RE: Design Quality of Residential Flat Buildings

I am writing to provide the Property Council of Australia’s comments on the draft SEPP 65 on design quality for residential flat development currently on exhibition.

The Property Council supports most of the key initiatives of the draft SEPP, namely that:
- consent authorities be required to consider design quality in development applications for residential flat buildings,
- qualified architects be required to design or direct the design of residential flat buildings,
- development applications for residential flat buildings be referred to a Design Review Panel (DRP) if one has been constituted for the area, and
- the consent authority must consider the recommendations of the DRP when evaluating the merits of the development application.

However we do have concerns with some aspects of the draft SEPP. In particular, we are concerned that the SEPP as drafted:
- would undermine height and floorspace controls in local planning instruments thereby significantly undermining certainty for land owners and values of some sites,
- may lead to a deterioration in design standards should ill conceived ‘minimum standards’ be prescribed and applied inappropriately by either the designers or consent authorities,
- could potentially frustrate the Government’s desire to achieve a more efficient development control system if the design review process is not managed expeditiously, and
- may impact upon housing affordability, with cost increases arising from excessive or inappropriate standards and delays in the approval process.

The Need for State Government Intervention

The Property Council supports the Premier’s view that the design of residential flat developments requires improvement in many instances. As you know, our NSW President Louise Joslin was a member of the Urban Design Advisory Committee whose recommendations to Government is the basis for this SEPP. The industry is now represented by Mirvac’s Ian Costley.

We believe that much of the property industry is already responding positively to the Government’s initiatives and significant improvements in the quality of residential flat design are occurring.

Most major developers at least appreciate that an aesthetically appealing, ecologically responsible, functional, well designed and specified residential flat building will be much more marketable and financially successful than those that do not achieve these outcomes and most major developers adopt this approach when preparing briefs for new projects. The Property Council’s own Design Dividend project has demonstrated that good design does provide an economic return to the investor.

While many recent residential projects have raised the bar of acceptable design standards in NSW, many smaller scale projects (particularly in middle and outer ring suburbs) continue to be
prepared by unqualified designers with little appreciation of design quality. This may be driven to some extent by housing affordability in these areas where, due to the need to keep prices down to levels appropriate to the particular market, developers keep design and construction costs to a minimum so that the product can be delivered at an appropriate price point. Also, in many cases ‘design quality’ is not addressed as a matter for consideration in council planning instruments and policies, and some smaller councils do not have appropriately qualified staff to assess design quality matters.

**Protecting Certainty and Land Values (Part 2)**

The Property Council is extremely concerned that two of the design principles in the draft SEPP would act to undermine height and floorspace controls in local planning instruments thereby significantly undermining certainty for land owners and values of some sites.

The design principles of scale (clause 9) and density (clause 11) allow a consent authority or design review panel to consider whether the scale and density of a proposed development are appropriate. Since clause 5 provides that the SEPP takes precedence over all other environmental planning instruments, it could be determined that a proposed development’s scale or density is not appropriate even if the development complies with height and floorspace ratio controls for the site in another environmental planning instrument.

This undermines the key determinants for a site’s value (height and FSR) and creates an enormous spectre of uncertainty for investors, owners and developers.

This is surely not an outcome intended by the Government and we strongly recommend that the draft SEPP be amended to ensure this unintended consequence is avoided. Clauses 9 and 11 should be amended or deleted to ensure that the SEPP cannot be used to undermine height and FSR controls of environmental planning instruments.

**Design Quality Principles (Part 2)**

The Property Council is also concerned with the potential of the proposed design quality principles to provide the basis of very prescriptive council controls on what constitutes good design.

Good design is a very subjective issue. It cannot be clearly defined and regulated without adverse implications to achieving creative, affordable and innovative design solutions. Critics will often have widely differing views on the merits of a particular design.

The recommendations of the Urban Design Advisory Committee (UDAC) report to the Premier, *Achieving Better Urban Design – Residential Flat Developments in NSW*, deliberately steered away from attempting to define good design or proposing design principles. Instead it recommended a SEPP that be used to set out the best process to ensure well designed outcomes can be achieved.

On page 5 of the report, the Committee stated:

“High quality design, given the complexity of our cities and the factors that affect design, will not be readily achieved by simplistic rules. It will be achieved by better skills and judgement in the development process.”

The risk to the desired objective of achieving good design in residential flat developments, if the draft SEPP was adopted in its current form, is that a myriad of prescriptive design requirements
will be adopted by various consent authorities in future DCPs following on from and expanding on the design principles currently contained in the draft SEPP.

This is highlighted by the Model Development Control Plan for Residential Flat Buildings that has been received recently by the Property Council for comment. The Model DCP states that it is “not a statutory document but provides guidelines for applying the design principles outlined in SEPP 65 to a specific location” (page 2). However it is highly likely that if the Model DCP is adopted in its current very prescriptive form, it will be adopted by the various consent authorities as the minimum standard and will be added to by them in their own DCPs.

This very real potential for over regulation of design is against the recommendations of UDAC. This will inhibit creative design expression and limit full evaluation of design alternatives most appropriate to a specific site. It is the Property Council’s opinion that all stakeholders will ultimately be frustrated by and disappointed with the overall outcome.

It is important that local government not simply respond to the planning instrument without proper regard to the circumstances in which they are to apply, and without proper direction. The inevitable result will be further unwarranted increases in the cost of housing. This is particularly significant at a time when the cost of housing is of major concern to both government and industry.

It is recommended that a major change be made to the draft SEPP by deleting Part 2 - Design Quality Principles and consequential changes. This will result in a planning instrument that is in accordance with the general recommendations of the UDAC report and will make a significant contribution to achieving the Government’s objectives for improved residential flat design but limit the chance for over regulation in prescriptive DCPs. It will ensure that appropriately qualified persons design or direct the design of all residential flat buildings, encourage creative innovative designs, establish a design review process where designs are referred to an independent DRP and the consent authority will have the benefit of the DRP’s report when it considers the development consent application.

**Design Review Panels (Part 3)**

The establishment of DRPs will hopefully provide valuable design assistance to consent authorities. However, it raises the possibility of the panels becoming parallel approval bodies that duplicate the assessment role of council officers. This raises the potential for applicants to be placed in the difficult position of knowing who to listen to in cases where the council officer and the DRP disagree. It also has the potential to result in significant delays in the assessment process as differences between the panel and the council officer are debated.

Access to these panels by applicants prior to DA lodgement is also likely to become an important part of the process. Along with their other responsibilities, these panels are likely to be very busy. The Property Council is concerned that they may become over loaded and that the involvement of suitably skilled people may diminish, thereby compromising the quality of advice they provide.

Furthermore, in many cases the panel may not have a sufficient depth of understanding of the background and individual circumstances of a particular application in context. It may also not have a detailed knowledge of the relevant planning instruments. This raises the potential for the personal aesthetic taste of the panel to override the more complex planning considerations of a particular circumstance.
Given the large areas covered by individual panels, it is expected that the workload of each panel will be such that in practice the panels will have a design overview role, rather than a parallel approval function. However, this is an issue that can only be resolved following review of the trial panels, which for the above reason must be a through and objective process to ensure community confidence.

There is also a risk of ‘name’ architects used to dealing with large budgets for prestigious projects applying an unreasonable standard of design upon projects aimed at providing low cost housing.

Application of Design Quality Principles (Part 4)

While the provisions relating to the preparation of environmental planning instruments and DCPs are strongly supported as a means of improving the quality of residential assessment frameworks, the draft amendments to the Regulation with respect to development applications is problematic in a number of regards.

With regard to Draft Clause 5 to Schedule 1, as drafted this clause relates to all development applications that relate to a residential flat building. That is, minor modifications, strata subdivisions and any other ‘development’ is called up, rather than just the erection of a residential flat building. Clause 5 should therefore be modified as follows:

“(5) In addition, a statement of environmental effects referred to in subclause (1)(c) must include, if the development application relates to the erection or significant alteration of a residential flat building...

The wording of Clause (5)(c) of Schedule 1 could be interpreted to require that a statement of environmental effects must demonstrate that the development complies with all applicable controls. This is clearly a drafting error that does not facilitate consideration of appropriate departures from controls. It should therefore be amended to read:

“(c) identification of the extent to which the development complies with applicable development controls, including plans and elevations of the proposed development indicating applicable height limits, setbacks, height planes and the like, as relevant.”

Clauses (5)(d) and (f) require that a statement of environmental effects include a sample board of materials and a model. This should be amended to require a sample board and model to accompany a DA, rather than be included in a statement of environmental effects, as they are physical items that cannot be included in a written statement. Furthermore, the inclusion of a model is not necessary in all cases, will add to the cost of the application and may tend to discourage ongoing design refinement by applicants who are hesitant to reproduce a new model each time their design is amended. The requirement for a model should therefore be left to the consent authorities discretion.

It is also not clear how the Draft SEPP relates to SEPP 5 housing (for the aged and disabled). The Draft SEPP could be used by certain Council’s as a means of effectively preventing the use of SEPP 5. While it is clearly appropriate that SEPP 5 projects display design quality, a critical aspect of SEPP 5 is the recognition that such housing should not be assessed by the same criteria as typical residential flat buildings.

Other Comments

Some additional comments we wish to make on the draft SEPP are as follows:
1. Clause 2 - terms used in this clause and elsewhere, such as “sustainable development” and “sustainable housing” should be defined in Clause 3.

Nowhere does the draft SEPP require residential development to be consistent with the objectives or require consent authorities to consider the objectives. To do so would give weight to the design quality principles and remove the need for the repetition and multiple layers of design quality provisions contained in subsequent parts of the draft SEPP.

2. Clause 3 (1) - Page 2 of the Explanatory Notes advises that serviced apartments will be defined as residential flat buildings under SEPP 65 and must be assessed under SEPP 65. However, the definition of residential flat buildings in Clause 3 does not make this clear. This is an extension of the scope of the UDAC report and is not supported. Serviced apartments are rightly classified as tourism accommodation class and not residential flats.

3. Clause 7 – Principle 1 General Approach. This is so broad as to be meaningless other than as an introductory statement.

4. Clause 13 - Principles 3 and 5 are of major concern. Since it is intended that the SEPP takes precedence over all other environmental planning instruments (Clause 5) a consent authority can determine that a development has a scale or density that is not appropriate (for whatever reason), even if the development complies with height and FSR controls for the site in another EPI. This undermines the key determinants for a site’s value and creates an enormous spectre of uncertainty for investors, owners and developers. This was surely not intended by the Government.

Principle 3 (Scale) is merely an extension or repetition of principle 2 (Context) and Principle 4 (Built Form). While useful in relation to the preparation of control documents, it has little value when considering a DA, where the ‘scale’ is usually defined by height and/or FSR controls and the like. In any event, this principle provides a simplistic definition of scale. Scale does not merely mean the overall bulk and height of a building, it also involves the proportional relationships of the component elements of buildings, landscapes etc (eg. Patterns of modulatiois, fenestration etc.).

5. Clause 11 - Principle 5: Density. Similarly, the determination of residential densities is a strategic planning matter. While residential strategies and DCPs clearly need to address density, how will a DA for a single site subject to a density standard address this principle, other than by complying with the standard?

6. Clause 13 - Principle 7: Amenity. This principle requires “ease of access for all age groups and degrees of mobility”. There needs to be some balance on this matter. The industry already has to comply with AS 1428 and the Disability Discrimination Act. Concern is that the wording of the principle could result in DCP’s requiring 100% accessible or adaptable apartments. This may result in walk-up apartments being prohibited effecting housing affordability and the ability of the industry to produce low cost affordable residential flat buildings.

7. Clause 14 - Principle 8: Resource, energy and water efficiency is of great concern as to the level of detail requirements that undoubtedly will stem from this principle in subsequent DCP’’s. This principle also includes reference to ‘construction’ and ‘efficient appliances’ that are beyond the proper scope of a State Planning Policy. These are really BCA/Construction Certificate issues.

8. Clause 15 Principle 9: Social Dimensions. While this principle recognises the need for residential development to suit the social mix and needs in the neighbourhood, if the design principles are to be as broad as currently drafted, they should include recognition that design
quality does not necessarily, and in many cases specifically should not, entail more expensive design. Many of the smaller walk-up flat building proposals in middle and outer suburbs that will be most affected by the Draft SEPP are the most affordable new housing in an area. Without recognition of the significant socioeconomic value of such housing, the Draft SEPP has the potential to significantly impact upon the affordability of new housing.

9. Clause 17(1) makes the Minister responsible for appointing the DRP members. The Property Council supports this aspect of the draft SEPP as in most cases the DRP will be addressing matters referred to it from several local government areas.

10. Clause 18(4) excludes from appointment as a member of a DRP an officer or employee of a consent authority that is advised by the panel. Property Council believes this to be important to insure impartiality of the panel.

11. Clause 19(c) makes the provision that a member of a design review panel “is entitled to such remuneration, if any, and the payment of such expenses, if any, as are determined by the Minister”. Will the applicant be required to pay the remuneration and expenses of the DRP members? If so, this will impact adversely on the affordability of new residential flat buildings.

12. Clause 22(2) requires the DRP to review any DCPs for the area or region for which the DRP is responsible and to advise the consent authority whether it endorses those provisions. Concern is expressed that this is a huge responsibility for the panel and will add substantially to its work load. The instrument is at risk of placing too great a work load on the members of DRPs which will make it difficult for people with the appropriate skills and experience to commit the time required to being active members of DRPs.

13. Clause 24 requires the consent authority to refer a masterplan to the DRP and to consider its comments before adopting the masterplan. As with our comments in respect to Clause 22(2), we believe that the instrument is at risk of placing too great a work load on the members of DRPs.

14. Clause 25(2)(c) requires the consent authority to take into consideration the publication “Better Urban Living Guidelines for Urban Housing in NSW”. The Property Council is of the view that the reference to these guidelines is inappropriate in the draft SEPP and should be deleted. It will generate a whole new area of compliance assessment and debate. The Property Council also notes that this document is not necessarily consistent with AMCORD or other guideline documents, and there has been no substantive case for adoption of one in favour of the other. Furthermore, the concept of giving statutory force to a ‘guideline’ defeats the whole concept of the flexibility of a guideline. An advisory note of the existence of the guidelines would be more consistent with their appropriate function.

15. Clause 25(3) makes a time provision of up to 31 days for the advice to be provided by the DRP to the consent authority from the time of the request. The Property Council is of the view that the time provision is excessive, will delay the processing of applications and will prevent the consent authority from determining the application within the statutory period. A more reasonable time provision is up to 14 days.

16. Clause 25(4) confirms that the review by the DRP does not increase or otherwise affect the period in which a development application is required to be determined by a consent authority. The Property Council strongly supports this provision as the DRP process has the potential to be used by consent authorities as a reason to delay the assessment of the application.

17. It is recommended that the DRP be available for consultation during pre-development application lodgement discussions. If the applicant wishes to avail itself of early advice from the
DRP to ensure a consistency of advice and to enable the applicant to consider the advice of the DRP at an early phase of the design process, it should be possible to do so.

18. The applicant should be able to present its design solution to a meeting of the DRP.

19. Regulation Clause 50(1A)(b) requires the qualified designer to give a statement with development applications that the design principles of Part 2 of SEPP 65 are achieved for the residential flat building. What happens if, because of the particular circumstance of the site, one or more of the principles have not been achieved? An overall merit argument should be possible.

**Implications for the Structure of the Planning System**

While the overall intent and principle mechanisms of the Draft SEPP are an appropriate move to improve the quality of residential development, it nevertheless represents another layer to an increasingly cumbersome and complex approvals process. This is in direct conflict with the underlying objectives of the Part 3 reforms and ‘Plan First’.

The SEPP should be more focussed upon Part 3 matters (ie. strategic and plan making matters) than on the Part 4 DA process. That is, get the LEPS and DCPs right and DAs will not need to address the various principles in the SEPP, thereby cutting down on considerations of countless and repetitive matters for considerations. Furthermore, the lay person may then not need a planning expert and lawyer to understand the planning system, and DA submissions may be able to get to the point and clearly inform the public and decision makers!

Since the amendments to the Act in 1998 that stripped the then Section 90 down to the leaner Section 79C, there has been a continuing increase in red tape and statutory duplication (eg. the extremely detailed provisions of SEPP 5 and the insertion of a new ‘master planning’ layer in the established hierarchy of planning instruments).

Please do not hesitate to contact me about any of the above issues.

Mark Quinlan

**Executive Director**