

# SHELTER NSW COMMENT



Subject: **Affordable rental housing SEPP**

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The Department of Planning launched a new state environmental planning policy, the *State Environmental Planning Policy (Affordable Rental Housing) 2009*, on July 31.

This policy contains most of the proposals from a suite of proposals flagged in November 2008. On 19 November 2008, the Department of Planning held a confidential briefing in Sydney to nongovernment and government stakeholders (including some local councils). In addition, we are aware there was at least one other briefing, to the property and development industry sector, also, and, apparently, active liaison between the Department and the Property Council during the first part of this year.

The Department had been reviewing two state environmental planning policies, *SEPP 10 – Retention of Low-cost Rental Accommodation* and *SEPP 70 – Affordable Housing (Revised Schemes)*. It was generally assumed that the work around the proposals flagged in November were part of this review of those SEPPs and that one ‘affordable housing SEPP’ might emerge.

The new SEPP commenced on July 31, though some parts commence when Schedule 3.1[6] of the *Environmental Planning and Assessment Amendment Act 2008* is proclaimed.<sup>1</sup>

## **Relation to other instruments**

The new SEPP amends various environmental planning instruments, including SEPP 70, to make reference to Part 5B (the ‘Provision of public infrastructure’ provisions) of the Act, as introduced by the *Environmental Planning and Assessment Amendment Act 2008*. This is a simple updating of the references in those instruments to the proposed new/replacement sections of the *Environmental Planning and Assessment Act 1979*.

The new SEPP repeals SEPP 10, and incorporates key provisions from it.

SEPP 70 still exists, as do (currently) the Section 94F-based affordable housing schemes in Willoughby and Sydney City.

### **Purpose – section 3**

The main effects of the SEPP are to:<sup>2</sup>

- introduce incentives in the form of development concessions on standards to developers who include a proportion of community housing in multi-unit housing;
- allow secondary dwellings and boarding houses in residential zones;
- create a new land-use category called supportive accommodation;
- allow flats to be built on centrally-located land where they are not otherwise zoned if the flats are for social housing;
- continue to allow Housing NSW to build smaller developments (20 or less) units on a site without a council's consent;
- allow group homes with 10 or less bedrooms to be developed without consent, and makes group homes a complying development subject to meeting specified development standards; and
- retain substantive provisions of SEPP 10 but link them with a contributions scheme under section 94F.

*Comment:* The SEPP does not have provisions to authorize affordable housing contributions for developments where demand for affordable housing is created or where there is a rezoning ('inclusionary zoning'), as required by section 94F of the Act. This SEPP is not the 'affordable housing SEPP' that was promised by the Government when it introduced section 94F into the Act in 2000.<sup>3</sup>

### **Definitions – section 4**

The SEPP gives a similar definition of 'social housing provider' to that which had been in *State Environmental Planning Policy (Infrastructure) 2007*.<sup>4</sup>

It introduces a new land use, 'supportive accommodation', meaning a residential flat or boarding house used for long-term accommodation by a person who uses support services provided in that building.<sup>5</sup>

It expands the definition of 'affordable housing' given by the Act (namely, housing for very low income, low income households or moderate income households) by indicating that such households are those who:

- have a gross income less than 120% of the median household income for the ABS Sydney statistical division *and* who pay no more than 30% of their income in rent; or
- are eligible to occupy rental housing under the National Rental Affordability Scheme and who pay no more rent than what they would pay if they were actually living in housing provided under that Scheme.

*Comment:* The definition of very low–moderate income households by reference to household income *and* rent paid is peculiar. It defines affordable housing not just by an outcome (housing affordability) but by a particular, operational mechanism to achieve that: it is a definition of low (etc.) -income households not

in housing stress, not a definition of low (etc.) -income households. This is unhelpful. Firstly, it defines affordable housing in relation to rent payments and thus to rental housing tenures. This tenure-exclusive definition of affordable housing is inconsistent with the definition agreed to by housing, local government and planning ministers under the 'Framework for National Action on Affordable Housing' (June 2005), and more importantly, is inconsistent with any common-sense definition of the term, which must involve tenure-neutrality. The types of products that could be described as affordable housing is much wider than that indicated, and while some of the innovative models we observe overseas have not emerged strongly in Australia as yet, it would be wrong to provide obstacles to them. The definition in the Act is open enough to allow for flexibility; the definition used in the SEPP, in contrast, is narrow, restrictive and counterproductive.

Secondly, the definition is peculiar that in that it relates to Sydney only. It is not clear what the implications of this are, because it does not seem to be the case that all the provisions relate to the Sydney region only. Since many of the provisions do relate to other parts of the state, it is strange that the policy's definition of affordable housing does not give a benchmark for the rest of the state. For example, the *Housing Regulation 2009* (under the *Housing Act 2001*) gives the relevant median income for people who live outside Sydney as that reported by the Australian Bureau of Statistics for the whole of New South Wales.

Thirdly, the definition is inconsistent with that given in *State Environmental Planning Policy no.70 – Affordable Housing (Revised Schemes)*.

The second part of the definition, giving an alternative interpretation by reference to the Commonwealth National Rental Affordability Scheme seems to be a cover-all (let out) in case there are households eligible under that Scheme's definitions but not by the first part.

### **Application – section 7**

The SEPP applies to the whole state, but some provisions apply only to Sydney and to certain regional towns.

The sections that apply only to Sydney are:<sup>6</sup>

- a restriction on application of 'in-fill affordable housing' provisions (sections 10-18: see page 4, below) to land that is within 800 meters walking distance from a railway station or wharf, or within 400 meters walking distance from a light-rail station or bus-stop; and
- permission for social housing providers and public authorities to build flats in areas not zoned for flats, within 800 meters of a railway or light rail station (see page 8, below).

Sections that apply only to Sydney, Newcastle, and Wollongong are those on retention of existing low-rental private rental housing (see page 9, below).<sup>7</sup>

The sections that apply only to 32 named regional towns are those that allow social housing providers and public authorities to build flats in areas not zoned for flats within 400 meters of a town center (see page 8, below).

### **Community and public rental housing ('in-fill affordable housing') – sections 10-18**

The SEPP uses an incentive/bonus approach to allow greater floor space in a housing development where the developer includes community housing in that development<sup>8</sup>, and where the development is for public housing.

These provisions apply if:

- the land-use zones are residential;
- where the development is in Sydney, the development is within 800 meters walking distance from a railway station or wharf, or the development is within 400 meters walking distance from a light-rail station or bus-stop;
- where the development is in the form of dual occupancies, multi-dwelling houses, and flats that would ordinarily not be allowed in the land-use zone, the building is no higher than 8.5 meters and the development includes at least 50% affordable rental housing<sup>9</sup>;
- where the development is in the form of flats that would ordinarily be allowed in the land-use zone, the development includes at least 20% affordable rental housing; and
- the affordable housing units in the development are used for affordable rental housing for 10 years and are managed by a registered community housing provider<sup>10</sup>; the Department of Planning anticipates that the affordable rental dwellings will stay in the affordable segment of the private rental market after the 10 year period since the building would have been 'built to a budget' and be 10 years old and thus not attract the premium price (for housing sales) or rent of new housing in the area.<sup>11</sup>

*Comment:* The requirement that 'in-fill affordable housing' must be managed by a registered community housing provider was not included in the presentation notes given at the briefing given by the Department of Planning on 19 November 2008.

It is unfortunate, because it means this set of provisions (Part 2, Division 1) will not encourage more supply of affordable private rental housing, which is sorely needed.

In its submission on the Department of Planning's affordable rental housing proposals of November 2008, Shelter NSW supported this proposal – which at that time did not specify that it was to apply only to units managed by a registered community housing provider.

The potential of private landlords and real estate estates to participate in affordable rental housing schemes as providers and managers of that housing is untapped. We know that private landlords (who might be the 'mum and dad investors') play a key role in some other countries' social housing systems, notably Germany. It is unlikely that all of the shortfall between supply and

need for affordable rental housing can be made by the government and nongovernment sectors; moreover, we know that most very low-income private renters prefer private rental to public housing (Terry Burke, Caroline Neske and Liss Ralston, *Entering rental housing*, AHURI, Melbourne, 2004). The provision is a lost opportunity to test possibilities and feasibilities of the role of private providers of affordable rental housing.

Had the management of the dwellings to be generated by this provision been open to private providers then the cautious approach being taken to tenure (section 17(a)) could have been warranted.

However, the provision intends the dwellings to be part of the community housing sector, at least for 10 years. If the intention is to expand the social housing sector, then it would be more effective for the title of the affordable dwellings, or a proportion of them, to be transferred to the consent authority (typically, a local government). In this way, the dwellings could stay in the social housing sector 'in perpetuity'. This is how the incentive-based scheme has worked in Waverley (for donated units), and where planning agreements have been used to attract dedicated units of affordable housing, as in Canada Bay.

The availability of the bonus only where the affordable units will be managed by a community housing provider means that the take-up of the section will be limited by the capacity of community housing providers to manage the housing on an ongoing basis (for the 10 years) on a sustainable basis. We might presume that this could be more feasible where the community housing provider is party to a joint venture participating in a project getting subsidies under the National Affordability Rental Scheme.

These provisions are likely to be of most use to developers who wish (or are happy) to have community housing providers manage their properties, and so could be helpful to consortiums seeking NRAS subsidies. Conversely, housing developers who do not wish to have their properties managed by community housing providers will not benefit.

The bonus takes these forms in the case of dual occupancies, multi-dwelling houses, and flats that would ordinarily not be allowed in the land-use zone, and where the building is no higher than 8.5 meters and the development includes at least 50% affordable housing:

- permission to develop to a maximum floor space ratio of 0.75 : 1, or to the existing maximum floor space ratio for any form of residential development on the site – for development applications lodged before 30 June 2011<sup>12</sup>; and
- permission to develop to a maximum floor space ratio of 0.5 : 1, or to the existing maximum floor space ratio for any form of residential development on the site – for development applications lodged on or after 30 June 2011.<sup>13</sup>

The bonus takes these forms in the case of flats that would ordinarily be allowed in the land-use zone, and the development includes at least 20% affordable housing:

- additional floor space ratio of 0.5 : 1 on sites where the existing maximum floor-space ratio is 2.5 : 1 or less, if the number of rental affordable units will be 50% or higher<sup>14</sup>;
- a maximum increase in floor space calculated according to a formula  $Y=AH\div 100$  on sites where the existing maximum floor-space ratio is 2.5 : 1 or less, if the number of affordable rental units will be less than 50%;
- a 20% maximum increase in floor space on sites where the existing maximum floor-space ratio is more than 2.5 : 1, if the number of affordable rental units will be 50% or higher; or
- a maximum increase in floor space calculated according to a formula  $Z=AH\div 2.5$  on sites where the existing maximum floor-space ratio is more than 2.5 : 1, if the number of affordable rental units will be less than 50%.

### **Secondary dwellings – sections 19-24**

The SEPP allows secondary dwellings to be developed on land zoned residential, and thus prevents a consent authority from rejecting an application for a secondary dwelling on that ground.

*Comment:* Shelter NSW supported this proposal, in its submission on the Department of Planning's affordable rental housing proposals of November 2008.

A secondary dwelling must have floor area of no more than 60 square meters or whatever maximum floor area is allowed by another environmental planning instrument.

*Comment:* This provision repeats the requirement of the *Standard Instrument (Local Environmental Plans) Order 2006* that secondary dwellings may not have a floor area of more than 60 square meters or a specified proportion of the total floor area of both the principal and secondary dwellings, whichever is the greater. The Canada Bay Local Environmental Plan 2008 indicates 40% of the total floor area of both dwellings for the secondary dwelling; the Pittwater LEP 1993 and Liverpool LEP 2008 indicate 20%.

The SEPP prohibits rejection of development consent to a secondary dwelling on the grounds it is part of a principal dwelling (i.e. it is a 'granny flat' narrowly defined), and on the grounds it is not part of a principal dwelling where the site area is more than 450 square meters.

It also prohibits rejection of development consent to a secondary dwelling on the ground that no parking is to be provided with it.

*Comment:* Shelter suggested no additional carparking space be required, in its submission to the Department of Planning on their November 2008 policy proposals. The secondary-dwelling provisions of the Parramatta Development Control Plan 2005 and the Fairfield City Wide Development Control Plan 2006 do not require carparking.

Secondary dwellings will be regarded as complying development if they meet development standards indicated in the SEPP (Schedule 1 of the SEPP). These standards run over 11 pages and cover site coverage, floor area, building height, setbacks, landscaping, privacy, open space, etc.

*Comment:* Shelter suggested, in its submission to the Department of Planning on their November 2008 policy proposals, that secondary dwellings be treated as complying development, given the minimal or no negative environmental impacts of such development.

### **Boarding houses – sections 25-30**

The SEPP allows boarding houses to be developed on land zoned residential, and also on land zoned neighborhood center<sup>15</sup>, local center, and mixed use, and thus prevents a consent authority from rejecting an application for a boarding house on that ground.

It specifies some minimum development standards. Among other matters, these allow boarding houses to be built to the maximum floor space ratio of other residential accommodation permitted. It also allows (but does not require) a boarding house to have a private kitchen or bathroom facility in each room, opening up a market for so-called ‘new generation’ boarding houses (e.g. catering to submarkets such as students).

Where the dwelling is to be built on land zoned for residential flats it will be able to have extra floor ratio of 0.5 : 1 if the existing maximum FSR is 2.5 : 1 or less, or of 20% if the existing maximum FSR is more than 2.5 : 1.

*Comment:* Shelter supported this proposal, in its submission to the Department of Planning on their November 2008 policy proposals.

### **Supportive accommodation – sections 31-33**

The SEPP introduces a new land-use category, ‘supportive accommodation’. This is an existing residential flat or boarding house used for long-term, separate (i.e. not dormitory or otherwise shared-bedroom) accommodation by a person who uses support services that are provided in that building. The services that may be in the building may include, but are not limited to, medical services, counselling services, and education and training services. The building may also include spaces used for supervision of the resident and for administrative services related to the residents being supported.

This sort of housing may be built on land where residential flats or boarding houses are permitted.

*Comment:* This category is intended to allow for developments of the ‘Common Ground’ model, where support services are located in the residential building itself, rather than off-site. Such developments would have been permissible uses in mixed use zones. This provision extends their geographic range to all land where residential flats or boarding houses are permitted. This includes land zoned for general residential, low-density residential, medium-

density residential, high-density residential, neighborhood center, local centre, and mixed use, by reference to section 26 of this SEPP<sup>16</sup>; and also, land that is not zoned for residential flats but where residential flats may be built under section 34 of this SEPP (see next section).

### **Flats for community and public housing – sections 34-39**

The SEPP allows social housing providers and public authorities to build flats in areas not zoned for flats, within 800 meters of a railway or light rail station in Sydney, and within 400 meters of commercial- and mixed-use land in 32 named regional towns, subject to a *site compatibility certificate*.<sup>17</sup> In the case of the regional towns, the flats are permissible if the land is within 400 meters of land that is zoned commercial core or mixed use (or equivalents).<sup>18</sup>

These provisions do not apply to development where the development incentives for infill community and public housing apply (see above, page 4).

Such development needs development consent, and a consent authority may refuse consent if it disagrees with the Department of Planning's assessment that flats on the site are compatible with surrounding uses.

Carparking is not required for flats approved under these sections.

The flats approved under these sections must have at least 50% affordable housing – managed by a registered community housing provider – for 10 years. Alternatively, the flats may be public housing.<sup>19</sup>

*Comment:* The land-use sections are similar to provisions of section 62 of *State Environmental Planning Policy (Infrastructure) 2007*, the relevant provisions of which (Division 11) will be deleted by this SEPP. However, it differs in that it makes provision for such flat development within 400 meters of a town center of a nominated major regional city, a provision which was not found in the *State Environmental Planning Policy (Infrastructure) 2007*.

### **Development by the Land and Housing Corporation – sections 40-41**

The SEPP provides that certain public housing developments (in defined circumstances) may go ahead without development consent, on land where such development is normally permissible with consent. The developments circumstances are: a building that is not higher than 8.5 meters and contains no more than 20 dwellings on a single site; demolitions (except heritage items); and subdivisions. In the case of new buildings (the first of those three circumstances, only), Housing NSW must notify the neighbors and local council and consider their submissions. The provisions in this SEPP actually replicate similar provisions that had been inserted into the *State Environmental Planning Policy (Infrastructure)* on 20 February 2009.<sup>20</sup>

*Comment:* The SEPP makes one entity (Land and Housing Corporation) the proponent and the determining authority for developments of a reasonable size, a building with 20 dwellings. As such, the process might be one that is seen to be unfair. In its submission to the Department of Planning on their

November 2008 policy proposals, Shelter NSW suggested that in this case, the Corporation be allowed only to apply for a complying development certificate to the council (*not* to an accredited certifier) to give some semblance of transparency and accountability to the process.

### **Group homes – sections 42-46**

The SEPP allows group homes to be developed on land zoned residential, and also on land zoned mixed use, special activities, and infrastructure, and prevents a consent authority from rejecting an application for a group home on that ground.

Development may be carried out without consent if it does not have more than 10 bedrooms and it is by or on behalf of a public authority. An application for a group home that has more than 10 bedrooms or that is not made by or on behalf of a public authority needs development consent. This provision differs from the previous situation (under the *State Environmental Planning Policy (Infrastructure) 2007*, the relevant sections of which are now repealed) in that it allows more than one dwelling on a site, and it increases the maximum number of bedrooms in a development not needing consent from 5 to 10.

In addition, the new SEPP does not include provisions that had existed under the *Infrastructure SEPP* that capped the number of persons in group homes where development consent was not needed. Section 60 (now repealed) of the *Infrastructure SEPP* had a maximum limit on the number of residents (including resident staff) of a transitional group home carried out by or on behalf of a public authority, which number was fewer than the number of bedrooms multiplied by two (i.e. a transitional group home of 5 bedrooms could accommodate no more than 9 persons, including any resident staff). Similarly, the *Infrastructure SEPP* had a maximum limit on the number of residents (including resident staff) of a permanent group home, which number was fewer than number of bedrooms multiplied by two (i.e. a permanent group home of 5 bedrooms could accommodate no more than 9 persons, including any resident staff). Those limits on resident numbers did not apply to developments where development consent was sought.

Group homes are complying developments if they meet development standards indicated in the SEPP (Schedule 2 of the SEPP). These standards run over 9½ pages and cover site coverage, building height, setbacks, landscaping, privacy, carparking, fences, access ramps, etc.

***Comment:*** These provisions are meant to allow for the development of congregate living arrangements for people with disabilities that are different from the model of a shared household in one dwelling that has been typical of group homes over the last decade or so.

### **Retention of existing affordable private rental housing – sections 47-51**

Sections 47-51 reproduce the substantive provisions of SEPP 10 but link them with a contributions scheme under section 94F. The aim of these provisions is to compensate for the loss of private rental housing by having a developer contribute money to Housing NSW's boarding house financial assistance program.

Where an owner of a building that was a low-rental residential building on 28 January 2000 wants to demolish it, change its structure, change its use, or subdivide it (in the case of a block of flats)<sup>21</sup>, they must get consent from the local government council.<sup>22</sup> A 'low-rental residential building' is (a) a residential flat building that contains a 'low-rental dwelling', or (b) a boarding house. A 'low-rental dwelling' is one where the rent was less than the median rent level for a like dwelling in the 2 years before the development application was lodged.<sup>23</sup>

The council, in assessing the development application, has to take into account a number of factors, including:

- whether there is likely to be a reduction of affordable housing on the site<sup>24</sup>;
- whether there is available sufficient comparable accommodation to satisfy the demand for such accommodation;
- whether the development is likely cause adverse social and economic effects on the general community;
- whether adequate arrangements have been made to assist residents likely to be displaced to find alternative comparable accommodation;
- whether the cumulative loss of low-rental residential accommodation in the area will result in a significant reduction on the stock of that accommodation;
- the structural soundness of the building, the extent to which the building complies with fire-safety requirements, and the estimated cost of carrying out work to ensure the structural soundness of the building and compliance with fire-safety requirements;
- whether the imposition of a condition requiring the payment of a monetary contribution for the purposes of affordable housing would adequately mitigate the reduction of affordable housing resulting from the development<sup>25</sup>;
- in the case of a boarding house, the financial viability of the continued use of the boarding house<sup>26</sup>;

and also, the *Affordable rental housing SEPP: guidelines for the retention of existing affordable rental housing* produced by the Department of Planning.

If the consent authority is satisfied that the development will reduce or is likely to reduce the availability of affordable housing in its area, it may – as a condition of consent to the development application, and therefore agreement to the loss of that affordable housing – require the developer to pay some money (section 51). The decision to impose such a condition of development consent is at the council's discretion. The amount of monetary compensation is to be calculated using a set formula (sections 51(3) and 51 (4)). The formula is based on 5% of the notional cost of providing replacement affordable housing.<sup>27</sup> In the case of a boarding house that the council assesses is not financially viable and whose loss it consents to, the council may not require a monetary contribution if the rental yield was 3% or less.

The Policy does not prevent the consent authority from rejecting the development application (which it may do, under section 79C of the Act, which allows it to consider the likely social and economic impacts of a development when assessing development applications). Nor does it prevent approval without any imposition of a monetary compensation. The concurrence of the Director-General of the Department of Planning is no longer required to approve a development application for loss of a low-rental housing.

Local councils will not be able to keep the moneys given under section 51 for their own affordable housing priorities (as they had with 'SEPP 10 developer levies'): those contributions are to go to Housing NSW for its boarding house assistance program.

This part of the SEPP only applies to the Sydney region and the local government areas of Newcastle and Wollongong. Some local government areas that were covered by SEPP 10 are not now included: they are Cessnock, Lake Macquarie, Maitland, Port Stephens, Kiama, and Shellharbour.

*Comment:* The geographic scope of the policy has been narrowed (compared with SEPP 10) from the Greater Metropolitan Region to a smaller area within that Region, apparently because there has been little or no relevant development applications in some outer local government areas of the Region. The wider coverage of SEPP 10 did not 'hurt' the program and there were no burdens placed on local government staff in those outer areas. Moreover, in its submission to the Department of Planning on their November 2008 policy proposals, Shelter NSW suggested the geographic coverage should be expanded to cover the whole state. Such expansion would pick up any low-cost accommodation being lost from non-metropolitan areas, especially in provincial coastal towns.

The definition of a 'low-rental residential building' does not cover low-rental accommodation in caravan parks, the loss of which is not addressed by any statutory provision apart from the generic section 79C(1)(b). As far as we are aware, only Gosford council has specific provisions in an environmental planning instrument to address this matter. Research by the St Vincent de Paul Society shows that the number of large caravan parks (defined as having 40 or more powered sites and dwellings) in New South Wales has halved since 2000, when there were 164.<sup>28</sup> Because of these trends, there is a case for application of the SEPP's Part 3 provisions to caravan parks containing a low-rental dwelling – and, by analogy, to manufactured home estates, though we are unaware of analysis of the socioeconomic profile of residents in this housing submarket.

The *Affordable rental housing SEPP: guidelines for the retention of existing affordable rental housing* indicate that the minister for planning has directed that consent authorities must forward the money they collect from developers to Housing NSW.<sup>29</sup> The levy revenues collected under the former SEPP 10 were \$2.2 million in 2007-08 and \$1.5 million in 2006-07<sup>30</sup>, which typically were conveyed to community housing associations.<sup>31</sup> Now, Housing NSW will use the levy revenues to expand their Boarding House Financial Assistance Program.<sup>32</sup>

In its submission to the Department of Planning on their November 2008 policy proposals, Shelter NSW said that this was not an appropriate use of those monies. Firstly, Part 3 covers flats as well as boarding houses. Secondly, the Boarding House Financial Assistance Program, very worthy as it is, should be properly funded by Housing NSW from the Consolidated Fund subsidies

that agency gets. (Annual funding for the program has remained constant at \$200,000 since at least 2003-04.<sup>33</sup>) This program provides subsidies for certain building works for current *and new* boarding houses to assist their financial viability, and should be a prime candidate for pump-priming in the current economic conjuncture.

We note that Housing NSW will have to spend the developer contributions on boarding houses in the local government area where the relevant development had occurred, or in an adjoining local government area, under section 94G(4)(b) of the Act.

### **State Environmental Planning Policy no.70 – Affordable Housing (Revised Schemes)**

This SEPP has not been repealed. It has been updated by having redundant sections removed.

*Comment:* The new SEPP does not have provisions to authorize affordable housing contributions for developments creating demand for affordable housing or where there is a rezoning ('inclusionary zoning'), as required by section 94F of the Act.<sup>34</sup>

The presentation notes given at the briefing given by the Department of Planning on 19 November 2008 indicated that there would be such provisions for developments creating demand for affordable housing. Moreover, the Department's annual report for 2007-08 said 'a new Affordable Housing SEPP' would '... provide for councils to implement their own affordable housing schemes'.<sup>35</sup> We understand those provisions were opposed by lobby organizations representing the property development industry. Their absence in this SEPP is a *major weakness*.

The November 2008 proposal was not something new. It was a reiteration of provisions that are currently contained in the Act, but which are basically dead-in-the-water because the Department, minister, or Cabinet went cold on the introduction of an affordable housing SEPP sometime late 2001.

It would have enabled councils to prepare a local contributions scheme supported by an LEP that provides for levying of affordable housing contributions on developments creating a need for affordable housing. Councils are already able to do this now – in principle – under section 94F(3)(b) of the Act (similar provision in new section 116Y<sup>36</sup>). But a problem has been section 94F(3)(a), which requires a relevant state environmental planning policy, and another problem has been planning ministers' refusal to agree to affordable housing provisions in at least two councils' LEPs (Parramatta, Waverley).

In a document released with the new SEPP, *Supporting affordable rental housing: community guide*, the Department of Planning says: 'It is the NSW Government's general view that expanding developer levies for affordable housing is not appropriate in the current economic climate.'<sup>37</sup> Such a view was

obviously not held within the Department of Planning only last November (well into the global finance crisis). The argument about the ‘current economic climate’ is a specious one for rejecting expansion of the affordable housing levy system because the government has had ample time to introduce a SEPP that would enable such a system since 2000, when the Parliament amended the Act to allow for it (section 94F) – at least 6 years before the current economic recession. Back in 2005, one or two years before the global finance crisis began, the government signalled that would allow inclusionary zoning in certain zones, in the Sydney metropolitan strategy, *City of cities* – a commitment that it has failed to implement.<sup>38</sup>

Moreover, an argument that applying affordable housing levies would not be desirable, presumably on an assumption that they would discourage investment in development of residential flats or housing estates, is not one shared by all housing market analysts. During 2008 and 2009, the Sydney City Council commissioned two independent impact studies on a proposal for an affordable housing levy that it was thinking of applying to major residential and commercial developments. A study by PPM Consultants concluded that the impact of such a levy would not be very large, ‘generally-speaking’, because the target number of dwellings was small compared to the size of the City’s housing market and projected increases in supply of housing in the City.<sup>39</sup> A study by Hill PDA specifically commented on the impacts of the proposal on the property market in the current context of an economic recession. They said: ‘... the levy will have beneficial long term impacts on the property market and initiating the levy at this part of the property cycle will make it part of the development equation as confidence and construction activity are reignited.’<sup>40</sup>

The new SEPP is not the ‘affordable housing SEPP’ that was promised by the Government when it introduced section 94F into the Act in 2000. So, SEPP 70 remains the major SEPP to provide the legal basis (validity) for local government schemes to promote affordable housing where development creates the need for new affordable housing or where a development is allowed because of a rezoning, as allowed by section 94F of the Act.

If a council has a local environmental plan that includes provisions of such an ‘inclusionary zoning’ nature (provisions that have to be agreed to by the minister for planning), then those provisions need two things to be legally valid:

- (a) They need to contain a condition that complies with section 10 of this SEPP, namely, a provision that requires the council to have regard to the ‘affordable housing principles’ listed in SEPP 70.
- (b) The council’s area has to be identified as an area with a need for affordable housing in a SEPP. SEPP 70 is the relevant SEPP that does this.<sup>41</sup> It currently lists only four local government areas: Sydney City, South Sydney, Willoughby, and Leichhardt.

The schemes in Sydney City and Willoughby meet these criteria, and are safe for the moment. The future of those schemes will depend on what the

government allows in the new comprehensive LEPs for Sydney City and Willoughby currently being prepared by their councils.

### **Further comment (1): local governments as owner/provider of affordable rental housing**

The SEPP is are likely to have a negative impact on the small local government affordable housing subsector, given that:

- (a) The planning agreements section of the Act, 93F, which is used by councils like Canada Bay and Waverley, will be unavailable for this purpose when Part 5B of the *Environmental Planning and Assessment Amendment Act 2008* is proclaimed. The new section 116V does not allow planning agreements to be used for affordable housing as a matter of course, as has been the case since 2005 and now: should a developer offer a council affordable housing units under a planning agreement, the council will have to prepare a business case for and get the approval of the minister for planning to accept those units.<sup>42</sup>
- (b) Only 2 councils may use section 94F of the Act for proactive affordable housing schemes because of the limited coverage of SEPP 70.
- (c) The new SEPP's section 17 does not allow the dedication of housing units to a council in exchange for a development concession.
- (d) The *Affordable rental housing SEPP: guidelines for retention of existing affordable rental housings* do not allow councils to direct moneys given under section 51 to community housing providers trading in their local government area (as had been the case with 'SEPP 10 voluntary contributions').

Even worse is the implications of the new SEPP, especially sections 10-18, for the department and minister for planning's treatment of existing council schemes, as councils prepare comprehensive (whole-of-LGA) local environmental plans. The department and minister might regard the provisions of existing schemes as unnecessary given the new SEPP.

In 2007, the Waverley council scheme (which uses density bonuses, linked, since 2007, to planning agreements) was denied application to the Bondi Junction town center because of the preparation of a state policy. The Department of Planning required removal of draft provisions for affordable housing for a local environmental plan for the town centre on the ground they were inappropriate. Their letter to the council said, ominously: 'There are currently no such provisions in the Standard Instrument and whilst Council's initiative is laudable, the State Government is looking towards a State response to this issue. A consistent approach to an affordable housing mechanism is being considered and further advice will be provided to Council when this is resolved.' In 2008, again, when the council re-exhibited a draft LEP for the town center, the Department of Planning insisted on removal of affordable housing provisions. Then when Council wanted to reinsert them after the public exhibition period (and having considered submissions – including one from Housing NSW – supporting reinstatement), the Department of Planning said: 'There may be an issue with including a provision on affordable housing that has not been publicly exhibited.'! The Department indicated there 'may' (read: *might*) be another opportunity to consider affordable housing provisions when the council prepares its new comprehensive LEP. Waverley council's new comprehensive LEP is scheduled for finalization in March 2010.

The Willoughby council scheme, which uses rezoning as a trigger for mandatory 4% developer contributions in certain residential zones, is based on provisions in a local environmental plan and development control plan (validated by SEPP 70). The council's new comprehensive local environmental plan is scheduled for public exhibition soon.

The two schemes that operate in the City of Sydney (in Ultimo-Pyrmont and Green Square – both validated by SEPP 70) have the advantages of being initiated by the state government and of the affordable housing developer and provider being a state-owned enterprise (City West Housing). This *might* mean those schemes will be spared the chop. However, plans by the Sydney City council to extend affordable housing schemes throughout its area are likely to be rejected by the state government. Those were to explore opportunities to seek development contributions for affordable housing opportunities outside the established programs in Ultimo-Pyrmont and Green Square, use voluntary planning agreements to collect contributions for affordable housing (possibly linked to development incentives), and investigate the feasibility of an affordable housing fund.<sup>43</sup> In April this year, the Council publicly proposed an affordable housing levy. It is also considering a proposal based on capturing windfall gain from upzonings (which is, in principle, possible, under section 94F(1)(c) of the Act). These initiatives will require the department's support and the minister's consent to amend an LEP and a SEPP (e.g. SEPP 70).

### **Further comment (2): summary**

The policy contains four elements that are repackaged from a previous instrument, with some amendment: these are those relating to group homes, location of flats, fast-tracking of Land and Housing Corporation developments, and loss of low-rent private housing.

Of the four new elements, three are liberalization of controls on residential uses in residential zones (primarily): these are those relating to secondary dwellings, boarding houses, and supportive accommodation. The development bonuses for infill social housing can be seen as a replacement for loss of provisions on planning agreements and affordable housing (in as much as those generally involved tradeoffs of development standards).

This SEPP is not the 'affordable housing SEPP' that was promised by the Government when it introduced section 94F into the *Environmental Planning and Assessment Act* in 2000.

## Chronology of inaction on an affordable housing SEPP

1999 – November 24	Parliament amends EP&A Act to establish that one of the objects is ‘the provision and maintenance of affordable housing’, and specify that environmental planning instruments could contain provisions on ‘providing, maintaining, and regulating matters relating to affordable housing’.
2000 – June 1	Parliament amends EP&A Act to allow for inclusionary zoning where backed by a SEPP (ss.94F and 94G), and to validate 6 local government affordable housing schemes for 2 years.
2001 – July	Department of Urban Affairs and Planning advises Shelter that a draft SEPP to support 94F/94G would be completed ‘shortly’ – the draft does not appear
2002 – June 1	Department of Urban Affairs and Planning introduces SEPP 70 to (re)validate 3 of the about-to-expire 6 local schemes, being those based on the section 94F model.
2003 – December 15	Parramatta council proposes amendments to its LEP to allow mandatory developer contributions on multiunit development and requests validation though SEPP 70 – Department of Infrastructure, Planning and Natural Resources does not agree to requests
2004 – December 9	Parliament establishes the Redfern-Waterloo Authority with the power to collect section 94F developer contributions for affordable housing.
2005 – May 6	Parliament amends EP&A Act to regulate developers’ voluntary offers to councils of affordable housing, under case-by-case planning agreements (section 93F).
2005 – August 16	Canada Bay council accepts a developer’s voluntary offer of affordable housing units, under section 93F.
2005 – December	Sydney metropolitan strategy commits to provide for inclusionary zoning in urban renewal centers and corridors and major sites zoned to residential and mixed use, and to provide for provisions of affordable housing in the standard LEP template – not implemented
2005 – December	Sydney metropolitan strategy commits to an ‘initial NSW Affordable Housing Strategy by mid 2006’, being worked on by an IDC on Affordable Housing (established October 2005) – the strategy does not appear, and the IDC stops meeting late 2006
2006 – March 31	Standard Instrument (Local Environmental Plans) Order 2006 introduced – it contains no provisions on affordable housing
2007 – July	Minister for Planning advises Shelter that SEPP 10 and SEPP 70 are being reviewed.

2007 – December	<i>State plan</i> update refers to Housing NSW’s <i>New directions in social housing for older people</i> and <i>A new direction for community housing</i> as ‘the first two stages of the Government’s Affordable Housing Strategy’.
2008 – April 15	Waverley council amends its incentive-based affordable housing scheme to align with s.93F planning agreements
2008 – June 18	Parliament amends EP&A Act to limit planning agreements ordinarily to key community infrastructure.
2008 – July 16	Department of Planning exhibits amendments to the Sydney Olympic Park SEPP that include section 94F inclusionary zoning provisions – response to public feedback still being considered
2008 – November 19	Department of Planning briefs stakeholders on ‘affordable rental housing policy: policy proposals’.
2009 – February, April	Minister for Planning amends Infrastructure SEPP to implement some policy proposals flagged in November 2008.
2009 – March	Sydney City council exhibits draft affordable rental housing strategy with proposals for development contributions for affordable housing opportunities outside Ultimo-Pyrmont and Green Square, voluntary planning agreements, and an affordable housing levy.
2009 – March 5	Legislative Council rejects <i>Environmental Planning and Assessment Amendment (Affordable Housing Development Contributions) Bill 2008</i> (S Hale private member’s bill).
2009 – July 31	Affordable rental housing SEPP introduced.

## Notes

<sup>1</sup> Those provisions have not been proclaimed as at 6 August 2009.

<sup>2</sup> This list is a bald summary: there are conditions and qualifications which are themselves summarized below, but anyone wanting the complete picture should read the SEPP itself.

<sup>3</sup> See page 12 of this memo.

<sup>4</sup> A 'social housing provider' is any of the following: Housing NSW, Land and Housing Corporation, a registered community housing provider, the Aboriginal Housing Office, a registered Aboriginal housing organization, DADHC, a local government authority that provides affordable housing, and a not-for-profit organization that is a direct provider of rental housing to tenants (s.4(1)).

<sup>5</sup> See page 7 of this memo.

<sup>6</sup> Sydney here means the Sydney region, comprising 43 local government areas listed in the SEPP.

<sup>7</sup> Newcastle and Wollongong here refer to the local government areas of that name.

<sup>8</sup> This memo uses 'community housing' in the way it is defined in *Planning for the future: new directions for community housing in New South Wales 2007/08 – 2012/13*, namely: 'Housing provided by the not-for-profit sector to offer secure, subsidised rental housing to people on low-to-moderate incomes that is affordable and appropriate to their diverse needs' (Housing NSW, 2007, p.28), in which provision by nonprofit organizations is an essential characteristic, not in the way it is defined in the *Housing Act 2001*. The definition in *Planning for the future* does not preclude community housing from being provided using different eligibility criteria and rent-setting models to those of public housing, though registered community housing providers getting grants, etc., under Housing NSW funding programs generally have to comply with conditions that create a standard 'social housing' product. In the case of the rental housing managed by community housing providers that has been produced with the development incentives of this SEPP (sections 10-17, and 34-38) the rent-setting policy may be different from that in NAHA community housing: the maximum rent a tenanted household pays may be up to 30% of its gross income (if their gross household income is less than 120% of the median household income in Sydney) or it may be up to the (maximum) rent they would pay if they were renting an NRAS-subsidized dwelling (if they are eligible to occupy rental housing under the National Rental Affordability Scheme).

The SEPP does not indicate that the housing offered under sections 10-17 must be used for 'community housing'; rather, it says that the housing must be used for 'affordable housing' and that this affordable housing must be 'managed by a registered community housing provider'.

<sup>9</sup> A height of 8.5 meters allows for 2 storeys.

<sup>10</sup> The nature of the rental housing as 'affordable rental housing' relates to the definition of affordable housing in section 6: the tenanted household may not be charged rent that is more than 30% of its gross income (if their gross household income is less than 120% of the median household income in Sydney) or that is higher than the rent they would pay if they were renting an NRAS-subsidized dwelling (if they are eligible to occupy rental housing under the National Rental Affordability Scheme).

<sup>11</sup> Department of Planning, *Supporting rental affordable housing: community guide*, July 2009, p.7.

<sup>12</sup> The existing maximum floor space ratio in low-density residential zones is likely to be lower than 0.75 : 1, so a floor space ratio of 0.75 : 1 will become the new maximum in those zones for flats under this Policy until July 2011.

<sup>13</sup> My interpretation of the SEPP's section 14(1)(a) needs to be checked.

<sup>14</sup> My interpretation of the SEPP's section 13(2) needs to be checked.

<sup>15</sup> A 'neighborhood center' zone provides 'a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighborhood' (*Standard Instrument – Principal Local Environmental Plan*).

<sup>16</sup> This list of permissible zones for barding houses reflects that of the *Standard Instrument – Principal Local Environmental Plan*.

<sup>17</sup> The developer/applicant may be a social housing provider or a public authority, or someone acting on their behalf, or someone undertaking the development with the Land and Housing Corporation.

<sup>18</sup> The towns are Albury, Ballina, Batemans Bay, Bathurst, Bega, Bowral, Cessnock, Charlestown, Coffs Harbour, Dapto, Dubbo, Glendale-Cardiff, Gosford, Goulburn, Grafton, Lismore, Maitland, Morisset, Newcastle, Nowra, Orange, Port Macquarie, Queanbeyan, Raymond Terrace, Shellharbour, Tamworth, Taree, Tuggerah-Wyong, Tweed Heads, Wagga Wagga, Warrawong, and Wollongong.

<sup>19</sup> Where a developer of flats uses these particular provisions they do not have to comply with the condition about a minimum time period for use of the flats, or their management by community

housing provider, if the development is on land owned by the Land and Housing Corporation, or if the development application is made by a public authority, or if the development application is made on behalf of a public authority (s.38(2)).

<sup>20</sup> The insertion of these provisions in the Infrastructure SEPP might have been related to pressures on Housing NSW to deliver on tight timetable commitments for stage 1 of the Nationbuilding and Economic Stimulus Plan.

<sup>21</sup> A boarding house may not be strata-subdivided or subdivided into community title (section 52). SEPP 10 did not apply to the demolition of blocks of flats, only to their alteration or subdivision.

<sup>22</sup> This part of the SEPP (Part 3) does not apply to buildings covered by *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, or to buildings owned by, or under the care, control and management, of a social housing provider.

<sup>23</sup> These definitions are similar to those of SEPP 10, except that SEPP 10 included hostels as a low-rental residential dwelling. The *Standard Instrument – Principal Local Environmental Plan* defines a hostel as ‘premises that are generally staffed by social workers or support providers and at which: (a) residential accommodation is provided in dormitories, or on a single or shared basis, or by a combination of them, and (b) cooking, dining, laundering, cleaning and other facilities are provided on a shared basis.’ The Department of Planning explains that hostels were not included in the new SEPP because few SEPP 10 applications were received and those were generally from nonprofit or government agencies seeking to modernize facilities or reorganize their property holdings (*Affordable rental housing SEPP: guidelines for the retention of existing affordable rental housing*, July 2009, p.2).

<sup>24</sup> SEPP 10 said ‘major’ reduction.

<sup>25</sup> SEPP 10 had no section comparable to this.

The *Affordable rental housing SEPP: guidelines for the retention of existing affordable rental housing* (Department of Planning, July 2009) advise that: ‘Where it is clear that the overall impact is major and adverse and cannot adequately be mitigated, serious consideration should be given to refusal ...’ (p.9)

<sup>26</sup> The Policy regards a boarding house as financially viable if the rental yield is at least 6% (section 50(4)), calculated according to a formula given in section 51(5).

<sup>27</sup> Department of Planning, *Affordable rental housing SEPP: guidelines for the retention of existing affordable rental housing*, July 2009, pp.16-17.

<sup>28</sup> Andy Marks, *Residents at risk: stories of ‘last resort’ caravan park residency in NSW*, St Vincent de Paul Society NSW, 2008.

<sup>29</sup> The minister for planning’s power to make this direction comes from section 94G(3)(b) of the Act.

<sup>30</sup> Department of Planning, *Annual report 2007-2008*, p.32; Department of Planning, *Annual report 2006-2007*, p.23.

<sup>31</sup> The amount of levy revenue collected will depend on changes in the low-rental submarket and the applicability of the protective development controls. The Department of Planning indicated that affordable housing contributions were a common feature of SEPP 10 developments involving strata-subdivision of blocks of flats, but were less common for boarding houses (Department of Planning, *Affordable rental housing SEPP: guidelines for retention of existing affordable rental housing*, July 2009, p.10).

<sup>32</sup> Department of Planning, *Affordable rental housing SEPP: guidelines for the retention of existing affordable rental housing*, July 2009, p.19. The guidelines indicate that directing the money to this Program is a ‘highly cost effective use of the limited contribution funds’ and ‘ensures that contributions are used for the greatest community benefit’ (p.11).

<sup>33</sup> Housing NSW informational materials on the 2009-10 state Budget do not report the funding for 2009-10.

<sup>34</sup> Nor does the SEPP allow for development contributions for loss of affordable housing (as anticipated by section 94F(1)(a)) where the use of the dwelling for affordable housing began after 28 January 2000. In the case of such dwellings, a council may impose ‘other conditions relating to the provision, maintenance or retention of affordable housing’, but not a requirement of development contributions, under section 94F(5) (Department of Planning, *Affordable rental housing SEPP: guidelines for retention of existing affordable rental housing*, July 2009, p.5). Incidentally, this comment by the Department on the implications of Section 94F(5) is the first time we have seen anything on what this, seemingly cryptic, section might mean: it possibly has an (untested) capacity to create development consent conditions (so long as those do not involve developer contributions) especially in combination with section 79C(1)(b).

<sup>35</sup> Department of Planning, *Annual report 2007-2008*, p.18.

<sup>36</sup> The new numbering relates to sections of the *Environmental Planning and Assessment Amendment Act 2008* that have not been proclaimed yet (as at 6 August 2009).

<sup>37</sup> Department of Planning, *Supporting affordable rental housing: community guide*, July 2009, p.15.

<sup>38</sup> Action C4.3 says: 'Provide for inclusionary zoning which requires an affordable housing levy from development' (Department of Planning, *City of cities: a plan for Sydney's future – NSW government's metropolitan strategy*, December 2005, p.30).

'Inclusionary zoning' is a term for land-use planning schemes that require a proportion of a development to be set aside for affordable housing, whether through direct provision of affordable housing units by the developer or payment of a monetary contribution instead. It applies to development of housing estates, multi-unit development or commercial development, not to individual houses/cottages. The trigger for the set-aside is the generation of demand for new affordable housing from the development or the windfall gain to the developer obtained as a result of a rezoning ('planning gain'). Such schemes tend to apply to large areas such as major redevelopment sites or precincts or whole local government areas. The provisions are applied across the board on a mandatory basis and are not subject to case-by-case negotiation with developers. The term 'inclusionary zoning' refers to a scheme's parameters being contained in the land-use controls of a local environmental plan; the adjective 'inclusionary' refers to the embedding of affordable housing in development for social inclusion reasons, i.e. so as to allow low-income or disadvantaged people to be able to live in localities they would otherwise be priced out of.

<sup>39</sup> PPM Consultants Pty Ltd, 'Affordable housing levy – impact analysis: final report', November 2008, p.62.

<sup>40</sup> Hill PDA, 'City of Sydney affordable housing levy: peer review', November 2008, p.6.

<sup>41</sup> Section 51(1) of the *SEPP (Affordable Rental Housing) 2009* identifies a much bigger number of local government areas as having a need for affordable housing, to satisfy section 94F(1) of the Act – those areas being those within the Sydney region and the Newcastle and Wollongong local government areas. This section does not specifically indicate that it applies only for the purposes of that SEPP, and it might have general applicability. However, since the government has chosen not to amend SEPP 70 by deleting its section 9, it appears that the legal validity of the Willoughby and Sydney City affordable housing schemes on this matter rests on section 9 of SEPP 70 not on section 51(1) of the *SEPP (Affordable Rental Housing) 2009*.

<sup>42</sup> Section 93F of the Act, which came into law in 2005, allows for voluntary planning agreements to be made between a developer and a council where the developer offers a contribution for provision of affordable housing. Given the government's refusal to allow new local affordable housing schemes of a section 94F type, this section of the Act has become the anchor of new and proposed schemes by a number of councils, like Canada Bay, Penrith and Byron, and Waverley council adapted an existing scheme to the section 93F framework in 2007. The 2005 amendments were seen as an indication that this was the model that the government preferred if local councils were to get developer contributions for affordable housing (Craig Johnston, 'Planning law enables developer contributions for affordable housing', *Around the House*, June 2005, p.12).

However, property development lobby groups complained about the proliferation of section 93F-based schemes and the government amended the Act in 2008 to effectively stop them. Part 5B of the *Environmental Planning and Assessment Amendment Act 2008*, when proclaimed, limits council planning agreements ordinarily to 'key community infrastructure' (clause 116V), the definition of which does not include affordable housing (see proposed new section 31A of *Environmental Planning and Assessment Regulation 2000*). A council may, however, apply to the minister for planning for approval of a planning agreement that involves affordable housing: that is, on each occasion where a council wants to accept a voluntary offer of affordable housing from a developer they must get approval from the minister for planning (clause 116V(1)(b)). When considering a developer's voluntary offer of affordable housing, the council must consider the impact of the affordable housing on the affordability of the proposed development, whether the affordable housing offered is based on a reasonable apportionment between existing demand and new demand for affordable housing to be created by the proposed development, whether the affordable housing offered is based on a reasonable estimate of its cost, and whether the estimates of demand for affordable housing in the development are reasonable (clause 116U). To get the minister's approval for accepting the affordable housing, the council must present a business plan and an independent assessment of the business plan (clause 116V(5)). In considering the council's case, the minister must consider the impact of the affordable housing on the affordability of the proposed development, whether the affordable housing offered is based on a reasonable apportionment between existing demand and new demand for affordable housing

to be created by the proposed development, whether the affordable housing offered is based on a reasonable estimate of its cost, and whether the estimates of demand for affordable housing in the development are reasonable (clause 116V(4)). These provisions (clauses 116D, 116U and 116V) are obstructionist. They reflect the property development lobby's argument that developer contributions for affordable housing are 'a tax on housing affordability'.

<sup>43</sup> The proposals were in the 'City of Sydney draft affordable rental housing strategy 2009-2014', February 2009, pp.17-18.