



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:RH1b1948845

10 July 2020

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

Dear Sir/Madam,

Flood Prone Land Package

The Law Society appreciates the opportunity to comment on the proposed changes to update the Flood Prone Land Package, which provides advice to councils on considering flooding in land use planning. We apologise for the delay in finalising our submission. The Law Society's Environmental Planning and Development Committee contributed to this submission.

1. Planning Circular

The draft revised Planning Circular notes that Schedule 4 of the EP & A Regulation will be amended by the (yet to be drafted) Environmental Planning and Assessment Amendment (Flood Related Development Controls Information) Regulation 2020.

It is difficult for us to comment without seeing the exact wording of these amending provisions, particularly considering there is a choice between the types of flood related development controls that are to be noted on planning certificates by councils. The drafting will be important in such cases. We note that the draft Planning Circular states "Flood-related development controls are not defined but would include any development controls relating to flooding that apply to land, that are a matter for consideration under section 4.15 of the Act.". We note that a development control plan ("DCP") is stipulated as a matter for consideration under section 4.15 of the Act, so would be included on this basis.

2. Proposed local environmental plan ("LEP") clauses

Flood Planning Area

We support the inclusion of the consideration of climate change as part of the criteria in the decision-making process, with the new clause (4) providing that development consent must not be granted to development on land to which the clause applies:

unless the consent authority is satisfied that the projected changes to flood risk as a result of climate change have been considered in the design of the development including:

- a) consideration of the intended design life and scale of the development,
- b) evacuation and management of risk to life, and
- c) the potential to modify, relocate or remove the development.

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The new clauses are to apply to a Flood Planning Area (“FPA”) which is defined as land below the Flood Planning Level (“FPL”) “and may also extend to include other areas of land where the majority flood related controls apply”. We note that the word “of” appears to be missing between “majority” and “flood”. We are also concerned that the definition quoted is not clear. Any LEP clause should map the FPA and not contemplate that the clause could apply to other areas that are not defined.

The Planning Guideline suggests that most flood-related development controls are to apply to the FPA but may also “extend to include additional areas as outlined below”. The Planning Guideline suggests the areas should be mapped but we submit that this should be mandated and the definition clarified.

The definition of “hazardous materials” should mirror the definitions in the State Environmental Planning Policy and have the word “significant” inserted before “harm”.

We have compared the current and proposed considerations for development within an FPA, and provide our comments in the attached table.

Special Flood Considerations

Paragraph (3) provides that development consent must not be granted unless the consent authority is satisfied that the development:

- (a) complies with any council flood policies, development control plan and is consistent with any council adopted floodplain risk management plan (developed consistent with the Floodplain Development Manual),

We consider that this test does not provide sufficient flexibility. It requires compliance with a DCP, which is a stricter test than in the Act, which only requires that DCPs be considered. The test should be that the consent authority has considered the DCP, not that it is satisfied that it complies, to match the provisions in the Act. Further, the wording requires compliance with council flood policies, and consistency with any council adopted floodplain risk management plan (developed consistent with the Floodplain Development Manual). This creates uncertainty about the appropriate measures to be met and can create inconsistencies across local government areas with different councils adopting different flood policies on an ad hoc basis and from time to time.

Subparagraph (b) provides that the consent authority must be satisfied that the development “**will not affect** the safe occupation of and evacuation from the land,” and subparagraph (d) that it “**will not adversely affect** the environment during flood events due to hazardous materials” (emphasis added).

We suggest that there needs to be an appropriate threshold test for such an affectation or that the word “likely” be added given expert opinions can differ and this clause requires no doubt in order for a consent to be granted.

Paragraph (4) of this clause includes “boarding houses” in the category of “sensitive, vulnerable or critical uses”. We suggest that this will not always be the case and the definition should be excluded or narrowed.

3. Planning Guideline

We agree that all areas where flood-related development controls apply should be mapped and maps made publicly available. The Guideline proposes this can be done in DCPs, LEPs, other relevant environmental planning instruments (“EPI”) or on the council website. If the mapped areas are included in a DCP, then this means the EPI can be amended by

amending the DCP. As this may cause confusion, we query whether the mapping should be restricted to the EPI. Although we appreciate that some landowners would prefer their land not to be identified in a LEP as flood prone, that is the practical effect if it is mapped via a DCP. When doing a property search on the planning portal, this overlay is likely to be missed if it is mapped in a DCP.

We suggest that the Guideline should require the draft maps to be placed on public exhibition, including the reports and data used to determine the areas that are included. This will provide transparency and an ability to test the data. All draft maps, amendments and supporting documents should be provided to facilitate public consultation.

The Guideline refers to the determination of the flood planning level ("FPL") as provided in the NSW Government Floodplain Development Manual. We cannot comment on whether that is still an appropriate guide, but note that the Manual was last amended in 2005. The Manual itself provides that it should be reviewed every five years.¹

We note that many people associate flooding with rivers bursting banks, and many of the examples in the Manual focus on this. However, the Manual was amended in 2001 to include overland flooding. This covers flows from a variety of sources, including from pipes overflowing because urban development has been approved and built in local catchments and the drainage pipes don't have sufficient capacity. This is then segregated into local drainage and major drainage. Only the latter is considered appropriate to include in a planning certificate. However, the Manual now treats them in the same way and divides overland flooding into local and major and gives the council the discretion to choose which to include in the FPA. Presumably once a council updates its FPA, the FPA may well cover much broader areas than it did previously. This obviously has implications for the ability to undertake exempt and complying development. Given the level of discretion applied, we confirm the need for the transparency mentioned above on data and the decisions made to include or not include overland flooding in the FPA.

As noted in relation to the proposed LEP clauses, the definition of "boarding houses" in the category of "sensitive, vulnerable or critical uses" should be excluded or narrowed.

Conclusion

The Law Society appreciates the opportunity to participate in the reform process and we look forward to the opportunity to comment further in due course. 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,



Richard Harvey
President

¹Department of Infrastructure, Planning and Natural Resources, Government of New South Wales, *Floodplain Development Manual*, April 2005, 18 accessed at: < <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Water/Floodplains/floodplain-development-manual.pdf>>.

Clause 7.2(4) - using Penrith LEP as template	Proposal	Comment
is not likely to adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and	will not adversely affect flood behaviour resulting in detrimental increases in the flood affectation on other properties, including cumulative impacts,	the words "is not likely to" have been removed. We question whether, when it comes to flood predictions, an expert can be certain such that the former wording is more appropriate.
is not likely to significantly alter flow distributions and velocities to the detriment of other properties or the environment	will not significantly alter flow distributions and velocities to the detriment of other properties or the environment of the floodplain,	Same comment as above.
is not likely to adversely affect the safe and effective evacuation of the land and the surrounding area,	will not adversely affect the safe and efficient evacuation from the land or impact the capacity of existing evacuation routes for the surrounding area	Same comment as above.
is not likely to significantly detrimentally affect the environment or cause avoidable erosion, destruction of riparian vegetation or affect the restoration and establishment of riparian vegetation, or a reduction in the stability of river banks or waterways, and	will not adversely affect the environment or cause erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses	Same comment as above. We think the word "significantly" should remain. We suggest that every form of new development will adversely affect the environment in some way.
	will not increase the potential for hazardous material to pollute the environment during flood events,	Significant or another threshold should be added here.