The Next Chapter in Urban Consolidation in Sydney

The next chapter of urban consolidation in the Sydney Metropolitan area is about to begin. Baring intervention from the NSW Government, from 1 July 2019 development in the form of dual occupancy, terrace style housing and a new form of “quad occupancy” will be capable of approval under a complying development certificate issued by an accredited certifier.

The purpose of this article is to discuss the implications of complying development as an approval pathway for medium density housing, and the role of certifiers in the assessment of complying development certificates for medium density development.

The Evolution of Complying Development

A complying development certificate is a type of planning approval under the Environmental Planning and Assessment Act 1979 that may be issued by a person or corporation accredited to do so, who is not necessarily an employee of the local council. An accredited certifier must not refuse to issue a complying development certificate if the proposed building complies with the relevant development standards. In other words, the certifier has no discretion, or legal obligation, to consider merit issues such as visual impact or view loss in the assessment process. There is an underlying assumption in the complying development process that these impacts are acceptable if numerical development standards are satisfied.

Public notification of complying development certificate applications is limited. Applications for certain types of complying development certificates are required to be notified to occupiers of nearby dwellings. However, the purpose of the notification is to advise occupiers that they can obtain a copy of the complying development certificate if issued from the Council and not to invite objections on the application prior to its issue. Adjoining owners’ rights are limited to judicial review proceedings in the Land and Environment Court.

Complying development as a concept has existed in NSW planning legislation since 1998. Prior to then, all planning approvals were issued by local councils and State agencies. The types of building work that is capable of being approved by a complying development certificate is gradually expanding. Prior to 2008 complying development was largely left to individual councils to determine (if at all) and the types of building work falling within this category of development was limited to relatively uncontentious work such as alterations and additions to single detached dwellings.

In 2008 the NSW Government took a greater interest in complying development with the introduction of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (“the Codes SEPP”). The Codes SEPP is a broad-brush, State-wide approach to exempt and complying development. The Codes SEPP generally prevails over local
environmental plans to the extent of any inconsistency. Under the Codes SEPP as it currently stands, the types of building work permitted as complying development include new single detached dwellings, alterations and additions to existing dwellings; commercial and industrial alterations, container recycling facilities, and demolition.

**Dual Occupancy, Quad Occupancy and Terrace Style Housing - A New Approach**

On 6 July 2018 the Codes SEPP was amended to include dual occupancy and other types of “low-rise medium density development” as a form of development capable of approval by a complying development certificate. Prior to the amendment approvals for these forms of development were controlled exclusively under local environmental plans and the *State Environmental Planning Policy (Affordable Rental Housing) 2009*.

As the names suggest, a dual occupancy is 2 dwellings on a single allotment (whether attached or detached) and a quad occupancy is 4 dwellings on a single allotment. Terrace style housing is 3 or more dwellings that are attached and face, and are generally aligned along, 1 or more public roads. The Codes SEPP specifies minimum lot areas, maximum building heights and gross floor area and minimum setbacks, together with other controls set out in Part 3A of the Codes SEPP, that must be satisfied in order to qualify for a complying development certificate.

Commencement of the Code has been deferred in 50 Local Government Areas in NSW until 1 July 2019 and in the City of Ryde until 1 July 2020, “due to the special circumstances in Ryde and advice from the Greater Sydney Commission”. A list of the LGAs on the deferral list can be found here.

The new NSW Government is non-committal about whether it will extend deferral of the change beyond 1 July 2019. However the new Minister for Planning in NSW, Rob Stokes MP is opposed to more intensive forms of residential density and the spot rezoning of land to increase residential densities, which suggest that the Government will not stand in the way of the changes to the Codes SEPP, which promote incremental density increases.

Part 3B to the Codes SEPP is significant because it introduces for the first time medium density housing to the complying development approval pathway. Medium density housing can be a controversial form of housing in established areas and the assessment and approval of medium density housing in the past has traditionally been the role of local councils. Under the Codes SEPP certain forms of medium density housing can be approved by private certifiers.

**Will History Repeat Itself?**

The last time a NSW Government implemented a broad brush approach to urban consolidation in Sydney was in the late 1980s to mid-1990s when the construction and subdivision of dual occupancy development was made permissible by State policies. The policies were called *Sydney Regional Environmental Plan no. 12 - Dual Occupancy (“SREP 12”)* and *State Environmental Planning Policy no. 25 - Residential Allotment Sizes (“SEPP 25”)*. These policies established a consistent approval path for the construction and subdivision of dual occupancy buildings. SREP 12 and SEPP 25 saw dual occupancy development as a form of housing evolve from traditional granny flat style accommodation prior to the policies to free standing detached 4 bedroom attached dwelling houses. Dual

---


2 Much of the content of this part of the paper is drawn from a Briefing Paper titled “Urban Consolidation and Dual Occupancy Development” prepared by Marie Swain of the NSW Parliamentary Library Research Unit dated April 1995
occupancy became popular among builders and small developers as a quick way to profit from the development of a suburban block of land.

Dual occupancy, enabled by SREP 12 and SEPP 25, was criticised as a defacto form of medium density housing. It was claimed by opponents to the policies that this broad-brush approach did not take into account the urban character of local communities. The policies created grief for local councils and their development assessment planners in established areas, having to deal with objections on most development applications for dual occupancy buildings. Local councils complained that the broad-brush approach led to adverse impacts on neighbourhood character and residential amenity arising from poor design and location. Some councils complained that their local rights to plan for their communities had been usurped. The disquiet compelled the “Stop Dual Occupancy” political party to be formed in 1995 and which ran candidates in a number of seats in the NSW State Election in 1995.

SREP12 and SEPP 25 were repealed by the Labour Government when it won office in the 1995 State election. SREP 12 and SEPP 25 were replaced by a new strategic planning approach that required local councils to prepare their own residential settlement strategies identifying how they would plan for an increase in residential density in their individual Local Government Areas.

The New Approach

The Codes SEPP and the concept of complying development more broadly rely on certainty for both developers and neighbours by specifying development standards that are designed to address adverse impacts and which are capable of objective assessment. The need for certainty in turn drove a need for development standards to be designed in a way that limits the discretion of the private certifier. Most if not all of the controls in the Codes SEPP, before Part 3B, are numerical or map based, such that compliance is easily measured. That has now changed with the introduction of Part 3B of the Codes SEPP.

Part 3B of the Codes SEPP introduces subjective controls that require an assessment of the design merit. Those controls are contained in the document titled “Design Guide for Low Rise Medium Density Development”.

The Design Guide seeks to address the potential adverse impacts of the new broad-brush approach to medium density housing. The Design Guide contains principles, objectives and standards for the design of medium density housing covering design elements such as building envelopes, landscape area, local character visual and acoustic privacy. The Minister’s written introduction to the Design Guide states that it is designed to ensure that medium density housing under the Codes SEPP “respects the local character of existing communities and streetscapes, has good built form and scale, as well as provides good amenity for both residents and neighbours”.

The Design Guide is comprehensive, perhaps too comprehensive, running to some 210 pages. It is given statutory weight by various clauses in the Codes SEPP3, which provide that development under the Code must be consistent with the Design Guide in order to meet the description of complying development.

An application for a complying development certificate for a dual occupancy, terrace house or manor house under Part 3B of the Codes SEPP must be accompanied by a statement, in the form approved by the Planning Secretary,4 by a “qualified designer or a

3 Codes SEPP cls 3B.19, 3B.31 and 3B.44

4 At the time of writing there was no approved form published
person accredited as a building designer by the Building Designers Association of Australia” that:

- verifies that he or she designed, or directed the design of, the development, and
- addresses how the design is consistent with the relevant design criteria set out in the Design Guide

What are a Certifier’s Legal Obligations?

It appears the purpose of the design statement is to permit the certifier to defer the merit assessment aspects of the complying development certificate application to the building designer. However, it remains a legal obligation of the certifier under the EP&A Act and the Codes SEPP, and not the building designer, to be satisfied that the design is “consistent with the relevant design criteria in the Design Guide”. The legal standard of satisfaction is determined by the opinion of “a reasonable person who correctly understands the meaning of the law under which he operates”.6

It remains to be seen whether a certifier can lawfully discharge his or her legal obligation by simply receiving a document purporting to be a statement from a designer or accredited person explaining how the design is consistent with the Design Guide, or whether the certifier must assess the quality of that document.

The impact of section 4.31 of the EP&A Act, which commenced on 1 March 2018, is also yet to be revealed. As yet there are no published judicial decisions applying that section. Section 4.31 of the EP&A Act allows the Land and Environment Court to stand in the shoes of a certifier in judicial review proceedings and determine for itself whether a proposed development meets the description of complying development, rather than the Court applying the reasonable person test. This is a different standard to the reasonable person standard.

Conclusion

The introduction of medium density housing as a form of complying development will encourage more housing in established areas, which will increase housing supply and choice. It may also assist with housing affordability in the Sydney metropolitan area. The Design Guide is no doubt necessary to address the quality of design of the new medium density forms of development permitted under the Codes SEPP. It will be interesting to monitor implementation of Part 3B of the Codes SEPP, particularly the number of certifiers offering services, the number of certificates being issued and the quality of buildings once built.

More information can be found at the following link to the NSW Department of Planning and Environment website:


This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact Planning Law Solutions.

Michael Mantei
Lawyer Director - Planning Law Solutions

---

5 EP&A Regulation Sch 1, cl 4(1)(n)
6 Hornsby SC v Trives (No.3) [2015] NSWLEC 190 at [17]