Re: Sydney East Joint Regional Planning Panel
Development application DA2015/0332

MEMORANDUM OF ADVICE

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Re: Sydney East Joint Regional Planning Panel - Development application DA 2015/0332
Scalabrini Village Ltd – Mary and Millar Streets, Drummoyne

MEMORANDUM OF ADVICE

1. I am instructed by the Legal Division of the Department of Planning and Environment on behalf of Sydney East Joint Regional Planning Panel ('the Panel') to advise whether it is reasonably open to the Panel to grant consent to development application DA2015/0332 ('the DA') in relation to land at 17 Millar Street, Drummoyne ('the Land').

Background

2. On **26 March 2015**, the Panel approved DA459/14 ('the March DA') for substantial alterations and additions to existing building and use of the site as a residential aged care facility providing care for 161 persons and basement parking for 75 vehicles.

3. After the March DA was approved, the applicant advised the Panel that the decision may be open to legal challenge. A copy of that advice has not been furnished to the Panel.

4. The applicant resubmitted the DA, which is presently before the Panel for determination. Amendments reflecting the conditions imposed on the March DA were made to the plans and updated clause 4.6 requests and a SEPP 1 objection were submitted with the current DA.

5. Mr Gadiel of Gadens Lawyers addressed the Panel at its meeting of **12 November 2015**. Following the meeting, where consideration of the DA was deferred, Gadens submitted a written advice, dated **20 November 2015**, confirming the objection made by Mr Gadiel at the meeting.

6. Following receipt of the Gadens advice, the applicant has submitted a joint opinion prepared by Mr Chris McEwen SC and Mr Mark Seymour responding to the objection

and has also submitted a letter prepared by JBA Planning supplementing the clause 4.6 request to vary the development standards.

7. I am instructed that:

    a. The DA seeks approval for partial demolition of the existing school building structures 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 infrastructure.

    b. The Land is zoned R2 pursuant to the Canada Bay Local Environmental Plan 2013 ('the LEP'). Residential Care Facilities are prohibited in the R2 zone.

    c. The proposed development seeks to vary the following development standards:

        i. Clause 40(4) – Building Height and Storeys - State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 ('SEPP Seniors').
        ii. Clause 4.3 – Height of Buildings – LEP
        iii. Clause 4.4 – Floor Space Ratio - LEP

Advice sought

8. I am specifically instructed to advise on the following questions:

    a. Does the fact that the proposal exceeds the development standards for height and number of storeys in SEPPSL mean that the proposal is not 'in accordance with the Policy' and therefore the Policy does not override the development standards of the LEP?

    b. In assessing a request for varying the development standard for height and number of storeys, can a consent authority place any weight on the bulk of existing buildings on the site, which are to be demolished? Alternatively, is the only thing to be taken into account, the character of the area?

c. What weight can a consent authority place on the fact that the proposed use provides a major social benefit?

d. What is the status of the development consent issued in March 2015? Can it still be challenged in Court?

Does the fact that the proposal exceeds the development standards for height and number of storeys in SEPPSL mean that the proposal is not 'in accordance with the Policy' and therefore the Policy does not override the development standards of the LEP?

The Gadens argument

9. Whilst the Gadens submission is difficult to follow in parts, it appears to assert that:
   a. Unless development is carried out strictly 'in accordance' with the controls in SEPP Seniors, it does not 'apply'.
   b. The proposed development will not be carried out in accordance with SEPP Seniors due to the proposed height and number of storeys of the development.
   c. There is no provision within SEPP Seniors to vary the development standards.
   d. The only authority for a variation of the height and storey controls set by SEPP Seniors can come from clause 4.6 of the LEP.
   e. Even if the controls were varied by clause 4.6 of the LEP, the development could not be approved as it is 'not in accordance' with SEPP Seniors.

10. On the face of the argument advanced by Gadens, the proposed development would be prohibited on the Land if the proposal was not 'in accordance' with the Policy, and only the LEP applied.

11. Notwithstanding the above arguments, the Gadens submission, at [5.12], concludes that it would be unlawful to grant consent to the DA unless a variation under a clause 4.6 request is approved in relation to the LEP height and FSR controls as well as the height and storey controls in SEPP SL. The conclusion contradicts the body of the argument.

Proper construction of SEPP Seniors

12. In considering the proposed development, the Panel ought to consider how SEPP Seniors applies to the development so that a lawful decision may be made.

13. When construing SEPP Seniors, it is necessary to take a purposive and practical approach to the whole of the instrument[1]. Interpretation must give effect to the evident purpose or object of the instrument.

14. When read as a whole, it is plain that:

    a. SEPP Seniors applies to the Land (cl 4(1));
    b. Unlike clause 1.9(2) of the LEP, there is no clause that excludes the operation of State Environmental Planning Policy No. 1 – Development Standards ('SEPP 1');
    c. Clause 15 of SEPP Seniors is a mechanical clause which sets out the objects of the chapter relating to development for seniors housing and is expressed to allow certain development 'in accordance with this Policy'; and
    d. Development 'in accordance' with the Policy must necessarily take into account the power of SEPP 1.

15. Paragraph [5.7] of the Gadens submission refers to authority[2] that purports that the controls in an LEP may only be overridden when development is carried out 'in accordance with' SEPP Seniors. In my opinion, there is no such authority in the cited passages, nor for that matter in the whole of the judgment.

16. In my opinion, the Joint Opinion of McEwen SC and Seymour correctly sets out the statutory framework relevant to the Panel's consideration at paragraphs 7 to 25.

Method in which development standards may be varied

17. Having regard to the statutory framework, I am of the opinion that a breach of a development standard in SEPP Seniors that is otherwise varied by SEPP 1, is development 'in accordance' with the Policy.

18. The applicant has taken a 'belts and braces' approach to the development standards and has submitted:

    a. A SEPP 1 objection and clause 4.6 request to vary the development standards at clause 40(4)(a) and (b) of SEPP Seniors;

[1] *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; 91 ALR 16 at [19] and *Hecar Investments No. 6 Pty Ltd v Lake Macquarie Municipal Council* (1984) 53 LGRA 322 at 323.
[2] *Hastings Point Progress Association v Tweed Shire Council* [2009] NSWCA 285 at [9] and [98].

b. A clause 4.6 request to vary clause 4.4 of the LEP FSR standard; and
c. A clause 4.6 request to vary clause 4.3 of the LEP height standard.

19. I agree with the Joint Opinion of McEwen SC and Seymour that the Panel may rely on alternative sources of power to determine an application, even if one alternative source is not legally available. Such an approach, whilst conservative, will ensure that the decision is correctly made.

It is reasonably open to the Panel to vary the development standards

20. I have had the opportunity of considering the clause 4.6 requests dated **28 October 2015** and the SEPP 1 objection dated **28 October 2015**, as supplemented by the Joint Opinion of McEwen SC and Seymour and the supplementary clause 4.6 statement prepared by JBA dated **10 December 2015**.

21. I disagree with the Gadens submission at [6.4] that the clause 4.6 requests 'make no attempt to actually comply with' the decision in *Four2Five v Ashfield Council* [2015] NSWLEC 1009 and *Four2Five v Ashfield Council* [2015] NSWLEC 90.

22. That a development is consistent with an objective of a standard, notwithstanding non-compliance, is not an irrelevant consideration under clause 4.6. The authority in *Four2Five* is that consistency with objectives is not the **only** consideration for variation. Each of the clause 4.6 requests demonstrates that a positive finding of consistency with the objective of the standard may be made by the Panel, together with other reasons why it would be unreasonable or unnecessary in the circumstances of the case to strictly comply with the standards.

23. I am of the opinion that it is reasonably open to the Panel to uphold the SEPP 1 objection and vary the development standards in clauses 4.4 and 4.3 of the LEP pursuant to clause 4.6.

In assessing a request for varying the development standard for height and number of storeys, can a consent authority place any weight on the bulk of existing buildings on the site, which are to be demolished? Alternatively, is the only thing to be taken into account, the character of the area?

24. Depending on the controls that are sought to be varied, it may be reasonable for a consent authority to place weight on the existing buildings on a site that re to be demolished. I address each of the standards, together with the FSR standard, as follows.

Floor space ratio standard - LEP

25. The express objectives of the standard include 'to ensure that buildings are compatible with the bulk and scale of the desired future character of the locality'.

26. The written request argues that there will be 'compatibility' with the desired future character on the basis that the R1 zone contemplates buildings other than just residential buildings and that the existing buildings on the site are institutional in their character, taller than separate residential dwellings and located prominently along two street frontages and fit comfortably with the low density residential environment (page 7 of the request).

27. Whilst I agree with the arguments as to compatibility in the request, granting a departure to the development standard on the basis of the existing buildings is tenuous where the 'desired **future** character' is informed by a much lower FSR.

28. Notwithstanding, it would be open to the Panel to find that the proposed development is compatible with the desired future character of the locality as the request demonstrates that the buildings will exist together in harmony with adjoining development, and will sit comfortably in the streetscape. So long as the Panel finds that the FSR (and height per the LEP) is 'compatible' with the desired future character of the locality, the decision is open to it at law. As noted in the request, a finding of compatibility is not that it is the 'same', rather that it is homogenous.

Height standard - LEP

29. The same observations apply to the LEP height standard as to the FSR standard, noting that in my view the SEPP Seniors height control applies.

Height standard – SEPP Seniors

30. As stated in the clause 4.6 request, there is no express objective to the height and storey control at clause 40(4).

31. The author of the request has set out the 'underlying objectives' of the standard at page 8 of the request. Unlike the LEP height and FSR standards, it is reasonable to conclude that the underlying objectives of the control is to achieve compatibility of bulk and scale with **existing** character of the locality; avoid abrupt **change** in the scale of

development in the streetscape; and minimise adverse amenity impacts. The focus is clearly on the existing environment.

32. Accordingly, it is my opinion that when considering a departure from the height standards, that the existing building may be taken into account.

What weight can a consent authority place on the fact that the proposed use provides a major social benefit?

33. When considering a clause 4.6 request, it is a requirement to consider whether the written request justifies the contravention of the development standard by demonstrating that there are sufficient environmental planning grounds to justify contravention (clause 4.6(3)(b)).

34. In *Four2Five*, Commissioner Pearson considered a written request to vary a standard which identified public benefits arising from additional housing and employment benefits resulting from non-compliance with an FSR standard for a residential flat building. Commissioner Pearson found that such a benefit did arise, but that it was not a benefit that was particular to the circumstances of the site, and therefore did not grant the flexibility.

35. The clause 4.6 requests each seek to rely on the social benefit provision of seniors housing. A similar conclusion to that formed by Commissioner Pearson may be apparent on the face of the argument. However, the proposal will specialise in providing care and accommodation for individuals living with dementia. It is argued that the design of the facility is required to be more generous on the basis that individuals with dementia often have higher levels of mobility than normal high care individuals. Further that the space needs to dissipate environmental stimuli to reduce stress.

36. It is also argued that if the proposal complied with the standards, accommodations for only 59 residents would be permitted, less than half under the scheme where aged care is in demand.

37. Having regard to the particular circumstances of the case set out in the clause 4.6 request, I am of the view that it would be open to the Panel to take into account the social benefit of the proposal when determining the application.

What is the status of the development consent issued in March 2015? Can it still be challenged in Court?

38. The March 2015 consent is valid and may be acted upon unless or until it lapses.

39. It is unclear as to whether the consent was notified pursuant to s101 of the *Environmental Planning and Assessment* Act 1979 ('EP&A Act'). If it was, a challenge is only permissible within 3 months of the date of the notice. The only exception to that rule is if the error of law complained of is a jurisdictional fact. In the absence of the applicant's advice, it is difficult to further advise on the matter.

40. It would be open to the Panel to impose a condition of consent pursuant to s80A(1)(b) of the EP&A Act requiring the applicant to surrender the March 2015 consent before acting on any future approval. If the surrender was made, no challenge would be possible.

41. I so advise.

18 December 2015
Chambers

JACINTA REID

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