



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:lb:EP&D:584964
Direct line: 9926 0202

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The Manager
Centres and Urban Renewal Branch
Department of Planning and Infrastructure
GPO BOX 39
SYDNEY NSW 2000

Email: sepp65@planning.nsw.gov.au

Dear Sir / Madam

SEPP 65 and Residential Flat Design Code Review

Thank you for the opportunity to contribute to the review of the State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development (SEPP 65) and the Residential Flat Design Code (Design Code). The Discussion Paper has been considered by the Law Society's Environmental Planning and Development Committee (Committee).

The Committee has responsibility to consider and deal with any matters relating to or associated with environmental planning and development law, and to advise the Council of the Law Society on all issues relevant to that area of practice. Membership of the Committee is drawn widely from experienced professionals whose expertise has been developed variously in representing the interests of local government, government instrumentality, corporate and private clients.

The Committee's comments focus on the application of the Design Code and its relationship to SEPP 65. These comments are made in the context of its members' roles as legal advisors, responsible for giving advice on the interpretation and application of planning laws to other stakeholders in the planning system, such as applicants and Councils.

Application of the Code

The status of SEPP 65 is clear. It is an environmental planning instrument which has statutory effect on development and as a consequence may modify or supplement the provisions of a local environmental plan or development control plan.

SEPP 65 requires that a consent authority is to take into consideration the Design Code (clause 30). The preface to the Design Code states that the Code sets broad parameters within which good design of residential flat buildings can occur by illustrating the use of development controls and consistent guidelines. It is designed to be read with SEPP 65 to provide a “how to” of designing better built outcomes. The introduction section of the Design Code states that:

“The Design Code is a set of guidelines that provide benchmarks for better practice in the planning and design of residential flat buildings”¹.

The Committee considers some aspects of the interaction of the Design Code with SEPP 65 to be problematic. The Discussion Paper notes that a number of Councils have indicated that they share this concern and consider that the statutory weight of the Design Code is not clear in its application to development assessment.

There is not sufficient certainty in the current scheme to enable stakeholders to clearly distinguish between:

- Provisions that are legal requirements; and
- Provisions that are merely matters for consideration, to be balanced against other competing considerations.

The Committee notes, for example that Clause 30A of SEPP 65 sets standards that cannot be used as grounds to refuse development consent for residential flat buildings. The ceiling height and apartment area standards described by this clause are not contained within it. The clause evokes portions of the Design Code and in doing so gives them statutory weight. These provisions have not been drafted with the same legal precision required of a statutory instrument. It would be more appropriate, in the Committee’s view, for the standards to be entirely contained within the environmental planning instrument itself.

A code is defined in the Macquarie Dictionary and commonly understood to be a “system or collection of rules and regulations”. If this is truly the purpose of the Design Code, then all of its provisions should be included in an environmental planning instrument. Such an approach would be consistent with that taken in relation to exempt and complying development codes. This would ensure that rules that are intended to be legally binding have been drafted with the necessary legal precision and are available in a form appropriate for subordinate legislation.

Conversely, policy-makers may intend that some or all of the material covered in the Design Code should merely have the status of a guideline. Properly understood, a guideline may be applied flexibly - and departed from when a decision-maker considers that other guidelines or considerations take precedence. If this is the intention, the document should be titled as such, and the language of the document should be re-drafted to better reflect its status.

The introduction to the Discussion Paper states that the Design Code “is a guideline document which supports SEPP 65”. The Committee suggests that clarification of the status of some of the provisions of the Design Code as set out above would improve its usability and reduce complexity in accordance with the stated objectives of this review.

¹ Page 1 of the Residential Flat Design Code

Recommendation

The Committee recommends that those sections of the Design Code that are intended to have statutory effect should be incorporated into SEPP 65. Any provisions intended to have the status of guidelines should be clearly labeled as such by renaming the remaining provisions of the Design Code as the Residential Flat Design Guidelines.

Once again the Committee appreciates the opportunity to participate in the review process.

Yours sincerely



Justin Dowd
President