



THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Sarah McGirr
Team Leader, Natural Resources Policy
Policy, Planning Systems and Reform
Department of Planning
GPO Box 39
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Dear Ms McGirr

Review of Section 149 Certificate Process

The Law Society of New South Wales appreciates very much the opportunity to be involved in the process of reviewing the Section 149 Certificate as part of the review of the *Environmental Planning and Assessment Regulation 2000* (EP & A Regulation).

As you would be aware, the Society through its Property Law Committee (Committee) is very interested in this area and has been advocating significant change for many years. It is very exciting that there is now an opportunity to update the certificate and make it an appropriate and relevant document for use by everyone in the conveyancing process, as well as providing an opportunity for developers and other users to obtain reliable information about a range of issues in the planning process.

As requested, attached is a table with the Committee's comments completed, indicating whether the need for the information in the items included in the existing Schedule 4 of the EP & A Regulation (Schedule) are to be categorised as "high", "medium" or "low" with an additional column for comments.

The Committee would like to make a number of particular comments:

Purpose of Certificate

1. In making these comments, it is important to recognise that the certificate under Section 149(2) of the *Environmental Planning and Assessment Act* (Act) is primarily a disclosure document as it provides information about the "true status" of the land. As such, it is a snapshot of the land use restrictions applicable to the property as at the date of the certificate.

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2. The Committee does not see the Section 149(2) Certificate as a general information provision document. If it is to perform that function, that will unnecessarily dilute and confuse its primary purpose. Although this difference may appear a subtle one, it is vital that persons proposing to purchase in particular understand the characteristics of the land they are considering purchasing. The provision of this certificate is the only formal means of achieving that knowledge.
3. In this light, the Committee also strongly recommends the Department ensures that the review of the items in the Schedule is carried out in co-ordination with the review of the *Conveyancing (Sale of Land) Regulation 2005*.

Expanded Use of Section 149(5) Certificate

4. The Committee suggests that as a complement to the use of the Section 149(2) Certificate, the use of Section 149(5) should be expanded and in that process, its emphasis shifted from the conveyancing process to the wider development community so it would be seen as the main means of providing a wider more detailed range of information concerning the property.

More Prescriptive Certificate Format

5. The Committee considers that the form of the certificate needs to be more prescriptive, with simpler questions. Ideally, the certificate should be framed so that the questions can be posed in a form that admits only a "yes" or "no" answer. This prescription should apply to all councils so that the information received is consistent across the State. The Committee can see no reason why the same form cannot be used for the provision of the same information. The Department could perhaps assist with the development of a standard software template and other resources which could then be supplied to Councils. It would be unfortunate indeed, if the advances made in relation to the information to be provided, were to be let down by individual councils being allowed to present the information in different ways.
6. When providing information, it would be very useful that the source of the information be referenced. Particularly, directing the reader to where he or she can receive further information (including telephone numbers and url links), would make the certificate far more informative and relevant.

Notices

7. A critical item for any purchaser is whether or not a notice or order issued by council applies to the land. The Committee considers this a very overdue and necessary inclusion. Some councils include this information as part of a Section 149(5) Certificate. However, in view of the importance of the information and the fact that the Schedule is used for bringing in information from other Acts, it appears to the Committee to be highly appropriate to include relevant information from council's own files.

Section 28 of the Act

8. The issue of the application of Section 28 of the Act does need to be addressed. Councils, with a few exceptions (notably Woollahra Council), do not include a copy of the relevant environmental planning instrument which zones the land, in the certificate. The

practice of including a full copy of the LEP as part of the Section 149(2) certificate should not be encouraged. However, it is highly relevant in the conveyancing process, to learn whether or not the relevant instrument has a suspension of regulatory instruments clause of the type sanctioned by Section 28 of the Act. Again, it can be a standard item which draws to the attention of the reader of the certificate, whether or not an environmental planning instrument has specified any regulatory instruments pursuant to section 28 (in the form of a yes/no answer as per item 5 above). If the answer is "yes", the certificate should then provide particulars of that EPI and of the classes of regulatory instruments affected.

Timing of Changes

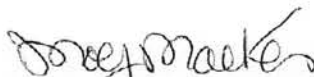
9. The timing of changes to the Schedule as raised in the meeting needs to be addressed. The Committee appreciates the issue is problematic and changes to the law are not matters that can be always predicted. However, information which is provided must be reliable. If the information is wrong because of a problem in its notification, then the certificate has the potential to be extremely dangerous in its use and can create havoc in the conveyancing process and other areas. The Law Society has written to the Department previously on this subject.
10. The Committee considers that a procedure needs to be established to avoid those consequences. The Committee's suggestion is that a change to the Schedule should not take effect until thirty days after the relevant information is made available to the public as a prospective change. The Committee would be happy to discuss the means of dissemination of that information but at the very least suggest that publication on the Legislation Website, E Plan and a Planning Circular, as well as notification to the Law Society, should occur at least thirty days before the implementation of any change which will affect the structure or content of the Section 149 Certificate.

Examples of Certificates

11. The Committee has, as a separate exercise, prepared examples of certificates which have been provided by members. These will be forwarded to you separately. The certificates warrant analysis as to the manner of presentation of information and the Committee would be most interested in being involved in an exercise to explain which of these are useful certificates and which are not.

The Committee appreciates that many of the matters raised will require further discussion and input and welcomes very much the opportunity to remain closely involved in the process to ensure a better outcome for all users of planning information. Once again, thank you for the opportunity to provide these comments to you.

Yours sincerely


Mary Macken
President

Encl

Attachment A – Prescribed planning certificate provisions				
Certificate Requirement	Details – Schedule 4 of the EP&A Regulations 2000	How is council made aware of the information requirements for the s149 certificate?	Need for information high/mod/low	Comments [see note at end to explain high/mod/low]
EPIs and DCP	List each EPI, DCP, planning proposal and draft EPI applying to the land	Council policies (except SEPPs)	High	<ol style="list-style-type: none"> SEPPs which do not zone land should be excluded from the certificate, but a general reference made as to where they could be sourced. in each case, a means to obtain further information should be provided.
Zoning and land use under LEPs	Land use zone; development permitted with consent, without consent or prohibited in the zone; fixed minimum land dimensions for erecting dwellings; critical habitat; land in conservation area; environmental heritage	<p>Mostly council policies.</p> <p><i>Threatened Species Conservation Act 1995</i> (s48 & s54) requires councils be given notice and provided with a map of declared critical habitat.</p>	Land use zone (H); development permitted with consent, without consent or prohibited in the zone(ALL M); fixed minimum land dimensions for erecting dwellings (M); critical habitat (M); land in conservation area(M); environmental heritage (H)	The land use is a critical piece of information and deserves prominence in the certificate, before other EPI's and any DCP. Permissible/ prohibited development also needs to be clearly stated. Whether the land contains a heritage item is also a critical piece of information
Complying development	Whether complying development under <i>SEPP (Exempt and Complying Development Codes) 2008</i> can be carried out. Reasons why cl1.19 of the Codes SEPP might preclude complying development.	<p>No statutory council notification process.</p> <p>Changes to the Codes SEPP are notified to councils through DoP practice (e.g. planning circulars and Fact Sheets).</p>	H	The general view was that whether or not complying development could be carried out on the land was important information for purchasers, and if it was to be included in the certificate, then it needed to be a very clear statement as to the availability of the SEPP.
Coastal protection	Land affected by the operation of s38 or 39 of <i>Coastal Protection Act 1979</i> – concurrence for certain development in the Coastal Zone.	Applies to mapped Coastal Zone. s4B(3) of CP Act requires maps be available for inspection at councils. Only a s149 requirement if council has been notified that land is affected.	L	Coastal protection matters appeared less relevant
Mine subsidence	Land proclaimed to be in a mine subsidence district within the meaning of s15 of <i>Mine Subsidence Compensation Act 1961</i> (MSC Act)	Mine subsidence districts proclaimed under s15 of the MSC Act and published in the Gazette. Councils consult with Mine Subsidence Board on mine subsidence districts when preparing LEPs (s117 Direction 4.2 – Mine Subsidence).	H	
Road widening and road realignment	Land affected by any road widening or road realignment under Div.3 Part 3 of <i>Roads Act 1993</i> or any EPI or council resolution.	Road widening under Div 3 Part 3 of Roads Act, s25 requires that road widening orders be published in Gazette, and road authority must lodge the order survey plan with the council.	H	The Conveyancing (Sale of Land) Regulation (CSOLR) does not extend to road widening in the same manner as Sch 4 item 6. The affectation is the same, - regardless of the source of authority. Other sources of road widening (refer CSOLR sch 3, part 3 Item 1) should be included here, and vice versa.
Hazard risk restrictions	Land affected by a council policy or public authority policy that restricts development due to land slip, bushfire, tidal inundation, subsidence, acid sulphate soils or other risks.	Either council policy or for other public authorities, council must be notified of policy's application to s149 certificates.	H	It would be very useful to know if the relevant policy is site/area specific or of general application. i.e. - Is the land affected because the policy applies in the area generally, or because of a particular characteristic of that land.
Flood related	If development on land for dwelling houses, dual	Council's LEP developed with consideration for flood	H	Same point applies as for hazard Risk

Attachment A – Prescribed planning certificate provisions				
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development controls	occupancies, multi-dwelling housing or residential flat buildings or for any other purpose is subject to flood related development controls.	prone land as identified through council's flood studies under the NSW <i>Floodplain Development Manual 2005</i> (s117 Direction 4.3 – Flood Prone Land).		
Land reserved for acquisition	Land identified in an EPI or proposed EPI providing for acquisition of the land by a public authority.	Council policy (for LEPs) No automatic council notification for SEPPs with acquisition provisions.	H	
Contribution plans	Name of each contributions plan applying to the land	Council policy Nb: "Contributions plan" only includes plans under s94EA (local council plans). Special infrastructure contributions under s94EF are not captured under this item in Schedule 4.	L	These are not seen as relevant to the conveyancing process
Bush fire prone land	A statement of whether or not all or any of the land is in bush fire prone land.	Council responsible for recording bush fire prone land (designated by the NSW RFS) on a bush fire prone land map for the area as referred to in section 146 (2) of the Act.	H	
Property vegetation plans	A statement if a property vegetation plan under the <i>Native Vegetation Act 2003</i> applies to the land (if council has been notified).	No formal council notification requirement for PVPs under the NV Act. PVPs only a s149 requirement if council has been notified of the existence of the plan by the person or body that approved the plan under the NV Act. Currently, PVPs may be registered (if the landholders and others consent) by the Registrar-General on the General Register of Deeds and make an entry in Register kept under the <i>Real Property Act 1900</i> .	L	Separate disclosure of a PVP would also be expected from the vendor, if applicable.
Tree dispute orders	Orders made under the <i>Trees (Disputes Between Neighbours) Act 2006</i> to carry out work in relation to a tree on the land.	<i>Trees Act</i> requires that Court provide a copy of any order it makes to the relevant council. Only s149 requirement if council notified of the order.	L (if the proposal that tree disputes be removed from the CSOLR is adopted); otherwise M	This is a topic which in the Committee's view should be excluded from the warranties in the CSOLR. If that view were adopted as part of the review of the CSOLR., the existence of orders notified to Council would be a matter best included pursuant to s149(5).
Directions under Part 3A	Statement of any directions by the Minister under s75P(2)(c1) of the Act that prohibitions or restrictions in an EPI do not have effect.	No formal council notification requirement for directions under s75P(2)(c1).	L	This notification would only occur as a result of the approval of a project, so its relevance is limited in the conveyancing process.
Site compatibility certificates – seniors housing	Site compatibility certificate for seniors housing under <i>SEPP (Housing for Seniors or People with a Disability) 2004</i> applying to the land, period of validity and terms imposed as conditions of consent to a DA.	No statutory notification in SEPP - SCCs notified to councils as a matter of DoP practice. Only a s149 requirement if council is aware of the SCC.	L	Limited utility
Site compatibility certificates – infrastructure	Site compatibility certificate under <i>SEPP (Infrastructure) 2007</i> in respect of proposed development on the land and period for which the certificate is valid.	No statutory notification in SEPP - SCCs notified to councils as a matter of DoP practice. Only a s149 requirement if council is aware of the SCC.	L	Limited utility
Site compatibility certificates – affordable rental housing	Site compatibility certificate for affordable rental housing under <i>SEPP (Affordable Rental Housing) 2009</i> applying to the land, period of validity and terms imposed as conditions of consent to a DA.	No statutory notification in SEPP - SCCs notified to councils as a matter of DoP practice. Only a s149 requirement if council is aware of the SCC.	L	Limited utility

Attachment A – Prescribed planning certificate provisions

Certificate Requirement	Details – Schedule 4 of the EP&A Regulations 2000	How is council made aware of the information requirements for the s149 certificate?	Need for information high/mod/low	Comments [see note at end to explain high/mod/low]
Contaminated land management	Provisions under the <i>Contaminated Land Management Act 1997</i> (CLM Act). If the land is: significantly contaminated land; subject to a management order; the subject of an approved voluntary management proposal; subject to an ongoing maintenance order; or the subject of a site audit statement.	S.59 of CLM Act requires councils to be informed by DECCW of land declared to be significantly contaminated land, management orders, voluntary management proposal or maintenance orders. S.53B requires site auditors to provide councils with copies of site audit statements relating to site audits.	H	Expand the note so it clearly forms part of the certificate. The topic should be dealt with as an enumerated item, as was the case prior to 1 July 2009.
Nation Building and Jobs Plan provisions	Provisions under the <i>Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009</i> (NBJP Act). Advice about any exemption under s23 or authorisation under s24 of the NBJP Act.	Under s26 of NBJP Act, Co-ordinator General may provide council with a copy of s23 exemption or s24 authorisation. Only a s149 requirement if council is provided with a copy of the exemption or authorisation by the Co-ordinator General.	L	Relevance is questionable. In addition, the method of disclosure (reference in the Act, not the Schedule to the EP & A Reg., should be discouraged).

HIGH/MODERATE /LOW

- a. "High" – something so important that every prospective purchaser should have that information before them before they sign a contract to purchase (the "vendor disclosure" test).
- b. "Moderate" – something of importance to a significant number of purchasers so that if the information is different from what is disclosed in the certificate attached to the contract the purchaser should, in some circumstances, have a right to rescind (the "vendor warranty" test).
- c. "Low" – information which may be of interest to a vendor, who may want to preclude objection by a purchaser to that information, and to a limited class of purchaser, but not of sufficient significance to ground a right of rescission (the "section 149(5)" test).