



7 April 2017

Alison Frame
Deputy Secretary
Policy and Strategy
Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

E-mail: legislativeupdates@planning.nsw.gov.au

Dear Ms Frame

Submission on Legislative Updates on the Environmental Planning and Assessment Act 1979 - Draft Environmental Planning and Assessment Amendment Bill 2017

The Southern Sydney Regional Organisation of Councils (SSROC) is an association of eleven councils in the area south of Sydney harbour. SSROC provides a forum for the exchange of ideas between our member councils, and an interface between governments, other councils and key bodies on issues of common interest. Together, our member Councils cover a population of over 1.6 million, or one third of the population of Sydney.

In order to make this submission within the timeframe of the review, it has not been possible for it to be reviewed by councils or to be endorsed by the SSROC. We will contact you further if any issues arise as it is reviewed.

The details of SSROC comments are in the sections below.

Thank you for the opportunity to provide comments and suggestions Draft Environmental Planning and Assessment Amendment Bill 2017. If you have any queries please contact SSROC Strategic Planning Manager, Vincent Ogu, on 8396 3800 or ssroc@ssroc.nsw.gov.au .

Yours sincerely,

Namoi Dougall
GENERAL MANAGER
Southern Sydney Regional Organisation of Councils

cc: Planning Legislation Updates 2017
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001



SSROC Submission on:

DRAFT ENVIRONMENTAL PLANNING AND ASSESSMENT AMMENDMENT BILL 2017

Submitted to the Department of Planning and Environment

7 April 2017

GENERAL COMMENTS

SSROC welcomes the opportunity to contribute comments on the Draft Environmental Planning and Assessment Amendment Bill 2017.

SSROC member councils welcome the focus of the legislative reform on key areas such as improved community participation, enhanced strategic planning, increased accountability in planning decision making and improved processing time outcomes for development applications. These will help to restore and build more confidence in the planning system.

While member councils support some key aspects of the reforms, there are considerable concerns. Suggestions and recommendations to improve on the Draft Environmental Planning and Assessment Amendment Bill 2017 are presented in the “Specific Comments” sections below.

SPECIFIC COMMENTS

1. The Objectives of the Act

Councils are concerned that the proposed revised objective: ‘to promote the timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing)’ may come at the expense of aligning land use to infrastructure.

To align and deliver infrastructure to support business, employment and housing opportunities needs to be distinctly identified in the objectives.

The inclusion of an objective promoting good design is supported and ‘design’ here should include design of ‘spaces and places’.

Recommendation:

1. To align and deliver infrastructure to support business, employment and housing opportunities needs to be distinctly identified in the objectives.

2. Exhibit the Environmental Planning and Assessment Regulation 2000

The Department of Planning and Environment (DPE) should exhibit the draft Environmental Planning and Assessment Regulation 2000 to enable councils to make more informed comments on the full impacts of the proposed reforms. The details of the Regulation are an important part of the legislative reforms.

The Regulation should be put on public exhibition before the proposed Environmental Planning and Assessment Amendment Bill 2017 is finalised.

Recommendation:

2. The draft of Environmental Planning and Assessment Regulation 2000 should be put on public exhibition before the proposed Environmental Planning and Assessment Amendment Bill 2017 is finalised.

3. Local strategic planning statements

Councils will be required to prepare a local strategic planning statement and review the statement at least every five years. The statement is expected to provide the strategic

context and rationale for local planning controls and is a mechanism for aligning goals and actions in the Community Strategic Plans with those in the regional and district plans. The statement incorporates the planning priorities for the area, actions for achieving the priorities and the monitoring mechanism.

The relationship between state/regional priorities and local plans is already a component of Local Environmental Plans making as specified in the Department of Planning and Environment guide for preparing planning proposals. State/regional plans and strategies must also be addressed in Community Strategic Plans prepared by all councils.

Councils are concerned that the requirement for a local strategic planning statement will add another layer to the strategic plans and reporting and is a potential duplication of materials in a community strategic plan, a delivery program and operational plan. Councils query the value the statements will add to the planning process.

The requirement for councils to prepare local strategic planning statements is not supported. There is need for changes that take into consideration council concerns.

The functions and powers of the Greater Sydney Commission in the approval of Local Strategic Planning Statements should also be clarified.

Recommendations:

3. The requirement for councils to prepare Local Strategic Planning Statements needs to be reconsidered or revised and council concerns taken into consideration.
4. The functions and powers of the Greater Sydney Commission in the approval of Local Strategic Planning Statements should also be clarified.

4. **Community consultation**

The reforms place emphasis on the community consultation that will accompany strategic planning and much of the success of the reforms could depend on effective community engagement. It is important to achieve the right balance between community consultation at a broader strategic planning level and community expectations at the development approval stage. Emphasis is placed on consultation with neighbours prior to Development Application and community consultation prior to State Significant Development Application. Councils are concerned that these pre-application consultations will do nothing to resolve design and environmental impact concerns of the community.

Councils emphasise that community consultations must be transparent, have clear scope and objective and the materials presented must be assessable and understandable by all relevant stakeholders.

It is important that it is specified how community views are to be considered, the level of importance that should be accorded to them and the level of openness to alternative solutions acceptable to the community.

The introduction of Community Participation Plans is supported. The emphasis on community consultation at largely the strategic level relative to the development approval stage may mean that community discontent will be an issue and this needs to be addressed.

Recommendation:

5. Community Participation Plans should specify how community views are to be considered, the level of importance that will be accorded to them and the level of openness to alternative solutions acceptable to the community.

5. Regulation and Certification Processes

The SSROC Secretariat appreciates that the Draft Environmental Planning and Assessment Amendment Bill 2017 acknowledges that the compliance and enforcement arrangement for private certifiers has shortcomings that have undermined public confidence. The legislative measures proposed by the Draft Bill to address the shortcomings, including establishing a compliance levy to pay for enforcement and compliance actions by councils will help. Nonetheless, councils are still concerned that loopholes still remain in the building regulation and certification.

Councils are concerned that the planning controls are open to misinterpretation by private certifiers and that they could issue complying development certificates that prioritise the interests of their clients rather than public interests. Council actions to reverse the decisions can be resource intensive and can involve Land & Environment Court proceedings.

Recommendation:

6. The amendment of the State Environmental Planning and Policy (Exempt & Complying Development Codes) 2008 and State Environmental Planning and Policy (Affordable Rental Housing) 2009 occurs with a view to closing the loopholes in the complying development certification process.

6. Private certification and accountability

Currently, private certifiers do not have any obligations to cooperate with councils that seek to investigate building works that are not authorised or to implement enforcement actions. This needs to change.

It is welcomed that the Draft Bill has proposed to make the immediate reporting of unauthorised building works mandatory for private certifiers. The Bill should go further and make it mandatory for private certifiers to cooperate and assist councils in investigating authorised works and in implementing of enforcement actions. For example, private certifiers should issue notices with full description of unauthorised works and arrange an unhindered access to council in the process of investigating an unauthorised building works.

It is debatable if the private certification process, where private certifiers are engaged and paid by the applicant and managed independent of government regulation, has always resulted in compliant development. Several SSROC member Councils do not believe so from experience in their areas. The extent of non-compliance is not known and cannot be effectively monitored.

It is unreasonable to rely on neighbours or the community to raise concerns as many people will not recognise a non-complying development. There is a concern that unauthorised works will occur under the reforms proposed.

Recommendation:

7. Steps need to be taken to eliminate situations where private certifiers neglect to undertake mandatory inspections or instances that unauthorised buildings are continued till final inspection. One approach that the Draft Bill should consider is to

make the demonstration that all mandatory and relevant stage inspections have been undertaken as a condition for issuance of Occupation Certificates.

7. Sub-division work certificates

Councils do not support the proposal to widen the role of private certifiers by granting them the authority to issue subdivision works certificate. This function should remain with councils.

It is important to emphasise here that some form of merit assessment is required in the processing of subdivision applications. For instance, consideration of access arrangements, purpose of subdivision and ensuring that subdivision works and associated essential infrastructure conditions of consent of planning agreement, where applicable, are met.

There is a concern that this would place immense responsibility on a private certifier, who would typically not be closely acquainted with a Council's Local Environmental Plan (LEP).

The certifier is expected to determine if the use is permissible in the zone, bearing in mind the difficulty of understanding inclusionary /exclusionary zoning and higher-order land use terms. The certifier would also need to be in a position to determine the minimum site area for a dual occupancy; determine the relevant floor space ratio (FSR), bearing in mind that many LEPs now have exceptions to FSR; and confirm that design statements are complete and thorough.

This needs to be thought through carefully and collaborative engagement with councils on this is important.

Recommendation:

8. The issuance of subdivision works certificate should remain with councils. Councils do not support the proposal to widen the role of private certifiers by granting them the authority to issue subdivision works certificate.

8. Complying Development

The extension of the application of complying development provisions should be approached with caution. While councils would support the streamlining of the development process, there are considerable concerns.

Councils emphasise that complying development provides little opportunity for merit assessment or community input. The understanding is that complying development was intended to apply to low impact development with minimal environmental impacts. Councils are concerned and do not support the proposed extension of complying development. This is particularly the case where development will be at densities greater than that permitted by council Local Environmental Plan. Moreover, there are concerns over development designs.

It seems that emphasis is placed on the Design Verification Statement (DVS) as part of complying development to justify the built form in relation to the local character. It is arguable that certifiers may not be planners or urban designers and may lack the necessary experience and knowledge to assess any strategic planning outcomes.

If certifiers are required to ensure that a DVS is accurate, there could be serious issues regarding their ability to assess subjective matters related to urban design on which they are not qualified.

Recommendation:

9. The extension of the application of complying development provisions are not supported by councils. Complying development provides little opportunity for merit assessment or community input.

9. Compliance

Councils welcome the emphasis that the Draft Bill places on compliance.

Compliance levy

The introduction of a Compliance and Enforcement Levy on Complying Development Certificates and development consents is supported. Necessary emphasis is placed on the regulating of complying development in the proposed reforms and a compliance levy to support councils' role in ensuring that complying development is compliant is proposed.

While councils would welcome more enforcement of compliance, they do not have the resources to check every complying development certificate. The proposed reforms need to be clear on whether councils will be fully funded to enforce compliance.

Recommendation:

10. Compliance and Enforcement Levy should cover the full-cost of Councils compliance functions, whether or not a formal notice or order or penalty notice is issued.

Stop Work Order

The time frame proposed by the reforms in aspects of compliance may not be workable. For example, a 7-day "Stop Work Order" is to apply if a complying development requires investigation. For many councils, this time frame is inadequate. What happens if investigation is not completed by then? There is a possibility that work could recommence on the building with compliance issues.

For the Stop Work Order is to be effective, the Draft Bill should consider allowing Councils to issue a 'Stop-Work Order' in relation to any unauthorised Complying Development Certificate matter at any time during the construction or after, if it is identified to be in breach of the Act, Regulation or relevant planning instrument.

Recommendation:

11. The Draft Bill should allow Councils to issue a Stop-Work Order in relation to any unauthorised Complying Development Certificate matter at any time during the construction.

10. Deterrence of unauthorised works

Councils support the Draft Bill's focus on deterring unauthorised building works. However, councils are concerned that the Draft Bill is proposing to prevent planning authorities such as councils, from approving modification for works already completed.

Currently, retrospective s.96 applications are lodged to address changes that became necessary during construction, to address mistakes, meet construction standards or to make minor improvements. The process of assessing s.96 applications is often slow. Reform can address this by adopting measures that provide an avenue for the works to be approved and an occupation certificate to be issued, if impacts of the changes are minimal. Legislative amendment could allow an occupation certificate to be issued after a building certificate has been issued.

The Building Information Certificate should take into consideration any necessary conditions in s.149D relating to the design, construction, fire safety and operation before issuance.

Recommendation:

12. The Draft Bill should not prevent planning authorities from approving modification for works already completed. This is important for the deterring of unauthorised works to be achieved.

11. Compliance Guides

The Department of Planning and Environment or the Building Professionals Board should develop comprehensive guides or notes with examples and illustrations that can assist Councils and Certifiers in the process of determining if specific type or scale of variation is consistent or not.

Recommendation:

13. The Draft Bill should be flexible enough to permit minor internal and external variations that have negligible or no impact to be accepted under the new provisions as consistent with the consent.

12. Validity of complying development certificate

Councils in general would welcome the proposed change to allow the Land and Environment Court to declare a complying development certificate invalid. However, the requirement that proceedings be commenced within 3 months that the certificate is issued, is a difficult timeframe which is not supported and should be reconsidered. It is possible that building works may not have commenced during the period.

There is probably no effective mechanism currently in place to publicise and notify complying development certificates to local residents and others likely to be impacted. It is also possible for non-compliance matters to be found and reported after three months.

A further limitation of the reform is that the Land and Environment Court has discretion not to require non-compliance works to be demolished and reconstructed to meet compliance requirements unless significant environmental impacts can be proven.

Recommendation:

14. The requirement that proceedings be commenced within 3 months that the certificate is issued should be reconsidered. It is possible for non-compliance matters to be found and reported after three months.

13. NSW planning portal and online planning services and information

The Draft Bill allows for provision for the online delivery of planning services and information including information on land use zoning, development standards and online delivery of planning certificate information through the NSW planning portal.

Councils in NSW already provide section 149(2) and (5) planning certificates together with rates certificates (s.603 of the Local Government Act 1993) and certificates for outstanding notices and orders (various Acts). These certificates are largely requested for property conveyancing or other property related transactions and these requests are usually met in a timely manner.

Councils reasonably believe that electronic disclosure of critical information such as land use zoning and development standards without verification has substantial risk issues. Some councils' risk management practices require all section 149(2) and (5) certificates to be verified before they are released to an applicant.

If the online delivery services are implemented as proposed and without collaborative and agreed arrangement with councils, the councils may not agree to bear any liability for information inadequacies. The Department of Planning and Environment needs to consider the risk issues carefully.

14. Resources for planning portal integration and related issues

The Draft Bill made no provision for resources to enable councils to upgrade their information systems so as to integrate with the NSW planning portal information system. Some councils have an existing on-line lodgement system for Development Applications and would need to be convinced that the centralised planning portal system will have added value and advantage.

There are operational and ethical issues that are not yet resolved. These include, compatibility of computer and information technology systems, data integration of the NSW Portal with Councils' systems, copyright, complexity of forms and risks associated with electronic authorisation of land owners consent.

Recommendation:

15. The Draft Bills should address the operational and ethical concerns raised by councils in relation to the planning portal. In addition, the issue of resources to enable councils to upgrade their information systems in readiness to integrate with the NSW planning portal information system needs to be addressed.

15. Review of environmental planning instruments

Councils in general would support the NSW Government intention of review and update environmental planning instruments. The emphasis of review should not be limited to Local Environmental Plans (LEPs). It is important to also a need to conduct regular reviews of Standard Instruments, local model clauses and planning circulars as the LEPs are mostly based on these documents.

Recommendation:

16. The Department of Planning and Environment should consider to put in place, a structured and consistent program for regular review and comments on Standard Instruments by councils and other stakeholders.

The Department of Planning and Environment should consider to put in place, a structured and consistent program for regular review and comments on Standard Instruments by councils and other stakeholders.

16. The standardisation of Development Control Plans

The proposal to standardise Development Control Plans (DCPs) is at this stage not supported without a collaborative approach in which council issues and concerns are meaningfully addressed. It is arguable that the proposal would lead to one size fits all, compromise planning and hinder good design.

DCP standardisation is restrictive and limits use of planning controls to address unique characteristics of different areas and respond to local issues. It is important that optional model clauses are available to councils in the process of updating DCP controls. It is considered that flexibility is necessary and should remain, in order to enable the preparation of DCPs that respond to local circumstances and differences.

Recommendations:

17. The Department of Planning and Environment should consult with councils, the development industry and the community on the form, structure and content of a standardised DCP before it is legislated.
18. An arrangement should be put in place where councils can have the option of retaining their detailed, placed-based controls in any new standardised DCP approach.

17. Designation of infrastructure corridor

The Draft Bill indicates that a State Environmental Planning Policy may designate land to be within an infrastructure corridor for purposes such as road, rail, pipeline or other linear infrastructure. Such a designation may not occur if the land is not zoned for that purpose, designated in a strategic plan or where approval of another public authority is required for a development consent.

Recommendation:

19. The need to protect major infrastructure corridors is supported. Such corridors should be designated within a strategic plan or within the local environmental plan to ensure transparency and community awareness.

18. Infrastructure contributions and finance

The Draft Bill proposes to expand infrastructure contributions, inclusive of Special Infrastructure Contributions and Voluntary Planning Agreements (VPAs), to apply to Complying Development. Councils need more information on the purpose and benefits of allowing VPAs to be entered into as part of a complying development proposal.

There are still several unknowns such as how VPAs will be implemented within the complying development process, operational details and the role of councils in the VPA negotiations.

The Draft Bill proposes that amendments to section 93F will allow the Minister of Planning to direct the method of determining the extent of the provision of public benefits to be made under a planning agreement. While councils welcome the Minister providing direction, there is need for further information on the method of determining the extent of the provision of public benefits specified in the Draft Bill.

Recommendations:

20. Councils have concerns and would need to be consulted and engaged on the purpose and benefits of allowing VPAs as part of a complying development proposal and the role of councils in any VPA negotiation.

21. Councils welcome the proposed role of the Minister providing direction on the method of determining the extent of the provision of public benefits under a VPA, and need further information on the method of determining the extent of the benefits.

19. Building provisions

Councils support the streamlining and consolidation of the building regulation and certification provisions and welcome the introduction of provisions that require construction certificate to be consistent with development consents.

It cannot be over emphasised, that it is necessary to ensure that effective and appropriate regulations are developed **in consultation with local councils**. This will increase the possibility of the provisions achieving the desired outcomes.

Recommendation:

22. Building regulations need to be developed in consultation with local councils.

20. Building manual

Councils welcome the proposed building manual provisions in the Draft Bill. It is important that councils are effectively engaged through out the process of the development of the form and content of the regulations. Councils expect the building manual provisions to provide an effective, efficient and easy to interpret mechanism to address the management, maintenance and certification of buildings and fire safety measures.

Recommendation:

23. Building manual provisions should provide an effective, efficient and easy to interpret mechanism to address building certification and fire safety measures.

21. Local Planning Panels

The Draft Bill indicates that decision making on regionally significant development will be transferred to Local Planning Panels. The functions, code of conduct and pressure issues are in the Draft Environmental Planning and Assessment Regulation 2017 which are not yet available. The panel membership of the Local Planning Panel is limited to three; two independents with relevant expertise and one community representative.

Recommendations:

24. The Draft Environmental Planning and Assessment Regulation 2000 that have details on the Local Planning Panel should be put on public exhibition before the Draft Environmental Planning and Assessment are finalised.

25. Councils should be allowed to add one to two more experts the Local Planning Panels, particularly as there may be complex cases that require expertise of more than two professionals.

List of Recommendations

1. To align and deliver infrastructure to support business, employment and housing opportunities needs to be distinctly identified in the objectives.
2. The draft of Environmental Planning and Assessment Regulation 2000 should be put on public exhibition before the proposed Environmental Planning and Assessment Amendment Bill 2017 is finalised.
3. The requirement for councils to prepare Local Strategic Planning Statements needs to be reconsidered or revised and council concerns taken into consideration.
4. The functions and powers of the Greater Sydney Commission in the approval of Local Strategic Planning Statements should also be clarified.
5. Community Participation Plans should specify how community views are to be considered, the level of importance that will be accorded to them and the level of openness to alternative solutions acceptable to the community.
6. The amendment of the State Environmental Planning and Policy (Exempt & Complying Development Codes) 2008 and State Environmental Planning and Policy (Affordable Rental Housing) 2009 occurs with a view to closing the loopholes in the complying development certification process.
7. Steps need to be taken to eliminate situations where private certifiers neglect to undertake mandatory inspections or instances that unauthorised buildings are continued till final inspection. One approach that the Draft Bill should consider is to make the demonstration that all mandatory and relevant stage inspections have been undertaken as a condition for issuance of Occupation Certificates.
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10. Compliance and Enforcement Levy should cover the full-cost of Councils compliance functions, whether or not a formal notice or order or penalty notice is issued.
11. The Draft Bill should allow Councils to issue a Stop-Work Order in relation to any unauthorised Complying Development Certificate matter at any time during the construction.
12. The Draft Bill should not prevent planning authorities from approving modification for works already completed. This is important for the deterring of unauthorised works to be achieved.
13. The Draft Bill should be flexible enough to permit minor internal and external variations that have negligible or no impact to be accepted under the new provisions as consistent with the consent.

14. The requirement that proceedings be commenced within 3 months that the certificate is issued should be reconsidered. It is possible for non-compliance matters to be found and reported after three months.
15. The Draft Bills should address the operational and ethical concerns raised by councils in relation to the planning portal. In addition, the issue of resources to enable councils to upgrade their information systems in readiness to integrate with the NSW planning portal information system needs to be addressed.
16. The Department of Planning and Environment should consider to put in place, a structured and consistent program for regular review and comments on Standard Instruments by councils and other stakeholders.
17. The Department of Planning and Environment should consult with councils, the development industry and the community on the form, structure and content of a standardised DCP before it is legislated.
18. An arrangement should be put in place where councils can have the option of retaining their detailed, placed-based controls in any new standardised DCP approach.
19. The need to protect major infrastructure corridors is supported. Such corridors should be designated within a strategic plan or within the local environmental plan to ensure transparency and community awareness.
20. Councils have concerns and would need to be consulted and engaged on the purpose and benefits of allowing VPAs as part of a complying development proposal and the role of councils in any VPA negotiation.
21. Councils welcome the proposed role of the Minister providing direction on the method of determining the extent of the provision of public benefits under a VPA, and need further information on the method of determining the extent of the benefits.
22. Building regulations need to be developed in consultation with local councils.
23. Building manual provisions should provide an effective, efficient and easy to interpret mechanism to address building certification and fire safety measures.
24. The Draft Environmental Planning and Assessment Regulation 2000 that have details on the Local Planning Panel should be put on public exhibition before the Draft Environmental Planning and Assessment are finalised.
25. Councils should be allowed to add one to two more experts the Local Planning Panels, particularly as there may be complex cases that require expertise of more than two professionals.