NSROC
Northern Sydney Regional Organisation of Councils

Submission

Council Conflict of Interest Policy – May 2022

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Prepared by Northern Sydney Regional Organisation of Councils

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OVERVIEW

Northern Sydney Regional Organisation of Councils (NSROC) appreciates the opportunity to make a submission to the Department of Planning and Environment (DPE) regarding the proposed requirement for councils in NSW to develop and adopt a Conflict of Interest Policy for council owned or initiated development as well as a suite of management controls to address potential conflicts of interest at the different phases of the development process. This submission has been prepared with the input and support of our member councils.

The impetus for this requirement to develop and adopt a Conflict of Interest Policy for council owned or initiated development, stems from a NSW Ombudsman report released in December 2020 and provided as a special report to the Parliament of NSW titled 'An inherent conflict of interest: councils as developer and regulator'. The report found that Broken Hill City Council had allowed its own unfinished Civic Centre to be used on at least three occasions for large public functions, despite not having the necessary certification that it was safe to do so. The foreword of the report also states that 'a lack of transparency; the unlawful and potential unsafe use…would likely not have come to light at all but for whistle-blower reports' and goes on to conclude 'This is an important systemic issue that affects most, if not all NSW councils to some extent'.

It should be noted the report provides no evidence for this statement, instead relying on a survey of councils which, in the large majority, stated that there was 'no need for additional regulations or restrictions – for any well-managed, accountable and responsible Councils' (Pg 12, An inherent conflict of interest: councils as developer and regulator – 15 December 2020). Indeed only 6 out of the 59 councils that responded to the survey supported a strengthening of the current legislation or clarification of requirements.

Despite this feedback and lack of evidence, DPE has pursued the recommendations of the NSW Ombudsman and has developed, with input from other state agencies and LGNSW, a proposal to introduce management controls and strategies to identify and manage potential conflicts of interest for what it refers to as 'council-related development' although noting there is not a definition on what is a conflict of interest for the purposes of the policy or management processes.

The presumption is that this approach will assist in preventing what occurred at Broken Hill City Council happening again. However in the documentation provided as part of the Ombudsman's report the then General Manager of Broken Hill City Council submitted that he had made his decision to occupy the building on three occasions predicated on advice that the risk to safety was low. There is no suggestion his decision was corrupt but instead it appears to be one of expediency.

A fundamental point therefore is that additional policies and strategies will be no safe-guard against a wilful disregard of due process. Noting that the NSROC councils in general do not consider conflicts of interest in council related development to be an issue for their communities nor one that requires further action, it can reasonably be argued that a more proportionate response is to deal with the culture of Broken Hill Council rather than saddle the entire sector with new policy and management requirements.

On further examination the released draft Policy does not directly address the specific issues around certification and culture at Broken Hill City Council and instead aims to establish management controls and strategies to address potential conflicts of interest in all the phases of the development process in a way which ignores the many conflict of interest checks which are already in place. Specifically, it contends that there needs to be greater transparency in the assessment and determination process, a view not supported by NSROC. It ignores the requirements of the state government's capital expenditure guidelines and appears uninformed by the regulatory and statutory process by which the

community is informed of any significant venture undertaken by a council. NSROC contends that councils already have a myriad of auditing, attestation and procedural requirements which provide transparency and are sufficient to guide council related development in a manner that it satisfactory to the community.

ASSESSMENT, DETERMINATION, CERTIFICATION

The approach by DPE guided by the cross-agency working group on this matter is to suggest that all NSW councils must (by changes to the Environmental Planning and Assessment Regulation 2021):

1. have a formal policy that sets out how they will manage any potential conflicts of interest that may arise in relation to council-related development;
2. consider this policy before determining any development applications that are council-related; and
3. publicly communicate any management approaches that the council will implement (if any) for each development – council must complete a management strategy and publish it on the NSW Planning Portal together with the development application when it is exhibited.

In responding to this approach NSROC wishes to stress two important points. The first is that local government is extremely well regulated in regard to conflicts of interest in a general sense, as well as in the area of council related development. The second is that the approach of DPE does not actually target the issues raised in the Ombudsman's report on Broken Hill but extends significantly beyond compliance and certification to be a broad and unnecessary impost on the areas of assessment and determination which already have sufficient controls and thresholds which deal with conflicts of interest. Again, it is worth stressing, that this is not considered an issue that is galvanising our communities or eliciting complaints, so seeking to add additional controls to the assessment and determination processes is both unwelcome and unnecessary.

In relation to the first point, council related development goes through a process which is similar in each NSROC council. If the development is significant it is will be flagged in Council's asset strategy, capital works program, and likely exhibited in Council's Community Strategic Plan and/or Delivery Program. Specifically, provision will be made in council's budget and then any construction activities funded by council will come to council again through the tender acceptance process. In addition, councils also need to provide landowners consent for such developments and this is not always delegated to staff for larger scale developments. It is important to note that all of these processes require reports to council and public consultation. It is not credible to suggest that the intention of council to develop at any significant scale is not subject to public scrutiny within the existing framework. The notion that the governance of these projects is deficient or that trust needs to be enhanced is not supported.

Beyond the process by which council related development is considered and then actioned by council as described above, the planning system already has a considered process for dealing with council initiated development. As per schedule 7 of SEPP (State and Regional Development) 2011, a development application which is council related and has a Capital Improved Value (CIV) of greater than $5 million must be referred to the state planning panels. All other council development applications must be referred to an independent hearing and assessment panel as per ministerial direction. All NSROC councils have such a panel. This means that the assessment of all council development applications is fully transparent and such applications can only be determined by these local panels which are either entirely or in the majority staffed by state appointees

Further the Capital Expenditure Guidelines (10-34) introduced by the Department of Premier and Cabinet in 2010 require an even higher level of scrutiny for any project worth more than $1 million or 1% of council's annual income. The requirements of the guidelines are onerous and include the following consultation exercises:

Councils must undertake public consultation and engagement processes prior to making any commitment to the project. Like other aspects of council business, councils are strongly encouraged to involve the community in decision making around capital projects. It is a requirement under these guidelines, that councils prepare a report on the public consultation process undertaken to bring the project to the review state as well as providing details on the process, for ongoing reporting on the project to the council and the community. The report should include:

- *how council conveyed the social, economic, employment, financial and environmental impacts of the project to the community*
- *confirmation that the project is included in the council's community strategic plan, delivery program and operational plan*
- *details of the consultation processes council has in place to allow participation by affected groups and consideration of their views*
- *a public interest evaluation showing a positive outcome for the broader community, which includes but is not limited to; effectiveness, accountability and transparency, equity, public access, consumer rights, security and privacy.*
- *details of the methods used by council to inform the broader community of the proposed project, its key elements and decisions made in relation to the project. This may include community newsletters, community surveys, newspaper or radio advertisements, etc.*
- *council's planning process to enable the community be provided with sufficient information to be adequately informed. To be considered sufficient the delivery program and operational plan should include:*
- *purpose of project and benefits to the community*
- *costs and funding sources, and*
- *construction time frames*
- *details of the public reaction to the proposal including any statistics on the outcome of surveys, any correspondence received from the community, etc*
- *details on any public meetings held in regard to the proposal*

In addition, the guidelines also require a risk assessment of the project including assessment of the governance and management structures in place to effectively minimise project risks. It is also expected that council will have an internal audit function as part of its governance structure.

Further, councils are required to develop a probity plan for any development above $10 million (it is optional for development above $5 million but less than $10 million) which specifically deals with conflicts of interest and includes the following:

Councils must develop a probity plan for the project. A probity plan is needed to ensure:

- *that the project process is transparent, that conflicts of interest are avoided, pecuniary interests declared and that the project complies with competition laws and principles*
- *if land is to be rezoned, that the development application process is outlined with particular attention paid to the separation of council's roles as landowner and consent authority*
- *the plan may need to include documentation of the relationship between the parties involved in the project, eg, the independence of parties from the project, council or prospective private sector bidders for the project.*

The only potential conflict of interest that thus remains without prescriptive guidelines, legislation or external oversight in the area of assessment is whether the assessment report itself has been completed by the council, which at the same time is the applicant. Many councils have a protocol, and in some cases an actual policy, of contracting to a third party the assessment process to further address

potential concerns regarding conflicts of interest for council development however this may be impractical for remote or regional councils. Some councils have also historically had the assessment of a council initiated development application completed by a neighbouring council however this has fallen out of favour, particularly as the universal introduction of IHAPs and the removal of councillors from the determination process has essentially removed the issue as one of concern for the community.

In considering the merits of requiring all councils to outsource the assessment process for all council development applications one has to consider whether this will simply appear the same as private developers and residents appointing their own certifiers for their own developments. This was introduced by the state government and is now a widely accepted practice but has led to some perceptions that in paying for their own regulation private developers and residents have created an inherent conflict of interest. The same mind-set could apply to council appointed independent assessing staff, whereby detractors would simply infer that by being paid by council the 'independent' assessing consultant has forgone true independence. Notwithstanding this possibility, the independence of the determination process is what has primacy in this process and the example of other state agencies which have their own determination powers (such as the Department of Education under the Education SEPP) further suggests that this is a non-issue.

Having identified that strong, transparent and accepted processes are in place for determination of all council related developments and that the assessment process is unlikely to be entirely free of notions of conflict of interest (either through paying for external assessment or having a neighbouring council do it), attention can be turned to the final element identified in the draft policy provided by DPE as an example of the matters which council should consider in developing a conflict of interest policy, namely the regulation and enforcement of approved council-related development.

Like determination of council applications, NSROC notes that certification of council developments with a CIV of more than $2 million must be done by a certifier independent of Council (clause 25, Part 4 of the Building and Development Certifiers Regulation 2020). On this basis the only issue that needs consideration is whether certification of council developments of lesser value should be certified by council staff, again noting that in the case of Broken Hill City Council, there was a Private Certifier Authority (PCA) but the general manager chose to occupy the building before the release of an interim occupation certificate. Accordingly mandating independent certifiers may be desirable but does not address the issue that was at the heart of the Broken Hill City Council breach nor will it always be possible in remote or regional councils. Nonetheless, NSROC contends it would be a good approach to separate this regulatory function and give it to a private entity, emulating the approach of the private sector. Most NSROC councils automatically do this, some guided by their existing policies around council led development. Should DPE insist councils have a Conflict of Interest Policy as mooted, this would form a central element, noting it would apply for development less than $2 million in value.

Further Compliance Requirements

The draft policy states that a management statement on how to manage potential conflicts of interest should be uploaded onto the NSW Planning Portal for council related developments. This statement should categorise the level of risk for the council related developments and includes a consideration of the type of development and the CIV. The sample policy excludes only the most minor and low value types of development (flagpoles, pipes, awnings etc) or types of development which are already exempt or complying development (commercial fit out and advertising signage). Whilst this is only a sample policy it conveys the message that all council related development requires at least consideration regardless of value, type or value.

Further the draft policy outlines a range of management controls which are extensive and onerous. These include the requirement that a statement would still be published when the council determines that the risks of a conflict of interest are low and no specific controls are warranted to ensure

'transparency'. Overall NSROC respectfully contends that this places an unnecessary burden on council and is not supported. The FAQs provided by DPE to support this approach suggest that there will be minimum additional pressure for councils, again a proposition which is not supported.

Councils will be required to upload statements even where there is no perceived risk but the FAQs suggest councils should also report key milestones (such as construction and occupancy certificates) to full meetings of council or the NSW Planning Portal to give greater transparency. The former is simply pointless whilst the latter not only duplicates the transparency afforded by the Capital Expenditure Guideline requirements and all the other oversight and public involvement opportunities identified earlier in this submission, but will also assist on-going antagonism, opposition and protest from any disgruntled members of the community who remain set against a lawful, appropriate and otherwise popular council development. Each report to council will provide another public forum for the merits of the project to be debated over and over again, even after a consent and construction certificate have been issued, after a firm has tendered for and won the project, after the construction has commenced and after the budget and capital works programme has been exhibited and adopted. What value would be achieved by continuing to report construction milestones to a full council when the construction is on-budget, approved by an independent panel, has been subject to a public submissions process and is required to have a range of additional measures if the CIV is above $5 million?

Views of the Local Government Sector

As previously discussed NSROC shares the broader sectors belief that the actions proposed by DPE are unwarranted and that this is a 'solution looking for a problem'. The NSW Ombudsman has not made a case that the incident at Broken Hill City Council is a systemic issue and suggesting that the failure of councils to fine themselves for breaches of consent conditions or building regulations is not a reasonable metric. Certainly it is not a metric that other state institutions such as ICAC apply to themselves. Further the absence of similar policy requirements in other jurisdictions suggests this is a non-issue outside of New South Wales as well.

NSROC contends that if there is a determination to introduce additional conflict of interest requirements they should recognise that most councils have robust process and protocols in place, and that if a policy is a mandatory requirement for councils that already have IHAPs (which consider and determine all council related development approvals), then the issues of assessment and certification are the only ones that need to be addressed. Further, any proposed policy need not address certification for any development with a CIV above $2 million as this is already regulated. Finally the requirement to use the NSW Planning Portal to publish statements about perceived risks and how they will be managed is both onerous and unnecessary.

In relation to the intention to amend the Environmental Planning and Assessment Regulation 2021 (the Regulations), NSROC requests the opportunity to view and comment prior to finalising any draft proposed amendment to the Regulations, should this proceed.

It should be noted that expediency has its place in local government as it does with every other significant deliverer of services. During the recent floods many councils made expedient decisions to repurpose facilities outside of the existing consent, do works without a consent, or stockpile debris and equipment without the required paperwork. The community accepts that sometimes these actions take place because senior staff understand that common sense must prevail over time-consuming bureaucratic processes. Whilst NSROC supports due process it notes that latitude must be provided for councils to act in the best interests of the community and this does not always allow for everything to happen in an orderly fashion.

CONCLUSION

NSROC and its member councils are committed to good governance and transparency. The proposed approach by DPE to compel councils to have a Conflict of Interest Policy and then assess all council related development with management statements and publish them on the NSW Planning Portal does not address the issues raised in the case of the Broken Hill City Council and is a poor fit for urban councils which have existing mechanisms and controls in place to manage conflicts of interest. Clearly the capacity and decision making for remote, small or regional councils is completely different to larger metropolitan councils and so one size does not fit all. Whilst DPE states that it has not mandated that a model policy be adopted by each council, it has not addressed why councils need one at all.

NSROC would support the introduction of a mandated Conflict of Interest Policy if it dealt with the assessment process only and the certification of developments with a CIV below $2 million. The rest of the proposed policy approach is not necessary and is already adequately addressed in existing guidelines and regulations. The requirement to put up management statements on the NSW Planning Portal is not supported. NSROC councils already have the trust and confidence of their communities and can be relied on to enhance that trust without further action on a matter arising from the missteps of a small regional council, and which has no currency in our communities.

Finally, in relation to the intention to amend the Environmental Planning and Assessment Regulation 2021 (the Regulations), NSROC requests the opportunity to view and comment prior to finalising any draft proposed amendment to the Regulations, should this proceed.