Mosman Municipal Council
Civic Centre
Mosman Square
PO Box 211
Spit Junction 2088

Telephone 02 9978 4000
Facsimile 02 9978 4132
ABN 94 414 022 939

council@mosman.nsw.gov.au
www.mosman.nsw.gov.au

28 March 2017

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

Dear Sir/Madam;

Re: Submission – Draft Environmental Planning and Assessment Amendment Bill 2017

I am writing in response to the Department's public exhibition of the *Draft Environmental Planning and Assessment Amendment Bill 2017* (the draft Bill) to amend the *Environmental Planning and Assessment Act 1979* (the Act).

If made, the amendments would affect the plan-making, development assessment, consultation, decision-making and enforcement processes of councils throughout NSW, including Mosman.

Council considered a report on this matter at its meeting on 7 March 2017 and resolved that a submission be prepared addressing the matters detailed below.

1. Revised objects

The draft Bill includes revised objects which the Department has advised for the most part are intended to reflect, simplify and modernise existing objects. However, when comparing the revised objects with the current objects in section 5 of the Act, substantial differences are evident. Council raises concern about the following:

- Current object 5(a)(ii) "*to encourage the promotion and co-ordination of the orderly and economic use and development of land*" is omitted and replaced by new object (c) "*to promote the timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing)*". These objects are not the same. "Orderly" is defined as "in order", "well-arranged" or "systematic", which has a different meaning to "timely delivery", defined as "occurring at a suitable time", "seasonable" or "opportune". The proposed changes omit the fundamental need for planning to be orderly or systematic, focusing instead on the fast approval of development which can be odds with good planning outcomes. Current object 5(a)(ii) should be retained in the Act.
- Current objects 5(a)(iii), (iv) and (v) to encourage the "*protection, provision and co-ordination of communication and utility services*", "*provision of land for public purposes*" and "*provision and co-ordination of community services and facilities*" are all omitted. The new objects do not appear to address these matters. Reference to provision of land for public purposes and infrastructure in current objects 5(a)(iii), (iv) and (v) should be retained in the Act.
- Current object 5(a)(vi) "*to encourage the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats*" is amended, with reference to protection of the habitats of native animals and plants omitted. This is an issue namely that a threatened plant and/or animal require

appropriate habitats to survive and will not exist without a population or ecological community. This terminology was retained in the draft Planning Bill 2013. Reference to protection of habitats in current object 5(a)(vi) should be retained in the Act.

The draft Bill proposes new objects to promote good design and the sustainable management of built and cultural heritage. The new objects are supported, however it is unclear how the object "*to promote good design in the built environment*" can be achieved in the context of complying development, where development such as new dwelling houses - and potentially medium density housing, as is being considered by the Department - are permissible under *SEPP (Exempt and Complying Development Codes) 2008* (the Codes SEPP) by tick-box assessment without adequate regard for a site's context, its relationship to neighbouring land, or character of an area.

The revised objects in the draft Bill do not address:

- Healthy built environments – The draft Planning Bill 2013 included the object "*health, safety and amenity in the planning, design, construction and performance of individual buildings and the built environment"* however this is not contained in the current draft Bill. The importance of the built environment in supporting human health as part of everyday living has been widely documented. Land use regulation can influence physical activity opportunities, healthy food access, and opportunities for social and community interactions. The object of the draft 2013 Bill pertaining to healthy built environments should be included in the Act.
- Public transport - The draft Planning Bill 2013 included the object *"the co-ordination, planning, delivery and integration of infrastructure and services in strategic planning and growth management"* however this is not contained in the current draft Bill. The provision of public transport to support the growing NSW population is critical, and as such, an object to this effect should be included in the Act.

2. Community participation

Under the draft Bill, all planning authorities (including councils) will need to prepare a community participation plan explaining how they will engage with the community in plan-making and development decisions (or include this detail in the community engagement strategy prepared under the *Local Government Act 1993).*

No objection is raised regarding the requirement to prepare a community participation plan. Council has a strong background in community engagement and uses a range of methodologies to inform, consult and involve the community in plan-making and development decisions, including traditional (newspaper advertisements, material on display in Council foyer, letters to affected landowners, notice on site) and modern (Facebook, Twitter, mosmanplanning.net website, e-newsletters, online DA tracker) approaches. Council's consultation goes beyond the statutory minimum set by the Act, with the methodology used dependent upon the type, scale, and likely impact of the proposal or application.

It is important that flexibility be facilitated in community participation plans – however concern is raised that the draft Bill does not provide for this. The draft Bill amends the statutory public exhibition requirements to a minimum of 28 days for new/amending strategic plans and 14 days for development applications and the like, removing the discretion that councils currently have to waive notification for minor applications. This is not supported as:

- Removing a council's discretion to waive notification for minor development applications would burden some applicants and councils with additional cost and time in processing such applications to allow for unnecessary notification. For example, minor works such as change of retail building use, internal works or minor landscaping in a backyard are unlikely to result in adverse impacts to neighbouring properties and do not need to be notified. Discretion to waive notification requirements in certain circumstances are detailed in Mosman's Development Control Plans (see extract below). This must be facilitated in community participation plans.
- Requiring notification of all development applications for a minimum of 14 days regardless of the type, scale, location etc of proposed works raises significant disparity when compared with the nil

notification requirements for complying development. For example, under the Codes SEPP, alterations/additions or a new two-storey dwelling house can be built with no neighbour notification – and yet an application for minor works, such as the examples given above, would need to be notified for a minimum for 14 days under the draft Bill.

- Requiring a minimum of 28 days notification for all new/amending strategic plans again removes the discretion for the Department to issue a gateway approval with a lesser notification period, of say minimum 14 days, for a minor amending LEP or DCP.

It is noted that no exhibition time frame is specified for SEPPs under the draft Bill. Draft SEPPs should be exhibited for a minimum period of 28 days, consistent with the exhibition period for LEPs.

The Department's consideration of legislating early consultation with neighbours as part of the development application process needs careful consideration. This concept has been explored by Council - Mosman DCPs allow notification requirements to be waived for minor development applications where adjoining neighbours have signed and agreed to the development application plans, however this is at the discretion of the Council and applies only to minor applications. This approach would not be suitable for more complex or controversial applications. Consideration needs to be given to when this would apply, verification of pre-consultation consultation, and the cost burden to councils if fee reduction was to be used as an incentive. Early consultation should be promoted as best practice, but not legislated.

Decision makers (including councils) will be required to give public notice of the reasons for decisions made in respect of applications for development consent, including how the community views were taken into account in making the decision. Currently, this information is contained in Mosman's development assessment reports and notices of determination which are published online on the DA Tracker and publicly available. It is unclear whether this current practice would satisfy the draft Bill's requirements for giving public notice.

Extract from Mosman Development Control Plans, Part 3 Notification of Applications:

The Director of Environment and Planning / Manager Development Services has the discretion to waive the need for notification where a development application for local development is considered to have minimal environmental impact. This may include applications for (but not be limited to):

(a) minor development where adjoining neighbours have signed and agreed to the development application plans;
(b) development on sites on which a heritage item is situated or within a heritage conservation area which, but for the heritage provisions in the LEP, would constitute exempt or complying development;
(c) internal alterations and additions where the approval of the owner/owners corporation has been obtained and there is no external change to the building;
(d) strata subdivision of a previously approved multiple dwelling building;
(e) change of use of a retail/commercial building in a business zone where there is no external change to the building;
(f) front fences in heritage conservation areas where they comply with this Plan;
(g) minor landscaping works that do not significantly alter the topography or drainage patterns or reduce the extent of site landscaped area;
(h) minor applications for a heritage listed item where a Conservation Management Plan has been prepared for the site.

Development applications for the ringbarking, cutting down, topping, lopping, removal, injuring or destruction of a tree or other vegetation that is or forms part of a heritage item or that is within a heritage conservation area will not be notified, except if determined otherwise by the Director of Environment and Planning / Manager Development Services.

Notwithstanding the discretionary powers to waive the need for notification of minor applications, where it is considered that the proposal is likely to have broader implications and the plans have been signed by adjoining owners, notification will still take place for a period of 14 days.

If Council decides to waive notification, applicants will not be required to pay fees for notification. In the instance where this decision is made after the lodgement of the application, fees for notification will be refunded to the applicant.

http://www.mosman.nsw.gov.au/planning-and-development/planning-controls/DCP/

3. Strategic planning

Under the draft Bill, councils will be required to develop and publish local strategic planning statements which must include/identify: the basis for strategic planning in the area; the planning priorities for the area and actions required to achieve priorities; and the basis on which the council is to monitor and report on the implementation of those actions. The statements will complete the line of sight from regional and district plans.

Council is supportive of transparency in the planning system and raises no objection to preparing a local strategic planning statement to clearly articulate its planning framework and inform future planning decisions. It would express Council's long–established housing strategy which is the basis for zoning and development standards in Mosman LEP 2012, and reflect new requirements set under the draft North District Plan. It is important that the Department provide guidance to councils regarding the structure of local strategic planning statements to ensure consistency across the State, with local content to be included by councils.

Under the draft Bill, councils will be required to check their local environmental plans (LEP) against set criteria every 5 years to ensure that LEPs remain responsive to strategic planning objectives and up to date. There is no objection raised to this requirement.

Councils will also be required to amend DCPs to follow a NSW-standardised format - yet to be devised - to improve the consistency across councils and user navigation, and allow DCPs to be put on the NSW Planning Portal. The benefit of consistency in DCP structure across the State is recognised, and no objection is raised to this provided that councils retain the ability to include local content, and be involved in drafting optional model DCP provisions.

4. Development assessment

Under the draft Bill, changes are proposed to prevent the misuse of modifications of development consents under section 96 of the Act and bring this assessment pathway back to its original intent, that is, to correct a minor error, misdescription or miscalculation only. Planning authorities will no longer be able to retrospectively approve a modification to a development consent where the works have been completed not in accordance with the original consent.

Council supports this proposed change which seeks to discourage unapproved works being carried out. However, if works are carried out not in accordance with a consent, it is unclear what mechanism or application there would be to consider the works, other than the issue of Orders and penalties. This needs further clarification.

Under the proposed changes, a planning authority will also be required to take into account the reasons for the original consent and give reasons for its decision in determination of the modification application. This occurs currently in Mosman, with development assessment reports addressing the original consent and proposed changes. The reports are published online on the DA Tracker and publicly available.

5. Complying development

Changes are proposed to the pathway for complying development to improve confidence in this form of development and increase its uptake across NSW. Council raises the following concerns:

- Mandatory notification requirements are proposed to be changed with notice of a complying development certificate (CDC) required to be given to the relevant council and neighbours both prior to and after issue of the CDC, including plans and documentation. It is unclear what the benefit of this duplication of notice is, and objection is raised that the draft Bill does not change the Act regarding the (lack of) public exhibition requirements for complying development. The notice would simply alert neighbours of a CDC being lodged, then endorsed, but not provide any legal right to make a submission in respect of it. This is at odds with the draft Bill's object to "*provide increased opportunity for community participation in environmental planning and assessment*".

- The Regulation will be able to specify certain sensitive categories of complying development for which only a council certifier is authorised to issue a CDC, and not a private certifier. The Department notes: "*As the use of complying development grows, it may be necessary to put in place additional safeguards to ensure the appropriate consideration of proposals with greater potential to impact local values or sensitive areas*." However, this begs the question as to why such development would be complying development in the first place? This change over-complicates the planning system and extends the scope of complying development far beyond what it was originally intended to be for, that is, for straightforward works with minimal environmental impact.
- The draft Bill includes a new investigative power to enable councils to issue a temporary stop work order (for up to 7 days) in order to investigate whether proposed works are being constructed in line with an issued complying development certificate. This timeframe should be extended to up to 14 days to facilitate effective investigation of issues.
- Concern regarding the use of voluntary planning agreements with CDCs is addressed under point 9 of this submission below.

The draft Bill also introduces a new compliance levy with revenue remitted to councils to resource investigation and enforcement activity. It is understood that the Department is undertaking further work to determine the most efficient and equitable model for this change. Council awaits the Department's findings.

6. Building provisions

Council is supportive of transparency in the planning system including proposed changes under the draft Bill to introduce a clear requirement in the Act that a construction certificate must be consistent with the development consent. These provisions are proposed to be moved from the Regulation to the Act, changing the focus of the 'consistency test' from being 'not inconsistent' to 'consistent' with the development consent.

7. Local planning panels

Under the draft Bill, the Minister will be given the power to direct that local planning panels be established, and where independent hearing and assessment panels currently exist, updated provisions will apply about constitution, membership and functions. Existing panels will be transitioned to the new provisions over a 12-month period.

Mosman Council has utilised a panel approach for independent determination of development applications since 2011 when the Mosman Development Assessment Panel (MDAP) was established under section 377 of the *Local Government Act 1993*. The proposed changes under the draft Bill are not inconsistent with this current model, although some are differences identified:

- Number of panel members – under the draft Bill, the local planning panel is to comprise three members being appointed by the council; whereas the MDAP Charter requires four panel members appointed by the General Manager after consultation with Council.
- Expertise of the panel members – under the draft Bill, the three panel members are comprised of two independent persons with relevant expertise and a community representative. 'Relevant expertise' is defined in the draft Bill as expertise in at least one area of planning, architecture, heritage, the environment, urban design, economics, traffic and transport, law, engineering, tourism or government and public administration. By comparison, the four MDAP members are to be comprised of:
    - a lawyer (or retired judge);
    - a professional expert with a university degree in urban design, planning or architecture;
    - a second professional expert with a university degree in environmental science or relevant environmental field; and
    - a community representative (taken from a pool of five community representatives).

Key differences are not only in the number of panel members, but in the range of expertise of the independent members. The draft Bill does not require the panel experts to be from different disciplines as is required under the MDAP Charter, which may be to the detriment of good planning outcomes. The Department should consider the provisions of the MDAP Charter in finalising the draft Bill provisions relating to local planning panels. Refer to http://mosman.nsw.gov.au/planning-and-development/development-applications/MDAP

Under the draft Bill, a new power of direction will allow the Minister to require more planning functions to be carried out by council staff. The Department notes that the vast majority of development applications should be determined by council planning staff under delegation, and the focus of the Minister's power would be on those councils where this does not occur. It is unclear if this would extend to having consistent delegations to local planning panels across NSW. The MDAP Charter, including matters to be referred to the panel, were adopted by Council following extensive community consultation - and it would be contrary to the Department's goal to improve consultation with communities if the Minister or Department mandated a change in delegations without proper consultation. Clarification and further explanation of this is required.

8. State significant, integrated and designated development, and infrastructure delivery

The draft Bill proposes changes that will affect the assessment pathways for different types of development - State significant, integrated and designated development, and development without consent under Part 5 of the Act - to improve transparency and efficiency in assessment processes and decision-making. For example, step-in power to be granted to the Secretary of the Department to prevent delays and resolve conflicts between State agencies; better integration of development consents and other statutory approvals issued by multiple agencies for major projects; and formalising the need for concurrence or notification of public authorities' activities under Part 5 within future infrastructure corridors.

Council is supportive of transparency and efficiency in the planning system – however efficiency must not be to the detriment of good planning outcomes, nor override due process. Caution needs to be exercised by the State Government, in particular with the Secretary's step-in power.

9. Planning agreements

The draft Bill clarifies and strengthens the Ministers' power to make a direction about the methodology underpinning voluntary planning agreements. This is part of a package of changes exhibited during November 2016 to January 2017 which included updated planning agreement guidelines, a planning circular and Ministerial Direction. A submission was made to the Department in respect of these changes in January this year.

Additionally, the draft Bill proposes to allow voluntary planning agreements to be entered into in conjunction with complying development. The Department's *Summary of proposals* (page 25) notes that "*Another anomaly is that there is currently no ability to levy for special infrastructure contributions for complying developments (as can be done for development applications). This will be corrected by allowing special infrastructure contributions to be required, and planning agreements to be entered into, for complying developments (see Schedule 7.1[1], [3] and [5]-[7] on page 73 of the Bill).*"

However there is no further information pertaining to this. It is unclear how a planning agreement can be negotiated with complying development within the legislative framework set by the Codes SEPP. Clarification and further explanation of this is required.

10. Enforcement and compliance

Under the draft Bill, provisions for orders are consolidated into a new section. This includes provisions relating to development control orders, fire safety orders, brothel closure orders, process, representation, notice, special provisions, modification and revocation, effect and compliance, and cost.

As noted above, Council supports the proposed change to prevent the retrospective approval of modification works under section 96 of the Act so as to discourage unapproved works being carried out, however the reality is that unauthorised works do occur. It is unclear what mechanism or application there would be to consider this other than the issue of orders and penalties. This needs clarification.

The introduction of an enforceable undertakings regime similar to that under the *Protection of the Environment Operations Act 1997,* whereby Council can enter into an agreement requiring a consent holder to rectify harm and commit to improved behaviours, expands the options available to councils for enforcement and compliance.

11. Matters not included in the draft Bill

It is disappointing that the draft Bill does not address provisions in the Act that are known to be problematic or anomalous, such as existing use rights and variations to development standards for modification applications.

The aim of existing use rights provisions in Division 10 of the Act is to balance the potential hardship and dislocation that could result if landowners or occupiers were required to discontinue uses no longer permitted under current planning controls, against the need to transition to the new and preferred planning regime for the area (Department circular, 2006). Despite amendments to the Act in 2006 which restricted the use of these provisions, serious concerns remain, namely:

- Why do development standards identified in a council's LEP as applying to the land not apply when assessing development with existing use rights?
- If the long-term strategy for an area set under the new planning regime is that non-conforming uses be encouraged to transition over to a use permitted under the new planning regime, why does the legislation permit an existing use to be enlarged, expanded, intensified, altered, extended or rebuilt?
- Why does the 10% cap on increasing floor space ratio only apply to commercial and industrial land, not to all land?

In regards to variations to development standards, it is unclear why the provisions of clause 4.6 'Exceptions to development standards' of a council's LEP apply to a development application but not a modification application. Clause 4.6 requires:

- an applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify contravening the development standard; and
- a consent authority to be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

However, the legislation does not require such consideration for a modification application. This may be because under sections 96(1A) and (2) of the Act, a consent authority must be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted, and before that consent as originally granted was modified (if at all). In undertaking this assessment under section 96, the matters for consideration in clause 4.6 should be addressed.

Conclusion

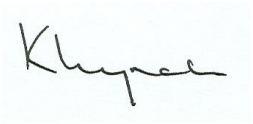
The draft Bill proposes significant changes to the Act including to the objects, community participation, strategic planning, development pathways, local planning panels, and enforcement and compliance provisions. Many of the changes proposed are positive and supported by Council, however this cannot be said of all changes proposed. Clarification from the Department is sought on a number of issues.

It is disappointing that the draft Bill does not address some provisions in the Act that are known to be problematic or anomalous.

To support the changes proposed under the draft Bill, amendment to the *Environmental Planning and Assessment Regulation 2000* (the Regulation) will be required – however proposed changes to the Regulation have not been released for public exhibition along with the draft Bill. It is difficult to fully appreciate the implications of changes proposed under the draft Bill without knowing the detail to be contained in the Regulation.

Thank you for the opportunity to comment on this proposal. Please do not hesitate to contact me on 9978 4058 or k.lynch@mosman.nsw.gov.au if you would like to discuss these issues further.

Yours sincerely



Kelly Lynch
SENIOR STRATEGIC PLANNER