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Design Quality of Residential Apartment Development – SEPP 65

This circular is to advise councils and practitioners of amendments to *State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development* and accompanying amendments to the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation).

Overview of the amendments

State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (SEPP 65) was introduced in 2002 to improve the design quality of residential apartment development in NSW.

A comprehensive review of SEPP 65 has just been completed which has resulted in amendments to the SEPP and a new *Apartment Design Guide*.

State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development (Amendment No. 3) (the amending SEPP) and *Environmental Planning and Assessment Amendment (Residential Apartment Development) Regulation 2015* (the amending Regulation) were published on the NSW legislation website on 19 June 2015 with a commencement date of 17 July 2015.

The key amendments to SEPP 65 include:

- renaming the SEPP to remove the word flat and replace it with apartment;
- new policy aims to provide a variety of dwelling types, support housing affordability and facilitate timely and efficient development assessment (amended clause 2);
- updates to the definitions to remove inconsistencies (amended clause 3);
- expanded application of the policy to apply to shop top housing and mixed use development with a residential component (amended clause 4);
- confirmation that residential apartments need to comply with BASIX (amended clause 6);
- a new clause that applies the *Apartment Design Guide* instead of development control plans, where they include provisions covered by the objectives, design criteria and design guidance in the *Apartment Design Guide*. The clause applies to visual privacy, solar and daylight access, common circulation and spaces, apartment size and layout,

- ceiling heights, private open space and balconies, natural ventilation and storage (clause 6A);
- amendment of the clause setting out standards that cannot be used as a reason to refuse a development application to include 'car parking' (added to 'minimum ceiling height' and 'minimum apartment size') (renumbered from clause 30A to clause 30);
- rationalised and updated design quality principles; reduced from ten to nine principles (schedule 1);
- reducing the minimum number of design review panel members from five to three (amended clause 21);
- a requirement that consent authorities must consider the *Apartment Design Guide*, in addition to SEPP 65, when determining development applications (amended clause 27);
- a requirement that the policy be reviewed every five years (new clause 33); and
- transitional provisions for these amendments (amended clause 31).

The key amendments to the EP&A Regulation include:

- amending the requirements for approving development control plans that have provisions applying to residential apartment development so that Parts 1 and 2 of the *Apartment Design Guide* must be considered (amended clause 21A);
- amending the requirements for making a development application and modification application. In addition to considering SEPP 65, the statement by the qualified designer must also demonstrate how the objectives of Parts 3 and 4 of the *Apartment Design Guide* have been achieved (amended clauses 50(1A) and 115);
- amending the requirements for modification applications where the qualified designer verifying the application did not design the original proposal. In these cases, the application must be referred to a relevant design review panel for advice (amended clause 115); and

- amending the maximum fee that councils can charge for applications that are referred to a design review panel. The new maximum fee is \$3000, increased from \$760 (amended clause 248).

Apartment Design Guide

Also coming out of the review is a new *Apartment Design Guide* which is a renamed and updated Residential Flat Design Code. SEPP 65 gives effect to the *Apartment Design Guide*. The Guide supports SEPP 65 by providing detail on how residential apartment development can meet the SEPP's design quality principles through good design and planning practice.

In addition to SEPP 65, the *Apartment Design Guide* must be considered by the qualified designer when preparing a design verification certificate, as well as the consent authority when determining a development application.

For additional information on the relationship between the *Apartment Design Guide* and SEPP 65 please refer to the Introduction in the Guide which outlines how the Apartment Design Guide is to be applied and its status granted under SEPP 65

Development to which the SEPP applies

Clause 4 sets out the developments to which the policy applies.

SEPP 65 now applies to:

- residential flat buildings;
- mixed use development with a residential component;
- shop top housing;
- that are three or more storeys and have four or more dwellings; and
- where the building is a new apartment building, substantial redevelopment or refurbishment of an existing building or conversion of an existing building.

This is an expansion of the policy to include shop top housing and mixed use development.

Unless a local environmental plan states otherwise, SEPP 65 does not apply to a boarding house or a serviced apartment.

The terms used in SEPP 65 are defined by the *Standard Instrument – Principal Local Environmental Plan* unless they are specifically defined in SEPP 65.

Clause 6A Development control plans cannot be inconsistent with Apartment Design Guide

The amending SEPP introduces a new clause that makes the objectives, design criteria and design

guidance in the following sections of the *Apartment Design Guide* prevail over a development control plan:

- visual privacy;
- solar and daylight access;
- common circulation and spaces;
- apartment size and layout;
- ceiling heights;
- private balconies and private open space;
- natural ventilation; and
- storage.

The effect of this clause is to apply a consistent approach by making the *Apartment Design Guide* apply for these sections, instead of a development control plan (DCP). If a DCP covers the same matter for residential apartment development, those DCP standards, requirements or controls have no effect, regardless of when the DCP was made.

For example, if a DCP includes a control that sets the minimum amount of storage to be provided within an apartment, this DCP control has no effect. Instead, 4G of the *Apartment Design Guide* which includes an objective and design criteria on the design of storage for an apartment will apply.

Clause 6A makes it clear that only the requirements in the *Apartment Design Guide* and not DCPs apply for these aspects of apartment design.

Clause 30 introduction of car parking

Clause 30 replaces the previous clause 30A in SEPP 65 and has been expanded to include car parking. Clause 30 sets out the standards that cannot be used by a consent authority to refuse consent to a development application if the relevant design criteria in the *Apartment Design Guide* have been satisfied. The standards are minimum car parking, minimum ceiling height and minimum internal apartment area.

This clause does not prevent a consent authority from refusing an application on other grounds. For example, if the proposed development does not comply with other requirements in the LEP or DCP or if it considers that adequate regard has not been given to the design quality principles and the corresponding objective of that design criteria within the *Apartment Design Guide*.

If council only has a maximum parking requirement in their LEP or DCP (with no minimum) then the minimum car parking requirement continues to be taken as zero. In this case the maximum requirement continues to apply to the development application. Alternatively, if a council has a fixed numerical requirement, this is taken to be the minimum car parking requirement.

Clause 30(3)(b) also confirms that the design criteria referenced by clause 30(1) are non-discretionary development standards within the meaning of section 79C (2) of the *Environmental Planning and Assessment Act 1979*.

Design Review Panels

Clause 19 through to clause 25, relating to design review panels, are amended to encourage the uptake of panels constituted under SEPP 65, in combination with the new increased maximum fee allowed by the amending Regulation.

The key changes include:

- amended arrangements for the membership of panels including qualifications and number and mix of members;
- setting a minimum term for a panel of two years;
- new circumstances where a member of a panel ceases to hold office;
- linking the procedures at design review panel meetings to the supporting information and templates provided in Part 5 of the *Apartment Design Guide*;
- a new clause 26A which provides for a chairperson and gives the chairperson a deliberative vote in the event of a tied vote;
- a requirement for the panel to consider not just the design quality principles but also the *Apartment Design Guide*; and
- enabling the Minister to abolish a panel at any time, for any reason.

Under transitional provisions, each design review panel in existence before the commencement of the amending SEPP is abolished.

The Minister for Planning has also delegated all his functions under Part 3 Division 1 of SEPP 65 in relation to design review panels. This means that councils have the ability to set up design review panels under SEPP 65. An Instrument of Delegation will be published in the gazette and a copy available on the Department's website.

Transitional provisions for the amending SEPP

Other transitional provisions which apply to the amending SEPP include:

- For development applications or modification applications that were lodged before the day that *State Environmental Planning Policy No 65 — Design Quality of Residential Flat Development (Amendment No 3)* was published on the NSW legislation website (19 June 2015) and not determined **before** the amendment commences (17 July 2015), the application must be determined under the version of the SEPP in force prior to 19 June 2015.
- If a development application or a modification application is lodged **after** the amendment is published on the NSW legislation website (19 June 2015) and the application has not been determined before the amendment commences (17 July 2015), the application must be determined under the amended SEPP.

When will the new rules apply?

The amending SEPP commences four weeks after the date of publication on the NSW legislation website. The date the amending SEPP was published was 19 June 2015 and the date of commencement is 17 July 2015. Consistent with the transitional provisions, development applications made after 19 June 2015 will be subject to the amendments unless they have been determined before the 17 July 2015 date of commencement.

Further Information

A copy of *State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development (Amendment No. 3)* and *Environmental Planning and Assessment Amendment (Residential Apartment Development) Regulation 2015* are available at www.legislation.nsw.gov.au

The *Apartment Design Guide* is available at:

www.planning.nsw.gov.au/apartmentdesignguide

For further information please contact the Department of Planning and Environment's information centre on 1300 305 695.

Department of Planning and Environment circulars are available at:

<http://www.planning.nsw.gov.au/circulars>

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