JOINT REGIONAL PLANNING PANEL

(Hunter and Central Coast)

JRPP No	**2011HCC021**
DA Number	**DA/715/2011**
Local Government Area	**Lake Macquarie City Council**
Proposed Development	**Seniors Living Village under SEPP (Housing for Seniors or People with a Disability) 2004**
Street Address	**114 Awaba Street, Morisset and 27 Goodwins Road, Morisset** **Lots 63, 76 and 77 DP755242 and Lot 2 DP860244**
Applicant/Owner	**Larry Schur / Larry and Jennifer Schur**
Number of Submissions	**Two**
Recommendation	**Refusal**
Report by	**Chris Dwyer, Principal Development Planner**

LAKE MACQUARIE CITY COUNCIL

DEVELOPMENT ASSESSMENT REPORT AND RECOMMENDATION

DA/715/2011

Seniors Living Village, Awaba Street, Morisset

Date Lodged:	18 May 2011
Approval Bodies:	Mine Subsidence Board; Rural Fire Service, Office of Water
Consent Authority:	Hunter and Central Coast Joint Regional Planning Panel
Referral Agencies:	Hunter Water
	Energy Australia
	NSW Police
Value:	$13.5 million
Exhibition:	4 June 2011 to 20 June 2011

Project Description

The development proposal is for the construction of a Seniors Living Village comprising 73 dwellings and a community centre.

Figure 1 – Seniors Living Village site plan

The proposal is for 72 two bedroom, single storey dwellings and 1 three bedroom single storey dwelling. Most dwellings are to be constructed as an 'attached dual occupancy' or 'duplex' style. The dwellings are to surround a community centre housing a dining/lounge room, media room, kitchen, hair salon, library, doctor, recreation and spa room.

The design incorporates landscaping, a small workshop, internal roads, garaging for all dwellings, open space and a Bushfire Asset Protection Zone to the south and south west of the site.

The site gains vehicle and pedestrian access off Awaba Street, and secondary emergency vehicle access off Awaba Street and Goodwins Road.

The development is to be a "secure" community with residences orientated toward the inside of the site, and perimeter security fencing to the boundary. Awaba Street is proposed to be constructed to 7.5m width.

Location

The site is located to the north of the township of Morisset. A previous consent for subdivision of the land into 50 residential allotments has been commenced (DA/1189/2007/A), however the applicant now advises that the preferred land use is a Seniors Living Village.

The residential zoned portion of the site is generally cleared of vegetation, gently sloping and is well located for residential and seniors living development being in close proximity to the emerging sub-regional CBD of Morisset and associated services and facilities.

The south western boundary of the site includes and abuts Clacks Creek and is zoned 7(1) Conservation (Primary). The land is also bushfire prone.

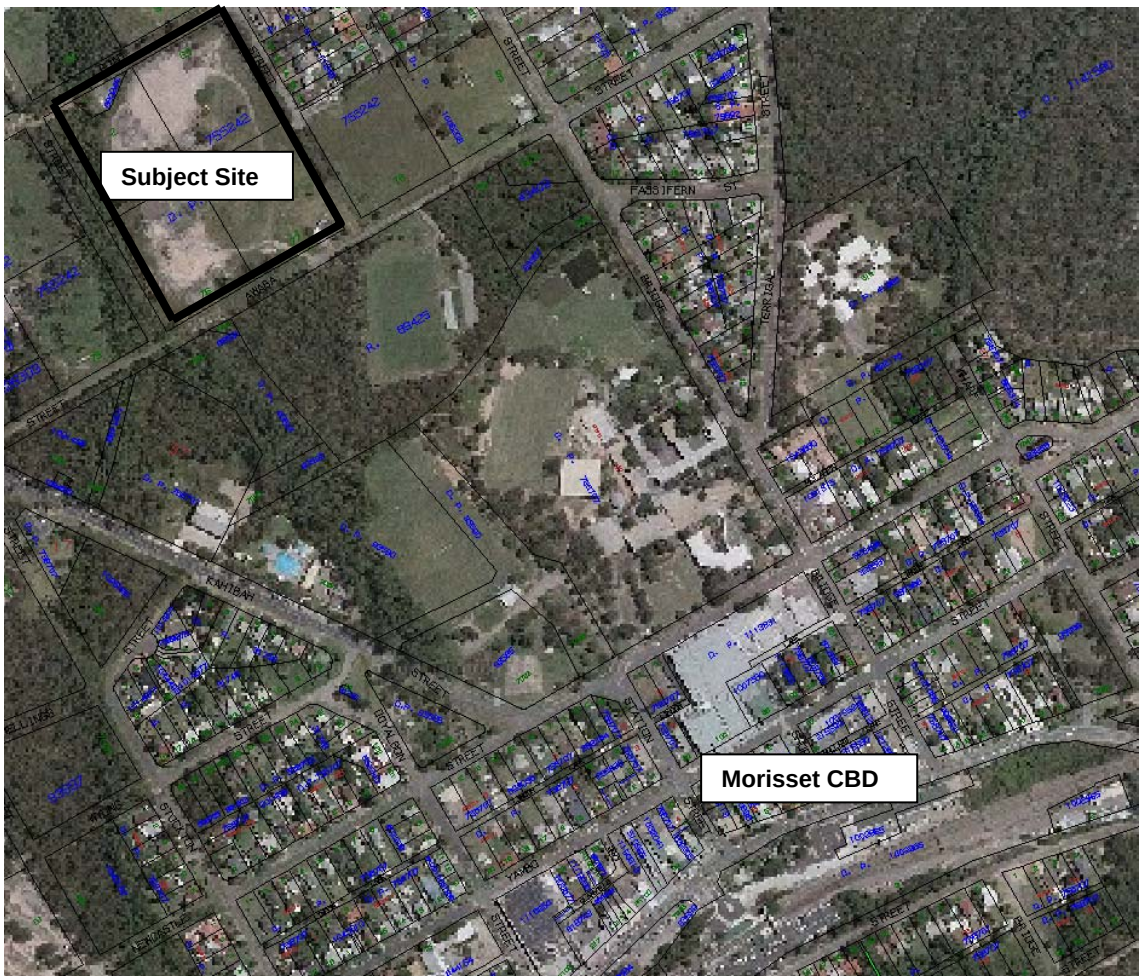

Photo 1 – Location of Proposed Seniors Living Village

Photo 2 – Site Aerial Photograph

Land Zoning and Permissibility

Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979 requires assessment of the application against relevant Environmental Planning Instruments.

To determine the permissibility of the proposal the land the subject of the application, and the zoning of that land, must be established.

On the development application form, the application is made over Lots 63, 76, and 77 DP755242, 114 Awaba Street, Morisset, and Lot 2 DP860244, 27 Goodwins Road, Morisset.

Lake Macquarie Local Environmental Plan 2004 (LMLEP)

The zoning of that land is 2(1) Residential and 7(1) Conservation (Primary) under the LMLEP. Figure 3 identifies the zoning of the land.

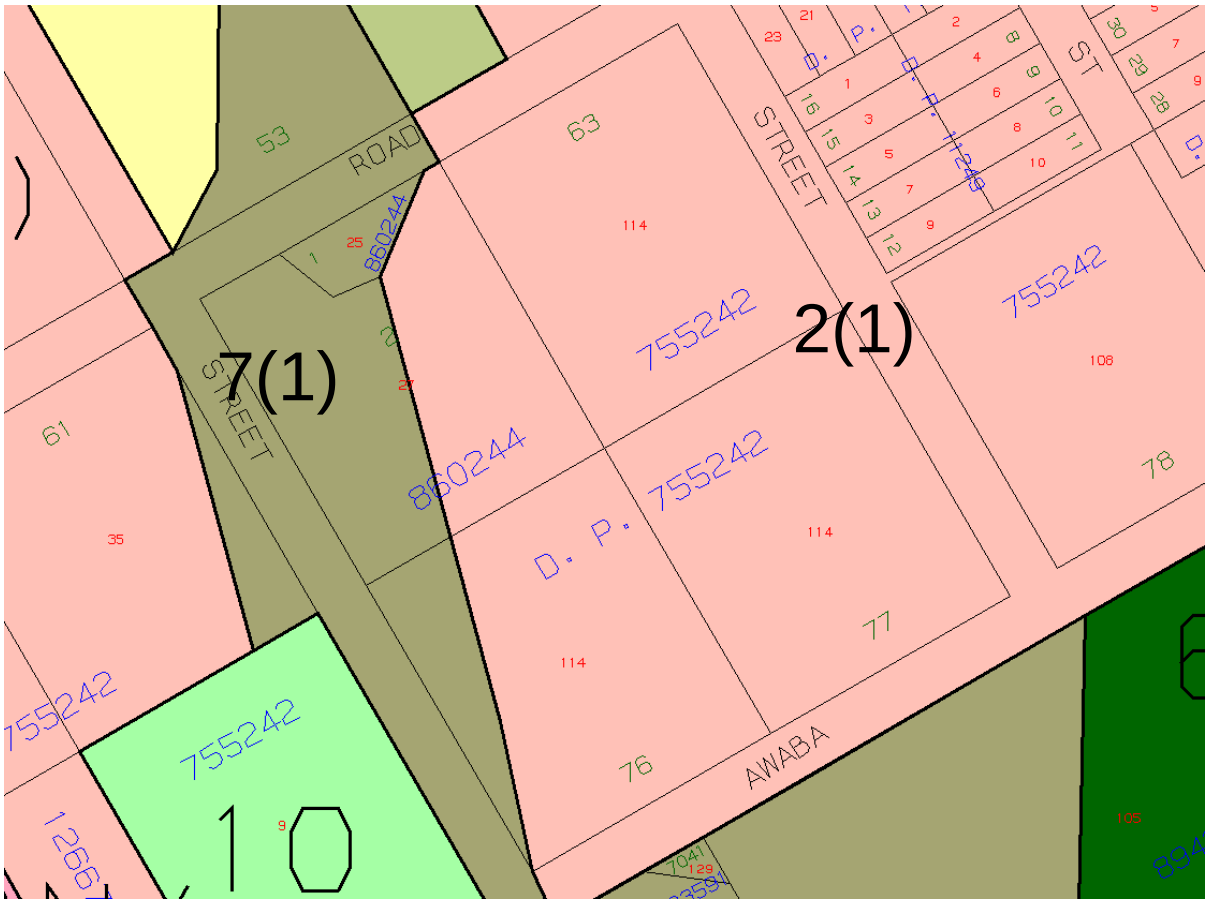

Figure 3 – Land Zoning LMLEP 2004

The land use of Seniors Housing is permissible with consent in the 2(1) Residential zone, but is prohibited within the 7(1) Conservation (Primary) zone, under Clause 15 (Land Use Table) of the LMLEP.

Similarly, the land use of Retirement Village is permissible with consent in the 2(1) Residential zone under Clause 41 of the LMLEP, however Clause 41 does not apply to 7(1) zoned land.

The consent authority is not able to consent to a land use of Seniors Housing or Retirement Village on 7(1) zoned land under the LMLEP.

State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (SEPP)

The development application is lodged under this SEPP. This SEPP provides relief from prohibition of Seniors Housing proposals in other Environmental Planning Instruments (such as the LMLEP), in certain circumstances.

The SEPP is not available for relief in this instance as the SEPP does not apply to the 7(1) zoned land [cl4(6) and Schedule 1]. Therefore the applicant cannot rely upon any 7(1) land for Seniors Housing, inclusive of dwellings, community centre, APZ, Open Space or any other required aspect of the proposal.

Land to which the Application relates

Notwithstanding the details on the application form, the applicant further identifies land to which the application relates within the SEE and lodged plan 30330C 'Development Area Identification Plan' by Daly Smith Pty Ltd dated 12/05/2011.

This plan seeks to ensure that the land the subject of the application is only zoned 2(1) Residential (thereby avoiding prohibition on the 7(1) zoned land). Figure 4 is an extract of that plan.

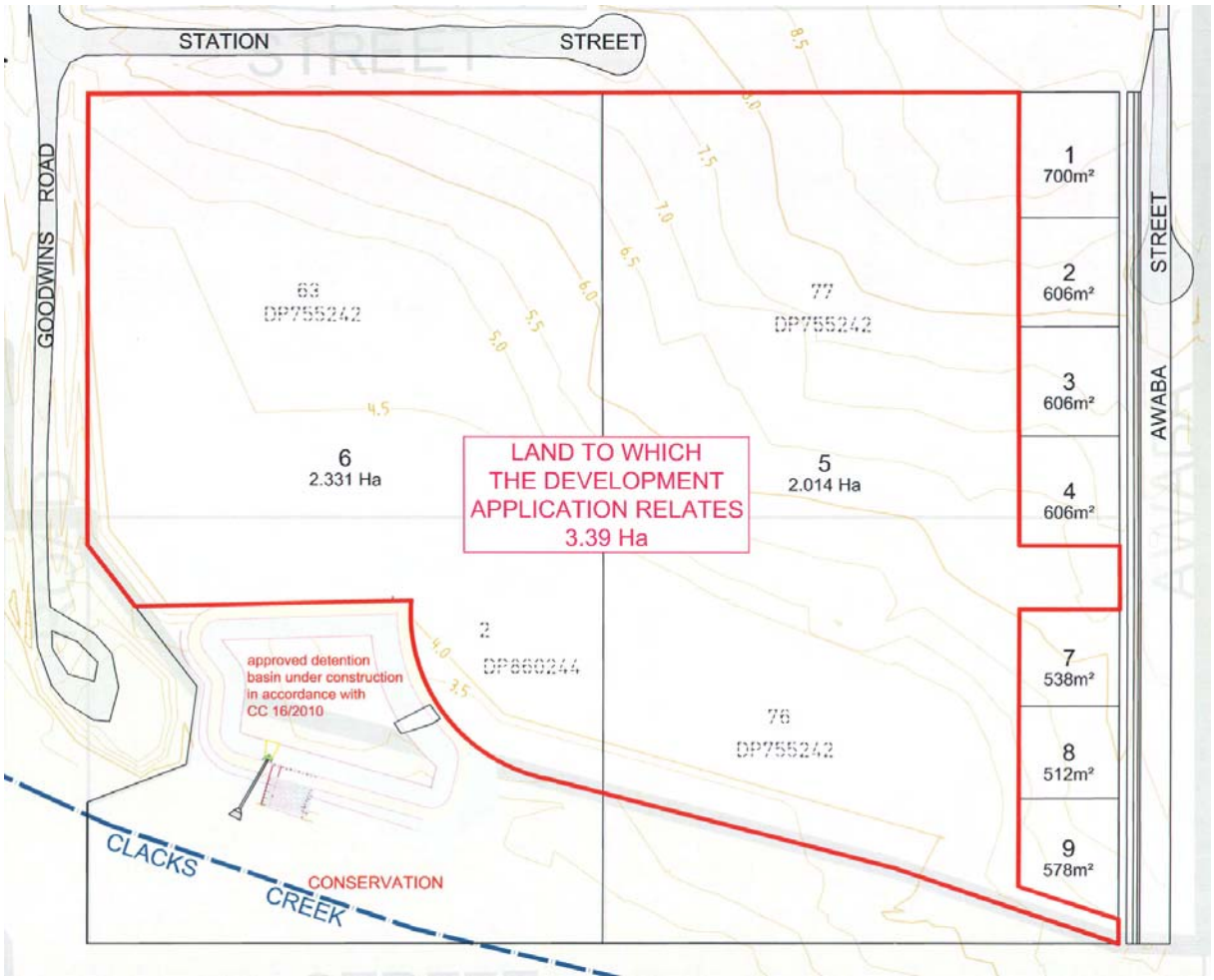

Figure 4 – Extract from SEE – Land to which Application Relates

The applicant provides Barrister advice (Appendix B2 of the SEE and Appendix A of this report) indicating effectively that if the application is made on the 2(1) zoned land only, then permissibility was achieved.

The proposal includes a Bushfire Asset Protection Zone or APZ (the green coloured area in Figure 1 adjoining 'Meadow Lane') and riparian corridor (the yellow coloured area in Figure 1 adjoining Coorumbung Street). An APZ is required for the Special Fire Protection Purpose under the Rural Fires Act 1997, and through 'Planning for Bushfire Protection'.

The land subject to the APZ is significant. The APZ is on land zoned 7(1) Conservation (Primary).

The APZ and Seniors Housing Village are symbiotic and cannot be separated as unique land uses, as one depends upon the other.

The approach of excising the 7(1) land to achieve permissibility, whilst still proposing development on the 7(1) land, is not supported by Council as it is seen as a vehicle to circumvent the proper legal construction of land use and permissibility.

What is the Application?

The applicant acknowledges that development is to occur on the 7(1) zoned land, but implies that such development is consistent with previous consents on that land (the 50 residential subdivision under DA/1189/2007/A) and that this development application may rely on that previous approval, and need not apply to the 7(1) zoned land.

This approach is not supported by Council. The previous approval DA/1189/2007/A was for a different land use to the one now proposed. The land that is now to be used as an APZ is the subject of condition 2 under DA/1189/2007/A to be revegetated to achieve the objectives

of the 7(1) zone. The revegetation under the previous consent, and the use of the land as an APZ under the current proposal, are in conflict. The previous consent cannot be relied upon in this manner.

It should be noted that even if the works under the previous application were consistent with the current proposal, fresh consent would still need to be obtained and the 7(1) land would be brought into the current proposal in any event.

The application remains a Seniors Living Village including APZ, over both 2(1) and 7(1) zoned land.

Additional Merit Issues

Despite prohibition, a preliminary assessment has been undertaken of the merits of the proposal. Issues arising from this assessment relate to the proposal's compliance with Council Policy and Development Control Plan 1 – Principles of Development, and accepted town planning and urban design principles.

Issues raised in the assessment include, but are not limited to:

- Flora and fauna impacts on the riparian lands and 7(1) zoned land;
- Urban design and siting impacts on the amenity of the locality;
- Urban design, relating to the development's poor relationship to existing residential development;
- Impacts of flooding on the development;
- Construction of roads that are not proposed in the application;
- Impact of stormwater disposal on Clacks Creek and adequacy of existing detention basin; and
- Reliance on outdated reports for flora and fauna, flooding, and social impact.

The application is not supported for the above reasons.

Legal Advice

As the application included legal advice, Council's Corporate Lawyer reviewed that information and provides written opinion. The legal advice submitted by the applicant is believed to contain factual errors that may have led to an incorrect conclusion. The advice of the Corporate Lawyer has been considered in the assessment and conclusions reached within this report.

Notification

Nearby and neighbouring properties were notified of the application. Two submissions were received, both questioning the traffic and road pavement capacity in the locality.

Additional notification was made to NSW Police, Hunter Water and Energy Australia (now Ausgrid). NSW Police had not responded to the application at the time of writing this report.

Hunter Water's preliminary advice is that the sewer pump station adjacent to the site should not impact upon the air quality of the locality by reason of noise or odour. A final written response from Hunter Water had not been received at the time of writing this report.

Ausgrid advises of no objection to the proposal, subject to standard conditions.

Approval Bodies

The application was forwarded to the Mine Subsidence Board, Rural Fire Service and Office of Water under the Integrated Development provisions of the Act and Regulation.

The Mine Subsidence Board raises no objections to the proposal.

The Office of Water has not responded to the proposal to date.

The Rural Fire Service's response dated 28 July 2011 raises issues associated with correct identification and classification of surrounding vegetation, and resultant calculations of separation distances and Asset Protection Zones, and clarification of access and egress to the site. The Rural Fire Service does not support the application at this stage and requires additional information.

Conclusion

The residential zoned portion of the site is capable of accommodating a well designed Seniors Living Village.

Unfortunately the applicant has elected to design the development on 7(1) Conservation (Primary) zoned land, resulting in significant concerns regarding permissibility and impact on the environment, and hence the application cannot be supported by Council.

The development application is prohibited under LMLEP and is not able to be approved by the consent authority [s79C(1)(a)(i) EPA Act 1979]. The consent authority is the Hunter and Central Coast Joint Regional Planning Panel.

Recommendation

It is recommended that DA/715/2011 be refused for the following reason:

1 The proposed Seniors Living Village is prohibited within the 7(1) Conservation (Primary) zone under clause 15 (Land Use Table) of the Lake Macquarie Local Environmental Plan 2004 and therefore fails the permissibility test under section 79(1)(a)(i) of the Environmental Planning and Assessment Act 1979.

Chris Dwyer**Error! No document variable supplied.**
Error! No document variable supplied.**Lake Macquarie City Council**

Appendix A – Applicant's Legal Advice

Larry & Jennifer Schur

proposed DA to

Lake Macquarie City Council

ADVICE ON PERMISSIBILITY

16 May 2011

prepared for
Optima Developments Pty Ltd
Town Planning & Development Consultants

from
MATTHEW FRASER
Barrister
Martin Place Chambers
Sydney

ADVICE ON PERMISSIBILITY

Background

1. I am briefed by Optima Developments Pty Limited on behalf of Mr Larry and Mrs Jennifer Schur for whom Optima have been engaged to prepare a Statement of Environmental Effects (SEE) to accompany a Development Application. The DA will be for a retirement village of 73 seniors housing dwellings, a community centre and associated landscaped gardens under *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (SEPP (HSPD) 2004).

2. During the course of a pre-DA enquiry with the council it has indicated that:
   - it has an issue in relation to permissibility and
   - is likely to insist on a further flora and fauna assessment.

It is only the question of permissibility that I am asked to deal with at this stage, because the question of a further flora and fauna assessment is readily resolvable. The land has been cleared and there is thus nothing to assess.

3. The issue of permissibility requires a proper understanding of some technical legal planning matters, to which this Advice is directed.

4. The site of the proposed seniors living development consists of 4 existing titles on Lots 63, 76 and 77 DP 7552429 and Lot 2 DP860244 with a total area of 4.345ha. The land is zoned partly 2(1) Residential and partly 7(1) Environmental Protection Conservation (Primary) under the *Lake Macquarie Local Environmental Plan 2004* (LEP 2004). The part of the land zoned 7(1) Conservation applies to an approximately 40m wide riparian and environmental corridor measured from the centre of Clacks Creek. This area contains a mixture of sparse and densely vegetated sections with some weed infestations and tall trees.

5. The proposed seniors living development is permissible on the 2(1) zoned land but prohibited on the 7(1) zoned land.

6. There is an existing subdivision consent DA/1189/2007/D issued by the council on 14 July 2008 which applies to the land (2008 Consent). The 2008 Consent was subject to a modification granted 2 March 2011 with the 2008 Consent still to lapse on 14 July 2013. The subdivision was of the 4 lots into a 50 lot subdivision.

7. Mr & Mrs Schur do not wish to proceed with the 2008 Consent, even though substantial works have been undertaken already pursuant to the 2008 Consent. The work which has been done includes construction of the detention basin and clearing of vegetation, amongst other works. I am instructed that the Schurs presently assess

that it is no longer viable, having regard to returns on such parcels of land, to pursue this residential subdivision development. Mr & Mrs Schur propose now to make application for a seniors living development under SEPP (HSPD) 2004.

8. Part of 2008 Consent includes a "fully constructed riparian corridor (managed as per Office of Water approved Vegetation Management Plan)" together with "open space grassland (20m wide APZ)" and a "detention basin 2733m²". Most of these approved works are in the land zoned 7(1). However, the detention basin is bisected by the zone boundary between the 2(1) and 7(1) zones, as shown *inter alia* on the Concept Landscape Masterplan LMP04 dated 5.5.11.

9. The VMP was approved by the Office of Water under the *Water Management Act 2000* and was part of the integrated approval process when the 2008 Consent was assessed by the council. Under the VMP, the management of the outer 20m of the zone immediately adjacent to the residential zone was required by the 2008 Consent to be to a standard equivalent to an asset protection zone (APZ). The 20m wide area adjacent to the residential zone, which is in accordance with the approved VMP, happens to satisfy the criteria for an APZ. Thus maintaining the area as required by the Office of Water's *Water Management Act* approval will not be in conflict with the anticipated requirement for an APZ in the same area for the proposed seniors housing development. Thus, neither the 2008 Consent nor the Office of Water approved VMP referred to the 20m as an APZ. When assessment was undertaken by the bushfire consultant for the seniors living development, he assessed that this area was equivalent to an APZ. Consequently, no work to establish the APZ for the seniors living development will be required. There will be ongoing maintenance in accordance with the approved VMP to continue to maintain it as an APZ.

10. There are other significant similarities notable between the 2008 Consent and the proposed SEPP (HSPD) DA. The subdivision layout plan approved by LMCC in the 2008 Consent proposed an 8m wide carriageway for Mountainview Avenue. Mountainview Avenue is more or less in the identical position of the proposed Meadow Lane of 8m wide in the proposed seniors housing village concept plan. The reserve area and detention basin are in identical positions. Indeed my instructions are that the VMP (reproduced at Appendix D of my brief) "will ensure that all of the requirements of the VMP, zone objectives and maintenance obligations of this portion of the development site as a managed APZ will be controlled and maintained as part of the village environment by the management". The VMP which is now proposed to be relied on in the anticipated DA for seniors housing development does not contain any proposed works in the area covered by the Office of Water's *Water Management Act* approved VMP in the 7(1) Conservation zoned land.

11. I am instructed that work required:

- to clear the 2(1) zoned land of vegetation in accordance with the 2008 Consent,
- to establish the VMP as required by the Office of Water's *Water Management Act* approval (which is physically able to act as the necessary APZ for the retirement village with no further work),
- to construct the detention basin, and
- other works required to be done in the 7(1) zoned land

either have been carried out or will be carried out under authority of the 2008 Consent. The proposed seniors living development relies upon the ability to maintain the APZ within the 20m of the 7(1) zoned land adjacent to the main village development as well as part of the detention basin which encroaches into the same land.

12. The council's position is that

- it classifies the APZ as part of the seniors housing development,
- that the APZ is on conservation land
- where the use is prohibited
- and therefore the development as proposed is not permissible.

The council points to Schedule 1 of SEPP (HSPD) 2004 which expressly excludes land zoned conservation for seniors housing.

13. The applicants' position is that

- the APZ and detention basin will be utilised by the seniors living development,
- these elements are or will already be constructed separate to the proposed DA,
- are not to be proposed as part of the SEPP (HSPD) 2004 development as applied for on the 2(1) zoned land, and
- that therefore the zoning of the land on which the detention basin and APZ for the development will be provided does not affect the question of permissibility of the development on the 2(1) zoned land.

14. I am asked in that context of those competing positions whether the proposed development is permissible or prohibited.

The competing arguments

The council's position

15. I firstly set out what I would understand to be the legal basis of the council's position.

16. Clause 4(6) and Schedule 1 of SEPP (HSPD) 2004 puts beyond dispute that where land is zoned "conservation" of any kind then seniors housing is not permissible and therefore prohibited on that land. The APZ is a necessary part of the development. The APZ is not a separate use, it is for the purpose of the seniors living development and therefore cannot be severed from it. This accords with the established legal process of characterisation of development recently explained in *Chamwell v Strathfield Council* (2007) 151 LGERA 400 at [27]-[36].

17. If the APZ and detention basin on the 7(1) land in this case can be compared to the car parks, driveways, accessways and landscaping used to facilitate the ultimate purpose of a supermarket as in *Chamwell v Strathfield*, then the APZ and detention basin, being a "use" of the conservation land for that purpose, form part of the seniors living development.

18. There is no doubt that the APZ and detention basin are necessary to enable the SEPP (HSPD) development to work, so it is understandable why the council takes this position.

The applicant's position

19. I now set out what I would understand to be the legal basis of the applicant's position.

20. The alternative analysis depends upon what is applied for in the DA for the retirement village. It is noted that no work will be required to establish the APZ or detention basin on the 7(1) environmentally zoned land. That has been or will have been done prior to the DA for the retirement village being determined by the council. All that is required is that there be an area to service the development is for it to be maintained in its condition as at the time when the council determines the application for the retirement village. All trees and other works required to be undertaken to that 7(1) zoned land will have been undertaken. The applicant argues that:

- as there will be no development application to do any development on the land zoned 7(1),
- there will thus be no "development" on that land.

It will only be proposed to use the area as an APZ and to drain into the detention basin already constructed. Such use is comparable to use of existing drainage infrastructure external to the land but no doubt necessary to be present before any development can take place.

21. If there is no application for development on the 7(1) zoned environmental land, then there is nothing for the council to characterise and consequently no impermissible development proposed.

22. The alternative argument acknowledges that the APZ and detention basin are necessary parts of carrying out the development. However the argument says that if it is available on adjacent land that of itself is no reason to refuse the development so long as the adjacent land can be maintained in perpetuity available for the APZ and detention basin. In this case the adjacent land being the conservation land is in the same ownership, therefore a development consent condition requiring the APZ and detention basin to be maintained can work in perpetuity, subject to appropriate conditions, which may require Restrictive or Public Positive Covenants to be registered on title.

Advice

23. The Advice I am asked to give is: which of these positions is correct at law?

24. The entitlement of an applicant for development consent to identify and define the land upon which the development can take place is established by caselaw. Even where there will be some reliance on neighbouring land for some purpose of the development, that does not automatically mean DA "relates" to that land. I understand the council quite properly does not take issue with the detention basin and accepts that the DA need not include the detention basin because it is a drainage facility just like other nearby drainage infrastructure which will be relied on.

25. The issue the council has is reliance on an APZ located on land not the subject of the DA.

26. A similar but not identical question has been litigated in *North Sydney Council v Ligon 302 Pty Ltd* in the Land & Environment Court, the NSW Court of Appeal (1995) 87 LGERA 435 and the High Court of Australia HCA (1996) 91 LGERA 352. In that case it was argued by the council that owners' consent for adjoining land was required because the development "related to" that adjoining land. The proposed development of the North Sydney Club was going to make use of existing easements for pedestrian access on land owned by proprietors of the adjoining Century Plaza building. In *Ligon v North Sydney* the issue was one of whether the consent of the

owners of the Century Plaza building was required for the development application. That question turned upon whether or not the development application "related" to land owned by the proprietors of the Century Plaza building. It is not the same question as here, but the reasoning does by analogy provide the answer to the question asked.

27. No doubt because the NSWCA was divided on the issue, there was an appeal to the High Court of Australia. In the HCA there was a joint judgment of Brennan CJ, Dawson, Toohey, McHugh, and Gummow JJ. The HCA crucial reasoning for present purposes is found at (1996) 91 LGERA 352 at 360:

> The development application in the instant case is for consent only to a development to be carried out on the Club site. The development application relates solely to the Club site. The use of the Century Plaza land to give access to the Club site is an existing use and, unless that use be intensified, no question of consent to a development of the Century Plaza land will arise. It may be expected that the use will be intensified but it does not follow that the prospect of intensification makes the application already lodged by Ligon invalid for want of the consent of Century Plaza. The prospect of intensification of use is capable of affecting the discretion to grant or refuse Ligon's application, but that is a different problem.

28. This conclusion can be applied to the subject. In this case both the detention basin and the APZ are or will be established when the DA for the seniors living development is determined by the council, thus no development or intensification of use of that land will take place. It may be necessary for the council to impose a condition of consent requiring easement for retention of the APZ area (and detention basin), but that is directly comparable to the easement for use of the Century Plaza land in *North Sydney Council v Ligon*.

29. To make this legal point quite clear, the two opinions expressed in the NSWCA are worth review. The NSWCA was divided between Kirby ACJ who concluded that the development did relate to the Century Plaza land, and Sheller JA and Clarke JA who were of the view that the development application did not so relate.

30. The analysis of Kirby ACJ was ultimately rejected by the HCA, yet that is the legal argument the council would have to rely on. I have a extracted a fairly long passage so as a reader of this Advice can understand the legal approach which has been rejected by the High Court, and contrast that to the correct approach. Kirby ACJ reasoned at 444:

> ... In the current case, and in the established facts, it was the contention of the respondent that no such consent was required because the development involved no change of use of the Century Plaza land...
>
> It was common ground that the proposed development included the use of two rights of footway across the land adjoining the club owned by the proprietors of the Century Plaza building. Securing the rights of footway was essential to providing entrance and egress

> respectively to the foyer of the club (to be used by members, patrons and other visitors and users) and to a separate foyer for the residential flat building to be built on top of the club (to be used by the new residents, visitors and other users).
>
> ... the right of footway presently enjoyed by patrons of the club was to be converted to a pedestrian walkway to the foyer providing entrance to the residential building erected on top of the club. In these circumstances, the respondent asserted that there was an established use which involved absolutely no new "development". Therefore no consent of the owners of the Century Plaza building was required ...

31. The direct comparison to the subject DA here, and the utilisation of the existing APZ area is clear. Then Kirby ACJ says at 447-448:

> Of course, borderline cases will arise from the task of statutory construction which is involved. Cases will exist where it might be difficult to decide whether the development application "relates" to the land owned by a third person. In some cases it might be possible, as Cripps J did in *Jeblon*, to sever a development application and, upon appropriate terms, to exclude its relationship with the land owned by others. But in the present case, that can hardly be done. It is, on the facts, an integral part of the entire arrangement for the building of the residential flat extension on top of the club premises, that a change will occur. A right of access over the Century Plaza, land formerly enjoyed exclusively by club members, their guests and related persons will henceforth be used by entirely different persons, having nothing to do with the club. This leaves the right of way intact ...
>
> Properly characterised, the respondent's development application undoubtedly "relates to" the land owned by the owners of Century Plaza building. There is that connection. And that is enough, by the terms of s 77(1), to require that the adjacent owners' consent in writing be obtained before the development application may be made.
>
> It is clearly established law that a development application must include relevant material pertinent to the entire application. It is not open to an applicant "arbitrarily to nominate a limited area of land and thereby to restrict the range of incidental uses which he must is close in his application": see *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485 at 514; 44 LGRA 346 at 367. Thus the "use" which must be disclosed in a development application will ordinarily involve disclosure of means of access: see, for example, *Pioneer* at 502. This is all the more so because the definition of "development" in the *Environmental Planning and Assessment Act* is, as I have pointed out, extremely wide and extends to the "use of that land".

This is the analysis which has been rejected by the court. Kirby ACJ was found to be wrong by the HCA in concluding that the DA in *Ligon* "related to" the neighbouring land, even though some use of neighbouring land was necessary. The council would need to rely on such (incorrect) reasoning to maintain its position in the face of the applicant defining the land to which the application relates. The HCA held that the application can relate to the land nominated by the applicant.

32. In contrast, Sheller JA reasoned at 449:

> ... The respondent does not propose to erect any building or carry out any work in, on, over or under the land the subject of the easements. However s 4(1) of the Act defines "development", in relation to land, to mean also "(c) the use of that land or of a building or work on that land". The owners of the Century Plaza land have refused to consent to the development application. Is their consent essential to the validity of the development application? ...

33. And then at 450 Sheller JA continues (my underlining):

> No one proposes to carry out any development, as the Act defines that word, on the Century Plaza land. If they were it would be necessary to determine whether the proposed development was prohibited or required consent. If the consent authority's consent was required, the developer would have to make a development application and to do so would need the consent in writing of the owner of the Century Plaza land, being land to which the development application related. <u>The fact that the Century Plaza land is subject to easements in favour of the land the subject of a development application is of itself of no significance. If the easements may currently be used as they will be used if the development on the Club land goes ahead, no development of the land the subject of the easements is to be carried out and no development application relating to that land needs to be made.</u> If the development on the Club land involved a different or excessive use of the rights of footway it would be outside the permit of the easements and may well amount to a proposed development of the servient tenement for which the consent of the owner of that land and of the consent authority would be required. In the absence of any evidence that it is proposed to use the easements in a way not permitted by their terms or to erect a building or carry out a work in, on, over or under the servient tenement there is not nor is there any need for a development application which relates to the servient tenement. Accordingly, in my opinion, on the material before the Court the making of the development application in relation to the Club land did not require the consent of the owner of the Century Plaza land.

34. The applicant in this case will need to either put in place and easement (or other land title mechanism: a restriction as to use, public positive covenant etc) to ensure the APZ area will be available in perpetuity, or accede to a condition of consent which has a like effect. Whether done before the DA is made, or in compliance with a condition of consent, the subject case is directly comparable to *North Sydney Council v Ligon*.

35. An applicant is entitled to identify what it is that it applies for and what land it is seeking development consent for, as was held by the HCA finally in *Ligon v North Sydney*. In the subject case, the zone boundaries do not equate with the lot boundaries defined by the Land Titles Office and the parcels of land owned by the applicant. The definition of "land" in s 4 *EP&A Act* is an inclusive definition which expands the ordinary meaning of the word "land", as noted by the HCA above in *Ligon v North Sydney*. The nature of the inclusionary definition is explained in *North Sydney Council v Ligon* by the High Court (at page 481) that the definition "speaks only of land of a topographical entity, not as a bundle of rights".

36. Further, in the course of his judgment Meagher JA in *Hillpalm Pty Limited v Tweed Shire Council* [2002] NSWCA 322 (some 7 years after *Ligon* was decided) noted that

> *... what land an application "relates to" must primarily, if not exclusively, be determined by an examination of the terms of the application itself, which, of course is a written document...*

37. It is legally proper for the applicant to define the land to which the application relates by reference to lines drawn on a plan which equate with the zone boundaries, rather than the lot and DPs. Such lines must of course have practical effect. Part of a development cannot be artificially severed. In this case the development itself , that which requires consent for construction and/or use, will be the subject of the DA. The APZ requires neither consent for construction (because it is already there in the form that equates to an APZ) nor consent for use (passive retention and maintenance is not "development" within the meaning of the EA&A Act).

38. There are cases following on from the *Ligon v North Sydney* case which confirm the foregoing analysis, to which I will now refer.

39. Even if it was the case that a separate application was required for a necessary part of a development off the site of the land identified as being the DA land, then that would not be reason to refuse the subject DA. As one example, in *Jeblon Pty Ltd v North Sydney Municipal Council* (1982) 48 LGRA 113, an application for change of use from a hairdresser's shop to a gourmet food shop required the fitting of external ventilation exhaust to the common property of the building within which the business was located. That the application did not relate to the common property, and the consent of the body corporate did not accompany the application. But that did not prevent the Court from granting consent. The consent was conditioned on the ventilation exhaust being installed, with the applicant left to secure the consent of the body corporate for those works. As Sheahan J said in *Bluewater District Services Pty Ltd v Sutherland Shire Council* (1998) 97 LGERA 389, the obtaining of the Court's consent *"...is but one stage or hurdle in a series of events and approval processes which must be pursued/concluded between the conception of a project and its completion"* (at p 393, citing *Grace Bros Pty Ltd v Willoughby Municipal Council* (1981) 44 LGRA 400). There his Honour upheld a consent notwithstanding the need for further works on common property, which works would require the consent of the body corporate.

40. Further, even if a condition of consent did require work outside the subject land (not the case here to establish the APZ or detention basin), then note what has

been said in reliance upon *North Sydney v* Ligon by the NSWCA in Curry *v Sutherland Shire Council* (1998) 100 LGERA 365 wherefrom I extract the reasoning of the decision of Stein JA with whom Mason P and Handley JA agreed at 368 (my underlining):

> In my opinion, the appellant's submission that the development application is invalid because it lacks the consent of the owner of lot 1 is misconceived. This is apparent from answering the following question. What was the subject matter of the development application? When this is examined, it is abundantly clear that it is the subdivision of lot 4 into three lots. The development application did not encompass lot 1, nor did the council grant consent to carry out development on lot 1.
>
> ... The proposed plan of subdivision submitted with the development application in August 1995 did not indicate any works on lot 1. The subdivision was confined to lot 4 (being divided into three new allotments).
>
> ... Be that as it may, it is plain that the development application was for a subdivision of land in accordance with a proposed plan. That plan was confined to the land to be subdivided and proposed no development on lot 1. Further, the development application was accompanied by a letter from the applicant dated 31 July 1995. The development application specifically referred to the attached letter. Inter alia, the letter stated:
>
> > The existing right of way access from Woolooware Road which presently services three lots — lots 4, 5 and 6 DP 205947 — is to be upgraded *within the applicants land* — by widening to accommodate two way traffic and by improving sight lines in the vicinity of the blind corners. (Emphasis added.)
>
> It further stated:
>
> > It is proposed to have access from Woolooware Road by right of carriageway in common with lots 5 and 6 DP 205947 but this right of carriageway is proposed to be widened to a minimum of 6 metres *within the applicants land*. (Emphasis added.)
>
> Thus, the letter was incorporated into the development application, see Hope JA in *Auburn Municipal Council v Szabo* (1971) 67 LGRA 427.
>
> Accordingly, it is plain that the development application did not include any works on lot 1 and the consent of the owner of that allotment to the making of the development application was not required.
>
> Before departing this issue, two matters should be briefly mentioned. Contrary to the submission of the appellant *North Sydney Council v Ligon 302 Pty Ltd* cannot assist her here, nor can it be distinguished. The High Court said (at 476; 355):
>
> > When a development application is made for consent to a specified development, the land to which the application "relates" must therefore be the land on which the specified development is proposed to be carried out.
>
> Lastly, the fact that the council imposed a condition requiring work to be carried out on land outside the subdivision does not give rise to its notional inclusion within the development application: see Hope JA in *Grace Bros Pty Ltd v Willoughby Municipal Council* (1980) 44 LGRA 422 at 425.

41. Thus on these authorities the applicant in this case is legally entitled to:

- nominate the land to which the application relates and is made in respect of;
- make or propose an easement or other mechanism to ensure availability of the APZ in perpetuity (or for the life of the development),
- even if work was required on the 7(1) land, which it is not.

42. Conditions can be imposed requiring work on land outside the subject application. In this case, no work is required on the APZ land, hence no DA will be required. Conditions requiring mowing and similar maintenance of the APZ do not require "development" of that land as defined in the EP&A Act. The cases repeatedly state that where a further application might be required for such works either from the council or other authorities that does not mean the subject DA must be refused. Here, it is important that no work (therefore development) is proposed on the land not zoned for the purpose of the retirement village. The council's decision to grant consent for seniors living development on the land where the zoning permits such development will not be invalid because of the relationship with land where the APZ will be : *Grace Bros Pty Ltd v Willoughby Municipal Council* (1980) 44 LGRA 422 at 427.

Summary

43. The following propositions can be derived from my survey of case law:

- An applicant can define the land to which the application relates.
- If no work is proposed on neighbouring land, then even though the impacts upon that land must be taken into account, that land is not land to which the application "relates" simply because there are impacts on that land.
- Unless application is made for use, work or development on land, then it is not the subject of the DA requiring consideration by the council.
- It is possible to condition work to be done or easements to be obtained or access to be obtained prior to commencement of a development where neighbouring land is required for that purpose, but that does not make that land part of or the subject of the application.

44. I conclude that the proposed development is permissible if the land to which the application relates is defined in the DA by the applicant as being only on the 2(1) zoned land.

How to proceed

45. It is established that an applicant is entitled to identify the land upon which development consent is sought to be carried out. That land need not be confined to existing cadastral boundaries, but may be defined by reference to zoning boundaries or any other topographical feature or even a personal desire of the proponent.

46. In this case the land to which the proposed seniors living development relates ought be defined to be the works and development on the land zoned 2(1) only. That is done simply by drawing a line on a plan to thus define and inform the council in the DA by reference to that plan that the land the subject of the DA is that identified on such a plan. If that is done in this case, then the detention pond and APZ would fall outside the development proposed. The DA would then be in respect only of land where the development is permissible

47. However, each of the detention pond and APZ are required for the development to function practically. The availability of those would need to be preserved in perpetuity either as required by conditions of consent or alternatively put in place now in the form of covenants or similar legal mechanism on title.

Conclusion

48. It is necessary for the council to be satisfied that any DA made to it is permissible. In this case, the land to which the DA relates can be readily defined in a practical manner to be the 2(1) zoned land. The passive reliance on the APZ area is required for bushfire protection, but that can be required as a condition of consent if not already preserved by an easement or similar legal mechanism.

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16 May 2011