



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: EP&D:RH1b1967962

8 September 2020

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

Dear Sir/Madam,

### **Proposed New Housing Diversity SEPP**

The Law Society appreciates the opportunity to comment on the Explanation of Intended Effect (“EIE”) for a new Housing Diversity State Planning Policy (“SEPP”). The Law Society’s Environmental Planning and Development Committee contributed to this submission.

The Department is proposing to prepare a new SEPP to consolidate and update the Government’s housing-related policies. The changes also aim to assist the State’s economic recovery following the COVID-19 pandemic.<sup>1</sup> Build-to-rent (“BTR”) in particular, has been identified as an opportunity for stimulus.<sup>2</sup> We support the aims of the new SEPP, which proposes a complete strategy to address affordable housing in NSW. However, we do not currently have all the information needed to make an informed and complete evaluation of the likely effectiveness of the proposed new SEPP in achieving its aims.

### **General matters**

#### *Savings and transitional provisions*

The practical implications of changing the definition of ‘boarding house’ to require boarding houses to be managed by a community housing provider (“CHP”) will need to be further clarified. It is currently not clear whether these changes will apply retrospectively, as there are no savings and transitional provisions that explain the impact of the changes on existing boarding house developments. If the changes do apply retrospectively, then this will likely mean some costs and investment are lost.

We consider that the changes should not apply to development applications that have already been lodged at the date of commencement of the new SEPP.

While the proposal to have boarding houses managed by a CHP is supported, it is recommended that this requirement be accompanied with a savings and transitional

---

<sup>1</sup> NSW Department of Planning, Industry and Environment, *Explanation of Intended Effect for a new Housing Diversity SEPP*, July 2020, 5.

<sup>2</sup> *Ibid* 1.

provision that means that all boarding houses approved prior to the proposed new SEPP eventually coming into force can maintain their current management structure.

#### *Gross floor area*

There are currently different definitions of gross floor area in the *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004* ("Seniors SEPP") and in the standard instrument under the *Standard Instrument (Local Environmental Plans) Order 2006*. The new SEPP could address this inconsistency.

#### *Consultation using an EIE in place of the SEPP*

We have previously expressed concern about the practice of publishing lengthy "Explanation of Intended Effect" documents in place of the draft amending legislation.<sup>3</sup> We reiterate our view that consultation on proposed legislation in its draft form allows for more nuanced and technical feedback to be provided on the likely anticipated, and unanticipated, impacts. We note that the design guidance intended to accompany the proposed new SEPP is also not yet available.

### **Specific proposals**

Our views in relation to some of the specific proposals in the new SEPP are set out in 'Attachment A' to this letter.

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](mailto:liza.booth@lawsociety.com.au) or on (02) 9926 0202.

Yours faithfully,



Richard Harvey  
**President**

---

<sup>3</sup> See, for example, the Law Society submission to the Department of Planning and Environment dated 18 July 2018, available at: <https://www.lawsociety.com.au/sites/default/files/2018-09/Letter%20to%20DPE%20-%20Proposed%20housekeeping%20amendment%20-%20Codes%20SEPP%20-%202018%20July%202018.pdf>.

**Attachment “A”**  
**Responses to specific proposed changes**

<b>Boarding Houses</b>	
Remove the ability for boarding houses to be constructed within the R2 Low Density Residential Zone	<p>We note that the inclusion of boarding houses as permissible development in the R2 Low Density Residential zone has been one of the most contentious aspects of boarding house development. The removal of this option may allay the concerns of some stakeholders. However, we consider that there are situations where a boarding house is suitable in an R2 Low Density Residential zone and that removing this option does not necessarily promote a diversity of residential accommodation.</p> <p>Community objections to boarding houses are usually focused on social issues and the height and bulk of the development. It could be possible to limit the height and bulk of appropriate developments using overriding Local Environment Plan (“LEP”) controls.</p> <p>Some councils may choose to include boarding houses as permissible development in the R2 Low Density Residential zone and may seek to introduce development standards for such development which are not inconsistent with the SEPP.</p>
Include a requirement for affordability of boarding house developments	<p>There is no definition of “affordable”. In our view, the upper end of any definitional range should equate with the lower end of the market range for a studio.</p> <p>With likely Apartment Design Guide<sup>4</sup> type design controls plus affordable housing controls on boarding houses, we question their viability. We suggest that there are boarding houses that have a role to play being at the lower end of market range but perhaps not in the lower range of “affordable” category. For some people unable to afford a one-bedroom apartment, it is a specific preference to be able to afford their own room without having to reside in a shared home. The EIE promotes large scale BTR but not the smaller boarding houses. A mix would ensure a diversity of options.</p> <p>We consider that there is a place for small, privately run, boarding houses that are not necessarily run by CHPs. There are some good examples of boarding houses that support workers such as council workers, and hospital workers, retail workers that have rents at the lower end of the market rate, but provide a more affordable option than a residential flat building and where a person can have their own room and not be obliged to reside in a shared house. The pressure on viability is likely to be compounded by the new proposed SEPP 70 controls and the ability to impose a levy which is not benchmarked against January 2000<sup>5</sup> e.g. the boarding house has to have a 10 year affordable housing criteria and then at the end of the 10 years if the owner wants to, for example, renovate the bathrooms, it could then</p>

<sup>4</sup> “Apartment Design Guide” published by the Department of Planning and Environment on the date of commencement of the *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development (Amendment No 3)* accessed at <https://www.planning.nsw.gov.au/Policy-and-Legislation/Housing/Apartment-Design-Guide>.

<sup>5</sup> Currently Part 3 of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* only applies if the building was a low-rental residential building as at 28 January 2000.

	<p>be subject to a levy because the rooms are no longer affordable.<sup>6</sup> It is not clear what is anticipated will happen at the end of the 10-year period - will there then be a loss of affordable housing stock as the former boarding house accommodation is let out at unaffordable rates?</p> <p>We note that the levy will be payable if the units were affordable <b>at any time</b> in the previous 5 years. This seems onerous - we suggest that consideration be given to its application based on an average rent for the previous 5 years.</p> <p>If there is a restriction on rent to make boarding house accommodation affordable, we query the need for a requirement that it be managed by a CHP.</p> <p>We have long-standing concerns with the concept of boarding houses being permissible under a SEPP designed for affordable housing if they are not in fact affordable.</p>
Co-living	This proposed new category of development is effectively accommodation in a residential flat building with communal facilities. The slightly smaller room size is balanced or outweighed by mandated communal areas. We suggest that the planning system should not be promoting this type of development, but just setting rules for it.
Parking – must not refuse 0.5	We agree that council local policies should be able to mandate less provision for parking, based on locational context e.g. if the building is within 200m of a tram line, railway station or high access bus route.
Room size	We do not consider that the increase to 30-35m <sup>2</sup> room size is likely to represent a viable alternative option. We do not consider that this differs from a residential flat building with mainly studio apartments. The minimum room size in that case is 35m <sup>2</sup> .
<b>Group Homes</b>	
Provide a quicker and easier process to allow an existing dwelling to be used as a group home	<p>We are concerned that there is insufficient regulation of group homes at present, compared to, say, seniors housing, yet the occupants may have much greater accessibility and carer needs than many seniors. We are aware of cases where this type of development has been used as de-facto seniors accommodation.</p> <p>We would be concerned about a process which avoided a comprehensive assessment.</p> <p>Group homes may require certain accessibility or privacy measures which may have impact on character and neighbourhood and there is no detail provided on this.</p>
<b>Seniors</b>	
Update the provisions of Schedule 1 – Environmentally sensitive land, of the Seniors SEPP to align with current legislative and planning conditions	There is no detail provided in relation to this proposal other than it will be updated. We are concerned that this could result in the broadening of Schedule 1 such that seniors housing is not able to occur in areas where it could previously. Many councils have started to prepare LEP overlays which identify potential environmental sensitivity which has not been verified (e.g. through the use of aerial photography) and that would then rule out seniors housing

<sup>6</sup> The proposed SEPP will instead allow a council to levy monetary contributions to offset the loss of dwellings that were low-rental at any time within the 5 years preceding the lodgment of the development application - see the EIE, p17.

	<p>even if it could be shown that the proposed development site does not fit within the environmentally sensitive category.</p>
<p>Amend the 'location and access to facilities' provisions so that point-to-point transport such as taxis, hire cars and ride share services, cannot be used for the purpose of meeting the accessibility requirement</p>	<p>We agree with this proposed amendment.</p>
<p>Introduce provisions in the new SEPP so that a site compatibility certificate ("SCC") is valid for 5 years (rather than the current 2 years), provided that a development application is lodged within 12 months of the date on which the SCC is issued</p>	<p>We are in favour of this extension, although we envisage that some councils may consider that 5 years is too long.</p> <p>Consideration could also be given to addressing the Court's jurisdiction to issue or amend SCCs (as raised in <i>Zhiva Living Dural Pty Limited v Hornsby Shire Council [2020] NSWCA 180</i>).</p>
<p>Registered club - the club must be a registered club at the time the SCC application is made.</p>	<p>This is reasonable, but if a club is no longer operating and the property is then put on the market, the requirement that the club must be a registered club should be extended to the period within 12 months before the SCC application is lodged.</p>
<p>Application of local development standards: It is proposed to amend the SEPP provisions to clarify that development standards in an LEP prevail to the extent of any inconsistency with the SEPP. It is proposed that the development standards in the Seniors SEPP could be varied using clause 4.6 of the Standard Instrument LEP, but only to a maximum of 20%.</p>	<p>This is a major change which does not, in our view, have the effect of promoting seniors housing. The maximum 20% variation using clause 4.6 does not assist, given the threshold for a variation under clause 4.6 can be high. We also query how this would affect existing developments that were approved under the former provisions.</p> <p>The 20% variation seems arbitrary and does not have regard to the type of control or the circumstances which might make a breach of it more likely (e.g. height control in steep topography). Clause 4.6 already provides an appropriate mechanism for variation to provide flexibility in applying certain development standards to a development.</p>
<p><b>Build to rent</b></p>	
<p>BTR is meant to support institutional investment and provide a more stable rental sector</p>	<p>The EIE promotes these changes as a COVID-19 response to encourage construction activity. However, we query the market support for the large institutional BTR model. The larger developments involve more investment risk and may be less likely to be built in a COVID-19 environment. If the idea is to promote construction activity, given the large number of apartments to rent, that could create its own risk of over-supply and reduce the prospect of future construction activity. We suggest that with on-site management and community facilities, the pressure on pricing is unlikely to result in the provision of greater housing choice than at present.</p> <p>We agree that there needs to be specific design guidance on communal facilities.</p> <p>We consider that minimum lease terms may be an issue. Longer lease terms should be offered, but the tenant should not be forced to accept a long-term lease or, alternatively, the lease break consequences should not be substantial. The goal of BTR is to give tenants certainty that they can stay for the long term, but we suggest that tenants also want the flexibility to move if they are obliged to or choose to do so for any reason.</p>

Compulsory permitted use in R4, B3, B4, B8 and R3 where RFBs permitted	This is a major change to allow what is effectively a residential flat building in the B3, B4 and B8 zones. Just because a BTR is commercially run, does not mean a residential use in those zones is appropriate. If the concern is to promote BTR, then the State Significant Development listing should be enough (at the \$100M threshold).
<b>Support delivery of social housing by the Land and Housing Corporation (“LAHC”)</b>	
Two-storey residential – an increase in the size of development that the LAHC can self-assess from 20 to 60 dwellings	We support the increase to facilitate LAHC’s new model for the provision of increased social housing.