EXPLANATION OF INTENDED EFFECT – AMENDMENT TO STATE ENVIRONMENTAL PLANNING POLICY NO. 70 – AFFORDABLE HOUSING (REVISED SCHEMES)

Findings and Recommendations:

This submission makes the following findings:

1. **Government policies and practices, including the insistence that local government areas need to be included in State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes) (SEPP 70) in order to enable the Councils of those areas the ability to require contributions for affordable housing in association with development proposals in their LGAs where affordable housing is needed, are directly hindering the provision and delivery of affordable housing.**

2. **It is absolutely nonsensical that a Council should be required to establish beyond reasonable doubt, to the Department's satisfaction, that there is a need for affordable housing in their local government area.**

3. **The time and resources and COSTS involved in the carrying out the work required to demonstrate to the Department's satisfaction that there is a need for affordable housing to support a Council's application for inclusion in SEPP 70 are considerable.**

4. **SEPP 70 is contrary to the objects of the Environmental Planning and Assessment Act.**

5. **The provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009 negate the need for Councils in the "*Sydney region*" or the local government areas of Newcastle and Wollongong to be included within SEPP 70 to enable them "*to require contributions for affordable housing in association with development proposals in areas where this housing is needed*".**

6. **SEPP 70 is redundant.**

Based on those findings, this submission recommends that:

1. **SEPP 70 be repealed, as the SEPP is redundant and its repeal would be in the public interest, including the interest of both the Department of Planning and Environment and local Councils, but even more importantly, in the interest of those persons desperately seeking the provision of more affordable housing within the *Sydney region*.**

2. **The Department of Planning and Environment provide guidance to Councils on what they need to provide in support of their affordable housing contribution schemes, including what feasibility/financial modelling is required to test/demonstrate the viability of such schemes.**

3. **As a matter of urgency, the Department of Planning and Environment develop a Practice Note on the preparation of Affordable Housing Contribution Schemes.**

4. **A Model Clause for affordable housing be developed for inclusion in local environmental planning instruments.**

EXPLANATION OF INTENDED EFFECT – AMENDMENT TO STATE ENVIRONMENTAL PLANNING POLICY NO. 70 – AFFORDABLE HOUSING (REVISED SCHEMES)

Executive Summary

This submission is primarily about whether *State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes)* is the appropriate mechanism to enable Councils to require contributions for affordable housing in association with development proposals in areas where affordable housing is needed.

If that is the Government's position, no objection is raised in principle to the proposed amendment to the SEPP to include the five nominated local government areas in the Explanation of Intended Effect.

The following comments are provided in relation to *State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes)*.

The Department's Explanation of Intended Effect on the proposed amendment to *State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes)* (SEPP 70) and the associated documentation, including the analysis undertaken by each of the 5 Councils of the need for affordable housing within their respective local government areas to support their application for inclusion in SEPP 70, brings into question whether SEPP 70 is a policy which encourages "*the provision and maintenance of affordable housing*" in accordance with Object 5 (a) (viii) of the *Environmental Planning and Assessment Act*.

It could also be argued, because of its limited applicability, and because the Policy does not provide a consistent planning regime for the provision of affordable rental housing across the State, that SEPP 70 does not encourage "*the promotion and co-ordination of the orderly and economic use and development of land*", in accordance with Object 5 (a) (ii) of the *Environmental Planning and Assessment Act*.

For the reasons detailed in this submission, it is contended that SEPP 70 is a state environmental planning policy that hinders, rather than encourages, the provision of affordable housing.

Also as detailed in this submission, it is contended that other planning legislation negates the need for Councils in the "*Sydney region*" or the local government areas of Newcastle and Wollongong to be included within SEPP 70 to enable those Councils "*to require contributions for affordable housing in association with development proposals in areas where this housing is needed*".

In view of the above, and for the reasons detailed in this submission, it is contended that SEPP 70 should not be used as the "*mechanism that allows specified councils to prepare an affordable housing contribution scheme for certain precincts, areas or developments associated with an upzoning within their local government area"*.

For the reasons detailed in this submission, it is contended that SEPP 70 is essentially redundant, and should be one of the SEPPs that the Department should repeal "*to simplify and modernise the planning system*".

It is firmly believed that the repeal of the SEPP would be in everyone's interest, including the interests of both the Department of Planning and Environment and local Councils, but even more importantly, in the interests of those persons desperately seeking the provision of more affordable housing within the *Sydney region*.

Discussion

The Government seems to take great delight in criticizing Councils for red tape and bureaucratic delays in the processing of applications and for wasting resources. In the case of affordable housing it is contended that it is the policies and practices of the Government that are directly hindering the effective and efficient delivery of affordable housing across the *Sydney region*.

The Department's "*Frequently Asked Questions*" (December 2017) supporting document with the Explanation of Intended Effect includes the following introductory statement:

> "*The NSW Government is working with councils to make it easier to deliver affordable rental homes in their communities*."

If the government is serious about making "*it easier to deliver affordable rental homes*", it should look seriously at its current planning policies and affordable housing practices.

Under current government policies and practices, a Council wanting to require contributions for affordable housing in association with development proposals in their LGA where affordable housing is needed, must first convince the Minister for Planning and Environment that there is an identified need for affordable housing in their LGA, and then have their LGA included in *State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes)* (SEPP 70).

It is contended that it is absolutely nonsensical that each Council should be required to establish, beyond reasonable doubt, to the Department's satisfaction, that there is a need for affordable housing in their respective local government area, in order to be included within SEPP 70 to enable that Council to require contributions for affordable housing in association with development proposals in their LGA.

Why should a Council be required to demonstrate to the Department's satisfaction that there is a need for affordable housing within their respective LGA. In relation to the need for affordable housing the Greater Sydney Commission's Draft District Plan Information Note 4 "Affordable Rental Housing Targets" (November 2016) notes that:

> *"The Greater Sydney housing market is commonly recognised as one of the least affordable in the world. In the last decade alone, the ratio of house prices to incomes has continued to grow while median rents have increased in real terms. Our stakeholder engagement identified housing affordability as a key challenge for Greater Sydney."* (page 2)

Is not the evidence already compelling and convincing enough to demonstrate to the Department's satisfaction that there is an identified need for affordable housing in all LGAs within the Sydney Region?

One of the objects of the *Environmental Planning and Assessment Act* is to encourage "*the provision and maintenance of affordable housing*". The question that really needs to be asked is whether SEPP 70 is the appropriate state environmental planning policy/mechanism to effectively and efficiently facilitate the provision and delivery of affordable housing? It would appear to be the Department's view that SEPP 70 is the appropriate state environmental planning policy to encourage "*the provision and maintenance of affordable housing"* based on the Explanation of Intended Effect for Amendment to *State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes)* December 2017. (That view is clearly evident in the Department's Plan Finalisation Report on a planning proposal for the Victoria Road Precinct in Marrickville, discussed later in this submission).

It is contended that a state environmental planning policy that has a prerequisite that a Council must first demonstrate to the satisfaction of the Department that there is an identified need for affordable housing in their respective LGA to be included in the Policy, is a policy that hinders, rather than encourages, the provision of affordable housing.

SEPP 70 came into effect in May 2002. The SEPP, which followed a legal challenge on the validity the use of Section 94 contributions for affordable housing in 2000, was primarily a policy to compensate for the expiry of the Environmental Planning and Assessment Amendment (Affordable Housing) Act, 2000 No. 29, which had a limited currency. Clause 9 of the SEPP 70 currently identifies that there is a need for affordable housing in only 4 local government areas (LGAs in existence when the SEPP came into force, being City of South Sydney, City of Sydney, Willoughby and Leichhardt) within the *Greater Metropolitan Region*.

Note:
Clause 9 of the SEPP reads as follows:

*"**9 Identification of need for affordable housing***
Pursuant to section 94F (1) of the Act, this Policy identifies that there is a need for affordable housing in each of the following local government areas within the Greater Metropolitan Region:

City of South Sydney
City of Sydney
City of Willoughby
Leichhardt"

As part of the amendment proposed in the Explanation of Intended Effect the existing listings of "*City of South Sydney*" (redundant as now part of the City of Sydney LGA) and "*Leichhardt*" (now part of the Inner West LGA, one of the 5 additional LGAs proposed to be included in the SEPP) should be deleted.

Whilst SEPP 70 applies to the *Greater Metropolitan Region* (Clause 6), the title of the SEPP and Aim of Policy (Clause 3) suggests that it has a much narrower application. The title of the SEPP includes the words *"(Revised Schemes)"* and the aim of the policy includes the words "*to insert revised affordable housing provisions into environmental planning instruments….*". It could be reasonably argued, and a strict interpretation of the aim of the policy would imply, that "***revised** affordable housing provisions*" could only be inserted into existing environmental planning instruments that currently contained "*affordable housing provisions*". If SEPP 70 is to be the state environmental planning policy used to identify that there is a need for affordable housing in an area, to help facilitate the delivery of affordable housing in that area, the words *"(Revised Schemes)"* should be deleted from its title, and the Aim of Policy should be amended to read "*The aim of this Policy is to enable affordable housing provisions to be included in the following environmental planning instruments to facilitate the provision and delivery of affordable housing:……".*

Greater Metropolitan Region
SEPP 70 "*applies to land within the Greater Metropolitan Region*". (Clause 6).

Under the SEPP the *Greater Metropolitan Region* is defined as follows:

***"Greater Metropolitan Region** means the land declared to be the Greater Metropolitan Region by order published in Government Gazette No 142 of 11 October 1991 at page 8758."*

The definition of "*Greater Metropolitan Region*" includes Local Government Areas outside the Sydney Region including Cessnock, Kiama, Lake Macquarie, Maitland, Port Stephens and Shellharbour.

It also includes other land (Wollongong LGA) which is outside the Greater Sydney (Capital City Statistical Area) referred to in Clause 8 Definition of "*affordable housing*" of SEPP 70 and Clause 6 Affordable Housing of *State Environmental Planning Policy (Affordable Rental Housing) 2009*.

It also includes other land (Gosford and Wyong LGAs) which is outside the Greater Sydney Region Plan.

The definition is over 26 years old and predates Council amalgamations.

The wording "*Greater Metropolitan Region*" could also cause confusion with other strategic planning documents released since October 1991, such as "*Metropolitan Plan for Sydney 2036*".

To avoid confusion and to be consistent with terminology used in more recent policies it is suggested that

the term "*Greater Metropolitan Region*" be deleted wherever appearing in the SEPP.

Clause 6 *Land to which this Policy applies* would also need to be amended.

One suggestion would be to amend Clause 6 (to be consistent with the terminology used in the Affordable Rental Housing SEPP) to read as follows:

This Policy applies to land within the *Sydney region* and to land within the following local government areas:

i. {Department to determine which local government areas outside the *Sydney region* the Policy should apply}
ii.

However the use of the term "*Sydney region*" may now cause confusion following the inclusion of the definition of "*Greater Sydney region*" in the Act.

The area identified as the *Greater Sydney region* in (Schedule 1 of the Greater Sydney Commission Act 2015) is different to the areas previously identified as the "*Greater Metropolitan Region*" and "*Sydney region*".

To avoid confusion it is suggested that the clause identifying land to which the Policy applies should individually list all local government areas to which the Policy applies.

Note:
Clause 5 of the SEPP reads as follows:

*"**5 Application of Policy***
This Policy applies only to a development application made after the commencement of this Policy."

The application of the Policy should not be restricted to only development applications. It should also relate to other types of applications, such as applications under Section 96 of the Environmental Planning and Assessment Act.

It is interesting to note that despite the issue of affordable housing significantly intensifying in the *Sydney region* since SEPP 70 came into effect, no additional local government areas have been identified within the SEPP as local government areas where there is an identified need for affordable housing since the SEPP came into effect.

The Explanation of Intended Effect proposes an amendment to SEPP 70 to identify 5 additional LGAs as local government areas with an identified need for affordable housing. The Councils of those respective local government areas have each undertaken an extensive analysis of the need for affordable housing within their local government areas to support their application for inclusion in SEPP 70. The time and resources (and costs) involved in carrying out that analysis and the preparation of the reports to support the respective Council's application for inclusion in SEPP 70 would have been considerable. For example, the Randwick City Council's Affordable Rental Housing Needs Analysis (2016) submission included draft LEP provisions on community infrastructure informed by specialised strategic advice on affordable housing and community infrastructure provision and a financial feasibility assessment. The draft provisions were aimed "*to deliver on providing affordable housing within the town centres and the required infrastructure items and public domain works, as identified in the draft strategy, to support growth and change.*"

Those reports have now been reviewed by the Department of Planning and Environment and the Department has considered that the reports met "*the requirement under Section 94F (1) of the Environmental Planning and Assessment Act 1979 to demonstrate a need for affordable housing within the local government areas.*"

It is noted that the Council reports prepared to demonstrate an identified need for affordable housing in their respective LGA, with the exception of the report from the City of Canada Bay, had been with the Department of Planning and Environment for some time before the Explanation of Intended Effect, which proposes to amend SEPP 70 to include those local government areas, was placed on public exhibition. That may be purely coincidental, but may be because of the

administrative processes involved, there may be reluctance to prepare a separate Explanation of Intended Effect each time a Council demonstrates to the Department's satisfaction that there is a need for affordable housing in their respective local government area.

Whilst SEPP 70 remains the state environmental planning policy required to be used to enable a Council to require contributions for affordable housing in association with development proposals in their LGA, it is essential that any report prepared by a Council to demonstrate an identified need for affordable housing in their respective LGAs is reviewed expeditiously by the Department, and if the Department determines that the report meets the requirement under Section 94F (1) of the Act, an Explanation of Intended Effect for the inclusion of that local government area needs to be prepared and placed on exhibition as soon as practicable.

To not do so can have unfortunate consequences and result in missed opportunities and Councils having to pursue other options to obtain the provision of affordable housing. This is clearly demonstrated in the case of a recently determined planning proposal for the rezoning of land, known as the Victoria Road Precinct, Marrickville in the Inner West LGA. The proponent's Planning Proposal, (Department's ref: PP_2015_MARRI_001_00), included the provision of affordable rental housing. The planning proposal was gazetted late last year. The LEP amendment to the planning controls did not include any affordable rental housing provisions.

The Department's Plan Finalisation Report on the Victoria Road Precinct Planning Proposal, dated 30/11/2017, stated in part:

> *"The draft LEP does not include provisions for affordable housing as Council is not part of State Environmental Planning Policy No. 70 - Affordable Housing (Revised Schemes) (SEPP 70). Council has requested to be included in SEPP 70 as part of a separate process, which would allow affordable housing contributions to be levied.*
>
> *The Department supports the provision of affordable housing in the precinct and until Council's request to be included in SEPP 70 is processed, the provision of affordable housing in the residential component of the precinct can be negotiated via VPAs in line with Council's Affordable Housing Policy for the precinct."* (page 7)

There are no doubt many other planning proposals currently in the system, or on the horizon, where the Council responsible for the area would be seeking to ensure that adequate affordable rental housing is provided. Strategies such as the Parramatta Road Corridor Urban Transformation Strategy and the Sydenham to Bankstown Urban Renewal Corridor Strategy are likely to lead to numerous planning proposals, many of which would be located on land in local government areas not currently included in SEPP 70, or on land proposed to be included in the proposed amendment to the SEPP detailed in the Explanation of Intended Effect.

Note:
In relation to Government led urban renewal projects, such as the Sydenham to Bankstown Urban Renewal Strategy, it should be responsibility of the Government to prepare the necessary "*affordable housing contributions scheme*(s) *to support each new planning proposal where contributions for affordable housing* **will** *be required",* including all the necessary market analysis for sites within the urban renewal area and the carrying out of the feasibility/financial modelling required to robustly test/demonstrate the viability of such schemes.

Returning to SEPP 70, it is contended that a SEPP, even with the proposed inclusion of those local government areas identified in the Explanation of Intended Effect, that only identifies that there is a need for affordable housing in 7 LGAs (the 5 proposed additional local government areas and the City of Sydney and Willoughby LGAs), does little to facilitate the delivery of affordable housing within the *Sydney region*.

For a state environmental planning policy to effectively facilitate the delivery of affordable housing across the *Sydney region* it needs to apply to **all** LGAs within the region, not just a selected few.

The Department's "*Frequently Asked Questions*" (December 2017) supporting document with the Explanation of Intended Effect provides the following response to the question "*Why do we need more affordable housing?*":

> *"Affordable rental housing underpins economic productivity and can support Sydney as a prosperous global city.*
>
> *The provision of affordable housing in the right places connects workers to jobs and people to services.*
>
> *Affordable housing is necessary for the workers on low incomes who keep Sydney and NSW operating and it is also a pathway out of social housing."* (Page 1)

Surely all "*the right places*" for affordable housing that "*connects workers to jobs and people to services*" are not confined only to those local government areas currently identified in SEPP 70 and the 5 additional LGAs proposed to be included in the SEPP.

The "*Frequently Asked Questions*" (December 2017) Intended Effect provides the following response to the "*How do councils currently provide affordable rental housing?":*

> *"Many councils currently use Voluntary Planning Agreements to boost the number of affordable rental homes in their area on an ad-hoc basis.*
>
> *Inclusion in SEPP 70 will simplify the process for development in these LGAs, meaning there is a consistent approach to providing affordable rental homes. It will make the requirements clear to landowners and proponents early in the planning and development process.*
>
> *The current system provides little consistency or certainty for developers, the community and councils."* (Pages 1-2)

If the Government insists on State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes) being the mechanism to enable Councils to require contributions for affordable housing in association with development proposals in areas where affordable housing is needed, until such time as that SEPP applies to **all** local government areas, there will not be "*a consistent approach to providing affordable rental homes*" across the *Sydney region* or a planning system that provides either "*consistency or certainty for developers, the community and councils*".

As detailed in the response to the above frequently asked question, the Department acknowledges that "*The current system provides little consistency or certainty for developers, the community and councils."* The amendments proposed, detailed in the Explanation of Intended Effect, do little to change that situation. The situation will not change until such time as there is "*a consistent planning regime for the provision of affordable rental housing*" (Aim 3 (a) of the Affordable Rental Housing SEPP).

A number of strategic planning documents have already identified that there is a need for affordable rental housing in local government areas other than those local government areas currently identified in SEPP 70 and the 5 additional LGAs proposed to be included in the proposed amendment to the SEPP detailed in the Explanation of Intended Effect. For example:

- <u>Draft Greater Sydney Region Plan</u>
  "*Housing is more diverse and affordable*" (Objective 11); and
  "*Prepare Affordable Rental Housing Target Schemes*" (Strategy 11.1)

- <u>Draft District Plans</u>
  "*Providing housing supply, choice and affordability, with access to jobs and services"* (Planning Priority E5); and
  "*Prepare Affordable Rental Housing Target Schemes*" (Action 16)

- Parramatta Road Corridor Urban Transformation Strategy
  It is noted that the former Minister of Planning in the Ministerial forward to this Strategy stated (in part) that *"The Strategy establishes a blueprint to deliver more diverse and affordable housing, more jobs and better support for local businesses."*

  Strategic actions for affordable housing include:
  "*Provide a minimum of 5% of new housing as Affordable Housing, or in-line with Government policy of the day";* and
  "*Amend State Environmental Planning Policy No 70 – Affordable Housing (Revised Scheme) to identify that there is a need for affordable housing in all local government areas in the Corridor*" (page 45)

- Revised draft Sydenham to Bankstown Urban Renewal Corridor Strategy
  Similar strategic actions for affordable housing to those identified for the Parramatta Road Urban Transformation Strategy should apply to the Sydenham to Bankstown Urban Renewal Corridor Strategy as suggested in submissions submitted in response to community consultation of the revised Draft Strategy. It is noted that the Inner West Council's submission on the revised Draft Strategy stated (in part):

  > *"It is essential that the Strategy sets an appropriate affordable rental housing target and that the State Government make amendments to State Environmental Planning Policy No 70 – Affordable Housing (Revised Scheme) to identify that there is a need for affordable housing in the Sydenham to Bankstown Urban Renewal Corridor and that the State Government make relevant amendments to the environmental planning instruments applying to all local government areas in the Corridor to permit the levying of affordable housing contributions for residential development in the Corridor, to enable the creation of Affordable Rental Housing in perpetuity under the management of a Registered Community Housing Provider."*

- NSW Family and Community Services – Centre for Affordable Housing
  Identifies 24 LGAs as "*High Need for Affordable Housing*" and 16 LGAs as "*Moderate High Need for Affordable Housing*" in the *Sydney Region*. (**NB**: The LGAs referred to above relate to former LGAs before amalgamation).

Clearly the documents referred to above demonstrate that there is an identified need for affordable housing in local government areas outside those local government areas currently identified in SEPP 70 and those to be included in the proposed amendment to the SEPP identified in the Explanation of Intended Effect.

Under the Draft Greater Sydney Region Plan and the Draft District Plans, each Council is required to prepare an Affordable Rental Housing Target Scheme for their respective local government area. Part of the preparation of such schemes would be to ensure that an appropriate mechanism(s) are in place to enable that Council to require contributions for affordable housing in association with development proposals in their area where that affordable housing is needed.

It is noted that the Greater Sydney Commission's testing affirms "*that across Greater Sydney targets generally in the range of 5-10 percent of new residential floor space are viable…*".(Page 59 *Draft Greater Sydney Region Plan* (October 2017)) The Commission notes that a 5 to 10% target "*will be flexible enough to account for the local characteristics and urban economics of an area*" and that percentage affordable target "*range has been identified based on feasibility testing undertaken in urban renewal and land release areas across Greater Sydney.*"

Under the Government's current affordable housing practices it would be necessary for all those Councils not currently listed in SEPP 70 to carry out an extensive analysis of the need for affordable housing in their respective local government areas and prepare reports to demonstrate to the Department and Environment and Planning that there is an identified need for affordable housing in their respective local government area.

The Premier of NSW has declared the housing affordability crisis as "*the biggest issue people have across the state*" and has identified "*fixing housing affordability*" in Sydney as one of her three top priorities.

If the government is serious about affordable housing and intends retaining SEPP 70 as the state environmental planning policy used to facilitate the delivery of that affordable housing, it is strongly recommended that the Department dispense with the need for all those Councils, not currently included in the SEPP, to prepare reports to demonstrate to the Department's satisfaction that there is an identified need for affordable housing in their respective local government area.

It is contended that to require such reports when affordable housing in the *Sydney region* is in crisis is nonsensical. Most Councils have limited resources, and as evidenced from the reports prepared by each of the 5 Councils proposed to be included in the SEPP, the time and resources (and costs) involved in carrying out that analysis and the preparation of the reports to support the respective Council's application for inclusion in SEPP 70 are considerable.

At a time when the financial sustainability of Councils is under increased scrutiny by the State Government it is difficult to justify expenses to demonstrate to the Department's satisfaction that there is a need for affordable housing in a local government area, especially considering that the Department's own documents clearly state that there is a need for affordable housing on land within those local government areas.

In light of the above, the question that really needs to be asked is whether SEPP 70 is the appropriate state environmental planning policy to facilitate the delivery of affordable housing? It is unknown the Department's reasoning for continuing to rely on the SEPP as the State environmental planning policy for identifying whether there is a need for affordable housing in an area. Maybe the Department's reasoning for relying on the SEPP for that purpose is provided in the following statement contained in the Explanation of Intended Effect, which reads as follows:

> "*Broadly, the policy* (SEPP 70) *provides the link between section 94F of the Environmental Planning and Assessment Act 1979 (EP&A Act) and collection of affordable housing contributions or dedication of affordable dwellings."* (page 6)

Section 94F of the Environmental Planning and Assessment Act relates to *Conditions requiring land or contributions for affordable housing*.

Subclause (1) of Section 94F states (in part):

> *(1) This section applies with respect to a development application for consent to carry out development within an area if a State environmental planning policy identifies that there is a need for affordable housing within the area and:*
> *(a) the consent authority is satisfied that the proposed development will or is likely to reduce the availability of affordable housing within the area, or*
> *(b) the consent authority is satisfied that the proposed development will create a need for affordable housing within the area, or*
> *(c) the proposed development is allowed only because of the initial zoning of a site, or the rezoning of a site, or*
> *(d) the regulations provide for this section to apply to the application."*

At the time when SEPP 70 came into force it was the only State environmental planning policy that identified that there was a need for affordable housing within certain areas. Consequently, at that time, SEPP 70 provided *"the link between section 94F of the Environmental Planning and Assessment Act 1979 (EP&A Act) and collection of affordable housing contributions or dedication of affordable dwellings",* in those identified areas.

SEPP 70 is no longer the only "*State environmental planning policy* (that) *identifies that there is a need for affordable housing within the area."*

State Environmental Planning Policy (Affordable Rental Housing) 2009 (Affordable Rental Housing SEPP), which came into effect in September 2009 also identifies that there is a need for affordable housing within certain areas. The relevant clause of that SEPP is *Clause 51 Contributions for affordable housing*.

Clause 51(1) of the Affordable Rental Housing SEPP relating to contributions for affordable housing states:

> *(1) For the purposes of Section 94F (1) of the Act, this Policy identifies a need for affordable housing on land within the Sydney region and on land within the local government area of Newcastle or Wollongong City."*

Note:
State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes) and *State Environmental Planning Policy (Affordable Rental Housing) 2009* identify that there is a need for affordable housing on certain land for different reasons.

In the case of SEPP 70 (including the amendments proposed in the Explanation of Intended Effect) the local government areas where land has been identified where there is a need for affordable housing relates to the local government areas of City of Sydney, Willoughby, Randwick, Inner West, Northern Beaches, City of Ryde and City of Canada Bay.

In the case of the Affordable Rental Housing SEPP the land that has been identified where there is a need for affordable housing relates to all land within the *Sydney region* and the local government areas of Newcastle and Wollongong City (Clause 48).

Some people may contend that by virtue of the "*Relationship with other environmental planning instruments*" clause in the respective SEPPs (Clause 7 in SEPP 70 and Clause 8 in the Affordable Rental Housing SEPP) that any provisions of SEPP 70 inconsistent with the provisions of the Affordable Rental Housing SEPP would prevail to the extent of the inconsistency.

However it is contended that it is not necessary to determine whether "*there is an inconsistency between* (the respective policies), ….. or if there is an inconsistency between the policies, which "*policy prevails to the extent of the inconsistency?*".

Section 94F (1) of the Act is very clear. The subject section of the Act only requires a "*State environmental policy to*" (identify) "*that there is a need for affordable housing within the area*". The subject section of the Act does not require the State environmental planning policy to specify any reasons as to why that area was identified as having "*a need for affordable housing*".

Even if there is an inconsistency between SEPP 70 and the Affordable Rental Housing SEPP, the provisions of the Act would prevail. Consequently Councils in the *Sydney region* and the local government areas of Newcastle and Wollongong would be able *"to require contributions for affordable housing in association with development proposals in areas where this housing is required",* regardless of whether or not their local government area was included in SEPP 70.

As the Affordable Rental Housing SEPP identifies that there a need for affordable housing within the *Sydney region* and on land within the local government areas of Newcastle and Wollongong the link between SEPP 70 and Section 94F of the Act is no longer required to enable Councils in the *Sydney region* or the local government areas of Newcastle and Wollongong *"to require contributions for affordable housing in association with development proposals in areas where this housing is required."* Consequently there is no need for Councils in those areas to undertake an extensive analysis to demonstrate that there is an identified need for affordable housing within their local government area and prepare detailed and costly reports to be submitted to the Department to support an application for their inclusion in SEPP 70.

Note:
As detailed above, *State Environmental Planning Policy (Affordable Rental Housing) 2009* identifies that there is a need for affordable housing in the *Sydney region* and the local government areas of Newcastle and Wollongong.

Division 1 In-fill affordable housing of Part 2 New affordable rental housing of the Affordable Rental Housing SEPP includes floor space ratio incentive provisions "*to facilitate the effective delivery of new affordable rental housing*".

The Policy applies to the land in the State (Clause 7). Consequently the policy does not only apply to land in the *Sydney region* and the local government areas of Newcastle and Wollongong, it applies to all land in the State.

The affordable housing incentive provision relating to in-fill affordable housing is not dependent on that land being in an area where a need for affordable housing has been identified under SEPP 70 or to land where a need for affordable housing has been identified under Clause 51 (1) of the Affordable Rental Housing SEPP.

The identification in a State environmental planning policy that there is a need for affordable housing on land within an area satisfies the initial requirement for a Council to be able to require contributions for affordable housing in association with development proposals in areas where affordable housing is needed. A Council would still need to prepare a planning proposal to insert appropriate provisions into their respective environmental planning instrument for their LGA for contributions to be required in accordance with an approved affordable contributions scheme for their area. The Explanation of Intended Effect notes that:

> *"The Councils will need to prepare an affordable housing contribution scheme to support each new planning proposal where contributions for affordable housing* ***will*** *be required. The scheme* ***will*** *be assessed by the Department of Planning and Environment and approved by the Minister for Planning."* (page 10)

Environmental Planning Instruments

As detailed in the Department's recently released Explanation of Intended Effects – Repeal of two operational SEPPs (October 2017), not all land in NSW is subject to a Standard Instrument LEP (e.g. deferred matters and land not included on the Land Application Map in the environmental planning instrument for that local government area).

In some cases it would be necessary to incorporate affordable housing provisions into environmental planning instruments which apply to land to which a Standard Instrument LEP does not apply.

With the initial requirement (impediment) to the delivery of affordable housing removed, Councils could then concentrate on devoting their resources into preparing their housing strategies and Affordable Rental Housing Target Schemes (as required under the Greater Sydney Commission's District Plans) and preparing an *affordable housing contribution scheme* for their area "*to support each new planning proposal where contributions for affordable housing will be required.*"

As detailed above, the affordable housing contribution schemes prepared by Councils to support each new planning proposal would need to assessed by the Department of Planning and Environment and approved by the Minister for Planning.

For the reasons detailed in this submission, it is contended that SEPP 70 is essentially redundant, and should be one of the SEPPs that the Department should repeal "*to simplify and modernise the planning system*".

Note:
Schedule 2 of SEPP 70 includes *Affordable housing principles.* Environmental planning instruments which relate to land to which SEPP 70 applies, such as Willoughby Local Environmental Plan 2012, include the following note:

"Note. *The affordable housing principles set out in Schedule 2 to State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes) may also apply to the development."* (Note to Clause 6.8 (2))

Under Clause 1.5 of the *Standard Instrument*, notes "*are provided for guidance and do not form part of this Plan*". Notwithstanding the above, in the event that SEPP 70 is repealed as recommended in this

submission, the Department may wish to consider incorporating affordable housing principles into a Standard Instrument Model Clause for Affordable Housing.

If the Department accepts the position put forward in this submission, that it is not necessary for a local government area in the *Sydney region* or the local government areas of Newcastle and Wollongong City to be identified, as an area where there is a need for affordable housing on land within their area, under SEPP 70, in order to enable those Councils "*to require contributions for affordable housing in association with development proposals in areas where this housing is needed*", the Department would no longer need to determine whether there is a need for affordable housing in those areas, and if so prepare an Explanation of Intended Effect to include that local government area in SEPP 70.

It is considered that the Department should be proactive and help Councils to prepare their respective affordable housing contribution schemes for their areas "*to support each new planning proposal where contributions for affordable housing will be required.*"

Note:
It is noted that Randwick City Council has prepared a planning proposal (Department's ref: PP_2017_RANDW_001_00) "*to increase the building height and floor space ratio controls and introduce new local provisions for the Kensington and Kingsford Town Centres*". The Council's Planning Proposal included a "*draft Community Infrastructure Contributions clause*" and a "*draft Affordable Housing Clause*".

Supporting documents submitted with that planning proposal included:

- Affordable Housing and Community Infrastructure to Support Growth (Appendix 3);
- Infrastructure Contributions Financial Feasibility Assessment Report, supported by a financial feasibility assessment (Appendix 4); and
- Draft Kensington Kingsford Affordable Housing Plan (Appendix 14)

The Department's Gateway Determination Report on that Planning Proposal, dated 31/10/2017, stated in part:

"*The Affordable Housing Clause should be written as a statement of intent rather than a specific clause and should include an appropriate figure ($/m2) for the town centres equivalent to the value of the properties; and more detail including an example of how the contribution is calculated and a further explanation of the "accountable total floor space" should be provided to assist in clarity and certainty of the clause*." (Pages 3-4) The above requirements were based on recommendations from the Department's Housing Policy team (Pages 8-9).

Under the Department's Gateway Determination of Randwick City Council's planning proposal referred to above, prior to community consultation the planning proposal is required to be amended to inter alia:

"(c) remove the proposed draft Community Infrastructure Contributions clause (Attachment C – Clause 6.14 Community Infrastructure height of buildings Kensington and Kingsford Town Centres) and amend to remove references throughout the proposal to a Community Infrastructure clause;" and

(e) include in the statement of intent for affordable housing a reference to:

i. determining an appropriate figure ($/m2) for the town centres, equivalent to the values of the properties; and

ii. providing more detail, including an example of how the contribution is calculated and further example of the "accountable total floor space".

The Department's Gateway determination for the planning proposal referred to above clearly identifies that there is "*a need for affordable housing*" guidelines to be developed to "encourage" and facilitate the provision and delivery of affordable housing throughout the State in an effective and efficient manner.

The above planning proposal sought, amongst other things, to insert provisions into the Council's LEP to enable contributions to be required in accordance with a proposed affordable contributions scheme. The following are extracts from the documentation submitted with that planning proposal:

"The affordable housing levy proposed is to be introduced via a two stepped staged approach, commencing at 3% (up to June 2019) and increasing to a maximum of 5% (from July 2019 onwards), to allow the market sufficient lead in time to absorb the contribution rate. (page 6)

Supporting the draft affordable housing clause, a draft Affordable Housing Plan for the Kensington and Kingsford town centres affordable housing contributions scheme (Appendix 14) provides the background requirements and operational detail for the Kensington and Kingsford town centres affordable housing contributions scheme.

A contribution is to be calculated based on the 'accountable total floor space' which means the gross floor area of the residential component of the development to which the development application relates."

It is noted that the "*affordable housing levy*" sought by the Council does not exceed the percentage affordable target range which the Greater Sydney Commission's testing affirmed was "*viable*" based on their "*feasibility testing undertaken in urban renewal and land release areas across Greater Sydney.*"

It is also noted that the planning proposal was accompanied by a study commissioned by the Council to "*provide advice on the financial viability of proposed draft development and infrastructure contribution options for the identified areas*." The financial viability testing factored in the costs associated with the proposed "*draft Community Infrastructure Contributions clause".* That study included "*an analysis of current market values, value uplift and a financial assessment of proposed development contributions*" for the identified areas and the report contained details of a "*market analysis for each of the sites including current purchase prices, probable development costs and current developer charges, along with apartment sales values, to provide a robust financial model to test impacts of varying developer charges.*"

The conditions of the Gateway determination suggests that the Department does not agree that the planning proposal's supporting documentation provides *"a robust financial model to test impacts of varying developer charges.*" In addition, whilst the Gateway determination has not specifically indicated whether the affordable housing levy rate proposed by the Council is acceptable the conditions of the Gateway determination would suggest that the feasibility model used by Department is different to that one used that the Greater Sydney Commission's testing affirmed was "*viable*" based on their "*feasibility testing undertaken in urban renewal and land release areas across Greater Sydney,*" or the feasibility model used by Urban Growth NSW to develop its strategic actions for affordable housing in the Parramatta Road Corridor Urban Transformation Strategy. It should also be noted that affordable housing levy rates proposed by the Council factored in the costs associated with the proposed "*draft Community Infrastructure Contributions clause"* (required to deleted under the Gateway Determination) in the financial modelling/testing of those levy rates to determine that those rates were viable.

In light of the above, and before other Councils start spending a lot of time and resources (and money preparing their affordable housing contributions schemes, the Department needs to provide guidance as to what Councils need to provide in support of their affordable housing contribution schemes, including what feasibility/financial modelling is required to test/demonstrate the viability of such schemes.

To ensure that the planning system plays a central role in delivering affordable housing, the Department needs to work constructively with Councils. Part of that work should be sharing the feasibility testing and model used by the Department, including any assumptions used, to assist Councils in preparing their affordable housing contribution schemes for their areas.

It is recommended that as a matter of urgency the Department of Planning and Environment develop a Practice Note on the preparation on Affordable Housing Contribution Schemes.

In order to help facilitate the delivery of affordable housing, it is considered that it would be beneficial that a Model Clause for affordable housing be developed for inclusion in local environmental planning instruments.

It is noted that the Department raised some issues in relation to Randwick City Council's draft *Affordable Housing Clause.*

A Standard Instrument Draft Model Clause for affordable housing has been prepared for the Department's consideration. That Model Clause is attached to this submission as Attachment A. A separate attachment, Attachment B, has been included in relation to the proposed definition of "*accountable total floor space*" and details how the affordable housing contribution is calculated, (which takes on board comments from the Greater Sydney Commission in relation to "*Affordable Rental Housing Targets*" and hopefully addresses the "*clarity and certainty*" issue raised by the Department in relation to Randwick's proposed draft Affordable Housing Clause).

I hope this submission assists the Department in its deliberations.

Yours Sincerely

Peter Wotton
Strategic Town Planner
9 January 2018

ATTACHMENT A: DRAFT MODEL CLAUSE

Note: The following Draft Model Clause is essentially based on Clause 6.8 of Willoughby Local Environmental Plan 2012 with some suggested changes in relation to the definition of the term "*accountable total floor space*" in subclause (7).

Suggested Model Clause (where included as a *Part 6 Additional local provisions* under the Standard Instrument):

6.X Affordable housing

(1) For the purposes of this clause, the *{Name of Local Government Area}* ***Housing Principles*** are as follows:

(a) affordable housing must be provided and managed in the *{Name of Local Government Area}* so that accommodation for a diverse residential population representative of all income groups is available in the *{Name of Local Government Area}*, and

(b) affordable housing must be rented to tenants whose gross household incomes fall within the following ranges of percentages of the median household income for the time being for the Greater Sydney (Greater Capital Statistical Area) according to the Australian Bureau of Statistics:

Very low income household	Less than 50%
Low income household	50% or more, but less than 80%
Moderate income household	80–120%

and at rents that do not exceed a benchmark of 30% of their actual household income, and

(c) dwellings provided for affordable housing must be managed so as to maintain their continued use for affordable housing, and

(d) rental from affordable housing received by or on behalf of the Council, after deduction of normal landlord's expenses (including management and maintenance costs and all rates and taxes payable in connection with the dwellings), must be used for the purpose of improving or replacing affordable housing or for providing additional affordable housing in the *{Name of Local Government Area}*, and

(e) affordable housing must consist of dwellings constructed to a standard that, in the opinion of the consent authority, is consistent with other dwellings in the Inner West, especially in terms of internal fittings and finishes, solar access and privacy.

(2) Development consent must not be granted to the erection of residential accommodation on land identified as "Area X" on the Special Provisions Area Map unless the consent authority has taken the following into consideration:

(a) the *{Name of Local Government Area}* Affordable Housing Principles,

(b) the impact the development would have on the existing mix and likely future mix of residential housing stock in the *{Name of Local Government Area}*,

(c) whether an affordable housing condition should be imposed on the consent.

Comment in relation to the Note in Clause 6.8 of Willoughby Local Environmental Plan 2012
The Note in the above clause reads as follows:

Note. The affordable housing principles set out in Schedule 2 to *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)* may also apply to the development.

As detailed in this submission, by virtue of Clause 1.5 of the Standard Instrument the above note is only provided for guidance and does not form part of the Plan. The use of the words in the note that the affordable housing principles of SEPP 70 "*may also apply to the development*" brings into question what is the purpose of the note being included in the first place.

Notwithstanding the above, in the event that SEPP 70 is repealed as recommended in this submission, the Department may which consider incorporating affordable housing principles into a Standard Instrument Model Clause for Affordable Housing.

(3) The following are ***affordable housing conditions***:

(a) a condition requiring the payment of a monetary contribution to the consent authority by the applicant to be used for the purpose of providing affordable housing in accordance with the *{Name of Local Government Area}* Affordable Housing Principles that is the value, calculated in accordance with subclause (4), of *{Insert percentage}* % of the accountable total floor space to which the development application relates, or

Notes:
The percentage inserted in this clause is the "Affordable housing contribution scheme", as approved by the Minister for Planning, for the planning proposal in the Local Government Area.

The Greater Sydney Commission's testing affirms "*that across Greater Sydney targets generally in the range of 5-10 percent of new residential floor space are viable*". The Commission notes that a 5 to 10% target "*will be flexible enough to account for the local characteristics and urban economics of an area*" and that percentage affordable target "*range has been identified based on feasibility testing undertaken in urban renewal and land release areas across Greater Sydney.*"

Based on the Greater Sydney Commission's testing, the minimum percentage of accountable total floor space specified in subclause (a) should be 5%, with higher percentages being possible in nominated areas, subject to transparent and robust viability and development feasibility testing.

(b) if *{Insert percentage specified in clause (3)(a)}* % of that accountable total floor space provides a sufficient amount of gross floor area, a condition requiring:

(i) the dedication in favour of the consent authority, free of cost, of land of the applicant comprised of one or more complete dwellings with a gross floor area of not more than the amount equivalent to that percentage, each dwelling having a gross floor area of not less than 50 square metres, and

(ii) if the total amount of gross floor area of the complete dwelling or dwellings is less than the amount equivalent to that percentage, the payment of a monetary contribution to the consent authority by the applicant that is the value, calculated in accordance with subclause (4), of the gross floor area equivalent to the difference between those amounts,

to be used for the purpose of providing affordable housing in accordance with the *{Name of Local Government Area}* Affordable Housing Principles.

(4) The amount of the contribution to be paid under a condition imposed under subclause (2) (c) is the value of the gross floor area concerned calculated by reference to the market value of dwellings of a similar size to those proposed by the development application.

Note. Section 94F of the Act permits the imposition of such a condition and specifies the circumstances under which such a condition may be imposed. Any condition imposed is subject to section 94G of the Act.

(5) This clause does not apply to development for the purpose of any of the following:

(a) boarding houses,
(b) community housing (as defined in section 3 of the *Housing Act 2001*),
(c) group homes,
(d) hostels,
(e) public housing (as defined in section 3 of the *Housing Act 2001*).

(6) An affordable housing condition must not be imposed in relation to an amount of accountable total floor space if the consent authority is satisfied that such a condition has previously been imposed under this clause in relation to the same or an equivalent amount of accountable total floor space on the site.

(7) In this clause:

Comment: "Accountable total floor space"
The definition of "*accountable total floor space*" under Clause 7 of Willoughby Local Environmental Plan 2012 reads as follows:

> ***"accountable total floor space** means the gross floor area of the residential component of the development to which the development application relates."*

The above definition of "*accountable total floor space*" has inherent interpretation issues and needs to be amended for the reasons detailed in Attachment B to this submission. For the reasons detailed in that Attachment, the following revised definition is recommended.

accountable total floor space means:

i. In the case of land where any form of residential accommodation was permitted on the land under this Plan as in force immediately before the commencement of *{Insert name of Local Government Area Local Environmental Plan}* (Amendment No. *{insert Amendment No. of the Planning Proposal})*, the gross floor area of the residential component of the development, to which the application relates, in excess of the maximum floor space ratio for any form of residential accommodation that was permitted on the land under this Plan as in force immediately before the commencement of *{Insert name of Local Government Area Local Environmental Plan}* (Amendment No. *{insert Amendment No. of the Planning Proposal})*, or
ii. In the case of land where no residential accommodation was permitted on the land under this Plan as in force immediately before the commencement of *{Insert name of Local Government Area Local Environmental Plan}* (Amendment No. *{insert Amendment No. of the Planning Proposal})*, the gross floor area of the residential component of the development, to which the application relates.

nominated housing provider means a not-for-profit organisation operating for the purpose of providing housing at below market rates to households that is registered with the NSW Register of Community Housing.

market value means the most current median sales price of such dwellings for the Inner West as documented in the Rent and Sales Report NSW published by the Department of Family and Community Services or, if another document has been approved for that purpose by the Director-General, that document.

ATTACHMENT B: "*Accountable total floor space*" definition

The Greater Sydney Commission's Draft District Plan Information Note 4 "*Affordable Rental Housing Targets*" includes details of Affordable Rental Housing Targets. That Information Note states that the affordable rental housing target "*…will be calculated as a proportion of all residential floor space above the base floor space ratio (that is, the residential floor space ratio that was permissible before the upzoning within the nominated area).*" It should also be noted that the Greater Sydney Commission's approach "*does not propose a minimum dwelling threshold above which the Target would apply.*" (page 2)

If the "*additional density within a site or precinct"* is to be based on a calculation of the proportion of all residential floor space above the residential floor space ratio that was permissible before "*a proposed rezoning or amendment to planning controls that will allow for additional density within a site or precinct*" an appropriate provision (calculation/mechanism) needs to be included in the Policy to that effect.

Some other environmental planning instruments refer to the additional residential floor space as "*accountable floor space*" where the *accountable floor space* relates to the amount of additional residential floor space provided in excess of the amount of gross floor area permitted for residential development under the planning controls that currently apply to that land.

The method of calculating "*accountable floor space*" is relatively simple in the case land zoned Residential.

Sample calculation

Parameters used: Property with a site area of 1,000sm zoned R4 High Density Residential with a floor space ratio of 1:1.

Existing maximum gross floor area permitted = 1,000sqm x 1 = 1,000sqm
Maximum residential gross floor area permitted = 1,000sqm

In the above example the "*accountable floor area*" would be any residential gross floor area in excess of 1,000sqm.

If a proposed rezoning or amendment to planning controls to that property allowed for additional density, for example an increase in the maximum floor space ratio for a building on the land to 3:1 the *accountable floor area* would be 1,000sqm x 3 less 1,000sqm (being the existing maximum residential floor area permitted) = 2,000sqm.

In the case of a proposed rezoning of industrial zoned land (where the existing planning controls do not permit residential development) to residential zoned land the accountable floor space would be the site area of the property multiplied by the FSR proposed in the rezoning.

However in the case of a proposed rezoning of business zoned land the calculation is not so clear in instances where the residential component of a development is only permissible if it is part of a mixed use development e.g. "*shop top housing*".

Sample calculation

Parameters used: Property with a site area of 1,000sm zoned B2 Local Centre with a floor space ratio of 1.5:1 (where the only form of residential accommodation permitted in the zone is "*shop top housing*" and assuming there are no other EPI provisions applying to the land that limit residential development on that land)

Existing maximum gross floor area permitted = 1,000sqm x 1.5 = 1,500sqm
Maximum residential gross floor area permitted = 1,500sqm less the amount of gross floor area required for non-residential purposes.

The definition of "*shop top housing*" requires that all the dwellings in such developments are "*located above ground floor retail or business premises*". In other words the ground floor level of such developments can not contain any dwellings.

The method used to calculate the amount of gross floor area required for the non-residential purposes needs to be user friendly and easy to understand and provide market certainty about the calculation of "*accountable floor area*" so that it can be factored into the development equation.

One method that would satisfy the above criteria would be to specify a non-residential FSR component of the maximum floor space ratio of development permitted on the land. In this regard it is considered appropriate to adopt a 0.5:1 FSR for the non-residential component of mixed use developments.

Note: An allowance of 0.5:1 FSR component for the non-residential component of a mixed use development would essentially be consistent with *Clause 4.4A Exception to maximum floor space ratio for active street frontages* of Leichhardt Local Environmental Plan 2013 which contains provisions which provide a 0.5:1 floor space incentive for mixed use developments that incorporate active street frontages at ground floor level in Zone B1 Neighbourhood Centre or Zone B2 Local Centre.

Consequently the formula recommended for determining the "accountable total floor space" of the residential components of shop top housing and mixed use developments, where such developments are permitted on the land, in Business zones is as follows:

Maximum floor space ratio of residential component of shop top housing and mixed use developments in Business zones*	=	Maximum floor space ratio permitted for a building under the Plan less 0:5:1

* Formula only applies where there are no other provisions in the Plan applying to the land that limits residential development on that land.