

# **Submission**

## **Draft NSW Housing Code and NSW Commercial Building Code for exempt and complying development**

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# SUBMISSION

## DRAFT NSW HOUSING CODE AND COMMERCIAL BUILDING CODE FOR EXEMPT AND COMPLYING DEVELOPMENT

### Introduction

The Local Government Association of NSW and Shires Association of NSW (the LGSA) welcome the opportunity to provide comment on the draft NSW Housing Code and the draft Commercial Building Code, and appreciate the decision to place the codes on public exhibition. The LGSA represent the 152 general purpose councils in NSW, all of which will be impacted by the implementation of the mandatory state wide codes for exempt and complying development.

Our submission raises some significant concerns with the approach taken by the Department of Planning in the development of the codes, the likely impact of the codes on councils and their communities and some key issues with the content of the codes.

### Background

The *Environmental Planning and Assessment Act* allows certain categories of development to be **exempted** from planning controls. The Act also provides for two types of development control:

- a *qualitative* control that requires a judgement to be made or a discretion to be exercised. These developments follow a merit assessment track and are regulated by councils under Part 4 of the Environmental Planning and Assessment Act.
- an objective or *quantitative* control based on a definition and measurement. A development either fits the definition and measurement, or it doesn't. This type of development is suitable for assessment under a **complying track**.

For complying development the current system allows owners to employ their own private certifiers or to apply to council to provide a certificate that the proposed development complies with a set of quantitative measurable criteria. Currently the State Government has identified certain classes of development as exempt or complying under SEPP (State Environmental Planning Policy) 60 - Exempt and Complying Development. These classes of development have been expanded by many councils, underpinned by their own locally developed codes. The State Government is now proposing to impose a mandatory set of exempt and complying codes that will apply across all council areas.

Generally it is accepted that exempt development should:

- have low impact beyond the site;
- be simple for applicants to identify;
- have quantifiable parameters that need to be met; and
- not affect the achievement of any policy objective.

Complying developments should:

- be assessed against clearly articulated quantitative criteria or development standards;
- require no judgement as to whether the criteria are met; and
- due to their small scale and low impact, not require public notification.

Consent is only available to applications that comply with the present criteria.

## General Concerns with the Codes

The LGSA support measures to widen exempt and complying provisions for appropriate development types. However the LGSA oppose the mandating of state wide standard categories of complying development as such measures:

- Override local context and are often 'out of step' with local planning objectives and standards.
- Are 'broad brush' and lower planning performance standards by overriding environmental, planning and heritage controls applicable to precincts and localities.
- Are often too prescriptive and discourage diversity and innovation in design.
- Reduce the opportunities for local residents to have a say in the development process.
- Expand the role of private certifiers even though new controls to improve the accountability and probity of the certification system have yet to be introduced and are untested.
- Increase the potential for errors and omissions in the certification process.

Developing a uniform set of state-wide codes to apply to areas as diverse as Bourke, Blacktown and Bondi is a challenge – this is evident by the length and complexity of the draft housing code and feedback from councils which shows that the codes, as drafted, will not achieve their objectives of simplifying and speeding up the system or will do so only by compromising or negating planning outcomes already achieved at the local level.

Some examples:

- In some councils, particularly in rural areas, the draft codes are more restrictive than council's existing residential codes and will therefore reduce (rather than increase) the amount of development that can be considered under the complying track.
- The draft codes will allow development that is significantly out of character with the existing neighbourhood e.g. in an area characterised by large lots with smaller houses set amongst bushland, the draft codes will enable larger homes to be built with the resultant loss of vegetation. Existing intact and historic streetscapes – not protected by heritage controls –potentially will be lost.
- The codes limit the opportunity for urban renewal and reduce the capacity of a council to change the desired shape and form of neighbourhoods e.g. in a middle ring suburb in Sydney, council wishes to encourage new houses to be built with a larger areas of private open space to the rear of dwellings, replacing existing small fibro houses that are set well back from the street. However as the building line in the codes is set in reference to existing adjoining houses, changes to the housing characteristics of this area cannot be achieved under the codes.

As well as being able to interpret the codes, applicants will need to read the codes in conjunction with a yet-to-be drafted State Environmental Planning Policy (Exempt and Complying Codes) 2008 that will contain general limitations, common definitions and provisions and areas excluded from the codes e.g. environmentally sensitive lands. The SEPP may or may not allow local variations to the codes or the option for some councils to be excluded from the general provisions. This is all unknown and results in speculation and at times inconsistent feedback from the Department staff.

The SEPP will provide the context for the implementation of the codes and establish the legal framework for the codes to be applied. It is vital that councils be given the opportunity to review the whole package of exempt and complying codes including the SEPP to assess the proposed impacts.

## Key concerns with the NSW Housing Code

The currently exhibited draft NSW Housing Code is the first in a series of codes to apply to residential and rural zones across the state. The current draft code applies in residential and rural zones to sites over 600 m<sup>2</sup> for:

- new single storey dwelling houses,
- alterations and additions to single storey dwellings;
- internal fit outs of two storey houses.

The draft housing code also lists 44 types of exempt development in residential and rural zones.

This code is the first in a series of codes that are to be developed for a variety of housing types and lot sizes. Future codes will cover single, two storey and terrace houses and duplexes on lots that are 450-600 m<sup>2</sup> and 200-450 m<sup>2</sup>.

Some of the key concerns with the codes, as drafted, include:

### ***The codes do not integrate with local plans and controls***

The draft complying codes will operate without reference to councils' current planning and development controls (found in Development Control Codes and Local Environmental Plans). This is because the codes adopt development standards rather than a performance based approach to development; that ignores the existing merit based assessment track and the associated comprehensive planning controls in each council.

The NSW Housing Code is written as an almost stand-alone document that attempts to overcome the lack of planning context and objectives by including a chapter on 'Principles of good housing design'. This section details a set of key principles and, under each principle, objectives and guidelines. These objectives are irrelevant to a quantitative assessment.

The inclusion of this section adds considerably to the length of the document but, because it is state wide and so general it is of limited use in promoting good design and development and fails to relate to the existing planning objectives at local government level.

The housing codes may assist efficiency (if revised) but they will not be effective in terms of achieving the best design solution for a particular site. The advantages will be with the proliferation of standard house designs that meet standard controls, rather than with buildings specifically designed for a particular site to maximise land use, and ensure sustainable design that address site specific and neighbours rights. The codes ignore density issues and assume that the zoning and lot site determine the planning standards.

The current codes are only suitable for homogenous suburbs such as certain low density residential release areas, where there the debate on density, housing typology, character or context has been resolved, and the land is not affected by environmental or heritage issues.

In contrast to what is proposed, other states and model codes approach this issue by having a residential code that includes development standards based criteria alongside performance based criteria. The Australian Model Code for Residential Development (AMCORD), developed in 1997 provides a model for the development of residential codes and notes that:

- setting the context for the codes is critical to their proper interpretation – structure planning and precinct planning provide the context for the application of appropriate densities; and
- codes should present both standards based and merit based tracks for assessment in the same document.

The advantage of this model is that complying and merit based assessment tracks are presented side by side, which enables applicants to better understand and appreciate the planning context of their site and to select the appropriate or desired track (complying or merit based) when developing a site .

The R-Codes in Western Australia appear to adopt a similar approach to AMCORD. The R-codes include both tracks for complying and merit assessment in the same document and reference the density of the land, rather than relying just on the lot size. The densities, set by council in consultation with communities, provide the framework to determine the objectives and corresponding performance and development standards for the site.

This approach could readily be adapted for use in NSW, particularly as a large number of councils utilise web based tools (including mapping and on-line documents) to provide planning and development information to applicants. Such an approach would also allow for the ready incorporation of local variations into the standard code without undermining the benefits of standardisation.

Further discussion, including a discussion paper, on the implementation of the codes is recommended to canvass the various options for integrating the codes more fully into local planning frameworks. This needs to be resolved before further work is undertaken on the detailed content as the approach affects the way the content is shaped, especially in relation to exclusions and variations.

#### ***The draft housing code is overly complex and difficult to understand***

The draft code is lengthy, complex and difficult to read. The draft housing code runs to 132 pages. By way of contrast, the recently released draft South Australian Residential Development Code is 18 pages in length. The layout of the codes (with no sequential numbering or page reference to different sections) also makes the document difficult to read.

The checklist of information required to be submitted with the complying development application is extensive and exceeds the existing information for Complying Development Certificates and Development Applications required by a number of councils. The information requirements should be limited and the listing replaced by a standard form that applicants could download from council websites.

The use of the language 'exempt' and 'complying' is not understood by the average person and is likely to be confusing as many council codes use the word complying in reference to their Development Control Plans. The names of the codes are also misleading as applicants may not understand that, should their design not comply with the codes, they will be required to meet the residential housing codes for their local area under a DCP and lodge a development application with council.

#### ***The scope of the codes is too extensive***

The complete series of codes (approximately 15 codes in all) are designed to meet an arbitrarily set target of 50% of applications being assessed under the complying development track. Thus the codes are being developed to meet a numerical target, rather than on the basis of the appropriateness of the development type for a complying track. The wide scope of the code means that:

- Development that would otherwise be considered more appropriate for a merit assessment will be included in the complying code track.
- The codes will become unnecessarily complex and cumbersome, particularly as more types of development and the codes for smaller lot sizes are developed.
- The more complex the codes the greater potential there is for errors and omissions in the certification process.
- The more complex the codes the more likely that applicants will choose the merit based assessment track.

- It is not clear how the codes are to apply to environmentally sensitive land, bushfire prone land, heritage conservation areas and other areas.
- There will be less opportunity for residents to express legitimate concerns about adjoining developments.
- The cumulative impact of numerous exempt developments that will be allowed on the one site will negatively impact on neighbours.

### ***Fixed in time approach***

The NSW Housing Code, as drafted, generally sets the building line (set back from the road) for new dwellings based on a numerical standard or the setback of existing adjoining dwellings. This will severely limit the potential for councils to encourage the renewal of existing suburbs to localities with a different form and design to that which currently exists.

Similarly, it will be difficult for councils and communities to retain relatively intact historical streetscapes that are not specifically protected by heritage controls that do not conform with the proposed building alignment and other standard controls.

### ***Exempt development***

The cumulative impact of numerous exempt developments needs to be considered. The codes, as drafted, place no limits on the number or type of allowable exempt developments on the one site, which could significantly impact on neighbour amenity.

### **More detailed concerns**

- Exclusions- it is unclear how these will apply and whether they will apply universally across all council areas, by Local Government Area or particular localities or sites within Local Government Areas. The wording of the exclusions needs to be clarified, including such words as 'difficult sites'.
- Other planning instruments – the relationship between the codes and Regional and State Environmental Planning Policies needs to be addressed.
- Local variations – it is not clear how local variations will be incorporated into the codes, how applications for local variations will be determined (criteria, process) and how applicants will find out whether their site is subject to a variation or is excluded from the codes.
- Opting out – a number of councils have indicated that their current codes already achieve very high take up rates for complying development that meet the Government's targets, or are very close to those targets, and have indicated that the proposed codes will lower those figures. Where councils can demonstrate that their existing codes are likely to achieve higher levels of complying development, will they be able to 'opt out' of the standard codes? Will these be such provisions in the SEPP?
- Some of the standards in the codes need to be reviewed, including:
  - The issue of views has been ignored and appropriate application of the view sharing principle needs to be considered. The appearance of dwellings from the water has also been overlooked – both standard local planning controls.
  - Environmentally sensitive land – The definitions under councils' LEPs and DCPs do not match what is proposed. Either these lands need to match what is included in section 149 Certificates or referred to on a map.
  - Swimming pools, bed and breakfast activities, small dams and rural sheds have been inadequately addressed;
  - The codes fail to consider landscape, open space and deep soil controls;
  - Bushfire prone land – although currently excluded from the codes the intent is to include this land subject to a system of certification that is unresolved and not explained to councils. More information on the proposed system needs to be given to councils for feedback.
  - More detail on services needs to be included to cover rural and regional issues.

- Floor Space Ratio – Whether an FSR should be used to control two storey development is unresolved.
- How development contributions are to be managed is unclear.

## **Key concerns with the Commercial Building Code**

The draft NSW Commercial Building Code applies in business and industrial zones and provides for:

- 39 types of exempt development; and
- 3 categories of complying development – change of use of building and internal fit-out and alterations (commercial and industrial uses) and advertising structures.

The LGSA believe that the Commercial Code, as drafted, is fundamentally flawed and unworkable in its current form. It does not properly consider the extent and variety of commercial and industrial building types, ranging from simple and small scale developments categorised as exempt development through to more complex types of development being considered under the complying track. It is recommended that the code be reviewed in light of Local Government comments and stakeholder feedback.

## **Problems with process**

The LGSA also have a number of issues of concern in relation to the timetable and process for the development of the codes.

### *The timeline is unrealistic*

The Department has indicated (informally) that the housing codes would be in place by the end of 2008. The LGSA would like to see information provided to all stakeholders so they can better understand the timeframe and process (public exhibition, trials etc) for the development of each of the proposed codes.

The short timeline to produce and review the codes is considered unrealistic and unnecessary, particularly given the scope and extent of the proposed exempt and complying codes. This work takes time to 'get right' and it is important that the Department ensures there is sufficient time for this exercise to be undertaken properly and with Local Government input. The first set of codes will establish the approach and the principles that will underpin the standards – it is therefore important that adequate time is taken to get this right, particularly as subsequent codes will cover sites as small as 200 m<sup>2</sup>.

### *The trial*

It is recognised that the Department of Planning has supported a trial of the codes on eleven councils. This is a constructive means of obtaining informed feedback and councils expect to be involved in an on going capacity in reviewing future codes. The LGSA would support the continuation of the trial for future codes.

### *The CDEP*

The role and responsibilities of the Complying Development Expert Panel (CDEP) need to be reviewed. The CDEP should have:

- A consistent membership as continual changes in membership limits its usefulness.
- Agenda and minutes from each meeting should be made available to all members.
- Greater clarity is needed about the role of members in providing advice on policy and technical matters.
- The role of the CDEP in approving local variations needs to be clarified.