Department of Planning, Housing and Infrastructure

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NSW GOVERNMENT

In-fill affordable housing

Practice note

December 2023

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In-fill affordable housing

Issued December 2023

The purpose of this practice note is to provide guidance for consent authorities and applicants on the application of the in-fill affordable housing floor space ratio (FSR) and height of building bonuses under Chapter 2, Part 2, Division 1 of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP).

Introduction

The NSW Government recognises the need to build more homes for our growing population, boost housing supply and improve housing affordability.

Under the National Housing Accord (the Accord), New South Wales is tasked with delivering approximately 377,000 new well-located dwellings, including approximately 15,800 social and affordable dwellings, by 2029.

The Accord brings together all levels of government, investors, and the construction sector to unlock additional affordable housing supply over the medium term.

Incentivising the delivery of additional dwellings, including more affordable dwellings through the Housing SEPP will ensure NSW is well-placed to deliver on its commitments under the Accord.

What are the in-fill affordable housing provisions?

The in-fill affordable housing provisions include a FSR bonus of up to 30% and a height of buildings bonus of up to 30% for projects that include residential development and provide at least 10% of gross floor area (GFA) as affordable housing. The height of buildings bonus only applies to residential flat buildings and shop top housing. The FSR and height of buildings bonuses are effectively double (up to 30%) the minimum required affordable housing component, which must be at least 10% of the development project.

The in-fill affordable housing bonuses apply to development by the Land and Housing Corporation (LAHC), Aboriginal Housing Office (AHO), Landcom and registered community housing providers (CHPs), as well as all other developers.

In addition to the increased FSR bonus and new height bonus, a new State significant development (SSD) pathway has been created for in-fill affordable housing where the residential

development component has a capital investment value (CIV) of more than $75 million in the Eastern Harbour City, Central River City or Western Parkland City, and more than $30 million elsewhere in NSW.

Division 1 In-fill affordable housing provisions

Development to which the division applies

Section 15C identifies that in-fill affordable housing provisions apply to development that includes residential development, as defined in section 15B of the Housing SEPP, if:

- the development is permitted with consent under another environmental planning instrument (EPI) or under Chapter 3, Part 4 of the Housing SEPP, which permits build-to-rent housing in some zones, and
- at least 10% of the GFA of the development will be used for the purposes of affordable housing, not including any other affordable housing required to be provided under another EPI or planning agreement.

As well as satisfying the above parameters, the in-fill affordable housing provisions apply to all or part of a residential development that is located on land:

- within an accessible area in the Six Cities Region (as defined by the *Environmental Planning and Assessment Act 1979* (EP&A Act)), other than in the City of Shoalhaven local government area (the meaning of 'accessible area' is defined within the Dictionary of the Housing SEPP),
- for development on other land (i.e. regional NSW) – all or part of the development that is within 800m walking distance of land within the nominated business zones (or land taken to be an equivalent zone).

Section 16 Affordable housing requirements for additional floor space ratio

This section establishes the FSR bonus and the proportionate minimum required affordable housing component. The *affordable housing component* is a defined term under the division and means the percentage of the GFA of the development used for affordable housing. Affordable housing required under another EPI or a planning agreement within the meaning of the *Environmental Planning and Assessment Act 1979* (EP&A Act), Division 7.1 is not counted towards the affordable housing component under the division.

Section 16 operates by providing that the maximum FSR for development to which the division applies is the maximum permissible FSR for the land plus an additional FSR of up to 30% of the maximum permissible FSR for development on the land.

The minimum required affordable housing component for the development, which must be at least 10%, means the percentage calculated as follows:

Affordable housing component = additional floor space ratio (as a percentage) ÷ 2

If the development involves residential flat buildings or shop top housing, the maximum building height for the residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional FSR derived at section 16. For example, where a development proposes 27% additional FSR, the development is also eligible for 27% additional building height.

Using a hypothetical site with an area of 1,000m^2 and FSR of 3:1 utilising the in-fill affordable housing provisions, the table below describes different additional FSR scenarios and the required affordable housing component.

Site Area	Maximum permissible FSR under another EPI	Total permissible GFA under EPI (m^2)	Additional FSR (%)	New FSR	Additional GFA (m^2)	New Total GFA (m^2)	Minimum affordable Housing Component (%)	Affordable Housing GFA (m^2)	Market Housing GFA (m^2)
1,000	3:1	3,000	**30**	3.9:1	900	3,900	**15**	**585**	3,315
1,000	3:1	3,000	**27.5**	3.83:1	830	3,830	**13.75**	**526.6**	3,303.4
1,000	3:1	3,000	**25**	3.75:1	750	3,750	**12.5**	**468.8**	3,281.2
1,000	3:1	3,000	**22.5**	3.68:1	680	3,680	**11.25**	**414**	3,266
1,000	3:1	3,000	**20**	3.6:1	600	3,600	**10**	**360**	3,240

This section does not apply if there is no maximum permissible FSR applying to the land.

Affordable housing dwellings delivered under the in-fill affordable housing provisions must be used for the purpose of affordable housing and managed by a registered CHP for a minimum 15 years.

Section 17 Additional floor space ratio for relevant authorities and registered community housing providers

Section 17 provides an alternate bonus calculation for relevant authorities and registered CHPs. The former FSR bonus continues to apply for development carried out by, or on behalf of LAHC, AHO, Landcom or a registered CHP on land with a maximum permissible FSR of 2:1 or less. These agencies and CHPs are now able to apply the more generous of the two formulae for calculating the FSR bonus under sections 16 or 17.

Section 18 Additional building height

This section establishes the height of buildings bonus and only applies to a building used for a residential flat building or shop top housing.

This provision operates by providing that the maximum height of buildings resulting from the development to which the division applies is the maximum permissible building height for the land plus an additional 30% of the maximum permissible height of buildings for development on the land under another EPI.

Notwithstanding the above, the additional height of buildings bonus is double (up to 30%) the minimum required affordable housing component.

The minimum required affordable housing component, which must be at least 10%, is represented as a percentage of the GFA of the development. The minimum required affordable housing component means the percentage calculated as follows:

Affordable housing component = additional building height (as a percentage) ÷ 2

Section 18 does not apply where additional floor space has been used under Section 16.

Where no maximum FSR applies

The following example illustrates the outcome for developments on sites where no maximum FSR applies. The introduction of the building height bonus allows sites that are not subject to an FSR standard to benefit from the in-fill affordable housing incentives. It also provides greater flexibility in accommodating bonus floor space.

Scenario: This site has an area of 1,500m^2 and HOB of 25m. The proposed development has GFA of 5,000m^2 and utilises an additional 30% building height. In this scenario, the development will obtain additional HOB of 7.5m resulting in a total HOB of 32.5m. In return, 15% of the total GFA must be used for affordable housing which translates into 750m^2 with the remaining 4,250m^2 GFA being market housing.

Application of the in-fill affordable housing bonuses

What is affordable housing?

Affordable housing means housing for very low income households, low income households or moderate income households.

The Housing SEPP establishes the following income eligibility limits for very low, low and moderate income households:

i) households that have a gross income within the following ranges of percentages of the median household income for Greater Sydney or the rest of NSW:

   a. very low income household — less than 50%,

   b. low income household — 50–less than 80%,

   c. moderate income household — 80–120%, and

   pays no more than 30% of the gross income in rent, or,

ii) households that are eligible to occupy rental accommodation under the National Rental Affordability Scheme and pays no more rent than that would be charged if the household were to occupy rental accommodation under the Scheme.

The *Environmental Planning and Assessment Regulation 2021* (EP&A Regulation) requires that consent conditions be imposed for in-fill affordable housing development as follows:

a) registration of a restriction against the title of the property in accordance with section 88E of the *Conveyancing Act 1919* to ensure the affordable housing component is:

   - used for affordable housing, and
   - managed by a registered CHP.

b) evidence of an agreement with a registered CHP for the management of the affordable housing component to be given to the Registrar of Community Housing, including the name of the registered CHP, and

c) evidence that the requirements of a) and b) above have been satisfied provided to the consent authority.

The registered CHP who manages the affordable housing component must also apply the NSW Affordable Housing Ministerial Guidelines.

The restrictions listed above do not apply to development carried out by or on behalf of LAHC or AHO.

Local requirements for affordable housing

Any local requirements for affordable housing do not count towards the minimum required affordable housing component under the Housing SEPP in-fill affordable housing provisions. That is, the minimum affordable housing component under the Housing SEPP needs to be met in addition to any requirement specified under a local policy or any planning agreement with a public authority.

Relationship with other bonuses available under the Housing SEPP

FSR bonuses available across the various divisions of the Housing SEPP are capped at 130% of the maximum permissible FSR under the local EPI.

This means that where a development includes multiple housing types under the Housing SEPP, the bonuses available cannot be added together to exceed 130% of the maximum permissible FSR, as per section 12A of the Housing SEPP.

Relationship with other bonuses available under other EPIs

Site specific or even project-specific FSR and/or height of buildings bonuses under another EPI may exist. For example, the applicable local environmental plan (LEP) may offer a 10% FSR bonus where a design competition is undertaken. In these circumstances, the in-fill affordable housing bonuses apply on top of the local bonus.

Maximum permissible FSR is defined under the Housing SEPP to mean the maximum FSR permitted on the land under an EPI (other than the Housing SEPP), or a development control plan (DCP). That is, the maximum FSR achievable under another EPI, inclusive of any other site or project-specific bonuses, should be determined first. The in-fill affordable housing bonus is then applied in addition to determine the project-specific FSR development standards. A similar definition for maximum permissible building height also exists in the Housing SEPP.

The following example illustrates how the in-fill affordable housing bonus would apply to a project subject to a FSR bonus under the applicable LEP.

- The site is subject to a base FSR of 5:1 under the LEP. The LEP provides a bonus of 10% FSR where a design competition is undertaken for development on the site. The maximum permissible FSR under an EPI other than the Housing SEPP is therefore 5.5:1.

The proposal seeks to achieve an additional 30% FSR bonus under the Housing SEPP provisions. The maximum FSR for the site under the in-fill affordable housing provisions is 7.15:1 (30% bonus on 5.5:1) and will require the delivery of 15% affordable housing calculated based on the total GFA of the development generated by the maximum project FSR of 7.15:1.

Relationship with existing concept consents or master plans

Where development consent has been granted to a concept development application, the EP&A Act provides that any further detailed development application (DA) cannot be inconsistent with that consent.

In-fill affordable housing State significant development

Thresholds for State significant development (SSD) for in-fill affordable housing

To be declared SSD, the residential development component of a proposal must have a CIV greater than $75 million if it is located in the Eastern Harbour City, Central River City or Western Parkland City, or $30 million if located elsewhere in NSW.

The Department holds a mandatory scoping meeting with applicants to discuss the key issues of a proposal prior to lodgement. Applicants are encouraged to understand and discuss site constraints with the Department prior to lodgement to ensure an efficient assessment and determination process. Applicants can request a scoping meeting with the Department and should refer to other published guidance documents relating to the SSD process.

If throughout the assessment, it is realised that the full 30% bonus cannot be accommodated on site, for the DA to be determined under the SSD pathway, the development must provide 10% of the total GFA as affordable housing regardless. In a situation where the full extent of the in-fill affordable housing bonus cannot be achieved and the applicant chooses not to provide 10% of the total GFA as affordable housing, the applicant would be required to withdraw the SSD application and lodge the DA with the relevant local council.

How are SSD-eligible DAs that have been lodged with council but not determined dealt with?

The relevant council or planning panel remains as the consent authority for DAs that were lodged, but not determined before the current in-fill affordable housing provisions commenced.

Refer to section 2.21 of Part 2.5 of the *State Environmental Planning Policy (Planning Systems) 2021* SEPP for further information.

Applicants interested in understanding more about the SSD process for a potential projects can review the Department's State Significant Development Guidelines.

Application of development control plans

DCPs do not apply to in-fill affordable housing SSD applications.

Refer to section 2.10 of the Planning Systems SEPP.

Where a DCP includes provisions relating to any of the following matters for residential apartment development, those DCP provisions are of no effect and the relevant provisions of the Apartment Design Guide (ADG) apply instead:

a) visual privacy,

b) solar and daylight access,

c) common circulation and spaces,

d) apartment size and layout,

e) ceiling heights,

f) private open space and balconies,

g) natural ventilation, and

h) storage

Refer to section 149 of the Housing SEPP.

Flexible application of in-fill affordable housing provisions

Responding to local standards

The full extent of the in-fill affordable housing bonuses may not be achieved on all sites, due to site constraints and local impacts. The in-fill affordable housing bonuses should not be treated as an entitlement. DAs that propose in-fill affordable housing will be subject to merit assessment by the consent authority. The application of the bonuses does not affect a consent authority's responsibility to consider the requirements of relevant EPIs, a development's likely impacts or the suitability of the site for the development. In applying the in-fill affordable housing bonuses, applicants and consent authorities should be flexible in the design response of the development having regard to:

- the Government's policy intent to deliver more affordable housing through the in-fill affordable housing provisions of the Housing SEPP, and
- the impact of the development on the amenity of the site and adjoining land, taking into account the building's height, scale and bulk.

The in-fill affordable housing bonuses do not override any provision in any LEP or other EPI. However, local development standards should be applied flexibly and need to be balanced against the need to realise more affordable housing.

In the case of solar access controls in a LEP for preserving solar access to dwellings and / or open space:

- The objective of preserving solar access is to be considered whilst balancing the need for affordable housing.
- The height and FSR bonus may not be achieved in full where the development would cause unreasonable overshadowing or would result in substantial reduction the mid-winter solar access available to existing dwellings.
- For example, an LEP contains a sun access control which specifies that development consent must not be granted to development that would cause unreasonable overshadowing to a public open space between set hours at mid-winter. Sites in the vicinity of the public open space may not be able to accommodate the full height bonus whilst complying with the local overshadowing controls. A portion of the height bonus may be able to be accommodated, up until the point where unreasonable overshadowing would occur.

In-fill affordable housing development standards

Under section 15C of the Housing SEPP, a development must include at least 10% affordable housing for the in-fill affordable housing provisions to apply.

At sections 16 and 18, the Housing SEPP provides FSR and height of buildings bonuses of up to 30%, requiring that at least 10% of the GFA be provided as affordable housing.

Under section 16 of the Housing SEPP, if the development involves residential flat buildings or shop top housing, the maximum building height is the maximum permissible building height for the land plus an additional building height (up to 30%) that is the same percentage as the additional FSR derived by the formula at section 16(2). For example, where a development proposes 22% additional FSR, the development is also eligible for 22% additional height.

Non-discretionary development standards

Section 19 of the Housing SEPP includes several non-discretionary development standards for in-fill affordable housing.

Non-discretionary development standards are standards that if complied with, prevent consent authorities from:

- taking the non-discretionary development standard into further consideration in determining the DA,

- refusing the DA on the grounds that the development does not comply with those standards, or
- imposing a condition of consent that has the same, or substantially the same, effect as the standard but is more onerous than the standard.

Applicants and consent authorities should refer to the Guide to Varying Development Standards published by the Department regarding the application of clause 4.6 and non-discretionary development standards.

Non-discretionary development standards do not prevent the consent authority from granting consent even though a non-discretionary development standard is not complied with. Particularly, where the Housing SEPP or another EPI contains more permissive standards for the same matter.

For example, the in-fill affordable housing provisions include a non-discretionary development standard for minimum parking rates. The consent authority cannot refuse a DA based on parking rate if these minimum rates are met. If another planning instrument contains a more permissive standard, or the consent authority is of the opinion that a lower parking rate is justified on merit, it is not intended that a written variation request pursuant to clause 4.6 should be required for the non-discretionary parking standard under the Housing SEPP.

Implementing the in-fill affordable housing changes for existing projects

Changes to a development application under assessment

Section 37 of the EP&A Regulation outlines that at any time before a DA is determined, an applicant may apply to the consent authority for an amendment to the DA.

A consent authority may allow an applicant to make changes to a development application.

Once an application has been determined, it is possible for changes to the project to be approved through:

- A modification application – must be substantially the same as the original consent, or
- A new DA – no relationship to any previous consent.

These pathways are discussed further below.

Modification applications

A development consent may be modified by written notice to the consent authority.

The EP&A Regulation provides that the original consent authority for a DA remains the relevant consent authority for any subsequent modification application.

The EP&A Act provides various pathways for modifying a development consent. A modification that aims to access the in-fill affordable housing bonuses is no different from any other modification and must show that the modified development is substantially the same as the original, unmodified development.

If this cannot be demonstrated to the satisfaction of the consent authority, an applicant could still potentially access the in-fill affordable housing bonuses by obtaining a new development consent.

New development applications

Where a new development consent is required, applicants may choose to lodge a new DA to include in-fill affordable housing and increase the GFA and height by applying the available bonuses.

The DA will be assessed against the planning controls at the time the new application is made and there is no need to meet the 'substantially the same test' under the EP&A Act, which would be required if a modification application was lodged.

More than one development consent to carry out development can apply to the same land.

Section 4.17(1)(b) of the EP&A Act allows a condition of consent to be imposed as part of a new development consent, to modify an existing consent. This prevents any inconsistencies between development consents that apply to the land.

Savings provisions

All applications made but not determined prior to the making of the Amending SEPP will be saved.

Residential amenity of affordable housing

Residential amenity is one of the design quality principles under Chapter 4 of the Housing SEPP that must be considered in the assessment of residential apartment development. Good residential amenity combines appropriate room dimensions and shapes, access to sunlight, natural ventilation, outlook, visual and acoustic privacy, storage, indoor and outdoor space, efficient layouts and service areas, and ease of access for all age groups and degrees of mobility. It is important that amenity is

maximised across a development, and that affordable dwellings are not subject to a lower standard. For example, if 70% of dwellings across a development achieve the ADG criteria for solar access (minimum 2 hours to living areas), then a similar percentage of the affordable dwellings should meet that standard.

Further information

A copy of this practice note can be accessed on the Department's website www.planning.nsw.gov.au.

Links to the Standard Instrument can be found on the NSW Legislation website at: www.legislation.nsw.gov.au

Authorised by

- Monica Gibson

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Important note

This note does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this note.