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Ms Christine Hanson
Director
Legal Services Branch
Department of Planning and Infrastructure
DX 85 SYDNEY

Dear Christine,

RE: EQUIVALENT LAND USE ZONES; STATE ENVIRONMENTAL PLANNING POLICY (AFFORDABLE RENTAL HOUSING) 2009

I refer to this matter and enclose herewith for your consideration my Memorandum of Opinion.

Yours faithfully,
ADRIAN GALASSO.

EQUIVALENT LAND USE ZONES

STATE ENVIRONMENTAL PLANNING POLICY (AFFORDABLE RENTAL HOUSING) 2009

MEMORANDUM OF OPINION

1. My instructing solicitor is the Director, Legal Services Branch, of the New South Wales Department of Planning and Infrastructure.

2. A development application for infill affordable housing on a site at Boronia Road Greenacre was lodged with the Bankstown City Council on 2 February 2011 pursuant to the provisions of *State Environmental Planning Policy (Affordable Rental Housing) 2009*, as applied at the date of lodgment of the development application. The SEPP has since been amended with savings and transitional provisions retaining the application of the Policy in force at that time. By operation of other provisions of the *Environmental Planning and Assessment Act* and another State Environmental Planning Policy, the Sydney West Region Joint Planning Panel is the consent authority for the development application.

3. The subject land is located within the Residential 2(a) Zone pursuant to the *Bankstown Local Environmental Plan 2001*. The development seeks to rely for permissibility upon the application of the SEPP.

4. The operative part of the SEPP is contained within Division 1 referable to infill affordable housing. Clause 10(1) of the SEPP deems the Division applicable:

> "...to a development site on land if the development site is within any of the following land use zones or within a land use zone that is equivalent to any of those zones, but only if development for the purposes of dwelling houses, multi-dwelling housing or residential flat buildings is permissible within the zone:

(a) Zone R1 General Residential,

(b) Zone R2 Low Density Residential,

(c) Zone R3 Medium Density Residential,

(d) Zone R4 High Density Residential."

5. The four zones identified in clause 10(1) of the SEPP are zones containing a label derived from the "standard instrument" as defined in the SEPP, and as meaning the standard instrument set out at the end of the *Standard Instrument (Local Environmental Plans) Order 2006*: see [12]-[14] below.

6. As referred above, the development site is not within any land use zone described by reference to the subparagraphs to clause 10(1). Accordingly, Division 1 of the SEPP can only apply if the two conditions precedent contained in it are satisfied. One of them is "if development for the purposes of dwelling houses, multi-dwelling housing or residential flat buildings is permissible within the zone". Those alternatives are disjunctive (as evidenced by the use of the word "or"). Dwelling houses are permissible within the Residential 2(a) Zone, and, accordingly, this second element is satisfied.

7. The current issue relates to the first condition precedent to the application of the Division which is whether, in the absence of land being zoned as described in clause 10(1)(a)-(b), the land use zone in which the development site is located "is equivalent to any of those zones", that is, is equivalent to any of the named zones in clause 10(1)(a)-(d).

8. The concept of equivalence for the purposes of clause 10(1) is specifically addressed in clause 5 of the SEPP. There are two alternatives for a conclusion of equivalence, the first of which (clause 5(1)(a)) I am instructed is not applicable.

9. Insofar as is relevant to the current question, clause 5(1) provides as follows:

> "A reference in this Policy to a land use zone that is equivalent to a named land use zone ...:
>
> ...

(b) ... is a land use zone in which (in the opinion of the relevant authority) equivalent land uses are permitted to those permitted in that named land use zone."

10. The terms of clause 5(1) require that in the assessment of equivalence the focus be upon "land uses [which] are permitted". In circumstances where, commonly, land use zones deal not only with permitted land uses but also with prohibited ones, and also commonly with objectives, 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.

11. The comparison exercise is to start, in my opinion, with the named land use zone. For the purposes of clause 10(1), there are four of them; the R1, R2, R3 and R4 zones are named in clause 10(1).

12. In a Note to clause 5 it is stated that "land use zones that are named in this Policy are those set out in the standard instrument". Notwithstanding the Note, the statement made in it does not form part of the SEPP: clause 4(3). That notwithstanding, clause 4(2) of the SEPP provides that a word or expression used in the Policy has the same meaning as it has in the standard instrument unless otherwise defined in the Policy. Clause 4(1) defines the concept of the "standard instrument" as, as referred above, the instrument set out at the end of the standard instrument Order. Accordingly, whilst the Note is not effective to reach the conclusion expressed in it, the operation of clause 4 of the SEPP leads one to the standard instrument Order.

13. This analysis is relevant to the terms of clause 10(1). The words or expressions used in clause 10(1) include those in subparagraphs (a)-(d) which are meaningless unless context for them is derived from a source. That source in the circumstances of the present case is within the standard order.

14. The standard order identifies, amongst other zones, the R1-R4 zones and lists within them certain matters, including specifically, and relevant for the purposes of the current question, what land uses are permitted. Whilst additional land uses may be added to each zone as and when a particular LEP is made in reliance upon the standard order, in my opinion, for the

purposes of the exercise prescribed in clause 5(1) of the SEPP, where the exercise involved is the ascertainment of equivalence of a land use zone, the starting point for comparison is the land uses permitted in the R1-R4 zones described in terms in the standard order.

15. There are four alternatives to the land use zones. The starting point for comparison can be, in my opinion, any of them. The proponent for the development has selected the R2 zone; however, in my opinion, it is a matter for the consent authority to determine which, if any, land use zone may be equivalent. Thus, if the consent authority forms the opinion that, for example, the R1 zone is relevant for the purposes of the comparative exercise, then it is not constrained by any notion of election that may be thought to have been made by the proponent.

16. Having identified land uses within one of the R1-R4 zones, the consent authority must then, as prescribed in clause 5(1)(b), form the opinion that in the Residential 2(a) Zone, pursuant to the Bankstown LEP, "equivalent land uses are permitted". That involves, firstly, identifying what those land uses are that are permitted in the Residential 2(a) Zone, and then forming an opinion as to equivalence.

17. No guidance is given in the SEPP as to what is meant by the concept of "equivalent" land uses. "Equivalent" is defined in the Macquarie Dictionary (3rd) as:

> "1. Equal in value, measure, force, effect, significance etc.
> 2. Corresponding in position, function etc..."

18. Perhaps relevantly, terms such as "identical", "the same', or "similar" were not selected by the draftsman of the Policy.

19. In my opinion, because of the way in which the comparative exercise is prescribed to occur in clause 5(1), the opinion that must be formed by the consent authority is that within the actual zone there are equivalent land uses permitted to the named zone. This means that, somewhat simplistically, the consent authority must form an affirmative opinion that in the actual zone, equivalent land uses are permitted to those which are permitted in the named

zone. If equivalent land uses are not so permitted, then the opinion of equivalence cannot be formed.

20. This issue was debated in a recent decision by Commissioner of the Land and Environment Court in *Chami v Bankstown City Council* [2011] NSWLEC 1311. In that case, Commissioner Tour formed the view that the Residential 2(a) Zone under the Bankstown Local Environmental Plan was an equivalent land use zone to the R2 Low Density Residential Zone in the standard instrument. In doing so, the Commissioner rejected a submission by the Council that all of the land uses in the named zone do not need to be identified as permissible in the actual zone: [35].

21. I am unable to agree with the approach to cl.5(1) undertaken by the Commissioner in *Chami*. Whilst the concept of equivalence may not be synonymous with "identical", at the very least where clause 5(1) is directed to a commonality in permitted land uses, in my opinion, at the least the exercise should be one in which a view be formed that, in the actual land use zone, equivalent land uses to those identified in the main zone are permitted.

22. 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 this respect, I do not understand the conclusion reached at [42] of any notion of "a degree of consistency or compatibility between the boarding house use and a dwelling house use" for the purposes of reaching the conclusion. As a matter of planning law, a dwelling house use is quite distinct from a boarding house use.

23. Having expressed that view, in my opinion there is permitted to be a degree of latitude in determining the question of equivalence. An example may in fact be the concept of a boarding house where, between the two instruments, although a boarding house is notionally permitted, the term is defined

differently (by reference to, for example, whether there can be private facilities within each boarding room). In that instance, although the terms (boarding house in either instrument) may not be identical, there is equivalence in terms of whether boarding houses, as a concept, are permitted.

24. In *Chami* the Commissioner also addressed the objectives of the two zones: [38]-[40]. In my opinion, because of the language of clause 5(1), such recourse is irrelevant to the task at hand.

25. For the purposes of considering the current question I have been provided with two letters of advice which have been provided to the Joint Planning Panel. The first is a letter dated 10 November 2011 from Messrs Lander & Rogers on behalf of the proponent, and the second is a letter dated 9 December 2011 by Lindsay Taylor Lawyers on behalf of the Bankstown City Council. Both of those letters address, albeit more expansively than this Memorandum, the current question.

26. 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 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.

27. Insofar as the second opinion is concerned (Lindsay Taylor Lawyers), for the reasons set out above, I concur with that part of the opinion that advises that recourse to the objectives of zones, and for that matter to circulars by the Department of Planning and Infrastructure, are irrelevant for the purposes of forming the conclusion required by clause 5(1): [20]-[22] and [48]-[49].

28. This notwithstanding, I disagree with that part of the Advice that expresses the view that for the purposes of answering the question in clause 5(1), clause 5(2) has the effect that the particular development the subject of the application should be referred to in order to determine equivalence in terms of permissibility in the two zones: [5]ff. Clause 5(1) requires, in its terms, no such assessment. If equivalence was to be determined by reference to whether the land use that is sought to be approved in the application is permitted in the actual zone and the named one, then that could easily be described in clause 5(1).

29. However clause 5(1) 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. In a sense, this is because, provided the land use zones are equivalent, and provided either of the three candidates for particular uses are permissible within the zone (as referred at the outset in this Memorandum of Opinion), the Division then operates to permit and control the nature of land uses according to its terms, irrespective of whether the development the subject of the application is treated the same way in the two zones. In a sense that enquiry is irrelevant because a threshold enquiry regarding permissible land uses between the two zones should always derive the same result *apropos* the development in the particular development application.

30. This error in approach was also undertaken by Commissioner Tour in *Chami*: [41]-[42]. Such an interpretation has the effect of significantly altering the express words of clause 5(1) to the point where those express words are essentially struck through. That is because, upon this approach, it is arguably irrelevant whether there are equivalent land uses in the two zones; instead, driven by this interpretation of clause 5(2), the only real enquiry would be whether the land use for which consent is sought in the development application is permissible in the actual zone and is permissible in one of the named land uses (or prohibited in both). That approach is nowhere to be fund in the words of clause 5(1) and has the potential to yield a materially different result because the test would be a single land use motivated enquiry (the land use in the development application) rather than a multiple land use motivated enquiry (the land uses referred to in cl.5(1)(b)).

31. Instead, in my opinion, what clause 5(2) is concerned with is a requirement that a view of equivalence be formed for each development application which relies upon Division 1 of the SEPP. It may be that for different development sites there is a different "consent authority".

32. The present case is one in point. Ordinarily the consent authority would be the Bankstown City Council; however, as I understand it, because of the size of the project, the consent authority for the purposes of determining the development application is the Joint Regional Planning Panel. In this respect provided the proper question is asked, it might be that reasonable minds differ as to equivalence; but what clause 5(2) is saying is that an opinion formed by a consent authority with respect to a development application cannot be regarded as an effective prohibition against reconsidering the same question later, in respect of a different development site. Within the realm, for example, of judicial review, it may well be that different persons, and sometimes the same person, arrives at a different conclusion; but that does not mean that one is right and one is wrong. This of course does not apply to the circumstance of the declared equivalence in cl.5(1)(a).

33. It is difficult, having regard to the matters set out above, and in particular the fact that clause 5(1) requires the forming of an "opinion", to express a meaningful view as to whether it is open to the consent authority to determine the matter one way or the other. This notwithstanding, for the reasons set out above, it is my opinion that the proper test for the purposes of clause 5(1) is to:

(i) firstly ascertain what land uses are permitted in one of the four land use zones named in clause 10(1)(a)-(b);

(ii) secondly, identify the land uses that are permitted in the Residential 2(a) Zone under the Bankstown LEP; and

(iii) 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.

34. With that test followed, the requisite opinion as to equivalence is to be formed. Leaving aside any view regarding the correctness of approach by the Commissioner in *Chami*, clause 5(2) would necessarily provide that the present consent authority is not bound by that decision, even if it was of precedential effect, and it must form the opinion for itself.

18 January 2012

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