THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:JWlb220921

22 September 2021

Planning Policy
Department of Planning, Industry and Environment
Locked Bag 5022
PARRAMATTA NSW 2124

Dear Sir/Madam,

Proposed Environmental Planning and Assessment Regulation 2021

The Law Society appreciates the opportunity to comment on the public consultation draft of the Proposed Environmental Planning and Assessment Regulation 2021 (proposed 2021 Regulation).

The Law Society's Environmental Planning and Development and Property Law Committees contributed to this submission.

General matters

The overview factsheet notes that the proposed 2021 Regulation largely continues the existing provisions in the *Environmental Planning and Assessment Regulation 2000* (2000 Regulation) with targeted changes aimed at reducing the administrative burden and increasing procedural efficiency. An anticipated benefit of this process is stated to be reduced assessment timeframes. We suggest that the focus should also be on more rigorous requirements to ensure better design and amenity, particularly in relation to public amenities and services to meet the demands generated by increased population densities in urban areas.

We note that the fact sheet also states that development application (DA) requirements set out in Schedule 1 of the 2000 Regulation will be transferred across to the approved form, which is located on the NSW planning portal. Once the new Regulation is made, it states the Department will undertake consultation with councils to design improvements to the form. We suggest that it would be useful to have a wider stakeholder consultation process.

Part 3 Development applications

Clause 35 (7) provides:

> A development application that is amended is taken to be lodged on the day on which the applicant applied for the amendment if the consent authority—
> (a) considers the amendment not to be minor, and
> (b) notifies the applicant, by means of the NSW planning portal, that the later day applies.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

This is consistent with current case law about the effective lodgment date being recalculated when an amendment is lodged, but the 'counting' of deemed refusal dates is now subject to a council notification. This may require the applicant to keep chasing the council and does not provide certainty. It may be preferable to rely on assumed council acceptance of the modification with the proposed 2021 Regulation providing that council must notify acceptance of the amendment.

Part 4 Determination of development applications

Clauses 64 and 65

We consider that the Planning Secretary should have the discretion to allow modification or surrender without the landowner's consent if satisfied that the surrender or modification does not change the planning approval status of that land. In the case of a concept plan for a significantly sized precinct, it is impractical to get landowner's consent from every lot owner where some of the lots have been sold off, and the modification relates to a stage that has no connection or impact on the earlier stages.

Clause 80

Clause 80 details requirements around additional information relating to local infrastructure contributions. The particulars to be detailed in a contributions condition should include, in addition to the contribution plan under which the condition is imposed, the amount and the category of contributions that apply, with sufficient detail to enable the applicant to determine the portions of the plan that are relevant.

Part 5 Modification of development consents

Clause 90

As indicated above, the requirement for landowner's consent should be reconsidered for modification applications. For large and staged subdivisions that are the subject of a concept or staged approval, it is not feasible to require landowner's consent from all the individual lot owners who may have bought into the first stage. The requirement for landowner's consent should only apply to that portion of the site that the modification seeks to amend. We note that this is the position with Penrith Lakes as provided in clause 115(11) of the current Regulation and 92 of the proposed 2021 Regulation. We suggest that draft clauses 90(1) and 91(4)(i) be amended to provide that the consent of the owner of the land to which the modification relates is required, not all landowners for the whole of the land subject to the development consent.

Part 6 Complying Development

Clause 122(2)(a)

The certifier is now required to identify the following in the complying development certificate (CDC): a detailed list of the plans, reports, studies, or other documents relied on by the certifier to determine the application for the certificate, including information about how the documents can be accessed. This is in addition to the endorsed plans. We consider that subclause (a) is too broad, as it could require the certifier to list basic public documents, including, for example, the Building Code of Australia, or relevant Australian Standards. It should be limited to documents lodged with the application as per clause 127(4)(b).

Clause 128

The 2000 Regulation contains a proviso that, when considering the development standards, it is assumed "…that any building work is carried out in accordance with the plans and specifications to which the complying development certificate relates and any conditions to which the complying development certificate is subject". We consider that this proviso should remain. Some CDCs will relate to changes to existing buildings where the use also changes, such that clauses 131 and 132 of the 2000 Regulation and clause 128 and 129 of the proposed 2021 Regulation both apply.

Clause 142 (1)

We suggest the use of the word "whether" is a typographical error and suggest that "where" should be substituted.

Part 8 – Infrastructure and Environmental Impact Assessment

Clause 156

We support the proposed changes in relation to the publication on the NSW planning portal of assessment reports that determine whether an activity is likely to have a significant environmental impact. However, we note that the requirement will only apply where, among other things, the activity has a capital investment value greater than $5 million. We consider that the threshold should be lower, say $2 million.

Clauses 158 and 159

Following the decision in *Dartbrook*[1], we query if it should be made clear that applications or scoping reports for the Planning Secretary's environmental planning requirements can be modified before or after issue of the environmental planning requirements.

Schedule 2 Designated Development

Revise categories that trigger designated development

We support the inclusion of additional emerging technology development categories, which also require an environmental protection licence (EPL), as designated development in Schedule 2 of the proposed 2021 Regulation. This recognises the potential for these categories of development to cause significant environmental impacts. The Law Society generally supports continued alignment of designated development with requirements for an EPL.

We note that the Regulatory Impact Statement for the proposed 2021 Regulation states that the provisions relating to energy recovery from waste (clause 21 of Schedule 2 of the proposed 2021 Regulation) are not intended to apply to Special Activation Precincts in regional NSW. We do not support this exclusion, as it will remove third party merits appeal rights and potentially result in a lower level of environmental regulation for this category of development.

[1] In AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces [2021] NSWCA 112, Preston CJ in his judgment gave extensive consideration to the issue of whether there is power to amend an application to modify a development consent. His Honour's view was that there is no power to amend an application to modify a development consent.

Exclude activities from being designated development and update categories based on industry changes

We do not support amending categories of designated development which effectively would further limit the types of development that would be subject to third party merits appeal rights where these activities present a high risk of harm to the environment, for example, poultry farms, as discussed below.

We do not support introducing a 10,000-bird threshold to exclude smaller poultry farms that are in sensitive locations from being designated development (see cl 10 Schedule 2 of the proposed 2021 Regulation), given their potential to cause water pollution, odour and other amenity issues that concern and affect neighbouring residents. Detailed upfront assessment and public participation enables such impacts to be predicted, assessed, exhibited and appropriately managed.

Update location-based triggers for designated development

Replacement of definition of 'environmentally sensitive area' with 'environmentally sensitive areas of State Significance'

We support the concept of limiting impacts to defined environmentally sensitive areas. We note that the proposed 2021 Regulation replaces the term 'environmentally sensitive areas' with the new term 'environmentally sensitive areas of State Significance' (ESASS). We support this new definition as existing environmental protections are retained, with reform efforts focused on making them more effective and comprehensive.

We also recommend harmonising the definition of ESASS using a highest common denominator approach across different environmental planning instruments and the proposed 2021 Regulation. A stronger, harmonised definition would promote greater transparency as well as providing stronger environmental safeguards.

'Associated works'

We do not support excluding associated works such as access roads when calculating the distance from a dwelling in the context of determining whether a development is designated development (see clause 2(3)(a) 'Measuring distances' of Schedule 2 under the proposed 2021 Regulation). The effect of this amendment would be to potentially limit the opportunities for residents near proposed development having the opportunity to make an application for merits review of an approval.

Schedule 3 Planning certificates

We support the refining of the matters listed in the Schedule and the reframing of those matters which were expressed in terms of "whether or not" a particular matter applies to instead reference "whether" the matter applies (for example, road widening and road realignment).

We strongly support the objective of standardisation of planning certificates, and welcome the suggestion that work be done during 2022 to inform the development of a template and perhaps a prescribed form. We believe the further consultation foreshadowed in the fact sheet should extend beyond councils to include applicants for, and users of, planning certificates.

Specific items in Schedule 3

We support the expansion of clause 1 to include draft development control plans. We also support the lapsing provision in clause 1(3) and the inclusion of exempt development (clause 5).

We suggest that clause 2 (c) be expanded by adding "or additional local provisions apply".

In relation to clause 6, we suggest the content of the certificate should extend beyond the *Building Products (Safety) Act 2017* to include orders under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* of which council is aware. Ideally certificates could reference the Orders Register under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020,* which is available online free of charge at the website of NSW Fair Trading.

We suggest consideration be given to structuring clause 10 so that each specific risk is set out in its own numbered subparagraph. This suggestion is based on some concerns expressed by Windeyer J in *Crowe v Rindock Pty Ltd* [2005] NSWSC 375. In that case His Honour held that a requisition on title, the wording of which was based on the wording of clause 7 of the 2000 Regulation, was impermissible as constituting a "wide and searching interrogatory", with certain parts of the requisition "quite inappropriate for the property the subject of the contract". It is an important part of conveyancing practice for purchasers to be able to test the knowledge of the vendor through the requisitions process. It is possible that the offending requisition would have been able to have been at least partially salvaged had the requisition been drafted by reference to enumerated subparagraphs.

The Note that appears at the end of Schedule 4 of the 2000 Regulation referencing section 59(2) of the *Contaminated Land Management Act 1997* does not appear in Schedule 3 of the proposed 2021 Regulation. We have previously expressed concerns about incorporating content into a planning certificate via notes (not least because notes do not form part of the 2000 Regulation – clause 8). We would prefer that the section 59(2) matters be particularised in the Schedule.

Schedule 4 Fees

Part 9 - items 9.7 and 9.8

We support the move to a fee unit method of calculation for these items.

There is a long-standing issue affecting conveyancing transactions involving sales and purchases of multiple lots. There is a divergence of charging practices among local councils based on differing interpretations of section 10.7 of the *Environmental Planning and Assessment Act 1979.* Some charge a single fee, irrespective of the number of lots the subject of the application. Others charge multiple fees calculated according to the number of valuations issued. Still others will charge a fee calculated on a per lot basis.

The problem mainly affects rural transactions but can have implications for other sites (development sites, strata sales where the residence and the car space are on separate titles). Frequently the information across the lots about the scheduled matters is identical (so only the title particulars differ across the multiple certificates).

One approach would be to prescribe a fee for the issue of a single section 10.7(2) certificate irrespective of the number of lots covered by the application. An alternative approach would be to prescribe a basic fee, and a further per lot fee based on the number of lots covered by

the certificate. If the information in the certificate is the same across the parcels (apart from lot number and title details), the additional fee should be nominal.

The Law Society appreciates the opportunity to participate in the reform process. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,

Juliana Warner
President