Planning Institute of Australia (NSW Division)

Submission on Draft Environmental Planning and Assessment Regulation 2010

Introduction

The NSW Division of the Planning Institute of Australia welcomes the opportunity to comment on the Draft Environmental Planning and Assessment Regulation 2010.

The Planning Institute of Australia (PIA) is the peak body representing professionals involved in planning Australian cities, towns and regions. The Institute has around 4,500 members nationally and around 1,300 members in New South Wales. PIA NSW plays a key role in promoting and supporting the planning profession within NSW and advocating key planning and public policy issues.

This submission has been prepared by members of the Planning Institute. The submission identifies various clauses of the draft Regulation upon which the Institute would like to comment. Comments are also made by the Institute in regard to the changes within the draft Regulation that apply to BASIX.

Clause 13 (2) - Proponent appeal relating to approval of project—deemed refusal

This clause states that:

For the purposes of section 75K (2) (b) of the Act, the day on which a pending application for approval to carry out a project is taken to have been refused for the purposes only of enabling an appeal within 3 months after the day of the deemed refusal is as follows:

(a) 60 days from the end of the proponent’s environmental assessment period for the project, except as provided by paragraph (b) or (c),

(b) 120 days from the end of that period if the Director-General notifies the proponent, when notifying the environmental assessment requirements for the project, that the project involves a complex environmental assessment and approval process,

(c) 30 days from the end of that period if the Director-General notifies the proponent, when notifying the environmental assessment requirements for the project, that the project does not involve a complex environmental assessment and approval process.

Commencing the deemed refusal period “from the end of the proponent’s environmental assessment period” for Part 3A projects is very different to the commencement of the deemed refusal period for Part 4 development applications.
The current and proposed deemed refusal period for development applications is clear and certain and the clock starts almost immediately upon the lodgement of the application. In the case of Part 3A applications there is no certainty as to when the deemed refusal period commences. The clock cannot start until after the application is lodged, the Minister confirms it is a major project, the Director General’s Requirements are issued and the Environmental Assessment is deemed adequate by the Department. The start of the “clock” is therefore almost entirely at the discretion of the Minister or his delegate and may not commence until many months after lodgement of the application. This exposes proponents to considerable uncertainty and cost in formulating the application with no statutory avenue to redress the “neglect and delay” of the Minister in the same manner as applies to a Council dealing with a development application. Whilst there are statutory time limits prescribed for certain steps in the Part 3A process (e.g. 21 days for the “test of adequacy”) there are no sanctions specified in the Regulation for a failure to meet these time limits. A writ of mandamus may provide a legal mechanism for enforcing performance, however in reality this is not a course likely to be taken by most applicants.

There is no obvious reason for the different treatment of deemed refusal periods for Part 3A and Part 4 applications. It is considered that the provisions applicable to development applications provide greater certainty for applicants and should be adopted for Part 3A to provide consistency across application streams.

It is recommended that the deemed refusal period for Part 3A applications commences at the same time as it does for development applications (i.e. from the date of lodgement of the application). The deemed refusal period should be of sufficient length to recognise the complexity of such applications and is suggested as being between 90 days and 270 days depending on the level of complexity. The applicable time should be determined at lodgement of the application.

**Clause 66 - Certain development allowed**

The proposal to remove the 1,000m² limit on ‘change of use’ provisions relating to existing light industrial and commercial uses is supported, however it is considered further amendments are required.

The unilateral amendments to the existing use regulations made by Minister Sartor without prior announcement or consultation represented a significant derogation of the prior regime. The effect of those changes was to severely curtail the ability of land owners to change a non-conforming use to another non-conforming use of another type.

Previously it was possible to change say a noxious factory in a residential zone to an innocuous office use. This type of change, whilst still a prohibited use, provided incentives for unsuitable uses to be progressively transitioned to more suitable ones.

The current and proposed regulations limit this incentive. In many cases it will be more commercially sensible to retain the (potentially problematic) prohibited use to retain the value of the land, rather than reduce that value by developing a permissable use (especially in single residential zones).

Safeguards under ordinary Section 79C planning assessment requirements (especially in the light of recent case law which requires assessment against applicable environmental planning controls) should ensure that proposed non-conforming changes of use with unacceptable impacts are avoided. A merit based approach providing incentives for the gradual transitioning of existing uses is an alternative to the current provisions which prescribe generic statutory limits on allowable uses in all circumstances. Though the prescriptive approach provides
certainty for owners, introduction of a more merit based approach with incentives for transitioning is suggested as a better long term method for dealing with existing use rights.

 Clause 75 - Rejection of development applications

Whilst this Clause is generally acceptable in its proposed terms, the practical problem that arises with the rejection of development applications results more from the fact that many Councils reject applications for reasons other than those specified.

This situation has arisen because of the changes to the Act removing the ability for many issues to be addressed at the old building application stage where conditions could be imposed. The current system forces Councils, to require more information at the development application stage because the process does not allow for conditions to be imposed on construction certificates or for minor amendments to construction certificates (which were possible with Building Applications). Councils are also reluctant to leave matters relating to public infrastructure or public domain matters in the hands of Private Certifiers at construction certificate stage. The Institute believes that the Act and regulations should allow Councils to issue conditional construction certificates. The second issue is the processing requirements for development applications have become more complex and costly through the adoption of e-planning steps and monitoring requirements. The outcome has been Councils standardising processes and introducing new procedures to comply with the e-planning processes and workflow monitoring.

One consequence of this is that some Councils refuse to accept lodgement of development applications over the counter if the required CD containing the application documents does not accompany the application or even if any one of the files on the CD exceeds 1 MB in size. Other Councils refuse to accept lodgement over the counter if a supporting document specified in the Council’s “Development Application Checklist” (e.g. a Drainage Concept Plan) is not available at the time of lodgement. Many of the documents in the development application checklists (which vary from Council to Council) are not documents specified in Part 1 of Schedule 1 and therefore their absence is not a basis for rejecting the application under Clause 75, let alone refusing to even receive the application over the counter. The absence of such documents is properly dealt with through the mechanism of a request for additional information under proposed Clause 78. It is also common that applicants fail to lodge adequate applications that do not comply with Clause 75 with a view to submitting material sometime after lodgement.

The practice of refusing to accept applications over the counter is an unnecessary cause of frustration, time consumption and cost to applicants and potentially Councils.

Clause 75 is clearly directed at enabling Councils to avoid having to administer unclear or incomplete applications. There is a reasonable 14 day period in which to do this and if it is done within the scope of the statutory power, the time spent in so doing does not contribute to Council’s statistics on assessment times.

It is recommended that the Clause be amended to include a provision to the effect that a consent authority cannot refuse to accept the lodgement of an application otherwise than in accordance with Clause 75. A Council can still ask for additional information within the 21 days pursuant to Clause 78 (or indeed at the time of lodgement) if the lodgement documentation is, in Councils opinion, deficient.
Clause 78 - Consent authority may request additional information

Whilst there is no in-principle objection to the proposed amendments to the requests for additional information provisions, they are unlikely to have any practical impact on prevailing development application assessment practices.

Under the current provisions, many Councils request information, sometimes more than 25 days after application lodgement. They are often issued via multiple ad hoc requests well after that period. As a consequence, the clock is never technically stopped, although both Council and applicant often treat the process as if it is.

Whilst the new provision attempts to limit the time frames and repetition of requests and responses, it is considered that pragmatism on behalf of applicants and Councils will prevail and there is likely to be very little practical difference to the current situation.

The Institute does however, express some concerns that the preoccupation with assessment time frames does not always result in good development outcomes and does not reflect the reality of the assessment process. Councils should be able to ask for additional information / changes that may arise from the full assessment of the proposal (e.g. issues may arise from the first request for additional information). The applicant should have the ability to make amendments or provide information so that an application can be approved without having to go to the Land and Environment Court. The new provision has the potential to result in more legal costs if Council has to refuse an application instead of negotiating an outcome. As the Land and Environment Court allows additional information / amended plans to be considered, the development assessment system should also incorporate a negotiation process before a refusal. In addition, a 21 day period for the applicant is not a very long period for the applicant to obtain necessary information. The Institute requests that clause 78 be reviewed in the light of these comments.

Clause 146 - Modification of consent granted by Court or Minister

This clause provides:

(1) The object of this clause is to vary the requirements of the Act in relation to the modification of development consents granted by the Land and Environment Court or by the Minister.

(2) A copy of an application for the modification of such a development consent is not to be lodged with the Court, but with the consent authority that dealt with the original development application from which that consent arose.

(3) A copy of the application for modification of a development consent granted by the Minister under section 80 (7) of the Act is to be lodged with the council.

This clause is confusing on a number of fronts. It expressly varies the requirements of the Act in relation to the modification of consents granted by the court or by the minister. The relevant part of the Act that is modified is section 96(8) which states that the court can modify a consent granted by it in certain circumstances.

The proposed clause is problematic because:

1. It doesn't say what a consent authority's role is once the copy of the modification application is lodged with the consent authority; and
2. It uses the word “copy” and not “original”, which implies that the original application must still be lodged with the court.
The proposed clause needs to clearly state the functions and obligations of the consent authority in relation to an application for modification of a court granted consent that is lodged with the consent authority (i.e. Can / does it determine the application? Does it refer the application to the court? Can an application be lodged directly with the Court?).

**Clause 160 - Work taken or not taken to be physically commenced**

This clause provides:

1. For the purposes of section 95 (7) of the Act, work is not taken to be physically commenced if that work only comprises the carrying out of a survey within the meaning of the Surveying and Spatial Information Act 2002.

2. This clause only applies to a development consent granted after the date of commencement of this Regulation.

This clause appears to be designed to overcome the Court of Appeal's decision in *Hunter Development Brokerage Pty Ltd v Cessnock City Council*. In that case the Court held that survey work could qualify as engineering work for the purpose of section 95(4) (the lapsing provision) provided it involved physical activity on the land, had an appearance of reality and was "not a mere sham."

However, the *Hunter Development* case has led to other cases in the Land and Environment Court in which the court has held that certain work, the nature and extent of which is probably just as marginal as survey work, is engineering work for the purposes of section 95 (4) of the Act. For example the Court has held that the taking of samples of soil for testing off-site is engineering work (*Zaymill Pty Ltd v Ryde City Council*) and the taking of samples of ground water for testing off-site is also engineering work (*Norlex Holdings Pty Ltd v Wingecarribee Shire Council*).

It may be futile to be overly prescriptive about the type of work that is, or is not taken to be physically commenced, as is intended by proposed clause 160. There will always be new circumstances (as we have seen in *Zaymill* and *Norlex*) where the type of work physically commenced is "marginal" in terms of its physical presence on site. The proposed new clause will not stop courts from applying the fundamental principle from *Hunter Development*, namely that the expression “engineering work” in section 95(4) should be given a broad meaning.

At a policy level the proposed new clause is problematic. The proposed clause 160 "raises the bar" for the physical commencement test. However that contradicts the Government’s recent decision to resile from the proposal to introduce the concept of “substantial commencement” into the lapsing provisions of the EP&A Act. The proposed new clause is almost a backdoor to a substantial commencement test and is contrary at a policy level to the Governments decision on substantial commencement.

The proper approach to addressing the issue of commencement is to amend the EP&A Act so as to clarify the meaning of the word “engineering work” in section 95(4) rather than prescribed circumstances that are taken or not taken to be physical commencement. Such an approach would also allow a proper debate about the underlying policy of lapsing of consents and whether or not the policy should be restrictive or permissive.

For all those reasons perhaps clause 160 should not proceeded in its present form, or at all.
Clause 291 - Maximum Fee

Whilst this Clause specifies development application fees as maximums and prescribes what services are encompassed by that fee, it is the practice for some Councils to levy additional fees at the time of development assessment lodgement, for example “scanning fees.” It appears to subvert the statutory effect of imposing “maximum fees” if such additional fees may be ordinarily imposed.

It is recommended that an additional sub-clause be included to the effect that the consent authority may not impose any fee, charge or levy additional to those specified in this Clause for the lodgement of an application.

The latter proposal should be implemented in conjunction with an increase in the maximum fees. Since the commencement of the fee schedule in the Regulation the processing costs for Councils in dealing with all development applications has increased. The main costs are labour charges for professional staff, increased administration labour costs to comply with additional monitoring, notification and data entry requirements, and e-planning costs moving to more IT based workflow management, scanning and document management. For example, labour costs for Councils have increased on average 2.5% annually for the last decade. Councils are experiencing enormous difficulties recruiting and maintaining good professional planning staff. An increase in the development application fees would enable Councils to fund recruitment of more qualified Planners to process applications faster, exercise delegations for determinations and provide better professional advice to applicants to reduce time and increase confidence in the approvals process.

The Institute recommends that the Schedule to clause 292(3) be revised to result in a minimum increase of 5% for all categories of application with CPI adjustment annually thereafter.

Clause 326 – Public meetings and Clause 327 - Transaction of business outside meetings or by telephone

Clause 326 provides:

A planning body (other than a committee) may (unless the Minister otherwise directs) conduct its meetings in public, and is required to do so for the conduct of any business that is required to be conducted in public by a direction of the Minister.

The relevant part of clause 327 that is concerning provides:

(1) A planning body may, if it thinks fit, transact any of its business by the circulation of papers among all the members of the planning body for the matter for the time being, and a resolution in writing approved in writing by a majority of those members is taken to be a decision of the planning body.

(2) The planning body may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone, closed-circuit television or other means, but only if any member who speaks on a matter before the meeting can be heard by the other members.

A “planning body” is defined in clause 321 as the planning assessment commission, a regional panel, a planning assessment panel or a committee. The Institute has significant concern that these clauses are contrary to the principles of good governance, specifically transparency and openness of decision-making.

A planning body may conduct its meetings in private. Because both clauses 326 and 327 use the word “may”, the decision whether to meet in public or private is left to the planning body concerned (except that the Minister may direct to the contrary). Because of the importance of
planning decisions and the principles of openness and transparency, such a decision (i.e. whether to meet in public or not) should be made by the legislature, not by the body empowered to make the planning/merits decision. There may be special circumstances where a meeting should be held in private, but this should be the exception rather than the rule.

Local councils are not permitted under the Local Government Act to conduct their meetings in private unless special circumstances exist. The assumption under the Local Government Act is that all meetings will be open to the public. The same standard of openness and transparency should apply to planning bodies.

The clauses should be amended so that all meetings of planning bodies are to be open to the public unless the planning body resolves to close its meeting and the reasons for its decision are made public. Sections of the Local Government Act that apply to meetings of local council’s could be used as a guide. For example the new regulations could read something like:

1. Except as provided by clause (2) and (3), a planning body must ensure that all meetings of the planning body at which a decision on a development application is to be made are open to the public.

2. A planning body may resolve to close so much of its meeting, or otherwise conduct a meeting in private, that comprises discussion or disclosure of the following matters:
   a. Advice concerning litigation or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege.
   b. Information concerning the nature and location of a place or an item of Aboriginal significance on community land.
   c. Any matter the disclosure of which would, in the opinion of the planning body, on balance, would be contrary to the public interest.

3. A planning body may conduct a meeting, or transact business in private by email, telephone, closed circuit television or over the internet if it is necessary to do so because one or more of the members cannot be present at the meeting.

4. The grounds on which part or all of a meeting is closed must be stated in the resolution to close that part of the meeting and must be recorded in the minutes of the meeting.

Schedule 1

Schedule 1 Part 1 (1) (h) requires “a list of any approvals of the kind referred to in section 91(1) of the Act that must be obtained before the development may be carried out”. Having regard to the determination of Lloyd J in Maule v Liporoni & Anor [2002] NSWLEC25, that it was up to the applicant to decide if the applicant chooses not to have the development application processed as integrated development, it would be helpful if the Department could provide some guidance on this issue.

Schedule 4

The Institute was involved in the Department’s reference group on the proposed prescribed contents of Planning Certificates and the proposals are supported.
Changes to BASIX

The Institute supports BASIX and notes the significant tangible environmental outcomes and raised environmental awareness that have resulted from it. However, the Institute does not support the introduction of costs, for the reasons set out below:

1. The 5 point justification statement (web hosting costs, issuing of certificates, meeting Commonwealth requirements, etc) attempts to justify charging a fee for actions which are standard Government business (community education and assistance, transparency, administration etc).

2. The State has been strongly criticised for its development charges and this proposed BASIX charge appears at odds with Government policy to reduce these costs.

3. The BASIX factsheet (Guideline to the Environmental Planning and Assessment Legislation 2010 – changes to BASIX) compares the proposed BASIX costs to similar charges in other States.

"The proposed fees are less than 1% of the overall costs for meeting BASIX commitments and represent about one tenth of the compliance costs incurred in other Australian jurisdictions using compulsory NatHERS rating tools or manual, paper based, compliance with the Building Code of Australia.”

The Institute considers that this reasoning adds little to the justification to introduce a charge for BASIX and raises the question about whether other States charge for a similar certification processes.

4. There is no information provided on what proportion of the proposed charges will be consumed by fee administration costs.

5. The Government should be doing more to raise the currently low “hurdle” for sustainability under the BASIX tool, raise energy conservation awareness and enhance stricter compliance in dwelling construction rather imposing additional charges.

Should you wish to discuss any of the issues raised within the submission please contact, Robyn Vincin, PIA NSW State Manager, on telephone number (02) 8904 1011 or email nswmanager@planning.org.au.

Yours sincerely,

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