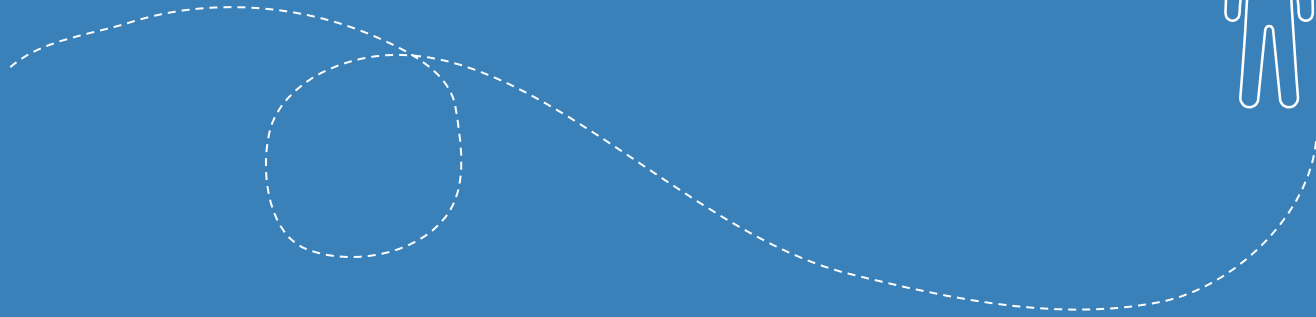
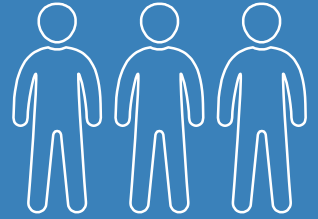


**2022 LOCAL GOVERNMENT,
PLANNING & ENVIRONMENTAL
LAW CONFERENCE**



JISELLA CORRADINI-BIRD, SENIOR ASSOCIATE

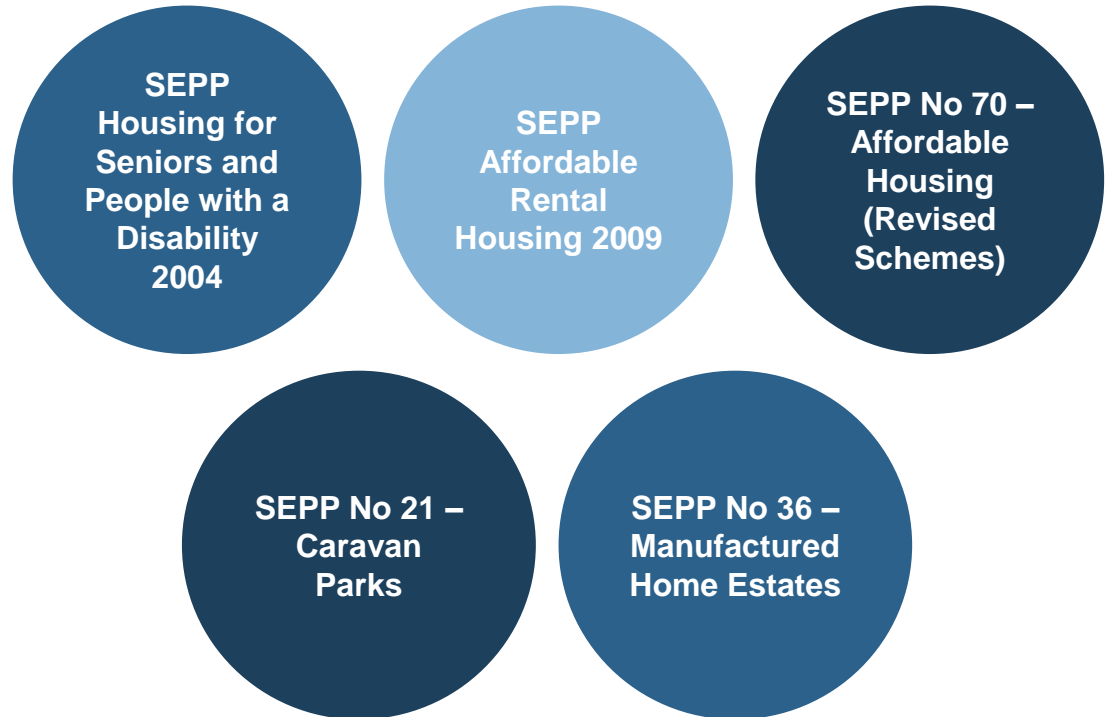


Affordable Housing

The operation and implications of the Housing SEPP

State Environmental Planning Policy (Housing) 2021

Consolidation of 5 State Environmental Planning Policies



The Housing SEPP came into force on 26 November 2021

The original savings provision



“1 Definitions

In this Schedule—

commencement date *means the day on which this Policy commenced.*

repealed instrument *means an instrument repealed under Chapter 1, section 10.*

2 General savings provision

*The former provisions of a **repealed instrument** continue to apply to the following—*

- (a) a development application made, but not yet determined, on or before the commencement date,*
- (b) a concept development application made, but not yet determined, on or before the commencement date,*
- (c) a staged development application made subsequent to a concept development application approval granted on or before the commencement date,*
- (d) a development consent granted on or before the commencement date,*
- (e) an environmental impact statement prepared in compliance with an environmental assessment requirement that is—*
 - (i) issued by the Planning Secretary on or before the commencement date, and*
 - (ii) in force when the statement is prepared.”*

Do we also
apply the **new**
instrument?

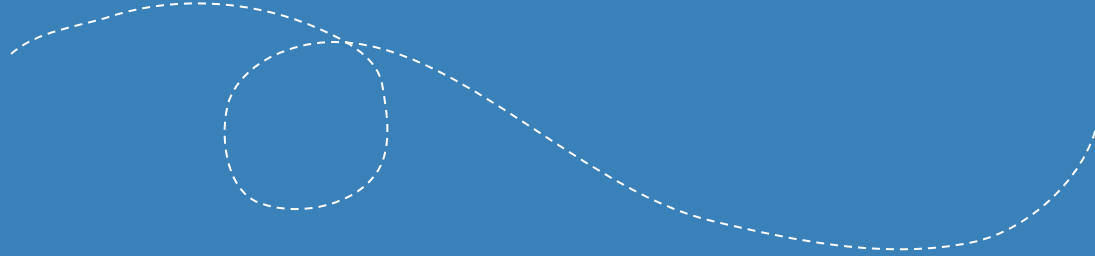


*Emag Apartments
Pty Limited v
Inner West
Council [2022]
NSWLEC 1042*



Commissioner Horton:

*“[38] While I have some sympathy for the Applicant’s submission at [35]-[38], as the wording of the savings provision **does not expressly preclude** operation of the provisions contained in the Housing SEPP, and because no inherent inconsistency arises from the operation of both SEPPs, being in similar terms, **I reluctantly accept the Respondent’s argument that consideration must be given to the provisions of both the SEPP ARH and the Housing SEPP.**”*



Other decisions in the Land and Environment Court



Commissioner Gray

- *HDH Investments Pty Ltd v Randwick City Council* [2021] NSWLEC 1761
- *Pertama Development Pty Ltd v Waverley Council* [2021] NSWLEC 1785

Acting Commissioner Clay

- *Chan v City of Canada Bay Council* [2021] NSWLEC 1782

Commissioner Chilcott

- *BL2093 Pty Ltd v Northern Beaches Council* [2021] NSWLEC 1784
- *United Equity Group and Pindaro Pty Limited v Northern Beaches Council* [2021] NSWLEC 1768

State Environmental Planning Policy (Housing) **Amendment** (Miscellaneous) 2022

Published 18 March 2022

“Schedule 7A Savings and transitional provisions

1 Definitions

In this Schedule—

commencement date means the day on which this Policy commenced.

repealed ARH SEPP means *State Environmental Planning Policy (Affordable rental Housing) 2009 as in force immediately before its repeal.*

repealed instrument means an instrument repealed under Chapter 1, section 10.

repealed Seniors SEPP means *State Environmental Planning Policy (housing for Seniors or People with a Disability) 2004, as in force immediately before its repeal.*

2 General savings provision

(1) *This Policy does not apply to the following matters:*

- (a) *a development application made, but not yet determined, on or before the commencement date,*
- (b) *a concept development application made, but not yet determined, on or before the commencement date,*
- (c) *a staged development application made subsequent to a concept development application approval granted on or before the commencement date,*
- (d) *a development consent granted on or before the commencement date,*
- (e) *an environmental impact statement prepared in compliance with an environmental assessment requirement that is—*
 - (i) *issued by the Planning Secretary on or before the commencement date, and*
 - (ii) *in force when the statement is prepared.”*

- (f) *the carrying out of an activity after the commencement date if—*
 - (i) *notice of the activity has been given to the council under the repealed ARH SEPP, clause 40A(2), and*
 - (ii) *an approval required under the Act, Part 5 for carrying out the activity is granted by the determining authority before 26 November 2022.*
- (2) *The provisions of a repealed instrument, as in force immediately before the repeal of the repealed instrument, continue to apply to a matter referred to in subsection (1).*



Is ‘determined’ the same as ‘finally determined’?

2 General savings provision

(1) *This Policy does not apply to the following matters:*

- (a) *a development application made, but not yet **determined**, on or before the commencement date,*

For savings provisions, it is usual to include words to the following effect:

*“if a development application has been made before the commencement... and the application has not been **finally** determined before that commencement...”*

The inclusion of the word “finally” is intended to protect the application of the savings provision to a development application that is reviewed or appealed after its determination.

*Jokona Pty Ltd
v Liverpool City
Council* [1997]
NSWLEC 17



Justice Bignold:

*“The answer to the question depends upon the proper interpretation to be given to the expression “if the application was made but had not been determined before the appointed day” appearing in cl.4(2) of the draft LEP. In the present case, the development application was determined by the Council when it refused development consent on 14 June 1996 in the exercise of its power so to do conferred by s.96(2) of the EP&A Act. **Does this fact deprive the development application of the benefit of the savings provision contained in cl.4(2)?***

I think the answer must be that it does.”

Standard savings provision

“If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced”

Consideration as a draft instrument?

Environmental Planning and Assessment Act 1979

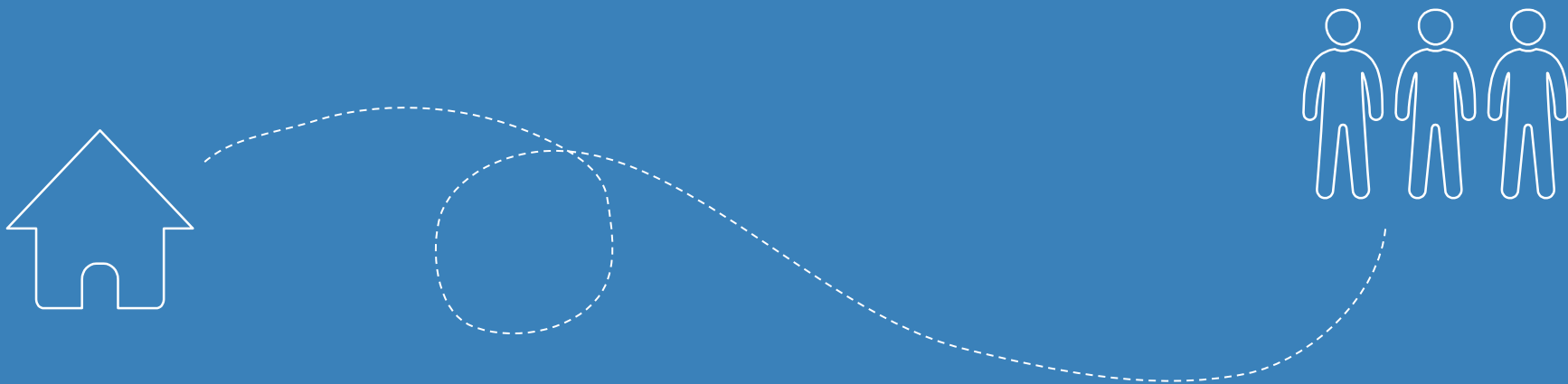
“4.15 Evaluation

(1) Matters for consideration – general In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application –

- (a) The provisions of –*
- (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and ...*



Consideration of the Housing SEPP would not be a mandatory consideration under section 4.15(1)(a)(ii) because the savings provision in the SEPP does not set the planning framework fictitiously back to a point in time where the SEPP would have been a draft instrument



Boarding Houses and Co-Living Housing

(boarding houses taken out of R2 zone, co living not inserted – opt in) – See amendment to standard instrument which has a savings provision clause 8.

New Standard Instrument Definitions



co-living housing means a building or place that—

- (a) has at least 6 private rooms, some or all of which may have private kitchen and bathroom facilities, and
- (b) provides occupants with a principal place of residence for at least 3 months, and
- (c) has shared facilities, such as a communal living room, bathroom, kitchen or laundry, maintained by a managing agent, who provides management services 24 hours a day,

but does not include backpackers' accommodation, a boarding house, a group home, hotel or motel accommodation, seniors housing or a serviced apartment.

Note— Co-living housing is a type of **residential accommodation**—see the definition of that term in this Dictionary.



boarding house means a building or place—

- (a) that provides residents with a principal place of residence for at least 3 months, and
- (b) that contains shared facilities, such as a communal living room, bathroom, kitchen or laundry, and
- (c) that contains rooms, some or all of which may have private kitchen and bathroom facilities, and
- (d) used to provide affordable housing, and
- (e) if not carried out by or on behalf of the Land and Housing Corporation—managed by a registered community housing provider,

but does not include backpackers' accommodation, co-living housing, a group home, hotel or motel accommodation, seniors housing or a serviced apartment.

Boarding Houses and Co-Living Housing in the R2 Zone



Part 2 Development for affordable housing

Division 2 Boarding houses

23 Boarding houses permitted with consent

- (1) Development for the purposes of boarding houses may be carried out with consent on land **on which development for the purposes of boarding houses is permitted** with consent under another environmental planning instrument.
- (2) Development for the purposes of a boarding house **must not be carried out on land in Zone R2 Low Density Residential** or an equivalent land use zone unless—
 - (a) for land in the Greater Sydney region—the land is within an accessible area, or
 - (b) otherwise—all or part of the boarding house is within 400m walking distance of land in Zone B2 Local Centre or Zone B4 Mixed Use, or an equivalent land use zone.

Part 3 Co-living housing

67 Co-living housing may be carried out on certain land with consent

Development for the purposes of co-living housing may be carried out with consent on **land in a zone in which development for the purposes of co-living housing, residential flat buildings or shop top housing is permitted** under another environmental planning instrument.

Example—

Co-living housing may be used as off-campus student accommodation.

Changes to the Standard Instrument Land Use Table



Boarding Houses removed from the R2 Zone



Co-living Housing not inserted into the R2 Zone – Councils must “opt in”

On 26 November 2021, the Standard Instrument (Local Environmental Plans) Amendment (Miscellaneous) Order 2021 commenced and amended the Land Use Table, Zone R2 to omit “boarding houses” from item 3.

The Standard Instrument (Local Environmental Plans) Amendment (Miscellaneous) Order 2021 does not contain a savings provision.



What if a
development
application for a
boarding house in
an R2 Zone was
lodged before
SEPP Housing
came into force?



Savings Provision

Clause 8(1) of the Standard Instrument (Local Environmental Plans) Order 2006 contains the following savings provision:







*“(1) The amendments made by an amending order **do not apply** to or in respect of any development application that was made, but not determined, before the commencement of the amending order.”*

As a consequence, the Standard Instrument (Local Environmental Plans) Amendment (Miscellaneous) Order 2021 do not apply to a development application which was lodged, but not determined, before 26 November 2021.

Development standards in SEPPs can be varied using clause 4.6 of the relevant LEP

Non-Discretionary Standards for Boarding Houses

Clause 24 of the Housing SEPP

-  *Floor space ratio bonus of 25% in zones where RFBs permitted OR maximum floor space ratio for residential accommodation on the land*
-  *Minimum landscaping requirements in Zones R2, R3 and R4 in accordance with the a “**relevant planning instrument**”*
-  *Minimum solar access requirements*
-  *Minimum areas and dimensions for communal living areas for boarding houses with more than 6 rooms*
-  *Minimum areas and dimensions for communal open space*
-  *Minimum number of parking spaces*

Matters that
the consent
authority
must be
satisfied of

Standards for Boarding Houses






Clause 25(1) of the Housing SEPP

- ✓ *Minimum and maximum floor areas for boarding rooms*
- ✓ *Maximum of 2 occupants per boarding house*
- ✓ *Access to adequate bathroom, kitchen and laundry facilities*
- ✓ *Maximum of 12 boarding rooms in the R2 Zone*
- ✓ *Restriction of the ground floor use in business zones*
- ✓ *Minimum of 1 communal living area for boarding houses with 6 boarding rooms*
- ✓ *Minimum lot size requirements*

Matters
which a
consent
authority
must
“consider”

Standards for Boarding Houses

Clause 25(2) of the Housing SEPP

-  *Compatibility with the character*
-  *Minimum front, side and rear setbacks for Zones R2, R3 and R4*
-  *Compliance with the separation distances in the ADG for boarding houses 3 storeys or more*
-  *Minimum motorcycle parking spaces*
-  *Minimum bicycle parking spaces*

Development standards in SEPPs can be varied using clause 4.6 of the relevant LEP

Non-Discretionary Standards for Co-living Housing

Clause 68 of the Housing SEPP

- ✓ *Floor space ratio bonus of 10% in zones where RFBs permitted OR maximum floor space ratio for residential accommodation on the land*
- ✓ *Minimum landscaping requirements in Zones R2, R3 and R4 in accordance with the a “**relevant planning instrument**”*
- ✓ *Minimum areas and dimensions for communal living areas for co-living housing (with 6 private rooms and with more than 6 private rooms)*
- ✓ *Minimum areas and dimensions for communal open space*
- ✓ *Minimum number of parking spaces*

Solar access requirements relating to co-living housing are matters for “consideration” only

Matters that
the consent
authority
must be
satisfied of

Standards for Co-living Housing







Clause 69 of the Housing SEPP

- ✓ *Minimum and maximum floor areas for private rooms*
- ✓ *Minimum lot size requirements*
- ✓ *Maximum of 12 private rooms in the R2 Zone*
- ✓ *Manager workspace requirements*
- ✓ *Restriction of the ground floor use in business zones*
- ✓ *Maximum of 2 occupants per private room*
- ✓ *Access to adequate bathroom, kitchen and laundry facilities*

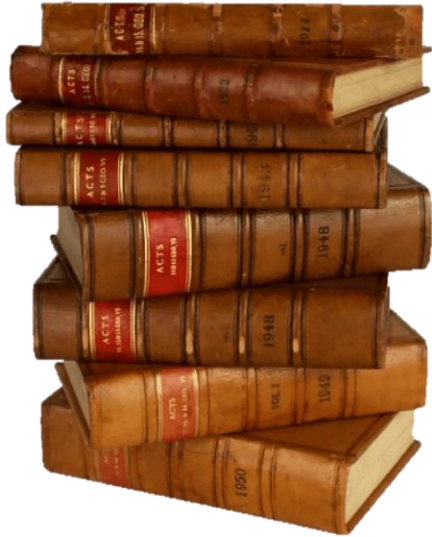
Matters
which a
consent
authority
must
“consider”

Standards for Boarding Houses

Clause 69(2) of the Housing SEPP

-  *Compatibility with the character*
-  *Minimum front, side and rear setbacks for Zones R2, R3 and R4*
-  *Compliance with the separation distances in the ADG for co-living housing 3 storeys or more*
-  *Minimum solar access requirements*
-  *Minimum motorcycle parking spaces*
-  *Minimum bicycle parking spaces*

“



relevant planning instrument means an environmental planning instrument, other than this Policy, or a development control plan, if any, that applies to the land on which the development will be carried out.

Thank you very much for your time

