



## PLANNING SYSTEM

Act and regulation changes

<b>Circular</b>	PS 09–022
<b>Issued</b>	5 August 2009
<b>Related</b>	PS 09– 004–6, 012, 013, 020, 021; PN 09–001

# Exempt and complying development codes – related regulation changes

This circular is to advise councils, accredited certifiers and the community of the Environmental Planning and Assessment Amendment (General Commercial and Industrial Code) Regulation 2009, which takes effect on 7 September 2009. The changes support the implementation of the new General Commercial and Industrial Code. In addition they alter the requirements for post-determination notification and planning certificates.

## Introduction

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP) commenced on 27 February 2009.

Planning Circular PS 09–021 outlines amendments to the Codes SEPP to:

- introduce a new Housing Internal Alterations Code and a new General Commercial and Industrial Code
- add new commercial, industrial and housing types to the General Exempt Development Code
- amend some development types and standards in the General Housing Code to clarify their interpretation.

These changes will commence on 7 September 2009.

To support the new provisions of the Codes SEPP, the Environmental Planning and Assessment Amendment (General Commercial and Industrial Code) Regulation 2009 (the Regulation amendment) was published on the NSW Legislation website on 5 August 2009. These changes to the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) will also commence on 7 September 2009.

## Overview of the changes

The Regulation amendment:

- enables a council or accredited certifier to require that additional information requested from an applicant for a complying development certificate be provided by a properly qualified person
- where an existing building is subject to an 'alternative solution' relating to a fire safety

requirement under the Building Code of Australia (BCA), proposals for internal alterations or a change of use are required to be consistent with that alternative solution before a complying development certificate is issued \*

- removes the requirement for a council or an accredited certifier to notify neighbours when a complying development certificate (CDC) is issued. (There is however a condition under the General Housing Code of the Codes SEPP that requires the person having the benefit of a CDC to notify neighbours two days before work commences)
- corrects a reference to a certifying authority as the person who must endorse any relevant plans that are attached to the CDC
- requires a council to provide information on a planning certificate issued under section 149 (2) of the *Environmental Planning and Assessment Act 1979* as to whether or not the land is land on which complying development may be carried out under the Codes SEPP. If complying development may not be carried out (see clause 1.19 of the Codes SEPP) the reasons why must be stated.

These changes are explained in more detail below.

\* 'Alternative solution' is a term used in the Building Code of Australia (BCA). The key to performance-based BCA provisions is that there is no obligation to adopt any particular material, component, design factor or construction method. An approval authority may still issue an approval if it can be demonstrated that the design complies with the relevant performance requirement. For more information, see: [www.abcb.gov.au](http://www.abcb.gov.au).

## Requiring a properly qualified person to provide information

Clause 127 of the EP&A Regulation allows the council or an accredited certifier to require a person applying for a CDC to provide additional information concerning the proposed development that is essential for the council's or accredited certifier's proper consideration of the application.

The Regulation amendment alters this provision to also allow the council or accredited certifier to require that the information the applicant provides be from a properly qualified person.

## Additional requirements where a building involves an alternative solution relating to fire safety

To ensure any building work is consistent with an existing alternative solution relating to fire safety, the Regulation amendment adds a further requirement in clause 130 of the EP&A Regulation. This requirement provides that a certifying authority must not issue a CDC for building work if the building is subject to an alternative solution relating to a fire safety requirement, unless the certifying authority has been provided with a written report from an accredited certifier that includes a statement that the proposed building work is consistent with the alternative solution.

## Post-determination notification of complying development

Clause 130(5) of the EP&A Regulation formerly required that the council or accredited certifier provide written notice to the owner or occupier of any land (other than land on which no dwelling is situated) within 40 metres of any boundary of the land to which the CDC relates within two days of their decision to issue the certificate.

Following feedback from stakeholders since the Codes SEPP commenced, it has become evident that the notification process itself was cumbersome and costly for both councils and accredited certifiers. In addition, the notice was issued two days after a CDC was issued, which did not serve the purpose of a 'courtesy notice' to neighbours that construction was about to commence.

The Regulation amendment overcomes these issues by removing the current requirements. Instead, notification requirements will be dealt with through a condition placed on the CDC.

The proposed condition will require that the person having the benefit of the CDC (ordinarily the applicant) must give at least two days' notice in writing of the intention to commence works to the owner or occupier of each dwelling that is situated within 20 metres of the lot on which the works will be carried out. There remains no requirement to notify adjoining vacant land.

At this stage notification will only be required where a certificate is issued under the General Housing Code. Notification will not be required under the new Housing Internal Alterations Code or the new General Commercial and Industrial Code in the Codes SEPP because of the nature and type of development carried out as complying development under these codes.

**Note.** In relation to post-determination notification of complying development, this Planning Circular effectively supersedes Planning Circular PS 09–005, issued on 20 February 2009, Planning Circular PS 09–012, issued on 17 April 2009 and Planning Circular PS 09–013, issued on 3 June 2009 but **only in so far as they relate to post-determination notification requirements for complying development.** Each of those circulars remains current for the other matters they contain.

## New form for issuing notices

The Department has prepared a standard form notice to satisfy the requirements of the new condition. A copy of this can be obtained through the Department's website at [www.planning.nsw.gov.au/housingcode](http://www.planning.nsw.gov.au/housingcode).

There is no requirement to issue the notice to both the owner and the occupier. In both instances, it is not necessary for the notice to be issued to a named individual. This means that persons having the benefit of the CDC do not require the personal details of the owner or occupier in order to satisfy the notice condition, nor do they need to undertake land title or property searches.

### Option 1—Notice to occupiers

Notice may be issued to occupiers by preparing a standard notice addressed to 'the occupier' and delivering the notice by hand or by post.

In the case of a strata title residential flat building, notice would need to be issued to the occupiers of all apartments within the building. (The alternative is to issue the notice to the owner/s of the residential flat building. See option 2 below.)

### Option 2—Notice to owners

Notice may be issued to the owner/s by preparing a standard notice addressed to 'the owner' and delivering the notice by hand or by post.

In the case of residential flat buildings, a notice can be issued to 'the owner or owners' corporation', addressed to the street address for the building, for example:

The Owner or Owners' Corporation  
65 Smith Street  
Ashfield NSW 2131

The notice can be delivered by hand or by post. If there is no specific letterbox for the building owner or owners' corporation, the alternative is to notify all of the occupiers (option 1).

## Changing the requirements for section 149(2) certificates

Planning Circular PS 09–005 issued on 20 February 2009 sets out the changes to Schedule 4 of the EP&A Regulation regarding new matters to be specified in a section 149 (2) certificate relating to complying development.

The introduction of the General Commercial and Industrial Code and the Housing Internal Alterations Code on 7 September 2009 will necessitate a change to the information councils are required to provide.

The new codes deal with changes of use and internal alterations within certain bulky goods premises, commercial premises, premises used for light industry, a warehouse or distribution centre, as well as internal alterations to existing dwelling houses.

Feedback from stakeholders currently using the Codes SEPP has also identified possible changes that would make the obligations to notify of complying development clearer.

The revised requirements under clause 3 (complying development) of Schedule 4 of the EP&A Regulation will require the council to provide information on whether or not the land is land on which complying development may be carried out under the following codes in the Codes SEPP:

- General Housing Code
- Housing Internal Alterations Code
- General Commercial and Industrial Code.

In addition, if complying development may not be carried out on that land because of one or more of the requirements of clause 1.19 of Codes SEPP, the council is required to provide the reasons why it may not be carried out. The new provisions require councils to expressly indicate the reasons why complying development may not be carried out on the land with respect to that code.

An example of a planning certificate for complying development relying on the new provisions is annexed to this circular.

Please note that under clause 279 of the EP&A Regulation, councils are still authorised to issue a 'limited' section 149 (2) certificate relating solely to complying development. Nothing in the Regulation amendment however permits this more limited section 149 (2) certificate to be attached to the contract for the sale of land or an option to purchase residential property.

## Other minor changes

The Regulation amendment also makes a change to clause 134 (2A) of the EP&A Regulation to correct a reference to the person who must endorse any relevant plans that are attached to a complying development certificate, i.e. it is the certifying authority rather than consent authority.

## Timing of changes

All of the changes to the Codes SEPP and the EP&A Regulation will not commence until 7 September 2009 to allow councils sufficient time to update their internal processes for issuing section 149 (2) certificates.

## Further information

The EP&A Regulation and amendment are available on the NSW legislation website at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

Information about the Codes SEPP, including the General Exempt Development Code, General Housing Code, Housing Internal Alterations Code and Commercial and Industrial Code is available on the Department's website at [www.planning.nsw.gov.au/housingcode](http://www.planning.nsw.gov.au/housingcode) and [www.planning.nsw.gov.au/commercialcode](http://www.planning.nsw.gov.au/commercialcode).

Note: This and other Department of Planning circulars are published on the web at [www.planning.nsw.gov.au/planningsystem/practicenotes](http://www.planning.nsw.gov.au/planningsystem/practicenotes).

### Authorised by:

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

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## Annexure

### Example planning certificate for complying development under the Codes SEPP

#### 3. Complying development

*[Provide information on whether or not land is land on which complying development may be carried out under each of the codes for complying development in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.*

*If complying development may not be carried out on that land because of one or more of the requirements under clause 1.19 of that Policy, why it may not be carried out.]*

#### **General Housing Code**

Complying development under the General Housing Code **may not** be carried out on the land. The land is affected by specific land exemptions:

- land is within a draft heritage conservation area
- land that is bush fire prone land.

#### **Housing Internal Alterations Code**

Complying development under the Housing Internal Alterations Code **may** be carried out on the land.

#### **General Commercial and Industrial Code**

Complying development under the General Commercial and Industrial Code **may** be carried out on the land.