

# Council-related Development Application Conflict of Interest Guidelines

## Introduction

Councils are development regulators. But they also can be the developer, landowner or hold a commercial interest in the land they regulate. Where councils have this dual role, an inherent conflict can arise between their interests in the development and their duty as regulator.

Identifying these conflicts of interest early and finding ways to address them is crucial to good governance and allows councils to strengthen their relationship with communities and build and enhance trust.

The following requirements have been introduced into the *Environmental Planning and Assessment Regulation 2021* to address conflicts of interest in council related development:

- Councils must adopt and have a policy that specifies how conflicts of interest in connection with council-related development applications will be handled. The policy must comply with the requirements in these Guidelines (section 66A).
- Council-related development applications must now be accompanied by either a management strategy statement, which explains how the council will manage potential conflicts of interest, or a statement that the council has no management strategy for the application (section 36A).
- Councils must record conflicts of interest in connection with each council-related development application, and the measures taken to manage the conflicts, in their existing DA register (section 242A).
- Council-related development applications must be exhibited for a minimum of 28 days to ensure transparency during the assessment process (*Environmental Planning and Assessment Act 1979*, schedule 1, clause 9B).

While the regulation changes do not mandate the use of the framework once a development consent is issued, it is best practice when developing their policies for councils to also address conflicts that may occur after development consent has been granted. This could be as simple as stating in the policy that the council will seek to enter a shared services arrangement with a neighbouring council about this phase of the development process, for any development that is the subject of the policy.

## Purpose of these Guidelines

These Guidelines are intended to:

- set out the requirements for the council conflict of interest policy required under section 66A,

- assist councils in meeting these requirements by providing a sample policy and management strategy statement that can be used as a template when developing their policies
- provide general information and guidance about the policy.

## Flexibility

In some circumstances, council may determine the risks associated with a council-related development are sufficiently low and no specific controls are warranted. Where this is the case, council should still publicly communicate that fact to ensure transparency.

Where a council determines for a particular class of development that the risks of a conflict of interest are very low, it may decide to not have any management controls for a specified type of development unless there is some direct involvement of a councillor or a council staff member in their private capacity.

This can happen, for instance, where the council is the owner of a large commercial building that has a range of shops within it, for which it receives many development applications for commercial fit outs and minor changes to the building facade. In those circumstances, the council's policy could outline that its management strategy for this class of development does not apply additional controls for conflicts of interest.

Other examples where this approach might be appropriate include development for internal alterations or additions to buildings that are not a heritage item, advertising signage, minor building structures projecting from a building façade over public land (such as awnings, verandas, bay windows, flagpoles, pipes and services), and development where the council might receive a small fee for the use of their land.

## Sample policy

The sample policy below is to help councils develop their conflict of interest policies for council-related development. It provides practical solutions for developing and implementing ways to manage potential conflicts at all stages of the development process.

For councils that have local planning panels, the council's policy only needs to deal with a subset of this development, as a range of development to which the policy would otherwise apply will already be referred to local planning panels.

**Using the sample policy is optional.** Each council and local government area is different and has unique local settings, therefore, councils should decide what is appropriate in their circumstances and develop a policy for managing conflicts of interest about council-related development that is suitable for their local area.

An example management strategy statement is also included below.

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## Requirements for conflict-of-interest policies

Any policy prepared and adopted by a council must:

- establish management controls and/or a management strategy to address potential conflicts of interest at the different phases of the development process for the types of council-related development that the council could be involved in,
- outline the process through which potential conflicts of interest will be identified, the risks assessed and appropriate management controls determined, and
- outline the process that will be followed to publicly communicate the management approaches for each development subject to the policy.

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## Sample policy

### Part 1 Preliminary

#### (1) Name of policy

This policy is the [insert name of policy].

*Note: For example, Conflicts of interest policy – dealing with council-related development throughout the development process.*

#### (2) Aim of policy

This policy aims to manage potential conflicts of interest and increase transparency at all stages of the development process for council-related development.

#### (3) Scope

This policy applies to council-related development.

#### (4) Definitions

(1) In this policy:

**application** means an application for consent under Part 4 of the Act to carry out development and includes an application to modify a development consent it does not include an application for a complying development certificate.

**council** means [insert name of the council]

**council-related development** means development for which the council is the applicant developer (whether lodged by or on behalf of council), landowner, or has a commercial interest in the land the subject of the application, where it will also be the regulator or consent authority

**development process** means application, assessment, determination, and enforcement

**the Act** means the *Environmental Planning and Assessment Act 1979*.

(2) A word or expression used in this policy has the same meaning as it has in the Act, and any instruments made under the Act, unless it is otherwise defined in this policy.

(3) Notes included in this policy do not form part of the policy.

*Note: Other definitions can be inserted.*

## Part 2 Process for identifying and managing potential conflicts of interest

### (5) Management controls and strategies

(1) The following management controls may be applied to:

- a. the **assessment** of an application for council-related development
  - *insert control(s)*
- b. the **determination** of an application for council-related development
  - *insert control(s)*
- c. the **regulation and enforcement** of approved council-related development
  - *insert control(s)*.

*Note: For example, council will enter into a shared services arrangement with a neighbouring council.*

(2) The management strategy for the following kinds of development is that no management controls need to be applied:

- a. commercial fit outs and minor changes to the building façade
- b. internal alterations or additions to buildings that are not a heritage item
- c. advertising signage
- d. minor building structures projecting from a building facade over public land (such as awnings, verandas, bay windows, flagpoles, pipes, and services)
- e. development where the council might receive a small fee for the use of their land.

Notes:

1. *While councils must have a policy that sets out how they propose to deal with potential conflicts of interest for council-related development, it could implement different controls for dealing with them based on the level of risk. For example, councils could set their controls based on:*
  - a. *risk category – low, moderate, high, very high*
  - b. *types of development – non-controversial small-scale development, development of a certain value with/without a commercial interest, controversial development, or even*
  - c. *capital investment value of the proposed development.*
2. *There is a range of management controls that could be applied in particular circumstances. The following are some examples that councils could use. Note that councils are not limited to one approach and could specify more than one approach if appropriate in their local settings:*
  - a. *Assessment and determination*
    - i. *The assessment and/or determination of an application are to be undertaken by council staff under delegation – this might be appropriate if the proposal is considered to be a low-level risk or non-controversial. For more controversial projects, this might only be effective if strict role separation controls are imposed.*
    - ii. *The application could also be referred for external assessment and/or determination to either:*

1. another council
2. a local planning panel if one is in place
3. a regional planning panel (may require negotiation – RPPs are not required to accept referrals)
4. a consultant.

*The involvement of an external third party might be appropriate for development where council has a commercial interest in the land, or the development is seen to be a political priority for the council.*

b. *Regulation and enforcement*

- i. *Engagement of a private certifier*
- ii. *Publication of certificates issued under Part 6 of the Act on the NSW Planning Portal*
- iii. *Peer review by a neighbouring council and/or entering into a shared services arrangement with a neighbouring council*
- iv. *Reporting of key milestones to the full council.*

3. *Councils may also wish to take advantage of their audit and risk committee to provide guidance for the types of controls that could be applied in specific circumstances.*

## **(6) Identifying whether a potential conflict of interest exists, assessment of level risk and determination of appropriate management controls**

- (1) Development applications lodged with the council that are council-related development are to be referred to the general manager (or a delegate) for a conflict-of-interest risk assessment.

*Note: Council-related development is defined in section 4.*

- (2) The general manager is to:

- a. assess whether the application is one in which a potential conflict of interest exists,
- b. identify the phase(s) of the development process at which the identified conflict of interest arises,
- c. assess the level of risk involved at each phase of the development process,
- d. determine what (if any) management controls should be implemented to address the identified conflict of interest (in each phase of the development process if necessary) having regard to any controls and strategies outlined in clause 5 of the policy and the outcome of the general manager's assessment of the level of risk involved as set out clause 6(2)(c) of the policy,

*Note: The general manager could determine that no management controls are necessary in the circumstances.*

- e. document the proposed management approach for the proposal in a statement that is published on the NSW Planning Portal.

*Note: The following is an example of a statement that could be published by councils to document its proposed management approach in a particular circumstance.*

## Scenario

BlueStar Council is upgrading one of their assets, 'Blue River Civic Place'. Council is the landowner and the applicant and is proposing to redevelop the site into a mixed-use development with a total capital investment value (CIV) of \$4.9 million. The development application seeks approval for the construction and use of an additional 2 storeys on an existing 3 storey building comprising a childcare centre, commercial office spaces and partial use of the building for council's public administration.

### Example management statement

<b>Council conflict of interest management statement</b>	
<b>Project name</b>	Blue River Civic Place
<b>DA number</b>	DA21/0001
<b>Potential conflict</b>	BlueStar Council is the applicant. Blue River Civic Place has an estimated capital investment value of \$4.9 million and the council expects to receive revenue through renting commercial office spaces.
<b>Management strategy</b>	<p>The council is managing potential conflicts of interest in this matter as follows:</p> <ul style="list-style-type: none"> <li>• The application will be referred to the local planning panel to determine the development application.</li> <li>• Council development assessment staff not involved with preparing the application will assess the DA. The staff will remain separated from the project team.</li> <li>• A private certifier will be engaged to undertake the certification for the development.</li> <li>• Green Hill Council has agreed to peer review any regulatory decisions should compliance decisions be made.</li> <li>• Key project milestones following the development consent will be reported at a public council meeting.</li> </ul>
<b>Contact</b>	Anyone with concerns about council fulfilling its obligations should report their concerns to the council.