

Memo

Development Assessment

To: Panel Members – Sydney East Joint Regional Planning Panel

From: David Kerr
Group Manager Development and Compliance Services

Date: 10 March 2015

Subject: DA2014/1062 (2014SYE120) - Demolition works and construction of a residential care facility with associated car parking, internal roads and landscaping at Lot1113/752038, Oxford Falls Road, Frenchs Forest

Dear Panel Members

I refer to an email received from the Chair of the Panel dated 9 March 2015 seeking clarification on a number of matters referred to in the assessment report which relate to the above-mentioned development application.

The following commentary addresses each question raised:

1. ***“On page 20 of the assessment report there is a reference to a 2004 judgment by Talbot J suggesting that certain clauses of the SEPP (HSPD) do not apply to Warringah. Could you please elaborate on that statement?”***

Comment:

The NSW Land and Environment Court decision of Talbot J on 31 May 2004, in *Mete v Warringah Council* (2004 NSW LEC 273) was based on questions of law as to whether State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP (HSPD)) applied to applications that were made under the provision of the Warringah Local Environmental Plan 2000 (WLEP 2000).

In summary, the judgement indicates that SEPP (HSPD) is a relevant instrument and must be considered in the assessment of all development applications. However, when a development application is lodged under the provisions of WLEP 2000 (as per the subject application), the judgement states:

“In the present case, there is no question of election because the applicant had already made his application pursuant to WLEP and has continued to pursue it under the terms of that instrument, notwithstanding that SEPP (SL) has been made in the meantime. It cannot be said, therefore, that the subject development application has been “made pursuant to Ch 3 of SEPP(SL) within the meaning of cl 25, cl 28, cl 30, cl 38(1), cl 51, cl 78 and cl 81, or any other provision of that policy where that phrase is used”.

Accordingly, the assessment of this application has only considered the Clauses of the SEPP which are not prefaced with the words “development application made pursuant to this chapter”.

2. ***“Reason 9 for refusal says that the site is unsuitable for the development (presumably because it is remote from services). Yet the Council has approved the same use at a smaller scale fairly recently. This needs an explanation why the site is suitable for the use at the smaller scale and unsuitable at the larger scale, and, preferably, at what point does the scale become unsuitable?”***



Comment:

Consent of an aged care facility (10 beds) on the subject site was granted by the Warringah Development Assessment Panel (WDAP) on 13 November 2013. This was contrary to Council's recommendation that the application should be refused for reasons which included the suitability of the site.

Notwithstanding that the site benefits from that previous consent, the consideration that the site is unsuitable for the currently proposed development, which is significantly larger than that already approved by the WDAP, remains consistent with Council's previous assessment.

The assessment of this application has concluded that the site is not suitable for the proposed development on the following grounds:

1. The inconsistency of the proposed development with provisions of SEPP (HSPD) 2004 and WLEP 2000, as stipulated in the assessment report;
2. The remoteness of the site from required services and facilities. Noting that this is a significantly larger development than previously approved Development Application; and
3. The fact that proposal is heavily relies upon the use of the public land and a portion of the neighbouring private property to the south to accommodate fire asset protection zones. The use of other land to support the purposes of a private development is not considered to be appropriate as it will put unreasonable constraints.
3. ***"What weight should be given to the Desired Future Character in a LEP as against the intensity of development allowed by the SEPP (HSPD)? (Reason for refusal No. 4)"***

Comment:

As indicated under Question 1 above, the application is made under the provision of WLEP 2000 and not SEPP (HSPD) 2004. Therefore, the intensity of the development under the SEPP does not apply to this application.

The Development standards for development that is made pursuant to WLEP 2000 are set out in the respective Locality Statements. Clause 12 of WLEP 2000 states that *"before granting consent for development classified Category Two or Three the consent authority must be satisfied that the development is consistent with the desired future character described in the relevant Locality Statement"*.

Therefore, in this respect, weight should be only given to the WLEP's Locality Statement for the B2 Locality statement for the proposed development.

Should you wish to discuss this matter further, please contact me on 9942 2949.

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