

19 December 2018

Ms Carolyn McNally
Secretary
Department of Planning
320 Pitt St
SYDNEY NSW 2000

Dear Ms McNally,

Amendments to SEPP 70

UDIA welcomes the opportunity to comment on the extension of SEPP 70 and the accompanying *Draft Guideline for Development an Affordable Housing Contribution Scheme* (draft Guideline).

UDIA NSW has extensively looked at Social and Affordable Housing issues and has convened a Taskforce of 20 industry leaders in 2018 to look at how to deliver social and Affordable Housing in a way that does not diminish housing supply more broadly. We understand the government is seeking to deliver this objective, we believe a range of measures is needed so as to not unnecessarily burden the development sector.

We are disappointed with the limited time for consultation for such a significant and fundamental change to a SEPP, and request that the consultation period be extended. The 30 November to 19 December period, 21 days during this time of year, means that many in the industry are unable to fully consider the implications of the proposal and engage with this change.

Broadly, the Guideline and the SEPP seems more focused on urban renewal, we would be pleased to work collaboratively with the Department and the Greater Sydney Commission on developing workable solutions for greenfield land.

Our submission is structured in three parts:

1. Comments on the Explanation of Intended Effect (**EIE**) of extending SEPP 70 to all local government areas, which UDIA opposes.
2. Comments on the draft Guideline, which we support although recommend some improvements.
3. Recommends legislative change to enable VPAs to exclude affordable housing contributions.

Explanation of Intended Effect

UDIA notes the Greater Sydney Region Plan Objective 11 is for more diverse and affordable housing and includes a 5-10% target subject to viability. UDIA does not support punitive measures to achieve an Affordable Housing Target, we believe incentives are a key part of the conversation and mix of initiatives that need to occur.

We applaud the work the government has done in developing a viability tool, we understand the intent is to release the tool and assumptions for industry review and

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understanding. Giving industry this opportunity will help provide certainty, and meaningfully adopting industry feedback will help promote acceptability within the industry of the viability tool.

State wide application

Section 7.32(1) of the Act provides that the power to impose is engaged within a local government area if a SEPP identifies that there is a need for affordable housing within that area.

There is no evidence presented as part of the EIE that suggest that there is a need for affordable housing across all local government areas across the State.

We do not see the inclusion of specific local government areas as an administrative step.

The proposed approach to SEPP 70 enables councils to apply for SEPP 70 without completing a needs assessment prior to inclusion in SEPP 70. UDIA would contend that the analysis needed prior to inclusion in SEPP 70 has an important benefit of flagging a council's intent to prepare a plan and supports the industry's ability to adapt to the plans the council have prepared.

We believe it is not necessarily immediately obvious that there is a requirement for SEPP 70 and mandated contributions in all LGAs, and it may not be appropriate for all areas as a solution. Particularly in areas with property values significantly higher than the median price in Sydney, as the 'affordable amount' at a market rent discount would still be out of reach for those on very-low, low and moderate incomes.

Change in Affordable Housing principle 3

Schedule 2 of the SEPP lists eight affordable housing principles, principle 3 is:

Affordable housing is to be made available to a mix of very low, low and moderate income households.

It is proposed to amend principle 3 to:

Affordable housing is to be made available to a mix of very low, low and moderate income households or any combination of these households.

The proposed wording would enable a council to further restrict Affordable Housing, potentially excluding those on moderate incomes from Affordable Housing. This shift could turn Affordable Housing into much more of a Social Housing type product. We believe this would undermine the community acceptability of Affordable Housing.

We note the draft Guideline in relation to Local affordable housing demand states:

The analysis should consider local worker's employment sources. Local workers are very low, or moderate-income earners who perform an important service within an area but cannot live nearby due to price constraints. Important services are generally front-line services, and for the local area may include medical professionals, teachers, police, child care workers and aged care workers.

An analysis of the income of professions shows that the first year salary of a teacher, police officer, nurse, firefighter, and ambulance officer can be above the threshold for Affordable Housing where eligibility is based on household size.

There would be further restrictions on front-line services worker referred to in the draft Guideline as being the intended recipients of Affordable Housing would actually be excluded from accessing such housing if it was restricted to low and very low income households only, particularly for teachers and medical professionals.

Definition of “Affordable Housing”

Notwithstanding the concerns we have raised elsewhere in the submission about the amendments to SEPP 70, we consider amending the definition of Affordable Housing in SEPP 70 to include reference to median income for ‘Rest of NSW’ makes sense for any Affordable Housing that is not included in the SEPP.

Draft Guideline

UDIA congratulates the Department on developing the draft Guideline, which provides certainty and consistency to developing an Affordable Housing Contribution Scheme.

We welcome the intent to provide developers certainty and transparency as to how affordable rental housing contributions will be determined. The requirement to consider impacts on development feasibility is welcome and necessary to ensure the policy does not make market housing more expensive when Sydney is already the second least affordable city in the world to buy a home. The release of the viability tool and the assumptions will be an important step in ensuring there is transparency and that viability is properly considered in a ‘ground-truthed’ manner.

The Guideline highlights the need for there to be an early signal to industry to ensure the industry can take these contributions into account prior to uplift in land values as a result of rezoning. We believe that the appropriate time to prepare a scheme is on new release areas well in advance of rezoning, where uplift hasn’t occurred. This would best occur alongside the existing LEP reviews. We believe this would help create consistent templates between councils so it is easy for industry to understand the contribution in each council area and manage a portfolio across Sydney.

There is a role for the Department to telegraph these changes and with consistent templates, there should be a greater opportunity to integrate within e-planning.

How to Prepare and implement an affordable housing contribution scheme?

The Guideline has a four-step process to an affordable housing contribution scheme

1. Identify area(s) for future rezoning
2. Analyse affordable housing conditions in the area(s)
3. Develop an affordable housing contributions rate
4. Produce scheme using template

UDIA’s comments on each step are below.

Identify area(s) for future rezoning

We agree that Affordable Housing Contributions should only apply to new, unidentified precincts.

Where a precinct has been announced for possible rezoning and affordable housing hasn't been flagged, then the uplift has already occurred and cannot be captured, except from development margins necessary to compensate for risk. The result is that development would not occur.

Appropriate transitional arrangements are needed in areas that have already been strategically identified and this would need to take into account local characteristics. Detailed feasibility and viability work will need to be done to consider the effectiveness of the scheme.

This step must be completed alongside the development of an updated LEP that provides uplift in the area where the scheme is announced to ensure the contribution scheme is viable.

Further, councils are required to write to the Secretary before commencing preparation of the scheme, we recommend the Department publish these letters in a collated manner so it is easy for industry to identify councils pursuing the use of SEPP 70.

We note that the EIE states that it is intended that Affordable Housing Contribution Schemes will only apply to land that has been the subject of an upzoning. However, the actual power to impose an Affordable Housing Contribution is governed by section 7.32 of the EP&A Act, which provides a number of different circumstances in which a contribution can be imposed. If it is not intended that an Affordable Housing Contribution Scheme would apply in all of these circumstances, either section 7.32 needs to be amended, or SEPP 70 must be amended to limit the circumstances in which an Affordable Housing Contribution can be levied.

With the proposed wholesale expansion of SEPP 70, we suggest that careful consideration needs to be given to the terms of sections 7.32 and 7.33 of the EP&A Act itself, to ensure that they are still fit for what is now their intended purpose.

In particular, section 7.32(1)(c) requires clarification. This appears to be the provision directed at an upzoning of land warranting a contribution. However, the language is very confused and the provision appears to apply in all circumstances and not just in relation to an upzoning of land. The text of the provision is:

*the proposed development is allowed only because of the **initial zoning** of a site, or the rezoning of a site*

The term "initial zoning" is not defined and has not been the subject of any judicial consideration. On a plain reading of the term, it appears to refer to the original zoning of the land, which would allow an Affordable Housing Contribution to be required in all cases and not just where the proposed development relies on an upzoning of the land.

Analyse affordable housing conditions in the area

Councils are required to complete detailed needs analysis for affordable housing. The analysis shows:

1. Demographic analysis
2. Local affordable housing demand
3. Local affordable housing supply
4. Affordable housing supply gaps

We believe all of this work is a critical pre-requisite to understand the gaps and the need for targets; however, a contribution from the development industry will not resolve affordable housing supply gaps that have been created through generations of underinvestment from government.

There must be a real willingness to provide incentives and to utilize government assets to support the government's social objective to provide subsidized housing. This includes much greater use of government land and potentially directly funding of projects.

UDIA's Social and Affordable Housing Taskforce is identifying some alternative approaches and we would be pleased to discuss these in more detail.

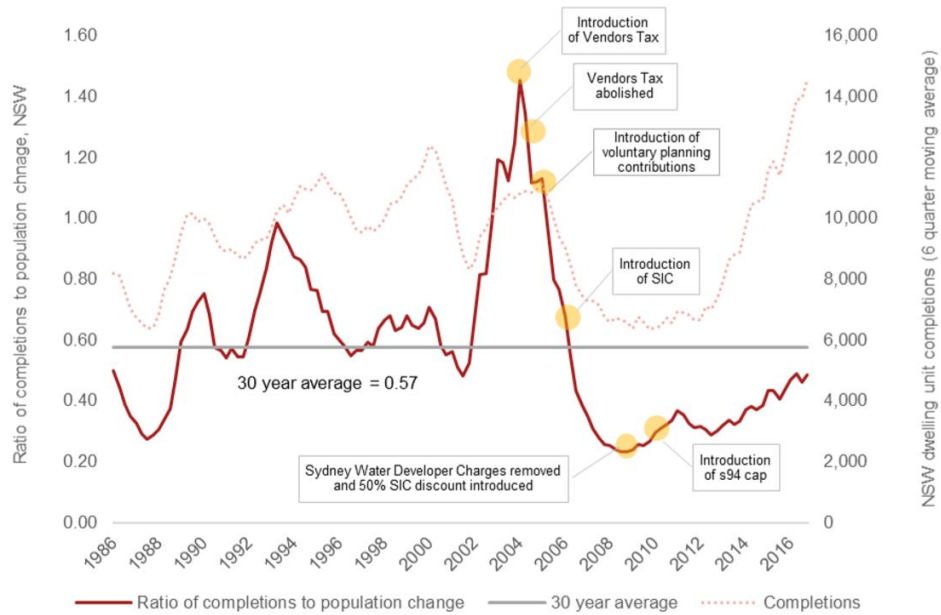
Develop a rate

The contribution rate must balance overall market affordability and the provision of subsidized housing products. The draft Guideline states:

A developer's ability to achieve an investment return is key to maintaining a sustainable development market and continued housing supply

It is vital that there is continued housing supply to ensure that prices across the market stabilize and do not become increasingly unaffordable over the medium and long-term. While there has been some softening recently, we still have a chronic under-supply of 100,000 dwellings, created as taxes increased as shown in the PwC graph below.

Figure 5 - Ratio of dwelling completions to population change



Source: ABS 2017, 8752.0, ABS 2017, 3101.0

Any rate must be viable, and discussion around viability must consider the cumulative impact of contributions. There is a limited portion of uplift that is able to be captured by government, and competing needs must be balanced including infrastructure contributions, section 7.11 and SICs, particularly in new release areas.

The proponent should have the flexibility to provide contributions in cash or contributions in-kind.

We are particularly concerned about the rate being spoken about as a dedication, and we note that this is a function of section 7.32(2)(a) of the EP&A Act. We understand the approach is that this would be a dedication to a community housing provider or council.

There should be greater consideration of private ownership for these dwellings. An Affordable Housing use can be secured in perpetuity by a restriction on use under section 88E of the *Conveyancing Act 1919*, which is the same approach taken with seniors housing. The restriction on use would ensure that the relevant dwelling can only be rented to an eligible person and could require management by a CHP, which would provide sufficient protection.

Private ownership creates the opportunity for tradeable and aggregated holdings of affordable housing dwellings in a market, which would make the delivery of affordable housing more viable in the long-term and support continued investment in affordable housing outside of the CHP process.

We believe this would be underpinned by a CHP managing the dwellings to ensure that they are tenanted to eligible people.

The right tenure settings will influence the number of dwellings that can be delivered, a private ownership model could deliver more dwellings.

We note, that this would require amendment of sections 7.32(2) and 7.33 of the EP&A Act in order to permit this alternative form of ownership.

Produce scheme using the template

UDIA supports the standard template to provide consistency with the schemes. We make the following comments about the template and its inclusions:

1. We support clear maps for where the scheme applies, and that it be underpinned by feasibility.
2. We are concerned about council's nominating particular community housing providers, as developments occur with affordable housing included more regularly some proponents may work with particular CHPs regularly, so it makes sense to continue existing relationships instead of forcing a developer to work with a particular CHP. Further, removing competitive tension may have an impact on the quality of the CHP sector.
3. We have raised our concerns about dedications and believe that a restriction on title and ongoing CHP management role is more appropriate.
4. Councils have a responsibility to regularly review the effectiveness of the program, where councils have not delivered affordable housing, they need to review the scheme and if it is not fit for purpose remove the scheme. We require further information on how the reviews will be managed. Similarly, if councils are not exceeding their GSC Dwelling Targets then the schemes impact on the broader market needs to be considered very carefully.

VPAs and SEPP 70

UDIA recommends the EP&A Act is amended to enable a VPA to exclude affordable housing contributions.

The EP&A Act states a voluntary planning agreement must provide for:

in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12 or 7.24 to the development, 7.4(3)(d)

The exclusions apply to local infrastructure contributions and SIC contributions (through s7.24); however, the EP&A Act does not allow a VPA to explicitly exclude conditions requiring land or contributions for affordable housing, which are levied under s7.32.

This is significant because a developer will often enter into a VPA at an early stage in a development project, as a condition of the rezoning of land, and other types of development contribution will only be imposed later, at development consent stage. The reason why the Act allows a VPA to exclude other forms of development contributions is to provide certainty for a developer in terms of the contribution cost burden that can be expected on the future development of the land.

Because SEPP 70 has had very limited application until recently, the omission of Affordable Housing Contributions from section 7.4(3)(d) has been of low importance. However, with the proposed expansion of SEPP 70 to the whole of NSW, it will become a matter of great importance, and it is an issue which is currently concerning many of our members who are in the process of negotiating VPAs in connection with the rezoning of land.

The Act should be amended to clarify that a VPA can exclude the application of Affordable Housing Contributions. Otherwise, we believe it could limit the use of negotiated outcomes that may lead to the provision of more Affordable Housing.

We believe councils would only agree to contract out of Affordable Housing Contributions if a public benefit at least equal to the benefit of Affordable Housing is provided. However, industry and council should be able to negotiate a better outcome for the site and the community.

We note the Frequently Asked Questions released alongside the EIE attempts to resolve this issue through a Ministerial Direction:

Can a VPA be applied where an AHCS is applied?

While the EP&A Act does not prevent the use of SEPP 70 and a VPA at the same time, a Ministerial Direction will be developed which will require Councils to justify the use of a VPA for affordable housing in addition to contributions under SEPP 70. The request will need to demonstrate a requirement for affordable housing, over and above that being met through the SEPP 70 affordable housing contribution. Further it will need to be shown, that the use of a VPA for affordability housing [sic] is appropriately reference in the Council's Local Strategic Planning Statement and Local Housing Strategy, and that development feasibility would not be impacted.

Without having a draft of the Ministerial Direction, which could have been exhibited alongside the expansion, we are unable to comment in detail; however, we have concerns about the proposed approach of the Ministerial Direction.

The proposed Ministerial Direction would still require Affordable Housing Contributions, although there may be circumstances where councils feel that other types of contributions in a VPA would provide greater community benefit than Affordable Housing and determine that the development should be exempt.

We also have concerns about how the Ministerial Direction would work where a VPA provides additional FSR to support a specific item in the VPA, as it would need to prevent Affordable Housing Contributions on that floorspace.

The best approach to managing these concerns and providing a straightforward pathway for local government and industry is to amend clause 7.4 to:

in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12, 7.24 or 7.32 to the development,

Conclusion

UDIA looks forward to working closely with the Department on ensuring that affordable housing can be delivered in a way that does not impact on affordability.

We recommend:

1. The SEPP70 is not extended to all LGAs without a needs analysis for each LGA to test the suitability of the SEPP.
2. The Department and GSC also look at other solutions to ensure we can deliver affordable housing.
3. Reviews the incentives for Affordable Housing, as the ARHSEPP does not currently provide sufficient incentive.
4. Maintain the existing principle 3 in SEPP 70.
5. Ensure development viability underpins any affordable housing contribution scheme.
6. Amend the act to enable VPAs the ability to contract out of Affordable Housing Contributions

We look forward to discussing this with you in more detail, please contact Mr Elliott Hale, General Manager, Policy, Government Relations and Media, on 02 9262 1214 or ehale@udiansw.com.au to arrange.

Yours sincerely

Steve Mann



Chief Executive

The Urban Development Institute of Australia (UDIA) NSW is the leading property industry group promoting the responsible growth of this State. We have over 500 company members and more than 3,000 of their employees attend our events, sit on our committees, undertake training or are involved in the activities of the organisation on an annual basis. Our organisation is the oldest property development advocacy group in the country, having been established in 1962. Our advocacy is based on making our cities more liveable, affordable and connected.