



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: EP&D:JvdPIb151222

15 December 2022

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

Dear Sir/Madam,

### **Proposed amendments to the Housing SEPP**

The Law Society appreciates the opportunity to comment on the Explanation of Intended Effect (EIE) which sets out an explanation of proposed amendments to the in-fill affordable housing, group homes, supportive accommodation and social housing provisions of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP).

We support the aim of the amendments to facilitate the supply of social and affordable housing, and are generally supportive of the proposals, subject to our comments in relation to specific proposals below.

### **Non-discretionary development standards**

The Law Society made a submission<sup>1</sup> in response to the draft Housing SEPP when it was exhibited, noting that the draft SEPP adopted non-discretionary development standards throughout (clauses 17, 23, 48, 64, 96, 97 and 100). As the Housing SEPP aims to provide greater clarity and certainty to the housing sector, we suggested that a requirement for a variation request applying clause 4.6<sup>2</sup> of the *Principal Local Environmental Plan* (Standard Instrument LEP) for each of these non-discretionary standards, did not seem to align with the intention of the Policy.

The current Housing SEPP includes non-discretionary development standards at sections 18, 24, 53, 68, 74, 107, and 108. Development consent in relation to these non-discretionary development standards must not be granted unless a written request has been considered

---

<sup>1</sup> The Law Society of NSW, [Proposed New Housing SEPP](#), 2 September 2021.

<sup>2</sup> By reference to section 4.15(3)(b) of the *Environmental Planning and Assessment Act 1979* which provides:

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards— ...

**(b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.**

and the consent authority is satisfied of the relevant matters pursuant to clause 4.6 (4) of the Standard Instrument LEP.

We consider that this issue remains a barrier to facilitating the delivery of affordable housing under the Housing SEPP. We reiterate our suggestion that 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 Housing SEPP.

We submit that it may be difficult for applicants to take advantage of the incentives, such as additional floor space ratio (FSR), if there is also the need to increase height (which would be likely to take advantage of the additional FSR). Applicants may be reluctant to utilise the incentives due to the risk of having to rely on a clause 4.6 variation request, as it may be difficult to establish grounds to satisfy the consent authority, including the Court, on appeal.

The EIE acknowledges this issue, stating that there has been low uptake and that one of the factors could be:

difficulty in accommodating the full FSR bonus while complying with development standards and other local council controls (for example, height of building, setbacks and landscaping) and uncertainty around the application of clause 4.6 to vary development,<sup>3</sup>

The EIE outlines planned reforms to clause 4.6 and foreshadows the issue of further guidance on its application in this context. However, we do not consider that this satisfactorily addresses the issues outlined above. In our view, there needs to be explicit provision allowing non-discretionary standards to be varied, without the need to rely on the application of clause 4.6 of the Standard Instrument LEP, so that it is clearer and easier for applicants to take advantage of the incentives, and easier for consent authorities to approve.

Where development standards are not identified as “non-discretionary” in the SEPP, we consider that it is appropriate that a variation request under clause 4.6 should be required (for example, under section 25, dealing with standards for boarding houses).

### **Increased FSR bonus for in-fill affordable housing**

We note that as the FSR bonus increases, it becomes difficult to reconcile with the character test, as required under section 19(3), because the result may be a building that is x% bigger than allowed under the prevailing character test. It may be preferable to consider also amending the character test to take this into account.

### **Supportive accommodation**

In relation to the use of existing buildings for supportive accommodation, the EIE states:

The proponent must provide a plan of management to the relevant local council that addresses the matters set out in Appendix 3 before carrying out the development. Council will not be required to review or assess the plan of management.<sup>4</sup>

This requirement does not appear to deliver a clear policy outcome or to impose an enforceable legal obligation. We query whether it is expected that a council may attempt to enforce the plan of management, or whether the council is simply the holder of the information.

---

<sup>3</sup> EIE, 9.

<sup>4</sup> Ibid, 25.

## Draft legislation

We consider that many of the proposals in the EIE appear to be positive innovations. We would, however, welcome the opportunity to review the draft legislation.

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,

A handwritten signature in black ink, appearing to read 'Joanne van der Plaats', with a long horizontal stroke extending to the right.

Joanne van der Plaats  
**President**