



The Impact of the Codes SEPP on Building Covenants

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History has shown that the inter-relationship between planning instruments and building covenants is a vexed issue and has a significant impact on developers, particularly in relation to new residential planned estates. Section 28 of the *Environmental Planning and Assessment Act 1979* (NSW) was originally introduced by the State Government to allow local authorities to suspend the operation of building covenants providing obstacles to the planning principles decided on by local authorities or the Minister (such as where a single residence covenant existed on land zoned medium or high density).

However, covenant suspension has caused collateral damage in new estate developments where developers seek to maintain quality and style through use of such covenants.

This has been recently complicated by the introduction of the *State Environmental Planning Policy (Exempt and Complying Development) Codes 2008 (Codes SEPP)* on 27 February 2009, which provides a uniform exempt and complying development system across all 152 local government areas in NSW.

The Codes SEPP (including the amended version in force from 25 February 2011) does not contain any provisions suspending building covenants restricting development. However

some LEPs in local government areas continue to contain suspension provisions.

As applicants will be able to choose between the Codes SEPP or an LEP for some complying development standards until 1 September 2011, the legal position in relation to the suspension of covenants has now become somewhat uncertain. Generally:

- 1 Between now and 1 September 2011, where the Codes SEPP and a LEP specifies development as "complying development", a developer may apply under either instrument for a complying development certificate. During this period the provisions of an LEP will apply, which may bring into play the suspension provisions under an LEP.
- 2 From 1 September 2011, where the Codes SEPP and an LEP specifies development as "complying development", the relevant LEP will cease to apply to that development. At face value, this will eliminate the "suspension powers" under an LEP in relation to building covenants. In those circumstances, any building covenant registered on title would arguably remain enforceable against any land owner in breach of such a building covenant.

In practical terms (in relation to applications applied for before 1 September 2011), if a

land owner applied to carry out complying development for new dwelling houses which contravened a building covenant, the consent authority - or the principal certifying authority - would be required to consider the provisions of an LEP, including the suspension provisions within an LEP.

Of course, this does not prevent other parties from taking action under a deed of building covenant for damages and or such other remedies available under a deed or at law. But that is an entirely separate issue to the planning approval regime.

The safest avenue to adopt may be to wait until the 'phasing out' of the dual system, so that once the Codes SEPP applies after 1 September 2010 for complying development, building covenants will remain operative. That does not guarantee however that the State Government will not introduce a suspension provision in the Codes SEPP in future. Given the relatively recent origins of the Codes SEPP and the absence of any judicial authority on the relationship between the Codes SEPP and LEPs, some uncertainty remains.

In the meantime, any developments which seek to use the Codes SEPP to certify complying development should be aware that the ongoing role of covenants will need to be examined closely to ensure that they are operative. ▽



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