

# Environment and Planning Update

April 2015



## Court rules on minimum apartment size standards for NSW developments

On 9 April 2015, the Land and Environment Court handed down its decision in *Botany Bay City Council v Botany Development Pty Ltd (No 2)* ruling that when Council standards conflict with State standards in relation to apartment sizes, a new more restrictive set of State standards would apply.

The decision casts uncertainty in relation to what minimum standards should now be used by developers, particularly where there are otherwise no standards set by the relevant Council.

### BACKGROUND TO DECISION

The matter involved an appeal from a Commissioner's decision approving the construction of a 6 storey residential development, containing 158 units. The apartments did not comply with the Development Control Plan (DCP) minimum apartment size requirements; however the Commissioner relied upon s.30A of the State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Buildings (SEPP 65) to determine that "unit size" could not be a reason for refusing consent. Clause 30A(1)(b) states:

- (1) A consent authority must not refuse consent to a development application for the carrying out of residential flat development on any of the following grounds:
- (b) apartment area: if the proposed area for each apartment is equal to, or greater than, the recommended internal area and external area for the relevant apartment type set out in Part 3 of the Residential Flat Design Code

Part 3 of the Residential Flat Design Code (RFDC) contains Rules of Thumb for apartment design, as well as a stricter table of minimum internal and external areas.

The standards applied by the Court in the first instance were the Rules of Thumb under the RFDC which state less restrictive minimum apartment sizes for 1, 2, and 3 bedroom apartments than the DCP.

### ISSUES ON APPEAL

The appeal related to the interpretation and application of cl.30A(1)(b). Despite the Court accepting the RFDC may have been drafted with the intention that the "recommended minimums" were the Rules of Thumb, it agreed with the appellant Council that the relevant minimums to be applied were those located in a separate table on page 69 of the RFDC.

## UNIT SIZE COMPARISONS CONSIDERED BY THE COURT

Apartment Type	Minimum area table RFDC, p 69	Minimum area Rules of Thumb	Minimum area DCP
Studio	38.5 m2	n/a	60 m2
One bedroom	For cross through - 50 m2 For maisonette/loft - 62 m2 For single aspect – 63.4 m2	50m2	75 m2
2 bedroom	For corner - 80 m2	70m2	100m2
	For cross through - 89 m2 For cross-over - 90 m2 For corner with study - 121 m2		
3 bedroom	124 m2	95m2	130 m2

In concluding that the “recommended internal and external areas” referred to in Cl.30A(1)(b) were those found in the table on page 69 of the RFDC, the Court held the Commissioner had erred by allowing the development because it complied with the Rules of Thumb.

### STATUS OF RULES OF THUMB IN QUESTION

The decision provides clarity in relation to the operation of SEPP 65 and the RFDC minimum standards to be applied in relation to unit size, particularly where there is a conflict with Council’s standards. Accordingly, a consent authority cannot refuse consent to a development application for a residential flat development if it complies with table on page 69 of the RFDC. Developers can no longer rely on the Rules of Thumb to receive the benefit of Cl.30A and overcome standards in the relevant DCP.

However, the uncertainty lies in relation to whether Councils that do not have DCP standards in relation to unit sizes, will now treat non-compliance with the table in the RFDC as a reason for refusal in its own right. The decision does not necessarily mean that Councils cannot and will not approve unit sizes smaller than those outlined in the table. Nonetheless, without the application of cl.30A, Council will have the discretion to refuse development based on the

Rules of Thumb sizes. It is the concern of industry groups that this will become the practice of consent authorities.

Therefore, the decision has been met with criticism from the industry for overturning long standing practice, and harming affordability of apartments. Arguments have been made that ramifications will increase the average size and cost of apartments throughout NSW. This may be true for Local Government Areas where the DCP applies minimum unit sizes that are greater than the Rules of Thumb – which includes, as in this recent case, Botany Bay Council.

### RENEWED PUSH TO SOLVE UNCERTAINTY

In light of the decision, there appears to have been a renewed push for the State Government to finalise and implement the currently draft SEPP 65 which has remained relatively dormant since it was released for public comment in September 2014.

The proposed amendments package would see the current RFDC replaced by the Apartment Design Guide (**ADG**). The ADG will introduce a number of important changes relevant to the construction of residential flats, including minimum apartment sizes which would replace both the table and Rules of Thumb in the RFDC.

## PROPOSED ADG STANDARDS V CURRENT RFDC STANDARDS

Apartment type	Proposed minimum Size	Proposed external minimum size	Current minimum (depending on layout)	Current external minimum size
Studio	35 m2	N/a	38.5 m2	6 m2
1 bedroom	50 m2	8 m2	50 m2 – 63.4 m2	8 m2 – 10 m2
2 bedroom	70 m2	10 m2	80 m2 - 121 m2	11 m2 - 33 m2
3 bedroom	95 m2	12 m2	124 m2	24 m2

The proposed minimum sizes are mostly identical to the current Rules of Thumb. This one set of minimum standards would therefore appear to resolve all uncertainty and concern in relation to what unit sizes should be applied. In relation to development occurring where strict Council standards apply, in light of this recent case, the proposed amendments are now more significant than ever.

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