

25 May 2020

Mr Marcus Ray  
Deputy Secretary, Planning and Assessment  
Department of Planning, Industry & Environment  
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PARRAMATTA NSW 2124

Email: [marcus.ray@planning.nsw.gov.au](mailto:marcus.ray@planning.nsw.gov.au)

Dear Mr Ray

### **RE: Clarification of Ambiguities Relating to Strata Certification**

The Association of Accredited Certifiers (AAC) has received enquiries regarding the process relating to strata certification and a number of ambiguities that exist within the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (the Codes SEPP).

These issues have the potential to hinder the development process, resulting in completed developments that have been legally constructed but cannot be readily strata-subdivided.

This creates an uncertain environment for Accredited Certifiers and can result in certificates that are incorrectly issued and determined invalid, or due to ambiguity in the interpretation of the SEPP, not issued at all when they could have been.

We are therefore seeking clarification on the following matters, so we may provide the correct interpretation of the legislation and best practice in relation to subdivision certification to AAC members.

#### **Requirement for Occupation Certificate Issue Prior to Strata Certificate**

A significant number of councils across New South Wales are including conditions in their development consents for strata subdivisions that prevent the issue of the strata certificate until such time as the Occupation Certificate for the building has been issued, and/or all conditions on the building development consent have been satisfied.

This practice imposes significant delays on the release of strata units to market, as settlement cannot occur until the strata plan has been registered. If the issue of a Strata Certificate, and therefore the subsequent registration of the strata plan, is delayed until after an Occupation Certificate has been issued, there can be a four to eight week delay from when the building can be occupied to when new residents are able to move in. Such a delay has significant cost implications for all stakeholders in the process, including extended rental costs and expenses for members of the public purchasing a unit.

There is no legislative link between an Occupation Certificate and a Strata Certificate. The legislation dealing with the issue of strata certificates, the *Strata Schemes Development Act 2015*, makes no mention of the requirement for an Occupation Certificate to have been issued prior to the issue of a Strata Certificate.

The Building Professionals Board (the Board) previously addressed this issue in November 2009, through Issue 18 of the BP Bulletin (attached). At that time, the Board advised in this publication, that it was its view, *“that an occupation certificate is the appropriate mechanism for ensuring the building work is completed and suitable for occupation and that the strata certificate should not perform this role.”*

In October 2019, the AAC wrote to the Board requesting clarification on this issue and to confirm that their advice of November 2009 was still current. The Board replied with the attached correspondence, which essentially states that as the Board is now part of the Department of Fair Trading and no longer administers the legislation, it is not appropriate that they issue advice to councils on development consent conditions. The Board also suggested that the AAC consider raising this issue with the Department of Planning, Industry and Environment.

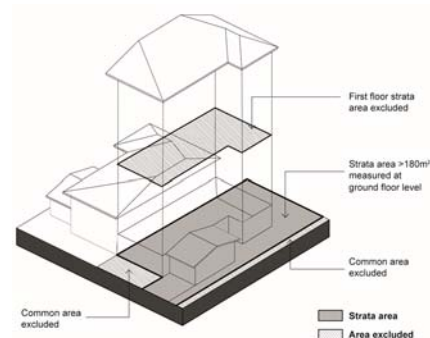
Accordingly, we request the Department clarify its position regarding this issue.

### Development Standards for Strata Subdivision – Codes SEPP

Clause 6.2(c) of the Codes SEPP states that one of the development standards for strata subdivision is, *“in the case of a dual occupancy where no part of a dwelling is located above any part of another dwelling or multi dwelling housing (terraces), the strata area (being the area of the ground floor of all dwellings) is not less than 180m<sup>2</sup>.”*

This development standard is causing uncertainty for Accredited Certifiers because of the ambiguity of the wording and the inconsistency of the wording with the diagram contained in the legislation. Further, the development standard has resulted in instances where a development is compliant under the Low Rise Medium Density Housing Code within the SEPP, but is then not compliant for strata subdivision.

In relation to the ambiguity of the wording, the Clause states that the “strata area” is the “ground floor of **all** dwellings”. This would indicate that the “strata area” for a dual occupancy would be the ground floor area of both units, or in a multi dwelling housing development of say four units, the “strata area” would be the ground floor of all four units. However, the diagram included in the legislation shows the “strata area” as being the ground floor area of only **one** unit. Further, the diagram shows the “strata area” as being the entire strata lot area, excluding any common areas, not just the ground floor area of the building on the strata lot, which is implied by the wording.



As mentioned above, the development standard has also resulted in compliance issues for the strata subdivision of certain developments. For example, in a multi-housing terrace type development, there has been an instance where such a development was deemed compliant with the Low Rise Medium Density Housing Code and a Complying Development Certificate (CDC) for the construction

of the development was subsequently issued. However, when the developer applied to a Strata Certifier to have the development strata subdivided, because the Certifier interpreted the “strata area” to be the ground floor area of one unit as per the diagram in the legislation, an interpretation that was supported by legal advice, the development did not comply with the requirements of the SEPP (being the minimum 180m<sup>2</sup> strata area) and the application for strata subdivision was subsequently refused. This left the developer with a completed development that had been legally approved by a CDC issued under the SEPP, had an Occupation Certificate issued, but could not be strata subdivided under the SEPP. The Developer had no choice in this instance, but to apply to council for a development application for strata subdivision, which would have delayed sale of the units by at least a month.

It should be noted that if the “strata area” defined in Clause 6.2(c) is confirmed to be the area of only one unit, then the majority of terrace type developments and some dual occupancies will not comply with the minimum area requirement of the Clause.

It is requested that the Department consider the wording of Clause 6.2(c) of the SEPP and the associated diagram with a view to re-drafting the clause to remove any ambiguity for certifiers and ensure consistency with the Low Rise Medium Density Housing Code to give developers confidence that developments approved under that Code can be strata subdivided under the Subdivisions Code within the SEPP.

#### **Development Standards for Torrens Title Subdivision – Codes SEPP**

Clause 6.4(d) of the Codes SEPP is also causing misunderstanding among certifiers and resulting in subdivisions of dual occupancies being issued incorrectly or valid subdivisions being refused, depending on interpretation of the Clause.

The Clause states that a development standard for Torrens title subdivision is:

*“if the subdivision relates to a dual occupancy, the area of each resulting lot must be at least—*

- (i) 60% of the minimum size specified for the subdivision of land for the purpose of a dual occupancy in the environmental planning instrument that applies to the land, or*
- (ii) if no minimum size is specified—200m<sup>2</sup>,”*

The confusion arises in the interpretation of the 60% value and whether this applies to the area of the parent lot before subdivision, or the area of the lot resulting from the subdivision.

For example, if the council LEP states that the minimum area for subdivision of a dual occupancy is 750m<sup>2</sup>, resulting in two 375 m<sup>2</sup> lots, is the minimum lot size achievable under the SEPP 60% of 750m<sup>2</sup>, being 450m<sup>2</sup>, which is more than the minimum lot size achievable by a DA under the council LEP, or is the minimum lot size achievable under the SEPP defined by 60% of 375m<sup>2</sup>, being 225m<sup>2</sup>, which is closer to the area of 200m<sup>2</sup> in sub-Clause (ii) where no minimum is specified in an LEP.

The interpretation of this Clause among AAC members is varied and as such, we request that the Department clarify the intention of the clause, to enable it to be applied consistently and appropriately throughout the industry.

## **Application of Schedule 6B of the Codes SEPP**

Finally, Clause 6.6 of the Codes SEPP requires, *“a complying development certificate for development specified under this code must be issued subject to the conditions specified in Schedule 6B”*. As Clause 6.6 sits within the Subdivisions Code, it is concluded from this Clause that any CDC issued under the Subdivisions Code must be issued subject to the Condition specified in Schedule 6B. This would then apply to CDCs issued for both strata title and Torrens title subdivisions.

However, the conditions contained within Schedule 6B of the SEPP are clearly related to the issue of a Torrens title subdivision, as they relate to matters such as evidence of servicing, provision of boundary fencing, easements for stormwater drainage, common driveways and the like. These items generally have no relevance to a strata titled subdivision and would only serve to confuse applicants if they were attached to a CDC approval for a strata subdivision.

Again, the interpretation of this requirement among our members is varied, with some applying the conditions to strata CDC approvals, with the knowledge that the conditions will confuse applicants and cannot be satisfied, while others are not applying the conditions to strata CDC approvals, realising they are not relevant to strata subdivision.

We respectfully ask that the Department consider reviewing Clause 6.6 of the SEPP and amending this Clause to only apply to complying development certificates for Torrens title subdivisions.

In closing, the abovementioned issues are causing significant difficulties for certifiers operating in the subdivision certification sector and are resulting in inconsistent practices and products being offered to the development industry.

More importantly, these issues are inflicting unnecessary delays on the process of finalising developments, and ultimately resulting in unnecessary additional costs to members of the public.

These issues will become more significant following the removal of the current deferral of the operation of the Low Rise Medium Density Housing Code within the majority of local government areas within Sydney on 1 July 2020. We ask the Department give consideration to urgently resolving these matters prior to this time.

If you would like to discuss these matters further, please do not hesitate to contact me on 0431 082 259.

Yours sincerely

  
Jill Brookfield  
Chief Executive Officer

# BPBulletin

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## PRACTICE ADVICE

### Subdivision Certificates and Strata Certificates

A 'subdivision certificate' is a Part 4A certificate issued under the EP&A Act. It authorises the registration of a plan of subdivision under Division 3 of Part 23 of the *Conveyancing Act 1919*.

A 'strata certificate' is a certificate issued under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*

A number of councils are imposing conditions on the development consent for strata subdivision requiring the completion of associated building works prior to the issue of a strata certificate.

The Board's view is that an occupation certificate is the appropriate mechanism for ensuring the building work is completed and suitable for occupation and that the strata certificate should not perform this role.

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Ref:

Ms Jill Brookfield  
Chief Executive Officer  
Association of Accredited Certifiers  
Via email to [jbrookfield@accreditedcertifiers.com.au](mailto:jbrookfield@accreditedcertifiers.com.au)

Dear Jill

Thank you for your letter dated 16 October 2019 regarding the decision of some councils to impose development consent conditions requiring that an occupation certificate be issued and/or all relevant consent conditions satisfied, before a strata certificate may be issued.

Generally speaking, the appropriateness of a condition of consent is a matter between the council and the applicant. The certifier's role is to ensure relevant conditions are satisfied before issuing an occupation certificate. If desired, the applicant may appeal under section 4.57 of the Environmental Planning and Assessment Act to modify the consent. The certifier may advise the applicant on the process of applying to modify the consent, if required.

I also refer to the advice in BPB's 2009 BP Bulletin on the appropriateness of an occupation (not strata) certificate as the official statement that a development is suitable for occupation. In 2009, BPB was part of the Department of Planning which administered the relevant legislation, and it was appropriate to issue this advice. We are now part of Fair Trading and it is no longer appropriate for us to issue advice to councils regarding development consent conditions.

You may consider raising this matter with the Department of Planning, Industry and Environment, and/or the Office of Local Government.

Thanks again for your letter.

Yours sincerely

Matthew Whitton  
**Director, Building Services**

12 November 2019