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Submission to the Review of the NSW Environmental Planning & Assessment Regulations 2000

November 2017

INTRODUCTION

The NSW Department of Planning and Environment (DP&E) recently released an Issues Paper which outlines the key operational provisions of the current NSW Environmental Planning and Assessment Regulations 2000 and sought feedback in relation to:

- Stakeholder views on known issues with the current Regulation; and
- Stakeholder feedback to help identify other issues, including suggestions for updating and improving the function of key operational provisions and reducing unnecessary regulatory and administrative burdens.

A report was presented to Council's Outcomes Committee on 28 November 2017 detailing comments and issues associated with the key functions and operations of the current Regulations. As a result, Council resolved the following:

> *That Council endorse the issues raised in the report as the basis for making a submission to the Department of Planning and Environment's review of the Environmental Planning and Assessment Regulation 2000.*

Submissions on the Issues Paper were due to the NSW DP&E by 24 November 2017 however due to constraints relating to Council's reporting schedule, Council was only able to formally consider its Submission at its meeting of 28 November 2017. The content of the Outcomes Committee report has provided the basis for Council's submission and is discussed as follows.

1. Environmental Planning Instruments (EPIs)

The Regulations contain limited provisions in relation to EPIs, as the Act prescribes the process for preparing, publicly exhibiting, making, reviewing and amending these instruments. It is considered that this is the appropriate legislative framework relating to EPIs, however, the Regulations do contain provisions which relate to the notification requirements when Council does not support a request to prepare a Planning Proposal.

The Issues Paper discusses the possibility of prescribing a time period for Council to give notice to an applicant of a decision not to support a Planning Proposal. The current provisions within the Regulations merely require Council to give notice as soon as practicable in writing that the proposal is not supported. Such a change would generally be supported and is not considered to be unduly onerous.

2. Development Control Plans (DCPs)

There are a number of provisions within the existing Regulations relating to the exhibition and adoption of DCPs which are considered to be either out of date or do not align with the current provisions within the Act relating to Planning Proposals. These are discussed as follows:

i. Timeframe for exhibition of DCPs

The Regulations currently require Council to exhibit any draft DCP for a period of 28 days. There is no allowance for variation to this depending on the significance of the amendment or if the draft DCP is associated with exhibition of a Planning Proposal. There have been instances where a Gateway Determination only requires a 14 day exhibition period for a Planning Proposal, however, the associated draft DCP is required to be exhibited for a total of 28 days under the Regulations. Similarly, very minor procedural DCP amendments with no impact on development standards or controls also requires a 4 week exhibition period, whereas Planning Proposals which potentially have greater implications on zoning and development outcomes are only given 14 day exhibition periods.

It is requested that consideration be given to a more flexible arrangement for the exhibition of draft DCPs depending on their significance and whether or not they are associated with and exhibited concurrently with a Planning Proposal.

ii. Requirements for exhibition of DCPs

The Regulation Review 'Issues Paper' raises the potential for new provisions which would require the re-exhibition of a draft DCP which has been significantly amended after public exhibition. Currently Council can adopt a plan with "any such alterations as the Council thinks fit". The Review has flagged the issue of re-exhibition of draft DCPs where amendments substantially alter the form or objectives of the draft DCP. Such changes would be supported by Council as they would be considered to improve transparency in the planning process.

iii. Notices for adoption of DCPs

The current Regulations require Council to give public notice within 28 days of adoption of a DCP. The rigidity of this requirement has caused some issues for Council in the past as often a DCP is adopted by Council but may not come into force until such time as an associated LEP is gazetted which can take several more months.

Council requests that the current review of the Regulations considers a more flexible arrangement for the public notification of adoption of draft DCPs.

3. Development Assessment Regulation

The following recommendations are made to the regulatory functions of development assessment under Part 6 of the Regulations:

i. There are numerous environmental planning instruments (EPIs) that describe different public exhibition requirements for different types of development. The review should consider consolidating and simplify these public exhibition requirements into the Regulations.

ii. Council supports the simplification of Clauses 100 (Notice of Determination) and 101 (Additional Particulars with Respect to Section 94 and Section 94A Conditions), however, it is noted that these are important provisions which Council uses to determine applications. It is also noted that the Department's suggestion to include the detail of the reasons for the determination would seemingly undermine the “simplification” objective. The reasons for the determination are detailed in the relevant assessment report which is made publicly available. Accordingly, the suggestion to include the reasons for determination in the notice is considered unnecessary.

iii. The review should seek to enable notices to be sent via email (if given) to remove administrative burdens and costs of mailing consents. This would be consistent with the Department’s aims regarding updating provisions to modernise systems.

iv. The State Government initiative to reduce assessment timeframes could be assisted if the Department considered inserting mandatory provisions for lodgement of Pre-Development Application for major developments.

v. Additionally, Schedule 1(Forms) should be reviewed so that the Regulations require a higher level of quality information to be prepared as part of Development Applications. This would be a reasonable response to enable ease and clarity of assessment for consent authorities as considerable time can be spent on deciphering plans or correcting errors on plans (particularly regarding scaling/architectural details etc.). The Department may wish to consider establishing a 'guideline DA template' to replace or complement Schedule 1.

4. Fees & Charges

To meet the cost of providing various planning services to applicants, consent authorities charge fees which are set out in the Regulations (Part 15 describes fees for development applications, building occupation, construction, and subdivision certificates, planning certificates, or review of decision to review a refusal determination). In most instances, these fees and charges have not been reviewed in over 5 years or have been addressed in an ad hoc manner as successive amendments are made to the Act regarding particular development types.

In recognition of the costs associated with implementing and resourcing new planning legislation, new procedures, new types of development activities, the natural attrition of service costs over time, and that the type and scale of development activity which varies across NSW, the fees should be reviewed taking account of the real costs of processing applications. The current cost setting is inappropriate for areas undergoing significant change. It is recommended that the Department investigate creating a more flexible and responsible approach to fees and charges that may examine annual rate-pegging or creating exemptions for areas undergoing significant change that require additional resourcing.

Additionally, the Department should refrain from determining policies regarding fees and charges for Pre-Planning Proposals, Planning Proposals and Voluntary Planning

Agreements (VPAs). This acknowledges that there are different levels of resourcing, development types/scales, and varied levels of development activity across NSW. It would be inappropriate to impose a one-size-fits-all approach on this issue.

To ensure clarity and consistency, it is also recommended that the fees associated with Planning Proposals (currently contained in Part 2 of the Regulations) be moved into Part 15 Fees and Charges so that all information relating to Fees and Charges is contained in the one location.

5. Development Contributions

The Act and Regulations describe a number of development contributions mechanisms including Section 94, 94A and Voluntary Planning Agreements (VPAs).

Currently, the Regulation does not require consideration of the Secretary's VPA Practice Notes; however, the Department could change this to make consideration of such guidelines mandatory. To avoid negative outcomes and to ensure public benefit objectives are met, the Department should undertake further consultation with Councils prior to making such considerations mandatory. This consultation should focus on the application and functionality of the Secretary's Practice Notes for VPAs to assess its efficiency in existing contexts.

The Department is also suggesting removing the need for Councils to have hard copies of all planning agreements available for public inspection at Council offices, and to instead upload copies of the planning agreements to the NSW Government Planning Portal. Council supports this proposal as it would remove an unnecessary administrative burden.

It is strongly recommended that the Department review and investigate implementation costs and procedures associated with the establishment and/or amendment of Section 94, 94A and VPAs Policy. There is a varied array of infrastructure costs, development activity, and envisioned growth across NSW and as such, any State Government policy approach to VPAs is not likely to appropriately outline all local costs/issues and may set unreasonable expectations on stakeholders.

It is recommended that the Department afford some degree of flexibility to address locally specific issues in their review of the Regulations, noting a staged approach to implementing changes may be warranted.

It should also be noted that Council officers are currently preparing a draft Voluntary Planning Agreement Policy to be considered by Council in the first quarter of 2018.

6. Planning Certificates

The contents of Planning Certificates are detailed in Schedule 4 of the Regulations which seek to condense an array of planning information from numerous statutes. Recent State Government reforms have changed various elements of this section via the public exhibition and implementation of legislative reforms and amendments to existing State Environmental Planning Policies (SEPPs). Subsequently, Council is in

a constant state of monitoring to update the relevant sections of the Planning Certificates given its legal status to ensure compliance.

The following recommendations are made in regard to this section:

i. The Department should seek to establish a notification process to alert Councils of changes to its EPIs that will require updates to S149 Planning Certificates prior to the changes coming into effect;

ii. Consider establishing a general template for Planning Certificates to remove complexities, however, acknowledge that some degree of flexibility will be needed to address locally-specific issues and legacy areas, such as the remaining Regional Environmental Plans.

iii. Where applicable, State Infrastructure Contribution levies should be identified similar to the existing provisions relating to Section 94 and 94A contribution plans;

iv. Hard copy planning certificates should be replaced by an online system through NSW Planning Portal, and ensure that 'check-points' are incorporated to ensure that the correct information is provided.

7. Miscellaneous operational and administrative provisions

There are 2 matters within this section that are considered important and are addressed below.

It is considered critical that the provisions relating to entertainment venues within Schedule 3A of the Regulations be maintained. These considerations should remain in the amended Regulation due to the specific occupant safety considerations with the use of these buildings. The nature of the operation of these venues increases the need for more specific and restrictive operational controls due to increased risks.

The second matter relates to penalty infringement offences under section 127A of the Act. Under clause 284 (Penalty Notice Offences) of the Environmental Planning and Assessment Regulation 2000, the authorisation of various individuals involved in enforcing of breaches of the Act and Regulation is specified. There are limitations on what offences authorised Council officers can issue penalty infringement notices (PINS) for. Changes need to be made to the authorisation to issue Penalty Notice Offences (Clause 284(3) and (4)). Local government authorised persons should have the same authorisation as per Clause 284(3) and (4). Councils are at the ‘coal face’ to detect these breaches and in many cases these breaches inhibit or delay Council’s enforcement options.

CONCLUSION

As highlighted in this submission, Council supports some of the potential changes discussed in the Issues Paper on the Review of the Environmental Planning and Assessment Regulations 2000. There are a number of other concerns Council has

in relation to the key operational provisions of the existing EP&A Regulations 2000. These have been highlighted and discussed in detail in this submission and Council looks forward to further information and consultation when a draft Regulation is released for public comment in 2018.