

Environment and Planning Update

July 2015



NSW Court decision settles apartment size approval concerns

On 30 July 2015, the Land and Environment Court of NSW handed down the decision in *Botany Development Pty Ltd v Council of the City of Botany Bay (No 3)*. Any development application lodged with a council prior to 17 July 2015 will be caught by the transitional provisions of the amendment to SEPP 65, and will be assessed in accordance with these decisions, and the relevant planning controls.

In approving the 154 unit residential development, the decision marks the end of any remaining speculation about the apartment sizes to be applied in conjunction with the State Environmental Planning Policy 65 – Design Quality of Residential Flat Buildings, and how consent authorities will assess development that will still be subject to the, now repealed, Residential Flat Design Code, due to the transitional provision in the amended SEPP 65. It concludes an ongoing dispute between the applicant and Council which commenced in Court on 20 May 2013.

BACKGROUND – THE APPEAL DECISION

Earlier this year we wrote about the Court's decision on 9 April 2015 in *Botany Development Ltd (No 2)*, which concerned Council's appeal of the Commissioner's original decision approving the development. The Court determined that the apartment size Rules of Thumb in the Residential Flat Design Code (RFDC) so often relied upon by developers, were not the relevant recommended apartment sizes referred to in the State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Buildings. Developers had to comply with the more prescriptive table on page 69 of the RFDC to receive the benefit of CI 30A of SEPP 65 and ensure Council could not refuse consent based on apartment size. The ability to be able to rely on CI 30A is particularly significant in the few local government areas that have maintained minimum apartments sizes under their respective Development Control Plan. The matter was remitted for the Commissioner to determine accordingly.

INDUSTRY REACTS AND SO DOES MINISTER FOR PLANNING

Prior to the remittal hearing, the property and development industries reacted to the appeal decision on the basis that it clouded the future of residential flat buildings in uncertainty as to apartment sizes allowed and represented a significant road block to achieving affordable housing. It followed that there was a push to resolve and implement long awaited amendments to SEPP 65 which included an overhaul of the RFDC which was to be replaced by the Apartment Design Guide.

The Hon. Rob Stokes MP, Minister for Planning responded with a media release on 15 May 2015 stating so called "minimum apartment sizes" that would shortly be introduced pursuant to the Apartment Design Guide, and in fact became effective on 17 July, 2015.

IMPACT OF APPEAL DECISION EXAGGERATED?

As was previously written, the appeal decision did not mean that Councils could not and would not approve unit sizes smaller than those outlined in the RFDC table. Nonetheless, without the application of Cl.30A of SEPP 65, Council had the discretion to refuse a development based on the Rules of Thumb sizes. It was clearly the concern of industry groups that this could become the practice of consent authorities. The recent decision of the Court has settled this concern, showing that developments could still be approved where they did not comply with the minimum apartment sizes table in a council's DCP and the RFDC.

REMITTAL HEARING

The central issue to be determined in the remittal hearing related to the unit sizes in the proposed development. The Court considered the controls and objectives under Council's Development Control Plan, the RFDC table, the RFDC Rules of Thumb and pursuant to the Apartment Design Guide. By way of comparison each document provided the numerical requirements as per below.

NONCOMPLIANCE WITH NUMERICAL REQUIREMENTS

In the evidence presented it was found the units did not satisfy the numerical requirements of the DCP in relation to apartment sizes. There was disagreement between parties as to how many units complied with the Table in the RFDC table, but it was agreed the development was not fully compliant with the RFDC table.

NO SUCH THING AS MINIMUM APARTMENT SIZE – AN EMPHASIS ON THE OBJECTIVES

Despite the numerical non-compliance with the DCP and the minimum apartment sizes in the RFDC, the Court accepted that the design of the units meant they were still capable of providing future residents with a high level of amenity. Most of the identified differences between the proposal and the RFDC table were small and had no effect on the amenity of the units, and would not affect their utility. The Commissioner noted the development satisfied the relevant objectives in the DCP and RFDC and found that the internal and external size of the units was not a reason to refuse the application.

UNIT SIZE COMPARISONS

Apartment Type	Minimum area table RFDC, p 69	Minimum area Rules of Thumb	Minimum area DCP	Apartment Design Guide
Studio	38.5 m ²	n/a	60 m ²	35m ²
50m ²	For cross through - 50 m ² For maisonette/loft - 62 m ² For single aspect – 63.4 m ²	50m ²	75 m ²	50m ²
2 bedroom	For corner - 80 m ² For cross through - 89 m ² For cross-over - 90 m ² For corner with study - 121 m ²	70m ²	100m ²	70m ²
3 bedroom	124 m ²	95m ²	130 m ²	90m ²

Therefore, notwithstanding the appeal decision regarding the DCP, the Rules of Thumb, and relevant minimum size to be applied in conjunction with SEPP 65, the Court still approved the development based on compliance with the objectives set out in the planning code.

STATUS AND RELEVANCE OF THE AMENDMENTS TO SEPP 65 AND INTRODUCTION OF THE APARTMENT DESIGN GUIDE

For future matters, it is noted that the SEPP 65 amendments have been gazetted which introduced the Apartment Design Guide and Cl. 6A which states Development control plans cannot be inconsistent with the Apartment Design Guide.

In this case, the Court did not agree that the amendments and the Apartment Design Guide which had come into effect were a mandatory consideration pursuant to s79c(1)(a)(ii) and applied the transitional provision. However they did:

Clearly establish the direction that the State government has established for the development of apartment buildings. The reliance on council development control plans has been reduced by the inclusion of cl 6A and the standards in the ADG and some weight must be given to this clear change of direction for the design of apartment buildings.

Due to its conclusions regarding adherence to the objectives of the apartment size provisions in the DCP and RFDC, the Court "had no need" to give any weight to SEPP 65 amendments

and the Apartment Design Guide, in concluding the proposed development was acceptable. Nonetheless it noted, the same application submitted after the coming into effect of the amended SEPP 65 and the Apartment Design Guide would satisfy the numerical requirements.

GOING FORWARD

The decision is particularly relevant for development applications currently before consent authorities that will still be subject to the RFDC pursuant to the transitional provisions of the amended SEPP 65. In these matters, strict compliance with the RFDC table on page 69, is not absolutely necessary where it can be demonstrated that the proposal satisfies the objectives of the relevant parts of the planning code. A case by case analysis is appropriate, with reference to the particular apartment designs, and compliance with other provisions of the RFDC. Additionally, whilst the transitional provision applies, although the Apartment Design Guide may not necessarily be mandatory consideration under the Act, recognition must be given to the clear change of direction to apartment design, particularly in terms of unit size, that the document embodies.

Developers and consent authorities alike can now breathe a sigh of relief, not only because of the certainty that has come with gazettal of the amended SEPP 65 and the introduction of the Apartment Design Guide but with the clarity provided in relation to developments that will be subject to the transitional provisions.

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