



Minute Paper for the Executive Council

Subject: - Environmental Planning and Assessment Amendment (COVID-19 Planning Bodies) Regulation 2020

Department of Planning, Industry and Environment

Document Number: IRF20/1538

Approved by the Executive Council,

Clerk of the Council.

Minute No. -- 16 --

Date 29 APR 2020

Approved,

Governor

*Her Excellency the Governor
and The Executive Council*

I RECOMMEND that Her Excellency the Governor, with the advice of the Executive Council, make the *Environmental Planning and Assessment Amendment (COVID-19 Planning Bodies) Regulation 2020* under the *Environmental Planning and Assessment Act 1979*.

For the purposes of section 7 of the *Subordinate Legislation Act 1989*, I CERTIFY that, in my opinion, the provisions of that Act relating to the proposed regulation have been complied with.

The Hon. Rob Stokes MP
Minister for Planning and Public Spaces



New South Wales

Environmental Planning and Assessment Amendment (COVID-19 Planning Bodies) Regulation 2020

under the

Environmental Planning and Assessment Act 1979

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Environmental Planning and Assessment Act 1979*.

A handwritten signature in blue ink, appearing to read "Kerry" followed by a stylized flourish.

Minister for Planning and Public Spaces

Explanatory note

The object of this Regulation is to provide for public hearings and public meetings of planning bodies to be held by means of an audio link or audio visual link for 6 months during the COVID-19 pandemic.

The relevant planning bodies are the Independent Planning Commission, Sydney district planning panels, regional planning panels, local planning panels and panels established by the Minister or Planning Secretary under section 2.3 of the *Environmental Planning and Assessment Act 1979*.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 2.3(7), 2.16(3)(a), 2.20(3)(a) and 10.13 (the general regulation-making power) and clause 8(a) of Schedule 2.

Approved by the
Executive Council

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Clerk of the Council

Environmental Planning and Assessment Amendment (COVID-19 Planning Bodies) Regulation 2020

under the

Environmental Planning and Assessment Act 1979

1 Name of Regulation

This Regulation is the *Environmental Planning and Assessment Amendment (COVID-19 Planning Bodies) Regulation 2020*.

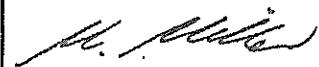
2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

Approved by the
Executive Council

MIN No. - - 1 6 - -

29th APR 2020



Clerk of the Council

Schedule 1 **Amendment of Environmental Planning and Assessment Regulation 2000**

Clause 294

Insert after clause 293—

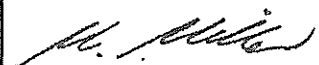
294 Special provisions for public hearings or public meetings of planning bodies during COVID-19 pandemic

- (1) This clause applies to public hearings or public meetings of planning bodies held during the prescribed period.
- (2) The public hearing or public meeting must—
 - (a) be held by means of an audio link or audio visual link, and
 - (b) be able to be heard or viewed by electronic means by a member of the public at the time it is held.
- (3) A notice of the public hearing or public meeting must include information about how a member of the public may hear or view the hearing or meeting.
- (4) During the public hearing or public meeting, the planning body may adjourn the hearing or meeting to a specified time or date if the planning body considers the adjournment necessary.
- (5) To avoid doubt, any notice required to be given of the public hearing or public meeting is not required to be given in respect of the adjournment.
- (6) A requirement that a person attend the public hearing or public meeting is taken to be satisfied if the person participates by means of an audio link or audio visual link.
- (7) Clause 25(3) of Schedule 2 to the Act applies to a public hearing of a planning body in the same way it applies to a public meeting of a planning body.
- (8) This clause extends to all public hearings or public meetings of planning bodies held during the prescribed period regardless of whether the requirement to hold the hearing or meeting arose before the prescribed period.
- (9) Despite subclause (8), a notice given before the commencement of this clause is not invalid because it does not include the matter required by subclause (3).
- (10) In this clause—

planning body has the same meaning as it has in Schedule 2 to the Act.
prescribed period has the same meaning as it has in section 10.17 of the Act.

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Executive Council

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Clerk of the Council



PARLIAMENTARY COUNSEL

Opinion

Environmental Planning and Assessment Act 1979
Proposed Environmental Planning and Assessment Amendment (COVID-19 Planning
Bodies) Regulation 2020

Your ref: jonathon.schipp@planning.nsw.gov.au
Our ref: s2020-174.d10

In my opinion the attached draft Regulation may legally be made.

Notification of the making of the Regulation will be published on the NSW legislation website automatically subject to the arrangements set out in the attached information sheet.

A handwritten signature in black ink, appearing to read "A O'Callaghan".

(A O'CALLAGHAN)
Parliamentary Counsel
25 April 2020

Approved by the
Executive Council

MIN No. -- 1 6 --

29th APR 2020



Clerk of the Council

EXPLANATORY NOTE

Environmental Planning and Assessment Regulation Amendment (COVID-19 Planning Bodies) Regulation 2020

The *Environmental Planning and Assessment Regulation Amendment (COVID-19 Planning Bodies) 2020* (**proposed regulation**) amends the *Environmental Planning and Assessment Regulation 2000* (**EP&A Regulation**) to facilitate the virtual public hearings and public meetings, by electronic means, for the Independent Planning Commission (**Commission**), Sydney district and regional planning panels and local planning panels.

Due to the social distancing restrictions associated with COVID-19, planning bodies are no longer able to hold public hearings or public meetings for development applications and planning proposals. Under the current legislative framework, planning bodies can hold virtual public hearings during the COVID-19 pandemic, however, the requirements are not mandatory. In the case of the Commission, there is a possibility that a Court could find that a virtual hearing is insufficient to comply with the statutory requirements for a public hearing under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

The amendments set out the minimum requirements for holding these virtual hearings and meetings to ensure procedural fairness is afforded to all stakeholders, and to ensure that virtual hearings and meetings held will satisfy the legal requirements of the EP&A Act.

The proposed regulation ensures that public hearings and meetings held by planning bodies will continue to be held in a robust, open and transparent manner. Further, these changes put beyond doubt that virtual hearings are sufficient during the COVID-19 pandemic, provided they meet certain minimum requirements, effectively mitigating the risk of a Court later finding that virtual public hearings or meetings held during the COVID-19 pandemic did not satisfy the requirements of the EP&A Act.

The Parliamentary Counsel has given her opinion that the proposed regulation can be legally made.

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Executive Council

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REPORT TO DEMONSTRATE COMPLIANCE OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (COVID-19 PLANNING BODIES) REGULATION 2020 WITH THE GUIDELINES UNDER THE *SUBORDINATE LEGISLATION ACT 1989*

SUMMARY

The Environmental Planning and Assessment Amendment (COVID-19 Planning Bodies) Regulation 2020 (**proposed Regulation**) is made under the *Environmental Planning and Assessment Act 1979 (EP&A Act)* and amends the *Environmental Planning and Assessment Regulation 2000 (EP&A Regulation)*.

The proposed Regulation requires the Independent Planning Commission, Sydney district and regional planning panels, and council local planning panels to hold public hearings and meetings using electronic means during the prescribed period for the COVID-19 pandemic. It also sets out the minimum requirements for holding these hearings and meetings.

PURPOSE OF THIS REPORT

Under the provisions of the *Subordinate Legislation Act 1989 (SL Act)*, a proposed statutory rule must not be submitted for making by the Governor unless accompanied by a copy of a certificate from the responsible Minister confirming compliance with the provisions of that Act. Guidelines for the preparation of statutory rules to demonstrate compliance with the SL Act are set out in Schedule 1. It is considered that the requirements of that Act have been complied with as set out below.

SCHEDULE 1 GUIDELINES TO THE SUBORDINATE LEGISLATION ACT 1989

Before a statutory rule is proposed to be made the following must be considered.

a) The objectives sought to be achieved and the reasons for them must be clearly formulated.

The objective of the amendments is to ensure that planning bodies can continue to hold public hearings and meetings for development applications and planning proposals, using electronic means.

Planning bodies can no longer effectively or efficiently comply with the existing regulatory requirement for “in-person” public hearings. The amendments enable digital compliance options and increase planning system efficiencies by allow development applications and planning proposals in the planning system to progress during the COVID-19 pandemic.

b) The objectives must be:

- **reasonable and appropriate;**
- **in accordance with the objectives, principles, spirit and intent of the enabling Act, and**
- **not inconsistent with the objectives of other Acts, statutory rules and stated government policies.**

The proposed Regulation is reasonable and appropriate as effective outcomes will be delivered through simple regulatory changes to ensure that planning bodies can undertake their functions in accordance with the public health requirements during the COVID-19 pandemic. A consistent approach will also be applied to all planning bodies to simplify current arrangements.

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The proposed regulation accords with the objectives, principles, spirit and intent of the EP&A Act, and is consistent with the objectives of other Acts, statutory rules and stated government policies.

The amendments are consistent with the principal Act object to provide increased opportunity for community participation in environmental planning and assessment. The amendments better align the EP&A Regulation with the digital government agenda and support the Department of Planning, Industry and Environment's (**Department**) agenda to increase the use of technology in planning.

Decisions must be based on adequate information and consultation

The proposed Regulation is administrative in nature and will not be exhibited.

The Independent Planning Commission and other planning bodies have published statements on its website stating that it will seek to use available digital technology to facilitate public hearings and meetings. The proposed Regulation merely clarifies the minimum requirements for holding these hearings and meetings.

The anticipated benefits from implementation of the amendments to the regulation should outweigh the costs.

To support public hearings and meetings continuing to be held in a robust, open and transparent manner, it is proposed to put it beyond doubt that 'virtual' hearings are sufficient for the purpose of the EP&A Act during the COVID-19 pandemic provided they meet the minimum requirements in the proposed Regulation.

The preferred option should involve the greatest net benefit or least net cost to the community.

The preferred option is the proposed Regulation, which seeks to make minor changes that are largely administrative in nature. The preferred option has greater net benefit to the community relative to the alternative options which are analysed below in (d).

c) Alternative options for achieving those objectives (whether wholly or substantially), and the option of not proceeding with any action, must be considered.

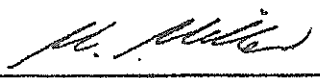
There are only two potential alternatives to the proposed Regulation.

First, public hearings and meetings could be deferred until after the COVID-19 pandemic and public gatherings are allowed. However, it is not clear when the current restrictions will be lifted, and this would suspend key functions of planning bodies and create significant investment uncertainty about the assessment process for a number of significant development applications and planning proposals.

Secondly, planning bodies could hold 'virtual' public hearings during the COVID-19 pandemic. However, there is a possibility that a Court could find that such a hearing is insufficient to comply with the statutory requirements for a public hearing under the EP&A Act. This could result in significant delays in the assessment of several development applications, and create significant uncertainty for investment in NSW.

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- d) An evaluation must be made of the costs and benefits expected to arise from each such option as compared with the costs and benefits (direct and indirect, and tangible and intangible) expected to arise from proceeding with the statutory rule.**

The preferred option has been selected over the alternatives identified above in (c), as it provides the benefits of:

- enabling the Independent Planning Commission to hold public hearings for projects where the Minister has already requested hearings;
- providing certainty for all stakeholders during the COVID-19 pandemic;
- supporting public hearings and meetings being held in a robust, open and transparent manner, including ensuring that members of the public can view and participate in the public hearings and meetings; and
- puts it beyond doubt that 'virtual' hearings and meetings are sufficient for the purposes of the EP&A Act during the COVID-19 pandemic provided they meet certain minimum requirements.

The preferred option may generate opposition from some special interest groups. However, the alternative options have the potential to result in greater costs to the community through delays in the assessment of a number of State significant development applications currently in the planning system, and puts at risk the potential investment that these projects may bring to the NSW economy, particularly in regional areas.

- e) Other government agencies must be consulted if an area of their responsibility is impinged upon or affected.**

The proposed Regulation was developed in consultation with the Independent Planning Commission and within the Department. No other agencies would be affected by the proposed Regulation.

f) Other requirements

The proposed Regulation is expressed plainly and unambiguously, and consistently with the language of the enabling Act.

CONCLUSION

The Guidelines set out in Schedule 1 of the SL Act have been complied with.


RECOMMENDATION

That the Minister certify that the provisions of the SL Act relating to the proposed Regulation has been complied with by signing the Executive Council minute.

Approved by the
Executive Council

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Clerk of the Council