
Memorandum

Date: 6 April 2020
To: Jane Fitzgerald, Property Council of Australia
From: Samantha Daly (JWS Lawyers) and Andrew Graham (EPM Projects)
Subject: Amendments to the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 - Briefing Paper to the Property Council of Australia
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The economic impacts of the COVID-19 crisis for the NSW economy have been, and will continue to be, significant. On the other side of the COVID-19 crisis, and as part of the recovery effort and to seek to stimulate the economy, both State and Federal governments will no doubt be looking at ways in which they can fast-track projects and boost business. In this regard last week we saw the announcement by Minister Stokes of the 'Planning System Acceleration Program' with the objective to cut red tape and fast track planning processes to stimulate the NSW economy.

As you would no doubt be aware, the demand for housing for seniors and those with a disability is increasing dramatically as the demographics of our country change over time. In 2017, 15% of Australians (3.8 million) were aged 65 and over and this number is growing every year.

Currently the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP)* provides a range of provisions aimed at increasing access to affordable and well-designed housing for older people and people with disabilities. The Seniors SEPP creates increased opportunities for housing older people and people with disabilities through permitting this category of housing on certain land where such housing may not otherwise be permitted under a local environmental plan. However, whilst development may be permitted under the Seniors SEPP on certain land, the development may be carried out only with the consent of the relevant consent authority unless another environmental planning instrument allows that development without consent.

A number of environmental planning instruments provide that certain development may be undertaken as exempt or complying development or development without consent, including relevantly the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP)*, the *State Environmental Planning Policy (Infrastructure) 2007 (ISEPP)* and the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (ESEPP)*. These alternative planning approval pathways allow proponents for development to fast-track the planning approval process which in turn means that essential development and infrastructure can be carried out as efficiently as possible.

The Seniors SEPP does not currently contain any provisions providing alternative planning approval pathways for public or private providers of housing for seniors or people with a disability.

The ISEPP and ESEPP were very welcome additions to the NSW planning system and have enabled a number of public and private infrastructure providers to provide new or upgraded facilities faster and cheaper than traditional planning pathways. With the increasing demand for seniors housing, and the need for economic stimulus, in our view the time is right for consideration of similar pathways to be introduced into the Seniors Housing SEPP. This would make it easier for both public and private providers of seniors housing to provide new and upgraded housing being an essential category of development in this State for our aging community.

JWS and EPM have considerable experience in advising clients on projects where alternative approval pathways have been successfully utilised by applicants for development to deliver projects quickly and for as little cost as possible. The alternative approval pathways provided in the ISEPP and the ESEPP allow proponents of development to avoid the development application process and provide a far more efficient and stream-lined pathway for important public infrastructure to be constructed and put into use as soon as possible.

Where development approvals are streamlined, the regulations surrounding alternative approval pathways ensure that the impacts of the development are acceptable and amenity for neighbours and the community is protected. In the case of complying development and development without consent, a form of impact assessment of the proposed development is still carried out and an approval granted by a certifier or a determining authority for the proposed activity which can include conditions to ensure that the development is acceptable. Furthermore, environmental planning instruments commonly include development standards for these categories of development that must be complied with to manage the impacts of these forms of fast-tracked development and provide consistency across the State.

We have worked with a number of schools since the introduction of the ISEPP in 2007 and the subsequent transition to the ESEPP in 2017. Based on our experience we have seen considerable advantages for schools in meeting the needs of their communities through the ability to utilise the alternative approval pathways in these environmental planning instruments. Specifically we have seen the following benefits that have been obtained through use of the provisions of the ISEPP and ESEPP by public and private schools:

- A number of schools have carried out development without consent to meet the needs of their community, including providing permanent classrooms to replace temporary classrooms or to build a new library or provide off-street car-parking. This has enabled schools to add additional facilities for students and staff whilst ensuring that the amenity for the local community is not adversely affected through the review of environmental factors (**REF**) process. Since the commencement of the ESEPP, this pathway is available to both government and non-government schools. We also note that non-government schools are required to comply with the *NSW Code of Practice for Part 5 activities for registered non-government schools* which provides a clear framework for schools to use in preparing a REF. Compliance with the Code is embedded in the planning regulations so that the community can be assured that non-government schools will adhere to the Code and remain accountable.
- A range of more minor forms of development are able to be carried out by schools as exempt development provided they are within the boundaries of an existing school, including play equipment, sporting fields and amenities buildings. These provisions are utilised regularly by schools and enable essential development with little or no impacts to neighbours and the local community to be undertaken without the need for approvals. In particular, the ESEPP permits short term portable classrooms to be undertaken as exempt development which has enabled many schools to provide short term teaching facilities to meet growing demand, or to enable portable classroom options whilst permanent facilities are being constructed or upgraded.
- Many forms of development within existing schools can be undertaken as complying development whereby a complying development certificate (**CDC**) is issued by a private certifier or a council. The ability to obtain CDCs for school development has enabled facilities such as new libraries, additional classrooms, upgraded sporting facilities and halls that meet certain development standards and are located on 'low risk' land (for eg land that is not bushfire prone land) to be approved quickly and at far less cost than if a development application was required. Under the planning legislation CDCs can also be modified to allow for changes to be made to approved development. Minor alterations or additions to existing development, such as an internal fitout of a library to convert part of a library to a classroom, may also be undertaken as complying development under the ESEPP.

The alternative approval pathways outlined above mean that applicants for development can avoid a development application process which can often be very lengthy, and in some cases involve multiple

applications and potentially the Land and Environment Court. This can arise across multiple areas, including schools, but also equally in seniors housing.

By way of example, a recent proposal for a seniors housing development at Waitara Avenue, Waitara involved multiple development applications and proceedings in the Land and Environment Court with the process taking over two years for approval to be obtained to carry out the development. The development involved a proposal for a senior's housing development by the Vasey Housing Association of NSW (**Vasey**) comprising a 12 storey building envelope and a maximum of 117 units. Specifically, the development application process involved a number of lengthy and complex stages including:

- (a) The lodging of a concept (staged) development application (**DA**) on **15 March 2017**;
- (b) The concept DA was recommended by Council for approval to the Sydney North Planning Panel in September 2017, following which Vasey made some amendments to the DA plans;
- (c) The concept development consent was granted in **December 2017**;
- (d) The approved building envelope was subsequently modified under the provisions of s 4.55(2) of the *Environmental Planning & Assessment Act 1979 (EP&A Act)* to amend the building envelope and relocate the communal open space areas and access arrangements. An application for modification of the concept development consent was lodged by Vasey in **May 2018**. The modification to the concept development consent was not granted until **April 2019**;
- (e) Following approved of the concept DA, a 'Stage 1' detailed DA for the construction of a 12 storey building to be used for the purposes of seniors housing and comprising a ground level café, 117 independent living units and associated resident amenities and facilities, landscaping works and a total of 152 cars in two basement levels was lodged by Vasey in **October 2018**. Not a single objection from the public was received on this DA. In May 2019, Vasey lodged a Class 1 application in the Land and Environment Court in respect of the deemed refusal of the development application;
- (f) A s34 conference was held on December 2019 and in **January 2020** the LEC issued final orders providing approval for the DA.

Whilst it is not suggested that the Vasey development in the form that it was approved would have necessarily been able to have been carried out under an alternative approval pathway/s even if such pathways were available under the Seniors SEPP, if such pathways were available under the Seniors SEPP it may have been possible for the development to have been designed so as to avoid the need for a development application. In particular the development may have been able to have been designed so that it could be carried out in a number of stages as complying development or development without consent, and some aspects of the development may have been exempt development such as landscaping works. Given a CDC is issued in a maximum of 20 days, with an ability for CDCs to be modified if required, the approval timeframe (of over two years) could clearly have been substantially reduced if alternative approval pathways were available to Vasey in this case.

For the reasons above, we consider that there would be substantial benefits to the State of NSW if the Seniors SEPP were amended to include alternative approval pathways for seniors' housing development and housing developments for people with disabilities. Providing alternative approval pathways could greatly reduce approval timeframes, whilst maintaining satisfactory environmental outcomes and amenity for the community through carefully drafted development standards that would be required to be strictly complied with in order for the pathways to be utilised by applicants (including for example, a minimum number of units (say 20-30) or a minimum dollar value to which the provisions apply). The pathways would make development under the Seniors SEPP faster and easier and thereby help both the public and private sector to meet growing demand for this form of housing, as well as providing a much needed economic stimulus to the sector. Given the role that development will play in

aiding the economic recovery of the State post COVID-19 we would strongly encourage the NSW government to use this time now to make the necessary amendments to the Seniors Housing SEPP so that the provisions are in place and 'ready to go' once the economy starts to pick up following the current crisis.