

19 December 2017

Director, Legislative Updates  
Department of Planning and Environment  
GPO Box 39  
SYDNEY NSW 2001

Dear Sir/Madam

### **Review of Environmental Planning and Assessment Regulation 2000**

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I refer to my letter dated 24 November 2017 providing a draft submission on the *Environmental Planning & Assessment Regulations Review Issues Paper* in advance of Council's formal submission.

At its meeting on 13 December, Council considered Group Manager's Report No. PL 62/17 concerning the review of the *Environmental Planning and Assessment Regulation 2000*. Council resolved to forward a submission to the Department of Environment and Planning indicating general support for the review Issues Paper and requesting the major issues for Hornsby Shire identified in Group Manager's Report No. PL62/17 be addressed, including:

1. The Regulation should clarify what constitutes a submission;
2. Councils should maintain responsibility for controls within Development Control Plans;
3. Prescribed timeframes for development assessment should be increased;
4. Reviews of Environmental Factors by public authorities should be made publicly available;
5. Councils should be responsible for determining fees for evaluation of planning proposals;
6. Section 94 Contribution caps should be indexed in accordance with the Consumer Price Index;
7. Section 149 Certificates should be retained to identify the planning affectations for land; and
8. Information to be publicly available through the development application process should be clarified.

Please find attached a copy of the abovementioned report and a copy of the confirmed Minutes of the 13 December 2017 meeting as Council's submission in response to the *Environmental Planning & Assessment Regulations Review Issues Paper*.

Should you require clarification on any matters raised in this submission, please contact Melissa Burne, Strategic Planner by phone on 9847 6767.

Yours faithfully



Jason Rawlin  
Acting Manager  
Strategic Planning Branch

TRIM Reference: F2004/07180-02

**11 PL62/17 Review of Environmental Planning and Assessment Regulation 2000****(F2004/07180-02)**

Mr Ross Walker, on behalf of Beecroft Cheltenham Civic Trust addressed Council regarding this item.

RESOLVED ON THE MOTION OF COUNCILLOR TILBURY, seconded by COUNCILLOR MCINTOSH,

THAT a submission be forwarded to the Department of Planning and Environment indicating Council's general support for the review of the Environmental Planning and Assessment Regulation 2000 and requesting the Department address the major issues for Hornsby Shire identified in Group Manager's Report No. PL62/17, including:

1. The Regulation should clarify what constitutes a submission;
2. Councils should maintain responsibility for controls within Development Control Plans;
3. Prescribed timeframes for development assessment should be increased;
4. Reviews of Environmental Factors by public authorities should be made publicly available;
5. Councils should be responsible for determining fees for evaluation of planning proposals;
6. Section 94 Contribution caps should be indexed in accordance with the Consumer Price Index;
7. Section 149 Certificates should be retained to identify the planning affectations for land; and
8. Information to be publicly available through the development application process should be clarified.

FOR: COUNCILLORS BROWNE, DEL GALLEGO, HEYDE, HUTCHENCE, MARR, MCINTOSH,  
NICITA, RUDDOCK, TILBURY AND WADDELL

AGAINST: NIL

**11 REVIEW OF ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000****EXECUTIVE SUMMARY**

- In September, the NSW Government released the *Review of the Environmental Planning and Assessment (EP&A) Regulation 2000 Issues Paper* (Issues Paper) for comment.
- The review of the *EP&A Regulation* is part of the Government's broader review of the *EP&A Act 1979*. This review follows the release for comment of the draft *EP&A Act* amendments earlier this year to which Council made a submission. The draft Bill was passed in NSW Parliament on 15 November 2017.
- The review of the *EP&A Regulation* is the first comprehensive review since 2000 and the outcomes of this review will inform the preparation of a new *EP&A Regulation* which will be released (in draft form) for consultation in 2018.
- It is recommended that Council forward a submission to the Department of Planning and Environment (DP&E) indicating its general support for the review of the *EP&A Regulation* and requesting the DP&E address the issues identified in this report.

**RECOMMENDATION**

THAT a submission be forwarded to the Department of Planning and Environment indicating Council's general support for the review of the *Environmental Planning and Assessment Regulation 2000* and requesting the Department address the major issues for Hornsby Shire identified in Group Manager's Report No. PL62/17, including:

1. The Regulation should clarify what constitutes a submission;
2. Councils should maintain responsibility for controls within Development Control Plans;
3. Prescribed timeframes for Development Assessment should be increased;
4. Reviews of Environmental Factors by public authorities should be made publicly available;
5. Councils should be responsible for determining fees for evaluation of planning proposals;
6. Section 94 Contribution caps should be indexed in accordance with Consumer Price Index;
7. Section 149 Certificates should be retained to identify the planning affectations for land; and
8. Information to be publicly available through the DA process should be clarified.

## PURPOSE

The purpose of this report is to outline the key issues for Hornsby Shire in response to a review of the *EP&A Regulation* being undertaken by the DP&E and to seek endorsement of a submission.

## BACKGROUND

In May 2016, the NSW Government announced a review of the *EP&A Act* with the intention of drafting amendments to modernise the planning system that build upon areas of previous agreement from the 2013 White Paper: *A New Planning System for NSW* and in response to the establishment of the Greater Sydney Commission. The review included consultation on planning issues and policy proposals with key stakeholders via forums, targeted on-line surveys and correspondence.

In January 2017, the NSW Government placed on public exhibition documents for the *Planning Legislation Updates*, including a draft *EP&A Act* amendment. The underlying objectives of the updates are to enhance community participation, promote strategic planning, increase probity and accountability in decision making, and promote simpler and faster processes for all participants.

At its meeting on 12 April, 2017, Council considered Group Manager's Report No. PL17/17 outlining the proposed planning legislation updates and identifying implications for Hornsby Shire. Council resolved to forward a submission to the DP&E indicating general support for the *Planning Legislation Updates* subject to the Department addressing issues relating to Community Participation Plans, Local Strategic Planning Statements, Complying Development Codes and Local Planning Panels.

In October 2017, amendments to the planning legislation were introduced into the NSW Parliament. The *Environmental Planning and Assessment Amendment Bill 2017* introduced for debate was largely consistent with that exhibited for comment. On 15 November 2017, the NSW Parliament passed the *EP&A Amendment Bill 2017*.

The *EP&A Regulation* complements the *EP&A Act* and provides the key operational provisions for the NSW planning system, many of which relate to the day to day operational activities of Council's planning functions. In September 2017, the DP&E released the *Review of the Environmental Planning and Assessment Regulation 2000 Issues Paper* for comment. The DP&E advised the objective of the paper is to initiate a review of the *EP&A Regulation* to:

- Reduce administrative burden and increase procedural efficiency;
- Reduce complexity; and
- Establish a simpler, more modern and transparent planning system.

The DP&E is seeking comments on issues highlighted in the Issues Paper and to assist identify other issues with the *EP&A Regulation*. This is the first comprehensive review since 2000 and will inform the preparation of a new *EP&A Regulation* which will be released in draft for consultation in 2018.

## DISCUSSION

This report outlines the key issues for Hornsby Shire in relation to the Issues Paper and planning functions under the *EP&A Regulation* with the intent of making a submission to the DP&E. The review is generally supported as it provides an opportunity for the Regulation to be updated to:

- Be consistent with *Standard Instrument LEP* format and language;
- Reflect changes in technology;
- Ensure consistency throughout planning legislation in relation to transparency and accountability, public exhibition requirements and availability of information to the public; and

- Clarify matters identified in the recent *EP&A Act* amendments that warrant further consideration.

Discussion in the balance of this report is arranged under headings which relate to the Issues Paper and key operational areas of the *EP&A Regulation*. Submissions on the review of the *EP&A Regulation* closed on 24 November 2017. Accordingly, a copy of this report has been forwarded to the DP&E as Council's unendorsed draft submission which will be updated pending Council's resolution.

#### **A. MODERN AND ACCESSIBLE REGULATION**

The DP&E has identified the review of the *EP&A Regulation* is an opportunity to promote modern and accessible legislation. The Issues Paper outlines a number of issues that should be considered to do same, including evaluating the process and methods for the making a formal submission to a planning authority. Reasons for evaluating the identified issues include the opportunity to simplify provisions to reduce administrative burden, and to respond to advancements in technology and communication methods.

##### **Key Issues for Council**

- a) Providing clarity in the *EP&A Regulation* on what constitutes a submission is supported. At a minimum, contact details should be provided in a submission.

Council receives submissions on planning matters through a variety of channels including e-mail, fax, post, survey response and online feedback. Submissions include individual letters, form letters, written comments provided at information sessions and petitions. Council responds to submissions based on the contact details provided in the submission. Communications include acknowledgment of submissions, advice concerning Council meetings at which a matter will be considered, Council's resolution, and future consultation on related matters.

To assist administration, a preferred e-mail or postal address should be provided. Administration of submissions includes their electronic storage. In this regard, the subject of the submission should be identified clearly.

Petitions are received in a variety of forms and information can often be difficult to interpret. Council is also aware of cases where people signing petitions have felt compelled to do so without any opinion on the matter or desire to be further contacted. Where petitions are submitted, there should be minimum requirements met for the acceptance of petitions as submissions. Minimum requirements could be applied to petitions to ensure the head petitioner provides appropriate contact details and an undertaking to advise fellow petitioners of the outcome of the petition.

To assist Council's communication in response to comments on specific planning matters and reduce administrative burden, the lines of communication should be specific, the preferred means of contact would be e-mail or postal address. Phone numbers are useful to assist planning officers to make direct contact with submitters to further discuss concerns. However, phone numbers and social media accounts should not be relied on as a sole contact for submissions.

**Recommend:** At a minimum, submissions on planning matters should be made in writing, clearly marked with the subject of the submission, and include the submitter's first name and surname, a preferred contact address (e-mail or postal address) and their place of residence/business address.

Where the submission is a petition, the head petitioner should be required to provide the same minimum contact details and they should carry the onus of providing updates on outcomes of the matter for which the petition was provided.

## **B. EXAMINING EXISTING PROVISIONS AND IDENTIFYING KNOWN ISSUES**

The Issues Paper outlines the key operational provisions of the current *EP&A Regulation* and known issues. The Issues Paper requests feedback on the known issues and other suggestions for change to improve the key operational provisions.

### **1. Planning Instruments**

The key land use planning instruments in NSW are Local Environmental Plans (LEPs) and State Environmental Planning Policies (SEPPs). The *EP&A Act* also provides for supplementary planning documents such as Development Control Plans (DCPs).

#### **Key issues for Council**

- a) The new *EP&A Act* will enable the Regulation to standardise DCPs. Council has indicated support of the standardisation of the form of DCPs but not of the content. The opportunity for councils to provide detailed guidance to address local character and their communities' preferences should not be diminished. Preparation of Model Provisions for content for DCPs has also been suggested. Model mandated provisions under the *Standard Instrument LEP* were problematic for a number of councils seeking to manage local conditions and character. Should model DCP provisions be prepared, these provisions should not be mandated.

**Recommend:** A reference group of council planners should be set up to advise the DP&E on how to standardise the structure of DCPs, without limiting the content of the plans and to consider model provisions for application in DCPs.

- b) After considering any submissions about a draft DCP, the *EP&A Regulation* currently allows a plan to be approved with any 'such alterations as the council thinks fit'. To improve transparency, the Issues Paper suggests a requirement for the re-exhibition of an amended plan in certain circumstances. For example, re-exhibition could be required where amendments substantially alter the form or objectives of the draft DCP.

There is no objection to improving transparency. However, the proposal to require re-exhibition of an amended plan in specified circumstances is not supported as it could cause unnecessary delays to planning process. Council reports provide sufficient transparency in providing explanation of any DCP amendments following public exhibition.

**Recommend:** Councils should retain discretion on how and when to re-exhibit a DCP.

### **2. Development Assessment and Consent**

Various parts of the *EP&A Regulation* are relevant to the development assessment and consent process. Of note, Part 6 of the Regulation includes requirements for Development Applications (DAs), including public participation, determination, requests for additional information, concurrence and assessment timeframes.

#### **Key issues for Council**

- a) The *EP&A Regulation* currently prescribes timeframes for DA procedures as 40 days for local, 60 days for integrated and designated, and 90 days for State Significant Infrastructure development. The timeframes should be reviewed. Council is aware of some applicants lodging appeals to the Land and Environment Court for DAs on the deemed refusal day to

force the matter to a Section 34 conciliation meeting. This activity increases costs and administration for councils as it requires councils to brief lawyers and prepare legal statements to meet court deadlines. Additional information is often presented at the conciliation meeting and a decision negotiated with the applicant and council staff which could have been managed at less cost within a more realistic timeframe.

**Recommend:** The prescribed timeframes for DAs should be increased to a minimum of 50 for local, 70 days for integrated and designated and 100 days for State Significant Infrastructure development.

- b) Deemed refusal timeframes should also be increased where DAs are required to be referred to an Independent Hearing and Assessment Panel (IHAP) for determination. This has implications for costs (time, administration and resourcing) incurred by councils, as well as timeframes for completion of assessment. The Development Assessment Best Practice Guide, March 2017 allows 5 days for DAs to be determined by a Local Planning Panel to meet the deemed approval time of 40 days. DAs referred to an IHAP require a more realistic deemed refusal period of at least an additional 10 days.

**Recommend:** Deemed refusal timeframes should add an additional 10 days where DAs are referred to an IHAP for determination.

- c) The exhibition of the draft EP&A Act amendments earlier this year identified a proposal to introduce incentives for early consultation into the *EP&A Regulation*. Council flagged in its submission that there are a number of practical problems in ensuring that the proponent has entered into meaningful consultation with the community prior to lodgement of a development application. For example, a developer may purport to have consulted and produce proposed development plans and documentation that were referred to neighbours for comment. However, there is no way to determine that the plans and documentation produced are the ones referred or that the developer has amended the proposal in response to feedback received.

It is necessary that Council continue to exhibit development proposals for community comment. Accordingly, should the DP&E wish to introduce incentives for early consultation, a reduction in assessment fees or public exhibition requirements in exchange for consultation prior to DA lodgement should not be introduced.

**Recommend:** The Department should not pursue a reduction in assessment fees or minimum statutory public exhibition requirements as incentives for early consultation.

- d) The *EP&A Regulation* does not currently specify the sensitive categories of complying development for which only a council certifier is authorised to approve. Council previously made comment on this issue as part of its submission on the draft *EP&A Act* amendments. Notwithstanding, it is understood that the draft *EP&A Act Bill* specifies that the Regulation can identify types of complying development that should only be issued by council.

The proposal to specify certain sensitive categories of complying development conflicts with the State Government's original philosophies for establishing complying development, that being the quick and easy evaluation of low impact, routine development against a set of predetermined standards. Introducing an additional development pathway will further complicate the planning system and the introduction of any categories of development that are deemed sensitive would better be considered by Council on their merit as a development application.

**Recommend:** The draft *EP&A Regulation* should not be amended to introduce sensitive categories of complying development and the associated requirement that only councils be able to determine same.

- e) Councils are currently required to publish a notice of determination, including the decision and date of decision, in the local newspaper. The draft *EP&A Act* amendments exhibited earlier this year do not specify whether the more detailed statement of reasons for decisions, including how the development has regard to statutory requirements and how community values have been taken into account, will need to be published in local newspapers. This matter is proposed to be addressed in the *EP&A Regulation*. Publication of such detail in local newspapers is not practical or cost effective.

**Recommend:** The DP&E should provide a more contemporary definition of “public notification” so that statements of reasons for decisions only have to be attached as an annexure to the Notice of Determination and posted on council websites.

### 3. Environmental Assessment

Various Parts and Schedules of the *EP&A Regulation* include requirements that are relevant to environmental assessment of “activities” (i.e. not requiring development consent) under Part 5 of the *EP&A Act* referred to as a Review of Environmental Factors (REFs).

- a) There is currently no requirement for public agencies to make their environmental assessments publicly available. The Issues Paper suggests that the *EP&A Regulation* could include a requirement for public agencies to make their environmental assessments on activities publicly available.

The NSW Government intends to expand the use of environmental assessments under Part 5 of the *EP&A Act*. For example, *State Environmental Planning Policy (Educational Establishments and Childcare Facilities) 2017* amended the approval process for a number of school developments by removing the need for a DA and replacing it with a REF by the relevant public agency. Similarly, the NSW Government recently placed on public exhibition proposed amendments to *State Environmental Planning Policy (Infrastructure) 2007* proposing new or expanded provisions for health services facilities and various other public authority works. These proposed amendments would also remove the need for a DA, replacing it with a REF.

**Recommend:** All REFs should be made publicly available and the authority responsible for the environmental assessment should provide a contact for any questions.

### 4. Fees and Charges

Part 15 of the *EP&A Regulation* sets fees for the services associated with the development application process as well as other planning services which have costs and resourcing issues. Some fees are based on the intention of meeting the costs of providing various planning services to applicants. The DP&E is seeking feedback on all fees and charges set by the current *EP&A Regulation*.

#### **Key issues for Council**

- a) The current fee schedule does not cover the real cost of assessing the application. Although fees are based on ‘cost of work’, these costs can be substantially under-estimated. Fees need to be significantly increased to acknowledge the level of work involved and the expertise required to assess a DA in an increasingly complex and litigious planning process.



Councils are increasingly required to negotiate outcomes with applicants and communities on highly controversial and technical issues. Councils also often seek peer review on various matters such as the urban design merit of proposals. Accordingly, the real cost of assessment needs to be determined by undertaking an audit of the average staff and consultant costs associated with assessing a wide range of DAs throughout both Metropolitan and non-Metropolitan areas.

**Recommend:** The DP&E should undertake an audit of the average staff and consultant costs associated with assessing a wide range of DAs throughout both Metropolitan and non-Metropolitan areas to determine development assessment fees.

- b) In response to the recent mandating of IHAPs and to ensure the costs of administering same are not borne by ratepayers, it is understood that the NSW Government has made a commitment to monitor the costs to councils and, if necessary, allow for cost recovery through development application fee adjustments.

**Recommend:** The *EP&A Regulation* should be amended to include an appropriate fee to achieve cost recovery for applications referred to planning panels.

- c) Fees for planning proposals submitted for consideration by councils are not currently prescribed under the *EP&A Regulation*. A basic principle for determining fees for planning proposals should be cost recovery. Costs can vary significantly depending on the studies required to be reviewed. Assessment requirements can vary widely depending on the type and scale of development and age of Council's planning strategies. Councils also often need to engage specialist consultants to peer review planning proposals. Accordingly, councils are best placed to determine the average costs of assessing planning proposals.

Council has a standard fee for evaluation of minor planning proposals (i.e. \$30,000) and major planning proposals (i.e. \$55,000) based on whether it would facilitate development with a construction value greater than \$20 million. However, the size and complexity of some proposals may require special agreements to be reached between proponents of planning proposals and councils so that the evaluation of planning proposals results in "no cost to Council". The evaluation of the South Dural Planning Proposal and supporting technical studies was one such project and had an evaluation cost of approximately \$1 million.

**Recommend:** The responsibility for determining fees and charges for evaluation of planning proposals and supporting technical studies should be left to the discretion of councils.

- d) Following the introduction of private certification into the market place, there is a community expectation and legal responsibility under the *EP&A Act* that councils will continue to investigate and, where appropriate, take enforcement action for a wide range of land use planning compliance matters, including:
- non-compliance with conditions of development consent;
  - variations from the approved plans;
  - pollution incidents;
  - poorly-maintained structures to prevent soil erosion;
  - roads and paths blocked by trucks or skip bins;
  - hoardings and cranes;

- development that does not comply with a consent; and
- building disputes.

The cost of councils providing officers to investigate and resolve these types of issues is significant and cannot be recovered by issuing cost compliance notices, fines or court action. To ensure that the regulatory regime that follows the approval process is properly monitored, it is appropriate that a compliance levy of 0.0025% of the Capital Investment Value (CIV) of a proposed development be charged on each development application with a minimum levy of \$75 on all applications. This fee would generally cover full cost recovery for council compliance work.

The charging of a levy is the most cost effective way of ensuring strong regulation is achieved. Issuing cost compliance notices, fines and initiating court action to recover costs involves additional administration resources, which cannot be recovered.

**Recommend:** A compliance levy of 0.0025% of the CIV of a proposed development should be charged on each development application with a minimum levy of \$75 on all applications.

- e) The regulated fees for councils lodging, registering and assessing Section 149 Building Certificates do not provide a full cost recovery for councils undertaking this assessment. The fees should be established on a full cost recovery basis and allow for lodging the application, reviewing past consents and undertaking a site inspection of the subject building. Section 149 Building Certificates are binding legal documents and therefore, require a high level of scrutiny before they are issued.

**Recommend:** Any fees prescribed in the *EP&A Regulation* for councils, lodging, registering and assessing Section 149 Building Certificates should be based on full cost recovery.

- f) The *EP&A Regulation* prescribes fees for the issue of Section 149 Planning Certificates. The form and content of Section 149(2) Certificates is set by the *EP&A Regulation*. Council determines the form and content of Section 149(5) Certificates based on what it considers a prospective purchaser of land would benefit from knowing. The fee for Section 149(2) Certificates is \$53 and the fee for Section 149(5) Certificates is \$80. These fees have been in place for some time without increase.

Given the level of information now required to be provided on both types of certificates, their legal status and the cost liability ramifications of issuing incorrect certificates, it does not properly reflect the time invested by Council staff to setup and maintain its various information and on-line systems to be able to produce Section 149 Planning Certificates accurately and efficiently.

Council's systems require regular maintenance to ensure land and property descriptions are updated upon notification of subdivision registrations as well as updating of planning affectations associated with the release of new planning legislation.

**Recommend:** Fees for 149(2) and 149(5) Certificates should be increased under the *EP&A Regulation* to better reflect the complexity of information now required to be provided on certificates and the responsibility of managing information and on-line systems.

## 5. Development Contributions

The *EP&A Act* establishes the framework for development contributions being Section 94 Contributions, Section 94A levies, voluntary planning agreements, affordable housing contributions and special infrastructure contributions (SICs). The *EP&A Regulation* includes a range of additional

requirements that relate to development contributions such as their form, structure, content, public notice and exhibition, and keeping of registers.

### **Key issues for Council**

- a) Council has made a number of submissions to the DP&E requesting that the artificial \$20,000 Section 94 Cap (which has remained unchanged since 2008) be removed to enable councils to collect the real cost of providing infrastructure and services to new population without having to go through the arduous task of demonstrating to the Independent Pricing and Regulatory Tribunal (IPART) that the costs being charged are for specified basic infrastructure and services. Notwithstanding, should the cap remain, Council has requested at a minimum that the cap be indexed in accordance with Consumer Price Index (CPI) to ensure the value of contributions plans is maintained over time. This is consistent with the principles in Clause 251 of the *EP&A Regulation*.

**Recommend:** The *EP&A Regulation* should be clarified to specify that where a Section 94 contribution cap is set, the cap should be indexed in accordance with CPI.

- b) The *EP&A Regulation* provides for the issue of practice notes to assist parties in the preparation of VPAs. However, there is currently no requirement to take practice notes into account. The Issues Paper identifies the review could consider amending the Regulation to ensure planning authorities and developers consider practice notes when parties enter into a VPA. No in principle objection is provided to such an amendment. However, the DP&E previously exhibited a draft policy framework for VPAs to which Council made a submission. Council's submission stated (in part) that the revised policy framework for VPAs should be refined to address the following issues:

- The Practice Note identifies that VPAs should not be used to capture "windfall gains" associated with rezoning of land. However, it provides no guidance on what is a windfall gain or reasonable profit, nor provides a methodology for valuations. The Practice Note should clarify terminology and standardise the valuation process; and
- The Practice Note suggests that councils are entitled to seek value capture. However, VPAs are often only negotiated with individual land owners of strategic, up-zoned land within town centres. Adjoining residents are forced to shoulder the burden of increased densities without the necessary infrastructure and community services being provided in parallel to the development. A fairer way of sharing the infrastructure cost burden is to partly fund the infrastructure from capturing a part of the uplift in property values after the strategic lands in town centres are up-zoned. Accordingly, a review of legislation should be undertaken to provide councils with a tool to capture a share of value uplift.

Accordingly, should the NSW Government wish to make it a requirement to take the VPA practice notes into account, it must first address Council's outstanding issues.

**Recommend:** Should a requirement be included in the *EP&A Regulation* that practice notes on VPAs are to be taken into account, the NSW Government should first develop best practice value capture principles and tools within the revised policy framework for VPAs.

## **6. Planning Certificates**

Clause 279 of the *EP&A Regulation* requires information prescribed in Schedule 4 to be included on a Section 149 Planning Certificates. The Issues Paper identified a number of issues relating to planning

certificates, including the type of information provided, how information is expressed and planning certificate consistency and complexity.

**Key issues for Council**

- a) The Issues Paper is seeking feedback on the role of Section 149 Planning Certificates. Section 149 Planning Certificates are required to be included with contracts for the sale of land so that prospective purchasers of land are aware of the relevant planning controls that apply to the land. They are also relied upon by proponents of development in preparing development applications and independent certifiers in determining complying development applications. Section 149 Planning Certificates should remain as they are the principal textual means for advising all the key relevant planning affectations applicable to any one parcel of land as at a certain date.

**Recommend:** The *EP&A Regulation* retains Section 149 Planning Certificates as the principal textual means of advising all the key relevant planning affectations applicable to a parcel of land.

- b) The Issues Paper is seeking feedback on what information should be included on planning certificates and the language and format in which information should appear. The *EP&A Regulation* should continue to prescribe the information, language and format that appear in Planning Certificates.

A reference group of council planners should be established to advise on the form, structure and subject matter of Section 149(2) Planning Certificates. However, any required information should be designed to recognise the limitations of the binary nature of Property Information Systems (PIS) which can only provide information for the entire parcel of land in a "yes" or "no" format. Council often supplements this limitation by providing reference to Council's web-based Geographic Information Systems (GIS) to provide spatial information.

Council should also retain the opportunity to provide more detailed information on a Section 149(5) Planning Certificate based on any other planning matters that it may consider relevant and of benefit for the consumer. Council is able to respond more quickly to salient planning issues than making a change to Schedule 4 of the *EP&A Regulation*. Council's Section 149(5) Planning Certificates includes information relevant to the land such as:

- Resolutions to prepare a planning proposal;
- Draft amendments to the Hornsby Development Control Plan;
- Tree and Vegetation Management provisions;
- Biodiversity Management provisions;
- Foreshore Area controls;
- Whether located in or adjacent to an existing or proposed rail corridor;
- Whether located in or adjacent to a rural area and associated agricultural undertakings;
- Subject to risk of "future" exposure to tidal inundation; and
- Potential for loose-fill asbestos.

**Recommend:** A reference group of council planners should be established to advise on the form, structure and subject matter of Section 149(2) Planning Certificates.

Councils should retain the opportunity to provide more detailed information on a Section 149(5) Planning Certificate based on any other planning matters that it may consider relevant and of benefit for the consumer.

- c) Councils rely on a number of other public authorities to advise when planning legislation is made or to supply geographic and property data to assist councils populate their GIS and PIS. Advice regarding making and coming into effect of legislation along with the appropriate format datasets to populate Council's information systems should be provided a minimum 7 days in advance to:
- enable interpretation of the legislation to determine where it applies;
  - upload GIS data and identify individually affected properties;
  - create condition codes and notations and update the PIS; and
  - update checking templates and advise relevant council staff.

**Recommend:** The *EP&A Regulation* should be updated to require public authorities to provide information to councils in an appropriate time period prior to legislation coming into effect and that the information is in a format that is designed for the purposes of populating councils GIS and PIS.

- d) The Issues Paper is seeking feedback on whether hard copy planning certificates could be replaced with an online system through the NSW Planning Portal. Council currently issues Section 149 Certificates in either hard or electronic copy according to the customer's request. It is estimated that approximately 90% of certificates are issued through the on-line system. However, all certificates are checked manually by Council officers to ensure the certificates are correct before they are issued by email in a pdf copy or hard copy for mailing or collection at Council offices.

There are no in principle concerns with the provision of a central portal where S149 Planning Certificates can be applied for. However, given the complexity of the planning controls that relate to any one local government area, it is difficult to see how the administrators of the NSW Planning Portal can ensure the issuing of accurate Section 149 Planning Certificates. Accordingly, councils should retain control of the production and issue of the certificates once verified as being correct.

**Recommend:** The DP&E should set up a working group to undertake further consultation with councils on any proposal to apply for S149 Planning Certificates via the NSW Planning Portal.

## 7. Miscellaneous Operational and Administrative Positions

In recent times, Council has responded to a number of privacy complaints regarding the inadvertent release to its website of personal information contained in DA related information. Two of these matters progressed to the NSW Civil and Administrative Tribunal with both matters being confidentially settled at mediation. As a result of the findings and outcomes of these privacy complaints, it has been necessary for Council to change its practices in respect to the availability of DA and related information on its website.

The EP&A Act and *EP&A Regulation* contain requirements to make certain information concerning DAs publicly available. Much of the information contains personal information of various individuals such as names, addresses, contact details. However, the Privacy and Personal Information

Protection Act (PPIPA) has specific requirements which must be met to protect such personal information. Hornsby Council, like most other local councils, has found it difficult to set in place practical operational steps which effectively balance the conflicting requirements of the GIPA Act, the EP&A Act and the PPIPA, particularly in respect of DAs. Council's approach has always tended towards the concepts of openness and accountability by providing easy access by the public to as much information as possible whilst maintaining optimal adherence to the privacy protection principles of the PPIPA.

The ready accessibility of information is particularly important for DAs, which are a major source of enquiry by our residents and ratepayers. As a result, a system titled DA Tracking was put in place in 2007 allowing easy accessibility on Council's website of information relating to DAs. Specific internal controls, record keeping procedures, document handling guidelines and training for staff were established to ensure maximum benefit was obtained from this service, whilst still maintaining a respect for the privacy of individuals. In response to recent concerns, Council officers undertook a complete review of its internal processes in respect of the management of information relating to DAs.

In summary, Council's approach reflects that the period of time between when a DA is lodged until it is determined (i.e. the assessment period) is part of Council's deliberative process in respect of that DA. Information received subsequent to the lodgement of the DA such as that dealing with procedural matters (e.g. notification of the erection of the DA sign, submissions, general communications/questions from the public, notification letters, and internal memos requesting comments from other areas of Council), is not made available during the period in which the DA is under assessment (i.e. during the deliberative process). However, once a determination of the DA has been made by Council, additional information may be made available, having regard to public interest considerations, by making a GIPA application. This approach reflects the intent of the EP&A Act and its reference to the availability of documents accompanying a DA (i.e. those that are submitted when the application is lodged). It should also be noted that this approach mirrors that which Council officers understand is intended to be taken by the DP&E.

**Recommend:** The *EP&A Regulation* should be reviewed to clarify that the information to be made publicly available through the DA process should be limited to the DA and its accompanying documents following their receipt by Council.

## BUDGET

There are no budgetary implications associated with this Report.

## POLICY

There is no policy implications associated with this report. Discussion is based on the issues associated with the current *EP&A Regulation*. Any policy implications associated with revised *EP&A Regulation* will be addressed in a future report to Council.

## CONCLUSION

In September 2017, the DP&E announced a comprehensive review of the *EP&A Regulation* in association with the review and amendments to the *EP&A Act*. The DP&E is seeking comments on any issues with the current *EP&A Regulation* and on matters highlighted in the Issues Paper.

The *EP&A Regulation* provides much of the detail to the planning framework set out in the *EP&A Act*, informing the day to day requirements of Council's key planning functions. Council has a number of issues with the current *EP&A Regulation* and proposals to amend the Regulation based on those mooted by the draft *EP&A Act* amendments.

It is recommended that Council forward a submission to the DP&E identifying its general support for a comprehensive review of the *EP&A Regulation* subject to addressing the issues identified in this report.

**RESPONSIBLE OFFICER**

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**Attachments:**

There are no attachments for this report.

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