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a sense of community

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1 December 2017

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

Attention: Ms Alice Goldsmith

Dear Sir/Madam,

RE: REVIEW OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATIONS 2000

I refer to the Department's review of the Environmental Planning and Assessment Regulations 2000 as outlined in the Issues Paper on this matter dated September 2017. Council submits the following comments for consideration especially in relation to the following relevant initiatives identified in the review:

General comments

Council notes that the review is currently at the first stage where the Department is seeking feedback on the current Regulation specifically in relation to the deficiencies and improvements in the current system. While this letter provides a wide-range of issues and concerns currently being encountered, Council, firstly, would like to raise a concern regarding the objectives of the review. The Issues Paper states that the objectives of the review are to reduce administrative burden and increase procedural efficiency; to reduce complexity and to establish a simpler, modern and transparent planning system. While these objectives are appropriate and commendable, Council is concerned that they provide no indication as to the specific outcomes that are expected in the draft Regulations to be released in 2018. More significantly, Council notes that the review of the of the EPA Regulations is based on the existing Environmental Planning and Assessment Act 1979 (the principal Act) and not the amendments to this Act as contained in the Environmental Planning and Assessment Amendment Bill 2017 recently passed by the NSW Parliament. Council notes a number of significant amendments in the Bill that already anticipate changes in the Regulations that are not referred to in the current EP&A Regulations review:

- **The introduction of Community Participation Plans** (Schedule 2.1) which requires all local councils to prepare a community participation plan. This will spell out when and how councils will engage with their communities across all the planning functions they perform. Specifically, the Bill inserts a new sub-clause 2.24 (4) into the principal Act which states that

  "(4) The regulations may make provision for or with respect to: (a) the form, content and procedures for making and publishing community participation plans (or any amendment of those plans), and (b) reports on the implementation of community participation plans."

  Council would emphasise the importance in any future amendments to the EP&A Regulations on this matter, the community's right to be informed about planning

matters that affect it, and provisions for it to be given opportunities to participate as early as possible in the strategic planning of their local government area.

- **Provisions that establish online planning services and information** (Schedule 2.1) which allow for public access through the NSW online planning portal. Specifically, the Bill inserts into Schedule 3 of the principal Act, among other things, provisions for regulations relating to the online delivery of planning services and information including:

  "3 Regulations and other provisions relating to online planning services and information

  (1) The regulations may make provision for or with respect to the online delivery of planning services and information, including:
  (a) the NSW planning portal and other specialised planning portals (including the status of services and information delivered online), and
  (b) access to information (and the issue of certificates) about land use zoning, development standards and other information relating to particular land, and
  (c) the lodgment or submission of applications and other things under this Act, and
  (d) the assessment of categories of development for which there are codified criteria or standards, and (e) the registration of consents, approvals or certificates (or other documents) and their effect on registration, and
  (f) the notification of the making or determination of applications for (or the issue or grant of) consents, approvals or certificates (or other documents) by means of the NSW planning portal."

  The proposed online portal has potential benefits that will only be realised if DPE is able to build a fully interactive web based lodgement system that feeds information into the databases of the individual Councils and not simply collect information from applicants and then send it to Council for processing thereby functioning only as an electronic courier service. It would be beneficial to councils if the review of the EP&A Regulations would include provisions for the online portal to function in a way that enables Council to be better prepared to interact with the Portal in a productive way.

- **The standard format for a development control plan** (Schedule 3.1) which requires, among other things, that development control plans are kept up-to-date and as simple as possible, so people can understand what development is permitted on a site through the creation of a standard format for DCPs. Essentially, the Bill allows the Government to establish a standard, online format for DCPs. Specifically, the Bill amends Section 74E of the principal Act by inserting a new sub-clause 2A which reads :

  "(2A) Regulations relating to the form, structure and subject-matter of development control plans may require the standardisation of those plans and, for that purpose, authorise the Minister to publish requirements as to their form, structure and subject-matter that are to be complied with by relevant planning authorities."

  While Council recognises the benefits of having standard formats for DCP, there should be adequate provisions in any future Regulation to allow for the detail, character and context of local areas to be maintained and addressed in DCPs. Council would emphasise the need to not lose the opportunity for local content and

character to be maintained in any proposed DCP standardisation that a future revamped Regulations would bring.

- **The introduction of Local Strategic Planning Statements** (Schedule 3.1) which requires all councils to prepare Local Strategic Planning Statements that set out the vision for land-use in the local area, the special character and values that are to be preserved, and how change will be managed into the future. Randwick Council envisages that the EPA Regulations will and should be amended/updated to give effect to:
    - What form Local Strategic Planning Statements should take and any process and timeframes for their preparation;
    - How the Local Strategic Planning Statements are align with the regional and district plans, and the council's own priorities in the community strategic plan it prepares under local government legislation
    - How development controls and LEP standards are shaped by Local Strategic Planning Statements to deliver the council and community's plan for the future
    - How Councillors of a council ward are to be given reasonable opportunity to participate in the preparation of the provisions of the Local Strategic Planning Statements that deal with their ward and to address their consistency with strategic plans applying to the ward

- **The introduction of a levy on applicants for Development Applications and Complying Development Applications** (Schedule 4.1) as reimbursement of costs incurred by councils in enforcing compliance of development standards. Specifically, the Bill authorises the introduction of new regulations under Section 105 of the principal Act to enable the recoupment of costs incurred by councils in investigating and enforcing development compliance. Randwick Council believes that any review of the EPA Regulations should allow for council's to set a reasonable levy that will have a proper deterrent effect and allow some cost recovery. Consideration should be given to council's applying an hourly rate on owners where "investigation" of alleged unauthorised works. Additionally, Council is constantly aware of instances where developers have constructed works that go beyond the approval, then retrospectively apply for a modification to authorise the extra works. To address this, the EPA Regulation should allow councils the ability to impose an additional fee to deter retrospective modification applications. As with the DA and CDC levy above, this fee should be set appropriately in the EP&A Regulations to have any meaningful deterrent effect.

Overall, Council queries why these changes to the EP&A Regulations as anticipated in the Bill have not been recognised upfront in the current EP&A Regulation review. Open discussion of these acknowledged changes should occur now rather than later when draft Regulations are released.

Specific Comments on the current EP&A Regulations

Clause 55A Amendments with respect to BASIX commitments

Clause 55A (3) reads as follows:

> *(3) If an amendment or variation of a development application, or of any accompanying document, results in the proposed development differing in any material respect from the description contained in a current BASIX certificate for the development, the application to amend or vary the development application must have annexed to it a replacement BASIX certificate whose description takes account of the amendment or variation.*

The requirement under this clause can lead to delays in issuing a determination. To reduce delays, it is suggested that the provision should be modified to allow an amended BASIX certificate to be required as a condition of consent if in the opinion of the consent authority, the requirements of a modified BASIX certificate can be reasonably achieved without substantial design changes.

Clause 56 - Extracts of development applications to be publicly available
To streamline the assessment process and make it easier for applicants to view plans electronically, consideration should be given to amending Clause 56 of the EP&A Regulations to require all plans to be made available to interested parties (unless specifically requested not to by the applicant or the DA relates to sensitive developments such as gaols, public buildings and police stations). Many Council's already display plans through their respective DA tracking systems. However, some council are restrained by the perceived privacy/copyright issues associated with making the plans and details publically available. Consideration should be given to allowing for an easier and consistent approach across all councils if the Regulations could be amended to specifically allow/require it.

Clause 59 - Seeking concurrence & Clause 66 Seeking General Terms of Approval

Clause 66 of the Regulations relate to the seeking of concurrence from relevant concurrence authorities and, in particular, sub-clause (2) reads as follows:

> *(2) In the case of a development application that indicates on its face that such concurrence is required, the application must be forwarded to the relevant concurrence authority within 14 days after the application is lodged.*

Clause 66 relates to the timeframes for seeking General Terms of Approval and, in particular, sub-clause (2) reads:

> *(2) In the case of a development application that indicates on its face that such an approval is required, the application must be forwarded to the relevant approval body within 14 days after the application is lodged.*

Clauses 59 (2) & 66 (2) are predicated on a 2 day turnaround to send across applications to relevant concurrence authority which may not be sufficient time especially for Councils that do not undertake their 'clearing house' daily. The DA best practice guide suggest that an appropriate time frame for referrals to be completed is up to 6 days. The Regulations should reflect the provision of the guidelines.

Clause 100 – Notice of Determination

Clause 100 relates to information that must be contained in a notice of determination and in particular sub-clause (1) (h) states as follows:

> *(h) whether the Planning Assessment Commission has conducted a public hearing in respect of the application,*

Council recommends that Clause 100 (1)(h) should be re-worded so that the determination only needs to note that a public enquiry has been held (when applicable). Public enquiries are not held very often and it seems unnecessary for every determination to states that 'a public enquiry has not been held'.

Division 7 Public participation
It is recommended that the Regulations be amended to include standard minimum notification requirements for all DAs. Section 79A of the Act will still allow Council to modify these requirement and incorporate discretionary provisions through their DCP.

Division 8A Prescribed conditions of development consent
Council is of the view that the prescribed conditions referred to in Division 8A should be worded as conditions to be directly included in determinations. They should include a reason and a timeframe for when it is to be complied with.

Division 11 Time within which development application procedures to be completed
The 40 days timeframe for assessment is considered an unrealistic timeframe. In particular, where an Independent Hearing and Assessment Panel (IHAP) is in place, the IHAP will only meet every two weeks and the deadline for reports to be completed will need to be at least 1 week prior to the meeting to allow the agenda to be created and circulated. This will impinge upon eth 40 days timeframe. Furthermore, when the determination timeframes are combined with a 14 day notification period, referral requirements and workloads, it is considered that 60 days is a more appropriate figure.

Additionally, the development notification period over Christmas/New year is typically postponed (or extended) in individual councils. The Regulations should consider the possibility of including provisions to formalise and standardise the extension of notification periods for the Christmas/New Year period and the attendant stop-the-clock provisions for all Councils.

Submissions to development applications
There are currently legal impediments to displaying submissions to development applications online. Opportunities for incorporating provisions in the Regulations to allow for submissions to be lodged and made publicly available online should be investigated. This would allow Council to proceed to implement a system were objections can be lodged and displayed online.

S79C Evaluation
Section 79C of the EP&A Act requires that in determining a development application, a consent authority is to take into consideration, among other things:

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and

The matters in the regulation that require consideration in the assessment are currently spread out in the Regulations such that they should be located together so that they can be easily found. Accordingly, where possible, the review to the Regulations should clarify what matters need to be considered in the assessment and incorporate in one part of the Regulation.

Approvals under other Acts (excluding integrated development) (*Note: This suggestion would require changes to the principal Act)*
Currently, if an application is received for footway dining associated with a small bar or pub, it appears that the applicant may be required to obtain three separate approvals from Council:

- Part 4 of the Environmental Planning and Assessment Act 1973
- Section 68 of the Local Government Act 1993

- Section 125 of the Roads Act 1993

To minimise unnecessary paperwork and streamline approvals for applications that require approval under multiple acts, it is recommended to that consideration be given to expanding Section 78(A) of the Environmental Planning and Assessment Act to allow for development consent (issued under Part 4) to incorporate approval under:

- Section 68 (Part E paragraph 2) of the Local Government Act 1993
- Section 125, 126 and 138 of the Roads Act 1993

If the EP&A Act can be further amended as detailed above, Clause 50 (4) of the EP&A Regulation should also be amended to reflect this.

Development application fees

The existing regime for development application (DA) fees in the Regulations need to be updated. Furthermore, standard DA fees do not appear to have been reviewed since November 2002 such that current fees do not reflect the actual costs associated with assessing DAs. As such, Council considers that the Regulations, at a minimum, should allow for fees to be increased to reflect CPI. In this regard, a detailed IPART review of fees is required.

Fees and charges (Design Excellence Panel)

The EP&A Regulation 2000 appears to be inconsistent with respect to the fees that may be charged for referral to the Design Excellence Panel:

- Cl 248: An additional fee, not exceeding $3,000, is payable for development involving an application for development consent, or an application for the modification of the development consent that is referred to a design review panel for advice.
- Cl 258(2A): An additional fee (for an application for modification), not exceeding $760, is payable for development to which clause 115 (3) applies. (115 (3) refers back to Residential Apartment Development and thus the Panel).

It is recommended that the Cl 258 be amended to remove the inconsistency, and reflect the new fees that were introduced when the Environmental Planning and Assessment amendment (residential apartment development) regulation 2015 was adopted.

Clause 25J Section 94A levy--determination of proposed cost of development vs Clause 255 How is a fee based on estimated cost determined

Clause 255 details how the cost of works is determined for calculating the DA fee, and Clause 25J details how the proposed cost of carrying out the development is calculated for the purpose of determining a S94A levy. Council would submit that, to simplify the process, the method of calculating the cost of works should be the same when applied to both calculating DA fees and the S94A contribution. Whilst it is acknowledged that the fee structure for S94A contributions has been designed to minimise fees associated with certain types of development (e.g. affordable housing), the provisions are complicated and difficult to enforce. In practice, Councils typically use the same cost of works for determining the DA fee and the S94A contribution. Further, to add to the complexity, it is noted that the trigger for referral of applications to the Regional Planning Panel is based on the Capital Investment Value which is a different way of calculating cost again.

Schedule 4 – Planning Certificates

In relation to the issue of planning certificates, Council makes the following comments:

- The role of planning certificate should remain in its current form as comprehensive summary of statutory planning controls, policies and advice on matters that have a significant implication on the current and future potential use of the land.

- Council supports a consistent presentation of information in Planning Certificates across NSW. The Regulations should construct the questions, where possible, to encourage YES or NO responses from Council. If more response is required to answer a specific question, the recommended text should be supplied by the Department.

In relation to the potential for the issuing of planning certificates through the NSW Planning Portal, Council makes the point that issuing Planning Certificates through the NSW Planning Portal would be both counter intuitive for the customer and counterproductive for Councils and the Department of Planning and Environment for the following reasons:

- Most Councils now email out electronic versions of Planning Certificates already; therefore negating the need for a Planning 149 Certificate request system through the NSW Planning Portal;
- Councils should remain as the issuing authority of Planning Certificates as they are best equipped to respond to changes in local policies, provide advice on contamination matters and respond to changes in their respective local land use planning frameworks
- By issuing Planning Certificates through the NSW Planning Portal, you would be making the community work harder to find and locate the information they need.
- The one-stop shop experience is already provided by both local Councils and third party information providers such as Info Track, SAI Global etc. If customers were required to order Planning Certificates through the Planning Portal, a customer requiring a Rating 603 Certificate, a notices and orders certificate and Planning Certificate would now have to obtain the information from two places and not one.
- Councils are already maintaining land and information systems which are integrated with several other software programs and databases; the requirement for Councils to update and maintain another parallel database would place an additional financial and resource burden on Councils.
- By moving the information to the NSW Planning Portal, Councils would lose an established revenue stream. Planning Portal or no Planning Portal, Councils still need to maintain and organise the information for their staff members and their customers. The funds generate from issuing Planning Certificates contributes to the cost of managing this information.

Building Certification provisions of the Regulations

It is noted that the review will exclude building and certification provisions and reference should be made to Council's submission in response to the Michael Lambert review and Draft Planning Bill for comments in relation to building and certification.

In relation to building certification, the review of the Regulation should include:

- A review of fees for applications for Building Certificates, to a minimum of $400 and a substantial increase in the scale of fees for a class 2 to 9 building, to be closer to cost recovery. In addition, Council should be able to charge the DA, CC and PCA

fee (or CDC & PCA fee) for any work carried out without the relevant consent or certification, irrespective of when the work was carried out or by whom.

- The Penalty Notice amounts should be converted into a sliding scale based on the type of development and level or severity of the breach, to provide greater flexibility and appropriate penalty amounts which are commensurate with the offence. And/or a greater penalty could be imposed on repeat offenders.

- The current provisions relating to Compliance Cost notices are too complex and are not working. The provisions should be simplified and Councils should be able to issue an invoice for all of their regulatory activities, from receipt of the issue until conclusion. It is important to note that most regulatory matters do not end in the issue of an order, they are subject to detailed and lengthy negotiations and actions. The provisions should also apply to 'unauthorised development' which does not have or relate to a current consent or CDC.

- The review should consider and clarify whether or not Crown Building work should be subject to the current and future fire safety certification provisions and submission of annual fire safety statements. In addition, it should be a requirement that the Crown Certifier provides a copy of the approved and as built plans and documents to the Council for the record.

Council looks forward to participate and contribute to the next stages of the EP&A Regulations Review process and would request that Council be kept up to date on any developments on this matter. Should you have any queries, please do not hesitate to contact David Ongkili, Council's Coordinator Strategic Planning, on 9399 0793.

Yours faithfully,

Alan Bright
Manager Strategic Planning