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CCL 23/02/21 - NATURAL DISASTER CLAUSE - NEWCASTLE LOCAL ENVIRONMENTAL PLAN 2012

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ITEM-5 **Attachment A:** Final natural disaster clause

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Dwelling house or secondary dwelling affected by natural disaster

(1) The objective of this clause is to enable the repair or replacement of lawfully erected dwelling houses and secondary dwelling that have been damaged or destroyed by a natural disaster.

(2) This clause applies to land in the following zones—

(a) [*set out the zones to which the clause is to apply*],

(3) Despite any other provision of this Plan, development consent may be granted to development on land to which this clause applies to enable a dwelling house or secondary dwelling that has been damaged or destroyed by a natural disaster to be repaired or replaced if—

(a) the dwelling house or secondary dwelling was lawfully erected, and

(b) the development application seeking the development consent is made to the consent authority no later than 5 years after the day on which the natural disaster caused the damage or destruction.

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ITEM 5 **Attachment B:** Submission on draft natural disaster clause

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City of Newcastle

Regulatory, Planning and Assessment.MBisson/DStarreveld
Phone: 4974 2000

7 September 2020

Disaster Recovery Team
NSW Department of Planning, Industry and Environment
Electronic submission via NSW Planning Portal

Dear Disaster Recovery Team

EXPRESSION OF INTEREST AND SUBMISSION ON THE OPTIONAL NATURAL DISASTER CLAUSE

Thank you for the opportunity to provide feedback on the optional natural disaster clause. City of Newcastle (CN) supports in principle a clause that will enable the expedited repair or replacement of a dwelling or secondary dwelling following a natural disaster.

CN would like to express interest in incorporating the final LEP clause into the Newcastle Local Environmental Plan 2012 (NLEP2012) but notes the following matters need further consideration in its preparation and implementation.

Adoption of the final LEP clause would be contingent on additional measures that manage the extent of variations to development standards, protect the amenity of neighbouring properties and ensures development is consistent with desired future character.

Firstly, 'natural disaster' should be defined in LEPs as a declared natural disaster, published on Resilience NSW's website and defined as:

> ***"Disaster**: A situation that causes significant destruction, disruption or distress to a community."*

Whilst the amending SEPP will expedite the inclusion of the clause within LEPs, it is recommended that the Department prepare guidelines to facilitate the efficient processing of development applications (DA). Applicants trying to utilise this clause to regularise unauthorised development or claiming disaster when not actually affected by one could be a significant challenge for Councils. The preparation of guidelines would outline the circumstances in which the clause would be available and set the minimum requirements for supporting documentation.

CN suggests the following supporting documentation to accompany DAs, as a minimum:

- Photographic evidence of the extent of the damaged structures.
- Evidence that the property is located within the declared natural disaster area.
- Structural engineering certification (or similar) confirming that damaged structures are suitable for retention and repair.
- Architectural plans clearly identifying existing structures and proposed repair, or replacement works clearly annotated.

The requested supporting documentation is likely to be required to support insurance claims so should not be an additional burden on homeowners attempting to rebuild quickly.

Secondly, the intent of the clause is to provide for the expedited rebuilding of communities following natural disaster, but this should not undermine the established local planning framework and the clause should be more targeted.

Totally removing the requirement for Clause 4.6 variations as well as the associated lodgement and processing fees is not recommended. CN currently charges fees for DAs which covers the entire assessment of the application including any Clause 4.6 variation. In any case, if Clause 4.6 was set aside but the extent of the variations was over 10% the decision would need to be made by the elected Council rather than by way of staff delegations, further prolonging assessment times.

It should also be noted that in some cases Councils may still have to determine a DA for a replacement dwelling on grounds other than Clause 4.6. For example, dwellings located in a high-hazard flood way where our engineering flooding experts advised that the risk to life was extreme, dwellings located in bushfire prone land with BAL-FZ ratings or smaller sites without space to accommodate adequate sewage disposal. Even in circumstances where a Clause 4.6 variation is not required, there could still be a need to consider other relevant planning matters and the proposed clause does not appear to adequately factor in these circumstances.

In cases of widespread natural disaster, Councils may receive a very high number of repair / replacement DAs that could significantly stretch the Councils resources. Allowing for variations beyond LEP standards creates unreasonable flexibility for applicants and uncertainty for neighbouring properties. Assessment times could be delayed due to protracted merit assessment of non-compliant DAs coupled with the volume of DAs lodged following widespread natural disaster.

Finally, further work is required to nominate appropriate zones to which the clause should apply. CN will investigate the potential implications of its application in partnership with other Hunter Councils and provide a response based on the wording of the final clause.

CN acknowledges the intent of the proposed clause and the merit in expediting the recovery and reconstruction of communities following natural disaster. CN would therefore like to proceed with the drafting (Stage 2) and opt-in process (Stage 3) and will make a final comment once an updated clause is drafted.

Should you wish to discuss the matters raised in this submission please contact Dan Starreveld, Senior Urban Planner on 4974 2964 or email dstarreveld@ncc.nsw.gov.au, who will be the point of contact moving forward.

Yours faithfully

Michelle Bisson
MANAGER GOVERNANCE

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ITEM 5 **Attachment C:** Department of Planning Industry and Environment guidance document

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Natural Disasters Clause

Guidance for Implementation

November 2020

Natural Disasters Local Environmental Plan Clause

Introduction

Clause 5.9 of the Standard Instrument Order (the clause) was introduced to support homeowners whose homes have been damaged or destroyed by natural disasters. The clause applies to development applications (DAs) where development consent is sought to repair or replace a dwelling house or secondary dwelling that was damaged or destroyed by a natural disaster.

The clause was prepared in response to regulatory challenges faced by homeowners seeking to rebuild homes following natural disasters where planning controls in Local Environmental Plans (LEP) have changed over time.

The clause will ensure that development consent can be granted for the repair or replacement of a dwelling that was damaged or destroyed by a natural disaster despite any provisions in the relevant LEP which would otherwise prevent the consent authority from doing so.

The clause intends to eliminate the need for applicants to:

- Prepare formal requests to vary a development standard; or
- Demonstrate the continuance of an existing use in circumstances where dwelling houses or secondary dwellings are no longer permitted with consent in the relevant zone (applicants will need to demonstrate that the existing dwelling was lawfully erected).

Natural Disasters

Natural disasters are naturally occurring, rapid onset events that cause serious disruption to life or property in a community or region, such as floods, bushfires, earthquakes, storms, cyclones, storm surges, landslides and tsunamis. A natural disaster can include a state of emergency declared under section 33 of the *State Emergency and Rescue Management Act 1989.*

The rebuilding or repair of damage or destruction caused by or because of any of these events is development to which the clause applies.

Varying Development Standards

The clause states that consent can be granted to the specified development in a zone where the clause applies despite any other provision of the relevant LEP. For this reason, it is not necessary for applicants to submit a request to vary a development standard where a development standard is contravened. DAs will still undergo a merit assessment to ensure that dwelling houses and secondary dwellings are of an appropriate size, location and design in the context of the site.

In situations where key planning controls or development standards have changed over time, removing the need to formally request a variation under clause 4.6 of the relevant LEP will save time and resources for applicants and consent authorities.

Merit Assessment

For DAs where the clause applies, the consent authority cannot refuse a DA on the basis it does not comply with a development standard or other provision in the applicable LEP.

The proposed development will be assessed on its merits against the relevant considerations under section 4.15 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and any other applicable legislation.

Any standards or provisions outlined in a State Environmental Planning Policy (SEPP) that are relevant to the DA continue to apply (including any concurrence or referral requirements). Development Control Plan (DCP) provisions also continue to apply.

Evaluation under section 4.15 of the *Environmental Planning and Assessment Act 1979* where the clause applies

For DAs where the clause applies, LEP provisions themselves must not be used as a reason for refusal. However, if the consent authority considers that the risk, or other environmental impact associated with the proposed development is inconsistent with the relevant considerations of section 4.15, the consent authority can refuse the application on that basis.

Example

Due to a period of local severe rains, a river floods and destroys two homes. Although this natural event is not subject to an emergency declaration under section 33 of the *State Emergency and Rescue Management Act 1989*, it is still considered to be a natural disaster and accordingly, the natural disasters clause could potentially be applied to rebuild the destroyed dwelling houses.

Council is unable to refuse the DA to rebuild the destroyed dwelling on the basis that it does not comply with a development standard in the applicable LEP – however, council will be able to undertake a merit assessment under section 4.15 of the EP&A Act. If council considers the site is unsuitable for redevelopment under section 4.15(1)(c) due to flooding concerns, then the DA may be rejected on this basis.

Other Applicable Legislation

The requirements of other applicable legislation referred to in a SEPP, or in the EP&A Act continue to apply to DAs where the clause applies. For example, section 4.14 of the EP&A Act continues to apply for development of bushfire prone land and all relevant requirements of *Planning for Bushfire Protection 2019* must be satisfied.

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 and the *Biodiversity Conservation Act 2016* will also continue to apply to development involving clearing of vegetation and development of land with high biodiversity values. Any relevant assessment and offsetting requirements under that Act must also be met.

Replace and Repair

The clause refers to the *repair* or *replacement* of a lawfully erected dwelling house or secondary dwelling that was damaged in a natural disaster. There is no requirement for the *replacement* or *repair* subject of a DA to be identical to the original dwelling which was destroyed or damaged.

Development consent can be granted for dwelling houses and secondary dwellings that are of a different size, location or design to the original dwelling under the clause. Changes to the design and location of a proposed dwelling may be required to meet the relevant provisions of a DCP, other environmental planning instruments, associated legislation or the requirements of the National Construction Code.

Lawfully Erected

To be a lawfully erected dwelling house or secondary dwelling, it must have been constructed under a valid development consent, building approval or another lawful planning pathway under the EP&A Act or equivalent historical planning legislation.

Further Information

For more information:

Web: www.planningportal.nsw.gov.au/natural-disasters-clause

Phone: 1300 73 44 66

Email: disaster.recovery@planning.nsw.gov.au