

2013HCC024 – DA/1892/2013

40-48 Burton Road, Mount Hutton

Appendix C:

Applicant Legal Advice

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BY EMAIL: markdixon@hallidayshores.com.au

Mark Dixon
Halliday Shores

Dear Mark,

**40-48 Burton Road Mount Hutton
Compliance with Requirements of State Environmental Planning Policy (Housing for Seniors Or People With A Disability) 2004**

1. INTRODUCTION

- 1.1 We refer to your recent correspondence concerning the extent to which the development application lodged in respect of a proposed retirement village at 40-48 Burton Road, Mount Hutton ('**Development**' and '**DA**' respectively), complies with the prescriptive requirements of the *State Environmental Planning Policy (Housing for Seniors or People With a Disability) 2004* (Seniors Living SEPP).
- 1.2 In preparing our advice you have asked us to consider the document titled "*State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 - Summary of Relevant Requirements and Identification of Where Those Requirements Are Addressed*" (**Compliance Table**) which we note has largely been prepared by Gavin Marberly-Smith of the Coastplan Group, which prepared the relevant statement of environmental effects. A copy of the Compliance Table is attached as Annexure 1. We have not been requested to directly review the DA and documents lodged in support of it.
- 1.3 Relevantly, we note that the Development is permissible with consent under clause 41 of Lake Macquarie Local Environmental Plan 2004 (**Lake Macquarie LEP.**).

2. SUMMARY OF ADVICE

- 2.1 We are of the view that the Seniors Living SEPP applies to the Site.
- 2.2 The Compliance Table indicates that the Development and the DA will comply with the prescriptive requirements of the Seniors Living SEPP. Accordingly, we have concluded that there is nothing in the DA which, when considered in the context of the Seniors Living SEPP, which would require modification or refusal of the DA.

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- 2.3 Although the consent authority will still be required to consider the DA on its merits in accordance with s.79C of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, that consideration is beyond the scope of this advice.

3. BACKGROUND

- 3.1 We understand that:

- (a) the Site is zoned partly '*1(2) Rural Living*' and partly '*Zone 7(5) Environmental Living Zone*' under *Lake Macquarie Local Environment Plan 2004 (Lake Macquarie LEP)*;
- (b) the Site is made up of two lots, one of 9 acres and one of 3 acres, with a dwelling on each lot; and
- (c) a development consent has previously been issued in respect of the Site. That development consent was issued pursuant to the provisions of the Lake Macquarie LEP.

- 3.2 Clause 15 of the Lake Macquarie LEP provides planning controls within each zone. It provides that development for the purposes of a dwelling house is permissible on land zoned '*1(2) Rural Living*' and '*Zone 7(5) Environmental Living Zone*'.

4. ADVICE - DOES THE SENIORS LIVING SEPP APPLY TO THE SITE?

- 4.1 Clause 4(1) of the Seniors Living SEPP provides:

"This Policy applies to land within New South Wales that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes, but only if:

(a) development for the purpose of any of the following is permitted on the land:

(i) dwelling-houses... (emphasis added)

- 4.2 We note that the part of the Site which is zoned '*1(2) Rural Living*' cannot be said to be land which is zoned primarily for urban purposes. We also note that for the avoidance of doubt, clause 4(2) provides that land zoned principally for rural uses is not zoned primarily for urban purposes.

- 4.3 In relation to that part of the Site zoned Environmental Living, the objectives of the zone are as follows:

- (a) provide land with ecological, geological, scientific, scenic and biodiversity values that may accommodate minimal impact, low density residential and agricultural development, and
- (b) manage development to minimise adverse impacts on those values, such as by encouraging appropriate use of disturbed land, and

- (c) protect, enhance and manage corridors to facilitate species movement, dispersal and interchange of genetic material, and
 - (d) encourage rehabilitation and conservation of environmentally important land, and
 - (e) provide for sustainable water cycle management.
- 4.4 Having regard to these objectives and the permissible uses within the Environmental Living zone, we believe that the appropriate conclusion is that the part of the Site zoned Environmental Living is not land which is zoned for urban purposes.
- 4.5 It follows that in order for the Seniors Living SEPP to apply the Site:
- (a) the Site must '*adjoin*' land zoned '*primarily for urban purposes*'; and
 - (b) development for the purposes of a dwelling house must be permissible on the Site;
 - (c) the Site must not be land to which the Seniors Living SEPP does not apply having regard to the provisions of clause 4(6) of that instrument.
- 4.6 In relation to matter (b) above, we note that dwelling houses are permissible with consent within the Environmental Living Zone.
- 4.7 In relation to matter (a) above, it is our view that the Site is "*near to*" or "*neighbouring on*" or "*in sufficiently close proximity to*" land zoned primarily for urban purposes. You have advised us that Council agree with this view.
- 4.8 Accordingly, we have concluded that the whole of the Site '*adjoins*' land zoned primarily for urban purposes.
- 4.9 We have also considered whether the operation of the Seniors Living SEPP is excluded by the operation of clause 6 of that instrument. Relevantly, clause 6(a) provides that the Seniors Living SEPP does not apply to the land described in Schedule 1 (Environmentally sensitive land).
- 4.10 Schedule 1 to the Seniors Living SEPP relevantly reads:
- "Land identified in another environmental planning instrument by any of the following descriptions or by like descriptions or by descriptions that incorporate any of the following words or expressions:*
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- (d) *environment protection*'.

- 4.11 It is arguable the '7(5) *Environmental Living Zone*' is a zone which identifies land by the description '*environment protection*' or by a like description or by a description that incorporates those words or that expression.
- 4.12 A number of cases have considered the correct approach to determining whether land is identified in another environmental planning instrument by any of the relevant descriptions or by like descriptions or by descriptions that incorporate any of the relevant words or expression.
- 4.13 It is clear that in determining whether the zoning of the Site by Lake Macquarie LEP is identified by the description '*environment protection*' or by like descriptions or descriptions that incorporated that expression, it is possible to consider the objectives of the 7(5) zone (set out above): *Pepperwood Ridge Pty Ltd v Newcastle City Council* [2006]NSWCA122 .
- 4.14 However, although the objectives of the zone appear to indicated that land which is zoned 7(5) is '*environmentally important*' , this does not of itself equate to '*environment protection*'
- 4.15 Additionally, although the name of the zone incorporates the word 'environment', it does not use or incorporate the phrase 'environment protection'.
- 4.16 For these reasons, we do not believe that the Site is excluded by reason of it being zoned in a manner identified in Schedule 1(d) to the Seniors Living SEPP.
- 4.17 We are not aware of any other reason why the Site might fall within the scope of Schedule 1.
- 4.18 It follows that the Seniors Living SEPP applies to the whole of the Site despite the partial zoning of the Site as '*Zone 7(5) Environmental Living Zone*' under the Lake Macquarie LEP.
- 5. DOES THE DA COMPLY WITH THE PRESCRIPTIVE REQUIREMENTS OF THE SENIORS LIVING SEPP**
- 5.1 The Compliance Table identifies:
- (a) the material requirements of the Seniors Living SEPP;
 - (b) whether the DA complies with those requirements; and
 - (c) identifies the location within the DA and supporting documents where those requirements are addressed.
- 5.2 In preparing this advice, we have particularly focussed Chapter 3 of the Seniors Living SEPP which is titled '*Development for Seniors Housing*'

5.3 In brief, the Compliance Table indicates that the DA complies with all prescriptive requirements of the Seniors Living SEPP. We particularly note that the Compliance Table indicates that:

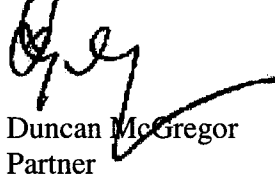
- (a) the requirements in relation to site compatibility certificates does not apply having regard to the provisions of Lake Macquarie LEP, clause 41, which permits retirement villages on the site with consent;
- (b) the DA complies with the locational and access requirements in clause 26 of the Seniors Living SEPP;
- (c) the Bushfire Assessment lodged in support of the DA demonstrates compliance with the bushfire prone land requirements set out in clause 27 of the Seniors Living SEPP;
- (d) the fact that the DA indicates that Development will be connected to Hunter Water's reticulated water and sewerage systems provides an appropriate basis for the consent authority to be satisfied in relation to clause 28 of the Seniors Living SEPP;
- (e) the fact that the DA includes an appropriate site analysis provides the consent authority with a sufficient basis to be satisfied in relation to clause 30 of the Seniors Living SEPP;
- (f) the fact that the DA appropriately addresses the matters referred to in clause 32 of the Seniors Living SEPP provides the consent authority with a sufficient basis to be satisfied in relation to the matters required of it under that clause;
- (g) the fact that the DA appropriately addresses the matters referred to in clause 33 of the Seniors Living SEPP provides the consent authority with a sufficient basis to be satisfied in relation to the matters required of it under that clause;
- (h) the fact that the DA appropriately addresses the matters referred to in clause 34 of the Seniors Living SEPP provides the consent authority with a sufficient basis to be satisfied in relation to the matters required of it under that clause;
- (i) the fact that the DA appropriately addresses the matters referred to in clause 35 of the Seniors Living SEPP provides the consent authority with a sufficient basis to be satisfied in relation to the matters required of it under that clause;
- (j) the fact that the DA details the relevant matters required by clause 36 of the Seniors Living SEPP in relation to stormwater;
- (k) the fact that the DA details the relevant matters required by clause 37 of the Seniors Living SEPP in relation to crime prevention;
- (l) the fact that the DA details the relevant matters required by clause 38 of the Seniors Living SEPP in relation to accessibility;

- (m) the fact that the DA details the relevant matters required by clause 39 of the Seniors Living SEPP in relation to waste management;
- (n) the fact that the DA details compliance with clause 40 where relevant in relation to minimum lot sizes and building height. We note that the height controls in clause 40 only apply if the development is proposed in a 'residential zone'. 'Residential zone' is not defined by the Seniors Living SEPP. We have reviewed the objectives of both the '1(2) Rural Living' and the 'Zone 7(5) Environmental Living' zones under Lake Macquarie LEP and in our view neither of these zones are correctly characterised as 'residential zones'. Accordingly, it is our view that the height controls in clause 40 do not apply to the proposed development;
- (o) the fact that the DA details compliance with clause 41 where relevant in relation to standards for hostels and self-contained dwellings;
- (p) the fact that the DA details compliance with clause 42 where relevant in relation to serviced self-care housing;
- (q) the fact that the DA details compliance with clause 43 in relation to transport to local centres;
- (r) the fact that the DA details compliance with clause 44 in relation to the provision of facilities on a staged basis; and
- (s) the fact that the DA details compliance with standards concerning accessibility and useability for hosts and self contained dwellings as set out in Schedule 3.

If you have any further questions please contact me on the details below.

Yours faithfully

MINTER ELLISON



Duncan McGregor
Partner

Partner responsible: Duncan McGregor Direct phone: +61 2 9921 4502