

# Is Replacing an External Balustrade Exempt Development?

## Replacing a balustrade might not be exempt development, why so?

Individual buildings will need to obtain specialist advice to determine if these works are exempt development, but some of the reasons why it may not be exempt include (not exhaustively):

1. If there is no current Annual Fire Safety Statement or Fire Safety Certificate lodged with either the Council and/or the Fire Brigade, the State Environmental Planning Policy (*Exempt and Complying Development Codes*) 2008 (SEPP) does not apply. This is due to 1.16(2) of Part 2 Division 1 of SEPP 8, which requires:
  - a) *the building has a current fire safety certificate or fire safety statement, or*
  - b) *no fire safety measures are currently implemented, required or proposed for the building.*
2. Part 59 of Ordinance 70 issued under the Local Government Act 1919 (NSW) does not require buildings with council approval prior to 1 July 1988 (pre-1988 building) to submit annual fire safety statements. This applies to schemes SP1 to approximately 33,200.
3. Local environmental plans for the relevant Council which predate September 2005 may specify that the proposed works are complying development which would override the SEPP.
4. The SEPP provides that for the works to be exempt it must meet the deemed to satisfy provisions in the National Construction Code. For more details check out our article [The NCC – It's Now Free](#)
5. The repair to or replacement of a balustrade is specified as exempt under 2.53 of the SEPP:

*A minor external non-structural building alteration, such as the following—  
(e) the repair to or replacement of a balustrade,*

There is a significant exclusion in the above, being “**non-structural**”.

6. Part 3.6 of Australian Standard AS/NZS1170.1 - 2002 - Structural design actions – Permanent, imposed and other actions states:

*Barriers, including parapets, balustrades and railings, together with members and connections that provide structural support, shall be designed to sustain the imposed actions given in Table 3.3. (emphasis added)*

7. Given balustrades are required to handle imposed actions under an Australian Standard that is titled “Structural Design” any replacement of the balustrade will almost always be structural and therefore outside of exempt development.

8. The Office of the Building Commissioner has recently weighed in on this point in relation to a prohibition order issued in relation to a development in Bella Vista ([https://www.fairtrading.nsw.gov.au/\\_data/assets/pdf\\_file/0011/1098263/Prohibition-Order-105-Bella-Vista-Drive\\_amended-.pdf](https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0011/1098263/Prohibition-Order-105-Bella-Vista-Drive_amended-.pdf)), in which they confirmed “*I consider that the Balustrade Walls are external load bearing components of the Building that are essential to the stability of the Building.*”

So the upshot is, the scheme will be looking to see what type of approval is required, if any. It’s also likely that this works are not excluded from compliance with the Design and Building Practitioners Act 2020. For more information, check out our article [Existing Construction Projects: Do they Need to comply with the Design and Building Practitioners Act 2020?](#)

We can assist with advice, applications and town planning certificates to support relevant applications.

Why is it important to get planning approval? There’s many reasons, including to avoid:

- Substantial penalties and stop work, removal or remediation orders can be issued under the Environmental Planning & Assessment Act 1989;
- Stop work, removal or remediation orders under the Design and Building Practitioners Act 2020 can be imposed on the building practitioner;
- The likely contractual ability of a contractor to terminate the contract; and
- Exclusion from insurance in respect of the illegal works.

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