Our reference Aaron Gadiel 35618906
Direct line +61 2 9931 4929
Email aaron.gadiel@gadens.com
Partner responsible Aaron Gadiel

gadens

Gadens Lawyers
Sydney Pty Limited
ABN 69 100 963 308

77 Castlereagh Street
Sydney NSW 2000
Australia

DX 364 Sydney

T +61 2 9931 4999
F +61 2 9931 4888

gadens.com

20 November 2015

John Roseth
Chair, Sydney East Joint Regional Planning Panel
C/- Joint Regional Planning Panels Secretariat
GPO Box 39
Sydney NSW 2001

By email: jrppenquiry@jrpp.nsw.gov.au

Dear Mr Roseth

2015SYE114 Canada Bay DA2015/0332

We confirm that we act for:

[redacted]

As you would recall, we made a written objection in relation to the above matter on 28 September 2015. This objection related to attempts by the proponent to secure a variation to development standards. Subsequent to this objection, the proponent prepared a series of new documents seeking to vary development standards (**the revised clause 4.6 requests**). These documents are:

- *Clause 4.6 Variation to Development Standard: Clause 4.3 Height of Buildings*, finalised by JBA on 28 October 2015 (**the LEP height variation request**).
- *Clause 4.6 Variation to Development Standard: Clause 4.4 Floor Space Ratio*, finalised by JBA on 28 October 2015 (**the LEP FSR variation request**).
- *Clause 4.6 Variation to Development Standard: Clause 40(4) of Seniors Housing SEPP*, finalised by JBA on 28 October 2015 (**the SEPP height variation request**).

We attended the meeting of the Sydney East Joint Regional Planning Panel (**the panel**) on 12 November 2015. We had only been in possession of the revised clause 4.6 requests for a short-time. Accordingly, we orally addressed the panel on the legal issues that would prevent the lawful grant of a development consent.

As you would recall, the panel deliberated on the matter. It then offered us the opportunity to put our oral submission to the panel in written form. This would enable the proponent to provide its own legal view in response, as well as allowing the panel the opportunity to obtain independent legal advice. This letter outlines the legal issues that we addressed orally on 12 November 2015.

In summary, our clients' submission is as follows:

- In relation to the site, SEPP 1 is no longer relevant. Any variation to development standards (including those under the Seniors Housing SEPP) must be considered against clause 4.6 of the LEP.

- The proposed development will **not** be carried out '**in accordance'** with the Seniors Housing SEPP because of its height and number of storeys.

- Clause 15 of the Seniors Housing SEPP **only** sets aside local controls when the proposed development is to be carried out 'in accordance with' the Seniors Housing SEPP.

- It will be unlawful for development consent to be granted for the proposed development unless a variation under a clause 4.6 request is approved in relation to the LEP's height and FSR controls, as well as the Seniors Housing SEPP height and storey controls.

- Each of the revised clause 4.6 variations purports to have been prepared in light of recent court decisions. However:

  - the LEP height variation request; and

  - the LEP FSR variation request,

  make no attempt to **actually** comply with the recent decisions.

- The SEPP height variation request is misconceived and, if relied upon by the consent authority, would lead it into legal error. Specifically:

  - The intent of the local planning controls is that on the termination of the use of site as an educational establishment, the site will transition to a new character that is more in-keeping with the adjacent land uses. The objective of the Seniors Housing SEPP height and storey controls is intended to accommodate this outcome. It cannot be said that this objective would be thwarted or defeated by a compliant development.

  - The proponent asks the consent authority to protect the current character of the area by allowing **all** the buildings that allegedly give the area that character to be almost completely demolished. The new replacement built form would plainly have a very different appearance.

- In seeking to establish sufficient environmental planning grounds to justify a contravention:

  - The fact that there are existing buildings on the site is irrelevant.

  - The fact that the overall development may (according to the proponent) be designed so that it causes no or minimal environmental harm does not, in itself, justify a contravention.

  - Allowing more of a particular development that serves a social purpose is an environmental planning ground that is capable of justifying a contravention, but only when there are no significant adverse impacts from that contravention.

- In the present circumstances it is impossible to see how the proponent could demonstrate that there are no significant adverse impacts that would arise from the proposed contravention.

- The objectives for each of the height and storey controls are intended to ensure that the desired future character is achieved. The 'desired future character' sought is a concrete one that is measured in terms of specific heights. It simply is not reasonably open to the consent authority to conclude that the proposed development will be consistent with the height and storey controls.

- Similar issues arise in relation to the FSR control in the LEP. It simply is not reasonably open to the consent authority to conclude that the proposed development will be consistent with the LEP's FSR control.

- Each of the clause 4.6 requests must establish that the proposed development is consistent with the R2 zone objectives, including the clause 4.6 request made in relation to the Seniors Housing SEPP. The proposed development cannot be consistent with the zone objectives as it is not a type of development that may be provided **within** a **low density** residential environment. It is legally impossible for the consent authority to be satisfied that the proposed development is consistent with the zone objectives.

- There is no way that the development, as currently proposed, can lawfully be the subject of a development consent. The great bulk of our criticisms will apply no matter how the clause 4.6 requests are framed.

- If the panel wishes to simplify its consideration of this matter, we suggest that the panel simply decide the point on consistency with the zone objective (as per section 10 of this submission). This point alone is sufficient to require a refusal of the development application.

The details of our submission are set out below. Please note that this submission only relates to legal issues. Our clients have made separate submissions that deal with merit issues.

1. The relevant site details and controls

1.1 The site is 17 Millar Street, Drummoyne, also known as Lot 1 DP795487 and Lot 6 DP9735 (**the site**).

1.2 Presently the site comprises a series of disused buildings that were originally erected for the purposes of a public school.

1.3 The site is zoned 'R2 Low Density Residential' under the Canada Bay Local Environmental Plan 2013 (the LEP).

The LEP controls

1.4 The site is subject to a maximum building height of 8.5 metres under clause 4.3(2) of the LEP. The LEP requires that this be measured to the highest point of the building, including plant and lift overruns, but excluding communication antennae, etc.

1.5 The site is subject to a maximum floor space ratio (**FSR**) of 0.5:1 under clause 4.4(2) of the LEP.

The Seniors Housing SEPP controls

1.6 *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**the Seniors Housing SEPP**) applies to the site. Its provisions are triggered when a development application is made under Chapter 3 of the SEPP.

1.7 Under clause 40(4)(a) of the Seniors Housing SEPP, consent cannot be granted to a development application unless the height of all buildings in the proposed development is eight metres or less.

1.8 Building height is not calculated in the same way that it is under the LEP. For the purposes of the Seniors Housing SEPP, it is measured up to any point on the ceiling of the topmost floor of the building (ie it does not include external roof structure, etc).

1.9 Under clause 40(4)(b) of the Seniors Housing SEPP, consent cannot be granted to a development application if a building that is adjacent to a boundary of the site is more than two storeys in height.

1.10 Under clause 48(b) of the Seniors Housing SEPP, a consent authority must not refuse consent to a development application for a residential care facility if the density and scale of the buildings when expressed as a floor space ratio is 1:1 or less.

2. The proposed development

2.1 The development application is for:

> Partial demolition and construction of a new building for use as a residential aged care facility with accommodation for 161 persons, basement carparking, alterations and additions to existing hall building, tree removal and landscaping, waste facilities, new fencing, signage and associated site infrastructure

2.2 Despite the proponent's description of the development as being a 'partial' demolition, the full extent of the demolition for which consent is sought is extensive. The relevant plan (Bickerton Masters Architecture 'Existing & Demolition Site Plan', Drawing DA102 Revision 2) shows that:

(a) the major buildings on the site will be completely demolished (blocks B, D, G and F); and

(b) the remaining two buildings (blocks A and C) will be almost entirely demolished.

2.3 The development is best described as:

(a) the **demolition** of a series of two storey buildings with a peaked roof; and

(b) the erection of **new** four storey buildings with a flat roof (as a residential care facility).

2.4 The proponent is relying on Chapter 3 of the Seniors Housing SEPP (as the environmental planning instrument that permits the development to be carried out with consent).

2.5 The proposed development will exceed the LEP's maximum height. It will reach 13.93 metres in height (when measured in accordance with the LEP's definition of height). This is 5.43 metres above the LEP maximum of 8.5 metres.

2.6 The proposed development will exceed the maximum height under the Seniors Housing SEPP. It will reach 13.25 metres in height (when measured in accordance with the Seniors Housing SEPP definition of height). This is 5.25 metres above the Seniors Housing SEPP maximum of eight metres.

2.7 The proposed development will have a FSR of 1.33:1. It will exceed the LEP's FSR maximum of 0.5:1. Given that the site area is 8,989m^2 the FSR exceedance means that approximately 11,955m^2 of gross floor area would be developed on the

site, more than two-and-half times the gross floor area that would be permitted under the LEP (4,495m^2).

2.8 The proposed buildings adjacent to the boundaries of the site will be four storeys, contrary to the standard in the Seniors Housing SEPP.

3. The relationship between state environmental planning policies and local environmental plans

3.1 The relationship between state environmental planning policies (**SEPPs**) and local environmental plans (**LEPs**) is governed by section 36 of the *Environmental Planning and Assessment Act 1979* (**the Act**). Section 36(1) says:

3.2 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 …
>
> (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 (bold added).

3.3 The meaning of the phrase 'general presumption' was considered by Young JA in *Hasting Point Progress Association v Tweed Shire Council* [2009] NSWCA 285. It was said (at [75]):

> [T]here is no definition of "general presumption", but it seems to me that is means rebuttable presumption rather than conclusive presumption and that the term means that **unless**, on a proper construction of the relevant instruments **one can see some other legislative intention**, in the event of an inconsistency, the State environmental planning policy prevails and a provision of a local environmental plan ceases to apply to the extent of the inconsistency (bold added).

3.4 A similar assessment was made by Basten JA in the same judgment (at [26]):

> In short, where there is no clearly expressed legislative intention, the terms of a SEPP will prevail over inconsistent provisions in a LEP. However, when a LEP is clearly expressed to override a SEPP, the LEP will take precedence.

3.5 This is relevant in the present circumstances in two respects.

3.6 **Firstly**, it is relevant to the mechanism by which any development standards may be lawfully varied.

3.7 **Secondly,** it is relevant to the extent (and how) that the Seniors Housing SEPP works together with the LEP.

4. Mechanism by which development standards may be lawfully varied

4.1 Historically, development standards in LEPs and SEPPs could be varied under *State Environmental Planning Policy No 1—Development Standards* (**SEPP 1**).

4.2 However, in relation to the site, SEPP 1 is no longer relevant.

4.3 This is because clause 1.9(2) of the LEP says:

> 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* (bold added) …

4.4 It is important to note that SEPP 1 is not simply excluded in relation to development standards imposed by the LEP. It is excluded from having any application at all to the land that is the subject of the LEP. It would take explicit language in a SEPP to override this explicit and unambiguous legislative intention embodied in the LEP.

4.5 The closest thing SEPP 1 contains to such a provision is clause 5:

> This policy prevails over any inconsistency between it and any other environmental planning instrument, whenever made.

4.6 However, clause 5 is a generalised statement. The intent of clause 1.9(2) of the LEP was clearly to override clause 5 to the extent that it would allow SEPP 1 to apply to the land covered by the LEP. The clear and specific words of clause 1.9(2) plainly rebut the general presumption that would otherwise apply under section 36(1) of the Act.

4.7 This is evidently the same view reached by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90. In that matter it was said (at [24]) that:

> Clause 4.6 operates exclusively in relation to applications for variation of all development standards i**ncluding but not limited to those considered formerly under *State Environmental Planning Policy No 1 – Development Standards* (SEPP 1)** as provided in cl 1.9 (bold added).

4.8 For completeness, we should add that it is impossible to argue that SEPP 1 is still available to vary the development standard of a SEPP, but not a standard instrument-compliant LEP (noting that clause 1.9 is a standard instrument mandated clause). This is because if SEPP 1 still applied to the land, it would apply **in full**. This would mean that — under its clauses 6 and 7 — SEPP 1 could still be used to vary standard instrument LEP imposed development standards, as well as SEPP standards. Such an outcome is so clearly contrary to the intention of the legislative scheme that it must be readily dismissed. That is, SEPP 1 cannot be said to have any application to the site – in relation to the LEP standards or standard imposed under other SEPPs.

4.9 All of this is consistent with — and reinforced by — the terms of clause 4.6 of the LEP. Clause 4.6 plays a similar role to SEPP 1 (although, crucially, its requirements are different).

4.10 Clause 4.6(1)-(4) is as follows:

> 4.6 Exceptions to development standards
>
> (1) The objectives of this clause are as follows:
>
> (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
>
> (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.
>
> (2) Development consent may, subject to this clause, be granted for development **even though the development would contravene a development standard** imposed by this **or any other environmental planning instrument**. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.
>
> (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is **consistent** with the **objectives** of the **particular standard** and the **objectives** for development within the **zone** in which the development is proposed to be carried out …

4.11 Significantly, clause 4.6(2) explicitly allows development standards to be varied even though they are imposed by another environmental planning instrument. That is, the clause's express provisions contemplate that variation to, say, a SEPP development standard will be dealt with under clause 4.6.

4.12 This is important. There are important differences between the processes for upholding a SEPP 1 objection and those for approving a clause 4.6 request. In this case, the key issues (to be discussed further later in this submission) are:

(a) the requirement to establish that the proposed development will be consistent with the **zone** objectives;

(b) the requirement to establish that there are sufficient environmental planning grounds to justify contravening the development standard, separately from the 'unreasonable or unnecessary' requirement; and

(c) the requirement to establish that compliance with the development standard is 'unreasonable or unnecessary', separately (and in addition to) the requirement to establish consistency with development standards and zone objectives.

5. The extent that the Seniors Housing SEPP works together with the LEP

5.1 Clause 5(3) of the Seniors Housing SEPP says:

> If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the **inconsistency** (bold added).

5.2 It is important to understand that it is possible for a SEPP and an LEP to work together. That is, the mere fact that a SEPP makes some provision in relation to a development does not, in itself, displace all of the provisions of a LEP in relation to a development. Even though a SEPP and a LEP both make provisions that purport to apply to a given development, it is possible that no inconsistency arises if:

(d) it is possible to comply with the requirements of both instruments;

(e) the LEP does not remove or diminish the conferral of power made by the SEPP; and

(f) there is no discernible intention for the SEPP 'to cover the field', to the exclusion of the LEP.

This is consistent with the analysis of Basten JA (with whom, in this regard, Young JA agreed at [76]) in *Hasting Point Progress Association v Tweed Shire Council* [2009] NSWCA 285 [51].

5.3 In *Mete v Warringah Council* [2004] NSWLEC 273, the Land and Environment Court said (at [28]):

> [The Seniors Housing SEPP] applies to all land within New South Wales …. but is **not** expressed in a way which excludes the operation of the …[LEP] except to the extent of any inconsistency (bold added).

5.4 The key provision in the Seniors Housing SEPP is clause 15. It provides that

> This Chapter [ie Chapter 3] **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 … (bold added).

5.5 Clause 15 has the potential to create an inconsistency with the LEP. However, it is qualified in an important respect. It only applies when development is to be carried out 'in accordance with' the Seniors Housing SEPP. In this context, there is no room for a legal argument about the meaning of the phrase 'in accordance with'. It means that one thing must be consistent with or correspond to another thing (*Mount Barker Properties v District Council of Mount Barker* 115 LGERA 190, 204). There must be complete agreement (*Re Federated Furnishing Trade Society of Australasia* (1993) 41 FCR 151, 158).

5.6 The wording of clause 15 is in sharp contrast with, say, clause 28(1) of the *State Environmental Planning Policy (Infrastructure) 2007* which merely says:

> Development for the purpose of educational establishments may be carried out by any person with consent on land in a prescribed zone.

5.7 The Court of Appeal has decided that a provision of a LEP that mandates that consent be refused in circumstances that would diminish (a predecessor provision of) clause 15 was an inconsistent provision and therefore had no effect. However, this decision made express reference to the wording of (the predecessor provision of) clause 15. That is, the override only applied **when the development was carried out 'in accordance with' the Seniors Housing SEPP**: *Hasting Point Progress Association*, per McColl JA [9] and Young JA [98].

5.8 The importance of this qualification is reinforced by the stated objectives of the Seniors Housing SEPP itself. Clause 2(2)(a) says:

> These aims will be achieved by: … setting aside local planning controls that would prevent the development of housing for seniors or people with a disability **that meets the development criteria and standards specified in this Policy** (bold added) …

5.9 The proposed development will **not** be carried out **in accordance** with the Seniors Housing SEPP because of its height and number of storeys (see paragraph 2.6). There is no provision **within** the Seniors Housing SEPP for the controls to be varied. The only authority for a variation of the height and storey controls set by the Seniors Housing SEPP can come from the LEP (ie clause 4.6). Accordingly, even if a clause 4.6 variation was made allowing the development to contravene the height and storey controls imposed by the Seniors Housing SEPP, the development would not be one that was in accordance with the Seniors Housing SEPP.

5.10 Accordingly, the development standards of the LEP cannot be — in the context of the proposed development — set aside by clause 15.

5.11 For completeness, we should highlight the perversity of any contrary argument. If clause 15 were somehow (despite its plain words) to prevail over the LEP in all circumstances, then it would also prevail over clause 4.6 of the LEP. The consequence would be that the development must be carried out 'in accordance with this Policy' irrespective of clause 4.6. The proponent cannot simultaneously argue that clause 15 overrides the development standards in the LEP, but not clause 4.6. This would be irrational. Either the LEP development standards **and** clause 4.6 apply or they do not. In our view, they do apply in this case.

5.12 The practical consequence of all of this is that it will be unlawful for development consent to be granted for the proposed development unless a variation under a clause 4.6 request is approved in relation to the LEP's height and FSR controls, as well as the Seniors Housing SEPP height and storey controls.

5.13 We note that the proponent has submitted such requests that attempt to secure that outcome. These are discussed further below.

6. Unreasonable or unnecessary in the circumstances of the case

6.1 The courts have recently clarified the way in which clause 4.6 works in a series of decisions: *Four2Five v Ashfield Council* [2015] NSWLEC 1009; *Four2Five v Ashfield Council* [2015] NSWLEC 90 and *Four2Five v Ashfield Council* [2015] NSWCA 248.

6.2 Prior to these decisions it was commonly thought that if a proposed development was consistent with the objectives of a development standard, then it would automatically mean that requiring strict compliance with the numerical standard would be 'unreasonable or unnecessary in the circumstances of the case'. This mistaken view was based on an old body of case law relevant to SEPP 1.

6.3 This means that it is not open to a consent authority to conclude that requiring strict compliance will be 'unreasonable and unnecessary' merely because the objective of a development standard will be achieved. The Land and Environment Court have nominated some circumstances in which the 'unreasonable and unnecessary' requirement could be made out. These are:

(g) that the underlying objective or purpose is not relevant to the development;

(h) that the objective would be defeated or thwarted if compliance was required;

(i) that the development standard has been virtually abandoned or destroyed by the Council's own actions in departing from the standard; or

(j) that the zoning of the land is unreasonable or inappropriate

(*Four2Five v Ashfield Council* [2015] NSWLEC 1009 [61]).

6.4 Each of the revised clause 4.6 variations purports to have been prepared in the light of *Four2Five v Ashfield Council*. However:

(a) the LEP height variation request; and

(b) the LEP FSR variation request,

make no attempt to **actually** comply with the decision in *Four2Five.*

6.5 Nothing in those two documents attempts to address why compliance is 'unreasonable or unnecessary in the circumstances of the case' in any way other than via consistency with the development standard objectives. The documents themselves each reflect this when they say (on page 6 of each document):

> Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the First Method that "the objectives of the standard are achieved notwithstanding non-compliance with the standard".

6.6 As a result, there is no reasonable basis for the consent authority to be satisfied that the applicant's written request has adequately addressed the 'unreasonable or unnecessary' requirement (as per clause 4.6(4)(a)(i)).

6.7 The SEPP height variation request does actually **attempt** to comply with *Four2Five* by saying (on page 6) that it also relies on the 'third method', being:

> that "the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable".

6.8 The SEPP height variation request says (on page 18) that:

> Compliance with the height and storey standards would thwart the first underlying objective of the height and storeys development standards, namely to achieve compatibility of bulk and scale with the existing character of the locality. This is because the height of the proposed development is mainly contained within the height of the existing buildings by utilising the existing roof areas to contain habitable floors. The existing buildings already from part of and contribute to the location's character. Protection of the current character would be thwarted by requiring the buildings to be lower than those already on the site. Compatibility with the current streetscape is maintained by utilising existing building forms.

6.9 If a consent authority were to approve a clause 4.6 request on this basis it would make a legal error. We say this for two reasons.

6.10 **Firstly**, the above text misdirects the consent authority. If the consent authority were to rely on it, it would be asking itself the wrong question. The objects of the Seniors Housing SEPP height and storey controls are not explicitly stated in the instrument itself. However, they can be readily inferred from the design principles set out in Division 2 of Part 3 of the Seniors Housing SEPP. These principles clearly establish the matters to which the development standards set out in the subsequent Part 4 are seeking to address. Relevantly, they say (in clause 33):

> **33 Neighbourhood amenity and streetscape**
>
> The proposed development should:
>
> (a) recognise the desirable elements of the location's current character (or, **in the case of precincts undergoing a transition, where described in local planning controls, the desired future character**) so that new buildings contribute to the quality and identity of the area, and …
>
> (c) maintain reasonable neighbourhood amenity and appropriate residential character by: …
>
> (iii) adopting building heights at the street frontage that **are compatible in scale with adjacent development** (some bold added) …

6.11 The objective here is to be 'compatible in scale with adjacent development'. The adjacent development is low density residential housing, not four storey buildings. The existing two storey buildings on the site, that are to be demolished, are clearly not 'adjacent development'.

6.12 The objective is also to address recognise the desirable elements of the location's character. However, the objective is **not** for the built form to respond to a location's **current** character **if the area is in transition**. If the local planning controls indicate that the area is in transition, the objective is for the built form to respond to the desired **future** character.

6.13 The existing two storey buildings on site (which the proponent proposes to almost completely demolish) materially do not comply with the existing 8.5 metre height limit and 0.5:1 FSR imposed by the LEP. The LEP is relatively recent (2013) and the buildings have been there for decades. The intent of LEP controls is plainly to transition the built form on the site to a lower density, lower scale form. That is, in this instance, the LEP controls are seeking to achieve a 'desired future character' rather than re-inforce or protect any existing character.

6.14 This is made clear by the first objective of the LEP's height control, which (in clause 4.3(1)(a)) says:

> to ensure that buildings are compatible with the desired **future** character in terms of building height and roof forms (bold added)

6.15 Similarly, the first objective of the LEP's FSR control clause 4.1(a) declares the same goal:

> to ensure that buildings are compatible with the bulk and scale of the desired **future** character of the locality (bold added)

6.16 The only way that the underlying purpose of the Seniors Housing SEPP's height and storey controls could be defeated or thwarted is if requiring strict compliance would:

(a) **prevent** achievement of the desirable elements of the location's desired **future** character as expressed in the local planning controls; or

(b) lead to building heights at the street frontage that are **not** compatible in scale (ie too small when compared with) **adjacent** development.

6.17 This is the question which the consent authority must ask itself if it is considering allowing a clause 4.6 request on the nominated ground.

6.18 When this aspect of the matter was discussed with panel members on 12 November 2015, some panel members suggested that the inclusion of the school site within the R2 zone, and the application of the R2 controls to the zone, was merely the result of the application of a Department of Planning practice note.

6.19 Care must be taken when resorting to extrinsic material (ie material that does not form part of the LEP) in interpreting a statutory document such as the LEP. In interpreting a legislative instrument extrinsic material should generally only be resorted to if there is an ambiguity or some imprecision. These circumstances do not arise in the present case.

6.20 Nonetheless, even if the relevant extrinsic material were considered, it only reinforces our view. We assume the Department of Planning practice note that was being referred to was 'Zoning for Infrastructure in LEPs', PN 10–001, dated 14 December 2010. Relevantly, this established principles for zoning 'infrastructure' (which is defined to include educational establishments). Among these principles is the following (on page 3):

> Applying the adjacent zone type to public infrastructure land follows a basic planning principle of aligning land uses. It is established practice to refer to the zoning of adjoining land when seeking to establish an appropriate zoning for land. In many cases the infrastructure land would have been zoned the same as the adjoining land if it had not been used instead for an infrastructure purpose.
>
> **This approach avoids the need for spot rezonings when the infrastructure use** expands, **ceases**, is realigned or is downsized in the future. It is preferable that the land use zone be the same as the adjacent zoning, **so that future uses are compatible with existing surrounding uses** (bold added)

6.21 It also says (on page 4):

> Most existing infrastructure land currently zoned 'special use' should be rezoned in the LEP according to what the adjacent zone is, if that zone is a 'prescribed zone' in the …[*State Environmental Planning Policy (Infrastructure) 2007*] which permits that type of infrastructure. …
>
> Where infrastructure adjoins multiple zones (that are prescribed zones), the following rules apply: … adopt a zone that is compatible with surrounding land uses, having regard to:
>
> - the nature and character of the subject site
>
> - **existing adjacent land uses and preferred future uses**
>
> - regional strategy priorities
>
> - availability of services and infrastructure to support new land uses
>
> - environmental impacts and risks (bold added)

6.22 It is plain — whether extrinsic material is considered or not — that the intent of the local planning controls for the site is that when the use of site as an educational establishment ends, the site will transition to a new character that is more in-keeping with the adjacent land uses. In short, this reinforces our understanding of the objectives of the Seniors Housing SEPP and how it should be addressed in the current circumstances.

6.23 There is a **second** reason that we say the proponent's clause 4.6 request (as per paragraph 6.8 above) would lead to legal error. The text asks the consent authority to protect the current character of the area by allowing **all** the buildings that allegedly give that character to be almost completely demolished. The new replacement built form would plainly have a very different appearance.

6.24 The justification is so absurd that it is plain that no reasonable consent authority — aware of its statutory duties — could possibly make a decision on such a basis.

7. Environmental planning grounds

7.1 The revised clause 4.6 requests each contain text that purport to provide sufficient environmental planning grounds to justify the contravention. This can be generally summarised as follows (taken from the headings on pages 15-17 of the LEP height variation request):

(c) The existing buildings already exceed the development standards.

(d) The additional height is contained within the existing roof forms.

(e) The street elevations have been designed to minimise the perceived number of storeys.

(f) The proposal steps down towards the south-eastern and south-western boundaries.

(g) Environmental and amenity impacts of the additional height.

7.2 None of these matters are capable, by themselves, of constituting 'sufficient environmental planning ground's to '**justify contravening** the development standard (bold added)'.

7.3 The word ;'justify' is relevantly defined by the *Macquarie Dictionary* (online) to be:

to show (an act, claim, statement, etc.) to be just, right, or warranted

7.4 For an environmental planning ground to '**justify'** a contravention of the standard, the ground must be such that it makes the contravention acceptable, even though it would normally be unacceptable.

7.5 If the environmental planning ground has some positive benefit, the positive benefit can only justify a contravention if the benefit **would not exist** (or at least exist to the same extent) in the absence of the contravention.

7.6 Likewise, if the environmental planning ground is the avoidance or mitigation of some adverse circumstance, this can only justify the contravention if the avoidance/mitigation **would not occur** in the absence of a contravention.

7.7 It is the **contravention** that must be shown to be acceptable or warranted, not the development as whole. A contravention can only be properly understood if the proposed non-complying development is contrasted with a reasonable complying development.

7.8 This requirement is essentially a codification of the longstanding principles outlined in *Winten v North Sydney Council* [2001] NSWLEC 46. In that case it was held that (in relation to SEPP 1):

(a) in considering what is acceptable it is the non-compliance that must be considered, not the development (at [28]);

(b) it is not sufficient merely to point to an absence of environmental harm (at [25]; and

(c) there needs to be a consideration of a development that would comply with the standard (at [26]).

7.9 The fact that there are existing buildings on the site is irrelevant. If the site is to be re-developed under the proposal these buildings will almost completely be demolished. The demolition of the buildings is not an element of the contravention. The current existence and/or the demolition of these buildings are incapable of rationally making acceptable what would otherwise ordinarily be an unacceptable contravention (on height, storeys and FSR).

7.10 The fact that the overall development may (according to the proponent) be designed so that it causes no or minimal environmental harm does not, in itself, justify a contravention. If there was no or minimal environmental harm from a **compliant** development then there is no rational need for a contravention.

7.11 The closest that the revised clause 4.6 requests come to in making out some sort of environmental planning ground is the section titled 'better planning outcome' (page 12 of the LEP height variation request is typical). This essentially says that if the development is allowed with more floor space, better and more care can be provided to the elderly. This at least relates to the contravention. That is, the contravention is the additional floor space, storeys and height.

7.12 However, most forms of development serve a social purpose (even if, at times, many forms of development also serve private purposes). For example:

(a) residential flat buildings provide a more affordable housing choice in high demand areas;

(b) retail premises provide an important supply of household goods essential to maintaining living standards; and

(c) office developments provide a source of employment.

7.13 An ‘environmental planning ground’ cannot simply be that if you allow a proponent to do more of a socially useful thing, more good things will be achieved. Such an approach would place no outer limits on the intensity or scale of social beneficially development (which would include most forms of development). This cannot be the intent of clause 4.6(3)(b)).

7.14 It is submitted that allowing more of a particular development that serves a social purpose **is** an environmental planning ground capable of justifying a contravention, **but only when there are no significant adverse impacts from that contravention**. We note that this approach was taken by the Land and Environment Court (in relation to a seniors housing development) in *Oreison v Hurstville City Council* [2012] NSWLEC 1210 [78].

7.15 The ‘adverse impacts’ that need to be considered are:

(a) any increase in the negative consequences that the planning controls themselves were seeking to avoid; and

(b) any delay or deprivation of the positive consequences that the planning controls were seeking to bring about.

7.16 In the present circumstances it is impossible to see how the proponent could demonstrate that there are no significant adverse impacts that would arise from the proposed contravention:

(a) The contravention will prevent or delay the desired future character being achieved on the site (and in the surrounding streetscape) in terms of bulk, scale and height. This denies the community the benefit of a positive consequence for which the controls seek to achieve: clause 4.3(a) of the LEP; clause 4.4(1)(a) of the LEP and clause 33(a) of the Seniors Housing SEPP.

(b) The contravention will not **minimise** visual impact. By definition the erection of a four-storey buildings in lieu of **new** and **height-compliant** two-storey buildings must have a materially greater visual impact. This is not ‘minimisation’. This brings about an adverse consequence which the controls seek to avoid: clause 4.3(1)(b) of the LEP, clause 4.4(1)(c) of the LEP; and clause 33(c)(iii) of the Seniors Housing SEPP.

7.17 For an example of the Land and Environment Court considering a clause 4.6 request in the context of an objective to **minimise** an impact, see *Tepazo v Lane Cove Council* [2014] NSWLEC 1078 [81]-[85].

7.18 In short, we do not consider that it is reasonably open to the consent authority to decide that there are sufficient environment planning grounds to justify the contravention.

8. Consistency with the height and storey control objectives

8.1 As discussed above, the objectives for each of the height and storey controls (clause 4.3(1) of the LEP and clause 33(a) of the Seniors Housing SEPP) are intended to ensure that the desired future character is achieved. In the LEP, this is expressly qualified by the words **‘in terms of building height and roof forms’**.

8.2 That is, it is not some sort of amorphous ‘desired future character’. The ‘desired future character’ sought is a concrete one. It is measured in terms of specific heights.

8.3 We can imagine that, in some circumstances, the desired future character (in terms of height) could be achieved without strict numerical compliance. For example, if reasons of topography (such as the location of an historic quarry) meant that the

appearance of non-complying building would better reflect the desired future character (relative to the street and neighbouring development) than a complying building. However, no such circumstances are raised here.

8.4 The desired future character (in terms of height) sought by the LEP is 8.5 metre high buildings. Nothing about the proposal is consistent with the idea. The proposed buildings will look nothing like 8.5 metre buildings.

8.5 In order to facilitate a movement towards the desired future character envisaged in local planning controls, the Seniors Housing SEPP establishes an 8 metre height control. Again, the proposed buildings will look nothing like 8 metre buildings.

8.6 Consistency does not merely mean anything as flexible as 'not antipathetic'. Consistency means 'agreeing to or accordant, compatible': *Addenbrooke v Woollahra Municipal Council* [2008] NSWLEC 190 [45].

8.7 For completeness, it is worth addressing whether the presence of the existing non-complying buildings is relevant for the purposes of deciding whether a proposed development is consistent with a 'desired future character' objective.

8.8 The issue was considered by the Land and Environment Court in *Chidiac v Mosman Council* [2015] NSWLEC 1044 in an analogous context. The Court said the following (at [90], [92] and [120]-[123]):

> That which is proposed as the floor space ratio for this development is clearly antithetic to this aspect of the desired future character of the area. However, for this aspect, the incompatibility is more egregious because of the proposal to increase the inconsistency that the present structure has in this regard. Although this proposed increase can be regarded as compounding the extent of the incompatibility, **it is the mere fact of incompatibility (and a substantial degree of incompatibility) that is the vice that causes the proposal to fail this objective**.
>
> … For the floor space ratio development standard, although the present floor space ratio is nearly double that which is set by the LEP, that to which the test of compatibility needs to be applied, in the first stage of the evaluation against the subjective of desired future character of the area … **Even if that which was proposed had merely sought to mimic the extent of the exceedances contained in the present building, such an exceedances could not be said to be "in harmony" with the desired future character of the area**.
>
> … [G]iven the substantial nature of the structures in this locality observed during the site inspection (despite the somewhat rundown nature of the existing structure on the site), there was nothing to evidence the remotest possibility that, with appropriate maintenance of existing structures, there was any likelihood of the necessity to demolish and rebuild …
>
> …. As a consequence, the desired future character is something that could be regarded as, practically, being impossible to achieve in any immediately relevant timeframe.
>
> …In the context of the relevant controls expressing the desired future character having been in place… in earlier iterations of local environmental plans since the early 1980s, it seems to me that expressing an aspiration in a planning instrument where that aspiration (particularly in light of the desirability of the location involved) might be regarded as tending towards fantasy might not be regarded as representing a purposive approach to planning in this locality.
>
> … Having, however, unburdened myself of that observation, **I acknowledge that, to remain within what I understand to be the strictures of the Court of Appeal in Botany Bay City Council, it would be entirely inappropriate to proceed to approve the proposed development** as it would not be in the public interest to do so because the proposed development is inconsistent with the objectives of the particular standards and the objectives for development within the zone in which the development is proposed to be carried out (bold added)

8.9 It simply not reasonably open to the consent authority to conclude that the proposed development will be consistent with the height and storey controls.

9. Consistency with the FSR objectives

9.1 Under clause 4.4(1) of the LEP, the objectives of the FSR control are as follows:

(a) to ensure that buildings are compatible with the bulk and scale of the desired **future** character of the locality,

(b) to provide a suitable balance between landscaping and built form,

(c) to **minimise** the effects of bulk and scale of buildings (bold added).

9.2 This raises the same 'desired future character' issues that were discussed above. Again we note that the 'desired future character' is not some vague amorphous one. It is defined in terms of 'bulk and scale'. That is, something that is directly measures by floor space ratio. Again, there may be circumstances where issues such as topography (or the placement of gross floor area underground) might allow for a variation whilst maintaining consistency with a standard. However, these do not arise in the present case.

9.3 The last objective is to 'minimise' the effects of bulk and scale of buildings. If any variation will **increase** the effects of bulk and scale (from that which is permitted under the numerical controls) then the effects of bulk and scale will not be **minimised**.

9.4 In the present case, it is unarguable that:

(a) visual impact is an effect of bulk and scale; and

(b) four storey buildings have a greater visual impact than buildings that would comply with the 0.5:1 FSR control.

(We note that if the proponent elected to pursue a development that was **compliant** with the Seniors Housing SEPP it could benefit from an FSR of up to 1:1 — without a clause 4.6 request — under clause 48(b) of the Seniors Housing SEP. The fact that this is not available is solely a consequence of its choice to pursue a non-complying development.)

9.5 Additionally, merit issues that arise from the intensity of use are also the subject of our clients' objections, This includes the size and location of the garbage area. These are adverse effects that are made worse (and not minimised) by the proposal to exceed 0.5:1 FSR.

9.6 It simply not reasonably open to the consent authority to conclude that the proposed development will be consistent with the LEP's FSR control.

10. Consistency with the zone objectives

10.1 Each of the clause 4.6 requests must establish that the proposed development is **consistent** with the R2 zone objectives, **including the clause 4.6 request made in relation to the Seniors Housing SEPP**.

10.2 Ordinarily, under a standard instrument-compliant LEP (such as the LEP in the present case) it is only necessary for a consent authority to have **regard** to zone objectives (clause 2.3(2)). However, once the proponent seeks to contravene a development standard, a higher hurdle is raised. The consent authority must be satisfied that the proposed development is **consistent** with the zone objective (under clause 4.6(4)(a)(ii)).

10.3 The consent authority must form an opinion about this matter before it embarks on its consideration of the merits of an application (*Conservation of North Ocean Shores v Byron Shire Council* [2009] NSWLEC 69 [19]).

10.4 The two zone objectives are:

- To provide for the **housing needs** of the community **within** a **low density** residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents (bold added).

10.5 The proposed development clearly provides for the housing needs of the community. Accordingly, the first objective is relevant and the second objective is neutral/not-relevant.

10.6 In terms of the first objective, the nature of the housing needs is limited to that which may be provided **within** a **low density** residential environment.

10.7 While the phrase 'low density' is not defined in the LEP, it is used in contradistinction to the phrases 'medium density' and 'high density'. In terms of housing:

(c) the 'R2 Low Density Residential' zone permits (among other things) dwelling houses (ie a buildings containing only one dwelling) and dual occupancies;

(d) the 'R3 Medium Density Residential' zone permits (among other things) 'residential accommodation' which includes attached dwellings, multi dwelling housing and residential flat buildings.

(e) the 'R4 High Density Residential' permits (among other things) multi dwelling housing, shop top housing and residential flat buildings.

10.8 On this basis, it can be concluded that a 'low density residential environment' is one that is characterised by detached houses and dual occupancies.

10.9 For completeness, we should note that it is irrelevant that a compliant residential care facility would not have the appearance of detached housing or dual occupancies. The law-makers have decided that, irrespective of zone objectives, an 8 metre high building — and two storey buildings adjacent to the boundary — are permissible with consent in an R2 zone. However, the law-makers have also made it clear that the moment that a proponent steps outside of the safe cocoon of the Seniors Housing SEPP, the proponent will need to justify **consistency** with the R2 zone objectives.

10.10 We do not see any reasonable basis for the consent authority to decide that a four-storey (residential) development is **consistent** with the provision of housing needs of the community **within** a low density residential environment. Therefore it is legally impossible for the consent authority to be satisfied the proposed development is consistent with the zone objectives.

11. Next steps

11.1 While we have made a criticism of the presentation of the revised clause 4.6 requests, the great bulk of our criticisms will apply no matter which way and how the clause 4.6 requests are framed.

11.2 There is no way that the development, as currently proposed, can be lawfully the subject of a development consent.

11.3 We appreciate that many different legal flaws have been identified above. Many of them, **alone**, are sufficient to deprive the panel of the legal authority for granting consent.

11.4 If the panel wishes to simplify its consideration of this matter, we suggest that the panel simply decide the point on consistency with the zone objective (as per section 10 of this submission). This point alone is sufficient to require a refusal of the development application.

Yours sincerely

Aaron Gadiel
Partner
Accredited Specialist - Local Government and Planning Law

cc Tony McNamara

City of Canada Bay
Locked Bag 1470
Drummoyne NSW 1470

By email: council@canadabay.nsw.gov.au