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9 January 2014

Damian Jaeger
Senior Development Officer
Newcastle City Council
Transmission by email: djaeger@ncc.nsw.gov.au

Dear Damian,

'SHORTLAND WATERS DA' 2012/419
CONCEPT OF SENIORS HOUSING DEVELOPMENT, GOLF COURSE & ASSOCIATED WORKS
Response No. 1- Requirement for Additional Contamination/ Remediation Information

This submission has been prepared in response to the Panel's request for additional information on the above-mentioned DA. Within the Panel's Meeting Minutes (4th December 2013), additional information was requested with regard to 3 issues. This submission responds to the first issue, outlined below. It is understood that this advice is to be reviewed by Council's legal representative. We would be pleased to meet with Council and/or its representatives at the earliest opportunity if desired, in order to respond to any queries that arise and in order to gain Council's support for the outlined approach.

Additional submissions addressing the remaining issues are being finalised and will be forwarded to Council at the earliest opportunity.

1. ***The Panel is generally supportive of the proposed use of the site as a seniors housing development and golf course but will require compelling legal advice supported by Council to the effect that the additional information sought in respect of the contamination and remediation issues is not required for the purpose of this stage of the approval…***

In the *Assessment Report & Recommendation* (the 'Assessment Report') prepared on behalf of Council, it was recommended that the Concept DA be refused on the basis of a purported lack of information with regard to specific site contamination matters relating to both the Vale Street site (golf course lot) and the Lorna Street site (Council's former landfill). An aerial image of these sites is provided at **Figure 1** for your reference.

The Report generally acknowledged that there are no other matters which would prevent the granting of consent to the Concept DA.

For background purposes, a summary of the sites' known contamination status and related consultation with Council undertaken to date is provided at **Attachment 1**.

Figure 1: Aerial image of site

SEPP 55 & CONCEPT PLANS

As previously presented to Council and the Panel, a key aspect of the proposal is that it is a Concept proposal only, forming part of a staged DA under section 83B of the *Environmental Planning & Assessment Act 1979* (EP&A Act). No stage 1 works are currently proposed.

The recommendation for refusal in the Assessment Report relies heavily on subclause 7(1)(b) of *State Environmental Planning Policy No. 55- Remediation of Land* (SEPP 55) i.e.:

> *…this brings us back to Clause 7 of SEPP 55 which requires that the land is suitable in its contaminated state (or will be made suitable, after remediation) for the purposes of the proposed*

> *development. My concern relates to the potential for on-going groundwater contamination and impacts on the receiving environment. In essence if the RAP requires amendment, potentially a large amendment based on the results of the sampling, has Council adequately assessed the suitability of the site (in regards to protection of the environment). ..*(p21)

Assessment of the proposal against clause 7(1)(b) in Table 4 of the Report concluded that:

> *The information submitted for the contaminated Lorna Street site indicates that the proposed golf course use will be suitable after proposed remediation strategy and recommended detailed investigations for future DAs. However there is potential for groundwater contaminants to impact on receiving waters (including the SEPP 14 wetland) and the information submitted has not adequately addressed this clause...*(p22)

No mention was made of the Vale Street site in relation to this subclause in Table 4, although the Report makes reference to the site's non-compliance with the provision in later sections.

As outlined in previous submissions to Council (and in the following sections of this submission), the existing contamination information is considered to be sufficient to allow for the determination of the Concept proposal DA in relation to subclause 7(1)(b). It is submitted that the information contained within the various contamination assessments previously submitted, the Remedial Action Plan (RAP) and the Site Auditor's advice clearly indicates that the site can be made suitable for the proposed development after remediation. Additional requested information is required only to inform the detailed design of remediation control measures (see **Attachment 1** for further discussion).

Irrespective of the above, it is submitted that the Assessment Report's reliance on subclause 7(1)(b) of SEPP 55 for its refusal is incorrect as this clause has not been 'triggered' by the current Concept DA and therefore strict compliance is not required.

Two pieces of legal advice obtained by the applicant are provided at **Attachment 2** (one of which was previously submitted to Council and the Panel), which explore this issue in detail. In summary, having regard to the language used in SEPP 55, the proper construction of clause 7(1)(b) is that:

> *…the relevant application before the consent authority must propose the carrying out of development. On our review of the DA, no development is proposed to be carried out without obtaining development consent* (p4, advice dated 7/1/14). Therefore *SEPP 55 provides no legal threshold or bar to the grant of consent to the DA. The SEPP 55 considerations will become*

relevant and applicable to development applications for the future stages of the proposal when the carrying out of development is actually proposed (p5).

It is noted that the Assessment Report also relied heavily on legal advice commissioned by Council which indicated that *if a condition is so uncertain as to leave open the possibility that compliance with it may alter the nature of the development for which the application was made, the application is invalid* (p21). It is clarified that the applicant is not seeking the imposition of a condition of consent to delay the appropriate consideration of SEPP 55 until later DAs. Rather, the applicant seeks to correctly consider subclause 7(1)(b) at the detailed DA stage, when consent for the *carrying out of works* is sought.

Regardless, both the applicant and the NSW Accredited Site Auditor (engaged in relation to the proposal) submit that the additional information requested by Council is unlikely to change the fundamental nature of the concept proposal, or affect the suitability of the site for the proposed uses.

SECTION 79C OF THE EP&A ACT

Section 79C(1) of the EP&A Act lists a range of matters *of relevance to the development the subject of the DA*, which must be taken into consideration by the consent authority before determining a DA. Relevant to the refusal recommendation in the Assessment Report (p41), it requires the consideration of contamination matters in relation to the *provisions of any environmental planning instrument* (subclause [a][i]); the *likely impacts of that development* (subclause [b]); the *suitability of the site for the development* (subclause [c]); and the *public interest* (subclause [e]).

Of key importance to section 79C(1)(a)(i), the application of SEPP 55 is addressed above in this submission. In summary, we submit that the Concept proposal satisfies all relevant provisions of this SEPP (noting that provisions of subclause 7[1][b] will not be triggered until a subsequent detailed DA for the *carrying out* of works is lodged). Accordingly, the proposal complies with section 79C(1)(a)(i) of the Act.

Of relevance to the remaining provisions, we submit that the purported lack of requested contamination information does not prevent the granting of consent to the Concept DA under section 79C(1) for the following reasons:

- **S79C(1)(b)- Likely Impacts:**

This provision requires that the likely impacts of the development must be considered, including *environmental impacts on both the natural and built environments, and social and economic impacts in the locality*. The potential social or economic impacts of the proposal are not in question. The refusal recommendation appears to suggest that the lack of additional contamination information does not allow proper consideration as to whether the proposal (the golf course or seniors housing) will have a detrimental impact on the environment.

The Site Auditor's advice (previously submitted) clearly indicates that the proposed remediation works for the Lorna Street site will improve the current environmental condition of the site. The Assessment Report agrees that *the cap and contain strategy is the suitable remediation strategy for the users of the site…the physical cap will provide suitable protection to users on-site* (p21). There is no suggestion that the proposed development (i.e. the golf course use) will create new contamination impacts that will affect the determination of the DA. Accordingly, we submit that section 79C(1)(b) of the Act has been satisfied as the *likely impacts of the development* have been appropriately considered.

Whilst Council has suggested that *the issue of off-site impacts remain* (p21), this is not a relevant consideration in this instance. The development is not expected to create any off-site impacts. The off-site impacts in question (i.e. groundwater contamination) are in fact an existing/ ongoing attribute of the site which will unquestionably be improved by the development.

Similarly, there is no suggestion that the proposed development of seniors housing on the Vale Street site will result in new contamination impacts on the environment. The results of the Phase 1 contamination assessment and advice from the Site Auditor indicate that any existing or potential contamination of the site can be readily dealt with as part of future detailed DAs for the carrying out of works.

- **S79C(1)(c)- Suitability of the Site:**

This provision requires that the suitability of the site for the development be considered.

Again, the Assessment Report acknowledges that (with the exception of the off-site groundwater issue) use of the Lorna Street site for a golf course *is considered to be a highly suitable outcome* (p39). The Panel has also provided general support for the

proposed use of the site as a golf course. It is submitted that the existing off-site groundwater contamination issue is not relevant in this instance, as it has no bearing on the suitability of the site for the proposed golf course use.

Further, the DEC guidelines (*Guidelines for the NSW Site Auditor Scheme,* 2006) clarify that simply the presence of groundwater contamination does not mean that the site is unsuitable for surface activities i.e.:

> *Where groundwater contamination is present under a site but does not or is unlikely to make the site unsuitable for use because it does not pose an unacceptable risk to users of the site, an auditor may issue a site audit statement certifying that the land is suitable for a specific use despite the contamination* (Section 4.4.2).

There is no dispute between the parties that there will be any contact between the users of the site and the groundwater, as outlined within the RAP.

With regard to Vale Street, (with the exception of contamination matters), the Assessment Report agrees that *the proposal is considered to be suitable for the locality* (p40). Again, the results of the Phase 1 contamination assessment and advice from the Site Auditor indicate that any existing or potential contamination of the site can be readily dealt with as part of future detailed DAs for the carrying out of works. As outlined in the Phase 1 assessment (and illustrated in **Figure 2** below), the existing contamination in the southern portion of the site (elevated Total Recoverable Hydrocarbons associated with a petrol tank) can be readily remediated. This contamination was identified from a single soil sample and was found to affect only shallow soils (less than 0.5m depth). 'Localised' remediation in the immediate vicinity of the fuel tank is required to fully eliminate the hazard, including the removal of the tanks and associated pipework. It is noted that no residential development is proposed in this area, only the establishment of a domestic bin storage facility.

The only remaining area of potential for contamination is limited to the northern site boundary where uncontrolled fill could *possibly* be present (indicated only because of the previous ownership of the site by BHP). There is no indication that any potential contamination of the site could result in exceptional or unexpected hazards which cannot be remediated through routine means. In fact, previous investigations of the bulk of the development footprint (sampling locations indicated by yellow squares in **Figure 2**) have confirmed the absence of contamination in these areas (including uncontrolled fill).

Accordingly, it is submitted that the subject site can unquestionably be made suitable for the proposed development of a golf course and seniors housing, after remediation. The details of any additional investigation and remediation measures can be appropriately determined at the detailed DA stage.

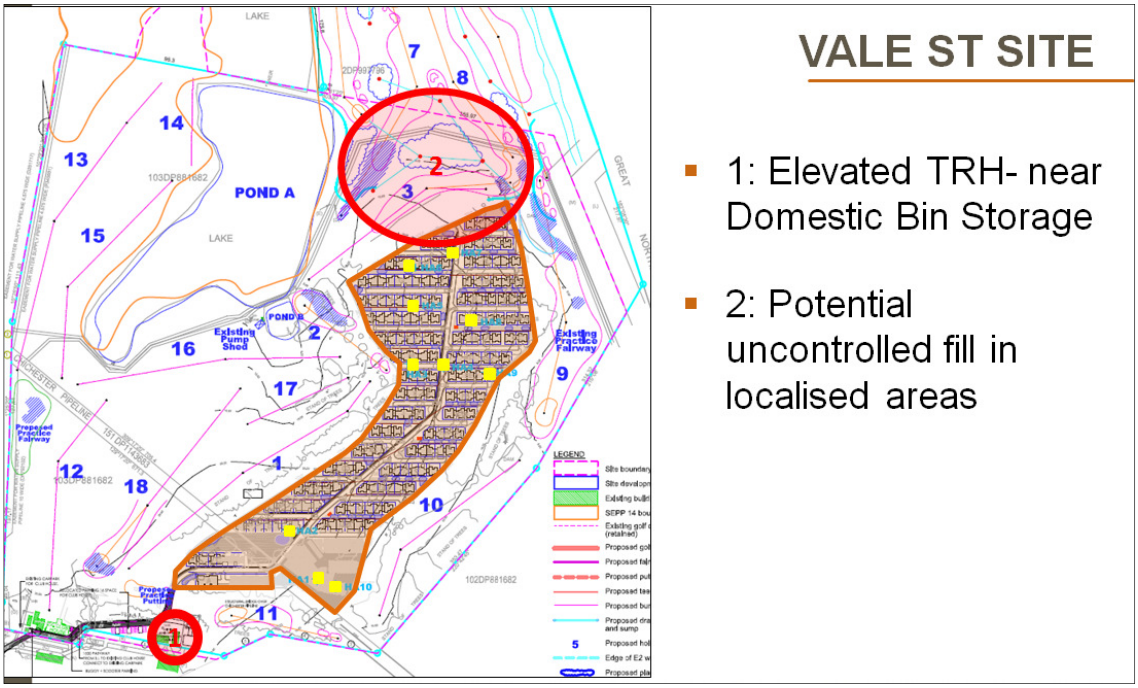

Figure 2: Approximate location of areas of known & potential contamination- Vale Street site

- **S79C(1)(c)- the Public Interest:**

The Assessment Report acknowledges that, in all respects with the exception of contamination matters, the *development is considered to be in the public interest* (p40). The public interest advantages of the proposal are significant, and include:

- Assistance in meeting the ever-increasing need for seniors housing in well-serviced locations;
- Support for the viability of a local sporting club with a history of over 70 years;
- The adaptive re-use of a highly degraded and vacant parcel of public land, and its sale by Council and subsequent relief from any ongoing management burden to ratepayers; and
- The remediation of a historically contaminated site.

The key reason presented in the Assessment Report for the recommended refusal of the DA is that there are potential risks of groundwater contamination to the SEPP 14 wetlands. The refusal of the DA for this reason is counter-intuitive, as the proposal will unquestionably improve the existing groundwater contamination migration into the wetlands. The 'do-nothing' approach, where the DA is refused and this proposal does not proceed, would result in a far greater contamination hazard.

Similarly, the proposed remediation of the Vale Street site (with details to be provided with a subsequent DA) will also result in positive environmental outcomes, in addition to the other public interest benefits outlined above.

CONCLUDING COMMENTS

In summary, as outlined in the preceding sections, the additional information requested by Council is not required to permit the granting of consent by the Panel to the Concept DA. The application of s79C(1) of the EP&A Act, including the provisions of SEPP 55, do not provide any legal obstacles to the positive determination of the proposal.

It is emphasised that the intent of Concept proposals under s83B of the Act is to give a level of certainty to developers/ investors by supporting the general idea of development, with detailed matters to be *the subject of subsequent development applications*. It is submitted that the appropriateness of the conceptual use of the site for seniors housing and a golf course is undisputed, and has been supported by the Panel. The details of required remediation works is a matter which can and should be dealt with at the detailed DA stage.

We look forward to your urgent response to the above matters. Please don't hesitate to contact me if you would like to discuss any aspect of the above or require any additional information.

Yours Sincerely,

JILLIAN KUCZERA
SENIOR PROJECT PLANNER
CITY PLAN STRATEGY AND DEVELOPMENT PTY LIMITED

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ATTACHMENTS:

1. Summary of Contamination Status & Council Consultation
2. Legal advice from HWL Ebsworth Lawyers, dated 4 December 2013 and 7 January 2014

CC:

Wesley Wilson (NCC Team Coordinator Development Assessment)
wwilson@ncc.nsw.gov.au

Suzie Jattan (JRPP Secretariat) Suzie.Jattan@planning.nsw.gov.au

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ATTCHMENT 1

SUMMARY OF CONTAMINATION STATUS OF SITES & COUNCIL CONSULTATION

Lorna Street site

1. Council operated a putrescible landfill on the site for several decades and did not complete any comprehensive remediation of the land, nor are there any known plans by Council to undertake such remediation. The site is currently in very poor condition and contaminated groundwater has been leaching unchecked into the adjacent SEPP 14 wetlands for many years, although (limited) existing data indicates contamination concentrations within groundwater are decreasing naturally over time.

2. A Remedial Action Plan[1] (RAP) was prepared for the site by the applicant, which proposes to remediate the land by 'capping and containing' the soil. This would allow for the development of replacement golf course works on the land.

3. Council required[2] the applicant to engage a NSW Accredited Site Auditor to confirm if the remediation strategy in the RAP was appropriate for the proposed landuse (a golf course). The Site Auditor confirmed[3] that the strategy was appropriate, and can be expected to improve the current environmental condition of the land, including minimising ongoing impacts of groundwater migration off-site (p6). The Assessment Report prepared on behalf of Council subsequently concurred that the remediation strategy is suitable for the users of the site (p20).

4. All requested information with regard to contamination was provided to Council by the 30th April 2013, including the Site Auditor's advice. No additional information was requested by Council between April and September 2013.

5. On the 19th September 2013, Council raised the concern[4] that there was the potential for contaminated groundwater from the site to impact on the SEPP 14 wetlands (irrespective of the fact this had already been occurring for several decades). Council requested that additional groundwater sampling and assessment be undertaken to determine if the RAP should be revised to more fully address groundwater contamination.

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1 *Remedial Action Plan- Former Lorna Street Landfill*, RCA, January 2013
2 *Request for Additional Information*, M. Thomas (NCC), 16 July 2012
3 *Site Audit of Former Lorna Street Landfill Site- Interim Advice #1,* Ian Gregson (GHD), 10 April 2013
4 Email from D. Jaeger (NCC), 19 September 2013

6. The Auditor confirmed[5],[6] that additional assessment is needed, including with regard to groundwater issues, however clarified that this additional assessment was needed primarily to confirm the details of required control measures (e.g. thickness of capping), not to determine if the remediation strategy was appropriate for the site or if the site was suitable for the proposed use. The Auditor indicated that the undertaking of the additional assessment is not likely to change the general remediation strategy and could reasonably be carried out as part of final design/ future DAs.

7. A submission[7] was provided to Council on the 25th September 2013 outlining the reasons why it was considered that existing information was sufficient to allow determination of the Concept DA, and requested that the additional assessment be undertaken to support future detailed DAs (as it involved detailed matters such as the specification of control measures). It was noted that, if Council did require the works to be undertaken immediately, a timeframe of up to 4 months was estimated.

8. Council did not respond to the submission. The Assessment Report (issued in October 2013) subsequently recommended refusal of the DA based on the non-provision of the additional groundwater assessment data.

Vale Street site

1. The site has been in continuous use as a golf course since around 1935.

2. A Phase 1 Contamination Assessment was prepared for the site[8]. Most relevantly, it indicated that known contamination was limited to elevated levels of Total Recoverable Hydrocarbons associated with a petrol tank in the southern portion of the site. A domestic bin storage facility is proposed in this area- no residential development is proposed in the vicinity.

3. The Assessment also indicated that there could be potential for uncontrolled filling in some areas, particularly in the northern portion of the site near the Lorna Street site (including some small areas of proposed residential development).

4. All requested information with regard to contamination was provided to Council by the 30th April 2013. No additional information was requested by Council between April and September 2013.

[5] Ian Gregson (GHD), pers. comm., late 2013
[6] *Site Audit of Former Lorna Street Landfill Site- Interim Advice #1,* Ian Gregson (GHD), 10 April 2013
[7] *Shortland Waters- Additional Request for Information- Contamination Issues*, J. Kuczera (City Plan), 25 September 2013
[8] *Phase 1 Environmental Site Assessment- Shortland Waters Golf Course, 90 Vale St Birmingham Gardens*, RCA, January 2013

5. On the 19th September 2013, Council requested[9] that a detailed site investigation be undertaken, including the preparation of a RAP. In the applicant's submission to Council of the 25th September[10], the applicant agreed to undertake the assessment and a timeframe of up to 5 weeks was estimated.
6. Council did not respond to the submission, and the Assessment Report recommended refusal of the DA.
7. The Auditor presented to Council and the Panel (4th December 2013) that, regardless of the need for further investigation:
8. Based on the findings of the Phase 1 Assessment, the potential for widespread or significant contamination of the site is unlikely;
9. Remediation of any contamination encountered is likely to be limited to the excavation / removal of contaminated soil, or isolation and management beneath a clean capping layer. These situations are unlikely to require fundamental changes to the nature of the proposed development; and
10. It would be reasonable to carry out the additional investigation as part of final design/ future DAs.

[9] Email from D. Jaeger (NCC), 19 September 2013
[10] *Shortland Waters- Additional Request for Information- Contamination Issues*, J. Kuczera (City Plan), 25 September 2013

HWL EBSWORTH
LAWYERS

Our Ref: KMG:JPM:297689

4 December 2013

Mr Brian Brown
Chamber Developments Pty Limited
Level 1, The Promenade
4-6 The Kingsway
CRONULLA NSW 2230

Email: **brian@chamberdevelopments.com.au**

Dear Sir

Development Application DA-2012/419 for Concept of Seniors Housing Development, Golf Course and Associated Works (Staged Development)
Property: 2/90 Vale Street Birmingham Gardens, 4/50A Queen Street Waratah West & 8/475 Sandgate Road Shortland

We refer to your request for advice in relation to staged development application DA-2012/419 which is to be determined by the Hunter & Central Coast Joint Regional Planning Panel (**JRPP**).

Development Application

You have made a development application DA 2012/419 to Newcastle City Council for staged concept proposal for a seniors living development (including 189 villas, 56 apartments and a 127 bed residential care facility), golf course works (including remediation and redesign), additional works, and subdivision (DA) at a site comprising Lots 103 DP 881682: 2/90 Vale Street, Birmingham Gardens Part Lot 10 DP1149782, 8/475 Sandgate Road, Shortland Lot 151 DP 1143683, 4/50A Queen Street, Waratah Part Lot101 DP 881682 (University Land) - now Part Lot 1 DP1188100 (Site).

The DA is a 'staged development application' pursuant to s 83B of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**) for a concept approval where no 'works' are proposed as part of the DA. Subsequent development applications will be required for the approval of carrying out of the development proposed. The capital investment value of the project has been identified by the JRPP as $66,536,395.

The DA is for Integrated Development pursuant to Section 91 of the EPA Act 1979 as it requires approvals and or concurrence from other external authorities.

Assessment Report and Recommendation

In accordance with the provisions of the EPA Act, the Council has prepared an Assessment Report and Recommendation in respect of the DA (**Assessment Report**). The Assessment Report recommends refusal on the following basis:

> *That Integrated Development Application DA-2012/419 be refused on the grounds of unsatisfactory information with respect to land contamination and non-compliance*

with the provisions of State Environmental Planning Policy 55 (Remediation of Land).

Based upon the Assessment Report all other merits of the DA a considered to be acceptable, subject to appropriate conditions with the Assessment Report noting:

> *Overall, subject to the Golf Court land (Lot 103) and Lorna Street Site (Part Lot 10) being deemed suitable for the proposed land use having regard to land contamination and remediation (currently unsatisfactory), the proposal is considered to be suitable for the locality.*

SEPP 55 and the Carrying Out of Development

The sole reason for recommending refusal is based upon the insufficient information for the consent authority to determine whether the land is contaminated and having regard to its contamination whether the site is suitable or can be made suitable. The relevant clause in SEPP 55 is clause 7 which provides and follows:

> *(1) A consent authority must not consent to* ***the carrying out of any development*** *on land unless:*
>
> *(a) it has considered whether the land is contaminated, and*
>
> *(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and*
>
> *(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.*
>
> *(2) Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subclause (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.*
>
> *(3) The applicant for development consent must carry out the investigation required by subclause (2) and must provide a report on it to the consent authority. The consent authority may require the applicant to carry out, and provide a report on, a detailed investigation (as referred to in the contaminated land planning guidelines) if it considers that the findings of the preliminary investigation warrant such an investigation.*
>
> *(4) The land concerned is:*
>
> *(a) land that is within an investigation area,*
>
> *(b) land on which development for a purpose referred to in Table 1 to the contaminated land planning guidelines is being, or is known to have been, carried out,*
>
> *(c) to the extent to which it is proposed to carry out development on it for residential, educational, recreational or child care purposes, or for the purposes of a hospital—land:*
>
> *(i) in relation to which there is no knowledge (or incomplete knowledge) as to whether development for a purpose referred to in Table 1 to the contaminated land planning guidelines has been carried out, and*
>
> *(ii) on which it would have been lawful to carry out such development during any period in respect of which there is no knowledge (or incomplete knowledge).* ***[our emphasis]***

In undertaking its assessment the Council obtained legal advice regarding the requirements of SEPP 55. The conclusions of that legal advice are set out at page 21 of the Assessment Report. In our view the legal advice and the Assessment Report somewhat misconceives the application of clause 7 of SEPP 55 in the circumstances of the DA.

The operation of clause 7 of SEPP 55 imposes an obligation on Council to consider contamination issues for land when considering whether or not to consent to the *carrying out of development.*

Although the DA proposes development it only proposes a concept plan, it does not propose the *carrying out of any* development.

This is consistent with the language and provisions of s 83B of the EPA Act which provides:

> *(1) For the purposes of this Act, a staged development application is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for separate parts of the site are to be the subject of subsequent development applications. The application may set out detailed proposals for the first stage of development.*
>
> *(2) A development application is not to be treated as a staged development application unless the applicant requests it to be treated as a staged development application.*
>
> ***(3) If consent is granted on the determination of a staged development application, the consent does not authorise the carrying out of development on any part of the site concerned unless:***
>
> ***(a) consent is subsequently granted to carry out development on that part of the site following a further development application in respect of that part of the site, or***
>
> ***(b) the staged development application also provided the requisite details of the development on that part of the site and consent is granted for that first stage of development without the need for further consent.*** *[our emphasis]*
>
> *(4) The terms of a consent granted on the determination of a staged development application are to reflect the operation of subsection (3).*

The language used is to be contrasted with, for example the language used in clause 4.6 the *Standard Instrument Principal Local Environmental Plan* which provides:

> *(1) The objectives of this clause are as follows:*
>
> *(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
>
> *(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
>
> *(2)* ***Development consent may, subject to this clause, be granted for development*** *even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
>
> *(3)* ***Development consent must not be granted for development*** *that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

*(4) **Development consent must not be granted for development** that contravenes a development standard unless:*

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

*(6) **Development consent must not be granted under this clause** for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 *applies or for the land on which such a building is situated,*

(c) clause 5.4.

[our emphasis]

On review of the provisions of clause 7 of SEPP 55 and s83B of the EPA Act and the language used, we consider that the trigger in Clause 7 does not arise until and unless a development application proposes the *carrying out of development* on the site. In the circumstances of the DA, this obligation simply does not arise because the DA does not propose the carrying out of any development. Further, the carrying out of development is expressly not authorised by the operation of s83B(3).

The DA simply sets out the parameters in concept form for the future undertaking of development, subject to future development applications which must be consistent with the approved concept.

Therefore SEPP 55 provides no legal threshold or bar to the grant of consent to the DA. The SEPP 55 considerations will become relevant and applicable to development applications for the future Stages of the proposal when the carrying out of development is actually proposed.

We trust the above assists.

Should you have any queries in relation to the above please do not hesitate to contact Kirston Gerathy or John Paul Merlino of our office.

Yours faithfully
HWL Ebsworth

Kirston Gerathy
Partner

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Our Ref: KMG:JPM:297689

7 January 2014

Mr Brian Brown
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Email: **brian@chamberdevelopments.com.au**

Dear Sir

Development Application DA-2012/419 for Concept of Seniors Housing Development, Golf Course and Associated Works (Staged Development)
Property: 2/90 Vale Street Birmingham Gardens, 4/50A Queen Street Waratah West & 8/475 Sandgate Road Shortland

We refer to our letter dated 4 December 2013 (**Our Previous Advice**).

By letter dated 16 December 2013 from City Plan Services you have conveyed the JRPP's request for a *compelling legal advice supported by Council to the effect that the additional information sought in respect of the contamination and remediation issues is not required for the purpose of this stage of the approval.*

It should be noted at this stage that the requirement for this further advice to be supported by Council is not something that we can require. Council must act in accordance with its own charter in order to take its own position on this issue.

This further advice should be read in conjunction with Our Previous Advice.

Background

In Our Previous Advice we set out the relevant background facts which, for ease of reference we repeat below.

Development Application

You have made a development application DA 2012/419 to Newcastle City Council for staged concept proposal for a seniors living development (including 189 villas, 56 apartments and a 127 bed residential care facility), golf course works (including remediation and redesign), additional works, and subdivision (**DA**) at a site comprising Lots 103 DP 881682: 2/90 Vale Street, Birmingham Gardens Part Lot 10 DP1149782, 8/475 Sandgate Road, Shortland Lot 151 DP 1143683, 4/50A Queen Street, Waratah Part Lot101 DP 881682 (University Land) - now Part Lot 1 DP1188100 (Site).

The DA is a 'staged development application' pursuant to s 83B of the *Environmental Planning and Assessment Act* 1979 (**EPA Act**) for a concept approval where no 'works' are proposed as part of the DA. Subsequent development applications will be required for the

approval of carrying out of the development proposed. The capital investment value of the project has been identified by the JRPP as $66,536,395.

The DA is for Integrated Development pursuant to Section 91 of the EPA Act 1979 as it requires approvals and or concurrence from other external authorities.

Assessment Report and Recommendation

In accordance with the provisions of the EPA Act, the Council has prepared an Assessment Report and Recommendation in respect of the DA (**Assessment Report**). The Assessment Report recommends refusal on the following basis:

> *That Integrated Development Application DA-2012/419 be refused on the grounds of unsatisfactory information with respect to land contamination and non-compliance with the provisions of State Environmental Planning Policy 55 (Remediation of Land).*

Based upon the Assessment Report all other merits of the DA a considered to be acceptable, subject to appropriate conditions with the Assessment Report noting:

> *Overall, subject to the Golf Court land (Lot 103) and Lorna Street Site (Part Lot 10) being deemed suitable for the proposed land use having regard to land contamination and remediation (currently unsatisfactory), the proposal is considered to be suitable for the locality.*

SEPP 55 and the Carrying Out of Development

The recommendation for refusal is based upon Council's consideration of the that the information provided with the DA is insufficient for the consent authority to determine whether the land is contaminated and having regard to its contamination whether the site is suitable or can be made suitable. We understand that Council considers that clause 7 of SEPP 55 has triggered this requirement. However in our view clause 7 has not been engaged by the DA and so it does not apply.

Clause 7 provides in its entirety:

> *(1) A consent authority must not consent to **the carrying out of any development** on land unless:*
>
> *(a) it has considered whether the land is contaminated, and*
>
> *(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and*
>
> *(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.*
>
> *(2) Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subclause (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.*
>
> *(3) The applicant for development consent must carry out the investigation required by subclause (2) and must provide a report on it to the consent authority. The consent authority may require the applicant to carry out, and provide a report on, a detailed investigation (as referred to in the contaminated land planning guidelines) if it considers that the findings of the preliminary investigation warrant such an investigation.*
>
> *(4) The land concerned is:*

> *(a) land that is within an investigation area,*
>
> *(b) land on which development for a purpose referred to in Table 1 to the contaminated land planning guidelines is being, or is known to have been, carried out,*
>
> *(c) to the extent to which it is proposed to carry out development on it for residential, educational, recreational or child care purposes, or for the purposes of a hospital—land:*
>
> *(i) in relation to which there is no knowledge (or incomplete knowledge) as to whether development for a purpose referred to in Table 1 to the contaminated land planning guidelines has been carried out, and*
>
> *(ii) on which it would have been lawful to carry out such development during any period in respect of which there is no knowledge (or incomplete knowledge).**[our emphasis]***

The operation of clause 7 of SEPP 55 imposes an obligation on Council to consider contamination issues for land when considering whether or not to consent to the *carrying out of development.*

As we understand that the DA, it does not propose the carrying out of any development. Rather it proposes an overview of the proposal across the whole site.

This is consistent with the language and provisions of s 83B of the EPA Act which provides:

> *(1) For the purposes of this Act, a staged development application is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for separate parts of the site are to be the subject of subsequent development applications. The application may set out detailed proposals for the first stage of development.*
>
> *(2) A development application is not to be treated as a staged development application unless the applicant requests it to be treated as a staged development application.*
>
> ***(3) If consent is granted on the determination of a staged development application, the consent does not authorise the carrying out of development on any part of the site concerned unless:***
>
> ***(a) consent is subsequently granted to carry out development on that part of the site following a further development application in respect of that part of the site, or***
>
> ***(b) the staged development application also provided the requisite details of the development on that part of the site and consent is granted for that first stage of development without the need for further consent.** [our emphasis]*
>
> *(4) The terms of a consent granted on the determination of a staged development application are to reflect the operation of subsection (3).*

Our Previous Advice contrasted the language use in s83B and cl7 with the language used in clause 4.6 of the *Standard Instrument Principal Local Environmental Plan.* However to further demonstrate the difference in the language used within SEPP 55 itself we refer to clause 12 which provides:

> *(1) The consent authority **must not refuse development consent for a category 1 remediation work** unless the authority is satisfied that there would be a more significant risk of harm to human health or some other aspect of the environment from the carrying out of the work than there would be from the use of the land concerned (in the absence of the work) for any purpose for which it may lawfully be used.*

> *(2) Nothing in this clause prevents the consent authority from* ***refusing consent to a development application*** *if:*
>
> *(a) by operation of an environmental planning instrument or section 79B (3) of the Act, the development application may not be determined by the granting of consent without the concurrence of a specified person, and*
>
> *(b) that concurrence is not given.*

Having regard to the language used in SEPP 55 the proper construction of clause 7 is that the relevant application before the consent authority must propose the *carrying out of development.* On our review of the DA, no development is proposed to be carried out without obtaining development consent.

As a matter of proper statutory construction the words *must not consent to the carrying out of any development on land* must be given some work to do, particularly where the words used elsewhere within the same instrument are different.[1]

In *Barana Properties (No.1) Pty Limited v Sydney City Council & Anor* [2007] NSWLEC 812 Jagot J considered whether a certain provision of and environmental planning instrument applied to a staged development application. Her Honour stated:

> *With respect to the question whether cl 28B applied to the proposed development the answer is it did not apply because the criterion of reference is the 'proposed development' (that is, the development proposed in the development application lodged on 18 July 2005). The definition of 'development' in s4 of the EPA Act contemplates separate classes of activities including the use of land and the erection of buildings. The development application lodged on 18 July 2005 did not propose development comprising the erection of any building. Hence cl 28B(1) ...did not apply to the development application.*

In *Barana* the development application proposed a building envelope not the erection of a building. Using the same analysis by analogy, the DA does not propose the carrying out of development, rather a concept plan.

This is entirely consistent with the express provision of s83B(3) of the EPA Act.

A concept plan is just that – it does not authorise the undertaking of any development. The statutory scheme is expressly set up to provide a regime for general conceptual approval with detailed analysis to be undertaken at the separate required development application stage.

In this context the staged development provisions in section 83B replaced the prior master planning provisions contained in the Act prior to 2005 amendments. The scheme contemplates and expressly provides for approvals of projects at a level of generality in concept only, with the safeguard of detailed requirements and environmental assessment necessarily undertaken through the individual subsequent development application/s.

The legislature made this plain in the second reading speech by the then Minister Knowles on 27 May 2005. He said:

> *Section 83B provides that a stage development application may set out an overview of the proposal across the whole site with details of each separate component of the development to be subjected to subsequent development applications. ... A stage development application is subject to the provisions of integrated approvals and designated development, and requirements prescribed by the regulations while any consent on the stage development*

[1] A court construing a statutory provision must strive to give meaning to every word of the provision[52]. In *The Commonwealth v Baume*[53] Griffith CJ cited *R v Berchet*[54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent": *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 124 CLR 355

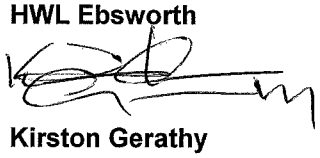
remains in force, a determination on any further development applications for that site cannot be inconsistent with a staged approval".

The DA simply sets out the parameters in concept form for the future undertaking of development, subject to future development applications which must be consistent with the approved concept.

Therefore SEPP 55 provides no legal threshold or bar to the grant of consent to the DA. The SEPP 55 considerations will become relevant and applicable to development applications for the future Stages of the proposal when the carrying out of development is actually proposed.

Should you have any queries in relation to the above please do not hesitate to contact Kirston Gerathy or John Paul Merlino of our office.

Yours faithfully
HWL Ebsworth



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