 96 modifications cannot be used to approve unauthorised building works.		

Reference	Support	Concern	Recommendation
	Section 96 modifications must take into account the statement of reasons.		
Enforceable undertakings (p.51) s.105	Enforceable undertakings will allow Councils to enter into an agreement with a holder of a development consent to rectify non-compliance and improve behaviours, failing which Council can efficiently apply to the court to enforce its terms.		
Schedule 5 Infrastructure and environmental impact assessment			
Environmental impact assessment (p.54) Division 5.1			In general, the EP&A Act should have greater synchronisation with related legislation such as the Threatened Species Conservation Act 1995.
Review of decisions to refuse concurrence (p.54) Division 5.3		Whilst acknowledging the intention to expedite the approval process, increasing the power of the Secretary of the Department to give advice, concurrence, or approval on behalf of another state agency, if there are delays or conflicts in providing advice to Council on planning functions has the potential to result in key issues being disregarded and inappropriate development being approved.	Criteria and procedures for the exercise of this authority should be specified in more detail in regulation, failing which, the power should be removed.

Reference	Support	Concern	Recommendation
Schedule 6 Building and subdivision certification			
Functions of certifiers (p.57-68) <i>cl.6.5, cl.6.31</i>		The functions of certifiers should include a monitoring and compliance role, which links with cl.6.31.	Amend cl.6.5 to include the functions of certifiers with a monitoring and compliance role.
Requirements before building work commences (p.58-59) <i>cl.6.6</i>		cl.6.6 appears to be missing requirements for the person with the benefit of consent to obtain a construction certificate before work commences and for the certifier to provide a copy of the construction certificate to Council 2 days prior to commencement.	Amend cl.6.6 to include the requirement for persons with the benefit of development consent to obtain a construction certificate and for a certifier (where not Council) to provide a copy of the construction certificate to Council 2 days prior to commencement.
Restriction on issue of construction certificate (p.59) <i>cl.6.8</i>		There is no reference to payment of developer contributions. This is acceptable if contributions are picked up in the regulations.	Amend cl.6.8 to include payment of developer contributions or refer to requirement for payment in regulations.
Requirements before subdivision work commences (p.61) <i>cl.6.12</i>		cl.6.6 appears to be missing requirements for the person with the benefit of consent to obtain a subdivision works certificate before work commences and for the certifier to provide a copy of the subdivision works certificate to Council 2 days prior to commencement.	Amend cl.6.12 to include the requirement for persons with the benefit of development consent to obtain a subdivision works certificate before commencement of subdivision works and for a certifier (where not Council) to provide a copy of the subdivision works certificate to Council 2 days

Reference	Support	Concern	Recommendation
Persons who may issue compliance certificates (p.63) <i>cl.6.17</i>		Clause 6.17 anticipates allowing persons other than accredited certifiers to issue compliance certificates. Given concerns with the current private certification system, any expansion of the system must be subject to stringent accreditation, audit and disciplinary processes of those persons.	The private building certification system should not be expanded to include non-accredited persons until stringent accreditation, audit and disciplinary processes are established for those persons.
Owners building manual (p.67) <i>cl.6.27</i>		There are no controls relating to the purpose, monitoring and compliance of owners building manuals. The introduction of an additional building system requirement must be justified as it will inevitably lead to greater bureaucracy and slower approval processes.	The Regulations must justify and address in detail the purpose of providing an owners building manual as well as monitoring and compliance requirements.
Validity of certificates (p.69) <i>cl.6.32</i>	The concept of the Courts being able to declare certificates other than occupation certificates invalid.	The three month time limit to challenge a certificate is too short. In Council's experience, issues often do not arise until development commences, which can occur some months after approval is granted.	Amend cl.6.32 to allow proceedings to be brought within 6 months after the issue of the certificate.
Schedule 7 Infrastructure contributions and finance			
Development contributions and complying development certificates	Review of the infrastructure contributions system including special infrastructure contributions, section 94 guidelines and	Allowing deferred commencement conditions, special infrastructure contributions and voluntary planning agreements in conjunction with CDCs is inconsistent with the operation of a simple checklist approval process for minor development and could potentially	Remove deferred commencement conditions, special infrastructure contributions and voluntary planning agreements in conjunction with CDCs.

Reference	Support	Concern	Recommendation
(p.73) s.93F, s.94EE, s.94EF, s.93K	section 94A levy variation requests.	result in inappropriate outcomes. Allowing the Minister to determine the extent of the provision of the public benefit under a planning agreement is not required given the voluntary nature of such agreements and has the potential to unreasonably limit Councils in their negotiations. There is no mention of 'environmental infrastructure' in the proposed review of the infrastructure contributions system. Whilst previous arrangements for infrastructure contributions may have adequately accounted for certain types of infrastructure (e.g. roads and footpaths), inadequate arrangements have been afforded to the construction and ongoing maintenance of environmental infrastructure including (but not limited to) water quality devices, revegetation and riparian corridors. Outcomes of such oversights are evident on the Northern Beaches with various recent and historical large developments (e.g. residential subdivision, seniors living) having no or insufficient management of water quality devices and poor quality riparian corridors. The flow on effect of this is a substantial impact to water quality and downstream environments (including weed plumes) at a catchment scale.	Remove the ability for the Minister to determine public benefits from planning agreements. Consider 'environmental infrastructure' as part of the infrastructure contributions system review, such as water quality infrastructure and the establishment and maintenance of vegetated riparian corridors.
Schedule 8 Reviews and appeals			
Date from which development consent has		The section appears to state that all development consents do not take effect until they are uploaded to the NSW planning portal. This presupposes systems	Amend s.83 to remove the requirement that that development consents take effect from the date

Reference	Support	Concern	Recommendation
effect (p.75) s.83		are in place across all Councils to implement this requirement and sufficient resources are also available.	they are registered on the NSW planning portal until such time as it is clear that this approach can be implemented without a significant cost and time burden on Councils.
Powers of Court on appeals (p.80) <i>cl.8.14</i>		The ability for the Court to give approval without concurrence of relevant persons or bodies, as well as overturn any approvals, such as the current s.79B provisions for threatened species will potentially negatively impact biological diversity, as this is often given a lower consideration by the Courts.	Amend cl.8.14 to prohibit the Court from giving approval and/or overturn any approvals without concurrence of relevant persons or bodies.
Schedule 9 Implementation and enforcement			
Enforcement of undertakings (p.17) s.9.#, <i>cl.9.36</i>	Increased power for Councils and the Court to enforce compliance with complying development certificates and construction certificates.		
Schedule 10 Miscellaneous			
			The Department should consider standardising the section 149 planning certificates template

