

**SUBJECT: CCL 28/03/17 - SUBMISSION ON PROPOSED CHANGES TO PLANNING LEGISLATION**

**REPORT BY: PLANNING AND REGULATORY  
CONTACT: ACTING DIRECTOR PLANNING AND REGULATORY /  
MANAGER STRATEGIC PLANNING**

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## **PURPOSE**

This report presents a draft submission on the Environmental Planning and Assessment Amendment Bill 2017 for Councillors' consideration.

## **RECOMMENDATION**

- 1 Council endorses the draft submission provided at **Attachment A** for lodgment with the Department of Planning and Environment.

## **KEY ISSUES**

- 2 Exhibition of the exposure draft Bill commenced on 10 January 2017 and concludes on 31 March 2017.
- 3 The amendments contained in the exposure draft Bill continue the State Government's planning reforms and includes proposals first put forward in the *White Paper - a New Planning System for NSW*, which was released in 2013.
- 4 The draft Bill contains ten schedules which each amend a different part of the *Environmental Planning and Assessment Act, 1979* (the Act). The schedules relate to the following matters:
  - i) the role of design
  - ii) community participation
  - iii) local strategic planning
  - iv) processes for local and State significant development
  - v) infrastructure delivery
  - vi) planning agreements
  - vii) State, regional and local decision making
  - viii) building provisions
  - ix) enforcement
- 5 Councillors received a briefing on the draft amendments on 21 February 2017.

## **FINANCIAL IMPACT**

- 6 The State Government has not provided an assessment of potential financial impacts on local Councils of implementing the new planning legislation. Changes that may have a financial impact on Council include:
  - i) Changes to the decision making process through the increased use of regional and local planning panels. Councils currently provide support to

Joint Regional Panels. The amendments will require Councils to also support local planning panels.

- ii) It is proposed that the types of development that can be privately certified are to be expanded. This may impact on the number of development applications (and fees) submitted to Council.
- iii) Councils are being given more enforcement powers to ensure compliance with development consents which are intended to be a "faster and cheaper" regulatory option. The draft Bill is proposing to give the Department of Planning and Councils the ability to enter into 'enforceable undertakings' with holders of a development consent. Enforceable undertakings are aimed at achieving compliance with the Act in cases where fines or prosecutions may be less useful. These give the regulator the power to enter into an agreement that then requires the consent holder to rectify harm that has occurred and to commit to improved behavior in the future.
- iv) The draft Bill proposes the introduction of a compliance levy on complying development to resource councils in their investigation and enforcement activity.

#### **COMMUNITY STRATEGIC PLAN ALIGNMENT**

- 7 The amendments require Councils to prepare local strategic planning statements that are to be consistent with regional plans and the land use objectives of the Community Strategic Plan.

#### **IMPLEMENTATION PLAN/IMPLICATIONS**

- 8 There are new reporting requirements proposed in the draft Bill for Councils in relation to the operation of local planning panels and the community participation plan. Councils will now be required to provide annual reports to the Planning Secretary.
- 9 Councils will also be required to prepare new planning documents such as a new standardised Development Control Plan and local strategic planning statement.
- 10 Councils will be required to review the Local Environmental Plan every 5 years.

#### **RISK ASSESSMENT AND MITIGATION**

- 11 No significant risk to Council's operations have been identified.

#### **RELATED PREVIOUS DECISIONS**

- 12 Council considered a report on the White Paper on 25 June 2013 and resolved to make a submission to the Department of Planning.

#### **CONSULTATION**

- 13 The Department of Planning and Environment (DPE) is conducting the public consultation.
- 14 Internal consultation was undertaken in the preparation of the submission.
- 15 Community members are able to review the exposure draft Bill and supporting documents and lodge submissions with DPE.

## **OPTIONS**

### **Option 1**

- 16 The recommendation as at Paragraph 1. This is the recommended option.

### **Option 2**

- 17 Council not endorse the draft submission. This is not the recommended option.

## **BACKGROUND**

- 18 The NSW Government has prepared substantial amendments to the *Environmental Planning and Assessment Act, 1979* as part of its ongoing reforms to the planning system.

## **REFERENCES**

Nil

## **ATTACHMENTS**

**Attachment A:** Newcastle City Council's submission on Planning Act amendments.

**Attachment A**

Planning and Regulatory.ABaxter/JGaynor  
Ref:  
Phone: 02 4974 2817

?? March 2017

Planning Legislation Updates 2017  
NSW Department of Planning and Environment  
GPO Box 39  
**SYDNEY NSW 2001**

Dear Sir / Madam,

**PLANNING LEGISLATION UPDATES 2017 - ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT BILL 2017**

I refer to the above matter and thank you for the opportunity to make a submission on the planning legislation updates 2017.

Newcastle City Council supports the intent of the legislative updates to:

- Enhance community participation;
- To promote strategic planning;
- Increase probity and accountability in decision making; and
- Promote simpler, faster processes for all participants.

Furthermore, Council commends the Department of Planning and Environment on its willingness to engage with stakeholders to determine the final content of the changes.

Council supports community participation in the planning system, particularly in the preparation of strategic plans. Council supports the preparation of community participation plans. However, Council is concerned regarding mandatory notification of all development applications. This would capture even minor applications that may not have impact upon neighbours and therefore compromise the aim to promote simpler and faster approvals. Preparation of the community participation plan at the local level, with community input, can define the parameters for each local level.

Council, in particular, supports an increased emphasis on strategic planning, through the proposed introduction of Local Strategic Planning Statements. In local communities this will likely be viewed as the most significant document guiding local development within their neighbourhood. To be successful it will be important that Local Strategic Planning Statements be given sufficient statutory status within the NSW planning framework. In addition to providing guidance on the preparation of local planning provisions, the status of strategic planning would be elevated further if the standard Local Environmental Plan itself required that development have regard to the Statement, including in any request to vary development standards.

Newcastle City Council's current Local Planning Strategy was prepared to facilitate the implementation of the vision and strategic directions of the Newcastle Community Strategic Plan (CSP), as they apply to land use. It would be expected that this could be adapted into the Local Strategic Planning Statement.

While Council supports the concept of a standard format for Development Control Plans the content itself should be at the discretion of Councils, developed with community input, to enable guidelines to be tailored for local conditions.

Please find attached a summary of identified matters relating specifically to the draft Bill. As outlined, there appears to be opportunities to clarify and streamline the legislative changes. Thank you again for the opportunity to comment on the planning legislation updates 2017.

Should you require any further information please contact Steven Masia, Senior Urban Planner on (02) 4974 2817.

Yours faithfully

**Andrew Baxter**  
**ACTING DIRECTOR PLANNING AND REGULATORY**

**Newcastle City Council's Submission on the Environmental Planning and Assessment Amendment Bill 2017**

**Schedule 1 Preliminary**

**Updated Objects of the Act**

1. Council supports the updated wording of the Objects of the Act, in particular the inclusion of a new object to promote good design in the built environment.

**Schedule 2 Planning Administration**

**General Comments**

2. Council supports the Government's aim to improve confidence in decision making. However, Council has reservations about the use of planning panels as the primary method for achieving this goal.
3. A key concern in relation to the planning commission / regional planning panels is the lack of accountability to the community, particularly when a planning commission / regional planning panel approves a development that varies significantly from a council's planning controls, or supports a rezoning review request to rezone land that the council has determined is inconsistent with its local strategic plan (or future local strategic planning statement).
4. Council's experience is that varying from planning controls or strategies (whether it's council or a State body acting as the consent authority) plays a significant part in determining the degree of confidence the community has in the planning system.
5. Providing reasons for these decisions is unlikely to be accepted by members of the community who objected to the proposal. In these decisions, it is important that the decision makers are accountable to the community, as elected representatives are.
6. Council recommends that the Regulation includes limits on variations to planning controls that can be approved by a planning commission or regional planning panel. These types of decisions are more appropriately made by the elected local representatives who are directly accountable to the community they serve.
7. Guidelines should be provided in relation to the circumstances where it would be more appropriate to go through a transparent, independent amendment process to the relevant planning document (LEP, district plan, DCP, local / regional strategy) prior to considering a development application that seeks to vary these controls. This would prevent strategy being inappropriately made through the development assessment process (an objective of the previous White Paper 2013).
8. The draft Bill is setting up a planning system that has several different approval bodies: the Minister, the Greater Sydney Commission, the Independent Planning Commission, Sydney district panels, regional planning panels, local planning panels, Councils (Councillors or staff), private certifiers and "any other person or body prescribed by the regulations". It is doubtful that this will result in a simpler, more certain and more transparent planning system.
9. The Regulation should state definitively the matters that each planning body may consider. This will be important to provide the community with some certainty about who the decision makers will be (from the start of an assessment process) for a planning proposal or development application.

10. Council representatives on planning panels may have conflicts of interest if the Council has already considered, for example, a rezoning request that is then sent to the regional planning panel for review. This may result in the review being conducted solely by the State representatives who may be seen by the community as being too far removed from local circumstances to make these decisions. Provision should be made in the model Code of Conduct for alternative local representation in the consideration of rezoning review requests.

### **Local Planning Panels**

11. In principle, Council has no objection to optional local planning panels, provided that members are appointed by the Council itself.
12. A funding mechanism (eg. fees set at cost recovery) for local and regional planning panels is required. Councils currently assist Regional Planning Panels without compensation. Another, unfunded, layer of governance should not be imposed on Councils.
13. There are several new reporting requirements for Councils to the Planning Secretary in administering planning panels and community participation plans. Council encourages the Department to make maximum use of the Planning Portal to capture information and generate reports rather than rely on manual reporting from Councils.

### **Community Participation**

14. Council supports enhanced community participation in all aspects of planning and supports the proposed community participation principles.
15. Regulations may set out further details in relation to the method of public exhibition, re-exhibition and community consultation by applicants. These details are not provided for comment. Council's view is that it is difficult to regulate a process that is best tailored to the specific matter and location of the proposal that is being considered. It is recommended that the principles only should be in the Act with the details left to the community participation plan, tailored for the particular Local Government Area.
16. The minimum public exhibition requirement (proposed under Part 1 of Schedule 1) of 14 days for all local development is not supported. It is not necessary to notify all development applications where there is deemed to be no impact on surrounding properties. Unnecessary notification will compromise the Department's aim for simpler and faster processes. It would unnecessarily increase assessment timeframes. In addition, it would increase costs to applicants and councils due to notification fees, advertising and administration charges associated with this additional task. As an example, mandatory notification could include change of use in commercial areas (food premises), or internal alterations if they do not meet exempt development provisions.
17. An exhibition requirement for nominated integrated developments has not been included in the draft Bill.
18. Genuine participation by the community in planning matters takes time and is resource intensive. It is not always conducive to a streamlined, quick planning approval process. The time required to involve the community in strategic planning will need to be acknowledged and accepted. A user friendly planning portal, kept up to date by the Department, will be essential to provide ready access to information and is supported by Council.

19. Commencing community consultation prior to lodgement of a State significant development or major rezoning proposal is supported. However, the status of this early consultation needs to be clarified. It should not replace any, later statutory requirements for consultation.
20. Council has concerns regarding the applicant undertaking neighbour consultation for local development if this consultation satisfies statutory consultation requirements. It will be difficult to obtain agreement from those consulted and the applicant as to the quality of the consultation undertaken.
21. Community Participation Plans should have mandated extended timeframes and consultation requirements for development applications that do not comply with adopted planning controls and strategies. A statement of reasons for non-compliance should be provided by the applicant for inclusion in exhibition material.
22. Where a public authority is not required to make available for public inspection any part of an environmental impact statement, it should be stated that this has occurred and the reason for not making the information publicly available. The Minister should approve such requests and it should be stated whether the Minister has approved the request.
23. Council supports the requirement to publish reasons for decisions and an explanation as to how community views were taken into account.

## **Schedule 2 Provisions Relating to Planning Bodies**

### **Part 2 Independent Planning Commission - public hearings and procedure**

24. Consideration should be given to allowing third party merit appeals even if there has been a public hearing, or altering the way public hearings are conducted, so that expert witnesses can be called and questioned. Currently public hearings only allow community members / stakeholders to read prepared statements. There is no discussion or debate, which does not assist in understanding how decisions are made.

### **Schedule 3 NSW Planning Portal and Online Delivery of Planning Services and Information**

25. Council supports the establishment of a NSW planning database to allow public access to documents and information. Allowing payments to be made to different agencies is a great incentive and one that Council would like to see implemented as soon as possible. This will assist with reducing issues with cheque payments and thereby reducing delays with the integrated assessment process.
26. Council requests that any standard technical requirements for spatial datasets be determined after consultation with Councils.
27. The Department will need to ensure it is adequately resourced to establish and maintain the planning database.

## **Schedule 3 Planning Instruments**

### **Review of Environmental Planning Instruments**

28. State environmental planning policies and local environmental plans are to be reviewed every five years. Generally Council supports the principle of keeping planning

documents under regular review. It is noted that there is no requirement for regional plans to be reviewed.

29. Given a key function of local environmental plans is to implement the regional plans, it follows, that the review of local environmental plans should only be mandated to occur after a State environmental plan or regional plan has been reviewed and updated.

#### **Section 74E Miscellaneous provisions relating to development control plans**

30. The summary of proposals document states that while the format of DCPs will be standardised, the content of the DCP will remain a matter for Councils. Council supports this approach as DCP guidelines need to be able to account for localised issues and environment.
31. However, the draft Bill allows for the Regulations to require the standardisation of DCPs along with requirements as to their "form, structure and subject-matter which are to be complied with by relevant planning authorities".
32. Council does not support mandated content within the standard DCPs. It is not apparent how any standardised DCP content will promote good design in the built environment. At this local level of planning, Councils and their communities should be able to determine the best local controls to fit their local environments.
33. The Design Led Planning Strategy to be developed by the Office of Government Architect maybe useful for providing design outcomes / ideas for the standard DCP.

#### **Local Strategic Planning Statements of Councils**

34. Council supports an increased emphasis on strategic planning within the NSW planning framework, down to a local level. The function and status within the planning framework of the Local Strategic Planning Statement requires clarification. In local communities this will be viewed as the most significant document guiding development in their area.
35. Newcastle City Council's current Local Planning Strategy was prepared to facilitate the implementation of the vision and strategic directions of the Newcastle Community Strategic Plan (CSP), as they apply to land use. The CSP is made under the Local Government Act 1993, and while under that Act the preparation of the CSP needs to have 'due regard' to Regional Plans, its purpose is broader than just implementing State or Regional plans. Under the integrated planning and reporting framework, the CSP is the principle strategy outlining community aspirations and directing Council operations.
36. In this regard, Figure 2 in the "Summary of Proposals January 2017" document is not accurate in depicting a CSP as sitting below the Local Strategic Planning Statement. It is recommended that the Local Strategic Planning Statement should be primarily land use based, directly informing Local Environmental Plan (LEP) and Development Control Plan (DCP) preparation, along with guiding development. However Council asserts that the Local Strategic Planning Statement must be a subordinate strategy to the CSP.
37. While outside the scope of the current legislation updates it is noted that the standard Local Environmental Plan (LEP) itself is not highly compatible with implementing a strategy led planning system, as there is no direct link between such a strategy and LEP provisions. The legislation should establish a clear legislative status within the NSW planning framework for Local Strategic Planning Statements. It is suggested that

the standard Local Environmental Plan itself could require that development have regard to these statements, including in the application of Clause 4.6 Exception to development standards.

38. The matters that are required to be included within the 'statement' suggest that it will be a local strategic land use plan resulting in a lengthier document rather than a simple 'statement'.

#### **Schedule 4 Development Assessment and Consent**

##### **Consent Authority**

39. Under the draft Bill, the Minister may give directions to councils under Section 117 of the Act on the circumstances in which the function of determining development applications is to be exercised on behalf of the Council by a local planning panel and the circumstances in which the function is to be exercised by a delegate of the Council, including who may comprise a local planning panel or who may be delegates of the Council.
40. This is different to the description in the "Summary of Proposals January 2017" document which states in Box 9 (p.35): *The Council will set the rules for which matters go to the panel. It is expected that the vast majority of development applications would continue to be determined by Council staff, with the more complex and contentious applications reserved for the local planning panels.*"
41. How local planning panels will be appointed and who will determine the matters the panel will consider should be clarified. Council officers are able to deal with "more complex and contentious applications" and it is not necessarily the case that these types of development applications should be outsourced to another body for consideration.

##### **Complying Development**

42. The introduction of a compliance levy for enforcing complying development standards is supported. Council currently receives a high volume of complaints regarding complying developments that are being handled by private certifiers.
43. The proposal to reduce the complexity of complying development is supported as well as an education program for Councils, the community and certifiers.
44. There was no discussion on how section 94 contributions will be applied to medium density complying development. It is recommended that a standard condition be developed.
45. There are proposals to "level the playing field" (see discussion under "Deferred commencement certificates") between complying development and development applications. This should be extended ensuring similar requirements for neighbour notification, particularly as development types included in complying development are expanded to more complex developments (such as medium density).

##### **Integrated Development**

46. An issue that was not explored in the exhibition material was whether or not proponents can seek to gain approval / concurrence from external agencies prior to the lodgement of an application and thereby not trigger the need for an integrated

assessment. In complex applications this ability to resolve agency issues before lodging the application will assist with assessment timeframes.

47. It is recommended that the review of the concurrence and referral process include consideration of a model condition on how to refer or include an agency's General Terms of Approval in the conditions of consent. Councils are currently adopting their own procedures in this regard, which impacts on the role of the Principal Certifying Authority when implementing the conditions of consent.

#### **Section 85A(9) Deferred Commencement Certificate**

48. Council questions the principle of permitting complying development to be issued with a deferred commencement certificate. Complying developments are 'straight forward' proposals that can comply with pre-determined conditions. They must fully meet these standards to obtain a complying development certificate. This is understood by the community.
49. An aim of the draft Bill is to increase confidence that the relevant standards will be met and enforced. This will be achieved through delivering a clear set of rules. It is unclear how the ability to issue a 'deferred commencement certificate' achieves this aim.
50. The "Summary of Proposals January 2017" document states that there should be a "level playing field" between complying development and development applications and "anomalies" between the two types of development assessment should be corrected.
51. Given that complying development deals with 'low impact' proposals that meet pre-determined conditions and other development applications fall outside that definition, it is not clear why assessment processes should or could be similar. The "certain circumstances" referred to in the "Summary of Proposals January 2017" document where a deferred commencement certificate can be issued, should be specified in the regulation.

#### **Section 96 Modifications of Consents**

52. In addition to considering the reasons given for the grant of consent, consideration should be given to the reason for the condition being imposed that is sought to be modified (if a specific reason has been supplied).
53. The use of section 96(1A), (1) and (2) is inconsistent between local government areas. The removal of the ability to allow retrospective approvals for works that go beyond the original consent is supported. However, the misuse of section 96 should be further reviewed to provide certainty around section 96(1) and s96(2) applications. This currently has implications on application fees and determining who is the consent authority in terms of regional development (s96(2) applications by regional planning panels). There is a degree of uncertainty and subjectivity to section 96 applications. Consideration should also be made on restricting the number of section 96 applications that can be made to a development.

#### **Clearer Building Provisions**

54. The amendment to the Act to require construction certificates to be consistent with the development consent is highly supported. It will assist in providing a greater degree of certainty to the community about development approvals. The consistency test for construction certificates should take into consideration or be similar to the 'substantially the same test' that is applied for section 96 applications.

**Schedule 7 - Infrastructure Contributions and Finance**

55. Complying development certificates may be subject to a planning agreement. More detail is required to explain the intent of this provision and how it will work in practice. The Bill Guide and Summary of Proposals 2017 document do not discuss this proposal.