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NSW Department of Planning and Environment
320 Pitt Street
Sydney NSW 2000
By email: Regulation.Review@planning.nsw.gov.au

Dear Sir/Madam

City of Sydney's submission on the Review of the Environmental Planning and Assessment Regulation 2000 Issues Paper

I write to provide the City of Sydney's comments on the *Environmental Planning and Assessment Regulation 2000 Issues Paper* and proposals for the Regulation as a consequence of the *Environmental Planning and Assessment Amendment Act 2017* (the Amendment Act).

The City supports the preparation of further guidance and regulation to ensure that efficient planning and development processes as a result of the Amendment Act and e-Planning *Environmental Planning and Assessment Regulation Amendments*. The City would welcome the opportunity to work with the Department to ensure that further work comprehensively addresses the practical application of the legislation and results in the best outcomes for the City and NSW.

Issues detailed in this submission address provisions relating to development assessment, development contributions, fees and charges, planning certificates and fire safety considerations relating to temporary structures.

Development assessment and consent

SEPP 65 and the Apartment Design Guide - Design quality in new development

The City strongly supports the retention of clauses of the Regulation relating to development applications and Statement of Environmental Effects, and building and BASIX certificates which include requirements to achieve or improve design quality of development included in *State Environmental Planning Policy 65* (SEPP 65) and the *Apartment Design Guide* (ADG). The City supports the design quality outcomes that have resulted from the application of SEPP 65 and the ADG. It relies on this guidance to ensure design quality and high quality apartment development which is essential to support Sydney's successful transformation into a more compact, liveable, economical and environmentally sustainable city.

SEE requirements for all development applications

The City supports the retention of Schedule 1, Part 2, (5) of the regulation which outlines the requirements for a Statement of Environmental Effects for a residential flat development application. These include an explanation of design quality principles, drawings in the context of surrounding development, development compliance, landscape proposals, statements of existing and likely future contexts, photomontages, sample boards of materials and colours, and detailed clauses and if appropriate, models.

The City considers that this provision promotes the submission of well-considered applications and robust assessments. To ensure that all development applications meet these same requirements, Schedule 1 should be further amended to apply this provision (with the exception of consideration of SEPP 65 and the ADG) to applications for non-residential development.

Provision for the preparation of environmental impact statements

The City understands that the Department is currently undertaking a review of EIS process for state significant projects and is aiming to improve decision-making, provide clarity and guidance to proponents and the community and improve the quality and consistency of EIS documents.

The City considers that these objectives could in part be met by the Regulations including further guidance on the preparation, contents, form and submission of environmental impact statements and the documents and information required to accompany them as enabled by section 105 of the *Environmental Planning and Assessment Act 1979.*

Providing statutory guidance on the preparation and processing of EIS will provide greater certainty and promote robust assessment and decision-making by the relevant determining authority.

Notifications of determinations in newspapers

Clause 124(1)(a) of the Regulation requires a consent authority to notify the determination of applications in a local newspaper. The local newspaper that covers the whole City of Sydney area is the *Sydney Morning Herald*. These adverts currently cost the council approximately $300,000 a year. The City currently notifies determination of consents on the City's website which is more accessible than a newspaper and has no additional cost.

The amendment of clause 124(1)(a) of the Regulation to allow for notification of determinations on a website would be consistent with the proposed Schedule 3 item 3(1)(c) (to be inserted in the Act by the *Environmental Planning and Assessment Amendment Act 2017).* This clause enables the Regulation to make provision for the online delivery of planning services on the NSW Planning Portal including the notification of the making or determination of applications.

Deemed refusal period

The City would support a review of clause 113(1)(a) and the 40 day deemed refusal period for development applications to allow sufficient time to determine the range of development applications routinely assessed by the City.

The 40 day period may be sufficient for small-scale applications which do not require notification and can be assessed by officers under Council's delegated authority, however does not allow time for reporting to Committee or for the resolution of complex issues arising from larger development proposals. This is a significant issue for the City, which regularly assesses and reports major development applications to Council and the Central Sydney Planning Committee.

Further, the current deemed refusal period is considered by some applicants as a pathway to an appeal to the Land and Environment Court. Appeals may be lodged immediately after the expiry of the 40 day period, sometimes after little engagement with the Council to resolve issues. These appeals require the City to divert resources otherwise allocated to determining applications into defending an appeal, which can involve significant resources and impact on the time taken to process development applications.

Given the exempt and complying regime, the City would support the extension of the 40 day period for more substantial development to allow greater time for the consideration of applications and Council or a future planning panel reporting timeframes, before the ability to lodge an appeal is triggered. The City would support a two-tiered deemed refusal period to allow for the timely processing of both householder and major development applications. For example the 40 day period could be applied to applications that are not notified and do not require reporting to the Central Sydney Planning Committee or a Local Planning Panel, with applications reported to one of these consent authorities subject to a longer period, for example 60 days. Extending this timeframe would allow applications that may take between 40 and 60 days to be approved, without triggering the appeal period. This would be more cost-effective as it would reduce the number of appeals lodged and resourced by the council.

Recommendation 1:

(a) Retention of existing clauses which refer to the need to achieve or improve design quality of development having regard to the *State Environmental Planning Policy 65* (SEPP 65) and the *Apartment Design Guide.*

(b) Retain the requirements for Statements of Environmental Effects under Schedule 1, Part 2, (5) for residential apartment development, and amend the provision to extend its application to applications for non-residential development, where relevant.

(c) Include within the Regulation new clauses specifying the requirements for assessment, minimum consultation with the community and public authorities and lodgement processes for the preparation of an EIS.

(d) Amend clause 124(1)(a) of the current Regulations to allow for notification of determinations on a website, rather than a local newspaper.

(e) Review the 40 day deemed refusal period which applies to all development applications, and consider either an extension of the period applied to all applications to 60 days, or a two-tiered approach to allow for the timely processing of both householder and major development applications.

Development contributions

Clause 25B form and subject matter of a planning agreement and 25F public inspection of a planning agreement

The proposal in the *Issues Paper* to amend the Regulation to require planning authorities and developers consider practice notes issued by the Secretary when entering into a planning agreement is consistent with the City's current practice and is supported.

The City also supports the proposal to require the exhibition of draft and publishing of final planning agreements on the Planning Portal to improve accessibility and transparency around these agreements subject to further guidance on the procedures. Clear processes and timeframes for the entering planning agreements into the Planning Portal will be required to ensure adequate resourcing and their timely implementation.

The proposal to require planning authorities to publish policies to guide and explain their use of planning agreements is supported because it will promote an understanding of how the City wishes to conduct negotiations and business in regards to planning agreements. Some guidance on procedure could also be included, however, as procedures may need to change to accommodate resources or changes in structure, requiring the publication of procedures is not supported.

Recommendation 2:

(a) Proceed with proposals to amend clause 25B to require authorities and developers consider practice notes issued by the Secretary when entering into a planning agreement.

(b) Proceed with proposals to amend clause 25F to require the exhibition of draft and final planning agreements on the Planning Portal to improve accessibility and transparency around these agreements subject to further guidance on the procedures.

(c) Proceed with proposals to amend clause 25F require planning authorities to publish policies to guide and explain their use of planning agreements. The publication of procedures, which may be subject to change, is not supported.

Fees and charges

Levy for compliance

The City supports Schedule 4 item 4.1 [17] of the Amendment Act which states that the Regulation may make provisions for the reimbursement of the costs incurred by councils in investigating and enforcing compliance with the requirements of this Act for development requiring consent (including complying development) by a levy on applicants. It is noted that in the consultation draft of the *Environmental Planning and Assessment Amendment Bill* this provision was only applicable to complying development and has now been extended to also apply to development applications.

The extension of the ability to require a levy on development applications to fund compliance actions will ensure that councils continue to undertake compliance work and build community acceptance of new development. This includes building confidence in the regulatory processes during construction, particularly in circumstances where development is certified and inspected by private accredited certifiers.

The Regulation should detail the rate of the levy and the process of reimbursement to ensure that adequate funds will be transferred to local councils to fully and effectively undertake envisaged compliance functions. The City would welcome the opportunity to work with the Department to develop provisions for the imposition and collection of levy for development in the City.

Clause 246B – fees for development applications

The prescribed fee structure for development applications in clause 246B should be reviewed because it allows local government to recover all costs associated with assessing and processing of complex development applications.

Development application fees received by the City for the 2016/17 financial year totalled approximately $6.5 million however this income covered only over half of the City's salary expenditure for its planning team, which was approximately $11.3 million. When compared with 2014/2015 this is a 2.3 per cent increase in fees and a 10.1 per cent increase in salary expenditure.

The number of CDC applications processed by the City is very small (approximately 80 applications for the period 2014/15 with application fees totalling approximately $40,000). The majority of CDC applications for development in the City are processed by private certifiers.

All CDCs issued by private certifiers are lodged with the City for records storage (as required by legislation). This process is very labour intensive and the lodgement fees do not cover costs. For example, the certificate lodgement fees received by the City for 2014/15 were approximately $189,000. This revenue however does not cover the full costs associated with employing two and a half full-time equivalent staff.

The City would support a review of the development application fees set out in clause 246B to ensure that the fees cover the market value costs of staff as well as public notification and advertising. This will support more detailed assessment of applications at the initial stages of development which will have flow-on benefits through the construction and certification stages of development.

The City also seeks clarification from the Department on how fees related to Stage 1 applications will be handled if lodged via the Planning Portal as proposed by the e-Planning amendment. At present, the City requires a percentage of the development application fee to be paid for Stage 1 applications, with the remainder of the development application fee to be paid at Stage 2.

Clause 256L Additional fee for Planning Reform

Clause 256L details the levy paid to the NSW Department of Planning and Environment on developments with costs over $50,000 to help achieve strategic outcomes in their regions, including work on updating their planning controls. Since 2000 the City has remitted over $26M to this fund, a significant proportion of fees from which it has yet to receive a substantial benefit. In fact, planning reform have generally added to the cost planning in the City.

The NSW Government should consider redistributing some of Planning Reform fee towards the cost recovery of DA processing by contributing councils and the costs associated with Local Planning Panels. The redirection of a portion of the levy back to councils could facilitate the recruitment of more staff, reduce DA processing times and deliver improved service to the community. Unlike the current fee, it would establish a

clear relationship between the levy and DA processing as well as meeting external costs required by State changes to DA determination.

To address the reduction or removal of the fee collected for strategic planning, the NSW Government should undertake a review of alternative funding options which could include budget measures, value capture from rezonings or stamp duties.

Recovery of additional application fees resulting from underpayment

The Regulation should be amended to provide for circumstances where consent authorities become aware an under-estimation of development costs after the determination of a development application. If development costs are under-estimated this results in a shortfall in development application fees (and potentially reduced section 61 contributions under the City of Sydney Act).

It is estimated that 45 per cent of development applications with an estimated cost of works over $10 million pay insufficient fees based on an underestimated cost of works. Information about contracted costs; long service leave levy payments; construction certificate applications and residential home warranty insurance policies issued under the Home Building Act can indicate discrepancies in the estimation of development costs.

Clause 256 allows a consent authority to make a determination in regard to fees, including underpayment. However, such a determination must be made within 14 days of an application being lodged. Issues in relation to underpayment of development application fees often arise well after the prescribed 14 day period has lapsed. These issues are generally detectable at construction certificate stage, after builders are appointed and when the actual (contracted) construction costs can be established.

Further, section 125 (offences against the Act and Regulations) of the *Environmental Planning and Assessment Act 1979* does not allow for detected shortfalls in development application fees to be recovered based on the actual or contracted development cost.

The City would support an additional subclause in clause 246B or 256 of the Regulation to allow councils to recover any additional application fees resulting from an underestimate or underpayment that may arise or become known at any stage during the development or construction process.

Recommendation 3:

(a) Support the inclusion of provisions in the Regulation for the imposition and collection of a levy for the investigation and enforcement of compliance for all development requiring consent. The Department of Planning and Environment should consult with the City on the rate and processes for local councils to be reimbursed for costs incurred.

(b) A review of the fees prescribed in clause 246B be undertaken to cover all costs associated with assessing and processing of complex development applications.

(c) An additional subclause be included in clause 246B or 256 to allow councils to recover any additional application fees resulting from an underestimate/underpayment that may arise at any stage during the development or construction process.

(d) The Department of Planning and Environment provide guidance on how the NSW Planning Portal and integrated fee calculator will deal with Stage 1 and Stage 2 development applications submitted to the City of Sydney.

(e) The Department of Planning and Environment undertake a review of clause 256L to:

- Remove, reduce or redistribute a portion of the Planning Reform fee to contributing councils towards the costs of DA processing, and
- investigate alternative funding streams for the Planning Reform fee.

Section 149 Planning Certificates

The City would support the review of Planning Certificates to facilitate the delivery via an online system through the NSW Planning Portal as proposed in the *Issues Paper*.

Making these certificates available online would improve accessibility to this information. It would also assist in the processing of complying development certificates by private accredited certifiers. Councils could update the information on the NSW Planning Portal without the need to allocate resources to producing these certificates.

Recommendation 4:

(a) Proceed with the review of Planning Certificates to facilitate the delivery via an online system through the NSW Planning Portal as proposed in the Issues Paper

Sensitive categories for complying development

The City supports Schedule 4 item 4.2(7) of the Amendment Act which enables the regulations to specify the kind of development for which an accredited certifier is not authorised to issue a complying development certificate.

In its submission to the Amendment Act, the City supported proposals to enable sensitive development categories for which only a council certifier can issue a complying development certificate. The categories the City suggested included heritage items, heritage conservation areas, and special precinct or environmentally sensitive areas. These categories were considered those within which council certifiers have greater experience and access to advice from council specialists to minimise impacts.

To remove the need to nominate specific development in the sensitive categories and provide the opportunity to meet local concerns and conditions, the Regulation should specify development on schedule 3 of an LEP and identified in the schedule by the Council as being development for which an accredited certifier is not authorised to issue a complying development certificate. The Gateway process can provide government oversight on whether it is appropriate to limit accredited certifier authorisation for the particular development type.

Similarly, the Regulation could also include any complying development added to *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* and identified in the SEPP as development for which an accredited certifier is not authorised.

This would ensure flexibility to incorporate appropriate development within the sensitive categories, without the need to make future amendments to the Regulation.

Recommendation 5:

(a) The new Regulation allow any complying development included in Schedule 3 of a LEP or *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* as development for which an accredited certifier is not authorised to issue a complying development certificate.

Regulations proposed as a result of the Environmental Planning and Assessment Amendment Act

The City's submission in response to the *Environmental Planning and Assessment Amendment Bill 2017* recommended the preparation of further regulation and guidance relating to a range of proposals. These include:

- the content of *Statements of Reasons for Decisions* including the ability to cross reference the relevant planning assessment report and publication requirements.
- the form and scope of early consultation and how a proponent's consultation will be integrated with council's consultation processes. Proposals to explore financial incentives are not supported and should not proceed.
- clear processes and timeframes for the preparation of *Local Strategic Planning Statements* to ensure adequate resourcing and their timely endorsement.
- clear processes and required timeframes for the LEP review and its timely endorsement.
- standard form, structure and subject matter of DCPs be contingent on the ability for the City of Sydney to retain its unique planning controls and include provisions specific to its local area and allow for new innovative provisions.
- matters that the Minister must consider when making changes to conditions with associated environmental requirements and include a process for notifying relevant parties.
- practical options available to councils regularise breaches of consent when demolition is not achievable or appropriate.
- a transparent process of notification of objectors, neighbours and/or public authorities of any transfer or replacement of conditions on a development consent.

I thank you for your consideration of our comments. If you have any questions about the City's submission, please contact Julie Prentice, Specialist Planner on 9265 9003 or at jprentice@cityofsydney.nsw.gov.au

Yours sincerely

Graham Jahn AM
Director
City Planning I Development I Transport