



YC/YC
13268
10 December 2015

Sydney East Joint Regional Planning Panel
Regional Panels Secretariat
GPO Box 39
Sydney NSW 2001

Dear Sir or Madam

**SUPPLEMENTARY CLAUSE 4.6 STATEMENT - DA 2015/0332
5 MARY STREET AND 17 MILLAR STREET, DRUMMOYNE**

I refer to the determination of the Sydney East Joint Regional Planning Panel (JRPP) on 12 November 2015 to defer its decision on DA 2015/0332, to allow Scalabrini Village to respond to Gadens' written submission of 20 November 2015.

A response to Gadens' submission is to be provided by Mr Craig Tidemann of Thomson Geer and Mr Chris McEwen SC and Mr Mark Seymour of Martin Place Chambers on 11 December 2015.

This letter contains additional arguments in support of the following clause 4.6 variation requests dated 28 October 2015 and previously submitted to Canada Bay Council:

- Clause 40(4) of the Seniors Housing SEPP (the **SEPP Height Variation Request**);
- Clause 4.3 Height of Buildings (the **LEP Height Variation Request**); and
- Clause 4.4 Floor Space Ratio (the **LEP FSR Variation Request**).

This letter should be read in conjunction with the above clause 4.6 variation requests.

1.0 SUPPLEMENTARY STATEMENT TO THE SEPP HEIGHT VARIATION REQUEST

In addition to the arguments presented in the SEPP Height Variation Request, we submit that compliance with the standards in clause 40(4) of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (the **Seniors Housing SEPP**) would be unreasonable or unnecessary, because they apply specifically to land in the R2 Low Density Zone, and that zone is inappropriate for the site.

This argument was identified by Preston CJ of the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSW LEC 827 as the fifth of five ways to establish that compliance with a development standard would be unreasonable or unnecessary in the circumstances of the case (the **Fifth Wehbe Method**). Specifically, the Fifth Wehbe Method provides that compliance with a development standard can be shown to be unreasonable or unnecessary because:

"The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone."

The development standards in clause 40(4) of the Seniors Housing SEPP are appropriate for the R2 Low Density Residential Zone (and equivalent zones in non-Standard Instrument LEPs). Those standards are: 8m or less (clause 40(4)(a)), maximum 2 storeys adjacent to a site boundary (clause 40(4)(b)) and maximum 1 storey in the rear 25% of the site (clause 40(4)(c)). These building heights are typical of low density residential building typologies. In addition, the title and preamble to clause 40(4) suggest that the standards apply only to low density residential zones. The provision states:

“(4) Height in zones where residential flat buildings are not permitted

If the development is proposed in a residential zone where residential flat buildings are not permitted:

...”

In our view, given the existing use of the site as an educational establishment with buildings of greater height and density than the controls to be applied to the site, the R2 Low Density Residential Zone is not an appropriate zone for the subject site. The (then) Department of Planning’s *Practice Note PN 11-002: Preparing LEPs using the Standard Instrument: standard zones* sets out the intended purpose of each of the zones in the Standard Instrument LEP. That document describes the intended purpose of the R2 Low Density Residential Zone as follows:

“This zone is intended to be applied to land where primarily low density housing is to be established or maintained. Typically the zone features detached dwelling houses, but it may be appropriate to include ‘dual occupancy’ (attached or detached) or some ‘multi-dwelling housing.’ This is the lowest density urban residential zone and the most restrictive in terms of other permitted uses considered suitable. These are generally restricted to facilities or services that meet the day-to-day needs of residents. This zone is generally not suitable adjacent to major transport nodes or larger activity centres where residential densities should be higher.”

Having regard to the above, in our view the R2 Low Density Residential Zone is inappropriate for the site. While the zone is not exclusively to be applied to residential sites, it is not the appropriate zone for this particular site, given its history and capability of supporting a land use within a building of similar size to the existing buildings without changing the character of the area. The site does not and did not, at the time of gazettal of the Canada Bay LEP, accommodate low density residential development. The site was developed and used as the Drummoyne Boys High School until the school’s closure in 1990. Since that time, the site has been used for a variety of educational uses, including most recently by the Wesley Institute of Performing Arts (recently renamed as Excelsia College) until August 2015.

In addition, most of the non-residential uses that are permitted in the R2 Zone are suited to a low density residential built form typology. For example, bed and breakfast accommodation, boarding houses, child care centres, community facilities and health consulting rooms (which are rooms located in a dwelling house) are all permitted. This suggests that the R2 Zone is more appropriate for sites that are either used for low density residential purposes, or non-residential purposes in a low density built form. The subject site does not fit either description.

Given that the R2 Low Density Residential Zone is inappropriate for the site, it follows that the standards in clause 40(4) – which apply specifically to land in a low density residential zone – are inappropriate for the site. Therefore, in accordance with the Fifth Wehbe Method, compliance with those standards would be unreasonable or unnecessary in the circumstances of this case.

2.0 SUPPLEMENTARY STATEMENT TO THE LEP HEIGHT VARIATION REQUEST

JBA remains of the view that the 8.5m maximum building height in clause 4.3 of the Canada Bay Local Environmental Plan 2013 (the **Canada Bay LEP**) does not apply to the site, because the 8m height limit in clause 40(4)(a) of the Seniors Housing SEPP prevails. Therefore, a clause 4.6 variation request is not required to vary the standard in clause 4.3. For the abundance of caution,

however, below we set out our additional arguments as to why compliance with the standard in clause 4.3 would be unreasonable or unnecessary in the circumstances of this case.

In addition to the arguments presented in the LEP Height Variation Request, we submit that compliance with the building height standard in clause 4.3 of the Canada Bay LEP would be unreasonable or unnecessary, because that standard is appropriate for the R2 Low Density Zone, and that zone is inappropriate for the site. Again, this argument is based on the Fifth Wehbe Method discussed above.

The standard in clause 4.3 is a maximum building height of 8.5m, measured from existing ground level to the top of the building. This height limit would generally accommodate a building up to two storeys in height with a pitched roof, being the type of building typically found in a low density residential zone. This standard has been applied across the R2 Zone in the Canada Bay LEP.

We repeat our arguments in section 1.0 that the R2 Low Density Residential Zone is inappropriate for the site. It follows that the height standard in clause 4.3 of the Canada Bay LEP – which is appropriate for the R2 Low Density Zone – is inappropriate for the site. Therefore, in accordance with the Fifth Wehbe Method, compliance with that standard would be unreasonable or unnecessary in the circumstances of this case.

3.0 SUPPLEMENTARY STATEMENT TO THE LEP FSR VARIATION REQUEST

In addition to the arguments presented in the LEP FSR Variation Request, we submit that compliance with the FSR standard in clause 4.4 of the Canada Bay LEP would be unreasonable or unnecessary, because that standard is appropriate for the R2 Low Density Zone, and that zone is inappropriate for the site. Again, this argument is based on the Fifth Wehbe Method discussed above.

The standard in clause 4.4 is a maximum FSR of 0.5:1. This standard is appropriate for development in the R2 Low Density Zone, because it can generally accommodate 1-2 storeys with unbuilt upon areas in the form of a front yard and back yard, typically found in low density residential areas. This standard has been applied across the R2 Zone in the Canada Bay LEP.

We repeat our arguments in section 1.0 that the R2 Low Density Residential Zone is inappropriate for the site. It follows that the FSR standard in clause 4.4 of the Canada Bay LEP – which is appropriate for the R2 Low Density Zone – is inappropriate for the site. Therefore, in accordance with the Fifth Wehbe Method, compliance with that standard would be unreasonable or unnecessary in the circumstances of this case.

We trust the above is sufficient. Should you have any queries about this matter, please do not hesitate to contact me on (02) 9956-6962 or ycarr@jbaurban.com.au.

Yours faithfully



Yvette Carr
Principal Planner