ITEM	**81 - 95 Boronia Road, GREENACRE NSW 2190** **Demolition of the existing dwellings and associated site structures and the construction of a part two / part three storey residential flat building development containing 144 dwellings with basement car parking, an internal road and strata subdivision pursuant to the provisions contained in State Environmental Planning Policy (Affordable Rental Housing) 2009.**
FILE	**DA-76/2011 - East Ward**
ZONING	**2(a) - Residential A**
DATE OF LODGEMENT	**2 February 2011**
APPLICANT	**Creative Planning Solutions P/L**
OWNERS	**GPV Investments Pty Ltd**
ESTIMATED VALUE	**$23,489,000.00**
AUTHOR	**Development Services**

SUMMARY REPORT

This development application seeks approval for the development of the site for a 144 unit residential flat building with basement car parking and strata subdivision, and has been lodged pursuant to State Environmental Planning Policy (Affordable Rental Housing) 2009. The development application was reported to the meeting of the Sydney West Joint Regional Planning Panel on 15 December 2011, where a decision on the application was deferred to allow independent legal advice to be sought regarding State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARH SEPP). In particular, the minutes of the meeting of 15 December 2011 state:

> *Mary-Lynne Taylor recommended that the application be deferred to gain independent legal advice from Senior Counsel in respect to the following:*
>
> *(i) The permissibility of the development with particular reference to the application of the ARH SEPP*
> *(ii) The interpretation of the discretion within the amended SEPP with regards to the word 'may'.*
> *(iii) The interpretation of the equivalent zone test.*

Independent advice has since been obtained from Adrian Galasso SC in a Memorandum of Opinion to the Department of Planning and Infrastructure, dated 18 January 2012.

The JRPP has since written to Council by way of a letter dated 9 March 2012, and asked the following:

> *The Regional Panel would like to ask Council to consider the legal advice and to prepare a supplementary assessment report on the following basis:*
>
> 1. *If the regional panel decides the assessment of the DA should be under the provisions of the repealed ARH SEPP, which applied at the time of lodgement; and*
>
> 2. *If the equivalency test has been met, in accordance with the test proposed in the legal advice from Mr Adrian Galasso, SC.*
>
> 3. *The Regional Panel would also be assisted by the Council planning officer's opinion on whether the equivalency test is met in this particular DA.*

The development application has been lodged under the provisions of the ARH SEPP and so one of the fundamental assessment tasks that must be performed is to determine whether the ARH SEPP actually applies to the development, and which version of the SEPP is to be applied. The following report assesses this matter in detail.

WHICH VERSION OF THE ARH SEPP IS THE APPLICATION TO BE ASSESSED AGAINST?

The first point in the letter from the JRPP dated 9 March 2012 is:

> 1. *If the regional panel decides the assessment of the DA should be under the provisions of the repealed ARH SEPP, which applied at the time of lodgement; and*

The development application was lodged on 2 February, 2011, and was lodged under the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009. The version of the ARH SEPP which applied at the time of lodgement of the application is referred to in this report as the unamended SEPP. To determine whether the unamended ARH SEPP applies to the development, Clause 5(1) of the unamended SEPP required a certain "test" to be applied by the consent authority.

That test is referred to as the "equivalency test". In simple terms, and as will be expanded upon later in this report, the equivalency test requires the consent authority to determine whether the applicable land use zone in the local planning instrument, in this case the Bankstown Local Environmental Plan 2001, is a land use zone in which equivalent land uses are permitted to those permitted in a named land use zone in the Standard Instrument. If no equivalence can be found, then the SEPP does not apply. Conversely, if equivalence can be determined, then the SEPP applies.

On 20 May 2011, the ARH SEPP was amended and that amendment removed the equivalency test for this form of development, leaving a much simpler test in its place. That new test, put simply, is that if the development is prohibited within the zone which applies under the relevant environmental planning instrument, in this case, the Bankstown Local Environmental Plan 2001, then the ARH SEPP does not apply to the development. Relevantly, Clause 10(1) of the amended ARH SEPP states:

> *(1) This Division applies to development for the purposes of dual occupancies, multi dwelling housing or residential flat buildings if:*
>
> *(a) the development concerned is permitted with consent under another environmental planning instrument, ….*

Which version of the SEPP is to be applied to the development application remains a choice for the consent authority, as per the provisions of Clause 54A(2) of the amended ARH SEPP, which states:

> *(2) If a development application (an existing application) has been made before the commencement of the amending SEPP in relation to development to which this SEPP applied before that commencement, the application may be determined as if the amending SEPP had not been made.*

The JRPP has recently determined a development application under the provisions of the amended version of the ARH SEPP in the case of 1-5 The Crescent Yagoona (DA1236/2010, JRPP Ref 2010SYW095). Similar to the current application for 81-95 Boronia Road, Greenacre, the development application for 1-5 The Crescent was lodged when the unamended version of the ARH SEPP was in force and was undetermined at the date of the May 2011 amendment to the SEPP.

Council has also sought to determine development applications lodged, but not determined at the time of the 20 May 2011 amendment against the amended version of the SEPP. It would be reasonable that the amended version of the SEPP also be applied in this instance for the following reasons:

- Consistency with past decisions of the JRPP and Council.

- The findings of this report will be that the proposal fails the equivalency test which applied under the repealed ARH SEPP and fails the current test under the amended version of the ARH SEPP. The different forms of the test are considered to produce the same result, albeit through a simpler and clearer process when performed under the amended ARH SEPP.

- The fact that an option exists for undetermined applications suggest a deliberate intention to allow consent authorities the ability to use the simpler test provided in the amended ARH SEPP, to produce outcomes more consistent with Council's planning instruments in terms of permissibility.

In particular, the Department of Planning and Infrastructure fact sheet dated May 2011, which accompanied the changes to the SEPP, states *"villa, townhouse and residential flat developments by the private sector will no longer be allowed in low density residential areas".* It is worth noting that nowhere in this statement does it refer to "new" developments no longer being permitted, instead referring to all developments, suggesting an intention for the amended provisions to be applied to all development regardless of lodgement date.

- In terms of the transitional provisions, the fact sheet indicates that a consent authority may still assess applications under the unamended version of the SEPP *"subject to being compatible with the new local character provision…"*

  It is the clear intention in amending the ARH SEPP, not to make developments which are prohibited under an LEP to become permitted under the ARH SEPP, or to allow developments which are out of character with the local area to be permitted to proceed. The report to the JRPP meeting of 15 December 2011 assessed the proposal in accordance with the "character test" contained within the ARH SEPP and concluded that the development would not be in keeping with the character of the surrounding area. Furthermore, the amended ARH SEPP clearly provides the consent authority the choice as to which version of the SEPP to apply in order achieve these objectives.

Accordingly, it is recommended that the assessment of the application should be undertaken against the amended version of the ARH SEPP. If this newer and simpler test is applied, then the question which must be resolved is whether *"the development concerned is permitted with consent under another environmental planning instrument".*

The proposed development is for the purposes of a residential flat building, which is a use which is prohibited within the 2(a) Residential A zone which applies to the site under the Bankstown Local Environmental Plan 2001.

Accordingly, the ARH SEPP (as amended) would not apply to the development and the assessment of the development application must be undertaken against the Bankstown Local Environmental Plan 2001, in which case, the development is a prohibited development.

Assessment against the unamended ARH SEPP

Should the JRPP decide that the unamended ARH SEPP is to be applied for the purposes of assessment of the development application, the following point should be noted.

Clause 10(2)(c) of the unamended ARH SEPP states that the relevant division of the SEPP does not apply to a development site in the Sydney Region unless all or part of the development site is, relevantly within "*400 metres of a bus stop used by a regular bus service….that has at least one bus per hour servicing the bus stop between 06:00 and 18:00* ***each day*** *from Monday to Friday (both days inclusive)"* (emphasis added).

The previous report to the meeting of the JRPP of 15 December 2011 indicated that the site is located adjacent to a bus stop which provides a regular bus service in accordance with the provisions of the ARH SEPP. However, further assessment suggests that this is not the case.

Review of the relevant bus schedule from Metrobus for the M90 service indicates that bus services run past the site as follows:

Weekends and Public Holidays:

- *Liverpool to Burwood.*
  T5:59am, T6:59am, T7:14 am, 7:29am.

- *Burwood to Liverpool.*
  T6:49am, T7:49am, T8:14am, and 8:54am.

On public holidays, each of these services are notated with a "T". Regarding this notation, the schedule states:

> *"T- Trips highlighted or portions of trips highlighted, operate on Saturday only and do not operate on Sundays and public holidays".*

The wording found at Clause 10(2)(c) does not distinguish between bus services on public holidays or regular weekdays, meaning that if a public holiday were to fall on a Monday or a Friday, for example, the site would still need to be served by a bus service operating on those days at least every hour between 6am and 6pm. The notation found in the timetable indicates that on such days, no service would operate before 7:14am on the Liverpool to Burwood service, or before 8:54am on the Burwood to Liverpool Service. This means that, as a minimum, failure against the provisions of Clause 10(2)(c) would occur on Good Friday, Easter Monday, Queens Birthday week and Labour Day.

Accordingly, it is considered that it cannot be said that the provisions of Clause 10(2)(c) are satisfied and that as such, the division of the unamended ARH SEPP which relates to in- fill affordable housing does not apply to this development site. Therefore, the unamended version of the ARH SEPP would not apply to this development.

Notwithstanding this, the following sections of this report assess the development application against the equivalency test, as requested in the JRPP letter of 9 March 2012.

THE LEGAL ADVICE & THE "EQUIVALENCY TEST"

Item 2 of the letter from the JRPP to Council dated 9 March 2012 requests Council address:

> 2. *If the equivalency test has been met, in accordance with the test proposed in the legal advice from Mr Adrian Galasso, SC.*

The Panel sought independent legal advice regarding what are the steps to go through in undertaking the equivalency test.

The test suggested by Adrian Galasso SC in his letter to the Department of Planning and Infrastructure dated 18 January 2012 is to:

> a) *Firstly ascertain what land uses are permitted in one of the four land use zones named in Clause 10(1)(a)–(b);*
>
> b) *Secondly, identify the land uses that are permitted in the Residential 2(a) zone under the Bankstown LEP; and*
>
> c) *Finally, form an opinion as to whether the land uses permitted in the Residential 2(a) zone are equivalent to those permitted in the identified zone.*

The opinion of Adrian Galasso SC provides key background as to how the three step test is arrived at and also provides guidance and clarification on how to apply the test. Hence, there is particular value in drawing out the key points from his opinion, as follows.

Are the objectives of the ARH SEPP relevant?

Adrian Galasso SC at point 10 of his opinion dated 18 January 2012 states that *"….in my opinion, it is clear that the prescription in Clause 5(1), which relates then to equivalence for the purposes of Clause 10(1), is only with respect to permitted land uses, but not prohibited ones, nor objectives of the zone"*.

He also notes, at points 21 and 24, that he is unable to agree with the proponents legal advice or the approach taken by Commissioner Tour in the case of *Chami –v Bankstown City Council* wherein the Commissioner turned to the objectives of the zone, stating *"in my opinion, because the language of Clause 5(1), such recourse is irrelevant to the task at hand"*.

The conclusion that can be drawn from the opinion is that the objectives of the ARH SEPP are not a relevant consideration when undertaking the equivalency test.

How to consider the range of uses nominated in the Standard Instrument

Important guidance in how to apply the equivalency test is found at point 26 of his advice, where he states:

"Insofar as the advice on behalf of the proponent is concerned (Lander & Rogers), I would respectfully disagree with that part of the advice (at [15]-[18]) which claims that in applying the test set out in Clause 5(1) the consent authority could take into account uses which might be added to any of the named land use zone when it comes to having made a local environmental plan that follows the standard order. Such an argument would mean that the exercise required by Clause 5(1) never need be undertaken. This is because it is entirely possible that that whenever a new LEP may be made, land uses might be added (unless they are specifically prohibited from being added). For the reasons set out above, in my opinion, the starting point for comparison is, or more correctly are, the permitted land uses in the named zones in the standard order".

What is the likely result of the test of equivalency?

Adrian Galasso SC, in his advice, has not provided guidance as to whether, when the tests suggested in his opinion, are undertaken, whether the test of equivalency is satisfied. Rather, he indicates that, as per the legislation, this is a matter for the consent authority (in this case the JRPP), and that the answer need not be governed by the outcome of previous decisions on the matter.

However, he does provide some guidance, in his review of the *Chami* decision where, at point 22, he states:

"The exercise undertaken by the Commissioner in Chami, particularly with respect to boarding houses (at [37]-[42]) in my opinion defies the specific prescription in Clause 5(1) of the SEPP. Whether focusing upon, for example, boarding houses alone, or as one of the three permitted land uses in the R2 Zone, where boarding houses are not permitted in the Residential 2(a) zone, it would be difficult, in my opinion, to form the opinion that there are equivalent land uses in the Residential 2(a) zone to those in the R2 zone".

In considering the opinion provided by Adrian Galasso SC, it should be noted that nowhere in the above does it state that the "test" is to be considered to be a numerical comparison of how many land uses match, or fail to match (as the case may be) between the 2(a) Residential A zone, and a named land use zone. It is noted that this numerical- style exercise has been undertaken in a Memorandum provided from the Manager- Regional Panel Operations and Director- Assessment Systems to the Chair- Sydney West Joint Regional Planning Panel, dated 2 February 2012. Following the reasoning contained in the Adrian Galasso opinion, it is considered that this numerical style assessment is irrelevant to the test required to be undertaken.

The equivalency test and its application in this case

The test suggested by Adrian Galasso SC, is:

a) *Firstly ascertain what land uses are permitted in one of the four land use zones named in Clause 10(1)(a)–(b);*

b) *Secondly, identify the land uses that are permitted in the Residential 2(a) zone under the Bankstown LEP; ….*

These questions are dealt with in the following sections.

Equivalency of Zone R2 to the 2(a) zone

The report to the JRPP meeting of 15 December 2011 identifies that the named land use zone most applicable to the subject site under the Standard Instrument would be the zone R2- Low Density Residential.

In the R2 zone, "Boarding houses; Dwelling houses; Group homes" are identified as uses which are permissible with consent and "Home Occupations" are permitted without consent. There any many other forms of development which may be permitted by inclusion, but including those land uses for the purposes of the test identified by Adrian Galasso SC is contrary to his findings at point 26 of his advice (as referred to earlier in this report).

In the 2(a) Residential A zone, the following uses are permitted with consent:

> *Bed and breakfast establishments, car parks, centre based child care centres, community facilities, dams, dual occupancies, dwelling houses, educational establishments, family day care centres, family housing, health consulting rooms, home based child care centres, home businesses, home offices, hospitals, housing for older people or people with a disability, landfilling, marinas, places of public worship, public buildings recreation areas, rowhouses, sanctuaries, utility installations, villa homes.*

Of the 4 permitted uses within the R2 zone under the Standard Instrument, Boarding houses are identified as a prohibited land use within the 2(a) Residential A zone which applies to the site under the provisions of the Bankstown LEP 2001.

On this basis, and on the basis of comparing the land uses as a whole, it is considered that a conclusion cannot be drawn that the 2(a) Residential A zone under the Bankstown LEP 2001 is a land use zone in which equivalent land uses are permitted to those permitted in that named land use zone.

Whilst Council has suggested that the R2 zone is the most relevant zone to apply when undertaking the test required by the ARH SEPP, it is again a matter for the consent authority to determine which is the relevant zone for the comparative exercise.

If a different zone were considered more appropriate by the JRPP, the following is considered relevant:

Equivalency of zones R1, R3, and R4 to the 2(a) zone

In the R1- General Residential zone under the Standard Instrument, the following uses are permitted with consent:

> *Attached dwellings; Boarding houses; Child care centres; Community facilities; Dwelling houses; Group homes; Hostels; Multi dwelling housing; Neighbourhood shops; Places of public worship; Residential flat buildings; Respite day care centres; Semi-detached dwellings; Seniors housing; Shop top housing. Home Occupations are permitted without consent.*

In the R3- Medium Density Residential zone, the following land uses are permitted with consent:

> *Attached dwellings; Boarding houses; Child care centres; Community facilities; Group homes; Multi dwelling housing; Neighbourhood shops; Places of public worship; Respite day care centres; Seniors housing*

In the R4- High Density Residential zone, the following land uses are permitted with consent:

> *Boarding houses; Child care centres; Community facilities; Neighbourhood shops; Places of public worship; Residential flat buildings; Respite day care centres; Shop top housing*

As a comparative exercise, the following results can be found:

1. The Standard Instrument permits boarding houses within all four named land use zones. The Bankstown LEP 2001 does not permit boarding houses in the 2(a) Residential A zone.

2. The Standard Instrument permits residential flat buildings, boarding houses, respite day care centres and shop top housing, in the R1 and R4 zones. The Bankstown LEP 2001 does not permit such uses in the 2(a) Residential A zone.

3. The Standard Instrument permits hostels in the R1 zone. The Bankstown LEP 2001 does not permit hostels in the 2(a) Residential A zone.

4. The Standard Instrument permits neighbourhood shops in the R1, R3 and R4 zones. The Bankstown LEP 2001 does not permit neighbourhood shops in the Residential 2(a) zone.

5. The Bankstown LEP 2001 permits a range of uses which are not permitted in the R1, R2, R3, and R4 zones.

The results of this analysis form the basis of the final part of the equivalency test suggested in Adrian Galasso's opinion, which is dealt with in the following section.

Are the land uses permitted in the 2(a) zone equivalent to zones in the Standard Instrument

After performing the comparison above, Adrian Galasso SC suggests that the final item of the equivalency test is :

c) *Finally, form an opinion as to whether the land uses permitted in the Residential 2(a) zone are equivalent to those permitted in the identified zone.*

On the basis of the above, and having particular regard to the advice at item 22 of the opinion provided by Adrian Galasso SC (as referred to earlier in this report), it is considered that an opinion could not be formed that there are equivalent land uses permitted in the residential 2(a) zone to those in the named zones in the Standard Instrument.

COUNCIL'S PLANNING OFFICERS OPINION

The third item of the letter from the JRPP to council dated 9 March 2012 states:

3. *The Regional Panel would also be assisted by the Council planning officer's opinion on whether the equivalency test is met in this particular DA.*

The previous analysis has assessed the land uses within the 2(a) Residential A zone and those permitted in the R2 zone (most relevantly) and the other residential zones within the Standard Instrument. The test, as suggested by Adrian Galasso SC referred to in Clause 5(1) of the ARH SEPP is *"not concerned about permissibility of a particular form of development (that in the development application), but rather as to whether permitted land uses (the plural) in the two zones are equivalent or not"*.

Accordingly, the equivalency test is not considered to be a comparison of the manner in which residential flat buildings are treated in the 2(a) zone of the Bankstown Local Environmental Plan 2001 and the R2 zone of the Standard Instrument. Rather, the test is whether equivalent land uses are permitted in the two zones. Further, this test must be performed solely on the permitted land uses in the R2 zone, not the permitted uses and those which may also be added.

The test suggested in Adrian Galasso SC's opinion is considered to be the relevant test to apply when undertaking the equivalency test. Breaking that test down into its individual components, Council's Planning Officer's opinion on equivalency is as follows:

a) Firstly ascertain what land uses are permitted in one of the four land use zones named in Clause 10(1)(a)–(b);

In the R2 zone:

- *Boarding houses; Dwelling houses; Group homes are identified as uses which are permissible with consent and "Home Occupations" are permitted without consent.*

b) Secondly, identify the land uses that are permitted in the Residential 2(a) zone under the Bankstown LEP; and

In the 2(a) Residential A zone, the following uses are permitted with consent:

- *Bed and breakfast establishments, car parks, centre based child care centres, community facilities, dams, dual occupancies, dwelling houses, educational establishments, family day care centres, family housing, health consulting rooms, home based child care centres, home businesses, home offices, hospitals, housing for older people or people with a disability, landfilling, marinas, places of public worship, public buildings recreation areas, rowhouses, sanctuaries, utility installations, villa homes.*

c) Finally, form an opinion as to whether the land uses permitted in the Residential 2(a) zone are equivalent to those permitted in the identified zone.

It is considered that on analysis of the land uses permitted in the two zones listed above, it cannot be said that equivalent land uses are permitted within the Residential 2(a) zone to those permitted in the R2 zone.

The R2 zone seeks to permit a land use (boarding house) which is not permitted in the 2(a) zone. Also, the 2(a) zone permits numerous uses which are not permitted in the R2 zone, namely bed and breakfast establishments, car parks, centre based child care centres, community facilities, dams, dual occupancies, educational establishments, family day care centres, family housing, health consulting rooms, home based child care centres, home businesses, home offices, hospitals, landfilling, marinas, places of public worship, public buildings recreation areas, rowhouses, sanctuaries, utility installations, and villa homes.

Whether the land uses nominated in the 2(a) zone but not nominated in the R2 zone are low intensity style uses, or compatible/ complimentary uses is considered irrelevant to the exercise of performing the test. Rather, the equivalency test requires only a comparison of whether land uses permitted in the two zones are equivalent, without regard to objectives, intensity, or other issues.

On this analysis, and from the comparison of land used uses listed in each zone, it cannot be said that land uses permitted in the Residential 2(a) zone are equivalent to those permitted in the R2 zone.

Similar failings happen when the R1, R3, and R4 zones are compared against the 2(a) zone.

Accordingly, it is Council's Planning Officer's opinion that:

1) When the test suggested by Adrian Galasso SC is applied, it cannot be said that land uses permitted in the Residential 2(a) zone are equivalent to those permitted in the R2 zone;

2) accordingly the unamended ARH SEPP does not apply to the proposed development; and

3) The proposed development is prohibited under the provisions of the Bankstown Local Environmental Plan 2001.

RECOMMENDATION

That development application No. DA-76/2011 (JRPP ref 2011SYW027) be refused for the following reasons:

1. The *State Environmental Planning Policy (Affordable Rental Housing) 2009*, as in force when the application was made is not applicable to the proposed development. The *State Environmental Planning Policy (Affordable Rental Housing) 2009*, as amended on 20 May 2011, is not applicable to the proposed development. The proposed development is defined under the Bankstown Local Environmental Plan 2001 as a '*residential flat building*' and is prohibited in the 2(a) - Residential A zone, (Pursuant to Section 79C(1)(a)(i) *Environmental Planning and Assessment Act 1979).*

2. The proposed development is inconsistent with the objectives of the Bankstown Local Environmental Plan 2001 clause 2(a)(v) as it would not be compatible with the prevailing suburban character and amenity of the locality of the development site, (Pursuant to Section 79C(1)(a)(i) *Environmental Planning and Assessment Act 1979*).

3. The proposed development is inconsistent with the objectives of the 2(a) - Residential A zone clause 44(1) of the Bankstown Local Environmental Plan 2001 as it would not complement the single dwelling suburban character of the residential areas of Bankstown City, (Pursuant to Section 79C(1)(a)(i) *Environmental Planning and Assessment Act 1979).*

4. The application lacks adequate information as required by schedule 1 of the *Environmental Planning and Assessment Regulation 2000*, and in particular in regard to *State Environmental Planning Policy 65 - Design Quality of Residential Flat Development*, and plan details, (Pursuant to Section 79C(1)(a)(iv) Environmental Planning and Assessment Act 1979).

5. The application lacks adequate information regarding stormwater drainage including easements for drainage over down stream properties, and has not therefore established that the proposed development can be suitably drained, (Pursuant to Section 79C(1)(b) *Environmental Planning and Assessment Act 1979).*

6. The application lacks adequate information in regard to the impact of a median island required by the RTA in Boronia Road, including any requirements for amendments to the proposed development, (Pursuant to Section 79C(1)(b) Environmental Planning and Assessment Act 1979).

7. The proposed development will not provide sufficient on site visitor parking and lacks suitable loading and unloading facilities, having regard to the scale of the proposed development, its location on an arterial road, 'no stopping' restrictions required by the RTA and a bus stop along the site frontage, Pursuant to Section 79C(1)(b) *Environmental Planning and Assessment Act 1979*).

8. The bulk, scale and design of the proposed development will result in adverse amenity impacts for neighbouring residential properties, including privacy and overlooking impacts, and an inadequate living environment and amenity for future residents of the development, (Pursuant to Section 79C(1)(b) *Environmental Planning and Assessment Act 1979).*

9. For the reasons stated above the proposed development is unsuitable for the site, will be inconsistent with the objects under section 5(a) of the *Environmental Planning and Assessment Act 1979* related to encouraging development for the purposes of promoting a better environment and the promotion and co-ordination of the orderly development of land, and therefore is not in the public interest, (Pursuant to Section 79C(1)(c)&(e) *Environmental Planning and Assessment Act 1979).*