



specialist aged care

17 November 2015

Dr John Roseth
Chairman
Sydney East Joint Regional Planning Panel
GPO Box 39
Sydney, NSW, 2000

Dear Mr Roseth

Fernleigh Residential Aged Care Facility
8-14 Sherbrook Road and 78-82 Mons Avenue, West Ryde
Local Development Application No. LDA2014/0419

The purpose of this letter is to:

- respond to recent objections;
- distinguish Commonwealth funding and licensing issues from planning controls;
- clarify the level of care that will be provided at Fernleigh;
- demonstrate compliance with the SEPP; and
- provide further detail so that the JRPP can be satisfied that all relevant matters have been addressed.

As previously advised, all residents of the Fernleigh facility will be residents who would have qualified as 'high care' residents under the definitions previously set out in the *Commonwealth Aged Care Act* and *Aged-care Funding Instrument (ACFI)*.

The parameters of that definition have been encapsulated in the condition proposed by the Council so that the services which will be provided at Fernleigh pursuant to the development consent will, for all relevant purposes, be the provision of high care services to residents who require that level of care.

The Fernleigh facility has for many years provided a valuable and vital community service, despite a compromised physical configuration. The granting of the development consent will ensure this community service continues in a purpose built state of the art contemporary aged care facility.

Opal will now address the various matters which have arisen for consideration by the JRPP.

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Legal response

The first section of the Opal response relates to legal matters.

Opal has requested further clarification of the legal questions from its legal advisers.

Opal has been provided with the following advice from Susan Hill, Special Counsel (Hones Lawyers, North Sydney), which demonstrates that the provisions of cl26 can be satisfied in the following ways:

1. The primary position is that there is compliance with cl26 because all reasonably necessary services are provided which means that no variation is required.
2. Alternatively, if the JRPP considers that compliance is not achieved, it may vary the requirements of cl26 as a development standard.

Clause 26 can be satisfied without the need for variation

Opal considers that the proposed development satisfies the terms of cl26 without the need for variation because, when the provisions of cl26 are correctly applied, appropriate access will be available for residents in accordance with cl26.

This is because the terms of cl26 require the JRPP to undertake a two step process.

The first step is for the JRPP to determine which services are required to be provided to the residents of the Fernleigh facility.

This is confirmed by the legal advice provided to the JRPP by Ms Jacinta Reid (paragraph [32]-[33]).

Only once that question has been answered should the JRPP take the next step in the process, which is to ascertain whether access to those services will be provided as required by cl26.

Step 1 - what services must be provided?

In order to determine whether the provisions of cl26 have been satisfied, it is first necessary to clarify what services are required to be provided to residents by the terms of the clause.

The necessity of this inquiry is clear from the words of cl26(1) which is in the following terms (emphasis added):

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***

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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.

Clause 26 does not dictate that each and every service must be provided to all residents of every facility.

To the contrary, cl26 specifically directs the consent authority to consider what services may reasonably be required by the residents of the proposed development which is being assessed.

Applying that to the current context, the JRPP is considering the proposed Fernleigh development which has been deliberately designed as a high care facility catering for the specific needs of the frail and dementia sector of the aged care demographic.

This means that the JRPP must ask itself - to what services would this category of residents reasonably require access?

What services are required to be provided to Fernleigh residents?

In terms of the Fernleigh application, the JRPP is only concerned with identifying which of the services listed in cl26(1) are services to which the residents of a high care and dementia facility such as Fernleigh would reasonably require access.

The types of access which might reasonably be required by active, independent residents in other types of aged housing facilities are irrelevant to the JRPP's consideration of the needs of the residents of Fernleigh.

Turning specifically to the terms of sub-clause 26(1)(a), this provides that the residents of Fernleigh should have access to:

(a) shops, bank service providers and other retail and commercial services that residents may reasonably require...

It is not possible to reasonably form the opinion that residents with the level of incapacity which the Fernleigh facility is designed to cater for, would reasonably require access to these services.

To suggest that these residents would reasonably require that they be able to independently walk to a shopping centre for banking or other retail or commercial transactions would be to fail to acknowledge the extent of the limitations and incapacities with which they must contend on a daily

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basis.

The residents will not have the capacity to undertake any independent excursions.

Nor will they have the capacity to carry out financial, commercial or retail transactions.

For dementia and very frail residents, these matters are attended to by carers, guardians and professional staff.

To suggest that these residents are somehow capable of physically travelling to a shopping centre to independently undertake banking or other financial transactions would demonstrate a complete lack of understanding of their personal situation.

The JRPP would conclude that no access is required to such services.

Step 2 – provision of services

If the JRPP considered that some level of access was reasonably required to the services set out in cl26(1)(a), the detailed information provided by Opal in its letter to the Council dated 28 September 2015, make clear that the provisions of the SEPP are able to be satisfied.

As noted in the JRPP's legal advice (at [27]), cl26 does not stipulate the hours, or even days, during which the services are to be available. It is a matter for the consent authority to determine what is reasonable.

The requirements of cl26(1)(a) are satisfactorily addressed by the provision of on-line services for banking and retail services together with the availability of accompanied journeys to the shopping centre with professional staff and facilities within the Fernleigh development.

For the purposes of sub-clause (b), appropriate community services and recreation facilities will be available at the Fernleigh facility as outlined by Opal in its letter to the Council dated 28 September 2015.

For the purposes of sub-clause (c), medical practitioner services will be available at the Fernleigh facility.

These conclusions are consistent with the advice provided to the JRPP that if the relevant facilities are provided on site then they are clearly located within 400m of the site for the purposes of satisfying cl26.

Clause 26 is a development standard

If the JRPP considers that it is necessary to uphold a variation to the requirements of cl26, Opal maintains that the provisions of cl26(1) constitute a development standard which can be the

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subject of variation.

Three different judges of the Land and Environment Court, including the former Chief Judge, McClelland CJ, each concluded that the predecessor of cl26 (namely, cl12 of SEPP5) was a development standard that could be varied pursuant to the provisions of SEPP1. Those three decisions were:

- McClelland CJ in *Georgakis v North Sydney Council* [2004] NSWLEC124
- Bignold J in *Hewitt v Hurstville Council* [2001] NSWLEC 294
- Sheahan J in *Neometro Architects and Planners v Gosford City Council* [2002] NSWLEC 33

As demonstrated by the terms of cl12, which are set out below, there are no material differences between the former cl12 and the current cl26 for the purposes of determining whether or not it is a development standard:

12. (1) *Location, facilities and support services* 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*

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days inclusive).

(2A) The consent authority **must not consent** to a development application made pursuant to this Part to carry out development on land that adjoins land zoned primarily for urban purposes **unless** the consent authority is **satisfied, by written evidence**, that residents of the proposed development will have **reasonable access** to:

- (a) home delivered meals, and
- (b) personal care and home nursing, and
- (c) assistance with housework.

None of the legal opinions provided to the JRPP by its own advisers, the objectors or the Council have referred to any decision of the Court which has specifically taken a contrary view to the decisions set out above in more than 10 years of seniors housing applications having been the subject of consideration by the Court.

Given that there are 3 separate decisions of Judges of the Court which endorse this position, and no decisions to the contrary, Opal requests that the JRPP determine the matter in accordance with the established position of the Court by reference to the above decisions.

The facts and circumstances of this application, being an application for a facility which will be providing high level care principally to residents with dementia or other similar level of incapacity, demonstrate that such variation would be appropriate in circumstances where independent access to external services would not reasonably be required by the residents of the facility.

Objector issues

The following section of this submission relates to matters raised by objector Mr Reiss, in his submission to the JRPP dated October 2015.

Federal Government provisions are not relevant to planning controls

The objector refers to the relevance of the definition of 'high care' that was proposed, namely that all residents "will all be assessed as "high care" under the Commonwealth Aged Care Act and Aged-care Funding Instrument (ACFI), as administered by the Commonwealth Department of Social Services".

The objector appears to blur Federal Government policies, regulations and licensing requirements in relation to the provision of and funding for aged care services with the standards and controls of State Government environmental planning instruments.

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These are separate and distinct matters.

The role of the JRPP is to undertake an assessment of the development application by reference to the relevant planning controls which are imposed pursuant to the SEPP.

The bureaucratic, procedural and administrative regime in which the facility will operate, which is primarily the domain of the Federal Government, is not a matter with which the JRPP needs to concern itself.

The fact that the Federal Government has altered its funding regime in so far as these previously categorised levels of care as 'high' and 'low' is of no relevance to the use of similar terms within conditions of consent.

The removal of the definition from the Act does not change the fact that the current and future residents of Fernleigh will be 'High Care' as previously defined in the Act.

The Federal Government previously used the distinction between 'high' and 'low' levels of aged care within what can fairly be described as a complex administrative hierarchy which required classification of the level of care provided to each resident in order to determine a daily funding allowance.

That system has now been amended.

However, that carries with it no imperative regarding amendment of the planning controls or the services which are permitted to be provided in accordance with development consent.

Whilst the Commonwealth Aged Care Act and Aged-care Funding Instrument no longer distinguish between "high care" and "low care" residents, it does not change the fact that current and future residents at Fernleigh are (and will be) 'high care' residents as previously defined under the Act.

The Council has proposed an appropriate condition which, for the purposes of the development consent (not for Federal Government funding or licensing) stipulates and confines the nature of the services which will be provided at Fernleigh as follows:

Further restriction on occupation of the development.

Notwithstanding the above condition, the development may only be occupied by residents which require high level care. For the purposes of this condition, high level care means care provided either by registered nurses, or under the supervision of registered nurses, on a 24 hour / day basis to people who need almost complete assistance with most activities of daily living. Nursing care is combined with accommodation, support services (cleaning, laundry and meals), personal care services (help with dressing, eating, toileting, bathing and moving around), and allied health services (such as physiotherapy, occupational therapy, recreational therapy and podiatry).

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Opal believes the above condition of consent proposed by Council satisfactorily encapsulates the nature of 'high care' services which will be provided to and required by the residents of the redeveloped Fernleigh facility.

Impacts of a "high care" classification

The objector claims that classifying all residents as "high care" will interfere with Government subsidies and annual allocation of places to aged care facilities

This statement is incorrect and without foundation.

Previously the Federal Government mandated that certain aged care bed licences should only be used to cater for 'high care' or 'low care' residents, however there is no longer any Government mandate in this regard. It should be noted the licences at Fernleigh have no conditions attaching to them as to the type of residents to be admitted. Further, the Government planning ratios which underpin the annual allocation of licences (80 per 1,000 people over 70), do not stipulate any particular type of care unless the Provider applies to specifically cater for one of the 'special needs groups'.

The very nature of the special needs groups means that they will be 'high care' residents.

Please refer to Appendix A – Legal Advice from Clayton Utz titled "Fernleigh Facility - "high" level of residential care" which confirms there are no legal restrictions on Opal's ability to admit only 'high care' residents at Fernleigh.

The Opal website

Clearly, the Fernleigh facility will be governed by the development consent, not by the Opal website.

The centre is one of more than 70 aged care residential facilities that are operated by Opal.

The Fernleigh facility has, for many years, been dedicated to the provision of services for high care and dementia residents.

Information which is contained on the Opal website is generic in nature. This is because the website is likely to be the first port of call for families who have reached the point of making what is often a difficult decision regarding placing an aging and/or frail parent into care.

The aim of the website is not to provide a detailed analysis of the terms and conditions under which each of the many centres operates. As well as operating 71 'high care' facilities (Class 9a or 9c building), Opal also operates 3 Assisted Living Apartment complexes (Class 3 building) which do provide accommodation for lower care residents and operate under the state based Retirement Village Act. It should be noted these are in the process of being upgraded and transitioned into

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'high care' facilities due to a lack of demand for these 'low care' services.

Rather, the website is intended to provide a range of general information so that families can, as they being their inquiries regarding aged care options, obtain a reasonable understanding of the range of services offered by Opal.

The entry for Fernleigh on Opal's website clearly states the home is for high care residents.

In relation to the description of Respite Care on the Opal website, the Objector indicates that said description includes activities that would not be normally be associated with "high care" frail seniors (such as yoga, Pilates, cinema days, gardening and "men's shed"). In fact these activities are described in specific reference to a 'day respite' program which operates at a small number of regional Opal homes (the recipient only stays between 9am-3pm). No such service is proposed at Fernleigh.

A generic description of respite services across 71 homes is not relevant to any analysis of Fernleigh, which does (and will) provide 'high care' residential respite. This is made clear to any person making inquiries regarding admission of a resident to care.

Likewise, in Opal's "Step by Step Guide - All you need to know about Residential Aged-Care" which is available on the Opal website, is a generic consumer guide to assist people who are considering aged care options. It is not specific to any Opal home/s including Fernleigh.

The Commonwealth Government website

The objector refers to the Commonwealth Government website 'myagedcare.com.au'.

This website contains the database of available Residential Aged-Care places.

The entry for Opal Fernleigh is a generic entry for every Opal home listed on *myagedcare* which currently has no restrictions on its licences (as noted above, Opal operates more than 70 aged care facilities).

We have checked our records and can find no history of Fernleigh accepting low care respite residents. Every resident at Fernleigh is 'high care', requires 24 hour medical supervision and is incapable of independently accessing offsite services.

As noted above, the entry for Fernleigh on Opal's website clearly states the home is for high care residents.

Range of services

The objector claims that limiting the admission of residents to 'high care' in the manner proposed would, in some way, be inconsistent with the objectives of the SEPP which is to: *"create opportunities for the development of housing that is located and designed in a manner particularly*

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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."

As discussed above, the SEPP clearly does not require that all levels of care be provided in every facility.

Contrary to the objector's assertions, the Fernleigh facility is being designed to cater for a special sector of aged care residents who would otherwise be at risk of not receiving appropriate care in a more general residential care setting.

The Fernleigh facility furthers the objectives of the SEPP by ensuring that frail residents, specifically those suffering from dementia, do receive appropriate care, services and facilities.

This is consistent with the Aged Care Act which, although it provides for the admission of a range of resident types, does not mandate that any service provider is required to accommodate all sectors. The service provider has the discretion to tailor its service to cater for any group that falls within the terms of the Act.

Conclusion

The matters set out above demonstrate that the proposed redevelopment of the Fernleigh facility satisfies all relevant provisions of the SEPP and is worthy of approval on its merits.

We trust that this information fully satisfies the requirements of the Sydney East Joint Regional Planning Panel. If additional information is required or further clarification is sought on any of the matters outlined above, please do not hesitate to contact the undersigned.

Yours sincerely

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