

07 July 2017

Director
Codes and Approvals Pathways
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Sent by email: codes@planning.nsw.gov.au

Dear Sir/Madam,

A Review of Complying Development in Greenfield Areas

As a community legal centre specialising in environmental and planning law, EDO NSW welcomes the opportunity to comment on the *Background Paper – A Review of Complying Development in Greenfield Areas (Background Paper)* and *Explanation of Intended Effect for a proposed new Greenfield Housing Code (EIE)*.

This submission identifies five key issues with the proposed application of complying development in greenfield areas:

- Potential inconsistencies between the policy and legislative objectives
- Environmentally sensitive areas
- Concerns with private certification
- Cumulative impacts and strategic planning
- Coordination with related SEPP and Code reforms

This submission reiterates our previous recommendations on complying development, including on the *Proposed Medium Density Housing Code – Statement of Intended Effect* and *Draft Medium Density Design Guide*, December 2016 (**attached**) and *‘One Part of the Missing Middle’ – Options for Low Rise Medium Density Housing as Complying Development*, February 2016.¹

At the outset, we reiterate that Code-based assessment should only be used to provide streamlined assessment processes for small, genuinely low impact developments. Larger, higher impact developments – including those with potential for cumulative impacts such as development of a new suburb on a greenfield site – should be subject to full assessment, local community input and approval processes. Turning greenfield development into complying development is particularly concerning given that the new ‘Biodiversity Assessment Method’ will not apply to complying development. This *assumes* any biodiversity impacts are not significant.²

¹ Available at: http://www.edonsw.org.au/planning_development_heritage_policy

² See the Biodiversity Conservation Act 2016, section 7.7(1)(b).

1. Potential inconsistencies between the policy and legislative objectives

We understand the purpose of the new code is to speed up delivery of new housing to meet the needs of Sydney's growing population and improve housing affordability.³

In this context we note that Australian cities – including Sydney – are amongst the most sprawling and least densely populated in the world.⁴ It is not clear that greenfield development will remedy the current housing affordability crisis in NSW. As noted by the President of the NSW Chapter of the Australian Institute of Architects, '...releasing new greenfield sites for housing is not a good solution to the affordable housing or the housing supply problem...'.⁵

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 and expanded building efficiency and sustainability standards. Despite several government and independent reviews, these important aspects of a rigorous and efficient system have not been adequately addressed or finalised. Instead of resolving these first, further incremental expansion of codes is now being extended to greenfield areas.

We are also concerned that the proposal to expand code-based development into greenfield areas to achieve the policy goal of affordable housing is inconsistent with the legislative objects of the EP&A Act, namely the requirement to promote ecologically sustainable development (ESD).⁶ This is due to the failure of the complying development process to take into account cumulative impacts and impacts on threatened species and ecological communities and other environmentally sensitive areas as a 'fundamental consideration' (discussed further below).

This being the case, in order to improve the sustainability of our cities, the NSW Government should be focussing on ecologically sustainable, evidence-based laws and policies to improve housing affordability within the existing urban footprint, rather than expanding complying development into greenfield areas.

As we recently noted in a submission to the Greater Sydney Commission:⁷

³ "We are committed to speeding up the delivery of new homes in greenfield areas to meet the needs of a growing population and to improve housing affordability": <http://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Review-of-Complying-Development-in-Greenfield-Areas>.

⁴ Demographia, *Demographia World Urban Areas (Built Up Urban Areas or World Agglomerations)*, 13th Annual Edition, April 2017, pp. 67 (Sydney is ranked the 936th least densely populated city out of 1040 cities across the globe).

⁵ Architecture AU, 'We're not in the 1950s anymore': NSW greenfield housing plan 'not sustainable,' *Institute says*, 6 June 2017.

⁶ EP&A Act, section 5(a)(vii) and *Protection of the Environment Administration Act 1991* (NSW), section 6.

⁷ EDO NSW submission on the Greater Sydney Commission's draft policy, *Towards Our Greater Sydney 2056*, March 2017, available at: http://www.edonsw.org.au/planning_development_heritage_policy.

‘Accelerated housing’ needs more assurance of upfront social and green infrastructure

Housing and population projections have been revised upwards since *A Plan for Growing Sydney* was finalised in 2014. *Towards our Greater Sydney* notes that higher growth rates are ‘the new norm’ and that 725,000 new dwellings will be needed across Sydney in the 20 years to 2036. The Commission proposes a combination of urban renewal, medium-density in-fill and new land release areas to accelerate housing delivery. It also lists a number of criteria to deliver homes in the right places (ToGS p 8).

We **recommend** the Commission consider how to provide existing residents and future generations with greater assurance that social infrastructure will be considered upfront as communities continue to grow (including ‘green infrastructure’ such as open space, remnant bushland, urban forest, waterways and cycleways).

Maintaining and improving access to amenities is a reasonable expectation amidst the uncertainty of widespread change. Yet there is no particular NSW government policy, community charter or law that ensures this. Specific, accountable assurances that environmental, cultural and heritage values will be respected, conserved and enhanced through upfront planning can relieve community scepticism and an understandable fear of change. For example, this could include a Sustainability Framework or charter for decision-making (alongside the Liveability Framework).

Furthermore, while the Commission highlights the *Draft Medium Density Design Guide* in promoting good design outcomes (ToGS p 9), it is not clear whether this will have any legal status in future. We have expressed concern at the continuing expansion of complying development in advance of restoring community confidence in the private certification system. If the Medium Density Housing Code proceeds despite these concerns, we **recommend** that leading practice standards for design, construction, efficiency and sustainability should be mandatory; and local communities should have greater say in where and in what circumstances the Medium Density Housing Code applies.

2. Environmentally sensitive areas

Greenfield areas may include threatened species habitat, ecological communities and other environmentally sensitive areas. EDO NSW again submits that complying development is not appropriate in sensitive areas. In such areas, specific impacts need to be properly assessed.

We understand that the existing exemptions and buffer zones specified in the *State Environmental Planning Policy (Exempt and Complying Development Codes 2008 (Codes SEPP))* will apply to code-based development in greenfield areas.⁸ We strongly support this.

However, it is not clear that these exemptions and buffer zones are sufficient to protect environmentally sensitive areas (for example areas of high Aboriginal cultural significance, wetlands and littoral rainforests, which are particularly fragile) from multiple, unassessed developments undertaken within in relatively short distance of

⁸ EIE, p. 5; Codes SEPP, clause 1.19.

such sites. The exemptions also deal with sensitive areas *identified* in environmental planning instruments, but this does not protect areas that haven't yet been identified.

We therefore **recommend** that there needs to be comprehensive assessment of any greenfield site to identify environmental and heritage values, and increased buffer zones applied to protect those values and assets, combined with proper development assessment of and consultation on any development proposals.

3. Concerns with private certification

As previously submitted, it is essential to ensure appropriate governance arrangements are in place before any further expansion of complying development Codes and SEPPs.

There is ample evidence of private certifiers certifying non-compliant developments, or issuing construction certificates in contravention of consent.⁹ Many councils lack the resources to manage resident concerns regarding inappropriately certified development, or to rectify such breaches in the Land and Environment Court.

As noted previously, EDO NSW operates 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 including from the Building Professionals Board and the Department of Planning and Environment.

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 Building Professionals Board itself. It is necessary to build confidence in the system prior to further expanding the use of Codes. Transparency, accountability and genuine, iterative community consultation are therefore critical, including for the design of standards and future implementation.

While we support elements of various design guidelines that may drive best practice design of high, quality, liveable, sustainable and energy efficient homes, we are concerned about the use of a complying development code to achieve this due to inconsistent certification and enforceability.

We strongly recommend that concerns about governance and oversight of private certification are addressed before any further attempt to expand code-based assessment. This should include – at a minimum – full implementation of the recommendations outlined in the 2015 *Independent Review of the Building Professionals Act 2005*¹⁰ (rather than partial implementation of these recommendations, as proposed by the NSW Government).¹¹

⁹ See 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/Maltabarow-building-certification-report-May2013.pdf>; and *Kogarah City Council v Armstrong Alliance Pty Ltd (No 2)* [2013] NSWLEC 32, Pepper J at 1.

¹⁰ M. Lambert, *Independent Review of the Building Professionals Act 2005: Final Report*, October 2015.

¹¹ NSW Government, *Response to the Independent Review of the Building Professionals Act 2005*, September 2016.

4. Cumulative impacts and strategic planning

Complying development does not require effective consideration of cumulative impacts. The use of complying development to create a new suburb on a greenfield site will obviously have significant landscape-scale impacts.

Specifically, we are concerned that residential subdivisions comprising 200m² lots (each with a 'complying' dwelling)¹² will result in unforeseen cumulative impacts, including on nearby environmentally sensitive areas.¹³ Accordingly, housing developments on subdivided blocks beyond a certain clear objective threshold should be assessed and approved by a consent authority bound by section 79C of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**). To clarify, this should be in addition to the recommendation to increase (and where necessary add) buffer zones around environmentally sensitive areas.

A more effective way to address cumulative impacts is through effective and clear strategic planning linked to appropriate individual development assessment processes. As previously submitted, there is a crucial role for strategic planning to demarcate important areas for public open space, parks and bushland, biodiversity and food growing. It is crucial that expanded use of complying development does not facilitate urban sprawl or undermine the environmental goals of strategic planning.

For example, there is no clear link between desired housing approval clearance rates in greenfield areas and the three environmental priorities for Greater Sydney recognised in *Towards a Growing Sydney* ('a sustainable city' p12). As previously stated:

EDO NSW supports the call for a 'longer-term planning approach for non-urban areas' of Sydney (ToGS p 12) – to manage its green infrastructure and urban streetscapes. The concept of 'green infrastructure' was entirely absent from the 2013 planning reforms, and its increasing prominence is an emerging example of ESD in practice. We also support the need for increased climate resilience, resource efficiency and environmental performance, alongside economic development and flourishing social relations (ToGS p 12). Yet none of this can materialise without SMARTER¹⁴ goals.

While we strongly support the intent of aims across the three environmental priorities – [which include] to improve the health of waterways, protect biodiversity, scenic and cultural heritage; improve access to open space, healthy lifestyles and local food; reduce carbon reliance and waste; develop renewable energy resources; and address hazard exposure – these need to be supported by clear baselines, measures and targets.

As the crucial next step, we **recommend** committing to clear environmental goals and targets that will be reinforced and given effect in District Plans, LEPs and development decisions.

¹² EIE, p. 7 (which states that minimum lot size for complying development on greenfield sites will be 200m²).

¹³ Also see: EDO NSW, *Submission responding to the NSW Coastal Management Reforms*, 29 February 2016. Page 10 outlines our concerns regarding the impact of expanded, code-based development on wetlands and littoral rainforests: Available online:

https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2647/attachments/original/1456972213/sub_Coastal_Management_Bill_EDOA_1602.pdf?1456972213

¹⁴ Specific, Measurable, Assignable (responsibility), Relevant, Time-based, Evaluated, Re-evaluated.

We **recommend** that the liveability and sustainability goals from *Towards a Growing Sydney* must be embedded, expanded and actioned in Codes and SEPPs.

5. Coordination with related SEPP, Code and environmental assessment reforms

Finally, we note that there are a number of other SEPP and Code review and development processes underway, along with further uncertainty due to the overhaul of the entire biodiversity assessment system under the EP&A Act and *Biodiversity Conservation Act 2016*. For example, the proposed Vegetation SEPP under the biodiversity reforms is intended to ensure that, if development does not require consent, it is still subject to appropriate ecological assessment. As our submission on the Vegetation SEPP noted:¹⁵

Expansion of complying development is a particular concern, because current policy settings *exclude* complying development from the proposed Biodiversity Assessment Method (**BAM**) assessment process. The perverse effect is that complying development (and other policies like the Infrastructure SEPP) could apply to areas on the Sensitive Biodiversity Values Land Map; or to areas that would otherwise trigger the Biodiversity Offset Scheme (**BOS**) threshold due to cumulative size of clearing. This must be addressed in the Vegetation SEPP or elsewhere.

We **recommend** a systematic review of tree removal permitted via existing and proposed SEPPs... to ensure they complement, not undermine, the aims of the Vegetation SEPP – to preserve local and regional biodiversity and amenity. We **recommend** these issues be addressed holistically, whether via the Vegetation SEPP or other clear, mandatory regulatory process. The aim should be to reduce and monitor the cumulative impacts on biodiversity, streetscape amenity and urban heat island effects; and to protect and enhance urban tree canopy and green infrastructure (by which we mean urban bushland, public parks, active transport networks, private gardens etc).

We also **recommend** that BAM assessments be required for complying development that meets the BOS threshold, either due to cumulative clearing size (for example, multiple uses of any medium density housing code) or on sensitive mapped land.

We reiterate these recommendations to ensure that biodiversity and ecological integrity is a fundamental consideration in new and existing SEPPs. The interaction of different review processes and legislative reforms also needs to be clarified.

Conclusion

In summary, we do not support the expansion of complying development on greenfield sites, particularly if there are environmental or heritage values present. If expansion of code-based assessment is the preferred option, we submit that it should not proceed until critical issues are fully addressed. These issues include:

¹⁵ EDO NSW submission on the [Explanation of Intended Effect for the State Environmental Planning Policy \(Vegetation\) 2017](http://www.edonsw.org.au/nsw_biodiversity_and_land_management_reforms_draft_regulations_and_products) (June 2017). Available at: http://www.edonsw.org.au/nsw_biodiversity_and_land_management_reforms_draft_regulations_and_products.

- establishing clear evidence that any such expansion is consistent with the principles of ESD and will result in proper identification and protection of environmentally sensitive areas.
- increasing (or where necessary, adding) buffer zones to protect environmentally and culturally sensitive areas (such as wetlands, littoral rainforests, endangered ecological communities and areas of Aboriginal significance);
- improving governance of private certifiers;
- strategically assessing and accounting for cumulative impacts;
- ensuring that the liveability and sustainability goals from *Towards a Growing Sydney* are embedded, expanded and actioned in Codes and SEPPs;
- ensuring meaningful community engagement on design standards; and
- mandating leading practice sustainability standards.

Please do not hesitate to contact us if you have any inquires regarding this submission.

Kind Regards,



Rachel Walmsley
Policy and Law Reform Director

Attachment: EDO NSW Submission on *Proposed Medium Density Housing Code – Statement of Intended Effect and Draft Medium Density Design Guide*, December 2016.



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