

Re: Interpretation of clause 26(1)
*State Environmental Planning Policy (Housing
for Seniors or People with a Disability) 2004*

MEMORANDUM OF ADVICE

Ms Kirsty Thomas
Senior Legal Officer
Legal Services Branch
Department of Planning & Environment

T: 02 9228 6341
E: kirsty.thomas@planning.nsw.gov.au

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Re: Interpretation of clause 26(1) - *State Environmental Planning Policy (Housing for Seniors or People with a Disability)* 2004

MEMORANDUM OF ADVICE

1. I am instructed to advise on the proper interpretation of clause 26(1) of *State Environmental Planning Policy (Housing for Seniors or People with a Disability)* 2004 ("SEPP SL").
2. More specifically, I am requested to advise on the following question:

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

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

Principles of statutory interpretation

3. SEPP SL, being an instrument made under Part 3, Division 2 of the *Environmental Planning and Assessment Act* 1979 ('the Act'), is a form delegated legislation. The general principles relating to the interpretation of Acts of Parliament are applicable¹ to its construction.
4. There are a number of common law principles of interpretation relevant to the proper construction of clause 26 of SEPP SL, as follows:
 - a. A purposive and practical approach is to be given to the whole of the instrument²

¹ *Collector of Customs v Agfa-Gevaert Ltd* (1996) 141 ALR 59 at 65; *Parry v Osborn* [1955] VLR 152

² *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; 91 ALR 16 at [19] and *Hecar Investments No. 6 Pty Ltd v Lake Macquarie Municipal Council* (1984) 53 LGRA 322 at 323.

- b. All words in an instrument are to have meaning and effect³;
- c. General words are to be given their plain and ordinary meaning unless the contrary is shown⁴;
- d. All words, must prima facie, be given some meaning and effect⁵, and construed to produce 'the greatest harmony and the least inconsistency'⁶;
- e. Where there are two provisions in a single piece of legislation which initially appear to be in conflict since it is 'improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect, one should look to see whether any other meaning produces a more reasonable result'⁷; and
- f. Interpretation to give effect to evident purpose or object of the instrument⁸.

Construction of clause 26 of SEPP SL

- 5. Chapter 3 of SEPP SL guides development for seniors housing. The objective of the chapter is set out at clause 14: *'to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age'*.
- 6. Clause 15 of SEPP SL describes the 'purpose' of Chapter 3 to enable development for the purpose of 'any form' of seniors housing on nominated lands notwithstanding such development may be prohibited.
- 7. 'Seniors housing' is defined at clause 10 as being residential accommodation that is, or is intended to be, used permanently for seniors or people with a disability, consisting of a residential care facility or a hostel or a group of self-contained dwellings or a combination of those uses, but not a 'hospital'.

³ *Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ; *Beckwith v R* (1976) 135 CLR 569 at 5784; 12 ALR 333 at 337 per Gibbs J; *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679; 24 ALR 513 at 518-19 per Mason J, which whom Barwick CJ agreed at 674; 515 and Aickin J agreed at 680; 519

⁴ *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629 per Dixon J at 647; *Maunsell v Olins* [1975] AC 373 at 382; [1975] 1 All ER 16 at 18 per Lord Reid; *Ireland v Johnson, CEO Department of Corrective Services* [2009] WASCA 162; (2009) 189 IR 135 at [31] per Miere J, which whom Wheeler and Pullin JJA agreed at 136; *Commissioner for ACT Revenue v Dataflex Pty Ltd* [2011] ACTCA 14; (2011) 5 ACTLR 271; 252 FLR 50 at [42].

⁵ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355; 153 ALR 490 at [71] per McHugh, Gummow, Kirby and Hayne JJ.

⁶ *Australian Alliance Assurance Co Ltd v Attorney General (QLD)* [1916] ST Qd 135 at 161 per Cooper CJ; *T v T* [2008] FamVAFC 4; (2008) 216 FLR 365 at [82].

⁷ *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574; 116 ALR 54 at 63 per Gummow J

⁸ *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; 35 ALR 151; *Davies v Western Australia* (1904) 2 CLR 29, noting that where a provision in delegated legislation is so ambiguous that no meaning can be given to it, it may be found to that the delegated legislation has not been properly exercised and the provision will be held to ultra vires.

8. Residential care facilities are broadly defined at clause 11 of SEPP SL as:

*In this Policy, a **residential care facility** is residential accommodation for seniors or people with a disability that includes:*

- (a) meals and cleaning services, and*
- (b) personal care or nursing care, or both, and*
- (c) appropriate staffing, furniture, furnishings and equipment for the provision of that accommodation and care,*

not being a dwelling, hostel, hospital or psychiatric facility.

9. Hostels are similarly broadly defined at clause 12 of SEPP SL as:

*In this Policy, a **hostel** is residential accommodation for seniors or people with a disability where:*

- (a) meals, laundering, cleaning and other facilities are provided on a shared basis, and*
- (b) at least one staff member is available on site 24 hours a day to provide management services.*

10. Relevantly, notwithstanding that higher levels of services are required to be provided 'on site', neither 'residential care facilities' nor 'hostels' require occupants to meet a minimum standard of frailty. The only requirement for occupants is that they are 'seniors' or 'people with a disability'⁹. The definitions of those terms in SEPP SL do not exclude able bodied persons from residing in the accommodation.

11. Clause 26(1) of SEPP SL requires a consent authority to be 'satisfied' that residents of the proposed development will have access 'that complies with subclause (2)' to the following services:

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

12. Bank service provider is defined at clause 26(5) as 'any bank, credit union or building society or any post office that provides banking services'. 'Banking services' are not defined in SEPP SL.

Reaching 'satisfaction' that residents will have access to services

13. The chapeau to clause 26(1) is specific in its terms. Rather than requiring the consent authority to reach a general level of satisfaction that residents will have access to

⁹ The terms 'seniors' and 'people with a disability' are defined at clauses 9 and 10 of SEPP SL respectively

necessary services, it requires that residents will have 'access that complies with subclause (2)'.

14. It is therefore necessary to read clauses 26(1) and (2) together to understand the level of satisfaction to be achieved by the consent authority.
15. Clause 26(2) provides that 'access complies' with clause 26(1) if it meets certain criteria as follows:

- (2) *Access complies with this clause if:*
 - (a) *the facilities and services referred to in subclause (1) are located at a distance of not more than 400 metres from the site of the proposed development that is a distance accessible by means of a suitable access pathway and the overall average gradient for the pathway is no more than 1:14, although the following gradients along the pathway are also acceptable:*
 - (i) *a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,*
 - (ii) *a gradient of no more than 1:10 for a maximum length of 5 metres at a time,*
 - (iii) *a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time, or*
 - (b) *in the case of a proposed development on land in a local government area within the Sydney Statistical Division—there is a public transport service available to the residents who will occupy the proposed development:*
 - (i) *that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and*
 - (ii) *that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in subclause (1), and*
 - (iii) *that is available both to and from the proposed development at least once between 8am and 12pm per day and at least once between 12pm and 6pm each day from Monday to Friday (both days inclusive),*

and the gradient along the pathway from the site to the public transport services (and from the public transport services to the facilities and services referred to in subclause (1)) complies with subclause (3), or
 - (c) *in the case of a proposed development on land in a local government area that is not within the Sydney Statistical Division—there is a transport service available to the residents who will occupy the proposed development:*
 - (i) *that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and*
 - (ii) *that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in subclause (1), and*
 - (iii) *that is available both to and from the proposed development during daylight hours at least once each day from Monday to Friday (both days inclusive),*

and the gradient along the pathway from the site to the public transport services (and from the transport services to the facilities and services referred to in subclause (1)) complies with subclause (3).

16. When reading clauses 26(1) and (2) together, and having regard to the objectives of Chapter 3 of SEPP SL, it is clear that a minimum level of services must be physically available either on the subject land or within the distances (and at the grades)

prescribed in clause 26(2). That is, the policy has not yet envisaged 'virtual' services such as internet shopping and banking services that one might access independently of those arranged by the residential care facility.

17. The only exceptions to access to services and facilities are those set out in clause 26(2)(b) and (c) and (3) where access to public transport services servicing the facilities and services referred to in clause 26(1) is available¹⁰.
18. Section 26(1)(b) of the *Environmental Planning and Assessment Act 1979* provides that an environmental planning instrument may make provision for or with respect to 'controlling' development. Clause 26 of SEPP SL is a control on development for the purposes of housing for seniors and persons with a disability.
19. The opinion required by clause 26 of SEPP SL is a pre-condition, a jurisdictional fact of the subjective opinion variety, which must be met to enliven the consent power of the consent authority.¹¹
20. The Sydney East Joint Regional Planning Panel is a collegiate body deciding questions by majority. Therefore, it is necessary that the majority of the panel forms the opinion that access to services in accordance with clause 26 of SEPP SL will be available to residents of seniors living developments¹².
21. To form the requisite opinion, the panel **must** have written evidence before it that residents of the proposed development will have access to the services and facilities referred to in clause 26(1).
22. The written evidence should provide details each of services and facilities referred to in clause 26(1) and the location (and grade) of such services, addressing the specific requirements of clause 26(2) and (3). If the services and facilities are to be accessed 'on site' details of the location and range of services should be provided by the applicant.

¹⁰ Note the distance and grade requirements in clauses 26(2) and (3) for the location public transport services.

¹¹ *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21, 197 CLR 611 at [128] – [145]; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16, 240 CLR 611 at [23]–[24]; *Commissioner of Police v Ryan* [2007] NSWCA 196, 70 NSWLR 73 at [47]

¹² *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23, 143 LGERA 277 at [66]; *Maritime Union of Australia v Geraldton Port Authority* [1999] FCA 899, 93 FCR 34 at [288] – [291]

Can a consent authority reach the satisfaction required by subclause 26(1) of SEPP SL 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

23. The JRPP is not empowered to reach the relevant state of satisfaction required by clause 26(1) of SEPP SL on the basis that residents of the residential care facility are (or will) require high care and are therefore unable to access services independently outside the site.
24. Consideration of the anticipated frailty of residents, however logical, is a matter outside of the scope of clause 26 of SEPP SL.

Can a consent authority reach the satisfaction required by subclause 26(1) of SEPP SL 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.

25. Clause 26(2)(a) of SEPP SL requires the facilities and services required by clause 26(1) to be located at a distance of *'not more than 400 metres from the site of the proposed development'*.
26. In my opinion, the location requirements of clause 26(2)(a) of SEPP SL permit a development to provide the required services 'on site' as the requirement is that it be 'not more than' 400 metres from the site, rather than located 'off site'.
27. When coming to the opinion required by clause 26(1) the JRPP is required to form the opinion that the development 'will have access' to certain facilities and services. Clause 26 does not stipulate the hours, or even days, that 'access' must be available to residents. A purposive approach to the interpretation of clause 26 would be that 'reasonable' access must be available to residents. It is for the consent authority to determine what is 'reasonable access' to the prescribed services and facilities, having regard to the written evidence provided to it.
28. In *Creighton Properties Pty Limited v Kiama Municipal Council* [2006] NSWLEC 297 at [40] – [49], Preston CJ considered the issue of compliance with conditions precedent

to the formation of an opinion of satisfaction. The reasoning in *Creighton* was adopted by Commissioner Morris and Acting Commissioner Adam in *Treysten Pty Limited v Hornsby Shire Council* [2011] NSWLEC 1364 at [79]¹³ where the Court considered access to services for serviced self-care housing.

29. In *Treysten* the Court was required to be satisfied (by written evidence) that residents would have 'reasonable access' to certain services. The Court found that the consent authority is not necessarily required to have the benefit of signed contracts evidencing service agreements prior to determination of the DA. Rather, it should have the benefit of understanding the precise details of the type and range of services to be provided to residents. That information should also demonstrate how the services are to be provided and accessed by residents for the life of the development.¹⁴
30. The JRPP would need to be careful to be satisfied that the written evidence provided to it, demonstrates that reasonable access will be available to each of the prescribed services and facilities. The written evidence provided to the JRPP pursuant to clause 26(1) should provide the information referred to in *Treysten* and set out above.
31. With the exception of bank service providers, none of the services and facilities referred to in clause 26(1) are defined in SEPP SL. Accordingly, the plain and ordinary meanings of those terms would apply.
32. Clause 26(1)(a) permits the consent authority to determine the types and extent of access to 'shops, bank service providers and other retail and commercial services' that 'residents may reasonably require'. Accordingly, the consent authority may take into account the types of residents to be catered for in that respect.
33. If the consent authority were to conclude that only limited services meeting the requirements of clause 26(1)(a) were to be provided on the basis that frailty of occupants was such that expansive services were not required, it should be careful to ensure that a condition reflecting the circumstances of the intended occupants was imposed.

¹³ Also considering *Information Gateways* at [27]

¹⁴ At [81]

34. Clause 26(1)(b) and (c) do not include the same discretion as clause 26(1)(a) and require access to community services and recreation facilities and the practice of a general medical practitioner.
35. In my opinion, the JRPP could be satisfied of the location requirements of clause 26(2) of SEPP SL if services of the type referred to in clause 26(1) were 'brought' to the site. The reference to 'recreation facilities' in clause 26(1)(b) infers access to a building or complex for 'recreation'. Accordingly, access to such a facility would need to be provided 'on site' or within the location distances referred to in clause 26(2), rather than being 'mobile' in nature, and 'brought' to the site.
36. I so advise.

31 August 2015
Chambers



JACINTA REID

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