

Managing council-related development

This document answers frequently asked questions about managing conflicts of interest for council-related development.

The Department of Planning and Environment is consulting on a proposal to help councils manage potential conflicts of interest where the council is the consent authority and regulator, but also the applicant developer (whether lodged by or on behalf of the council), landowner or otherwise holds a commercial interest in the land. We refer to this as **council-related development**.

Councils regularly lodge development applications (DAs) as an applicant to complete their own projects and achieve outcomes for the community. This includes development like parks, affordable housing and toilet blocks, as well as commercial proposals. This dual role is common in local government. But council's interests in the development as the applicant can sometimes conflict with their compliance and enforcement function.

The NSW Ombudsman believes this dual role creates the potential for conflicts of interest for councils and that it is a systemic issue that needs to be addressed. The Ombudsman recognised that councils often relied on informal and ad hoc processes and procedures to deal with the issue, but was concerned that many councils did not have documented procedures to follow when they were assessing and then regulating their own DAs.

What changes are proposed to address the Ombudsman's concerns?

To ensure the planning system remains transparent and accountable, the NSW Government proposes to make changes to the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation) to require councils to:

- 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
- consider this policy before determining any development applications that are council-related
- 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.

Why are the changes to the regulation necessary?

The community expects that all public officials will perform their duties in a fair and unbiased way and that the decisions they make are not affected by self-interest, private affiliations, or the likelihood of personal gain or loss.

Ensuring that the community has confidence in the integrity of public officials and public sector processes is fundamental to the functioning of a society governed by the rule of law. For this reason, it is important that private interests that conflict with the public interest are identified and

managed effectively. This is not only good governance but also allows councils to strengthen their relationship with their communities and build and enhance trust.

In what circumstances does this framework apply?

It applies where a council is the consent authority and regulator for a development and is also the applicant developer (whether lodged by or on behalf of council), landowner, or has a commercial interest in the land that is the subject of the application.

How will these changes affect councils?

Before it can assess and determine council-related development applications, a council will need to:

- prepare and adopt a policy that sets out how it proposes to manage any potential conflicts of interest that could arise
- consider the policy when assessing the specific type of DA
- publish any management approaches it proposes to implement in relation to the specific development type when publishing the development application.

As part of these changes, the community participation plan requirements in the EP&A Regulation will be updated to require councils to notify council-related DAs on the NSW Planning Portal. As part of this notification, councils will be expected to upload a management statement on how they propose to manage potential conflicts of interest. We have provided an example management statement that councils can use as a template.

What should a council's policy contain?

Any policy that is 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 it could be involved in
- outline the process through which potential conflicts of interest will be identified, risks assessed, and appropriate management controls determined
- outline the process that will be followed to publicly communicate the management approaches for each development subject to the policy.

We have prepared a sample policy to help councils develop their own policies. It contains practical solutions for developing and implementing ways to manage potential conflicts at all stages of the development process. We also encourage councils to use their risk and audit committees, where available, to provide input into the policy framework.

What if there is little risk of conflict of interest for some types of development?

Councils should take a risk-based approach for council-related development. Where there are greater risks involved, councils are encouraged to have strict role separations or use external consultants and/or peer reviews by neighbouring councils.

While councils must have a policy that sets out how they propose to deal with potential conflicts of interest for council-related development, they could implement different controls based on the level of risk. For example, councils could set their controls based on:

- risk category – low, moderate, high, very high
- types of development – non-controversial small-scale development, development of a certain value with/without a commercial interest, controversial development
- capital investment value of the proposed development.

In some circumstances, a council may determine that the risks involved in a matter are so low that no specific controls are warranted. Where this is the case, they are still expected to publicly communicate the decision through the NSW Planning Portal to ensure transparency.

Do all councils have to adopt the sample policy?

No. The sample policy is to guide councils in developing their own conflict of interest policy. While it is intended to be a useful template of the minimum requirements for such a policy, councils should decide what is appropriate for their specific circumstances and develop a policy suitable for their local area.

What controls are appropriate to manage potential conflicts of interest?

There are a range of management controls that could be applied in any given circumstance, which may change depending on a range of factors and the level of risk.

When considering what management controls may be appropriate, we encourage councils to think about the factors that may increase or decrease the potential risk of a perceived or actual conflict of interest. For example:

- **Does the council have a commercial interest in the development?** A council with a commercial interest has a higher risk of a perceived or actual conflict of interest than one that does not.
- **Is it a highly controversial development for the community?** Where a development is contentious, it may be prudent to follow a more public and transparent process to reduce any perceived conflicts.
- **Do individual councillors have conflicts of interest?** If the elected council is responsible for determining DAs and multiple individual councillors have personal conflicts of interest, looking at ways to remove any perception of an institutional conflict is important.
- **What is the value of the development?** If the development is of a higher value or complexity, it may be at greater risk of being subject to a conflict of interest.

Some ways in which councils could manage potential conflicts of interest are to:

- ensure strict role separation within council between assessment and compliance staff and project teams
- enter into a shared service agreement with a neighbouring council for the assessment and compliance of a particular development
- use an external consultant to complete the development assessment

- use a local planning panel or a regional planning panel to determine the development application, noting that engaging a regional planning panel may require negotiation as they are not required to accept referrals
- engage a private certifier for certification activities
- publish certificates issued under Part 6 of the EP&A Act on the NSW Planning Portal
- report key milestones to the full council.

Can you give examples of where different levels of controls might be appropriate?

While not intended to be prescriptive, the following examples provide guidance on how controls have been successfully used by councils in the past to manage potential conflicts of interest.

Example 1 – No controls are required

The sample policy we have developed for councils identifies development for which a management strategy is not required. In the provided example, the council determined that it did not need management controls for commercial fit outs, internal alterations and additions, advertising signage, minor structures projecting from a façade, or where council receives a small fee for the use of their land. This is because the level of risk for these types of development was sufficiently low.

Example 2 – Small-scale, routine, and operational development

Councils regularly undertake small-scale, non-controversial, and routine operational developments. Some councils have delegated the assessment function to council staff for the following developments where:

- the capital investment value is less than \$100,000
- fewer than 3 objections are received.

As they are routine in nature, council staff with role separation are unlikely to feel pressure in regulating these developments. Private certifiers could also be engaged to undertake certification for many of these activities.

Example 3 – development less than \$5 million (CIV)

Where the council has a local planning panel in place, the council should refer the development to the local planning panel.

Many regional councils are not required to have local planning panels. Where there is no panel, council should consider if the development can be referred to a regional panel. While this is not absolute and must be approved by the panel, it might be possible if the development is highly controversial, the council has a commercial interest, or multiple individual councillors have conflicts of interest.

Councils may also wish to consider who should prepare the assessment report. In some circumstances, assessment reports for higher-risk developments may be prepared by an external consultant or neighbouring council. Where an elected council is making the decision, the external report may provide a layer of independence that will give the community confidence.

Private certifiers are required for all development applications exceeding \$2 million. While council staff may be able to regulate lower-risk development applications with strict role separation, higher-risk DAs may benefit from seeking the support of a neighbouring council.

Example 4 – development exceeding \$5 million (CIV)

Council-related development exceeding \$5 million (CIV) is considered regionally significant and consequently must be assessed by a regional planning panel. Depending on the nature of the development, external assessment may provide an additional layer of independence. Significant projects with substantial political implications for the council may result in the perception that staff will be influenced in their assessment and compliance work.

With that in mind, councils may look to enter an arrangement with a neighbouring council to undertake the compliance and enforcement role following the development. This could include peer reviewing decisions or a more active role depending on the agreement.

For these types of development, reporting key milestones (such as construction and occupancy certificates) to full meetings of the council or on the NSW Planning Portal can give transparency.

Are councils required to have a management strategy for each development application?

Councils are required to document the proposed management approach for a development proposal (if any) in a statement that is published on the NSW Planning Portal.

In some circumstances, an assessment against council's policy may find that the risks involved are sufficiently low that no specific controls are warranted. Where this is the case, it should still be publicly communicated through the NSW Planning Portal to ensure transparency.

Will this add to administrative pressures on council?

The management strategies are designed to be straightforward and integrated within existing council processes. There may be some additional administrative pressures, but we expect these to be minimal for councils, especially those that already manage potential conflicts of interest.

What consultation informed the development of the policy?

The department formed a working group consisting of representatives from the its Planning and Assessment group, the Office of Local Government, the Department of Customer Service, and Local Government NSW to review how councils can better manage conflicts of interest where they are both the proponent and regulator for their own development.

When will councils need to adopt a policy?

The department is consulting on its proposal and the sample policy until 30 May 2022. Changes to the EP&A Regulation will be introduced in July 2022, after which councils will be given 6 months to adopt a policy to clearly state how it proposes to manage potential conflicts of interest.

More information

For more information, visit www.planningportal.nsw.gov.au/draftplans/exhibition/council-conflict-interest-policy.