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Australia's property industry

## Creating for Generations

19 May 2021

Mr Mick Veitch MLC  
Chair  
Regulation Committee  
NSW Legislative Council  
Macquarie Street  
SYDNEY NSW 2000

Email [Regulation.Committee@parliament.nsw.gov.au](mailto:Regulation.Committee@parliament.nsw.gov.au)

Dear Mr Veitch,

### Committee Inquiry – Disallowance of Environmental Planning Instruments

The Property Council of Australia welcomes the opportunity to provide comments to the NSW Legislative Council's Regulation Committee (the Committee) to inform its members as part of this inquiry.

As Australia's peak representative of the property and construction industry, the Property Council's members include investors, owners, managers and developers of property across all asset classes.

Although we support the Inquiry reviewing this issue, we do NOT support the intention to establish powers for the Parliament to disallow SEPPs or other environmental planning instruments that are made under the EP&A Act.

We would welcome the opportunity to provide further information to the Committee if it would assist the Committee to better understand the role that SEPPs play in the property and development industry and how they provide certainty with respect to economic development, environmental protection and the supply of both diverse and affordable housing types.

Should you have any questions, we would be happy to appear before the Committee at its upcoming hearing to provide oral evidence. Should you have any questions regarding the content of this submission, please contact Troy Loveday, NSW Policy Manager, on 0414 265 152 or [tloveday@propertycouncil.com.au](mailto:tloveday@propertycouncil.com.au)

Yours sincerely



**Jane Fitzgerald**  
NSW Executive Director  
Property Council of Australia

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# **Submission to NSW Legislative Council Regulation Committee**

## **Inquiry into Environmental Planning Instruments**

**19 May 2021**

## 1.0 Introduction

The Property Council of Australia welcomes the opportunity to provide a submission to the committee as part of this current inquiry into environmental planning instruments (**the Inquiry**).

Although we are pleased to provide useful information to the inquiry, we do NOT support any proposal to allow SEPPs to be disallowed by the Parliament.

### 1.1 Terms of Reference

We have noted the Inquiry's terms of reference which include the Committee inquiring and reporting on:

- the making of environmental planning instruments (SEPPs) under section 3.29 of the *Environmental Planning and Assessment Act 1979*,
- whether SEPPs should be disallowable under the *Interpretation Act 1987*, and
- any other related matters.

We welcome the opportunity to provide this submission to the Committee for its consideration as part of its deliberation and reporting processes. We have provided information that should be relevant to the Committee's understanding of the role of SEPPs and their purpose in the NSW planning system.

## 2.0 Role of Environmental Planning Instruments

The planning system in New South Wales is made up of two types of environmental planning instruments (**EPIs**), being State Environmental Planning Policies (**SEPPs**) and Local Environmental Plans (**LEPs**). Both being made under Part 3 of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**), section 3.29 for a SEPP and section 3.31 for a LEP. We understand the Inquiry is solely concerned with the question of whether Parliament should have authority to disallow a SEPP made by the Governor.

As the Committee would be aware, SEPPs play an important role in the NSW planning system as they can provide a consistent planning approach across the State and override local planning controls where they do not achieve State or regional objectives.

In our view there are several important safeguards built into the to serve to ensure that SEPPs are made for valid planning reasons and satisfy the public interest.

### 2.1 Objects of the Act

Section 3.13 of the EP&A Act requires that an environmental planning instrument that is made is done so for the purposes of achieving the objects of the EP&A Act. There are ten (10) objects of the EP&A Act which are listed in section 1.3 and cover a very broad range of land use planning matters.

We believe it is important that the Minister and the Department ensure that any proposed SEPP satisfies these requirements. Often when an instrument is notified on the NSW Government Legislation Website ([www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)) there is no related information provided that indicates how the instrument made addresses the objects of the EP&A Act or its relationship to existing policies. This is an area where significant improvements could be made.

### 2.2 Content of an Environmental Planning Instrument

The EP&A Act also specifies that the content of an environmental planning instrument may make provision in respect of any of the following matters:

- Protecting, improving or utilising, to the best advantage, the environment,
- Controlling (whether by the imposition of development or otherwise) development,
- Reserving land for use for the purpose of open space, a public place or public reserve, a national park or other land reserved or dedicated under the *National Parks and Wildlife Act 1974*, a public cemetery, a public hospital, a public railway, a public school or any other purpose that is prescribed as a public purpose for the purposes of this section,
- Providing, maintaining and retaining, and regulating any matters relating to affordable housing,
- Protecting or preserving trees or vegetation,
- Protecting and conserving native animals and plants, including threatened species and ecological communities, and their habitats,
- Controlling any act, matter or thing for which or with respect to which provision made be made under paragraph (a) or (e),
- Controlling advertising,
- Such other matters as are authorised or required to be included in an environmental planning instrument by this or any other Act.

## 2.3 Review of Environmental Planning Instruments

Section 3.21 of the EP&A Act requires that the Planning Secretary shall keep SEPPs under regular and periodic review for the purpose of ensuring that the objects of the EP&A Act achieved to the maximum extent possible.

The Department of Planning, Industry and Environment has recently carried out several reviews of the SEPPs that apply in NSW to ensure that they meet the needs of a modern planning system. The key outcomes that these reviews seek to achieve include:

- considering whether SEPPs are still relevant, and
- considering the need to update and integrate into a new SEPP or elsewhere in the planning framework.

Examples of this include a new housing diversity SEPP that is currently under development to integrate a number of existing policies into a single policy and a new Draft Environment SEPP that was exhibited during 2017. The Infrastructure SEPP was developed as part of this program to consolidate several policies into a single policy guide.

## 2.4 Thematic categories of SEPPs

In our view, most of the current SEPPs in force in NSW fall into one of following three broad thematic categories, being for the purpose of economic development, environmental protection or to facilitate a diverse and affordable supply of housing.

**Economic development** - these are policies regulate many of the State's economic development precincts and also enable certain types of critical infrastructure and include:

- *State Environmental Planning Policy No 33 – Hazardous and Offensive Development*
- *State Environmental Planning Policy No 64 – Advertising and Signage*
- *State Environmental Planning Policy (State Significant Precincts) 2005*
- *State Environmental Planning Policy (Infrastructure) 2007*
- *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*
- *State Environmental Planning Policy (Western Sydney Employment Area) 2009*
- *State Environmental Planning Policy (State and Regional Development) 2011*
- *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017*
- *State Environmental Planning Policy (Primary Production and Rural Development) 2019*
- *State Environmental Planning Policy (Activation Precincts) 2020*
- *State Environmental Planning Policy (Western Sydney Aerotropolis) 2020*
- *State Environmental Planning Policy (Three Ports) 2013*

**Environmental protection** - these are policies provide an important role to in respect of State-wide policy positions on significant environmental issues, which include:

- *State Environmental Planning Policy No 19 – Bushland in Urban Areas*
- *State Environmental Planning Policy No 55 – Remediation of Land*
- *Greater Metropolitan Regional Plan No 2 – Georges River Catchment*
- *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005*
- *State Environmental Planning Policy (Kosciuszko National Park – Alpine Resorts) 2007*
- *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011*
- *State Environmental Planning Policy (Coastal Management) 2018*
- *State Environmental Planning Policy (Koala Habitat Protection) 2020*
- *State Environmental Planning Policy (Koala Habitat Protection) 2021*

**Housing supply and design** - these are policies that ensure that Sydney and other parts of NSW have an adequate supply of diverse, affordable and well-designed housing, which include:

- *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development.*
- *State Environmental Planning Policy No 70 – Affordable Housing (Revised Schemes)*
- *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*
- *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004*
- *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*
- *State Environmental Planning Policy (Exempt and Complying Development Codes) 2009*
- *State Environmental Planning Policy (Affordable Rental Housing) 2009*

## 2.5 Amendments to existing SEPPs

The majority of new SEPPs made are actually amendments being made to an existing Principal SEPP. These may comprise minor or significant amendments.

Recent examples of minor amendments to a SEPP include:

- *State Environmental Planning Policy (State and Regional Development) Amendment (Warehouses and Data Centres) 2021.*
- *State Environmental Planning Policy (Infrastructure) Amendment (Health Services Facilities) 2021.*
- *State Environmental Planning Policy (Three Ports) Amendment (Shipping Containers) 2021.*
- *State Environmental Planning Policy (Flood Planning) 2021.*
- *State Environmental Planning Policy (Exempt and Complying Development) Amendment (Bush Fire Response) 2020.*
- *State Environmental Planning Policy (State and Regional Development) Amendment (State Significant Development) 2020.*
- *State Environmental Planning Policy (Infrastructure) Amendment (Energy Storage Technology) 2020.*

In our view, amendments of this nature have minor consequences to the intent of the policy and the operation of its provisions as a whole. These types of amendments are necessary to respond to current issues and unforeseen matters that may have not been known when the initial policy was developed.

Additionally, Orders made by the Minister for Planning can also be used to amend certain SEPPs to declare certain project to be a particular type or class of development. These are important tools as they provide certainty regarding the assessment process for critical and State Significant Infrastructure project.

Several recent examples of these include:

- *Environmental Planning and Assessment Amendment (Albion Park Rail Bypass) Order 2017,*
- *Environmental Planning and Assessment Amendment (The Northern Road Upgrade) Order 2017,*
- *Environmental Planning and Assessment Amendment (Maitland Hospital) Order 2017,*
- *Environmental Planning and Assessment Amendment (M4-M5 Link Project) Order 2017,*
- *Environmental Planning and Assessment Amendment (Parramatta Light Rail) Order 2018,*
- *Environmental Planning and Assessment Amendment (Newcastle Gas-Fired Power Station) Order 2018,*
- *Environmental Planning and Assessment Amendment (Port Kembla Gas Terminal) Order 2018,*
- *Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018*
- *Environmental Planning and Assessment Amendment (F6 Extension Stage 1) Order 2018*

These ensure that the environmental assessment of these significant infrastructure projects can be undertaken as a single project and in a holistic and efficient process by a single consent authority instead as multiple assessments by multiple decision-making authorities. It is critical that the Minister for Planning can declare infrastructure projects that meet the relevant criteria for State Significant Development using this process without risk of the Order being disallowed.

## 2.6 Need for certainty

All environmental planning instruments play an important role for the property and development industry as they provide the planning rules that guide land use and investment decisions.

Although local plans set zoning controls and impose a set of development standards to different types of development, SEPPs can provide important requirements to enable development that local controls may not permit. SEPPs allow for a consistent policy approach to be applied across the State for significant issues, such as apartment design rules, housing for seniors, coastal management, protection of koala habitat and infrastructure planning.

A landowner must know the planning rules that apply to their land at the time they propose to make an application to carry out development. This information will usually be confirmed by obtaining a Planning Certificate (issued under section 10.7 of the *Environmental Planning and Assessment Act 1979*). If it was possible for a SEPP to be disallowed by the Parliament, there would be a period of uncertainty between the notification of a SEPP and the cut off for any disallowance motion to be considered.



### 3.0 Validity of Environmental Planning Instruments

An alternative to the disallowance of an environmental planning instrument by Parliament is the long-established opportunity for any planning decision to be challenged through the Courts.

Section 9.45 of the EP&A Act allows any person to bring proceedings in the Court for an order to remedy or restrain a breach of the Act. This is a right that is open to anyone whether or not any right of that person has been infringed as a consequence of that breach.

As we have seen on several occasions, the Land & Environment Court has found certain environmental planning instruments to be invalid. An example of this was the *Ku-ring-gai Local Environmental Plan (Town Centres) 2010* which the Court found to be invalid in July 2011. These actions can cause significant uncertainty and frustration to persons undertaking development and construction activity, including delay and holding costs until new planning controls are made.

Based on the experience incurred when the Land & Environment Court has found an environmental planning instrument to be invalid, we do not support the use of disallowance motions by the Parliament to overturn the making of a SEPP or other environmental planning instrument made under the EP&A Act.

### 4.0 Need for improvements to current process for making SEPPs

Despite our strong opposition to allowing a SEPP to be disallowed by the Parliament, we would encourage the consideration of improvements regarding their preparation, exhibition and making.

In 2015, the Department proposed the reduction in the number of SEPPs and deemed SEPPs to streamline the NSW planning system and improve user experience. We support a clearer and more transparent planning system and a reduction in the number and layers of planning rules is needed. The 2015 review led to the making of *State Environmental Planning Policy (Integration and Repeals) 2016*, which repealed more than fifteen SEPPs and deemed SEPPs. The policy transferred many of the provisions contained in these SEPPs into local plans or local plan making directions.

We recognise the key role that SEPPs currently play in addressing a wide range of planning issues across NSW. **However, the process for making SEPPs could be improved to require greater consideration of impacts (Regulatory Impact Statements) to be available during the public consultation period.**

All SEPPs can be access on the NSW Government Legislation Website and provide both 'As Made' and 'Consolidated' versions. Apart from these legally drafted instruments, most SEPPs do not provide plain-English versions that explain their meaning and operation to non-planners in the community. This is particularly the case for the Exempt and Complying Development Codes which are difficult for non-planners to understand and apply when considering small domestic building works to their homes. We would encourage the Department investigate preparing plain-English guides to frequently used SEPPs.



## 5.0 Conclusion

The Property Council welcomes this opportunity to provide the Committee with a submission to aid its inquiry. However, we do NOT support the intention to establish powers for the Parliament to disallow SEPPs or other environmental planning instruments that are made under the EP&A Act.

### Recommendations:

1. That powers for the Parliament to disallow SEPPs or other environmental planning instruments are not introduced.
2. When a proposed instrument (SEPP) is published on the NSW Government Legislation Website, related information is provided to indicate how the instrument made addresses of the EP&A Act or its relationship to existing policies.
3. Greater consideration of impacts (Regulatory Impact Statements) should be made available during the public consultation period for SEPPs.
4. When SEPPs are published on the NSW Government Legislation Website, a plain-English guide to frequently used SEPPs is published alongside the 'As Made' and 'Consolidated' versions of the SEPPs. Plain-English guides should explain the meaning of SEPPs to non-planners in the community.

We welcome the opportunity to provide further information to the Committee if it would assist the Committee to better understand the role that SEPPs play in the property and development industry and how they provide certainty with respect to economic development, environmental protection and the supply of both diverse and affordable housing types.

Should you have any questions, we would be happy to appear before the Committee at its upcoming hearing to provide oral evidence.