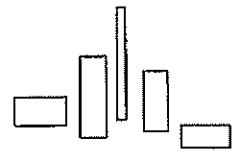


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PIKES & VEREKERS
LAWYERS

12 October 2015

The General Manager
City of Ryde Council
Locked Bag 2069
NORTH RYDE NSW 1670

Attention: Paul Kapetas

EMAIL pkapetas@ryde.nsw.gov.au
cityofryde@ryde.nsw.gov.au

Dear Sir

**FERNLEIGH NURSING HOME
PROPOSED DEVELOPMENT FOR SENIORS HOUSING
PREMISES: 8-14 SHERBROOKE ROAD AND 78-82 MONS AVENUE, WEST RYDE
Our ref PMJ:MML:150855**

We act for Ms Jayne Walsh of No. 84 Mons Avenue, West Ryde, concerning the proposed development of land at West Ryde for seniors housing.

We are instructed to advise in respect of the following matters raised by the Sydney East Joint Regional Planning Panel ("the JRPP") which is the consent authority in this matter.

Can a consent authority reach the satisfaction required by subclause 26(1) of SEPPSL without the location of a residential care facility meeting the requirements of subclause 26(2), provided it receives written evidence that:

- (a) The residents of a residential care facility are (or will be) high-care and therefore unable to access services independently outside the site; and
- (b) Services reasonably required by the residents will be brought to the site.

We advise as follows:

Executive Summary

- (i) The Development Application as submitted seeks consent for seniors housing pursuant to cl16 of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 ("the SEPP").



- (ii) Thus, the proposed development as properly categorised is, on the face of the Application as submitted to Council, for seniors housing.
- (iii) Accommodation for seniors housing can take the form of a residential care facility, a hostel, a group of self contained dwellings, or a combination of all such accommodation.
- (iv) The site related requirements for seniors housing as set out in cl26 of the SEPP are critical and essential ingredients of the SEPP.
- (v) Clause 26 is part of Chapter 3 of the SEPP with the objectives of Chapter 3 being set out in cl14, which states in part as follows:

"... to create opportunities for development of housing that is located and designed in a manner particularly suited to both seniors who are independent, mobile and active, as well as those who are frail, and other people with a disability."
- (vi) The facts of this matter establish that the proposal is not located (due to distances and unacceptable gradients to services) nor designed (due to insufficient cl26 services being constructed on-site) in a manner which is particularly suited to the target group. The types of services to be provided by the Applicant on site are limited with there being no independent choice of services to be provided.
- (vii) All types of accommodation for seniors housing within the meaning of cl10 of the SEPP is to comply with the locational and access requirements irrespective of the type of accommodation to be provided for seniors housing. The location and access requirements must be applied consistently irrespective of the type of accommodation proposed.
- (viii) The relaxation of an essential ingredient i.e. cl26 location and access requirements, merely because an applicant alleges a certain type of occupant, will not require such services or cannot independently access such services, is incorrect in law and an irrelevant consideration in the assessment and determination process.
- (ix) The shortfalls in the application relating to location services cannot be remedied by imposing a condition of consent. Such a condition would have the effect of limiting or restricting the future use of the site as an aged care facility as defined in Ryde LEP 2014, rather than for a seniors housing development pursuant to the SEPP.
- (x) To argue on the one hand that the proposal is for seniors housing and presumably take the benefits which come with the SEPP and on the other hand argue that non-compliance with the SEPP can be remedied by

imposing a condition limiting the type of occupation is both beyond power and unlawful.

- (xi) The language in cl26 of the SEPP is clear. There are no exceptions in the clause which would permit lesser services to be made available or some form of limited services based upon the type of occupants in a seniors living development. The "reasonable" services to be provided are the services specifically referred to in cl26(1)(a)-(c) and must be provided for all types of seniors housing.
- (xii) The terms of cl26 are also unambiguous. It would have been easy for the drafters of cl26 to have made a distinction between the types of occupants and the necessary services for each of those groups. The clause does not do this.

Therefore, any condition of a development consent which permits a lesser degree of service, other than the cl26 services is beyond power and unlawful.

Likewise, any condition seeking to restrict occupation to a specific target group, i.e. aged care occupants, is also beyond power and unlawful for the following reasons:

- The result of imposing such a condition is to fundamentally change the nature of the application as submitted.
- The application, as submitted, seeks consent for seniors housing. A condition limiting use to a certain type of occupant becomes something other than seniors housing for which the applicant does not seek consent.
- The result of imposing such a condition is to alter the very nature of that for which consent is sought, i.e. seniors housing, to some form of residential care facility. No consent is sought for a residential care facility.
- Section 80A of the *Environmental Planning Assessment Act 1979* provides the power to impose conditions. Having regard to the DA as submitted, a condition restricting use to a certain type of occupant is not permitted pursuant to s80A because such a condition is not a condition of the type authorised pursuant to any of the provisions of s80A. In particular, s80A(1)(a) provides as follows:

(1) Conditions—generally

A condition of development consent may be imposed if:

(a) it relates to any matter referred to in section 79C (1) of relevance to the development the subject of the consent...

- Each of the matters of relevance to be taken into consideration pursuant to s79C is set out in that section. However, s79C limits the matters for consideration to those matters which are "**...of relevance to the development the subject of the development application...**", see s79C(1).
 - The "*development the subject of the Development Application*" is for seniors housing. A condition which seeks to change the fundamental nature of the application as submitted is not authorised by s80A and is beyond power.
 - Nor would such a condition be authorised pursuant to s80A(g) because such a condition would not be modifying "*the details of the development the subject of the Development Application*" it would be fundamentally changing the nature of the development for which consent is sought.
- (xiii) The consent authority cannot reach the relevant degree of satisfaction required by cl26(1) of the SEPP on the basis that residents of the residential care facility will allegedly require a higher degree of care and are, therefore, unable to access services.
- (xiv) The consent authority cannot reach the satisfaction required by cl26(1) of the SEPP where services which are required by cl26 of the SEPP are to be brought to occupants of the site. This is both contrary to cl26 of the SEPP and also to the objectives set out in cl14, which specifically relates to development for seniors housing.

The Proposed Development/Relevant Background

The Development Application seeks consent for the redevelopment and expansion of the existing Fernleigh Residential Care Facility in West Ryde ("the Facility").

The Facility has approximately seventy (70) beds with the application seeking consent for an additional 70 beds to a maximum of 140. The Facility is approximately 520m to the nearest shops and public transport.

The DA as lodged seeks consent for seniors housing pursuant to Chapter 3 of the SEPP.

We note that the use of the land as a "residential care facility" is a permissible use of the land with consent pursuant to Ryde Local Environmental Plan 2014.

However, the applicant specifically seeks consent for seniors housing development pursuant to the SEPP and therefore the application must be assessed and determined on the basis that the proposed use as properly categorised is for seniors housing. This categorisation of the use has important consequences for the proper assessment and determination of the DA.

The consequence of the applicant's election is that the DA must be assessed and determined on the basis that all relevant aims, objectives, controls and standards apply to a seniors housing development pursuant to the SEPP.

Seniors housing within the meaning of the SEPP, whether it is a type of accommodation for a residential care facility, a hostel or self-contained dwellings, or a combination of all of these uses, must be assessed against the controls in Chapter 3 of the SEPP. It would be beyond power and unlawful to assess and deal with a particular type of seniors housing in a different manner to another type of seniors housing. The relevant controls apply to all types of uses which fall within the meaning of senior housing pursuant to the SEPP and must be applied consistently.

Whether a consent or authority can reach the satisfaction required by clause 26(1) of SEPPSL without the location of a residential care facility meeting the requirements of subclause 26(2), provided it receives written evidence that the residents of a residential care facility are (or will be) high-care and therefore unable to access services independently outside the site.

The future residents of the proposed residential care facility, whether or not there is provision for higher care for some or all of the residents, will nevertheless be residents of the type referred to in Chapter 2 of the SEPP.

Irrespective of whether it is the applicant's intention to provide a higher level of care, the requirements of the SEPP relating to the location and provision of services pursuant to cl26(1)(a)-(c) of the SEPP is paramount and an essential requirement of a seniors living development.

As indicated above, this is the consequence of the applicant's election to seek consent for seniors housing pursuant to the SEPP, rather than seeking development consent for a residential care facility pursuant to the Ryde LEP.

We are instructed that the proposed seniors housing development does not provide on-site services of the type as are required pursuant to cl26 of the SEPP, nor is there a public transport node within 400m of the site.

Clause 26 of the SEPP is couched in mandatory terms, such that a consent authority **must not consent** to a development application unless the authority is satisfied by written evidence that residents will have access that complies with cl26(1) and (2) of the SEPP.

The proposed development is clearly non-compliant with cl26(1) and (2) of the SEPP and, as such, the consent authority cannot reach the necessary degree of satisfaction as is required pursuant to cl26(1). To do so in the circumstances of this case would constitute an error or law.

If a development consent is granted having regard to the circumstances of this matter, then we are of the opinion that such consent would most likely not survive a legal challenge.

The applicant submits that the residents who currently occupy the site (as well as future occupants) are not able to access services offsite independently because of physical and/or mental frailty. The applicant further submits that the requirements in cl26(2)(b) of the SEPP, which were written into the SEPP more than 10 years ago, have no relevance to a residential care facility as it operates today. We do not agree.

The fact is that the subject application seeks development consent for seniors housing pursuant to the SEPP. The SEPP is a relevant planning instrument which must be given primacy in the assessment and determination process. As indicated above, if consent were to be granted on the basis of the applicant's submission, we are of the opinion that such consent would most likely not survive a legal challenge.

Therefore, in our opinion, the consent authority cannot reach the relevant degree of satisfaction required by cl26(1) of the SEPP on the basis that residents of the residential care facility will allegedly require a higher degree of care and are, therefore, unable to access services. This is no justification for non-compliance with the relevant provisions which are mandatory for seniors housing.

Whether a Consent Authority can reach the satisfaction required by subclause 26(1) of SEPPSL without the location of a residential care facility meeting the requirements of subclause 26(2), provided it receives written evidence that services reasonably required by the residents will be brought to the site.

Clause 26(2) of the SEPP sets out the services to be provided for a seniors housing development as follows:

- (a) shops, bank services providers and other retailing commercial services that residents may reasonably require, and
- (b) community services and recreation facilities, and
- (c) the practice of a general medical practitioner.

All of the above services must be located at a distance of not more than 400m from the site of the proposed development with such distances also needing to comply with the specific gradients referred to in cl26(2) of the SEPP.

If a development site is located within the Sydney Statistical Division (such as the subject site), then provided there is an acceptable path of travel to a public transport node which is no greater than 400m from the site, then cl26(1) will be complied with. The proposed development does not comply with the locational and access requirements of cl26.

Services of the type referred to in cl 26(1) can be incorporated within a site to be used for seniors housing. However, this is not the case in respect of the subject development application.

We are of the opinion that it would not be lawful, as a means of satisfying the cl26 requirements to merely bring services to the site by way of some form of external service providers. In any event, the full range of services required by cl26, including shops, banks, commercial services and recreation facilities, need to be provided for all types of seniors housing, be it for a residential care facility, hostel, or self contained dwellings.

One of the essential elements of the SEPP is to create opportunities for the development of housing that is **located and designed** in a manner suited for senior housing, see cl14 of the SEPP. The proposed development does not comply with cl14.

We are of the firm opinion that, having regard to the circumstances of this matter, a condition of development consent which requires only limited services to be brought to the site for future occupants of the development on the basis that such occupants are frail and needing a higher level of care is beyond power.

We are therefore of the opinion that the consent authority cannot reach the satisfaction required by cl 26(1) of the SEPP where services which are required by cl26 of the SEPP are to be brought to occupants of the site. This is both contrary to cl26 of the SEPP and also to the objectives set out in cl14 which specifically relates to development for seniors housing.

We should be obliged if you could provide a copy of this letter to the JRPP for its consideration as part of the assessment and determination process relating to the DA.

Yours faithfully



Peter Jackson
Partner

