



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:JWlb020921

2 September 2021

Planning Policy
Department of Planning, Industry and Environment
Locked Bag 5022
PARRAMATTA NSW 2124

Dear Sir/Madam,

Proposed New Housing SEPP

The Law Society is grateful for the opportunity to comment on the public consultation draft of the *State Environmental Planning Policy (Housing) 2021* (draft SEPP), together with the supporting documentation, including amendments to the *Standard Instrument (Local Environment Plans) Order 2006* and the draft Environmental Planning and Assessment Amendment (Housing) Regulation 2021 (draft Regulation).

The draft SEPP will consolidate provisions from the following existing State Environmental Planning Policies (SEPPs): *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARH SEPP); *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004* (Seniors SEPP); *State Environmental Planning Policy No 70 – Affordable Housing (Revised Schemes)* (SEPP 70); *State Environmental Planning Policy No 21 – Caravan Parks* (SEPP 21); and *State Environmental Planning Policy No 36 – Manufactured Home Estates* (SEPP 36).

We support the aims of the draft SEPP, which proposes a complete strategy to address affordable housing in NSW, and are generally supportive of its provisions, subject to our comments in relation to specific provisions below.

General matters

Savings and transitional provisions

The savings provision in Schedule 6 is clear and should avoid any debate as to the weight, if any, that should be given to the draft legislation along the lines of the discussion in *Maygood Australia Pty Ltd v Willoughby City Council* [2013] NSWLEC 142 and *Omid Mohebat-Arani v Ku-ring-gai Council* [2017] NSWLEC 143 at [20].

However, the draft SEPP will have the effect of prohibiting certain land uses (e.g., privately owned boarding houses and independent living units in the R2 zone (clause 76(1)(d)). We expect that there will be many such applications which will be captured by the savings provision. It is difficult to give weight to draft provisions where they have the effect of

prohibiting a certain land use. It might be useful to consider amending the savings provision to expressly provide that no weight is to be given to the provisions of the new Housing SEPP to the extent that it prohibits a certain land use.

Student accommodation

The FAQs note that, unlike the EIE, the draft SEPP omits a separate definition of, and provisions for, student housing. The Department notes that on-campus accommodation will continue to be facilitated through the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017*. Off-campus, housing developers will use the co-living provisions. The Department states that this change recognises the similarities between the typologies for student housing and co-living and responds to concerns expressed by both educational establishments and private sector developers.¹

The Law Society is concerned, however, that the slightly higher standard which the co-living category creates may make student housing unattractive to the providers who currently fill this void.

Definitions

Relating the definitions to terms found in the Standard Instrument (SI) is the correct approach, in the Law Society's view.

However, "boarding house" as a planning term still has a definition which is slightly at odds with "boarding premises" under the *Boarding Houses Act 2012*.

Boarding Houses

While it was always a requirement under the ARH SEPP that rents had to fall within certain limits determined by statistical data, the case law did not always appear to reflect the rent controls consistent with the ARH SEPP.

In cases like *Pomeroy v Hawkesbury City Council* [2018] NSWLEC 1146, affordability appeared to be a guideline only, for example at paragraph 39 Commissioner O'Neill stated: *...it is instead the form of the building of a boarding house and the limited size of rooms that constrains the relative cost of boarding house accommodation, which is provided at market rents.*

The Law Society supports the updated definition of affordable housing households and the requirement that boarding houses be managed by registered community housing providers (CHPs).

However, members of the Law Society who act for councils report that, although SEPP 70 and the draft SEPP arguably support the premise that there is a need for affordable housing in every Local Government Area of the State, not every proposal for a Division 1 Infill development can necessarily find a CHP to operate it.

While co-living housing may be a viable alternative in some cases, and has slightly higher amenity outcomes, there is no guarantee of affordability. Affordability is now linked, not only to the size of the dwellings and the compromised amenity, but to the mandating of CHPs. The Law Society is therefore concerned that there may not be sufficient funded and otherwise supported CHPs to fill the need for community boarding houses.

¹ NSW Government, Department of Planning, Industry and Environment, *Housing SEPP consultation draft: Frequently asked questions*, 2.

Seniors Housing

Definition of Gross Floor Area

Gross floor area (GFA) is separately defined in clause 72 for the purpose of Part 4 Seniors Housing but the SI definition of GFA applies for the balance of the draft SEPP. We consider that the draft SEPP should adopt the SI definition and have specific exceptions for the purpose of seniors housing if that is considered necessary. To complicate matters further, the definition of GFA in Part 4 has been changed from the definition in the Seniors SEPP to something similar to, but different from, the SI definition of GFA (disregarding the exceptions in sub-paragraphs (e) and (f)). For example, GFA is defined in the draft SEPP to exclude “space for the loading and unloading of goods” but does not include the words in the SI definition which immediately follow, “(including access to it)”. Those words have been the subject of judicial consideration and excluding them will invite further litigation about what parts of the floor area should be excluded to calculate GFA for the purposes of seniors housing.

Clause 76(1)(d) states that the only form of seniors housing permitted in the R2 zone is a residential care facility. We note that this was not flagged in the EIE. The clause is headed as a development standard, but we suggest it merits reconsideration as to how it is framed.

Group Homes

The need for greater regulation of group homes has not been addressed in the draft SEPP. The provisions relating to group homes are to be reviewed after the making of the Housing SEPP.² We consider that there is a need to introduce regulation to avoid this category of development being used as *de facto* housing for seniors or people with a disability, without the regulatory framework. In the SI, “group home” is defined to exclude development to which Seniors SEPP applies. That exclusion does not prevent seniors from occupying a group home.

Clauses 57-58 make provision for group homes as exempt development. Characterisation of development as a group home is not a simple exercise, and it may not be appropriate to make provision for exempt development where a complex characterisation exercise is required. The issue has given rise to litigation, see *Black Hill Residents Group Incorporated v Marist Youth Care Limited (t/as Marist180) (No 5)* [2021] NSWLEC 43.

Non-discretionary development standards

The draft SEPP adopts non-discretionary development standards throughout (clauses 17, 23, 48, 64, 96, 97 and 100). Based on the stated aims of the Policy,³ it does not seem to be the intention that a clause 4.6 variation would be required for each of these non-discretionary standards. We consider that the requirement for a clause 4.6 variation would create complexity and additional costs. Non-discretionary development standards have effect pursuant to s 4.15(2) and (3) of the *Environmental Planning and Assessment Act 1979* and can only be varied in accordance with s 4.15(3) of the Act.

This could be remedied by adding a provision which allows for variation of the non-discretionary standards as a subclause of each relevant provision or as a new clause in the draft SEPP. Making it clear that a clause 4.6 request is not required will avoid the issue

² Ibid 1.

³ Clause 3 of the draft SEPP states that one of the aims of the Policy is: “(b) to provide greater clarity and certainty for the housing sector.”

which has arisen in relation to clause 29(4) of the ARH SEPP (see *Parker Logan Property Pty Ltd v Inner West Council* [2018] NSWLEC 1339 at [30]-[47]).

Where a non-discretionary standard applies, it should be clear how it is intended to operate where a standard under the applicable Local Environmental Plan which applies is less onerous (e.g., height and floor space ratio).

Other issues

The character test has been included as a development standard (clauses 24(1)(a) and 65(1)(e)). We suggest that this is a subjective test, and that it should instead be inserted as a separate clause, such as, for example, clause 30A of the ARH SEPP.

Clause 24(1)(d) is also subjective and is not appropriate as a development standard.

Clause 48(2)(b) is an incomplete sentence. The current wording from clause 22(4)(b) should be retained.

Cross-referencing errors

There appear to be cross-referencing errors in the package of documents. Some examples appear below, if they are of assistance.

Clause 42(2)(b) of the draft SEPP refers to Chapter 3, Part 5 of the draft SEPP. This appears to be an incorrect reference as Chapter 3 only has four Parts. The draft Regulation also refers to Chapter 3, Part 5 of the draft SEPP: see Schedule 1, paragraphs [7] and [17].

Paragraph [17] of the draft Regulation refers to clause 85(2). It is not clear in which instrument clause 85(2) is located.

There appears to be a typographical error in paragraph [14] in Schedule 1 of the draft Regulation which proposes amending clause 2(1)(q) in the *Environmental Planning and Assessment Regulation 2000*, addressing reduction of availability of affordable housing. This paragraph should refer to clause 43(1) in the draft SEPP, rather than clause 45(1).

Clause 2(2) states, in error, "Chapter 3, Part 8 commences on 1 November 2021", as the SEPP does not include a Chapter 3, Part 8.

The Law Society appreciates the opportunity to participate in the reform process. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,



Juliana Warner
President