

A state environmental planning policy that enables local affordable housing schemes

The state government (Department of Planning) is currently reviewing two state environmental planning policies, State Environmental Planning Policy no. 10 – Retention of Low-cost Rental Accommodation, and State Environmental Planning Policy no. 70 – Affordable Housing (Revised Schemes).

It is possible the Department of Planning will propose the amalgamation of SEPP 10 and SEPP 70 and the introduction of a new State Environmental Planning Policy (Affordable Housing). If so, this will raise questions like:

- Will the protection that State Environmental Planning Policy 10 currently offers to affordable housing in the private rental housing market be retained?
- Will the enabling function that State Environmental Planning Policy 70 currently offers to affordable housing schemes in the City of Sydney and Willoughby be readily applicable to schemes in other local government areas?
- What will be the link, if any, to the Standard LEP template and to the government's commitment (in the *City of cities* Sydney metropolitan strategy) to provide for provisions of affordable housing in the department's standard template for local environmental plans?

This background paper gives information about the present situation about relevant aspects of the environmental planning and assessment system and affordable housing.

The legal basis for local affordable housing schemes

Local government councils that might want to encourage provision of affordable housing in their area by requiring a certain proportion of new housing to be built or provided as affordable housing are unable to do so. This is because, even though the Environmental Planning and Assessment Act in principle allows them to do so, the state government minister for planning has not introduced an appropriate state environmental planning policy (SEPP). This is necessary because, while that Act has provisions that would allow a local government council to require a certain proportion of new housing to be built or provided as affordable housing, it does so with provisos – and a key proviso is that there is a SEPP that authorizes the council's scheme.

Local governments potentially have powers – under the Act – to encourage provision of affordable housing in their area by requiring a certain proportion of new housing to be built or provided as affordable housing ('inclusionary zoning'). This housing could be required where there is a new housing estate or a multi-unit development

(flats), if the development is likely to lead to a loss of affordable housing or a need for affordable housing. Or it could be where there is a rezoning.

A council can only use those provisions of the Act – which are sections 94F and 94G – in certain circumstances:¹

- It must have a local environmental plan that authorizes it to impose conditions on developers to provide a contribution for affordable housing (s.94F(3)(b)²). Councils' local environmental plans are made by the minister for planning on the advice of the relevant council (s.70, 68³), and she does not have to accept their advice.
- It must have a local environmental plan that sets out or adopts a scheme for dedications or contributions (i.e. a local government affordable housing scheme) that authorizes those conditions (s.94F(3)(b)⁴).
- It must get the minister for planning to include a statement in a state environmental planning policy that makes requirements about imposing conditions (s.94F(3)(a)⁵).
- It must get the minister for planning to include a statement in a state environmental planning policy that identifies a need for affordable housing in the council's local government area (s.94F(1)). This requirement will no longer be necessary when the relevant sections of the Environmental Planning and Assessment Amendment Act 2008 are proclaimed. The equivalent provision in the amended Act, section 116Y(1), states: 'A State environmental planning policy may identify that there is a need for affordable housing within the area.' Compare this with the wording of section 94F(1): 'This section applies with a respect to a development application for consent to carry out development within an area *if* a State environmental planning policy identifies that there is a need for affordable housing within the area and ...' (emphasis added). That is, the law currently requires a local government area to be identified as an area with a need for affordable housing in a SEPP before a council may apply consent conditions requiring affordable housing contributions. However, proposed section 116Y(1) makes no precondition of the identification of an area as one with a need for affordable housing in a SEPP.

It is clear that there are a few hurdles a council has to jump before it can introduce and implement an inclusionary zoning scheme. Those hurdles come down to two – the minister for and the department of planning. They can stop a council having such provisions in its LEP, and they can refuse to put relevant provisions in a SEPP to satisfy the Act's requirement that there be such.

Few local governments are interested in production of affordable housing. Provision of housing assistance is a core state government responsibility and many local governments are thinly stretched to provide the current services they have responsibility for. Nevertheless, where local conditions have called for it, some councils have developed affordable housing strategies and some few have developed affordable housing schemes.

The easiest legal mechanism available to councils to get contributions for affordable housing from developers is by negotiating a 'planning agreement' with the developer under which the developer *voluntarily* offers land, money or dwellings to the council. (See s.93F of the Act.⁶) This mechanism has been used by a handful of councils in inner Sydney (Waverley, Randwick, Canada Bay), and it is the path being considered by councils wishing to encourage affordable housing at the moment (e.g. Byron, Kiama, Clarence Valley, Penrith), because the state government barriers to its use are fewer compared with attempting inclusionary zoning.⁷

This mechanism is rather ad hoc, since it involves one-by-one and case-by-case negotiation between a council and developers, about whether a developer wants to offer some affordable housing units and what it expected back from the council. Waverley council is working to make its scheme more systematic by linking it to density bonuses on multi-unit development.

The other mechanism, inclusionary zoning, has a broader sweep, and could apply to all developments of a certain size, whether new blocks of flats or new private housing estates. This mechanism is used, in similar ways but with local variations, in only two parts of the state – the City of Sydney and Willoughby local government areas.

In those two areas, the local affordable housing schemes are validated by a state environmental planning policy, State Environmental Planning Policy no. 70 – Affordable Housing (Revised Schemes). The government has refused to amend this SEPP, introduced in 2002, to allow new schemes in other council areas.

The state government stymied an application by Parramatta Council for proposed inclusionary provisions in its LEP to be authorized by that SEPP. Department of Planning officials have vetoed proposals by at least one council town planning department who have wanted to put inclusionary zoning provisions in a draft LEP.

The position of the state government appears to be that it is opposed to councils having inclusionary zoning schemes despite: (i) maintaining relevant provisions in the Act when the Parliament passed the Environmental Planning and Assessment Amendment Bill 2008 on June 18, and (ii) the (unimplemented) commitments in the *City of cities* Sydney metropolitan strategy (December 2005) to provide for inclusionary zoning in urban renewal centers and corridors and major sites zoned to residential and mixed use (Action C4.3.3) and to provide for provisions of affordable housing in the standard LEP template (Action C4.3.4). The then Treasurer, in reply to a question by Sylvia Hale MLC in the Legislative Council, said: 'Inclusionary zoning ... has the potential to reduce overall housing affordability and will not be generally supported across the board'. (2 April 2008). Yet the draft SEPP for the Sydney Olympic Park exhibited in July included inclusionary zoning provisions. This development area is under the control of the state government (as developer and consent authority), a situation which might explain why the state government is not hostile to inclusionary zoning there compared with developments where local government councils are the consent authorities.

State Environmental Planning Policy 10

State Environmental Planning Policy no. 10 – Retention of Low-cost Rental Accommodation is the major planning instrument designed to protect existing affordable rental housing provided by private providers. It does not prevent owners of dwellings providing this type of business from changing the use of their property, but it puts some obstacles in their way.

It applies to 'low-rental residential buildings', of which there are 3 subtypes:

- a residential flat building containing a low-rental dwelling
- a boarding-house
- a hostel

It only applies to buildings that were low-rental residential buildings in January 2000.

It does not cover caravan parks and manufactured home estates.

This policy covers all local government areas in the Greater Metropolitan Region, i.e. Sydney, Lower Hunter, and Illawarra (not to 'country' areas).

The policy requires a development application to be got for:

- the demolition, alteration or addition to the structure or internal or external fabric, strata-subdivision, or change of use of a boarding house or hostel; and
- the alteration or addition to the structure or internal or external fabric, or strata-subdivision of a residential flat building containing a low-rental dwelling.

In considering a development application for any of those proposed actions, the council must consider:

- (a) whether there is likely to be a major reduction in the number of households or units of low-rental accommodation on the site;
- (b) whether there is available sufficient comparable accommodation in the locality to satisfy the demand for such accommodation in the locality;
- (c) whether the development would likely cause adverse social and economic effects on the general community;
- (d) whether adequate arrangements have been made to assist residents likely to be displaced to find alternative comparable accommodation in the locality;
- (e) whether the cumulative loss of low-rental residential accommodation in the area will result in a significant reduction on the stock of that accommodation; and
- (f) 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.

The council cannot agree to the application unless the director-general of the Department of Planning agrees. In deciding about such concurrence, the Department

of Planning has to consider the 6 matters mentioned above, and also – in the case of a boarding house – its financial viability.

On a definitional matter – a residential flat building containing a low-rental dwelling: a ‘low-rental dwelling’ is a dwelling (of the same type and having the same number of bedrooms) let at a rent at or less than the median rent in the local government area.

On another definitional matter – whether there is available sufficient comparable accommodation in the locality to satisfy the demand for such accommodation in the locality: ‘sufficient comparable accommodation’ is taken to be not available if there is a vacancy rate in private rental housing in Sydney of less than 3%.

It appears to be the case that concurrence from the Department of Planning is generally got, but the Department often puts conditions on its concurrence, to compensate for the loss of low-rental housing units. Those compensatory measures could be either a requirement that the developer:

- (i) dedicate a specified number of units for private rental at a certain rent for a certain period (e.g. three years), or
- (ii) make a monetary contribution for affordable housing purposes.

The second of these measures appears to be more common. In this case, the developer agrees with the Department to make a voluntary contribution to affordable housing in accordance with a calculation made by the Department; the developer signs a deed of agreement with a community housing association to make a monetary contribution to them; and the developer then re-fronts the council with supplementary information. The council approves the development application for the loss of affordable housing, with a consent condition on the contribution of money to the community housing association. This mechanism raised \$1.5 million in 2006-07.

State Environmental Planning Policy 70

State Environmental Planning Policy 70 – Affordable Housing (Revised Schemes) gives legal effect to affordable housing schemes in Ultimo-Pyrmont (Sydney Regional Environmental Plan 26 – City West), Willoughby (Willoughby Local Environmental Plan 1995), and Green Square (South Sydney Local Environmental Plan 1998).

The SEPP has a provision that satisfies sections 94F(1) and 94F(3), but it only covers the Greater Metropolitan Region, and it only names 4 local government areas as areas with a need for affordable housing (being City of Sydney, Willoughby, Leichhardt, and the former South Sydney).⁸

This SEPP came into existence because of indecision and adhocery by the state government in its support for local government inclusionary zoning schemes, an idea that briefly flickered for a few years at the turn of the century.

A few local councils attempted to use the 'section 94' provisions of the Act, intended to finance local government urban services from development contributions where there was a nexus between the development and a need generated for those services, for affordable housing. By the end of the 1990s, there were three operational schemes of this kind, at Randwick, Waverley and North Sydney.

The first inclusionary zoning scheme in New South Wales was initiated by the state government in 1995, for Ultimo-Pyrmont, where it had an interest in promoting urban regeneration.⁹ The first local council to introduce provisions of an inclusionary zoning nature into a local environmental plan was Willoughby in 1998. This was followed by the then South Sydney council in 1998, for the Green Square precinct of that municipality, where the state government had an interest in promoting urban regeneration. The Green Square scheme is modelled on the Ultimo-Pyrmont scheme.

The government amended the Act in 1999 to, among other things:

- establish that one of the objects was 'the provision and maintenance of affordable housing';
- define affordable housing, as 'housing for very low income households, low income households or moderate income households, being such households as are prescribed by the regulations or as are provided for in an environmental planning instrument';
- specify that environmental planning instruments could contain provisions on 'providing, maintaining, and regulating matters relating to affordable housing'; and
- enable the making of regulations on affordable housing.

The legal foundation for the Green Square scheme, section 94, was challenged by a developer in the area, Meriton, who won a Land and Environment Court case in 2000. The judgement stated that provision of housing for low-income families was 'a purpose not contemplated by s94' and that the use of the section for such purpose was 'invalid'.¹⁰ The government had thought that the 1999 amendments combined with section 94 would be sufficient to provide legality to the Green Square scheme. This was not to be so. The judgment advised them: 'New legislation will be required if it is sought to maintain a scheme for affordable housing.'

The government then got the state parliament to pass the Environmental Planning and Assessment Amendment (Affordable Housing) Bill 2000. This did two things:

- It inserted two new sections into the Act, which provided a basis for future inclusionary zoning schemes. These were section 94F and 94G. The model for these provisions was the existing nexus model that applied to section 94 contributions: note that section 94F indicates circumstances that may trigger application of affordable housing consent conditions, such as a loss of affordable housing by a development, creation of a need for affordable housing by a development, or a zoning or rezoning that allows the development. The purpose of this section was to enable the imposition of development consent conditions

for affordable housing, subject to conditions of the section itself and to provisions of a (future) state environmental planning policy on this matter.

- It validated six affordable housing planning schemes (being those in the City of Sydney (Ultimo-Pyrmont), the then South Sydney (Green Square), Willoughby, North Sydney, Randwick and Waverley, as mentioned above). This Act had a section which repealed the validation of the six schemes on the second anniversary of its assent (i.e. 5 June 2002), 'unless sooner repealed by an environmental planning instrument'.

That sunset clause was there because it was the government's intention to standardize inclusionary zoning schemes (in accordance with the new sections 94F and 94G) and to regulate them through a new SEPP (an 'affordable housing SEPP'), which was foreshadowed by the wording of section 94F.¹¹ Substantial work was done on this instrument, assisted by a reference group on which Shelter was represented, as well as on guidelines for councils to use when implementing it. However, the SEPP never saw the light of day: a draft was to be released for public consultation in late 2001. This is possibly because of a campaign against inclusionary zoning by the Urban Development Institute of Australia, Property Council of Australia, and Housing Industry Association, who argued it would lead to higher homepurchase costs for homebuyers and higher rents for commercial and industrial tenants.¹²

Instead, on the eve of the expiry of the validation of the six schemes, the government brought in a SEPP with a more limited role. That was to validate the inclusionary zoning schemes of Willoughby, Ultimo-Pyrmont and Green Square – and do no more. That SEPP was State Environmental Planning Policy no.70 – Affordable Housing (Revised Schemes), which commenced on 1 June 2002 (i.e. in the nick of time). This Policy amended three local environmental planning instruments providing the legal basis to those schemes, by inserting relevant affordable housing provisions.

The validation of the North Sydney, Randwick and Waverley schemes expired. Randwick and Waverley councils stopped collecting section 94 contributions for affordable housing.¹³ North Sydney continued with its scheme, linking it to development assessment under SEPP 10.

SEPP 70 is not the affordable housing SEPP foreshadowed by the drafters of the 2000 amendments. SEPP 70 is not a usable instrument to satisfy the Act's requirement – for a council to implement an inclusionary zoning scheme – that the area be identified as one where there is a need for affordable housing. This is because it only applies to the Greater Metropolitan Region. A non-metropolitan council wishing to establish an affordable housing scheme under section 94F would need to get the minister for planning to (as well as approving provisions in an LEP) to amend SEPP 70 so that it covers the whole state (or their region).

Also, SEPP 70 indicates those areas where there is a need for affordable housing, as required by section 94F(1). The areas listed are Willoughby, City of Sydney, Leichhardt, and South Sydney. A council wishing to establish an affordable housing

scheme under section 94F would need to get the minister for planning to (as well as approving provisions in an LEP) to amend SEPP 70 so that it identifies their local government area as an area with a need for affordable housing.

SEPP 70 does make requirements about imposing conditions of development consent for affordable housing, as required by section 94F(3)(a) of the Act.¹⁴ (See section 10 of SEPP 70.)

Since SEPP 70 was introduced, one council, Parramatta, prepared amendments to its local environmental plan to enable affordable housing conditions on multi-unit developments, and requested the minister for planning to approve those amendments and also to give them the legal backing of SEPP 70 or another appropriate SEPP. The minister did not agree to this.

The lack of an appropriate affordable housing SEPP has been a discouragement to councils that might have wanted to introduce inclusionary zoning schemes.¹⁵ Since the introduction of section 93F into the Act in mid 2005, councils with an interest in this have been using voluntary planning agreements instead.¹⁶

Section 94F and SEPP 70 have a primary purpose of enabling affordable schemes where development creates a need for new affordable housing. However, one of the triggers for a council imposing a consent condition for affordable housing contributions (subject to there being enabling LEP and SEPP provisions) is where the development will or is likely to reduce the availability of affordable housing in the area (section 94F(1)(a)¹⁷).¹⁸ This means there is some overlap in purpose with SEPP 10, which is triggered when there is a likely loss of particular types of affordable housing, namely boarding houses, hostels, and low-rental dwellings.

Issues for advocacy

The government's review of SEPP 10 and SEPP 70 highlights a need for a state environmental planning policy on affordable housing that (i) enables councils that want inclusionary zoning schemes to be easily able to have them, by appropriate wording to satisfy sections 94F(1) and 94F(3)(a),¹⁹ and (ii) arrest the loss of affordable housing in favored locations.

The provisions of a new affordable housing SEPP, however actually worded, should:

- extend the land to which the policy applies – to the whole state
- readily enable a local government area to be identified as an area with a need for affordable housing, thus satisfying section 94F(1)²⁰
- provide requirements on conditions of development consent for affordable housing contributions, thus satisfying section 94F(3)(a)²¹
- retain the validations of the affordable housing schemes in Ultimo-Pyrmont, Green Square and Willoughby
- preserve the current protections on loss of affordable housing provided by SEPP 10

In addition, there is an argument for expansion of the scope of 'SEPP 10' type provisions to caravan parks and manufactured home estates.

Notes

¹ These sections will be replaced by proposed sections 116Y-116ZB when those latter are proclaimed as part of a process of staged proclamation of the Environmental Planning and Assessment Amendment Act 2008.

² This section will be replaced by a similarly worded provision, section 116Y(4)(b), under the Environmental Planning and Assessment Amendment Act 2008, when proclaimed.

³ These sections will be replaced by similarly worded provisions, sections 53 and 59, under the Environmental Planning and Assessment Amendment Act 2008, when proclaimed.

⁴ This section will be replaced by a similarly worded provision, section 116Y(4)(b), under the Environmental Planning and Assessment Amendment Act 2008, when proclaimed.

⁵ This section will be replaced by a similarly worded provision, section 116Y(4)(a), under the Environmental Planning and Assessment Amendment Act 2008, when proclaimed.

⁶ This section will be replaced by a similarly worded provision, section 116T, under the Environmental Planning and Assessment Amendment Act 2008, when proclaimed.

⁷ When the relevant provisions of the Environmental Planning and Assessment Act 2008 are proclaimed, use of planning agreements will be more difficult than under the previous sections of the Act on planning agreements (which were first introduced in 2005), since – unlike the provisions that existed from 2005 to 2008 – a council will need the consent of the minister for the planning for the particular agreement with the developer: see proposed section 116V(1)(b).

⁸ Leichhardt is listed because part of Leichhardt municipality was then included in the area covered by the Sydney REP no.26 – City West.

⁹ The provisions were in Sydney Regional Environmental Plan no.26 – City West.

¹⁰ *Meriton Apartments Pty Ltd v Minister for Urban Affairs and Planning & Or* [2000] NSWLEC 20 (18 February 2000), online at

<www.austlii.edu.au/au/cases/nsw/NSWLEC/2000/20.html>, viewed 2 October 2008.

¹¹ The government's plans at the time are outlined in Neil Howie, 'New planning legislation – the possibilities for affordable housing' and Helen O'Loughlin, 'Towards an affordable housing SEPP', in *People, plans and places – the new affordable housing system*, NCOSS and Shelter NSW, September 2000.

¹² Leyshon Consulting, 'Position paper – affordable housing levy', April 2001. A more recent statement of a development industry perspective is NSW Urban Taskforce, 'Affordable housing: issues with existing planning mechanisms at state and local government level and options to stimulate private investment – a report to the NSW government', March 2006.

¹³ Waverley council's affordable housing scheme uses density bonuses in return for voluntary contributions of affordable housing units in multi-unit development, the legal basis for which is provisions in a development control plan (and since early 2008, section 93F of the Act).

Randwick council also has a policy of negotiating voluntary developer contributions for affordable housing, a policy that postdates the expiry of validation of its earlier scheme.

¹⁴ Compare section 116Y(4)(a) under the Environmental Planning and Assessment Amendment Act 2008, when proclaimed.

¹⁵ However, the Sydney City Council has indicated it will consider extension of inclusionary zoning to future renewal areas or all commercial developments ('Sustainable Sydney 2030: City of Sydney strategic plan – final consultation draft', 2008, p.271); the insertion of relevant

provisions in the Sydney LEP would need the approval of the department of planning and minister for planning.

¹⁶ While the state government has backed off the support it gave to local government affordable housing schemes in the late 1990s, it has not eschewed an inclusionary zoning approach in major development areas under its direct control. Two cases indicating this are the inclusionary zoning provisions in the Redfern-Waterloo Authority Act 2004 (see section 30) and in the draft State Environmental Planning Policy (Major Projects) 2005 (Amendment no.20) of 2008 affecting Sydney Olympic Park (see clause 43).

¹⁷ This section will be replaced by a similarly worded provision, section 116Y(2)(a), under the Environmental Planning and Assessment Amendment Act 2008, when proclaimed.

¹⁸ See the definition of 'affordable housing' in planning law, on page 6, above.

¹⁹ Note that a council would still need to have appropriate provisions in a local environmental plan (section 94F(3)(b), cp. proposed section 116Y(4)(b)) and these might not be approved by the minister for planning.

²⁰ As indicated on page 2 (above), this might not be necessary when the relevant provision of the Environmental Planning and Assessment Amendment Act 2008 (i.e. s.116Y(1)) is proclaimed.

²¹ Or section 116Y(4)(a), when the relevant provisions of the Environmental Planning and Assessment Amendment Act 2008 are proclaimed.