Allens Arthur Robinson

4 August 2010

ABN 47 702 595 758
Deutsche Bank Place
Corner Hunter and Phillip Streets
Sydney NSW 2000
Australia

Tel 61 2 9230 4000
Fax 61 2 9230 5333

Correspondence
GPO Box 50
Sydney NSW 2001
DX 105 Sydney

www.aar.com.au

Mark Owens
General Manager - Project Management and Property Development
RSL LifeCare
PO Box 56
Narrabeen NSW 2101

Dear Sir

Advice on Byron Local Environmental Plan

Premises: Bayside@Byron - Corner Beech Road and Broken Head Road, Suffolk Park

1. Background

RSL LifeCare is the proponent for the re-development and expansion of an aged care facility at the Premises (***Application***).

On 1 July 2010 the Joint Regional Planning Panel (***JRPP***) deferred assessment of the Application in order for legal advice to be obtained in respect of clause 24(3)(a)(ii) of the *Byron Local Environmental Plan 1988* (***LEP***) and its application to the proposed development at the Premises.

We understand that the JRPP is concerned that clause 24(3)(a)(ii) may preclude the grant of consent to the Application on the basis that the proposed development is likely to increase the level of flooding on an adjoining property (***Adjacent Lot***).

GHD has prepared a flood study for the proposed development which sets out flood modelling based upon both the current climate scenario and future climate scenario under pre and post-development conditions (***Flood Study***).

We have been asked to advise on the interpretation of clause 24(3)(a)(ii) of the Byron LEP and specifically its application to the proposed development on the basis of the projections contained in the Flood Study.

2. Executive Summary

(a) Clause 24(3)(a)(ii) of the Byron LEP is a prohibition and not a development standard. However, the *de minimis principle* must be taken into account and on the relevant facts, it would be open to the JRPP to grant development consent to the Application.

(b) The decision of Commissioners Hussey and Taylor in *S J Connelly Pty Ltd v Byron Shire Council* [2009] NSWLEC 1068 is of no relevance to the assessment of the Application.

3. Flood modelling

The relevant results from the Flood Study modelling under each climate scenario are set out below.

(a) Affected Area

The area of the Adjoining Lot affected by a change in flood depth is $60m^2$ in current climate scenario and reduced to $45m^2$ in future climate change scenario.

(b) Current Climate Scenario

- The pre-development (existing) 100-year flood depth on the Adjacent Lot is between 300-460mm.
- The post-development flood water height for the 100-year flood results in an increase of an area-weighted average of 12.3mm over an area of approximately $60m^2$.

(c) Future Climate Scenario

- The pre-development (existing) 100-year flood depth on the Adjacent Lot is between 400-560mm.
- The post-development flood water height on the Adjacent Lot for the 100-year flood results in an increase of an area-weighted average of 22.5mm over an area of approximately $45m^2$.

(d) Flood Hazard Level

The proposed development does not increase the hazard level of flooding on the Adjoining Lot.

The *NSW Floodplain Development Manual (2005)* and the *Byron Shire DCP Part K (2002)* characterise the Adjacent Lot, under both pre-development and post-development conditions, as "Low Hazard Flood Storage".

4. Byron LEP

Clause 24(3)(a)(ii) of the LEP relevantly provides:

> The council shall not consent to the erection of a building or the carrying out of a work on flood liable land unless ... the council is satisfied that ... the development would not increase the level of flooding on other land in the vicinity. (our emphasis)

This clause is a prohibition and not a development standard. It prohibits Council (or any other consent authority) from granting consent for development on flood liable land unless Council is "satisfied" that the development will not result in an "increase in the level of flooding on other land in the vicinity".

Clause 5(2)(d) of the LEP defines the flood level as follows:

> that a reference in relation to land, to the adopted flood level is a reference to the height above Australian Height Datum [AHD] to which the council has determined that a flood is likely to rise in respect of that land.

It is clear from this definition that the reference in clause 24(3)(a)(ii) to "level of flooding" means the height of the flood waters above AHD.

5. The *de minimis* principle

Notwithstanding clause 24(3)(a)(ii) (discussed at 4 above), the *de minimis principle* must be taken into account by a consent authority.

It is well established that as a general rule of statutory interpretation, unless the contrary intention appears, an enactment by implication imports the principle of the maxim *de minimis non curat lex* (the law does not concern itself with trifling matters).

If an enactment is expressed to apply to matters of a certain description it will not apply where the description is satisfied only to a very small extent. This principle has been applied, either expressly or by implication, in a long and wide variety of situations where a very small failure to comply with a mandatory condition has been ignored (*Farnell Electronic Components Pty Ltd v Collector of Customs* (1996 72 FCR 125) at 128).

Relevantly, the Land and Environment Court has applied the *de minimis principle* to the exercise of discretion to restrictions on development imposed by environmental planning instruments and development control plans on numerous occasions. The following exceedances have been held to be *de minimis* in the exercise of that discretion:

(a) the bedroom floor area of the proposed new dwelling was 2% in excess of the 35% total built area permitted (*Artmade Architectural v Campbelltown City Council* [2007] NSWLEC 855 at [9]);

(b) a "modest" non-compliance in part of a dwelling with the height limits prescribed in the DCP, which made no effective contribution to the shadow impact of the proposal (*Urbancorp Pty Limited v Nambucca Shire Council* [2006] NSWLEC 705 at [16]-[18]);

(c) a proposed floor space ratio of 0.409:1 where the relevant LEP required development in the zone not to exceed a floor space ratio of 0.39:1 (*Khomoutov v Horsby Shire Council* [2006] NSWLEC 409 at [10]); and

(d) the height of the roof of a penthouse as modified was 120mm higher than the proposal as approved (*Symond v North Sydney Municipal Council* [1990] NSWLEC 16). Bignold J applied the *de minimis principle* and held that the departure from the LEP standard was of "no legal consequence".

As discussed at 3 above, the Flood Study modelling shows an increase in the flood height resulting from the proposed development of between 12.3mm and 22.5mm on the Adjoining Lot depending on the climate scenario used. Additionally, these increases are only over a relatively small area of between 45m^2 and 60m^2.

It is open for the consent authority to be satisfied that such increase is relevantly negligible. Importantly, these minor increases in flood height **do not** result in any change in the characterisation of the flood affectation of the Adjoining Lot as Low Hazard Flood Storage under pre and post-development scenarios for both current and future climate conditions.

Accordingly, it is our view that it is open to the JRPP to apply the *de minimis principle* to the interpretation of clause 24(3)(a)(ii) of the Byron LEP and grant development consent.

6. S J Connelly Pty Ltd v Byron Shire Council [2009] NSWLEC 1068

While clause 24(3)(a)(ii) of the Byron LEP was considered in the decision of Commissioners Hussey and Taylor in *S J Connelly Pty Ltd v Byron Shire Council* [2009] NSWLEC 1068, for the following reasons this decision is of no relevance to the assessment of the Application:

(a) the decision was based on facts relating to flooding conditions in respect of a different and unrelated site;

(b) the Commissioners were not referred to, or asked to consider and apply, the *de minimis principle*; and

(c) a decision of a Commissioner in respect of a different application for a different site is persuasive only and is not binding on a consent authority.

Yours faithfully

Allens Arthur Robinson

Noel Hemmings QC
Noel.A.Hemmings@aar.com.au
T +61 2 9230 4848

Paul Lalich
Partner

Tom Cregan
Lawyer
Tom.Cregan@aar.com.au
T + 61 2 9230 5064