

7.1 DRAFT POLICY FOR MANAGING CONFLICT OF INTEREST IN COUNCIL-RELATED DEVELOPMENT APPLICATIONS

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2 ANNEXURES ATTACHED

RECOMMENDATION

That in relation to the report “Draft Policy for Managing Conflict of Interest in Council Related-Development Applications”, Council:

- (i) proceed to public exhibition of the Draft Policy for Managing Conflict of Interest in Council-Related Development Applications for a period of 28 days;*
- (ii) receive a further report following the public exhibition period in the event that submissions are received and/or the Draft Policy is proposed to be amended; and*
- (iii) authorise the adoption of the Draft Policy in the event that no submissions are received and no changes are made to the Draft Policy.*

SUMMARY

As a result of forthcoming changes to the *NSW Environmental Planning and Assessment Regulation 2021 (EP&A Regulation 2021)*, all Councils in NSW must develop a conflict of interest policy for Council-related development applications. The purpose of the policy is to establish the process through which potential conflicts of interest will be identified, procedures for risk assessment, and the management controls to be implemented by Council to address the potential conflicts. As outlined by the Department of Planning and Environment, the intent of the policy is to manage potential conflicts of interest and increase transparency in the assessment and determination of Council-related developments.

Following the public exhibition of the draft policy and in the event that submissions are received or changes are proposed to be made to the policy document, a further report will be prepared for Council's consideration. In the event that no submissions are received and no changes are proposed it is recommended the Policy, as exhibited, be adopted.

COMMENTARY

Background

Councils have a significant role as development regulators. However, Councils can also be a developer, landowner or hold a commercial interest in the land they regulate. Where a council has this dual role, an inherent conflict can arise between its interests in the development and its legislative duty as regulator. Identifying these conflicts of interest early and finding ways to address them is crucial to good governance and enables Council to strengthen its relationship with communities and build and enhance trust.

The Department of Planning and Environment has determined that the following requirements be introduced into the *NSW Environmental Planning and Assessment*

Regulation 2021 (EP&A Regulation 2021) to address conflicts of interest in Council-related development. The Department has issued a set of guidelines to assist Councils in preparing a conflict of interest policy, **ATTACHED**, refer **ANNEXURE A**:

Regulation/Guidelines Requirement	Response
Councils must adopt and have a policy that specifies how conflicts of interest in connection with Council-related development applications will be handled. The policy must comply with the requirements in these Guidelines (section 66A).	The Department has provided a draft Policy intended to capture the relevant provisions of the new EP&A Regulation 2021. This Policy has been used as a template for Council's Draft Policy.
Council-related development applications must now be accompanied by either a management statement, which explains how the council will manage potential conflicts of interest, or a statement that the council has no management strategy for the application (section 36A).	The Draft Policy includes management controls and strategies which are to be applied to the assessment and determination of Council-related development applications.
Councils must record conflicts of interest in connection with each council-related development application, and the measures taken to manage the conflicts, in their existing DA register (section 242A).	Administrative processes will be updated to account for this requirement. Council will be required to publicly communicate via the NSW Planning Portal the management approaches they propose to implement. An example management statement template is included in the Draft Policy.
Council-related development applications must be exhibited for a minimum of 28 days to ensure transparency during the assessment process (<i>NSW Environmental Planning and Assessment Act 1979</i> , schedule 1, clause 9B).	This requirement has been included in the Draft Policy.

Council will not be permitted to determine a Council-related development application unless it has adopted a conflict of interest policy and takes into consideration that policy in making its determination. In addition, Council must publicly communicate (via the NSW Planning Portal) the management approaches it proposes to implement.

The regulation changes strictly relate to the assessment and determination process of development assessment and does not mandate the use of the framework post determination. However, the Department of Planning and Environment also advises that *"it is best practice when developing their policies for councils to also address conflicts that may occur after development consent has been granted"*.

An example of this would be the processing of a construction certificate for Council related development. Post consent matters are typically more objective and prescriptive; therefore, it is not proposed to introduce measures post the issuing of development consent in the Draft Policy at this stage.

This will continue to be monitored on a case by case basis to determine whether any additional probity measures are required for Council-related development, post consent.

Council's Policies and the Proposed Amendments

Council does not currently have an adopted Policy dealing with conflicts of interest arising from Council-related development applications. However, internal governance processes are already in place by determining Development-related applications under delegated authority based on an internal hierarchy of delegations that ensure manager, director and/or General Manager review where considered appropriate.

Furthermore, there are thresholds where certain Council applications are required to be determined via the State under State Environmental Planning Policy (Planning Systems) 2021 (SEPP). Council projects with a capital investment value greater than \$5 million is the most common trigger, called Regionally Significant Development. Under the SEPP Council related development applications greater than \$5 million in value must be determined by the Northern Regional Planning Panel. Council's current internal governance procedures mean that a third-party consultant is engaged to assess Regionally Significant development applications. This provides greater transparency for what would be considered higher risk Council related applications.

The Department of Planning and Environment has provided a template for a Draft Policy intended to capture the relevant provisions of the amended EP&A Regulation 2021. This Policy has been used as a template for Council's Draft Policy which is **ATTACHED**, refer **ANNEXURE B**.

Relevant internal divisions of Council have been briefed on the proposed changes and their legislated responsibilities when lodging Council-related development applications.

Finally, it is relevant to note that the Draft Policy does not relate to/is not intended to consider works such as driveways in road reserves or structures/connections in drainage reserves or similar works. These works are not included in the definition of "Council related" applications.

(a) Policy Implications

Council is required to have a Policy in place outlining how it manages conflict arising from council related development applications by 3 April 2023. The draft Policy is considered to meet this requirement.

Council's Community Consultation Plan 2019 should be updated to reflect the legislated 28 days public exhibition period for Council-related development applications.

(b) Financial Implications

No funding has been provided by the Department of Planning and Environment to enable councils to prepare and implement the new statutory requirements.

Financial implications may include additional costs if there is an increased need to engage independent planning consultants in the assessment of applications or post approval phase.

(c) Legal Implications

The new requirements have been introduced into the *Environmental Planning and Assessment Regulation 2021* and mandated for all Councils in NSW.

(d) Community Consultation

Exhibition of the Policy is recommended for a period of 28 days. If there are no changes to the policy or no submissions are received it is recommended that the Policy be deemed adopted at the completion of the exhibition period. If a submission is received or the policy is proposed to be changed a further report will be prepared for Council's consideration.

(e) Delivery Program Objective/Strategy

Focus Area 9 – Open and collaborative leadership.
