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Attention Aleks Milinkovic/Jodi Callaghan

The General Manager
Holroyd City Council
DX 25408 MERRYLANDS

21 June 2013

Dear General Manager,

Re: Validity of Crown development application DA 2012/413 for demolition and construction of 19 dwellings under State Environmental Planning Policy (Affordable Rental Housing) 2009
Ppty: 4-14 Welsford Street, Merrylands

We refer to the emails received from Jodi Callaghan dated 12 and 14 June 2013 in relation to Crown development application DA 2012/413 proposing the demolition of 6 existing public housing dwellings and associated outbuildings, consolidation of land into 1 lot and the construction of 19 dwellings with 12 parking spaces and the removal of trees ("the Development Application") on the land at 4-14 Welsford Street, Merrylands.

Council seeks our advice in relation to whether the development application can be made pursuant to clause 54A of *State Environmental Planning Policy (Affordable Rental Housing) 2009* ("SEPP ARH") and if so, whether the development application can be approved by the Sydney West Joint Regional Planning Panel ("the Sydney West JRPP").

Background

Council received the Development Application on 25 October 2012. The Development Application Form ("the DA Form") provides the "Applicant's Details" as "Land & Housing Corporation" and the following is given as a "Description of Proposed Development".

"Proposed removal of trees, demolition of 6 existing dwelling houses & associated structures & the construction of an infill affordable housing development comprising 19 units including carparking for 12 vehicles, associated site works, landscaping & site consolidation into one lot."

Attached to the DA Form is correspondence from the NSW Government Land & Housing Corporation which identifies that the Development Application is submitted "Under the provisions of Section 78A of the Environmental Planning and Assessment Act 1979" as a "Crown Development Application". The correspondence also states:

"As this application is being lodged by the Crown, please also be aware of the following:

1.

3097823_3

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2. *Under Section 89 of the Act, a consent authority may not impose conditions of consent to the application without the written approval of the Land and Housing Corporation or the Minister for Planning; or refuse the application without the written approval of the Minister....."*

The following documentation was provided with Council's instructions and has been considered for the purposes of providing advice in this matter:

1. The Development Application Form dated 23 October 2012 and identified as being "Received" (stamped) by Council on 25 October 2012.
2. The Business Paper prepared by Council's staff for the Council Meeting held on Tuesday, 7 May 2013 ("the Staff Planning Report").
3. A copy of the Report prepared by Council's staff for the Western Sydney Joint Regional Planning Panel.

We understand that the site is presently within Zone 2(a) Residential under the provisions of the Holroyd Local Environmental Plan 1991. The Staff Planning Report states:

"Under Holroyd LEP the proposed development is characterised as partly 'medium density housing' and partly as a 'residential flat building'. Medium density housing is permissible with consent in a 2(a) zone. However, residential flat buildings are prohibited. Notwithstanding, the provisions of the ARH SEPP prevail and the proposed development is permissible with consent under the Savings and Transitional provisions at Clause 54A of Division 1 of the SEPP."

The Holroyd Local Environmental Plan 2013 ("LEP 2013") was both published on the NSW legislation website and gazetted on 5 April 2013. Clause 1.1AA of LEP 2013 states that the plan commences "4 months after it is published on the NSW legislation website", therefore LEP 2013 has not yet commenced. We understand that the subject site is proposed to be zoned R2 – Low Density Residential pursuant to LEP 2013 and that the proposed development is defined as "multi dwelling housing" which is prohibited in the R2 Zone.

Advice

SEPP ARH

As referred to above, the proposed development is prohibited pursuant to LEP 1991 and will be prohibited under LEP 2013.

Division 1 of Part 2 of SEPP ARH relates to "In-fill affordable housing". Clause 10(1) of SEPP ARH presently provides:

"10 Development to which Division applies

- (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, and*

- (b) *the development is on land that does not contain a heritage item that is identified in an environmental planning instrument, or an interim heritage order or on the State Heritage Register under the Heritage Act 1977.*

We are instructed that the Development Application proposes both "*multi dwelling housing*" and "*residential flat buildings*" as referred to in clause 10(1) of SEPP ARH. However, as the proposal is not permitted with consent under another environmental planning instrument, the proposal is not development to which Division 1 of Part 2 of SEPP ARH applies and the Development Application cannot be considered as permissible development pursuant to the SEPP.

The Applicant relies on clause 54A(1) of SEPP ARH which provides:

"54A Savings and transitional provisions—2011 amendment

- (1) *Division 1 of Part 2, as in force before its amendment by State Environmental Planning Policy Amendment (Affordable Rental Housing) 2011 (the **amending SEPP**), continues to apply to development, if:*
- (a) *the land on which the development is situated is owned by the Land and Housing Corporation and was owned by that Corporation immediately before the amendment, and*
- (b) *the development is **commenced not later than 2 years after the amendment**.*
- (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.*
- (3) *If an existing application relates to development to which Division 1 or 3 of Part 2 applied, the consent authority must not consent to the development unless it has taken into consideration whether the design of the development is compatible with the character of the local area.*
- (4) *Despite subclause (2), clause 13 (2) (as in force before the amendments made by the amending SEPP) does not apply to development the subject of an existing application and any such application is to be determined by applying instead clause 13 (2) and (3) as inserted by the amending SEPP."*

Clause 54A was inserted into SEPP ARH on 20 May 2011 having regard to amendments that were made to the SEPP on 20 May 2011 (by "*the amending SEPP*"). Those amendments included a number of changes to Division 1 In-fill Affordable Housing, including a change to the type of permissible development pursuant to that Division.

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Clause 54A(1)

The reference in clause 54A(1) to *“Division 1 of Part 2, as in force before its amendment by State Environmental Planning Policy Amendment (Affordable Rental Housing) 2011 (the amending SEPP)”* is a reference to the version of Division 1 of Part 2 immediately prior to 20 May 2011.

Clause 54A(1)(b) specifies that the previous version of SEPP ARH (immediately prior to 20 May 2011), continues to apply to development on land owned by the Land & Housing Corporation if the *“development is commenced not later than 2 years after the amendment”*. Two years after the amendment to SEPP ARH is taken to be 20 May 2013. Given that the Development Application has not yet been determined and the development cannot therefore have *“commenced”*, it is reasonably arguable that clause 54A(1) does not apply to the Development Application.

Clause 54A(2)

Clause 54A(2) states that a development application that has been *“made before the commencement of the amending SEPP in relation to development to which this SEPP applied before that commencement”* may be determined as if the amending SEPP had not been made. The subject Development Application was lodged with Council on 25 October 2012 and was not *“made before the commencement of the amending SEPP”* (i.e. 20 May 2011). Accordingly, Clause 54A(2) does not apply to the Development Application.

Clause 54A - Conclusion

In summary Clause 54A does not apply to the Development Application because:

1. The development has not been commenced within 2 years after the amendment to Division 1 of Part 2 of SEPP ARH (that is 2 years from 20 May 2011), and
2. The Development Application was not made before the commencement of the amending SEPP (on 20 May 2011).

Having regard to the above, it is reasonably arguable that the Development Application cannot be determined by reference to Division 1 of Part 2 of SEPP ARH as in force before its amendment on 20 May 2011.

Crown Development Application

There are a number of requirements within the *Environmental Planning and Assessment Act 1979* (“EP&A Act”) and the *Environmental Planning and Assessment Regulation 2000* (“the Regulation”) that must be considered as part of Council’s (and a consent authority’s) obligations in relation to a development application lodged by the “Crown”.

Firstly, section 88 of the EP&A Act states that a reference to the “Crown” (for the purposes of Division 4 “Crown Developments” of Part 4 of the Act) includes a reference to a person prescribed by the Regulation to be the Crown.

Clause 226 of the Regulation states that *prescribed persons* (i.e. the Crown) for the purposes of section 88(2)(a) of the Act include:

- “(a) a public authority (not being a council)
- (b) a public utility
- (c) an Australian university
- (d) a TAFE establishment”

A “public authority” is defined in clause 4 of the EP&A Act as:

- “(a) a public or local authority constituted by or under an Act, or
- (b) **a government Department, or**
- (c) a statutory body representing the Crown, or
- (d) a chief executive officer within the meaning of the Public Sector Employment and Management Act 2002 (including the Director-General), or
- (e) a statutory State owned corporation (and its subsidiaries) within the meaning of the State Owned Corporations Act 1989 , or
- (f) a chief executive officer of a corporation or subsidiary referred to in paragraph (e), or
- (g) a person prescribed by the regulations for the purposes of this definition.”

In the present circumstances, the NSW Land & Housing Corporation is a division of the NSW Government “Department of Finance and Services” and is a “*government Department*” for the purposes of s4(b) of the EP&A Act . The Applicant in relation to the Development Application is therefore taken to be the “Crown” under Division 4 “*Crown Developments*” of Part 4 of the Act.

Having regard to clauses 89 and 89A of the EP&A Act, we note the following requirements in relation to a Crown Development Application:

1. Council as the consent authority in relation to the Development Application must not (and cannot) refuse its consent to the Development Application, except with the approval of the Minister. Council also must not impose a condition on any consent to the Development Application except with the approval of the Applicant or the Minister.
2. If Council does not determine a Crown Development Application within 70 days after the Development Application is lodged (see clause 113B of the Regulation), the Applicant or Council may refer the application to the applicable Regional Panel.
3. If the Regional Panel fails to determine the Development Application within 50 days after the application is referred to that body, the Applicant or the Panel may refer the development application to the Minister. The Regional Panel also has the power to refer a development application to the Minister at any time.
4. On referral being made by a consent authority, a Regional Panel or an Applicant, to the Minister, the Minister may direct the consent authority (in this case, the Council) to approve

the Development Application with or without specified conditions, or to refuse the Development Application. If there is a direction by the Minister to this effect, the consent authority must comply with the Minister's direction.

5. If the consent authority fails to comply with the Minister's direction (paragraph no. 4 above), the consent authority is taken to have determined the Crown Development Application in accordance with the Minister's direction on the last day for compliance specified in that direction.

JRPP Determination of the Development Application

Section 89 (1), (3) and (4) states:

"(1) A consent authority (other than the Minister) must not:

(a) refuse its consent to a Crown development application, except with the approval of the Minister, or

(b) impose a condition on its consent to a Crown development application, except with the approval of the applicant or the Minister.

...

(3) An applicable regional panel to which a Crown development application is referred may exercise the functions of the council as a consent authority (subject to subsection (1)) with respect to the application.

(4) A decision by a regional panel in determining a Crown development application is taken for all purposes to be the decision of the council."

It follows that the Sydney West JRPP may only exercise the functions of the Council in its determination of the Development Application. In that regard, the JRPP does not have the power to refuse the Development Application or impose a condition of consent, except with the consent of the Minister (because the Council did not have such power).

We have assumed for the purposes of this advice that the proposed development is prohibited pursuant to LEP 1991 and LEP 2013. It follows that Division 1 of Part 2 (the In-fill affordable housing provisions) of SEPP ARH, as presently in force, does not apply to the development, and it is reasonably arguable (based on the above assumptions) that the Development Application proposes prohibited development.

The JRPP does not have the power to refuse or approve the Development Application. It follows that the only decision that the JRPP could make is to refer the application to the Minister with a recommendation for the Minister to direct either approval or refusal.

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We trust that the above advice has been of assistance. Should you have any queries in relation to our advice please do not hesitate to contact Adam Seton or Peta Hudson at our Campbelltown office.

Yours faithfully

MARSDENS LAW GROUP



 **A.J. SETON**

Partner

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