

#### **CM13.4. Draft Conflict of Interest Policy - Council-related Development**

<b>DATE</b>	1 February 2023	<b>FIL REFERENCE</b>	FIL11/00183
<b>CONFIDENTIAL</b>	No		
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#### **Purpose of Report**

This report seeks Council endorsement for the public exhibition of the draft Council-related Development Application Conflict of Interest Policy (Draft Policy), and adoption of the Draft Policy should no public submissions be received. The Draft Policy has been created to comply with recent amendments to the *Environmental Planning and Assessment Regulation 2021*.

#### **Background**

Amendments to the *Environmental Planning and Assessment Regulation 2021* that come into effect on 3 April 2023 will require all Councils to:

- have a Conflict of Interest Policy in place that advises how they would manage real or perceived conflicts of interest that may arise when a Council assesses a development application, where Council has a commercial interest in the outcome;
- prepare a management statement which must be exhibited with the development application, which details the potential conflict and the way they propose to manage it; and
- exhibit Council-related development applications for a minimum period of 28 days and record the steps taken to manage any conflicts in Council's Development Application (DA) Register.

The Council-related Development Application Conflict of Interest Policy is in addition to AlburyCity's Code of Conduct.

#### **Issues**

The Draft Policy has been prepared to ensure consistency with the model template and the *Council-related Development Application Conflict of Interest Guidelines* prepared and provided by the NSW Department of Planning and Environment.

The Draft Policy would apply to all Council-related development with the exclusion of development applications for temporary uses, ancillary works within road reserves (eg. driveways, footpaths, etc.), ancillary work to public reserves and parks (eg. amenities buildings, fences, play equipment, etc.) and tree removal and easements over Council land, as the legislation allows for no management controls where the risks of a conflict of interest are very low.

The policy defines Council-related development as follows:

***“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.”***

It was determined not to include *Regulation and Enforcement* controls as these were not mandated by the legislation.

A Conflict of Interest form will be required to be submitted by the applicant with all Council-related development applications. The CEO (or his delegate) will then assess the level of risk involved and determine which management controls (if any) should be implemented to manage the risk.

A number of management controls have been created to reduce any conflict of interest risks and appropriate controls for the assessment and determination of Council-related development applications. Proposed management controls are outlined in the Draft Policy.

AlburyCity has traditionally engaged external consultants to assess major development applications where Council has a potential conflict of interest (eg. MAMA development, Lavington Sports Ground redevelopment, Albury Entertainment Centre redevelopment, Data Centre development at Albury Airport and Circular Plastic development at Nexus). The Draft Policy will formalise this process.

Towards Albury 2050 has the following outcome and the Draft Policy is consistent with this.

*4.4.2 Albury does business with excellence, showcasing good governance, openness and transparency.*

Sections 13.3 and 13.4 of AlburyCity’s Code of Conduct relate to the undertaking of Council’s land use planning, development assessment and other regulatory functions as outlined below.

***“Land use planning, development assessment and other regulatory functions”***

*13.3 You must ensure that land use planning, development assessment and other regulatory decisions are properly made, and that all parties are dealt with fairly. You must avoid any occasion for suspicion of improper conduct in the exercise of land use planning, development assessment and other regulatory functions.*

*13.4 In exercising land use planning, development assessment and other regulatory functions, you must ensure that no action, statement or communication between yourself and others conveys any suggestion of willingness to improperly provide concessions or preferential or unduly unfavourable treatment.”*

The Draft Policy should be read in conjunction with the Code of Conduct and aims to provide further instruction to support the management of conflicts which inevitably arise with Council-related development. No changes to the Code of Conduct are required with the introduction of this Policy.

Should the Draft Policy be adopted, there will need to be a consequential amendment to AlburyCity's Community Participation Plan to include the requirement for Council-related development applications to be advertised for a minimum of 28 days.

### Risk

- **Business Risk** – there will be some financial implications resulting from the need to engage external consultants to assess any relevant applications.
- **Corporate Risk** – the Draft Policy will provide clear and transparent directions for our community on how Council will assess and determine development applications where it may have a conflict of interest. There is likely to be some subsequent impacts upon the determination times of Development Applications covered by the policy due to the mandatory 28 day notification period, which would have only previously applied if the development application was Integrated Development or Designated Development.
- **WHS and Public Risk** – no risks identified.
- **Environmental Risk** – no risks identified.
- **Delivery Program Risk** – no major risks to the delivery program, however future programming will need to accommodate the minimum 28 day public notification period.

### Community Engagement

Even though the Draft Policy is related to existing legislative changes and essentially procedural, as well as formalising existing Council processes, it is proposed to publicly exhibit the Draft Policy for a minimum of 28 days to assist in public awareness of the Draft Policy. The Draft Policy will be advertised on the Have Your Say page on our website.

### Options

That Council:

1. Endorse the public exhibition of the Draft Council-related Development Application Conflict of Interest Policy. **Recommended** or,
2. Do not endorse the public exhibition of the Draft Council-related Development Application Conflict of Interest Policy. **Not Recommended**.

In this case Option 1 is recommended, as not having a relevant policy in place when the legislation comes into effect will delay the determination of any Council-related development applications until a policy is adopted.

### Conclusion

For a number of years, AlburyCity has had an unofficial policy of engaging external assessment of any large-scale developments where it has an interest as either a landowner or applicant. The Draft Policy formalises this approach to ensure that it is consistently applied. The major change relates to the

need to publish a Management Statement and for all affected development applications to be advertised for a period of 28 days.

It is recommended that Council endorse the Draft Policy for public exhibition and, in the event of no submissions being received, also endorse adoption of the Draft Policy, which is based on legislative changes.

### **Recommendation**

That Council:

- a. receive and note the contents of this report;
- b. endorse the public exhibition of the Draft Council-related Development Application Conflict of Interest Policy for a minimum period of 28 days; and
- c. should no submissions be received, the Draft Council-related Development Application Conflict of Interest Policy be adopted by Council.

### **Attachments**

1. Sample Policy for managing conflicts of interest – NSW Department of Planning and Environment (DOC23/96861).
2. Draft Council-related Development Application Conflict of Interest Policy (DOC23/96860).

# Sample policy for managing conflicts of interest for council-related development

## 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.

New requirements will be introduced into the Environmental Planning and Assessment Regulation 2021 for councils to prepare and publicise a policy that sets out how they propose to manage potential conflicts of interest. In addition, councils will have to publicly communicate via the NSW Planning Portal the management approaches they propose to implement (if any) for each development subject to the policy.

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 it could be involved in
- outline the process through which potential conflicts of interest will be identified, the 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.

In some circumstances, council may determine the risks are sufficiently low and no specific controls are warranted. Where this is the case, council should still publicly communicate that fact through the NSW Planning Portal 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 not to 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 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.

While the proposed 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 it has granted development consent. This could be as simple as stating in the policy that the council will enter into a shared services arrangement with a neighbouring council in relation to this phase of the development process for any development that is the subject of the policy.

The following sample policy is to help councils develop their own 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 would only need 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.

Because each council and local government area is different and has unique local settings, councils should decide what is appropriate in their circumstances and develop a policy for managing conflicts of interest in relation to council-related development that is suitable for their local area.

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## 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 for a complying development certificate and an application to modify a development consent

**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.*

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## 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 could 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 possible 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 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.

# Council-related Development Application Conflict of Interest Policy

## 1. Purpose

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

## 2. Scope

- 2.1. This policy applies to Council-related development and not personal staff conflicts. The policy should be read in conjunction with AlburyCity's Code of Conduct.

## 3. Definitions

- 3.1. In this policy:

**application** means an application for consent under Part 4 of the Act to carry out development and includes an application for a complying development certificate and an application to modify a development consent

**Council** means Albury City 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.

- 3.2. 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.
- 3.3. Notes included in this policy do not form part of the policy.

*Note: Other definitions can be inserted.*

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## 4. References

1. AlburyCity's Code of Conduct.
2. Department of Planning and Environment's 'Sample policy for managing conflicts of interest for Council-related development'.
3. Relevant Legislation:
  - *Environmental Planning and Assessment Act 1979*;
  - *Environmental Planning and Assessment Regulation 2021*; and
  - *Local Government Act 1993*.

## 5. Content

### 5.1. Management controls and strategies

- (1) The following management controls may be applied to:
  - a. the **assessment** of an application for Council-related development:
    - all Council-related development with a construction value exceeding \$2M shall be referred to an external party for assessment;
    - communication between the applicant and Council's assessment staff is to be made via public avenues (ie. NSW Planning Portal) or email. Direct access to the assessment staff by the applicant is not permitted;
    - Council development assessment staff who have no involvement in preparing the application will be responsible to assess or manage the assessment of the development application;
    - Council development assessment staff and project development teams are to be located in different areas of the Council building and are to have separate reporting lines – i.e. reporting to separate Service Leaders; and
    - other Council-related development may be referred for external assessment where deemed appropriate by the Service Leader City Development, Deputy CEO Infrastructure, Planning and Environment, Deputy CEO Business, Growth and Community or the CEO.
  - b. the **determination** of an application for Council-related development:
    - all Council-related development with a construction value of over \$5M is to be referred to the Southern Regional Planning Panel for determination;
    - all Council-related development which receives an objection during the notification period shall be reported to Council for determination;
    - all Council-related development with a construction value exceeding \$2M shall be referred to Council for determination; and
    - other Council-related development may be referred to Council for determination where deemed appropriate by the Service Leader City

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Development, Deputy CEO Infrastructure, Planning and Environment,  
Deputy CEO Business, Growth and Community or the CEO.

- (2) Per the legislation, no management controls need to be applied in the following circumstances due to the minor nature of these developments and low risk of conflicts:
- 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 façade 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; and
  - f. where other state bodies are the consent authority for the Council-related development.

5.2. 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 CEO for a conflict-of-interest risk assessment.

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

- (2) The Chief Executive Officer (or their delegate) 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 5.2 of this policy and the outcome of the CEO assessment of the level of risk involved as set out clause 5(2)(a) of the policy; and
- Note: The CEO 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 (refer example below).

5.3. Management statement

- (1) Note: Management statements should include at a minimum:

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- a. The nature of the interest, ie. what is Council's relationship with the development – landowner, landlord, etc;
- b. Council's investment or financial risk associated with the development;
- c. management strategy or mitigation measures on how the conflict will be managed; and
- d. Council contact (generally the delegated authority who will decide the development application).

(2) The following is an example of a statement that could be published by Councils to document its proposed management approach for a Council- related development.

**Scenario**

*Albury City Council is upgrading one of their assets, 'Albury 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 two storeys on an existing three storey building comprising a child care centre, commercial office spaces and partial use of the building for Council's public administration.*

**Council conflict of interest management statement**

Project name	Albury City Council
DA number	DA21/0001
Potential conflict	Albury City Council is the applicant. Albury Civic Place has an estimated capital investment value of \$4.9 Million and the Council expects to receive revenue through renting commercial office spaces.
Management strategy	<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>• Council X has agreed to peer review any regulatory decisions should compliance decisions be made; and</li> <li>• Key project milestones following the development consent will be reported at a public Council meeting.</li> </ul>

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Contact

Anyone with concerns about Council fulfilling its obligations should report their concerns to the Council.

5.4. Any breach of this policy will be investigated according to AlburyCity's Code of Conduct.

## 6. Documentation

6.1. Council-related development application Conflict of Interest form.

## 7. Authorisation

<b>Owner</b>	<b>Directorate</b>	City Development
	<b>Responsible Officer</b>	Service Leader City Development
<b>Authorisation</b>	Insert 'Approved Executive' or 'Adopted Council' Include date approved/adopted	
<b>Review Date</b>	Insert date four years from last issue date, or earlier if required	
<b>Register</b>	Indicate if this Policy is included in the Public Policy and Procedure Register.	
<b>Record of Amendments</b>	Insert date	Provide brief description of the change.
	Insert date	Provide brief description of the change.

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