7 December 2017

Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

Dear Sir/Madam

Subject: Response to Exhibition - Environmental Planning and Assessment Regulation Reform

Lake Macquarie City Council (LMCC) provides the following submission in response to the *Environmental Planning and Assessment Regulation 2000* (the Regulation) review. Note that due to time constraints, this submission has been prepared by staff, based on Council's current policy positions, and there has not been an opportunity for it to be reviewed by the elected Council.

LMCC has previously provided the Department with detailed feedback on the *Environmental Planning and Assessment Act 1979* (EP&A Act) reforms and welcomes the opportunity to comment on the Regulation review. It is noted that the nature of the EP&A Act reforms, as well as other concurrent legislative reviews, will influence the Regulation. Therefore, the following high-level comments are provided to inform the review, and request further involvement in reviewing detailed recommendations resulting from the review.

Supported Aspects of the Proposed Changes

Lake Macquarie City Council recognises that a number of elements of the review of the Regulation would make a positive contribution to planning in NSW. In particular, Council commends the proposals for Electronic and Online systems.

Use of electronic and online networks is supported to reduce administrative burden, minimise paper usage, improve accessibility for the community, improve transparency and accountability.

Council supports the use on electronic and online formats as outlined in Box 7 for:

- Lodgement of development applications (DAs)
- Submissions
- Notifications
- Repository of Voluntary Planning Agreements (VPAs), DCPs, contributions plan and DAs

LMCC currently makes information about all development applications and construction certificates available through Council's online Application Tracking tool. Council considers this an important tool in providing accountability and probity in the decision-making process.

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Suggestions and Recommendations on the Proposed Reforms

Many of the changes to the Regulation will result from the amendments to the EP&A Act, full details of which are not yet available. Council would like the opportunity to comment on the proposed Regulation once drafted.

Comments are provided on the key issues that relate to Council's application of the Regulation.

1. Making a Submission [Box 6]

   Submission

   Consistency in the acceptance of submissions via email, online as well as by post should be included in the regulation. Consideration should be given to submissions including suggested acceptable outcomes to assist in adequately interpreting and responding to the issues raised.

   Notification

   The often lengthy and complex legal descriptors attached to public notifications regarding conflict of interest and privacy, are distracting and intimidating to the public. These requirements should be simplified and included in the Regulation as standard text for consistent application across the State.

   It is recommended that a clearer process for public exhibition of DAs is implemented. A regulated notification system identifying the scale of a project and relevant length of public exhibition would provide more certainty for the community.

   There appears to be a frustration in the community of the complex and different administrative processes between local authorities. One way of making the administrative process more transparent would be to introduce standardised forms across all local government areas for all relevant processes that the community may come into contact with.

2. Development Assessment

   The quality of applications is a continuing issue for local authorities and one of the main reasons for perceived delays in the planning assessment process. A strengthened mechanism identifying the minimum requirements for the lodgement of a development application is recommended. This could be done on a sliding scale depending on the complexity of the proposal.

   The regulation of formal pre-lodgement processes for development of medium and major significance is recommended.

3. Administrative Burden [Box 7]

   Notice of Determinations

   The Regulation should establish standard procedures and text for notifications, to establish consistency across LGAs, improve community understanding and involvement and ensure the supporting electronic systems are established and promoted. Clear procedural statements detailing the submission and determination notification procedures within initial notifications would minimise the administrative burden of community enquiries and mailing of determinations.

We continue to have concerns regarding changes to the Act that require publication of reasons for all decisions. Requiring a 'Statement of Reason' report for EVERY determination is considered unreasonable. The reasons for determinations are inherent in all decisions in the consideration of s79C of the EP&A Act. The specialist technical analysis provided by the various Council departments in assessing and determining DAs cannot easily be distilled into a non-technical report for public consumption. At Lake Macquarie, comments from these specialists are currently made available in full through Council's online Application Tracking tool. Council also provides community access to s79C assessment reports for all DAs on Council's website. It would be duplication to produce an additional statutory document for every decision.

The proposed mandatory notification requirements are likely to slow the development assessment process by adding to documentation required to be produced by staff, but also potentially create more opportunities for legal challenges to determinations.

Adding more requirements into Clauses 100 and 101 of the Regulation would add an excessive administrative burden and would not provide any demonstrable benefit. The current determination requirements are considered necessary [Box 12].

4. Designated Development

- Environmentally sensitive area

"Environmentally sensitive area" remains a relevant factor in establishing the appropriate level of environmental impact assessment. However, the definition of environmentally sensitive area should be revised to include:

- Aboriginal Places – as declared under the *National Parks and Wildlife Act 1974*
- State Heritage listed Places – as declared under the *Heritage Act 1977*
- Local Heritage conservation areas – as declared in Local Environmental Plans
- Waterbodies
- Biophysical Strategic Agricultural Land
- Local areas of outstanding biodiversity value
- Riparian areas

Proximity to specific locations and environmental features remain important thresholds in the level of environmental impact assessment.

- Environmental Impacts Statements

Schedule 2 Part 3 Clause 7 should include specific reference to climate change, both mitigation and adaptation, and opportunities to build resilience and minimise risk. It should also include assessment of climate change impacts:

- flooding and/or inundation due to sea level rise;
- overland flooding due to increased frequency and intensity of rainfall events; and
- health impacts from extreme temperature, bushfire etc.

- Carbon Emission threshold

An additional category of designated development should be include in the Regulation to capture development that exceeds a define carbon emissions threshold. These developments have the potential to contribute to significant long term impacts on climate and should be assessed with the rigor of designated development.

5. Clause 228

   - Publication of assessment

   Requiring publicly accessible records of public agency assessments under Clause 228 is supported. It would assist Council in our dealings with the community to have a complete understanding of the assessment and management rationale for public works that occur in our LGA. Appreciation of the assessment rationale would enable Council to incorporate consistent mitigation measures for developments with associated public works.

   - Clause 228(2)(p)

   Clause 228(2)(p) should be reworded to separate and articulate the broader scope of climate change impacts beyond coastal processes and coastal hazards. Climate change impacts on all the other Clause 228 factors too and should be notated within the Regulation to ensure its influence is specifically considered.

6. Planning Certificates

   The current Section 149(2) certificates can be lengthy and overly complex.

   The role of planning certificates should be to make owners and prospective purchasers aware of any site specific constraints to use of the land. The certificate cannot cover all contingencies and should therefore avoid selective inclusion of SEPPs or LEP clauses.

   The Regulation should incorporate coastal hazard and future planning for sea level rise as described in Planning Circular PS 14-003 and PS 16-003 related to the draft Coastal Management SEPP.

   The following are considered unnecessary and should be removed from the certificate:

   - Site compatibility certificates and conditions for affordable housing
   - Site verification certificates

7. Exempt and Complying Development

   Part 7 Division 1 provides restrictions on the application of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* to certain types of development. Council requests the Regulation include restrictions to complying development on known contaminated land sites.

8. Development Control Plans (DCPs)

   Consistent format of DCPs is acknowledged as a positive move to improve navigation of the planning system. However, the application of 'Model Provisions' should remain optional, with flexibility for councils to require more detailed local controls, with higher standards if necessary.

   The diverse social and physical context of NSW makes it difficult to standardise development controls.

   While it would be helpful for a DCP format to be developed, the Regulation should not mandate its use. The experience of the standard local environmental plan provisions in NSW shows that many of the provisions and the format are inappropriate and unnecessary in many areas, leading to increasing complexity with counterproductive and unintended side effects.

Guideline DCP provisions within the Regulation, relating to the management of vegetation clearing pursuant to *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* would be beneficial.

9. *Clause 56 – Extracts of development applications to be publicly available*

   Access to development applications should be expanded in the Regulation to avoid the cumbersome, lengthy and overly complex GIPA[1] process for accessing information.

   The Regulation should be expanded to provide all DA information, rather than just extracts, to be available electronically. Restricting the provision of DA information to 'extracts' creates barriers to transparency and provides little proprietary or privacy protection given the information is generally accessible via the GIPA process. It also increases the administrative burden on council staff to locate documents and prepare extracts.

   Full and complete disclosure of applications would improve community engagement and increase applicant and assessor accountability.

10. *Clause 55 What is the procedure for amending a development application?*

    The ability to use Clause 55(1) to modify a DA prior to determination is restricted by the requirement for "agreement of the consent authority". This is an unnecessary administrative requirement that can lead to delays and uncertainty. Ability to revise applications prior to determination should be encouraged with the view to collaboratively developing a proposal that is acceptable, and thereby potentially minimise refusal appeals.

    It is acknowledged changes made under this Clause must be within the scope of 'substantially same the development' as per Section 96 of the Act to avoid the need for re-notifying.

    The Regulation should include provision for assumed acceptance if not notified otherwise within 14 days of receipt, to remove unnecessary administrative burden and uncertainty.

11. *Division 14 Review Conditions*

    The scope of reviewable conditions under *Clauses 124A & 124B* should be extended to include:

    - Industrial
    - Commercial
    - Home industry

    This would allow greater flexibility and provide proponents the opportunity to demonstrate satisfactory impacts.

    Use of innovative technologies, or the presence of site specific conditions, that warrant variation to standard prescriptive performance measures, are often restricted by conservative conditions of consent. Council is often forced to be overly conservative in conditioning development impacts since the recourse for unsatisfactory performance is a lengthy, costly, legal process. This precautionary approach doesn't readily allow opportunity for testing and progressing of alternate technologies or operating techniques.

[1] *Government Information (Public Access) Act 2009*

Currently, flexibility in performance measures for a development may be achieved via a Staged DA, in order to graduate the impacts and provide an opportunity to restrict expansion of the development should the impacts be proven unacceptable.

Reviewable conditions provide greater financial certainty to the proponent than does a Staged DA and places the onus of proof on the proponent, rather than relying on community complaints and Council's enforcement role to reign in any non-compliance. Reviewable conditions reduce the administrative burden of a Staged DA or Section 96 modification.

Expansion of reviewable conditions to other land uses will encourage new technologies and innovative approaches to environmental management and allow site specific outcomes that are not prejudiced by historical failings.

12. *Part 16C Paper Subdivisions*

    Clause 268ZL(5) currently classifies a proposed amendment that alters the number of lots or potential number of dwellings, even by one, as a 'major amendment', subject to a consent ballot.

    The entire process is already extremely complex for the community. Requiring another ballot for such a small change is considered excessive.

    The regulation should be changed so that an amendment that varies the overall number of lots by no more than 5% should be considered a 'minor amendment' (in the same way that costs may be varied by up to 5% in a 'minor amendment').

13. Additional administrative efficiencies or inconsistencies

    - *Clause 50 How must a DA be made?*

      Cl.50(2) - Wilderness Act 1987 is no longer the most relevant conservation tool to consider. This reference should be removed to reflect the changing biodiversity legislation.

      Cl.50(2A) – does not encompass all other SEPP assessment requirements e.g. SEPP55, SEPP44, SEPP71 etc. The Regulation cannot cover all other EPI requirements. This clause should be revised to reference all SEPPs in general terms rather than a selective few.
    - *Clause 92* – additional assessment matters should respond to the imminent NSW Government Coastal Management reforms.
    - *Division 8A* – Prescribed conditions of development consent should be expanded to include standard conditions relating to:
        - BASIX
        - Aboriginal heritage
        - Bushfire
        - Waste management and pollution prevention
    - *Clause 124* – should allow development consents and CDCs to be electronically notified and available for inspection
    - *Clause 124(2)* references a repealed LGA Act provision s.12(1A).
      A review of the statutory time periods is recommended to be determined by work days and not calendar days.
    - Regulated fees need to be reviewed and be reflective of the actual cost incurred by local authorities in the processing of all level of development applications.

Council anticipates a further opportunity to review a revised draft Regulation.

Should you require further information, please contact Council's Manager Integrated Planning, Sharon Pope, on 4921 0271.

Yours sincerely

Sharon Pope
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