RE:

Re Scalabrini Village Ltd
Development Application DA 2015/0332

JOINT OPINION

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Attention: Craig Tidemann

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1. Our instructing solicitors act for Scalabrini Village Ltd (**SVL**), which is a social housing provider.

2. On 31 August 2015 SVPL lodged development application DA 2015/0332 (**Application**) seeking development consent under the Environmental Planning and Assessment Act 1979 (**EPA Act**) for "*partial demolition and construction of a new building for use as a residential aged care facility with accommodation for 161 persons, basement car parking, alterations and additions to existing hall building. Tree removal and landscaping, waste facilities, new fencing, signage and associated site structure*" (**the Development**) on the land known as 17 Millar Street Drummoyne (**Site**).

3. The Application is presently before the Joint Regional Planning Panel (**Panel**) for assessment and determination.

4. We have been briefed with an objection lodged by Gadens Lawyers dated 20 November 2015 (**Objection**) that asserts development consent cannot be granted to the Application.

Advice sought

5. We have been requested to advise whether the conclusions expressed in the Objection are legally sound.

6. For the reasons that follow, we disagree with the method used, and hence the conclusions expressed in, the Objection. We also consider that provided the Panel adopts the recommended method for assessment of the Application involving

consideration of each of four statements lodged by SVL with the Application it will be reasonably open to the Panel to grant consent.

Statutory provisions

7. Section 79C of the EPA Act requires assessment of the Application by reference to, inter alia, the provisions of any environmental planning instruments that are "of relevance" to the Development the subject of the Application.

8. The most relevant environmental planning instrument is State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (**Seniors SEPP**). Chapter 3 of the Seniors SEPP makes the Development permissible on the Site.

9. Clause 40(1) of the Seniors SEPP provides that consent must not be granted to an application unless the proposed development complies with the standards specified in the clause. The Development as proposed would not comply with the height standard expressed in clause 40(4)(a) of the Seniors SEPP or the storey control in clause 40(4)(b).[1] Accordingly, consent could not be granted unless there is another source of power to allow for the grant of consent notwithstanding that non-compliance.

10. That source of power comes from State Environmental Planning Policy No 1 – Development Standards (**SEPP 1**). SEPP 1 applies to the State: clause 4(1). Pursuant to clause 6 of SEPP 1 a written objection may be made to the standard expressed in clause 40(4)(a) of the Seniors SEPP. If the Panel finds that objection to be well founded, it may grant consent to the Application under clause 7 of SEPP 1 notwithstanding the effect of clause 40(1) of the Seniors SEPP.

11. The Application includes a SEPP 1 objection to the standards in sub-clauses 40(4)(a) and (b) of the Seniors SEPP. The principles for the assessment of that objection are well understood: *Wehbe v Pittwater Council* (2007) 156 LGERA 446. The objection can be upheld because the objectives of the height control in clause 40(4)(a) of the Seniors SEPP are achieved notwithstanding non-compliance with the standard: *Wehbe* at [42].

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[1] We note that the proposed Development need not comply with clause 40(4)(c) due to the operation of clause 40(5)(b) because SVL is a social housing provider.

12. Other environmental planning instruments of potential relevance to the Application are State Environmental Planning Policy No 55 – Remediation of Land and Sydney Regional Planning Policy (Sydney Harbour Catchment) 2005 but there is no issue with their application in the assessment.

13. The fundamental issue arising from the Objection is how the Canada Bay Local Environmental Plan 2013 (**CBLEP**) applies, if at all, in the assessment of the Application.

Zoning and Land Use Table CBLEP

14. Clause 1.3 of the CBLEP applies the plan to the Site. Clause 2.2 of the CBLEP provides a zoning for the Site as R2 Low Density Residential. Clause 2.3 and the Land Use Table to the CBLEP prescribe which forms of development are permissible without consent, permissible with consent or prohibited within that R2 Low Density Residential zoning.

15. The Development is nominated as prohibited development pursuant to the CBLEP. However, in spite of the Land Use Table and Clause 2.3 of the CBLEP the Development is nominated as permissible with consent by the Seniors SEPP. This creates an inconsistency in the operation of the CBLEP with the Seniors SEPP. In those circumstances, the provisions of the Seniors SEPP will prevail due to clause 5(3) of the Seniors SEPP and s 36 of the EPA Act. This means that the zoning of the Site and the Land Use Table under the CBLEP are not "of relevance" for the assessment of the Application under s 79C of the EPA Act.

Inconsistency

16. Clause 5(3) of the Seniors SEPP is in the following terms:

> *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.*

17. It follows that the provisions of the Seniors SEPP are intended to prevail over inconsistent provisions of the CBLEP.

Other Controls: Height

18. Clause 4.3 of the CBLEP prevents the grant of consent for any proposed building which would exceed 8.5 metres in height on the Site. The Seniors SEPP, by operation of clause 40(4)(a), prevents a grant of consent if the height of a building to be used for a nominated purpose will exceed 8 metres on the Site. If these controls are relevantly inconsistent then the control expressed in the Seniors SEPP will prevail with the consequence that the control expressed in clause 4.3 of the CBLEP may be ignored as it will not be "of relevance" to the assessment of the Application by operation of clause 5(3) of the Seniors SEPP and s 36 of the EPA Act.

19. It is any inconsistency of the CBLEP controls with the Seniors SEPP that is in question, not the other way around. In construing clause 5(3) of the Seniors SEPP, the inconsistency must be in the operation of the control and not just a textual conflict. A contextual or operational inconsistency will arise because of the circumstances of a particular application of controls to particular applications.

20. In the Application, the proposed height for buildings will exceed 13 metres and so both controls are infringed. The prudent course for a thorough environmental assessment is to assume that there is not inconsistency in the operation of those controls and to require a dispensation from both controls. A statement lodged under clause 4.6 of the CBLEP is the only means by which the Panel can be satisfied consent may be granted notwithstanding the height control in clause 4.3 of the CBLEP.

21. Our opinion is that an objection under SEPP 1 is the proper vehicle for the Panel to assess if consent should be granted notwithstanding the control expressed in sub-clauses 40(4)(a) and (b) of the Seniors SEPP. If we are incorrect, then clause 4.6 of the CBLEP would be an alternative source of power to grant consent notwithstanding sub-clauses 40(4)(a) and (b) of the Seniors SEPP. Alternative sources of power may be relied upon in the determination of the Application provided that the dispensing

provisions are applied according to the particular terms of each source of power: *Vaw (Kurri Kurri) Pty Ltd v Scientific Committee* (2003) 58 NSWLR 631.

22. The ambiguity regarding operational inconsistency between instruments explains why a SEPP 1 objection and a clause 4.6 statement has been filed with the Application in respect of clause 40(4)(a) and (b) but, by comparison, only a clause 4.6 statement has been lodged in respect of clause 4.3 of the CBLEP.

23. We strongly recommend that all three statements/objections be considered by the Panel on their merits and determined according to the particulars tests that apply for SEPP 1 and clause 4.6 of the CBLEP.

Density

24. The position may be different with respect to the operation of clause 4.4 of the CBLEP. That clause prevents a grant of consent for a building on the Site that incorporates a floor space ratio (**FSR**) of greater than 0.5:1. The Seniors SEPP does not contain any control imposing a maximum FSR. We are of the opinion that, in the circumstances of this case, where the FSR proposed is 1.33:1 for the Development, there is an inconsistency between the instruments and therefore the Seniors SEPP will prevail with the result that clause 4.4 of the CBLEP could be ignored for the same reasons considered above with respect to the height control. However, if we are wrong and there is no operational inconsistency, then clause 4.6 of the CBLEP would provide a source of power to the Panel to grant consent to the Application notwithstanding non-compliance with clause 4.4 of the CBLEP. This explains why, for abundant caution, a statement has also been lodged under clause 4.6 of the CBLEP for a variation to the control in clause 4.4 of the CBLEP. Again, we strongly recommend that the Panel evaluate and determine if consent should be granted notwithstanding clause 4.4 of the CBLEP because of the statement lodged under clause 4.6 to avoid any possible absence of jurisdiction to approve the Development.

Remaining Provisions of CBLEP

25. Clause 1.9(2) of the CBLEP states that the provisions of SEPP 1 do not apply to the land to which the CBLEP applies. Instead, clause 4.6(2) of the CBLEP provides power to grant development consent "even though the development would contravene a development standard imposed by this or any other environmental planning instrument". In our opinion, for the reasons that follow, clause 1.9(2) of the CBLEP only operates to "not apply" or oust SEPP 1 from operation for applications made that must be determined by reference to the particular controls provided in the CBLEP. In the present case, the Application is made pursuant to the Seniors SEPP.

Analysis

26. The issue is whether clause 1.9(2) is "of relevance" to the assessment of the Development the subject of the Application. The Objection has assumed that it is, but without any analysis. In our opinion, clause 1.9(2) can only be "of relevance" in the assessment of the Application only to the extent that a control under the CBLEP is utilised. This is for two reasons in particular:

    (1) The Application is made pursuant to the Seniors SEPP. That is therefore the environmental planning instrument that is of primary relevance to the assessment of the Application under s 79C of the EPA Act. The Seniors SEPP does not exclude the use of SEPP 1. SEPP 1 states that it applies to the whole of the State and can therefore operate to allow consent to be granted notwithstanding that the Development would be in breach of a standard included in the Seniors SEPP. This interaction does not involve any application of the CBLEP and therefore clause 1.9(2) is not engaged.

    (2) If, to the contrary of (1) above, clause 1.9(2) of the CBLEP had an independent operation -even if not specifically engaged by the interaction between the Seniors SEPP and SEPP 1- then by application of the Seniors SEPP and SEPP 1, consent *could* be granted for the Application, but the grant of consent would be prevented by clause

1.9(2) of the CBLEP. This would create an operational inconsistency in the operation of clause 1.9(2) of the CBLEP with the provisions of the Seniors SEPP -and SEPP 1- and would not apply by operation of s 36 of the EPA Act in the specific circumstances of this Application: *Hastings Points Progress Association Inc v Tweed Shire Council* [2009] NSWCA 285.

27. The Objection starts from a premise that it is the CBLEP controls that are of primary relevance for the assessment of the Application. For the reasons given above, that approach cannot be correct and leads to incorrect conclusions regarding the proper assessment of the Application.

Alternative sources of power

28. In any event, as previously noted, the Panel can rely on alternative sources of power to determine the Application even if one alternative source is not, in fact, legally available. Accordingly, there would be no error made in granting consent to the Application provided the Panel chose to assess the Application by reference to each of the following:

    a. the provisions of SEPP 1 concerning an objection to sub-clauses 40(4)(a) and (b) of the Seniors SEPP concerning the maximum height of 8 metres and a maximum of two storeys at the boundary;
    b. the provisions of clause 4.6 of the CBLEP concerning the maximum height and storey controls in clause 40(4) of the Seniors SEPP;
    c. the provisions of clause 4.6 of the CBLEP concerning the maximum height of 8.5 metres under clause 4.3 of the CBLEP; and
    d. the provisions of clause 4.6 of the CBLEP concerning the maximum density of 0.5:1 in clause 4.4 of the CBLEP.

29. We strongly recommend that the Panel individually assess each statement or objection and determine the Application by reference to that assessment.

30. To that effect, there is a slight difference between an assessment carried out for an objection under SEPP 1 and that for consideration of a written statement lodged under clause 4.6 of the CBLEP. That is, while an objection under SEPP 1 can be well founded because the objectives of the height control in clause 40(4)(a) of the Seniors SEPP are achieved notwithstanding non-compliance with the standard, that would be only one of several matters to consider under clause 4.6 of the CBLEP: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90; [2015] NSWLEC 1009.

31. In our opinion, each of the objections and statements comply with the requirements of clause 4.6 of the CBLEP and SEPP 1. That is, each document includes the relevant information that the Panel can take into account in determining whether to uphold the variation to the particular control by operation of the particular dispensing power. We disagree with the conclusions expressed in the Objection that the statements are deficient.

Remaining Matters from the Objection

32. The Objection states that the intent of the local planning controls is that on termination of the use of the Site as an educational establishment, the site will transition to a new character that is in keeping with the adjacent land uses. In our opinion, this statement is not accurate and so leads to incorrect conclusions.

33. The "local planning controls" are not the only source of information that concerns the desired future character for the area or the Site. This is explicitly recognised in the notes to the Land Use Table in the CBLEP which refer to the Seniors SEPP as another policy used to determine if development may be carried out on particular land. Accordingly, the CBLEP expressly considers how other forms of development can be permissible in the various zones, including the R2 Low Density Residential zoning. Housing for seniors must have therefore been contemplated when the Council set out that the objective of the R2 Low Density Residential zone will "provide for the housing needs of the community within a low density residential environment".

34. The Objection treats that statement in the objectives of the R2 Low Density Residential zoning as if it were a prescriptive statement that only low density housing can be provided on any site in that zone. In our opinion, that is not what the objective says and nor is it what the objective of the zone is intended to express. The objective is a statement of the intention of the local council to provide a low-density residential environment in the R2 zone taken as a whole in which the housing needs of the community can be located. Those needs include other forms of development not regulated by the CBLEP itself.

35. The conclusion expressed in Part 10 of the Objection that any assessment of the Application against the objective of the R2 Low Density Residential zoning under clause 4.6(4)(a)(ii) of the CBLEP must result in refusal of the Application is wrong. In our opinion, the proper consideration of the objective means that, within the R2 zone, it is foreseen that there will be many different types of housing and the end result will, generally, be a residential environment of low density (compared to other zones). That is, these various types of housing, including seniors housing, can be provided within the low density residential zone and be compatible and harmonious with that objective even if an individual proposal is not itself considered low-density development.

Conclusion and Summary

36. For the reasons given above, it is our opinion that the Panel can and should separately assess the merits of the Development proposed in the Application:

    1.) Under the Seniors SEPP and grant consent despite sub-clauses 40(4)(a) and (b) of the Seniors SEPP pursuant to clause 7 of SEPP 1; and
    2.) Under the Seniors SEPP and grant consent despite sub-clauses 40(4)(a) and (b) of the Seniors SEPP, and despite clauses 4.3 and 4.4 of the CBLEP, pursuant to clause 4.6 of the CBLEP.

9 December 2015

Chambers

CHRIS McEWEN, SC

MARK SEYMOUR

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