

Supplementary Memorandum – Chapter 4 of Housing SEPP 2021 (former SEPP 65)

PPSPSSH-145 – Sutherland Shire Council

DA23/0420

8-20 Hinkler Road Caringbah and 319-333 Taren Point Road Caringbah

Background

This supplementary memo considers the savings provisions in Schedule 7A of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP) relating to the amendments made to the Housing SEPP on 14 December 2023 under the State Environmental Planning Policy Amendment (Housing) 2023, in particular the application of Chapter 4 Design of residential apartment development as inserted on that date. At the same time, State Environmental Planning Policy 65 (Design Quality of Residential Apartment Development) (SEPP 65) was repealed.

Clause 8 of Schedule 7A reads as follows:

8 State Environmental Planning Policy Amendment (Housing) 2023

- (1) An amendment made to this policy by the amending policy does not apply to the following—
 - (a) a development application made, but not determined, on or before 14 December 2023,
 - (b) a modification application made, but not determined, on or before 14 December 2023,
 - (c) an environmental impact statement prepared in compliance with environmental assessment requirements that were notified by the Planning Secretary on or before 14 December 2023.
- (2) ...
- (2A) Despite subsections (1) and (2), Chapter 4, as inserted by the amending policy, applies to a matter referred to in those subsections.
- (3) In this section—
amending policy means *State Environmental Planning Policy Amendment (Housing) 2023*.

The inserted Chapter 4 includes provisions for the design of residential apartment development.

Section 4.3.1 of the Assessment Report dated 14 March 2024 referred to section 8(1) of Schedule 7A of the Housing SEPP 2021 and stated that as the development application was made but not determined on or before 14 December 2023, the Housing SEPP amendments did not apply, and that the SEPP 65 provisions applicable at the date of lodgement applied. The assessment report did not make reference to section 8(2A) of Schedule 7A which appears to exclude the operation of section 8(1)(a) from operation in relation to Chapter 4.

This memorandum provides details of the differences between SEPP 65 and the Chapter 4 Housing SEPP provisions relevant to DA23/0420. It concludes that whilst there are some differences, the application of the Apartment Design Guide (ADG) and the Design Principles remain materially the same, and that the assessment provided within the Assessment report dated 14 March 2024 remains applicable.

Changes to the provisions

Chapter 4 and Schedule 9 of the Housing SEPP, together with sections 288A-288D of the Environmental Planning and Assessment Regulation 2021 (EP & A Regulations 2021) contains the substance of SEPP 65 with some changes. The most notable issues are:

- The ADG is unchanged and remains applicable (s147(1)(b)), although section 147(3) make is clear that this does not require a consent authority to require compliance with design criteria in the ADG. S147(3). This reflected caselaw already in place *Construction Development Management Services Pty Ltd v City of Sydney* [2023] NSWLEC 1620;
- The Design Principles from SEPP 65 are now located in schedule 9 of the Housing SEPP and whilst they have been slightly amended in layout, they remain materially the same as the repealed SEPP 65 Schedule 1. The consent authority must consider the design principles under section 147(1)(a) as they were required to do under clause 28(2) of SEPP 65.

Design Review Panel

- Part 3 of SEPP 65 relating to design review panels has been generally transferred to Part 15 Division 4A sections 288A-288D and schedule 5A of the EP & A Regulations 2021. Whilst some changes have been made, they do not affect the assessment of the DA.
- Section 28(1) of the repealed SEPP 65 required the consent authority to refer an application (other than state significant development) to the design review panel for advice concerning the design quality, and section 28(2)(a) required the consent authority to take into consideration any advice received from the panel. Provisions to similar effect are set out in section 145(2) and section 147(1)(c) of the Housing SEPP.
- In relation to this application, DA23/0420 was not referred to the Design Review Panel (DRP) because it was materially the same as the application under DA21/1251 about which the Design Review Panel had already made comments (see Section 10.0, pages 39-40 of the Assessment Report).

Conclusion

Despite the comments made in section 4.3.1 of the Assessment Report, it appears that Part 4 of the Housing SEPP (as amended) (including the design principles in Schedule 9) may apply to the application. However, the operative parts of the provisions relating to assessment of a residential flat building remain materially the same, with assessment requiring consideration of the ADG, the Design Principles and the advice from the DRP. The ADG is unchanged, and the Design Principles remain materially the same other than layout alterations. It is concluded that the assessment provided under the SEPP 65 provisions in the Assessment Report remain relevant and acceptable for assessment under Chapter 4 of the Housing SEPP (as amended).

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