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12 October 2015

The General Manager
Ryde City Council
1 Devlin St
RYDE NSW 2112

Attention: Mr P Kapetas

Dear Sirs

cl. 26 SEPP(SL)

LDA 2014/0419
Development Application for Residential Aged Care Facility
8-14 Sherbrooke Rd and 78-82 Mons Ave, West Ryde

Thank you for your Brief to Advise regarding whether cl. 26(1) of State Environmental Planning Policy (Seniors Living) 2004 **(SEPP(SL))** is a prohibition or a development standard, and consequential matters.

Summary of Advice

1. For reasons set out below, my opinion is as follows

   a. The requirement in cl. 26(1) of SEPP(SL) for access (as defined) to certain facilities and services is a prohibition and not a development standard.

   b. I am also of the opinion that the facilities and services set out in cll. 26(1)(a), (b) and (c) do not "relate to an aspect of the development" and do not of themselves comprise a development standard. They are cumulative and (subject to some leeway in paragraph (a)), they all need to be satisfied.

   c. If in the alternative it is held by a Court that cl. 26(1) is a development standard, then:

      i. It is my opinion that any non-compliance with development standards might then be able to be allowed pursuant to clause 4.6 of Ryde Local Environmental Plan 2014 **(RLEP)** rather

than State Environmental Planning Policy No. 1 – Development Standards **(SEPP1)**; and

ii. I would then agree with Ms Reid's advice that compliance with cl. 26(1) can be achieved by provision of the facilities and services on site, although I question if in practice this can be achieved; and

iii. The requirement for provision of the facilities set out in cl. 26(1)(a), (b) and (c) are cumulative and satisfaction of provision of *all* those facilities is required.

Preliminary Point

2. I am instructed that:

   a. the DA is a for a "residential aged care facility" in the form of a multi-dwelling housing development at 8-14 Sherbrooke Road and 78-82 Mons Avenue, West Ryde; and

   b. the subject land is within the R2 Low Residential Zone under the RLEP.

3. I note from the Land Use Table in RLEP that development for the purpose of residential care facilities[1] is permissible with consent on land within the R2 zone.

4. Whilst I have been provided with some of the plans of the proposed development, I have not been briefed with the actual Development Application or Statement of Environmental Effects.

5. I assume that the DA seeks the carrying out of development pursuant to SEPP(SL) and not pursuant to any permissibility for residential care facilities in the R2 zone.

6. On that basis I further assume that SEPP(SL) is relevant to the DA.

7. I contrast the situation in *Central Coast Care v Wyong Shire Council* (2003) 124 LGERA 320 and *Amalgamated Holdings Ltd v North Sydney Council* [2012] NSWLEC 138. In *Central Coast Care,* Lloyd J held that as the development application was not under SEPP 5, the applicant could not treat the application as if it were so made.

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1 "residential care facility" is defined in the Dictionary to RLEP as follows:

residential care facility means 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,
but does not include a dwelling, hostel, hospital or psychiatric facility.

8. In *Amalgamated Holdings*, Biscoe J held

> 34 . . . in any event, in my opinion, the Seniors SEPP was inapplicable because the development application was not made pursuant to the Seniors SEPP and was permissible with consent under a local environmental plan. Therefore, the design principles in the Seniors SEPP were not mandatory considerations under s 79C(1)(a)(i) of the EPA Act (it does not follow that they could not be taken into account as relevant, even though not mandatory) The predecessor of the Seniors SEPP was State Environmental Planning Policy No 5 - Housing for Older People or People with a Disability (**SEPP 5**). SEPP 5 has been held not to apply where an applicant for development consent has not invoked it in its development application and the development was permissible with consent under a relevant local environmental plan: *Central Coast Care v Wyong Shire Council* [2003] NSWLEC 17, 124 LGERA 320 at [21] - [29] per Lloyd J.

9. My advice below is based on the above assumptions, namely that the DA is made pursuant to SEPP(SL).

Caselaw – Development Standard of Prohibition

10. Many decisions of both the Land and Environment Court and of the Court of Appeal[2] have dealt with the question of whether a particular provision in an environmental planning instrument comprises a development standard, from which decisions various applicable principles have emerged.

11. In *Poynting*,[3] Giles JA of the Court of Appeal (with whom Heydon JA and Young CJ in Eq agreed) in essence set out a 2-step approach for determining whether or not a provision constituted a development standard:

    a. Whether the proposed development is prohibited under any circumstances by the relevant provision where that provision is construed in the context of the LEP as a whole; and

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2 See, for example:

- *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319;
- *Lowy v Land and Environment Court New South Wales* (2002) 123 LGERA 179;
- *Laurence Browning Pty Limited v Blue Mountains City Council* [2006] NSWLEC 74;
- *Residents Against Improper Development Inc v Chase Property Investments Pty Limited* (2006) 149 LGERA 360;
- *Blue Mountains City Council v Laurence Browning* (2006) 67 NSWLR 672; 150 LGERA 130;
- *Agostino v Penrith City Council* (2010) 172 LGERA 380, at 387;
- *Huang v Hurstville City Council (No. 2)* [2011] NSWLEC 151;
- *Wilson Parking Australia 1992 Pty Limited v Council of the City of Sydney* (2014) 201 LGERA 232.

3 *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319 at 342-344.

b. If it is not so prohibited, whether the relevant provision specifies a requirement or fixes a standard in relation to an aspect of the proposed development.

12. In the Court of Appeal decision of *Blue Mountains City Council v Laurence Browning*,[4] Basten JA (with whom Ipp and Tobias JJA agreed):

a. expressed concern over the 2-step test set out by Giles JA in *Poynting*, and

b. noted (at [77] that a prohibition on a particular kind of development will not be a development standard if the characteristic or criterion engaging its operation is an essential element of the particular type of development that might be permissible, rather than a standard or requirement in respect of an aspect of the proposed development:

c. noted the possibility of a zoning criterion affecting the permissibility of a proposed development (which went to the first step of the *Poynting* test).

13. In *Browning*, the Court held that such a zoning criterion, which would not be amenable to SEPP 1, prohibited the development.

14. In *Agostino*,[5] the Court of Appeal had to consider whether the phrase "with a maximum floor area of 150m^2" after "fruit and vegetable store" constituted a development standard. In summary, the Court held that the phrase comprised an essential element of the particular type of development which might be permissible, i.e. a "fruit and vegetable store with a maximum floor area of 150m^2", and that this was different from development for "fruit and vegetable store" which was prohibited. The Court held that the phrase was therefore not a standard or requirement in respect of an aspect (size) of the proposed development and accordingly it was not a development standard. As the proposed fruit and vegetable store had a floor area greater than 150m^2, it did not fall into the type of development that might be permissible and that therefore it was prohibited.

15. In *Huang*,[6] the issue was whether the requirement of a proposed brothel not being near or within view of (relevantly) a place of public worship was a development standard or a prohibition. Clause 16A(2)(a) of Hurstville LEP 1994 provided:

16A(2) Despite any other provision of this plan, the council may grant consent to the carrying out of development for the purposes of sex services premises only if:

(a) the council is satisfied that the premises will not be near, or within view of, any educational establishment, place of public worship or hospital or any place frequented by children, and

4 *Blue Mountains City Council v Laurence Browning* (2006) 67 NSWLR 672; 150 LGERA 130.

5 *Agostino v Penrith City Council* (2010) 172 LGERA 380.

6 *Huang v Hurstville City Council (No. 2)* [2011] NSWLEC 151

16. Whilst her Honour replicated the summary of the principles articulated by Giles JA in *Poynting* as set out by Jagot J in *Browning* in the Land and Environment Court,[7] ultimately she concluded that the requirement was a prohibition because it was an essential element of the permissible development. This is similar to the conclusion reached by the Court of Appeal in *Agostino.*

17. Her Honour held *(my emphasis underlined)*:

> *22. Authorities confirm that the LEP as a whole must be considered. . . . Clause 16A(2) specifies that it applies "despite any other provision of the plan" whereas cl 8(2) states at the outset "except as otherwise provided by this plan". As submitted by the Council, the zoning table operates in relation to Zone No 4 except as otherwise provided in the plan, and here cl 16A otherwise provides.*
>
> *23. I agree with the Council's submission that in light of Amendment No 7, cl 16A(2)(a) contains an essential element of the permissible development. Clause 16A(2)(a) is an exception to that permissible use. It specifies a condition precedent which must be satisfied of whether the land meets the essential condition of not being near or within view of any of the other stated uses referred to in the subsection, and only if the Council is satisfied can development consent be granted.*
>
> *24. . . . This provision is as much concerned with land use as cl 8(2). I agree with the Council that it prohibits the use of land enjoying the specified characteristics for the named purpose.*
>
> *25. The Council relied on Mayoh No 2 (Court of Appeal) as the most analogous to cl 16A(2)(a). In that case the distinction was made:*
>
> > *"on land of characteristic X no development may be carried out" and a provision which in form provides: "on such land development may be carried out in a particular way or to a particular extent".*
>
> *26. I agree that the first description is analogous to cl. 16A(2)(a)*

18. Recently, in *Wilson Parking Australia 1992 Pty Limited v Council of the City of Sydney*,[8] Pepper J undertook an analysis of the various judgments relating to whether a particular provision is or is not a development standard. Her Honour noted the decisions of the Court of Appeal in *Browning* and also in *Huang* (both in the Land and Environment Court and in the Court of Appeal.[9]

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7 *Laurence Browning Pty Ltd v Blue Mountains City Council* [2006] NSWLEC 74 at [26].

8 *Wilson Parking Australia 1992 Pty Limited v Council of the City of Sydney* (2014) 201 LGERA 232.

9 The Court of Appeal refused leave to appeal. In refusing leave to appeal in *Huang* Allsop P held, relevantly:

> 15 *. . . I would add the following. The principles governing this case have been set out in decisions of this Court. No request is made to* revisit *those cases or the principles*

19. Pepper J noted the decisions of the Court of Appeal in *Poynting, Laurence Browning and Agostino,* and that the 2-step test articulated in *Poynting* had come under some "rebuke".[10]

20. Pepper J held that the "divergence in methodology" in the Court of Appeal decisions was "unhelpful" and concluded that it remained appropriate to follow the test set out by the Court of Appeal in Poynting.[11] as, in her Honour's opinion, it was that test which Pain J used in *Huang* which was the most recent test of the issue prior to *Wilson Parking.* However, with great respect to her Honour, for the reasons set out in paragraph 15 above, it appears that Pain J had moved beyond *Poynting.*

Clause 26 of SEPP(SL)

21. Clause 26 of SEPP(SL) provides, relevantly:

> **26 Location and access to facilities**
>
> (1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to:
>
> (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.
>
> (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 . . .
>
> . . .; 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

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within them. The debate is upon the characterisation of the provisions of the LEP in the light of those decisions. . . . .

10 *Wilson Parking Australia 1992 Pty Limited v Council of the City of Sydney* (2014) 201 LGERA 232 at [33]-[40].

11 *Wilson Parking Australia 1992 Pty Limited v Council of the City of Sydney* (2014) 201 LGERA 232 at 245.

. . .; 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

. . .

(5) In this clause:

bank service provider means any bank, credit union or building society or any post office that provides banking services.

22. The wording of cl. 26(1) provides for it dealing with access to facilities and services located at a distance of not more than 400m from the site of the proposed development. Whilst I acknowledge that "the distance of any land, building or work from any specified point" is an example of "possible development standards given in the definition of "development standard", as noted by Jagot J in *Browing* and endorsed by the Court of Appeal in *Bowning*,[12] "that fact alone does not mean that the provision is thereby a development standard".

23. Clause 26(1) must be seen as part of SEPP(SL) as a whole.[13] An examination of SEPP(SL) provides the following:

a. The SEPP(SL) is divided into 4 chapters

i. Preliminary

ii. Key Concepts

iii. Development for Seniors Housing

iv. Miscellaneous

b. Chapter 3 – Development for Seniors Housing contains relevantly the following:

i. Clause 14

14 Objective of Chapter

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12 Jagot J in *Laurence Browning Pty Limited v Blue Mountains City Council* [2006] NSWLEC 74 at [26(2)]; *Blue Mountains City Council v Laurence Browning* (2006) 67 NSWLR 672; 150 LGERA 130 at [61].

13 Giles JA in *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319 at 342[94]; Jagot J in *Laurence Browning Pty Limited v Blue Mountains City Council* [2006] NSWLEC 74 at [26(1)].

The objective of this Chapter is 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.

ii. Clause 15 *(my emphasis underlined)*

15 What Chapter does

This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy:

(a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and

(b) development on land that adjoins land zoned primarily for urban purposes for the purpose of any form of seniors housing consisting of a hostel, a residential care facility or serviced self-care housing.

iii. Part 2 – Site Related Requirements, including cl. 26(1) and clauses 27 and 28, respectively with bush-fire prone land and connection to water and sewerage facilities.

iv. Part 3 – Design Requirements;

v. Part 4 – Development Standards to be Complied with, including requirements regarding site area, site frontage, a building's height (in certain locations), floor space

vi. Part 7 – Development Standards that cannot be used to refuse development consent if the requirements or standards specified therein are met, and these include (in cl. 48 in relation to residential care facilities) a building's height, floor space ratio, landscaped area and parking

24. Pursuant to s. 35 of the *Interpretation Act* 1987, the headings of Chapters, Parts, Divisions or Subdivisions into which the SEPP is divided form part of the SEPP. The headings to individual clauses do not. Accordingly, the headings to the Parts of Chapter 3 set out in the previous paragraph are part of the SEPP.

25. In a previous decision of *Georgakis v North Sydney Council*[14], McClellan CJ held that the equivalent[15] provision in SEPP(SL)'s predecessor (i.e. cl. 12 of

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14 *Georgakis v North Sydney Council* [2004] NSWLEC 123.

15 There are differences between cl. 12 in SEPP 5 and cl. 26(1) in SEPP(SL) but those differences can be ignored for the purposes of this advice. Relevantly, clause 12(1) and (2) provided:

SEPP 5) was a development standard. Even so, his Honour held, at [44] and [45]:

> 44 *But for the decision of the Court of Appeal in* ***Poynting*** *and the approach taken by Giles JA and Mason P in* ***Lowy*** *there may have been force in the submission that, rather than being an aspect of permissible development, cl 12 defines a characteristic of the land without which the development is prohibited on that land. However, I consider that conclusion to be excluded by the necessity to take the "wider view" identified by Giles JA in* ***Poynting*** *and endorsed by Mason P in* ***Lowy****.*
>
> 45 *It is true, as the council points out, that clauses 13 and 13A of SEPP5 are titled "Development Standards" whereas cl 12 is headed "Matters for Consideration". However, the character of the provision for present purposes cannot be determined by its title. All of these provisions are contained within Part 2 of the Policy under the heading "Development Criteria". They all provide elements of potential development on land to which the policy applies by the operation of cl 4.*

26. I note also 2 earlier decisions in which Bignold J and Sheahan J respectively adverted to cl. 13 of SEPP 5 being a development standard amenable to SEPP 1.[16] In neither of those decisions was there any analysis whether in fact that was the case. *Hewitt* proceeded on a concession by the Council that cl. 13 was a development standard, and *Neometro* there is merely a statement that a

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"(1) The consent authority must not consent to a development application made pursuant to this Part unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to:

(a) shops, banks 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.

2) Access complies with this subclause 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; or

(b) 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

(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the relevant facilities or services; and

(iii) that is available both to and from the proposed development during daylight hours at least once per day from Monday to Friday (both days inclusive)."

16 *Hewitt v Hurstville Council* [2001] NSWLEC 294 at [5]; *Neometro Architects and Planners v Gosford City Council* [2002] NSWLEC 33 at [56]

SEPP 1 Objection should be upheld. With respect, those decisions do not assist.

27. It is my opinion that the decision of *Georgakis* is no longer relevant, due to the additional Court of Appeal for additional caselaw, relevantly *Browning* and *Agostino*, and the significantly different structure of SEPP(SL) compared to SEPP 5. The current SEPP(SL) has the relevant clause in a Part of the SEPP separate from Parts relating to Design Requirements (Part 3) or Development Standards (Parts 4 and 7), which was not the case in SEPP 5. Accordingly, in my opinion, the statements by McClellan CJ in [45] would not apply to SEPP(SL).

28. In contrast, his Honour's statement in [44] anticipates the subsequent findings of the Court of Appeal in *Browning* and *Agostino*.

29. In a very recent decision of *Symon v Hornsby Shire Council,*[17] Commissioner Pearson had to deal with the very question of whether cl. 26(1) of SEPP(SL) is a development standard or a prohibition. At the end the Commissioner finds it is preferable for her to not determine that question because she finds that the SEPP 1 Objection that has been lodged is not well founded so that even if cl. 26(1) were a development standard the DA in that case was to be refused.

30. Even so, the Commissioner examined in detail the decision of *Georgakis* and concluded (at [43]) that:

> *43 . . . While there are substantial similarities between SEPP 5 and SEPP(SL), there are significant differences, which would not preclude a different conclusion to that reached by McClellan CJ in* Georgakis.

31. In the present case, in light of all the above, it is my opinion that cl. 26(1) of SEPP(SL) sets out an essential requirement relating to whether the proposed development is permissible on any particular site, rather than whether it might be permissible in a particular form (e.g. being of a certain height and floorspace etc).

32. Cl. 26(1) is not dissimilar from cl. 16A(2)(a) of Hurstville LEP which was the subject clause under consideration by Pain J in *Huang*, which she held was an essential element of the permitted development see paragraph 15 above. It is analogous to the "land with characteristic X" referred to by Meagher JA in *North Sydney Municipal Council v Mayoh [No. 2]*[18]:

> *.... There is, in my opinion, a distinction in the provisions between a provision which in form provides: 'On land of characteristic X no development may be carried out' and a provision which in form provides: 'On such land development may be carried out in a particular way or to a particular extent.'*

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17 *Symon v Hornsby Shire Council* [2015] NSWLEC 1028 (Pearson C, 27 February 2015)

18 *North Sydney Municipal Council v Mayoh [No. 2]* (1990) 7 LGRA 222 at 234.

33. As such, it is my opinion that cl. 26(1) is not a development standard but acts as a prohibition if its requirements are not satisfied. The requirements affect the permissibility of a proposed development pursuant to SEPP(SL) regardless of whether all the facilities and services referred to in cl. 26(1) are proposed to be accommodate in that development on site.

Alternative – if a development standard then SEPP 1 or cl. 4.6 of RLEP

34. In the alternative, if clause 26(1) of SEPP(SL) were considered to be a development standard, the next question would arise whether any objection to facilitate non-compliance with its requirements would be pursuant to SEPP 1 or pursuant to cl. 4.6 of RLEP.

35. For the following reasons I am of the opinion that any such objection would need to be pursuant to cl. 4.6 of RLEP.

36. Clause 4 of SEPP 1 provides, relevantly:

> **4 Application of Policy**
>
> (1) This Policy applies to the State, except as provided by this clause.
>
> (2) This Policy does not apply to the land shown edged heavy black and shaded on the map marked "State Environmental Planning Policy No 1—Development Standards (Amendment No 5)" deposited in the head office of the Department of Planning and copies of which are deposited in the office of Wollongong City Council.

37. Clause 1.3 of RLEP provides:

> **1.3 Land to which Plan applies**
>
> (1) This Plan applies to the land identified on the Land Application Map.
>
> (1A) Despite subclause (1), this Plan does not apply to the land identified as "Deferred Matter" on the Land Application Map.

38. I understand that, apart from a small area of deferred matter, the Land Application Map identifies the Ryde Local Government Area.

39. Clause 1.9 of RLEP provides:

> **1.9 Application of SEPPs**
>
> (1) This Plan is subject to the provisions of any State environmental planning policy that prevails over this Plan as provided by section 36 of the Act.
>
> (2) The following State environmental planning policies (or provisions) do not apply to the land to which this Plan applies:
>
> *State Environmental Planning Policy No 1—Development Standards*

40. An immediate question arises whether there is an inconsistency between cl. 4 of SEPP 1 ("the SEPP applies to the State with one exception"), and cl 1.9(2) of RLEP ("SEPP 1 does not apply to the land to which the RLEP applies" (which is part of the State)).

41. Section 36(1) of the *Environmental Planning and Assessment Act* 1979 provides:

> (1) In the event of an inconsistency between environmental planning instruments and unless otherwise provided:
>
> (a) there is a general presumption that a State environmental planning policy prevails over a local environmental plan or other instrument made before or after that State environmental planning policy, and
>
> (b) (Repealed)
>
> (c) the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind.

42. The Court of Appeal had cause to consider in detail s. 36 and an inconsistency between planning instruments in *Hastings Point Progress Association Inc v Tweed Shire Council.*[19] Basten JA (with whom McColl and Young JJA agreed) noted the seminal discussion on "inconsistency" by Kirby P (as he then was) in *Coffs Harbour Environment Centre Inc v Minister for Planning*[20] and the need to construe the term "inconsistency" in s. 36 as "having regard to the ordinary and natural meaning of the word."

43. In the present case, I note that:

a. on their faces, an inconsistency appears clear between cl. 4 of SEPP 1 and cl. 1.9 of RLEP,

b. RLEP was made in 2014, whereas SEPP 1 commenced in 1980, and the most recent amendment to cl. 4 was in 2002;

c. Section 36 provides only for a "general presumption" that a SEPP prevails over an LEP, which, as a presumption, can be rebutted;

d. Section 36 provides in its chapeau for the provision of an inconsistency being dealt with otherwise than the general presumptions, by means of the term "otherwise provided";

e. Relevantly, s. 36 does not indicate where such "otherwise provided" provision should be set out;

f. The RLEP purports to provide for such "otherwise provided" provision.

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19 *Hastings Point Progress Association Inc v Tweed Shire Council* [2009] NSWCA 285.

20 *Coffs Harbour Environment Centre Inc v Minister for Planning* (1982) 47 LGERA 319.

44. On that basis, I conclude that cl. 1.9(2) of RLEP is sufficient to negate the general presumption that a SEPP would prevail over an LEP.

45. Further comfort for this conclusion is found in the fact that cl. 4.6 of RLEP makes reference to it applying to "a development standard imposed by this or any other environmental planning instrument."

Ms Reid's Advice

46. I have been asked to express an opinion on the correctness of Ms Reid's Memorandum of Advice dated 31 August 2015.

47. Whereas I disagree (for reasons set out above) with her conclusion that cl. 26(1) is a development standard, if it were a development standard then I agree with Ms Reid that the access requirement in cl. 26(1) and expanded in cl. 26(2) is a maximum distance of 400m, which, *in theory*, might be able to be satisfied by the provision on site of the facilities and services set out in cl. 26(1)(a), (b) and (c).

48. However, with respect, I find it difficult to conceive a consent authority being able to be satisfied of providing all those facilities on site. Whilst those facilities and services are not defined (other than "bank service provider"), their ordinary and natural meaning of those terms would apply.

49. By reason of the reference in the definition in cl. 26(5) of ***bank service provider***[21] to a post office (which would be a physical place), and given that cl. 26 of SEPP(SL) is concerned with a site having access to those facilities and services, I am of the opinion that "bank service provider" means a physical place in which any bank, credit union or building society or any post office that provides banking services.

50. Furthermore, cl. 26(1) makes clear that the facilities and services set out in paragraphs (a), (b) and (c) and to which access is required, are cumulative and they all need to be satisfied. I am of the opinion that those facilities and services do not "relate to an aspect of the development" and do not of themselves comprise a development standard. I accept that there is some leeway in paragraph (a) only ("shops, bank service providers and other retail and commercial services that residents may reasonably require" – my emphasis underlined).

51. It is my opinion that, in context, such leeway "that residents may reasonably require" relates to each of the 3 types of facilities and services referred to in

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21 Clause 26(5) provides:

(5) In this clause:

bank service provider means any bank, credit union or building society or any post office that provides banking services.

paragraph (a). It is necessary to consider the type of shops that residents of the proposed development may reasonably require rather than merely the presence of *any* shop. (For example, residents of seniors housing are unlikely to require a shop that caters solely for children or teenagers.)

52. I note the suggestion in paragraph 33 of Ms Reid's advice for a condition could be imposed to reflect the circumstances of the intended occupants if the consent authority were to conclude that only limited services meeting the requirements of cl. 26(1)(a) were to be provided on the basis that frailty of occupants was such that expansive services were not required. This suggestion is dependent on the access to those facilities and services being a development standard, with which for reasons set out above I do not agree.

53. Furthermore, such a condition would reflect the nature of the actual development for which consent is sought, and would not conflict with the condition required pursuant to cl. 18 of SEPP(SL)[22] which is a general requirement for all development allowed by Chapter 3 of SEPP(SL).

Conclusion

54. For reasons set out above, my opinion is as follows

a. The requirement in cl. 26(1) of SEPP(SL) for access (as defined) to certain facilities and services is a prohibition and not a development standard.

b. I am also of the opinion that the facilities and services set out in cll. 26(1)(a), (b) and (c) do not "relate to an aspect of the development" and do not of themselves comprise a development standard. They are

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22 Cl. 18 of SEPP(SL) provides:

18 Restrictions on occupation of seniors housing allowed under this Chapter

(1) Development allowed by this Chapter may be carried out for the accommodation of the following only:

(a) seniors or people who have a disability,

(b) people who live within the same household with seniors or people who have a disability,

(c) staff employed to assist in the administration of and provision of services to housing provided under this Policy.

(2) A consent authority must not consent to a development application made pursuant to this Chapter unless:

(a) a condition is imposed by the consent authority to the effect that only the kinds of people referred to in subclause (1) may occupy any accommodation to which the application relates, and

(b) the consent authority is satisfied that a restriction as to user will be registered against the title of the property on which development is to be carried out, in accordance with section 88E of the *Conveyancing Act 1919*, limiting the use of any accommodation to which the application relates to the kinds of people referred to in subclause (1).

(3) Subclause (2) does not limit the kinds of conditions that may be imposed on a development consent, or allow conditions to be imposed on a development consent otherwise than in accordance with the Act.

cumulative and (subject to some leeway in paragraph (a)), they all need to be satisfied.

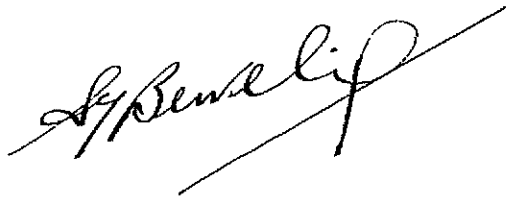
c. If in the alternative it is held by a Court that cl. 26(1) is a development standard, then:

   i. It is my opinion that any non-compliance with development standards might then be able to be allowed pursuant to clause 4.6 of Ryde Local Environmental Plan 2014 **(RLEP)** rather than State Environmental Planning Policy No. 1 – Development Standards **(SEPP1)**; and

   ii. I would then agree with Ms Reid's advice that compliance with cl. 26(1) can be achieved by provision of the facilities and services on site, although I question if in practice this can be achieved;

   iii. The requirement for provision of the facilities set out in cl. 26(1)(a), (b) and (c) are cumulative and satisfaction of provision of *all* those facilities is required.

Yours faithfully



S M Berveling