Submission on Options for Low Rise Medium Density Housing as Complying Development

prepared by

EDO NSW

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About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

Submitted to:

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(Submitted via online form)

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Introduction

EDO NSW welcomes the opportunity to comment on *'One Part of the Missing Middle' – Options for Low Rise Medium Density Housing as Complying Development* (**Discussion Paper**).

EDO NSW has extensive experience advising on all aspects of planning law and policy, particularly in relation to the *Environmental Planning and Assessment Act 1979 (***EP&A Act**). We also engage on an ongoing basis with planning reform processes in NSW, writing submissions in response to proposed legislative and policy amendments.

We operate a community legal advice line which receives up to 1200 calls a year, most relating to planning approvals. We continue to receive calls from community members concerned about breaches of complying development standards for neighbouring developments (usually residential). Recently we have seen an increase in referrals to us from the Building Professionals Board (as well as from the planning department). The continual expansion of complying development is likely to see these calls and concerns increase, yet the community's main assurance of regulatory oversight is from certifiers and the BPB itself. Genuine, comprehensive and iterative community consultation is therefore critical for this reform process, design of standards and future implementation.

This submission is intended to build on our previous comments and concerns regarding the proposed expansion of code-assessable (complying) development in NSW. These concerns have been outlined in two key submissions, responding to the NSW Planning White Paper (2013)[1] and to proposed changes to the Exempt and Complying Development Codes (2012),[2] respectively. Our submission on the Building Sustainability Index (BASIX) Target Review (2014)[3] is also relevant.

This submission will address the following issues:

1. **Purpose of code-based assessment**
2. **Environmentally sensitive areas**
3. **Governance of private certifiers**
4. **Cumulative Impacts**
5. **Community engagement**
6. **BASIX efficiency standards**
7. **Zones**
8. **Miscellaneous**

[1] Available online at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/180/attachments/original/1380534662/130628NSWPlanningWhitePaper_EDONSWsubmission.pdf?1380534662

[2] Available online at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/186/attachments/original/1380534743/121106SubmissiononExemptandComplyingCodesamendment2012.pdf?1380534743

[3] Available online at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1283/attachments/original/1391138033/140131_Submission_to_the_BASIX_Review.pdf?1391138033

1. Purpose of code-based assessment

As noted in our previous submissions, code-based assessment should only be used to provide 'streamlined assessment processes'[4] for small, low impact developments. Larger, higher impact developments – including those with potential for cumulative impacts – should be subject to full assessment and approval processes.

There is a risk that this principle is being eroded by incremental changes to the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**Exempt and Complying Development SEPP** or **SEPP**) without a sufficient level of community engagement – beyond 'responsive submission' processes like this one. For example, the SEPP was amended in 2013 with the result that industrial buildings with a floor area of up to 20,000m² are now classified as complying development, and protections for environmentally sensitive areas were weakened.[5]

The Discussion Paper proposes to expand complying development once again so that it includes the following three categories of medium density housing:

- Dual occupancies on a single lot with a minimum lot size of 400m² (**Option 1**)
- 3-4 dwellings ('manor homes') on a single lot with a minimum lot size of 600m² (**Option 2**)
- 3-10 dwellings on a single lot with a minimum lot size of 600m² (**Option 3**)

We note this considerably expands the existing General Housing Code in the SEPP. Specifically, only a single residential house on a block of at least 200m² currently qualifies as complying development.[6] While the Discussion Paper focusses on the advantages the proposed changes for 'homeowners',[7] we note that the primary take-up of Options 2 and 3 is likely to be from medium and large-scale developers rather than individual owners.

EDO NSW understands the importance of providing the community with diverse and affordable housing options. This is entirely compatible with (and must not be at the expense of) environmental protection, meaningful community consultation, credible certifier oversight and significantly improved building efficiency and sustainability standards. Despite several government and independent reviews, these important aspects of a rigorous and efficient system have not progressed. Instead of resolving these first, the Discussion Paper proposes further incremental expansion of Codes.

In summary, EDO NSW does not support the expansion of the Housing Code until critical issues are fully addressed. These issues include: effectively excluding complying development from environmentally sensitive areas, assessing and accounting for cumulative impacts, improving governance of private certifiers, ensuring meaningful community engagement on design standards, and mandating leading practice sustainability standards).

[4] *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, cl. 1.3.
[5] Ibid, clauses 5A.7, 17A and 19.
[6] Ibid, clause 3.1.
[7] Discussion Paper, p. 8. Specifically, the Paper states that '[t]he NSW Government is committed to reducing the cost and time to carry out routine complying developments for homeowners.'

2. Environmentally sensitive areas

EDO NSW submits that complying development is not appropriate in sensitive environmental areas. In such areas, specific impacts need to be properly assessed. The Discussion Paper notes the intention to maintain the current prohibition on complying development in 'environmentally sensitive areas'.[8] However, it is unclear whether this means the Government intends to maintain *all* prohibitions outlined in cll. 1.17A and 1.19 of the Exempt and Complying Development SEPP. This should be confirmed and clarified so that manor houses and terraces are excluded from (or near) sensitive areas. EDO NSW does not support weakening the protections in either of these clauses. On the contrary, we recommend:

- Increasing the 100m buffer zones that apply to certain sensitive areas, in accordance with advice provided by appropriately qualified, independent experts.[9]
- Expanding the definition of 'environmentally sensitive areas to include core koala habitat or potential koala habitat within the meaning of State Environmental Planning Policy No 44 – Koala Habitat Protection (**Koala SEPP**), or in a movement corridor used by koala.

These additional safeguards are particularly important given the potential for Options 2 and 3 (if they are passed) to have cumulative impacts on the surrounding environment.

We further note that the definition of 'environmentally sensitive areas' includes land to which *SEPP 14 – Coastal Wetlands* or *SEPP 26 – Littoral Rainforests*, apply. These SEPPs are being repealed and replaced by a new Coastal Management SEPP (which has not yet been put on exhibition). The Discussion Paper has not clarified whether the exiting definition of 'environmentally sensitive areas' will be amended to include the replacement coastal SEPP.

Conclusions

- EDO NSW supports the maintenance of the existing exclusions outlined in clauses. 1.17 and 1.19 of the Exempt and Complying Development SEPP.
- We further recommend strengthening these protections by:
    - Reintroducing a legislated prohibition under the Act (not just the SEPP).[10]
    - Increasing the buffer zones that apply to certain sensitive areas (in accordance with advice from appropriately qualified, independent experts).
    - Expanding the definition of 'environmentally sensitive areas' to include core koala habitat or potential koala habitat within the meaning of the

[8] Discussion Paper, pg. 11. See also *SEPP (Exempt and Complying Development Codes) 2008 clauses 17A and 19. Environmentally sensitive area* is further defined in clause 4 of the SEPP.
[9] The inclusion of these 100m buffer areas in LEPs is a mandatory requirement under the *Standard Instrument (Local Environmental Plans) Order 2006*, cl. 3.3.
[10] Former section 76A(6) of the *EP&A Act 1979* prohibited environmental planning instruments from allowing complying development that requires environmental agency concurrence, or in critical habitat, wilderness, heritage or environmentally sensitive areas.

Koala SEPP, or in a movement corridor used by koala. This would in turn ensure that complying development is excluded from these areas.

- If the *Coastal Management Bill 2015* is passed, the definition of 'environmentally sensitive areas' must be amended to include the replacement coastal SEPP.

3. Governance of private certifiers

Community and authorities' concerns about governance and oversight of private certification must be addressed before any attempt to expand code-based assessment. There is ample evidence of private certifiers certifying non-compliant developments, or issuing construction certificates in contravention of consent.[11] As noted by Justice Pepper in 2013 in *Kogarah City Council v Armstrong Alliance Pty Ltd*:[12]

> *Once again before the Court is an application for declaratory relief sought by a council occasioned by the unlawful certification by an accredited certifier of a development that is markedly different to the approval granted by that council.* ***Regrettably this is becoming an all too common occurrence in this Court.*** *It must not be tolerated. It brings the certification system into disrepute and undermines the planning regime of this State.*

Ongoing breaches not only undermine community confidence in the certification and planning system, but leave councils with the responsibility of managing resident concerns and in certain instances commencing proceedings in the Land and Environment Court.

Of further concern is the Building Professionals Board (**BPB**) poor enforcement record. This issue, and the related potential conflicts of interest, were highlighted by George Maltabarow in his 2013 report:[13]

> *…the BPB has a key role in accreditation, education and training, professional support as well as compliance investigation, audits, discipline and monitoring.*
>
> *There are both real and perceived conflicts between some of these roles. Indeed, the BPB has been criticised as being too reluctant to exercise its disciplinary powers and too slow in conducting investigations. There is a perception by some that the BPB is more focused on the support role than on supervisory elements and this could be a reflection, to some extent, of current legislative provisions.*

It does not make sense to increase the responsibility of private certifiers before addressing the ongoing and serious concerns raised by the court, Local Government

[11] See generally Maltabarow, George, *Building Certification and Regulation – Serving a New Planning System for NSW*, May 2013, Annex 9. Available online at: http://bpb.nsw.gov.au/sites/default/files/public/Archive/Appendix%209%20-%20recent%20litigation%20involving%20certifiers.pdf http://bpb.nsw.gov.au/sites/default/files/public/Archive/Maltabarow-building-certification-report-May2013.pdf (accessed 08 February 2016).

[12] *Kogarah City Council v Armstrong Alliance Pty Ltd (No 2) [2013] NSWLEC 32, Pepper J at 1.*

[13] Maltabarow, George, *Building Certification and Regulation – Serving a New Planning System for NSW*, May 2013, p. 13. Available online at: http://bpb.nsw.gov.au/sites/default/files/public/Archive/Maltabarow-building-certification-report-May2013.pdf (accessed 08 February 2016).

NSW[14] and community groups regarding certification of non-compliant development and poor enforcement by the BPB.[15]

Conclusions

- The General Housing Code must not be expanded until the various compliance and enforcement issues concerning private certifiers are rectified.

4. Cumulative impacts

The Discussion Paper does not adequately address the potential cumulative impacts of multiple complying developments in a given area. This is particularly concerning in relation to Options 2 and 3, which if passed may result in a series of privately-certified greenfield sites being transformed into entire suburbs of code-based dwellings. In other words, large areas could be developed either incrementally or as a substantial project by a single developer without any consideration of the overall environmental impacts of such development (including, for example, tree clearing).

It is further concerning that private certifiers could be entirely responsible for signing-off on dwellings across large areas. This is especially problematic in light of the ongoing governance issues outlined in Part 3 of this submission.

Furthermore, the mandated 100m buffer zone between complying developments and certain environmentally sensitive areas (such as coastal wetlands) may be inadequate to deal with the cumulative impacts associated with Options 2 and 3. This is particularly true where developers purchase large tracts of land adjacent to such areas with the express intention of building 3-10 dwellings on numerous, single lots. This issue is addressed in greater detail in Part 6 of this submission.

Conclusions

- Complying development should by definition be *low-impact* in order to justify exemption from assessment and determination by local councils. The cumulative impacts of multiple code-assessed dwellings across large areas remain unknown.
- The Government must clarify how it proposes to ensure that cumulative impacts of multiple code-based approvals are identified, prevented and continually monitored (including to avoid cumulative land-clearing and biodiversity impacts).
- The 100m buffer zone for sensitive environmental areas must be increased to provide greater protection. Advice from appropriately qualified scientists should be sought to determine an appropriate buffer.

[14] See Local Government NSW, *Submission to the Building Professionals Board Report on 'Building Certification and Regulation – Serving a New Planning System for NSW'*, March 2014. Available online at: http://www.lgnsw.org.au/files/imce-uploads/127/LGNSW-submission-to-bpb-maltabarow-report-march-2014.pdf (accessed 05 February 2016).

[15] See for example EDO NSW submissions, above n. 1, 2.

5. Community engagement

Local neighbours have no say on complying development once Code standards are set. It is therefore crucial to pre-empt negative impacts and address likely community concerns with upfront standards, safeguards and assurance of strong governance.

For example, what are the likely concerns of local residents being unable to comment on proposals to build up to 10 dwellings on 600m²? To answer this question there should be a systematic review of local council consultations and submissions on medium-rise development applications, in addition to proactive community consultation.

Currently the EP&A Regulation requires certifiers or owners to notify any neighbours within 20m of a complying development.[16] This is not the same as an exhibition period which enables residents to examine the proposed development and raise any concerns in a written submission, which is then considered by council. The challenge is to anticipate local concerns about significant redevelopment (such as 10 townhouses going up next door) in a way that engages and respects existing residents, and ensures people have a say on the future of their area.

The previous planning review proposed widespread and novel forms of community engagement about neighbourhood amenity, housing choice, the environment and specific development standards. Further consultation on design standards (for example, 'Stage 2') needs to reflect this approach – and more comprehensively engage councils and a diverse range of community members – rather than relying on a handful of reactive submissions. In the absence of this, we do not support any proposed expansion of the Exempt and Complying Development SEPP which will weaken the community's ability to comment on medium-density developments, and in certain instances multiple, complying developments spread across large areas.

Conclusions

- To enable the community to properly participate in decision-making about medium-density housing, consultation on what communities want needs to be an order of magnitude greater than reactive submissions to incremental Code standards. This should include novel methods and community focus groups.
- In addition to proactive community consultation, there should be a systematic review of local council consultations and public submissions received relating to medium-rise development applications, to understand concerns and inform development and design standards.

6. BASIX efficiency standards

The 2014 BASIX Target Review has not been completed. As noted in our submission responding to that Review, there remains considerable room to improve BASIX targets (beyond those increases proposed in the Review).[17] We believe that the improvements recommended in our submission (or greater) should be

[16] EPA Regulation, cl. 131AB. Note this does not apply to a 'residential release area.'
[17] See above, n 3.

implemented before code-based assessment is expanded in NSW. It is also important that complying development or BASIX standards do not stifle innovation that achieves superior environmental outcomes, including higher-efficiency buildings

Conclusions

- The BASIX tool should be updated to provide for significantly better water, energy and material efficiency before the General Housing Code is expanded. Notably, the Government should:
  - Strengthen minimum requirements of BASIX to reflect technological advances.
  - Raise standards for multi-unit dwellings (currently subject to lower targets). Set minimum (not maximum) baselines under BASIX, by removing the prohibition on councils and other consent authorities from imposing more stringent targets, at least in relation to precinct-scale development.

7. Zones

The Discussion Paper indicates that Options 1-3 are not currently being contemplated in rural or environmental living zones. However, it does not clarify whether these Options will be permissible in other environmental zones (such as environmental management or environmental conservation). Given the sensitivity and character of these areas, EDO NSW does not support Options 1-3 in *any* environmental zones. This means multiple-dwelling development would be prohibited in the relevant zone or at a minimum require public consultation and council consent.

Conclusions

- EDO NSW does not support Options 1-3 in any rural or environmental zones (including environmental living, environmental management and environmental conservation).

8. Miscellaneous

- Torrens title subdivision of 2 dwellings on a single lot should not be permitted as complying development. This is because subdivision should be governed by local councils under the relevant LEP.
- EDO NSW does not support private certification of on-site stormwater detention or compliance with council's waste management provisions in the absence of appropriate governance and enforcement arrangements.