SUBMISSION ON ISSUES PAPER FOR REVIEW OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000

Penrith City Council City Planning and Development Services Department Submission

November 2017

ISSUES PAPER – REVIEW OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000

Thank you for the opportunity to make comment on the "Review of the Environmental Planning and Assessment Regulation 2000 Issues paper".

Council supports the initiative to improve the NSW planning system through its progression of changes to the Environmental Planning and Assessment Act 1979 and supporting changes to the Environmental Planning and Assessment Regulation.

Key to successful implementation of the legislative updates is application of appropriate changes to the regulation to support the initiatives. Council welcomes any opportunity to contribute to the development of the new Regulation. Our response to the Regulation Review Issues paper, is set out in this document.

A more modern and accessible Regulation

Box 6: Making a submission on a planning matter
The proposal to formalise and standardise process and clarify appropriate content for submissions on planning matters is ***supported.*** Many Councils, Penrith included, already have the capacity and encourage submissions to be made on development applications through on line systems such as DA Trackers and require persons making submissions to provide an email address to facilitate responses. The majority of submissions on applications are now received through email. Expansion of this type of electronic process to exhibitions on planning instruments and centralisation of the mechanism through the NSW Planning Portal is also ***supported*** and would be enhanced by clarification on the portal as to what constitutes relevant issues for submissions to focus on. Alternate pathways such as making submission by mail to the relevant Council also need to be retained to ensure the ability to have a say is accessible to all members/groups within the community This system could also be expanded to include Advertised development applications and replace cumbersome and expensive newspaper advertisements with brief advice directing interested parties to the Portal or Council webpage.

Box 7: Examples of outdated/administratively burdensome provisions
Posting notices of determinations to submitters where they have elected not to be contacted by email: A proposal to make notices of determination, including reasons for decisions and how community views were taken into account publicly available on the NSW Planning Portal or a Council's website is ***supported***. Many Councils, Penrith included already have all Development Application assessment reports and notices of determination, publicly available on their DA Trackers. Council also currently dispatches all notices of determination and accompanying plans and documents electronically.

Where required by the Regulation (e.g. Designated Development), submitters who have not provided an email address could be issued with a letter advising them the documents can be viewed on the web page or portal and a Council's customer service staff could provide assistance in viewing these where required.

VPA register being maintained by Council:

The proposal for all VPAs being maintained in a register and available to the public online through a Council's website or the NSW planning portal is supported. Hard copies or assistance in viewing electronic versions may be provided by a Council's customer service team.

Notifying the community of Major Planning Proposals, DCPs and S94 Plans:

Where a Council's does not hold a comprehensive record of email addresses for residents; mail notification of major development proposals and amendments to planning instruments needs to be undertaken to protect the interests of all potentially affected persons.

Where Council is the responsible authority, community engagement must be undertaken in accordance with the Council's Community Participation/Engagement Plan. If a letter to residents and occupiers is required the process can be streamlined by advising in the letter, that the details of the proposal/plan can be viewed electronically, and assistance provided where required to residents who need help to access them.

Requirement for signatures on Certificates and Documents

Various clauses throughout the Regulation, for example cl 135 and Complying Development cl155 Form of Occupation Certificate, include a requirement for a Certificate to contain the signature of the person who issues the document. It is ***recommended*** that alternatives to this are investigated such as implementation of appropriate metadata captured by the system from which the certificate is being authorised to replace the physical signature. This type of approach is more in keeping with contemporary business practices and initiatives such as e-planning and the Planning Portal. Where the electronic authorisation of documents is not legally robust and auditable a signature may still be required.

1. Planning instruments

Box 9: Provisions relating to planning instruments in the current Regulation

Notification requirements where Council does not support a written planning proposal

The proposal to prescribe a timeframe within which planning authorities must notify proponents that a request for preparation of a planning proposal, ***is supported***. A suggested appropriate timeframe is 28 days from the date of a council's resolution.

Costs and expenses of undertaking studies, etc., relating to planning proposals

The continuation of a mechanism to allow Councils to recoup expenses associated with planning proposals ***is supported.*** It is recommended that the amounts be increased to more accurately reflect the costs of the Council based on the complexity of the proposal. Full cost recovery should be available.

Making and amending LEPs

The continuation of current provisions for making and amending LEPs contained in the Regulation is ***supported***. Additional resourcing for the DP&E to assess and progress council submissions is recommended.

Amendment and repeal of DCP/provisions

It is recommended that clause 23 of the Regulation be amended to delete the current requirement for 14 days' notice of the repeal. Given that repealing a DCP would require a resolution by Council and that the 14 days advance notice does not provide a right of submission from the public, there is limited public advantage in the clause.

Box 10: Related initiative – Standard format Development Control Plans

In previous submissions to the Department Council has been supportive of the proposal to introduce a standardised format for DCPs and acknowledges the benefits which may be gained in publishing and navigating the documents on the NSW Planning Portal. This support was, and remains qualified. Any proposal to control the content as it relates to achievement of local character and development outcomes in accordance with the aspirations of the local community are ***not supported***.

As such it is imperative that significant and meaningful ***engagement*** with Local Government, at all stages of the development of a standard format, is undertaken.

Conditional support to a standard format DCP is given provided only the structure of the DCP is mandated and councils are free to add their own content recognising local conditions, character and input from community consultation.

A Standardised format allowing for spatial representation of provisions on land is ***supported***

It is considered that a suite of optional model DCP provisions would be useful. The model DCPs must be developed in consultation with local government and be suitable to address the unique issues of different areas such as for development in rural areas, release areas, infill areas, coastal areas or inner city areas.

The inclusion of prescribed 'subject matter' is ***not supported*** as this would have the potential to undermine local government's ability to implement local provisions that address the specific needs of local areas and local communities.

2 Development assessment and consent

Issues relating to development assessment and consent provisions

2.1 Prescribed policy guidance documents for state significant development

The initiative to standardise and streamline the upfront processes for state significant development is ***supported***.

2.2 Provision for a modification application to be rejected or withdrawn

The proposal to formalise a process to allow for modification applications to be rejected or withdrawn is ***conditionally supported*** on the basis that; the requirement for the proponent to address the reasons given by the consent authority in granting the original consent be included in the submission requirements for a Sec 96 application in the regulation

2.3 Provision to allow for the surrender of a development consent or a Part 3A approval where one or more landowners do not consent

The proposal to provide for surrender of a development consent without the consent of the landowners is ***not supported*** unless the consent or approval did not require the owner's consent when the application was submitted eg Sec 8F or 49 of the existing regulation. In all other cases the landowners consent should be required.

2.4 Locating public exhibition requirements

The proposal to include all methods of engagement with the community into a Community Participation Plan, including exhibition requirements for development applications and other planning matters has merit.

Concern is expressed that the development industry and community will need to access different documents than they are used to in order to obtain this information and that uncertainty and misinformation may result from it not being aligned with other planning instrument and DCP information. Even when CPPs are published on the NSW planning portal, it will be an additional step for an applicant to identify the relevant requirements.

The proposal to locate exhibition requirements across a range of State instruments and policies into one place is ***supported.***

2.5 Requirements for notices of determination

Any proposal to make notices of determination, including reasons for decisions and how community views were taken into account publicly available on the NSW Planning Portal or a Council's website is ***supported***. Many Councils, Penrith included already have all Development Application assessment reports and notices of determination, publicly available on their DA Trackers. Council also currently dispatches all notices of determination and accompanying plans and documents electronically. Submitters who have not provided an email address could be issued with a letter advising them the documents can be viewed on the web page or portal and Council's customer service staff could provide assistance in viewing these where required.

2.6 Notification of internal review decision

A proposal to make notices of determination, including reasons for decisions and how community views were taken into account publicly available on the NSW Planning Portal or a Council's website is ***supported***. Many Councils, Penrith included already have all Development Application assessment reports and notices of determination, publicly available on their DA Trackers. Council also currently dispatches all notices of determination and accompanying plans and documents electronically.

Where required by the Regulation, submitters who have not provided an email address could be issued with a letter advising them the documents can be viewed on the web page or portal and a Council's customer service staff could provide assistance in viewing these where required.

Any proposal to introduce a requirement to notify persons who made submissions of a determination where the original application did not have the same requirement is ***not supported***.

2.7 Classes of designated development

In relation to the designated development provisions, it is ***recommended*** that a general review should be undertaken to ensure that Schedule 3 of the EP&A Regulation and Schedule 1 of POEO have the same definition and thresholds where appropriate, and to remove inconsistencies as far as practicable. For example:

1. The definition of "Crushing, grinding or separating" being one example. The EPA Regulation includes waste products (such as slag, concrete, bricks, tiles etc.) in the definition, whilst the POEO definition specifically excludes waste material. Also, in the same definition the EPA Regulation includes "intended capacity" whilst the POEO definition just states "capacity"; and

2. The EPA Regulation definition of "Drum or container reconditioning" compared with the POEO definition of "Container reconditioning". The EPA Regulation refers broadly to "poisonous or radioactive" substances in the Australian Dangerous Goods Code, whereas the POEO definition refers to specific classes of dangerous goods. In addition, the EPA Regulation has a threshold of "more than 100 drums per day, unless the works are wholly contained within a building". POEO does not make any distinction between activities being conducted inside or outside of a building.

2.8 Definition of an environmentally sensitive area in Schedule 3

Some recommended changes to the definition are as follows;

environmentally sensitive area means:

(a) land identified in an environmental planning instrument as an environment protection zone such as for the protection or preservation of habitat, plant communities, ***CONNECTIVITY***, escarpments, wetland or foreshore or land protected or preserved under State Environmental Planning Policy No 14—Coastal Wetlands or State Environmental Planning Policy No 26—Littoral Rainforests, or ***SEPP ENVIRONMENT (PREVIOUSLY SREP20)***

(b) land reserved as national parks or historic sites or dedicated as nature reserves or declared as wilderness or ***PROTECTED BY A BIODIVERSITY STEWARDSHIP AGREEMENT UNDER THE BIODIVERSITY CONSERVATION ACT 2016*** (under the National Parks and Wildlife Act 1974), or

(c) an area declared to be an aquatic reserve under Division 2 of Part 5 of the Marine Estate Management Act 2014, or

(d) land reserved or dedicated within the meaning of the Crown Lands Act 1989 for the preservation of flora, fauna, geological formations or for other environmental protection purposes, or

(e) land declared as wilderness under the Wilderness Act 1987.

3 Environmental assessment

Issue relating to environmental assessment provisions
3.1 Requirement for public agencies to make their environmental assessments publicly available The proposal to have public agencies to make their environmental assessments publicly available ***is supported***.

4. Fees and charges

Provisions relating to fees and charges
Fees for development applications assessed by local councils. DA fees are not regularly reviewed within the regulation and so do not keep pace with costs to Council of undertaking assessment and determination of applications. It is recommended that current fees are reviewed to align with the actual cost to Council of undertaking assessment and determination and then updated annually in accordance with the CPI. Consideration could be given to establishing a fee regime approved by the Secretary or Minister which is called up by the Act or Regulation but sits outside of it so that it can be more readily updated without the requirement to amend legislation.
Fees for development applications determined by IHAPS or Local Planning Panels Introduction of mandatory Local Planning Panels will have direct and significant cost and resourcing implications. Current fee structure has not been designed to accommodate the additional costs of administering the Panel or providing remuneration to the four panel members. As such the review of the regulation should consider the introduction of a mechanism for Council's to recover the cost of administering and running the panel which is additional to the existing statutory DA fee. Based on numbers of applications within the advertised thresholds, it is estimated that running a Local Planning Panel could cost Penrith Council over $100,000 per year. This additional cost is not able to be absorbed by the Planning Department through revenue from development application fees. As Council has a high percentage (97%) of applications currently determined under delegated authority, no savings from diverting applications away from determination by the Council will be realised. The Plan First Levy should be considered as a potential funding mechanism otherwise a DA fee increase will be necessary to avoid impact on assessment and determination service levels including Council's ability to administer the Local Planning Panels.
Calculation of estimated cost of works Initiatives outlined in the draft e-planning regulation to standardise estimated cost of development through the planning portal are ***supported***.
Fees for planning certificates

It is ***recommended*** that current fees are reviewed to align with the actual cost to Councils of preparing the certificates and then updated annually in accordance with the CPI.

Consideration could be given to establishing a fee regime approved by the Secretary or Minister which is called up by the Act or Regulation but sits outside of it so that it can be more readily updated without the requirement to amend legislation.

Planning reform fund fees

In the interests of transparency and to aid in preparation of mandatory reporting, it is ***recommended*** that planning reform fund fees are separately calculated and identified to proponents of planning applications. Planning reform fund fees should also apply to complying development certificates as the Department is losing a significant revenue stream through this approval pathway. CDC approvals will likely increase significantly as complying development is expanded to include medium density housing. Capturing a contribution toward planning reform from CDCs is considered especially important as a significant amount of the work undertaken by the Department in planning reform is in the complying development space.

Fees for S 96 modifications

Greater clarity is required in the structure and description of the S 96 application types and the fees which apply to them. The definitions in the current provisions and method of calculation of fees is confusing and overly complex.

Subdivision fees

Clarification of descriptions required – e.g. opening of road v not opening of road

5. Development Contributions

Issues relating to development contribution provisions

5.1 Practice notes for VPAs

The proposal to require *consideration* of practice notes in the preparation of VPAs will help ensure clarity and consistency in the process and is ***supported in principle***. The practice note should be implemented as a guide and not include mandated content. Should this initiative be pursued, it should be the subject of consultation with council's prior to finalisation and implementation.

5.2 Public inspection of draft and final planning agreements

The proposal to exhibit all final VPAs on the Planning Portal is supported. The exhibition of Draft VPAs on the Planning Portal or a Council's website would need to be accompanied by disclaimers to and information on the purpose of the Draft VPA and is ***supported in principle***.

5.3 Council policies on VPAs

In accordance with Council's January 2017submission on the draft policy framework for VPAs, it is considered that greater consistency, clarity and efficiency would be achieved if the DP&E prepared and required compliance with a State policy on VPAs, rather than mandating each council prepare and adopt its own policy. This approach would:

- relieve councils – especially smaller, less well-resourced rural LGAs – of the burden of preparing exhibiting and adopting a policy
- provide a consistent framework for development proponents who work across numerous LGAs
- significantly reduce prospects for unintended inappropriate VPA content. The State VPA template would provide all parties with certainty and clarity as to what can be included in the agreement, acting as an "honest broker" in the negotiation process.

Form and content of VPAs

It is ***recommended*** that the format of a VPA requires a field to capture the date of signing.

Indexation of Sec 94 contributions

It is ***recommended*** that alternate methods of indexing s94 Contribution rates be investigated. This could include indexation to indices more closely aligned to development and construction cost movements.

Maximum percentage of Section 94A levy

It is ***recommended*** that Clause 25K of the Regulation be amended to permit a "base" levy up to 3% for all councils where the levy would apply to major city centers such as Penrith or St Marys, negating the need to make special applications to the Minister. Scope to apply a 3% base levy would provide councils with more flexibility in determining whether to pursue a traditional s94 plan or a flat rate levy. A base levy up to 3% would permit funding increased infrastructure and facilities (including replacement and maintenance) essential to the successful development of major city centers, especially those on public transport networks. This suggestion would be consistent with the Review objectives of reducing administrative burden and increasing procedural efficiency.

6. Planning Certificates

Issues relating to planning certificate provisions

Role of planning certificates

The role of a planning certificate should be to provide a prospective purchaser or developer of a property with ***all*** of the essential information a council holds which they may require in order to make an informed decision and/or design and implement an appropriate development in accordance with the relevant land attributes and restrictions. The certificate must be able to be relied upon from a legal perspective.

With the increase in complying development and the reliance of designers and Certifiers on Planning Certificates to prepare and authorise accurate CDC's, it is ***recommended*** that the requirements of a planning certificate to be relied on to enable complying development should be revised. In many cases, for example, where the land is subject to flood planning controls a more detailed level of information is required than that prescribed by a 149(2). This would reduce the number of CDCs being issued which contain errors and the resulting need for compliance action.

Information on planning certificates

The information contained on a planning certificate should be fit for its intended purpose. It is recommended that a Certificate contain distinct sections which deal with;

1. Prescribed statutory information in plain English such as zonings, all permitted land uses, (including under SEPPs and additional permitted uses) relevant EPIs and key controls (such as displayed on the planning portal), DCP information (and links to content), and attributes based land constraints such as flooding information, bushfire, ANEF, OLS, etc where they have been provided by Government Agencies.
2. Other information which may be held by Council or contained in Council Policies such as Sec 94, VPAs and known risk constraints such as contaminated land information, hazards etc.
3. Certificates should ***not*** list items that do not apply (eg Coastal protection areas, site compatibility certificates) or may apply in certain circumstances – key matters should be clearly identified and shown up front

Increasing the amount of information, particularly non-statutory, included in a planning certificate serves to better inform the applicant, however also increases the risk associated with providing the information. In this regard, Councils are best placed to retain control of issuing planning certificates, to ensure the accuracy of information provided.

It is further ***recommended*** that orders, approvals/directions or charges ***should not*** be required on a planning certificate.

Language and format of planning certificates

The proposal to consider introduction of a standardised format and language for Planning Certificates ***is supported***. This will give councils, purchasers, lawyers and developers clarity and consistency in the documents they are producing/relying on to make decisions.

It would be beneficial if representatives from all stakeholder groups could workshop the requirements to contribute to development of a standard format and language for planning certificates.

Should planning certificates be available through the NSW planning Portal?

It is ***recommended*** that statutory planning certificates ***continue to be generated by Local Councils***. The verification of the accuracy of data provided on the certificates is currently completed by Councils effectively in timely fashion. In order to be able to be relied on from a legal perspective, a planning certificate needs to be issued by the Council that inputs and controls the data; ensuring checks for accuracy are undertaken. Additionally, Councils have the resources and ability to respond to planning updates and new development in an efficient manner.

There may be the ***opportunity*** for the portal to provide a certificate function, whereby information on the portal for a property can be provided to users in an easy to access format. Any portal certificates ***should not*** be legal documents and should be subject to appropriate disclaimers and conditions of use which confirm it is not able to be relied on as a legal document.

7. Local Planning Panels (IHAPs)

Introduction of Mandatory Local Planning Panels in Greater Sydney
The implementation of amendments to the EPA Act requiring mandatory Local Planning Panels for the entire Sydney region has not considered the performance record of individual Council's. Many Sydney Councils, including Penrith, have a history of providing high levels of delegation to staff in determining applications. It is ***recommended*** that this requirement be reviewed to exclude Council's in the Sydney Region with demonstrated high levels of delegation to Council staff. The mandatory introduction of LPP determinations in lieu of staff exercising delegations will add to the cost and timeframes of industry in gaining development approval. LPPs will have substantial administration and cost implications, introducing another layer of reporting and decision making; significantly increasing the administrative burden and reducing the procedural efficiency of Council in the determination of development applications. An increase in the dollar threshold for referral to the IHAP to $10 million is ***recommended*** as this would significantly increase the number of development applications still able to be determined under delegated authority and therefore reduce the impost on councils and developers in IHAP implementation.
The introduction of mandatory LPPs across the Sydney metropolitan area legislates that the administrative and cost burden of the Panels operations are to be borne by the Council. These costs include provision of staff, facilities, monitoring performance and meeting all costs of the panel including remuneration of the four Panel members. Advice issued by the Department of Planning and Environment has estimated this cost at up to $100,000 per Panel per year. Councils have been advised that the mechanism for cost recovery will be outlined in amendments to the Environmental Planning and Assessment Regulation 2000. No advice has been received to date regarding the cost of remuneration for the Panel members. It is r***ecommended*** that the legislation included in the regulations will allow for Council's to recover the full costs of administration, resourcing and remuneration as a result of being required to operate an LPP.