

Beth Morris  
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Department of Planning  
GPO Box 39  
Sydney NSW 2001

Dear Sir/Madam

**Proposed Amendments for Stage 2 Commercial Industrial Code, Exempt Code and the General Development Code**

[In response, please quote File Ref: LP03/568054]

Thank you for the opportunity to respond to the Stakeholder Discussion Paper referenced above.

Sutherland Shire Council has issued the second highest number of Complying Development Certificates of any urban Local Government Area (2009 - 10). In the main, Council supports the proposed expansion of the exempt development provisions. However, some of the amendments proposed in the Discussion Paper may result in commercial and industrial development with little architectural merit and with faint regard for Council's current development controls to protect the amenity of the surrounding area. These concerns and suggested changes to address them are detailed in the attached submission.

Yours faithfully

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## **Submission:**

### **Proposed Amendments for Stage 2 Commercial Industrial Code, Exempt Code and the General Development Code**

Sutherland Shire Council has issued the second highest number of Complying Development Certificates of any urban Local Government Area (2009 - 10). The expansion of the exempt development provisions is supported. These minor uses generally have little or no impact on surrounding properties and appropriate controls can be implemented. However, the proposed amendments to complying development to allow significant industrial development (up to 5,000 m<sup>2</sup>) and commercial development (50% of the gross floor area - up to 1,000 m<sup>2</sup>) while requiring compliance with the BCA are problematic.

The proposed changes may have a number of adverse results:

- development with little architectural or planning merit
- development with little regard for Council's current development controls
- inconsistent and arbitrary application of BCA requirements

The proposed changes allow private certifiers to permit significant development, including development with significant amenity and traffic impacts, with no community input. Furthermore, the discretion available to private certifiers may lead to the potential for corruption.

A private certifier will need to be familiar with all of the State and Council policies and instruments in order to determine the height, setback and density controls in order to assess new industrial buildings and additions to commercial buildings. For changes of use, private certifiers will need to know what is permissible in the zone and whether an existing use is approved and consistent with the zone. It is possible that these changes will result in certifiers seeking detailed reports from planning consultants in order to protect the integrity of their decisions. How can certifiers ensure they are receiving accurate information? Will this add costs to the process?

Private certifiers are generally building surveyors, not planners. They are employed by the client. The role of a private certifier, as both a regulator and a businessperson, is difficult. The private certifier may be caught between imposing costly and difficult BCA requirements, or detailed Council building envelope controls, and trying to please the client. The discretion available to the private certifier to apply may result in inappropriate and inconsistent decision-making. Once the consent is issued and the building built, it will be difficult to rectify these issues. In contrast, Council, as a regulator, is not subject to this inherent conflict of interest.

New requirements for compliance with the BCA (including fire protection and disabled access - possibly lift access to 2nd floor) may make internal alterations or additions to commercial and industrial buildings difficult. Furthermore, the discretion available to the private certifier for alternate solutions will lead to inconsistent decision making.

When complying development was first introduced, it was determined that it was inappropriate that the matter of upgrading a building (whether partially or entirely) be the sole responsibility of a private certifier. Clauses 93 and 94 of the Regulations were created to place the responsibility on the consent authority. Under the proposed changes, unscrupulous applicants could shop around and find the certifier that would not require, or at the least require only minimal, upgrading to a building. It is recognised that upgrading to the current requirements of the BCA can, in many cases, be onerous, and that discretion is used to arrive at an acceptable solution having regard to the merits of the case. However, who should have the discretion? The proposed changes either will allow some discretion or will require strict compliance with the BCA. This will lead to inconsistent decisions and / or significant costs that would need to be carried by the applicant. It may also result in a corruption in the decision making process.

Council has experienced a number of unscrupulous certifiers who have made dubious decisions. Unfortunately, BCA fire and disabled access requirements are a specialist area where compliance can be critical and can endanger human life. Council is often not aware of poor certifiers until a complaint or incident occurs. The bad conduct of certifiers is evident in the number of recent complaints to the Building Professionals Board and it is noted how little action has been taken.

It is Council's opinion that decisions in respect to upgrading are currently properly allocated with the consent authority. This properly allows the consent authority to determine what upgrading should be required in the specific case. It is recommended that, at the very least, the complying development provisions be amended, and the size of commercial and industrial development limited. It is also recommended that additional controls be included that ensure buildings have some architectural merit and streetscape appeal such that the outcome reflects good planning principles, as well as the desires of the community.

How these planning principles can be implemented in complying development is uncertain. Complying development should be a process that is transparent, where there is little discretion, decisions are consistent and outcomes are predictable. Unfortunately, planning is often subjective.

Should the Department wish to increase the uptake of complying development, the focus should be on development that requires little subjective assessment: for example, ancillary development and dwellings in standard suburban areas. Please note the following detailed comments:

**Exempt Development:**

The Discussion Paper proposes an expansion of the range of development types included as "exempt". There is no objection to the proposed expansion of the exempt development provisions to include amusement devices, automatic teller machines, charity bins, 24 hr trading (1 week before Christmas) and updating as per SEPP 4 places of public worship provisions, SEPP 60 buildings use for public meeting provision, and the existing provisions of SEPP Temporary Structures.

It is however recommended that the following developments also be included when the Exempt Development Code is next updated:

- The demolition of swimming pools (above ground) or in-ground pools that do not extend more than 600 mm above natural ground level.
- An updated definition of 'home business' which takes into account the fact that increasingly, a home businesses may be an internet business employing one or two persons involved in the electronic sale of items not materially located on the site (i.e., the business is a 'middleman' operation). As the 'home business' definition is currently drafted - because there is a sales component to such operations – these types of home businesses do not meet the criteria for exempt development. Sutherland Shire Council's compliance officers report a growing number of cases where, because of this outdated interpretation of business practices or capabilities, home businesses with no visual, noise, parking, traffic or other distinguishable impacts on the amenity of the local neighbourhood, must relocate out of homes and into office premises to do little more than operate a computer. It would seem that this was not the Department's intent when it drafted this definition. Thus, the Department should consult with internet operators to revisit this definition and redraft it to reflect contemporary realities. Alternatively, a separate definition may need to be drafted that addresses this specific use.
- A broader range of signage and advertisement types (after consultation with councils).

Whilst Council does not currently require a development application for the commercial use of footpaths and roadside stalls / outdoor dining on footpaths and other Council land, the current exempt development provisions highlight Council's process for such applications - a note to this effect would explain the requirement to comply with the Roads Act and Local Government Act.

Exempt development provisions for Roadside Stalls should include a maximum size 8m<sup>2</sup> (for those Councils who do not have a Standard Instrument yet).

Similarly, whilst Council does not currently require a development application for 'waste storage containers in road reserves and other public places', most novice builders will not know what 'comply with relevant legislation and licensing requirements' means. Councils generally already have a process for such applications and it would be preferable if a note to this effect was added.

#### **Internal Alterations to non-residential buildings:**

These provisions will enable internal alterations to any existing non-residential building as complying development. Internal alterations may intensify the use or affect the amenity of the area. For example, internal alteration to licensed premise (a club) may result in additional function rooms, bars etc. The impacts of the intensification of the use will not be assessed by Council with the result that the amenity of any adjoining residential property may be adversely affected. At the very least, it is recommended that internal alterations not apply to a:

funeral chapel  
funeral home  
retail premises where firearms within the meaning of the Firearms Act 1996 are sold  
pub (licensed premises)  
restricted premises  
sex services premises.

BCA requirements for compliance with fire protection and disabled access (e.g., lift access to 2nd floor) may make internal alterations to existing commercial buildings difficult. The private certifier may be required to impose costly and difficult BCA requirements whilst trying to please the client – an inherent conflict of interest. The discretion the private certifier can exercise may result in inappropriate decisions (as discussed above).

A control prohibiting alterations to create separate tenancies should also be included, as this type of development is an intensification of the site.

#### **Change of Use:**

Council has concerns about the impact of bulky goods premises. The proposed provisions enable a change of use from markets, landscape and garden supplies, timber and building supplies and vehicle sales or hire premises to bulky goods. This change of use provisions assume that bulky goods premises, markets, landscape and garden supplies, timber and building supplies and vehicle sales or hire premises are all the same type of development (with the same level of impact) and therefore allow change of use to/from such. However, in Council's experience, bulky goods premises are more like retail premises (see DOP circular PN06-003). Bulky goods development in industrial areas, or where there may be substantial traffic impacts, is not always appropriate.

Expansion of bulky goods or a change of use to bulky goods should not be permitted as these developments generally require greater parking and have greater trip generation than the original development (see RTA Guide to Traffic Generating developments). Such changes of use will result in inappropriate development with adverse environmental impacts, particularly where adjacent to residential development and along classified roads (where vehicle sales premises are located) where traffic impacts will have a significant impact. Many of these current uses are located in residential areas (and are not existing uses but rather permitted by an exceptions clause as an additional permitted use).

The requirement that the use must be permissible with consent in the zone (1.18(1)(a) and that the current use must be lawful (5.2(a)) is open to significant interpretation by private certifiers. Private certifiers do not have the benefit of Council files, showing the history of the site and approved uses, and can be reluctant to undertake the necessary research at Council (under FOI provisions) due to time and monetary constraints. Council has concerns that, in the future, because of inappropriate exempt and complying developments, its staff will be subject to significant (unpaid) compliance work.

Requirements for compliance with fire protection and disabled access (lift access to 2nd floor) parts of the BCA may make internal alterations to existing commercial buildings difficult (see above).

Change of use to restaurants is also laden with difficulties. Restaurants can have significant adverse impacts on the amenity of adjacent residential areas. Noise impacts, waste management, and hours of operation (to 10pm Mon – Sat) can result in adverse impacts to neighbours. New Clause 5.5(j), which excludes 60 m<sup>2</sup> or 40 seats of a restaurant from car parking requirements, is generous and likely to create parking problems in areas already saturated with restaurants (eg Gymea). Many small local shops currently provide no parking except for a loading space at the rear. It is recommended that an additional provision be added prohibiting a change of use to a restaurant as complying development where the site is located adjoining or opposite residential development.

The following detailed comments are made:

Add the following to list of 'Change of use premises':

From bulky goods premises or recreation facility (indoor) to light industry  
From light industry, bulky good premises or recreation facility (indoor) to warehouse or distribution centre.

The proposed ancillary use for 20% industrial retailing is acceptable and unlikely to change the character of industrial areas significantly.

Intensification of use - 'Where the development results in an increase in intensity any required additional car parking must be increased in accordance with new clause 5.5J' - It is noted that current clause 5.2 (c) states there should be no additional floor space. However, this clause places an obligation on the certifier to determine whether the development results in an increase in intensity - there is much scope for interpretation (and abuse) of this provision. A change of use or expansion of use for a restaurant, food shop or bulky goods premises is intensification, but the controls do not recognise this. It is recommended that these uses be excluded from change of use provisions.

#### **First Use of Premises:**

New provisions will enable the first use of premises without development consent. These provisions appear to apply to both buildings where a Development Consent has been issued and new buildings approved as complying development. Concern is raised about the first use of such premises. Many uses are permissible in a zone, for example in the SSLEP2006 employment zone (industrial), permissible uses range from heavy industrial uses, to childcare centres, to nightclubs, and veterinary hospitals. The discussion paper suggests (1.12.4) that some uses will not be allowed as complying development, but does not elaborate. It is not clear which 'first' uses will be permitted. Some uses will obviously be inappropriate and need an environmental assessment (amenity, intensity of development impacts). It is noted that Wyong Council allows 'first use' as complying development in the industrial and business parks but excludes the retailing and showroom display of goods, manufactured, processed, assembled, serviced or warehoused on site, and non industrial uses such

as recreational facilities, food shops or childcare centres. Similar provisions should be added here.

First use of premises adjoining or adjacent to residential area can be problematic. A development assessment of these premises ensures that the hours of operation are appropriate and that the use will not have an adverse impact on surrounding residential development. It is recommended that an additional provision be added limiting first use as complying development to where the site is not located adjoining or opposite residential development.

**External Additions and Alterations:**

The provisions enable minor external alterations and additions including mechanical ventilation, shop front and awning alterations (to similar) and skylights/roof windows as complying development.

**New Industrial Buildings and Additions:**

The expansion of the complying development code provisions to allow significant industrial development (up to 5,000 m<sup>2</sup>) and commercial development (up to 1,000 m<sup>2</sup>) may result in adverse impacts on the local amenity. The proposed controls do not reflect all of Council's current controls for bulk and scale, controls to protect the amenity of the area, and controls that reinforce the desired future character of the locality. There will be no community input, even if located adjacent to residential development. Whilst the controls sometimes reference Council's policy, this may be open to interpretation and is at the discretion of the certifier. Private certifiers will now need to become familiar with Council controls for height and density, setbacks and car parking. They will need to assess the intensity of development.

There are concerns that these complying development provisions will result in industrial development of poor quality - basic boxes using the lowest quality materials, with no architectural merit. Industrial buildings of significant size will not respond to site opportunities or constraints. Such development may result in adverse environmental impacts, particularly where adjacent or adjoining residential development and along classified roads, where traffic impacts, and access and loading arrangements will have a significant impact. In the case of Taren Point, the industrial zone adjoins the Woolooware Bay Aquatic Reserve and the Bay-to-Bay Cycle way. As such, visual and environmental considerations are very important.

A number of concerns should be addressed by appropriate conditions. It is not clear whether the requirement that "the development must comply with the RTA's requirements" overrides the later requirement to comply with Council's car parking requirements (as per Car Parking, Vehicular Access, loading and unloading section). It would be preferable if all new development complied with Council's car parking requirements. Any development that requires a traffic report, as per Council's controls or the RTA Guide to Traffic Generating Development, should require a development application and conform to appropriate controls.

A control prohibiting the construction of factory units (separate tenancies) should be included, as this type of use is an intensification of the site and requires assessment.

Adverse parking and traffic impacts from small units can often be ameliorated at DA stage.

**The following detailed comments are made:**

**Building Height** – It is not clear where the control limiting the maximum height of development ‘adjoining residential’ (8.5m) applies. This control should apply to sites located adjoining or opposite residential development.

**Setbacks** - Council defines Environmentally Sensitive Land as land within Zone 1 Environmental Housing (Environmentally Sensitive Land). The proposed setback control (10m) is not particularly useful to this zone. It is suggested that this clause refers to Environmentally Sensitive Area (coastal waters, SEPP 14 & 26, aquatic reserves, RAMSAR wetlands, national parks, crown land, etc). An additional control is required to ensure that a greater setback to a reserve is required (3m). This would enable a greater setback at Taren Point where industrial land abuts a reserve that abuts the RAMSAR wetlands/aquatic reserve. The controls should also be amended to recognise that some industrial land is subject to a foreshore building line under an EPI.

The landscape controls do not recognise that an EPI often have greater setback and landscape requirement. For example, SEPP Kurnell Peninsula (cl. 13) requires a 20 m landscaped setback to Captain Cook Drive, Kurnell. It will be up to the private certifier to be familiar with all of the State and Council policies and instruments. Once consent is issued and the building built, it will be almost impossible to rectify such issues. Similarly, Council requires a 6m landscape setback on large sites (>1000 m<sup>2</sup>) on Taren Point Road and Captain Cook Drive, Taren Point, in order to provide a better streetscape. Larger sites on classified roads should be required to provide greater landscaping.

**Site works** – The proposed cut of 3 metres and fill of 2 metres standard is excessive and will result in adverse amenity and environmental impacts.

**Additions to Commercial Buildings**

The changes will enable the construction of an addition to a commercial building (Business, office and retail premises) up to 50% of the gross floor area or 1000 m<sup>2</sup> (whichever is the lesser) as complying development. Whilst the use of these provisions will be largely limited by the ability of the site to provide additional parking (as many shops/business premises do not have additional area for parking), the provisions have the potential to result in significant development (up to 1,000 m<sup>2</sup>) in centres or neighbourhood shops, with no architectural or planning assessment. For example, supermarkets (both large and smaller ones) will be able to do substantial additions. Provided development is behind the existing building line (is 1cm enough?), and not ‘adjacent’ to residential development, three storey development is permitted over any part of the site. No consultation with adjoining owners or the surrounding residential area is required.

Allowing substantial additions to commercial development as complying development may result in some unattractive and haphazard streetscapes. Private certifiers are not obliged to take into account the desired future character of a place, the Council's



detailed development controls for building envelopes, or the impact of development on amalgamation pattern. There is no requirement to ensure street frontages are active and /or awnings are provided. Many streetscape elements currently detailed in Council's existing controls will not be implemented by these provisions. Measures to address building articulation, bulk and scale, pedestrian access, gateway landmark corners, privacy and overlooking, and building design that gives a human scale will not be implemented by these provisions. Neither do the controls address how lift overruns (lifts may now required by the BCA) will be treated.

Furthermore, Council will not be able to require improvements to the public domain (e.g., streetscape and public space works incorporating paving, hard and soft landscaping, street trees, lighting and street furniture incorporating rubbish bins, seating and street signs), the need for which may arise as a result of substantial additions.

It is also noted that the requirements for compliance with fire and disabled access parts of the BCA may make additions to existing commercial buildings impossible (lift access to 2nd floor).

The following detailed comments are made:

Maximum building height of the addition - Limiting the height of development where adjacent to residential development is desirable but it is not clear where this control will apply. Is a site separated from residential by a laneway subject to this control? Would this apply to a thin (6m wide) shop only one shop from residential development (i.e. neighbourhood shops)? Twelve (12) metre high buildings in neighbourhood business zones will result in a loss of residential amenity.

Car parking - for a cafe or restaurant: the exclusion of 60 m<sup>2</sup> or 40 seats from car parking requirements is generous and is likely to create parking problems in areas already saturated with restaurants (eg GyMEA).

The controls do not address how Council requirements for a rear lane access or road widening (S94 plan, EPI or DCP requirement) will be addressed.

Thank you for your consideration.