22 September 2021

The Secretary
NSW Department of Planning, Industry and Environment
Locked Bag 5022
Parramatta NSW 2124

Via Planning Portal

Submission on the review of the Proposed Environmental Planning and Assessment Regulation 2021

Dear Secretary,

The Urban Development Institute of Australia NSW (UDIA) is the leading industry body representing the interests of the urban development sector and has over 500 member companies in NSW. UDIA NSW advocates for the creation of liveable, affordable, and connected smart cities.

UDIA supports the review of the *NSW Environmental Planning and Assessment Regulations 2000* (the Regulations) being undertaken by the NSW Department of Planning, Industry and Environment (DPIE). Whilst the review is long overdue, UDIA considers that the scope of proposed changes is rather minimalist and provides limited opportunity to address some of the fundamental regulatory constraints embedded in the NSW planning system.

Under our 2019 *Make Planning Work* policy, we requested that the NSW planning system should have a predictable process and timeframe and dictated by a principle of "no surprises".

UDIA considers that the review has not gone far enough, and we will further advocate for inclusion of those matters not covered in the draft Regulations. These include the prescribed contents of planning proposals, the role and legal weight of non-statutory plans, and proponent-led rezonings.

Our submission focusses on what is presently available in the draft Regulations and our main concerns are covered in the following recommendations:

We have also raised several concerns about specific clauses in the draft Regulations, which are presented in Attachment No.1.

<u>Development Application, modification process and landowner's consent</u>

Recommendation 1. A consent authority should have the discretion to allow modification or surrender of a DA without landowner's consent provided they are satisfied that the surrender or modification does not change the planning approval status of that land (Refer to clauses 64(2) and 65 and clauses 90, 91(4)(a)).

Recommendation 2. Proposed Clause 91(4)(d) should be amended to state that a description of the proposed modification is only required when the development is modified and/or what specific conditions are to be modified.

Recommendation 3. That the final Regulations include provisions that allow an application for Environmental Assessment Requirements (EAR) for a State Significant DA can also be modified, as well as the EARs themselves.

Recommendation 4. That the final Regulations include provisions to state that if a consent authority has not determined the DA fees or rejected the DA within 14 days of lodgement on the planning portal, that the DA has been deemed acceptable by a consent authority.

Recommendation 5. That the final Regulations require a consent authority to confirm the "Stop the Clock" provisions for applicants who are seeking to modify their lodged DA and to also adopt a deemed acceptance date to improve certainty.

Complying Development Certificates

Recommendation 6. Amend proposed clause 122(2)(a) to make it clear that only the documents lodged with a Complying Development Certificate (CDC) application are required to be identified, or alternatively excluded.

Recommendation 7. The assumption that exists in current clause 131 is missing from proposed Clause 128 and should be added being *"…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".*

Recommendation 8. A CDC should be able to be obtained for land voluntarily notified as contaminated under clause 60 of the *Contaminated Land Management Act 1997* without a Remediation Action Plan, where it does not relate to that part of the land that is contaminated.

Recommendation 9. That the final Regulations to state that a CDC for simple works (fitout etc) should not require a site configuration and building envelope plan where there are no changes to the exterior of a building.

The use of the NSW Planning Portal

Recommendation 10. That DPIE provides greater definition with the term "lodgement date" for a DA that is uploaded to the planning portal.

Recommendation 11. That the planning portal should provide an applicant with greater oversight on the progress of their DA regarding the following:

- the lodgement date;
- acceptance and registration of the DA;
- allocation of an assessment officer;
- "stop the clock" covering modifications and surrender and date of DA; and
- referral to approval bodies.

Recommendation 12. That DPIE provides greater transparency and increased clarity with key planning policies and documents, including planning agreements, development control plans and contribution plans, which are placed on the planning portal.

Recommendation 13. That DPIE assesses the option to include provisions in the draft Regulations to address potential changes to the model DCP in accordance with the review into infrastructure contributions.

Recommendation 14. That DPIE provides greater disclosure of financial information on the planning portal, which includes monetary amounts received by a planning authority, value of the works and the value of the land.

Other Recommendations

Recommendation 15. That DPIE addresses those suggested changes to specific clauses in the draft Regulations as presented in Attachment 1 of this submission.

Justification of our recommendations

Development Application, modification process and landowner's consent

- It is impractical to require landowner's consent to modify a development consent (particularly for a staged concept approval) from all individual lot owners who have bought into a staged development at the first stage;

- Landowner's consent should only apply to that portion of the site where the modification requires an amendment. For example: The Penrith Lakes Development, which is covered in Clause 115(11) of the Regulations, allows the Penrith Lakes Development Corporation to modify the original approval without landowner's consent; and

- A consent authority should have the discretion to not require landowners' consent despite the provisions of the draft Regulations. We submit that amendments should be made to proposed clauses 90, 64(2) and 65. The same discretion should also apply to the surrender of a development consent (which also requires landowner's consent).

The Land and Environment Court (LEC) decision on *Ku-ring-gai Council v Buyozo Pty Ltd [2021] NSWCA 177l* is relevant, where it was determined that there is no power to modify a development consent except where the development itself is modified. Proposed clause 91 mandates that there should be a description of the modified development to be carried out under the development consent.

This gives the impression that some form of development must always be proposed in the modification application as opposed to amendment of conditions, but with no change to the works. Proposed Clause 91(4)(d) should be amended to state that a description of the proposed modification is only required where the development is modified and/or what specific conditions are to be modified.

The *Dartbrook* LEC decision (NSWCA 112) is also relevant, which determined that a DA can be modified before or after issue of the EARs. Accordingly, it should also be made clear that scoping reports for a State Significant Development can also be amended before or after issue of the EARs.

Clause 35(7) requires amendments to a DA to be either approved or rejected by a consent authority via the planning portal. Until they do, the applicant is essentially in "no man's land", and it remains unclear if the amendment will be accepted (which will restart the clock) or not. It should be mandated that consent authorities must respond within a certain timeframe being 14 days and that after this period the DA modification is taken to be accepted.

UDIA also seeks greater certainty with the "Stop the Clock" provisions relating to DA modifications. The Regulations should confirm when the clock restarts on an amendment to a DA, along with a deemed acceptance date.

Complying Development Certificates

There are several areas where Complying Development Certificates (CDC) present an issue. This includes minor changes to development proposals and for works that may be on contaminated land. Key points on both issues are presented below.

- The certifier is now required to identify within the 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. Whilst there is merit in this approach, particularly in respect of the CDC documents and certifications, it should be limited to exclude other documents likely to be relied upon such as Australian Standards and the Building Code of Australia itself. This will only result in excessive detail being included in the CDC for future reference;

- The current Regulations contain an assumption in clauses 131 and 132 that when considering the development standards, you assume *"…that any building work is carried out in accordance with the plans and specifications to which the CDC relates and any conditions to which the complying development certificate is subject."* This is missing in proposed clause 128 and 129 and is also not addressed in clause 131;

- For contaminated land, a CDC for works involving work on contaminated land requires a Remediation Action Plan (RAP). However, where the works do not affect the contaminated material, a RAP should not be required, especially if there has been a "cap and contain" remediation mitigation implemented on the subject site;

- A CDC for simple works (fitouts etc) should also not include a site configuration and building envelope plan, which is excessive, especially if its only internal building work with no changes to the building exterior;

- The *Proposed EP&A Regulation Fact Sheet* notes that the draft Regulations will require a CDC application on land that is declared as contaminated under clause 60 of the *Contaminated Land Management Act 1997* (CLM Act), to be accompanied by a site audit statement (SAS) from an accredited auditor. However, clause 60 of the CLM Act is not a declaration that the land is contaminated. It is where an owner has voluntarily notified that contamination reaches, or they suspect reaches, a threshold. Whilst this error is not repeated in the draft Regulations, it is noted as an error in the accompanying Fact Sheet. Voluntary notification under clause 60 should not result in an inability to pursue a CDC.

The use of the NSW Planning Portal

We acknowledge the improvements with the planning portal covering transparency, availability of information and increased efficiencies with lodging DAs online. The scheme is well and truly an improvement and a step in the right direction.

We urge further improvements based on the work we have done with this submission, which has been drafted by a special UDIA working group of developers and planning practitioners to assess the performance of the planning portal and how it can be used more efficiently to support the planning system.

Under key themes of certainty and transparency, the planning portal needs to be properly integrated into the draft Regulations. This especially applies with the DA "lodgement date" and if a consent authority has rejected a DA or how a modification is responded to. There are no proposed clauses that effectively deal with these issues, which is causing industry concern.

Quite simply the planning portal is not providing an accurate picture of how a council is responding to a DA lodged via the planning portal as compared to the "over the counter" method, which provided an applicant with an immediate status of the lodged DA, which has been registered and accepted by a consent authority.

Other key points are presented below:

- The consent authority must determine fees within 14 days (Clause 237(2)); however, the DA is not considered lodged until fees are paid (Clause 50(9)). This has effectively increased the processing time by up to 14 days and the deemed refusal period by 14 days;

- UDIA members have also advised that it can take longer than 14 days but with no recourse if this timeframe is exceeded. The DA at that point would not have been formally lodged, so no appeal rights apply, and an applicant must wait for the consent authority to determine a position. UDIA considers that if the consent authority has not determined the DA fees or rejected the DA within 14 days that the DA has been deemed acceptable by a consent authority;

- More oversight should be given to the applicant on the progress of their DA through the planning portal covering lodgement date; acceptance and registration of the DA; allocation of an assessment officer; "stop the clock" covering modifications and surrender and date of DA, and referral to approval bodies;

- Greater transparency with the planning portal can be achieved with the publication of planning agreements and arrangements for draft contributions plans and draft development control plans (DCP). Registration of these plans on the planning portal prior to their exhibition would allow tracking of their progress within a centralised database;

- DPIE to assess the option to include provisions in the draft Regulation to address potential changes to the model DCP with the review into infrastructure contributions; and

- Greater disclosure of financial information, including monetary amounts received by a planning authority, value of works and the value of land, will also lead to improved accountability and better understanding of the provisions that apply to a proposed development.

Conclusion

UDIA supports the proposed review of the *NSW Environmental Planning and Assessment Regulations 2000,* and our recommendations and concerns should allow DPIE to obtain a broader viewpoint on key industry concerns on how the present NSW system is performing.

Unfortunately, the review has not gone far enough and under our *Make Planning Work* 2021 policy, we will seek further reform of the Regulations to allow for more improved outcomes with the planning process to support growth. This approach can only serve to enhance the Regulations as an important contributor that shapes planning and development in NSW.

We look forward to engaging with you further on this critical area of planning reform and should you have any further enquiries please contact David White, GWS and South Regional Manager on 0415 914 612 or email at dwhite@udiansw.com.au

Yours sincerely,

Steve Mann
Chief Executive
UDIA NSW

Attachment No.1 – Assessment of Specific Clauses in the Draft Regulations

Table 1 – UDIA Concerns with Specific Clauses in the Draft Regulations

Clause	Justification / Concern	Recommendation
33 (3) (a)	The threshold of $500,000 trigger a requirement for a statement by a qualified designer is too low and should not be required for low impact developments considering the cost relevant to the value of the works.	It should be increased to $2 million.
36 (d)	The concurrence and approval fees are not known at the time of lodgement.	Recommend changes to the Planning Portal are made to provide more accurate information to an applicant at time of DA lodgement.
80	Any condition of consent imposing contributions should not only identify the contributions plan, but the amount and the category of contributions sufficient to enable the applicant to appreciate the portions of the plan that are relevant.	Amend to require specification of the portion of the contributions plan that applies.
84(2)	If the IPC is to hold a public hearing, there should be a maximum time for when a public hearing should occur to give certainty as to how long that step may take.	Mandate that a public hearing be held within a 28-day period.
156	UDIA members support the publication of Review of Environmental Factors (REF) on the planning portal but note that it is limited to works greater than $5 million. Members have reported a lack of transparency, particularly with road projects, that changes access to major shopping centre development proposals. The threshold of $5 million is too high and should be reduced to $2 million.	The monetary threshold for publication of an REF on the NSW planning portal should be $2 million.
Planning certificates Division 5	UDIA members support the increased level of information but has the following concerns: • To assist with interpretation, phraseology is not always consistent. The language used should be consistent with the Standard Instrument Order. Another example is the use of “draft” EPI or “proposed” Environmental Planning Instrument (EPI). • Whilst it is understandable that old draft EPIs and DCPs don’t need to be mentioned on the certificate, being those not made within 3 years, it is unclear what the consequences of the draft Local Environmental Plan/Development Control Plan not being made within 3 years of the end of the public exhibition are? If it is no longer in a certificate, then clause 4.15 should mandate that they are no longer relevant considerations. • Compliance with or assessment against the objectives of the zone are a pivotal assessment consideration. This	Amend so that: • language is consistent with the Standard Instrument Order • objectives of a zone are included • for complying development, specify the relevant code • specify exempt development that can be carried out as indicated • meaning of “item of environmental heritage” needs to be clarified. It should include State Heritage

	should be referenced on the certificate in addition to the development control table. • Current identification of complying development lacks meaning without listing the type of development that can be carried out as exempt or complying development in a schedule to the certificate. • The phrase "item of environmental heritage" may mean things to different people such as a heritage item, a heritage conservation area, State listing or something else. • Road widenings notified should include those in a draft instrument not just an adopted instrument given the significance. • The proposed changes allow councils not to identify whether exempt and complying development can be carried out on the land under the Codes SEPP because they do not have sufficient information. This could result in many councils relying on this to not answer the question. • With policies relating to risk the answer may be too generic for an applicant to appreciate what risk applies.	Register, local listing, and Heritage Conservation Area. • there are consistent phrases e.g., "draft EPI" and "proposed EPI". • it is clear where a road widening in a draft EPI is included in the certificate • Councils cannot avoid indicating whether development can be carried out as exempt or complying development without indicating the reason why. • Council's must indicate the relevant policies on risk that apply and the date they were adopted under clause 4.15 of the Act, draft EPIs not made within 3 years are not relevant considerations.
Schedule 3, clause 34	**Designated Development** UDIA considers that DPIE should use this opportunity to reconsider whether contaminated soil treatment should be designated development, where it is being capped and contained and has the benefit of a Site Audit Statement. This unnecessarily raises the prospect that the entire development is designated development e.g., asbestos contaminated soil is capped, and a mixed-use development is built above. The designated development trigger should focus on treatment not containment or excavation.	Exclude capping and storage of on-site contaminated soil as a trigger for designated development where it has a Site Audit Statement.