
MEMORANDUM OF ADVICE

The application of LEP development standards to affordable housing under a site compatibility certificate issued under State Environmental Planning Policy (Affordable Rental Housing) 2009

To

Todd Neal
Partner
Colin Biggers & Paisley
todd.neal@cbp.com.au
ph: +61 2 8281 4522

Justin Doyle
Barrister

Frederick Jordan Chambers
Level 2, 53 Martin Place
Sydney NSW 2000
Ph: 9229 7326
Email: jdoyle@fjc.net.au

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1. This advice

My instructing solicitors act for Pacific Planning who are the project planners and development managers for a developer who has made a concept plan application for an affordable housing development under *State Environmental Planning Policy (Affordable Rental Housing) 2009* (**Affordable Housing SEPP**). *Canterbury Local Environmental Plan 2012* also applies to the land (**Canterbury LEP**).

You have sought my advice as to whether a clause 4.6 request is required- to vary the height development standard contained in the Canterbury LEP, or whether the Affordable Housing SEPP applies such that the height development standard under the Canterbury LEP does not apply in the assessment of the concept plan application.

After first identifying the relevant provisions of the SEPP and LEP, I set out below my understanding of the issue as it has arisen in the context of the concept plan application. I then explain the reasoning which has led me to conclude that the height control does not apply as a development standard to prohibit development which exceeds the development control, such that a 4.6 written request must be made and supported by the consent authority.

I give my reasoning for concluding that the mapped height under the Affordable Housing SEPP is not a standard which binds assessment of an affordable housing development, if that development is within the scope of the site compatibility certificate.

Lastly, I set out the course that I recommend be followed to guard against Council reaching a different opinion so as to argue that a clause 4.6 request is required anyway.

2. Relevant provisions

The relevant height control contained in the LEP is found in clause 4.3. It reads:

4.3 Height of buildings

- (1) The objectives of this clause are as follows:*
 - (a) to establish and maintain the desirable attributes and character of an area,*
 - (b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,*
 - (c) to support building design that contributes positively to the streetscape and visual amenity of an area,*
 - (d) to reinforce important road frontages in specific localities.*
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

My instructions are that the subject development would exceed the height shown on the Height of Buildings Map.

Clause 4.6 which allows for the variation of LEP development standards is in the following terms:

4.6 Exceptions to development standards

- (1) The objectives of this clause are as follows:*
 - (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*

The Affordable Housing SEPP includes the following objectives:

3 Aims of Policy

The aims of this Policy are as follows:

- (a) *to provide a consistent planning regime for the provision of affordable rental housing,*
- (b) *to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards,*
- (c) *to facilitate the retention and mitigate the loss of existing affordable rental housing,*
- (d) *to employ a balanced approach between obligations for retaining and mitigating the loss of existing affordable rental housing, and incentives for the development of new affordable rental housing,*
- (e) *to facilitate an expanded role for not-for-profit-providers of affordable rental housing,*
- (f) *to support local business centres by providing affordable rental housing for workers close to places of work,*
- (g) *to facilitate the development of housing for the homeless and other disadvantaged people who may require support services, including group homes and supportive accommodation.*

Clause 9 deals with inconsistency between the instruments. It reads relevantly:

8 Relationship with other environmental planning instruments

If there is an inconsistency between this Policy and any other environmental planning instrument, whether made before or after the commencement of this Policy, this Policy prevails to the extent of the inconsistency.

I understand that there is no dispute that Division 5 of the Affordable Housing SEPP “applies” to the development proposed in the pending DA because it is “*development. ... for the purposes of a residential flat building ... (on behalf of) a social housing provider*”, on the basis that correspondence has been furnished to the Council from a social housing provider confirming that to be the case.

Clause 36 of the Affordable Housing SEPP provides as follows in relation to the erection of a residential flat building on behalf of a social housing provider:

36 Development may be carried out with consent

- (1) Development to which this Division applies may be carried out with consent.*
- (2) A consent authority must not consent to development to which this Division applies unless it is satisfied that:*
 - (a) the Director-General has certified in a site compatibility certificate that, in the Director-General's opinion, the development is compatible with the surrounding land uses, and*
 - (b) if the development is in respect of a building on land zoned primarily for commercial purposes, no part of the ground floor of the building that fronts a street will be used for residential purposes unless another environmental planning instrument permits such a use.*

Importantly, there are no words in clause 36(1) which indicate that the clause should not operate to permit development which would exceed the LEP height control to “*be carried out with consent*”, so long as the proposed development is of the type to which Division 5 of the Affordable Housing SEPP applies. That is, provided that the development proposed is within the scope and requirements of a duly issued site compatibility certificate, it “*may be carried out with consent*”, and any height restriction which would dictate otherwise will not apply.

To put it another way, there is nothing in the wording of the clause which suggests that its operation is so limited that it would not permit approval of proposed development which will extend above the height control if the development is nonetheless found to be appropriate after taking into account the site compatibility certificate.

That does not mean that the Council cannot take the issue of height or the mapped height control into consideration. But Council is in no way obliged to apply the standard to refuse an application for development where other considerations such as the text and background of the site compatibility certificate would encourage otherwise.

It is in that way that Clause 36(3) is to be understood where it states:

- (3) *Nothing in this clause prevents a consent authority from:*
 - (a) *consenting to development on a site by reference to site and design features that are more stringent than those identified in a site compatibility certificate for the same site, or*
 - (b) *refusing consent to development by reference to the consent authority's own assessment of the compatibility of the development with the surrounding land uses, or*
 - (c) *having regard to any other matter in determining a development application.*

Under those provisions of the Affordable Housing SEPP, the consent authority is required to carry out its “own assessment” of whether the development will be suitably compatible with its surroundings after taking into account the certificate. Again those words indicate to me that the Council is not obliged to refuse a building which does not comply with the height control..

3. The issue

I understand that there is no issue raised by the Council as to the applicability of the provisions of the Affordable Housing SEPP when assessing the DA, but Council has queried whether the height development standard applying to development assessed under clause 4.3 of the Canterbury LEP apply such as to prohibit development which breaches that standard unless varied through the operation of clause 4.6.

The question of whether development standards under the LEP apply to restrict development under the Affordable Housing SEPP depends in my opinion upon the ordinary meaning of the relevant provisions of the SEPP read alongside the evident planning purpose of the provision. The parameters limiting the sort of development that the Council can lawfully approve are set only by the words “*Development to which this Division applies*” (see clause 36(1) of the SEPP,). That is because it is development captured by that phrase which may be carried out notwithstanding any prohibition or restriction in the LEP.

I have considered the possibility of a narrow interpretation of the section that might be available to limit its operation to issues of permissibility only, with other provisions of Canterbury LEP continuing to apply strictly. However, such a reading would prevent Council conducting its “own assessment” of relevant matters, and would in effect prevent the Council from approving development which the consent authority had decided was desirable, such as the affordable housing encouraged by the SEPP.

The alternative reading is to be preferred in my view whereby the phrase “*Development to which this Division applies*” is intended to capture all aspects of development that would comply with the terms of a certificate issued under the Affordable Housing SEPP.

I am encouraged in that opinion by the objectives of the Affordable Housing SEPP. Most relevantly (focusing on the crucial wording from the provisions cited in full above) the objectives include:

- (a) **to provide a consistent planning regime for the provision of affordable rental housing,**
- (b) *to facilitate the effective delivery of new affordable rental housing by providing incentives by way of **expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards,***

That is, the State Policy aims not just to introduce an additional permissible form of development, but to achieve a more far reaching goal – that of providing a “*consistent planning regime*” for the development category of “*affordable rental housing*” that will apply uniformly across the state, irrespective of local planning restrictions, if a site has been certified to be suitable for that form of development notwithstanding the zoning that would otherwise apply.

The way in which the instrument proposes to achieve that goal is also stated. Not only does it provide “*incentives*” through “*expanded zoning permissibility*” but also through expanded “*floor space ratio bonuses and non-discretionary development standards*”.

It is worth noting that other parts of the Affordable Housing SEPP substitute new development standards for those that would apply under the LEP. For example, Clause 14 of the SEPP provides “*Standards that cannot be used to refuse consent*” for “*In-fill affordable housing*”. However, that Division does not add a new category of permissible development, but rather only extends to providing different development standards for development which is otherwise permissible in the zone.

There are no additional non-discretionary standards proposed for development under Division 5 of the Affordable Housing SEPP.

The absence of any such replacement development standards suggests to me that the way in which aspects of the permitted development are to be regulated in Division 5 is through the terms of the site compatibility certificate. Clause 36(2) allows the Director-General to certify a form of development that “*is compatible with the surrounding land uses*”. If there are development restrictions which must not be breached for the development to be compatible and acceptable, they can (and should) be identified in the site compatibility certificate.

Notably, the certificate in issue in this case contains a number of pre-requisites to be met before the exemption from provisions of Canterbury LEP apply.

There is nothing in Division 5 which suggests that it is beyond the power of the Director General to certify a form of affordable housing development to be compatible with the surrounding area even though it would breach a development standard. To limit the Director General in that way would seem to constrain the achievement of the objectives of the instrument.

It is also in my opinion relevant that even though the development standards in the LEP do not in my opinion apply strictly to prevent non-complying development, they can none-the-less be considered. Clause 36(3) is quite specific in opening up the available considerations for the Council. That subclause reads:

(3) *Nothing in this clause prevents a consent authority from:*

- (a) *consenting to development on a site by reference to site and design features that are more stringent than those identified in a site compatibility certificate for the same site, or*
- (b) *refusing consent to development by reference to the consent authority's own assessment of the compatibility of the development with the surrounding land uses, or*
- (c) *having regard to any other matter in determining a development application.*

In that way, development standards which apply to different forms of development within the relevant zone are still matters which the consent authority is entitled to consider, and indeed they may lead to a refusal of consent. They just do not apply so as to prohibit an affordable housing development that is otherwise rendered permissible by the Affordable Housing SEPP.

There is sound planning logic to such an interpretation. Where a site compatibility certificate is issued in relation to land in a zone where residential flat buildings are prohibited it is quite likely that the common development standards of height and FSR will have been set without any regard to standards appropriate to that form of development. In a commercial zone, for example, the floor space control may be entirely inappropriate for a residential development.

4. Way forward

For the reasons set out above, it is my considered opinion that development standards in Canterbury LEP do not apply to prevent a consent authority from approving affordable residential flat building development the subject of a site compatibility certificate that can otherwise lawfully be approved applying Division 5 of the Affordable Housing SEPP.

It follows then that a Clause 4.6 request is unnecessary since the Affordable Housing SEPP is intended to prevail over the LEP to the extent of an inconsistency. If development was considered to be prohibited because it "*contravened*" a height development standard (even though it fell within the scope of potential development allowed by a Site Compatibility Certificate), it would limit the effect of the certificate in a way that the words of the Instrument indicate were not intended.

Nonetheless, because the Council might apply a different reading and for the abundance of caution, I suggest that a clause 4.6 written request be supplied to the Council seeking the flexible application of any applicable development standard that would be breached by the proposal if it applied.

The objectives of the Affordable Housing SEPP, the issuing of the site compatibility certificate, and the fact that any applicable development standard was set without regard to the proposed form of development, all seem to be good reasons why it would be

unreasonable and unnecessary to apply the standard in this case, if there are good planning reasons for departing from the standard.

I would be happy to discuss the content of such a request if it would assist.

A handwritten signature in black ink, appearing to read 'Justin Doyle'.

Justin Doyle

Frederick Jordan Chambers

5 April 2019