

PLANNING SYSTEM

Coastal hazard notations

Circular	PS 14-003
Issued	13 November 2014
Related	

Coastal hazard notations on section 149 planning certificates

The purpose of this circular is to provide councils with guidance on section 149 planning certificate notations relating to coastal hazards.

Introduction

The NSW Government has identified a need to improve the way councils disclose coastal hazard information in planning certificates.

The Circular aims to ensure information on coastal hazards is relevant and clearly articulated.

Coastal hazard definition

A 'coastal hazard' has the same meaning as the *Coastal Protection Act 1979* and also includes any flood hazard influenced by oceanic processes or oceanic events.

This expanded definition is necessary to ensure that any flooding which is influenced by oceanic processes or events is also considered.

In this circular, 'coastal hazard' therefore means:

- a) beach erosion;
- b) shoreline recession;
- c) coastal lake or watercourse entrance instability;
- d) coastal inundation;
- e) coastal cliff or slope instability;
- f) tidal inundation;
- g) erosion caused by tidal waters, including the interaction of those waters with catchment floodwaters; and
- h) flood hazard influenced by oceanic processes (e.g. tides) or oceanic events (e.g. storm surge).

Section 149 planning certificates

Planning certificates are a means of disclosing information about a parcel of land. There are two types of information in planning certificates:

information under section 149(2) and information under section 149(5). The 'sections' refer to sections of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

A planning certificate under section 149(2) will disclose matters relating to the land, including whether or not the land is affected by a policy that restricts the development of land. Those policies can be based on identified risks (*Environmental Planning and Assessment Regulation 2000*, schedule 4, clause 7), and whether development on the land is subject to flood related development controls (EP&A Regulation, schedule 4, clause 7A).

A planning certificate may also include information under section 149(5). This allows a council to provide advice on other relevant matters affecting land. This can include past, current or future issues.

Inclusion of a planning certificate containing information prescribed under section 149(2) is a mandatory part of the property conveyancing process in NSW. The conveyancing process does not mandate the inclusion of information under section 149(5) but any purchaser may request such information be provided, pending payment of a fee to the issuing council.

Planning certificates may, however, be purchased from a council by anyone, at any time and for any purpose.

Planning certificates disclose the relevant information, policies and land-use controls that apply at the time of issue.

Identification of coastal hazards

The NSW coast is dynamic and complex. A range of forces and events can generate a coastal hazard. For

example, a storm event or events can cause a shoreline to change or move or a coastal area to be inundated.

If the position of the shoreline moves, then the shoreline-related hazards will also move. In this way certain land and assets will be exposed to a coastal hazard now, and adjoining land and assets may become exposed to that same coastal hazard in the future as the shoreline changes. This is called 'hazard migration'.

Because hazards can migrate over time, coastal land may have a current exposure to a coastal hazard and/or a future exposure to a coastal hazard.

On a stretch of sandy coast exposed to open ocean forces, hazard migration tends to be the result of irregular episodic events with intervening periods of relative stability in the shoreline position.

Hazard migration can also occur on coasts with rock cliffs or foredune escarpments. Events such as cliff collapse can potentially place both life and property at risk, although the frequency may be most uncertain.

Councils usually acquire information on coastal hazards through studies conducted by qualified professionals, and these studies are typically commissioned from time to time to ensure council information is updated. Cost and other considerations may mean that studies are initiated a number of years apart.

The challenge this creates is one of maintaining currency in the data related to coastal hazards.

When studies are only commissioned periodically, and when coastal hazards occur as irregular and episodic events, there is always a possibility that the real-time state of coastal land will have changed before the next study can be conducted. A study of coastal hazards, and any policy or instrument based on that study, need to be seen as a point-in-time assessment.

When a planning certificate identifies that the land is the subject of a policy or development control due to the exposure of the land to a coastal hazard, it should be seen as simply disclosing the existence of the policy or planning control which was adopted by council. It should not be seen as disclosing the current extent of the hazard itself. For any parcel of land, the exposure to a hazard can change suddenly and intermittently. Interested parties should make other inquiries to establish the current day exposure of that land to hazards and not rely on a planning certificate alone.

For the reasons above, care needs to be taken when communicating that information.

A key distinction that should be articulated on planning certificates is whether the policy or development control adopted by council is in response to:

- a current exposure to a coastal hazard; or

- a future exposure to a coastal hazard identified in the adopted study.

In the absence of such a distinction being made, the reader of a planning certificate may interpret a non-specific disclosure that the land has 'an exposure to a coastal hazard' as indicating that the land has a *current* exposure to a coastal hazard, even if that is not the case.

It is also helpful to give the reader a clear indication of the currency of the information. This might be done by articulating the date on which the study was adopted.

Identifying the future state of coastal land can be based on extrapolating historic patterns (such as shoreline recession or geomorphic trends) plus scientific modelling (such as sea level rise and climate variability). Those physical processes can, separately or in combination, alter where and when coastal hazards occur.

In the interests of transparency, it is good practice to clearly state the variables which have been considered and the assumptions on which the analysis relies. This information should be readily accessible as an adjunct to information presented in a planning certificate.

Current exposure to a coastal hazard

'Current exposure to a coastal hazard' refers to a situation where land is identified, through an adopted evidence-based study, as being exposed to the hazard at the time the study was prepared.

For example, land which would be subject to beach erosion if a prescribed storm ('the design event') occurred today would be land with a current exposure to a coastal hazard.

Future exposure to a coastal hazard

'Future exposure to a coastal hazard' refers to a situation where land is identified in an adopted study as being exposed to the hazard at some point in the future.

For example, if the shoreline and related coastal hazards migrate landward over time, then land which is not currently exposed to beach erosion may become exposed to that hazard in the future.

Probability of occurrence

A common misperception is that a '1 in 100 year' coastal flood, inundation or erosion event means that exposure to that hazard will be 100 years in the future.

A '1 in 100 year coastal flood' or a '1 in 100 year erosion event' are recurrence interval metrics. They do not predict when the event will occur but rather they tell us how likely they are to occur in any year.

This means, if a property is exposed to the 1 in 100 year coastal flood hazard today, then it has a 'current

exposure to a coastal hazard' and that exposure has a 1 per cent probability of occurring in any year.

Planning Certificates: Information under Section 149(2)

The information to be included in a planning certificate under section 149(2) is outlined in the Regulation. It includes the mandatory disclosure of matters relating to the land, such as whether a policy restricts development on land due to a hazard.

Where a relevant policy or development control does relate to the land and the policy or development control arises due to a coastal hazard, then notations should:

- clearly identify the type of hazard(s); and
- for each hazard identified, classify whether that hazard is a current or future hazard.

The benefit of introducing such a distinction 'up front' in a planning certificate is that people can be clear on the nature and timing of the risk.

Suggested wording for current hazards

If a relevant policy or development control applies to the land because of a current exposure to a coastal hazard, it is suggested that councils include a notation on the planning certificate in the following form:

'This land has been identified in the [*insert name of council policy or development control*] as having a current exposure to [*insert type of hazard(s)*]. The [*insert name of council policy or development control*] is based on a study dated [*insert date adopted by council*] and reflects information available at the time. Contact council for more information.'

Suggested wording for future hazards

If a relevant policy or development control applies to the land because of a future exposure to a coastal hazard, it is suggested that councils include a notation on the planning certificate in the following form:

'This land has been identified in the [*insert name of council policy or development control*] as having a future exposure to [*insert type of hazard(s)*]. The [*insert name of council policy or development control*] is based on a study dated [*insert date adopted by council*] and reflects information available at the time. Contact council for more information.'

Councils should, as a priority, take all necessary steps to be able to identify the type of coastal hazard affecting the land and to stipulate whether it is a current or future hazard. In the short term, if a council is not in a position to clearly identify whether a hazard is a current or future hazard, the council should clearly note this on the certificate.

The implementation of these changes is a necessary improvement in how councils disclose information about coastal hazards. The option to amend Schedule 4 of the *Environmental Planning and Assessment Regulation 2000* to achieve the necessary changes to coastal hazard notations on planning certificates can be considered in the future if required.

Planning Certificates: Information under Section 149(5)

Under section 149(5), the content of planning certificates may also include advice on such other relevant matters affecting the land of which the council may be aware.

Councils need to take reasonable care, in terms of content and timing, when disclosing information about current and future coastal hazards to the community.

The following principles are equally relevant to current and future hazards but the discussion focuses on future hazards to enhance clarity and understanding.

Timely disclosure is important. Counter-balancing the need to disclose information as soon as possible is the need to ensure that the disclosure is a matter that affects the land and that the attributes of the information are sufficient to warrant disclosure.

This leads to two guiding principles for coastal hazards disclosure in planning certificates.

- Firstly, if (in the opinion of the relevant council) the information is sufficiently accurate, complete and reliable¹, such that it allows the characteristics of the hazard to be described and understood, and if the matter affects the land, then the information should be included in a planning certificate under section 149(5).
- Secondly, if (in the opinion of the relevant council) the above test has been satisfied and a constraint on development is warranted, then the council should take steps to include relevant provisions within a local environmental plan and/or development control plan, or adopt a policy² that manages development on the land. If the policy or plan restricts development on the land, then the disclosure of the matter should more appropriately occur on a planning certificate under section 149(2) once the policy or plan is formally adopted by council.

Section 149(5) provides the means for a council to disclose information about a hazard from the time a council comes into knowledge regarding the existence

¹ Accuracy and completeness would be enhanced by a competent process of assessment (e.g. as described in the Guidelines for Preparing Coastal Zone Management Plans 2013 or the NSW Floodplain Development Manual 2005). Reliability would be enhanced by credible and broadly accepted scientific and coastal engineering advice.

² 'Policy' refers to any document adopted by a council to inform its planning and decision making.

and extent of that hazard (typically evidenced by the adoption by council of a completed investigation or study), and the time a council has a policy or planning instrument to manage that hazard.

Councils should also be aware of the 'good faith' liability protections afforded them by section 149(6) of the *Environmental Planning and Assessment Act 1979*, and section 733 of the *Local Government Act 1993*.

Councils intending to provide the community with ongoing and general advice about research and analysis relating to coastal hazards should consider disseminating that information via the council website.

Coastal Councils of NSW

Auburn City Council
 Ballina Shire Council
 Bankstown City Council
 Bega Valley Shire Council
 Bellingen Shire Council
 Burwood Council
 Byron Shire Council
 Canterbury City Council
 City of Canada Bay Council
 Clarence Valley Council
 Coffs Harbour City Council
 Council of the City of Sydney
 Eurobodalla Shire Council
 Fairfield City Council
 Gosford City Council
 Great Lakes Council
 Greater Taree City Council
 Hawkesbury City Council
 Hurstville City Council
 Kempsey Shire Council
 Kogarah City Council
 Lake Macquarie City Council
 Lane Cove Municipal Council
 Leichhardt Municipal Council
 Manly Council
 Marrickville Council
 Mosman Municipal Council
 Nambucca Shire Council
 Newcastle City Council
 North Sydney Council
 Parramatta City Council
 Pittwater Council
 Port Macquarie-Hastings Council
 Port Stephens Council
 Randwick City Council
 Richmond Valley Council
 Rockdale City Council
 Ryde City Council
 Shellharbour City Council
 Shoalhaven City Council
 Strathfield Municipal Council
 Sutherland Shire Council
 The Council of the City of Botany Bay
 The Council of the Municipality of Ashfield
 The Council of the Municipality of Hunters Hill
 The Council of the Municipality of Kiama
 The Council of the Shire of Hornsby

The Hills Shire Council
 Tweed Shire Council
 Warringah Council
 Waverley Council
 Willoughby City Council
 Wollongong City Council
 Wollahra Municipal Council
 Wyong Shire Council

Further Information

Relevant legislation is available online at <http://www.legislation.nsw.gov.au>

For further information please contact the Department of Planning and Environment's information centre on 1300 305 695.

Department of Planning and Environment circulars are available online at <http://www.planning.nsw.gov.au/circulars>

Authorised by:

Carolyn McNally
Secretary

Important note: This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

© State of New South Wales through the Department of Planning and Environment
www.planning.nsw.gov.au

Disclaimer: While every reasonable effort has been made to ensure that this document is correct at the time of publication, the State of New South Wales, its agencies and employees, disclaim any and all liability to any person in respect of anything or the consequences of anything done or omitted to be done in reliance upon the whole or any part of this document.