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21 December 2015

John Roseth
Chair, Sydney East Joint Regional Planning Panel
C/- Joint Regional Planning Panels Secretariat
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By email: jrppenquiry@jrpp.nsw.gov.au

Dear Mr Roseth

2015SYE114 Canada Bay DA2015/0332

This submission is made as a supplement to our submission of 20 November 2015. This further submission is made on behalf of the individuals named in that document.

This submission is a brief response to the most recent submission from the applicant (provided to the panel on 11 December 2015). This submission does not comprehensively address that document, as these matters were thoroughly addressed in our previous submission.

The response of our clients is as follows:

1. The lawyers acting for the applicant themselves express doubt as to the legal matters on which they are giving an opinion. For example, in its letter of 11 December 2015, Thompson Greer merely says that the applicant's recommended measures will **'as far as possible'** ensure that any challenge to a development consent will be **'unlikely'** to succeed due to a lack of jurisdiction. The 'joint opinion' concedes the possibility that some of its conclusions may, themselves, be 'incorrect' (see paragraphs 21 and 24).

   Our submission is that there is **no jurisdiction** to grant consent (even with the supplementary information provided by JBA dated 10 December 2015). We are of the view that a court will reach the same conclusion.

   Given the applicant's own lawyers are unable to put forward a position with any certainty; our clients submit that the panel should be highly sceptical of the applicant's position.

2. Paragraphs 7-8 of the 'joint opinion' focus on section 79C of the *Environmental Planning and Assessment Act 1979* (**the Act**). This provision deals with the evaluation of the merits of a development application. This is not the correct provision to consider in regard to this legal issue. In order to carry out a merit assessment of the development application, the panel must **first** have jurisdiction (*Wehbe v Pittwater Council* [2007] NSWLEC 827 [36]). Section 79C(1) does not establish the jurisdiction of the panel (that must exist before a merit evaluation can take place). Section 79C(1) only arises **once the panel has jurisdiction** and is applied in the course of carrying out the **merit evaluation** of the development.

   Clause 4.6 defines the circumstances by which it makes available the discretionary powers to overcome a prohibition (*North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468, 480; *Wilson Parking Australia 1992 Pty Ltd v Council of the City of Sydney* [2014] NSWLEC 12 [25]). This prohibition would otherwise arise and must be

applied **under section 76B(a) of the Act**. Section 79C(1) does not, by its terms, impose any prohibition or mandatory restriction.

In the present case, the prohibition that must be overcome, in order for a merit evaluation to take place, is the restriction on the height, storeys and floor space ratio of the buildings. This restriction applies under section 76B(a) of the Act to the proposed development, unless (and only unless) a request is made and upheld under clause 4.6 of the LEP.

3. In paragraph 16 of the 'joint opinion' it is asserted that the Seniors SEPP will prevail over the LEP to the extent of inconsistency. This has not been in dispute. The 'joint opinion' does not address the fact that the Seniors SEPP itself relevantly limits its operation to circumstances where 'the development is carried out in accordance with this Policy' (see paragraphs 5.4-5.10 of our previous submission). As the proposed development is **not** to be carried out in accordance with the Seniors SEPP, the development does not benefit from any Seniors SEPP override (in this regard).

4. The 'joint opinion' asserts that SEPP 1 applies as the mechanism to vary the development standards in the Seniors SEPP without justifying this approach against the matters we raised in our previous submission (see section 4 of that submission). The 'joint opinion' seems to express the view that the LEP is 'not relevant'. This is then used to assert that the explicit LEP provision displacing SEPP 1 from the land can simply be ignored. This is a fundamental misreading of the statutory scheme. Our previous submission deals with this, including citing the authoritative Court of Appeal statements on this matter (see section 3 of that submission).

   In further support of our earlier analysis, we note that section 36(4) of the Act explicitly contemplates that an environmental planning instrument may be expressly amended by a later environmental planning instrument, **of the same or a different kind**. When determining whether a development is prohibited under section 76B (absent a variation) the terms of all of the environmental planning instruments that apply to the land must be examined. Any inconsistencies between them must be resolved in accordance with section 36 of the Act. The 'joint opinion' does not attempt to do this.

5. In any event, despite paragraph 26 of the 'joint opinion', the LEP is plainly 'relevant' to the development application. It is relevant because of **each** of the following reasons:

   (a) The Seniors SEPP operates on a foundation of the land's underlying zoning and permissible uses. These arise from the LEP.

   (b) The 'inconsistency' provision of the Seniors SEPP does not override the LEP (see paragraph 3 above).

   (c) The Seniors SEPP itself expressly requires the LEP (as an embodiment of the local planning controls) to be taken into consideration (see clause 33(a)).

   (d) The Seniors SEPP does not provide an exclusive code for the regulation of development in respect of floor space ratio when a proposal exceeds 1:1 (this is made clear by the different language used in relation to clause 40 and clause 48 and the organisation of these clauses within the SEPP).

6. Paragraph 26(1) and paragraph 27 of the 'joint opinion' introduces the notion that an environmental planning instrument may have '**primary** relevance (bold added)'. This phrase is not known to the Act. For the purposes of establishing whether a prohibition exists (in the absence a clause 4.6 request that is upheld) there can be no planning instrument that is 'relevant' but not of 'primary relevance'. Either a planning instrument contains operative provisions that prevent the development from being carried out under section 76B(a) (in the absence of a clause 4.6 request being upheld) or it does not. This is established by examining the terms of the planning instruments that apply to the land and applying section 36 of the Act. The 'joint opinion' does not do this. (Notions of 'primary relevance' may arise in the context of a **merit** evaluation under section 79C(1), but this cannot take place until jurisdiction is established via clause 4.6.)

7. Paragraph 33 of the 'joint opinion' asserts that the 'local planning controls' are not the only source of information that concerns 'desired future character'. However, clause 33(a) of the Seniors Housing SEPP **expressly directs attention to those local planning controls**, and those controls only, for the purposes of establishing desired future character. In any event, it can hardly be said, in this case, that the Seniors Housing SEPP can be relied upon to establish that the proposed development is consistent with the desired future character, **given that the proposed development is materially inconsistent with the actual controls of the Seniors Housing SEPP.**

8. Paragraphs 34-35 of the 'joint opinion' says that the relevant zone objective should not be taken as a statement that 'only' low density can be provided on any site within that zone. This view is expressed without any reference to the key text of the zone objective and the requirement under clause 4.6 that any development must (in the opinion of the consent authority) be consistent with that objective. The objective envisages that land is to be used to **provide for** the housing needs of the community **within** a low density residential environment.

   The 'joint opinion' does not advance any logical basis that would be available to the panel to reach a conclusion that the proposed development would be consistent with that objective. It merely observes that there may be various types of housing within an R2 Low Density Residential zone, including seniors housing. This was not disputed by us in our previous submission. However, seniors housing may be developed at low, medium or high densities. The mere fact that seniors housing may be carried out in an R2 zone, does not mean that (if carried out at medium or high densities) it would provide for the housing needs of the community within a low density residential environment.

   By not focusing on the actual legal text, the 'joint opinion' overlooks the legal obligation that the panel actually has. The obligation is **not** to form an opinion about whether the proposed development would be compatible with a low density residential environment. The obligation is to form an opinion about whether (to follow the actual statutory language) the development is **consistent** with **the provision for the housing needs** of the community **within** a low density residential environment.

   There is no reasonable way in which a consent authority, properly informed of its statutory obligations, can form a view that a four-storey building residential building represents the provision of housing **within** a **low density** residential environment.

   It should be understood that the legal standard of unreasonableness **is not** limited to an irrational or bizarre decision. Unreasonableness encompasses, for example, a decision-maker misunderstanding its statutory obligation. A court of judicial review may infer that there has been a failure to properly arrive at the state of satisfaction or opinion if (upon the facts) the result is unreasonable. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification. The notion of 'unreasonable' encompasses, among other things, the failure by a decision-maker to obey rules requiring the proper application of the law (*Hornsby Shire Council v Trives (No 3)* [2015] NSWLEC 190 [17]-[20]).

   In our submission, if any clause 4.6 request is upheld in relation to the proposed development, in the subsequent judicial review proceedings, the Court will infer that the panel misinterpreted, failed to address or overlooked the requirement to ensure that the proposed development would be consistent with the zone objective. This will mean that the Court would conclude that there has been a failure to properly form the prerequisite state of satisfaction (*Trives (No 3)* [22]). This will result in a conclusion that any development consent was granted unlawfully.

9. JBA has now provided supplementary information which claims that certain development standards are unreasonable or unnecessary because they relate to the R2 Low Density Residential zone and that the zone is 'inappropriate for the site'.

   JBA cites the decision of the Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSWLEC 827. However, as a matter of law, this ground is not available in the present case for three reasons.

Firstly, the judgment in *Wehbe* says (at [49]):

> [C]are needs to be taken not to expand this fifth way of establishing that compliance is unreasonable or unnecessary beyond its limits. It is focused on "particular land" and the circumstances of the case. Compliance with the development standard is unreasonable or unnecessary not because the standard is inappropriate to the zoning, but rather because the zoning of the particular land is found to be unreasonable or inappropriate. **If the particular land should not have been included in the particular zone, the standard would not have applied, and the proposed development would not have had to comply with that standard.** To require compliance with the standard in these circumstances would be unreasonable or unnecessary (bold added).

In the present case no reasonable basis has been put forward as to why the particular land should not have been included in the R2 zone. It seems that the argument that it should not be in that zone rests on the fact that the existing/previous development and use of the site is not consistent with the new zone. This argument is perverse as it suggests that any change in planning controls that envisages a phase-out of existing use/development and its replacement with use/development of a different character is inappropriate. The apparent basis for the zoning is clearly set out in our previous submission (see paragraphs 6.18-6.22). This has not been credibly challenged.

Secondly, the decision in *Wehbe* — on this point — was based on the decision of the Court of Appeal in *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94. This decision actually resulted in a **refusal** to exercise the dispensing power under SEPP 1. However, the Court did agree (at [10]-[11]) with the principle (**in the context of SEPP 1**) that:

> If the zoning of particular land was found to be unreasonable or inappropriate [a consent authority] … might conclude that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land. Such a finding could lead to further findings that compliance with the standard in that case would also be unreasonable or unnecessary **and a SEPP 1 objection** should be upheld. (bold added).

In accepting this principle the Court referred to an even earlier decision *Legal & General Life of Australia Ltd v North Sydney Municipal Council* (1989) 68 LGRA 192. However, in that case, it was held that the buildings in the vicinity 'make the maintenance of the … development standards ... in the case of the … [subject] land … quite pointless' (quoted at [12]).

In the present case it is proposed to almost completely demolish all of the structures that do not accord with the desired future character. No issue can be raised that the application of the standards would be pointless. Indeed, it is this very situation that was apparently envisaged by the planning controls in seeking to achieve a desired **future** character, rather than maintaining an existing character.

Thirdly, the above case law — *Wehbe, Fast Buck$* and *Legal & General Life of Australia Ltd* — was also decided in the context of SEPP 1. The provisions of SEPP 1 did not require (as clause 4.6 does) that there be consistency with the objectives of the development standard and zone objectives.

The particular issue in *Fast Buck$* was the relationship between a minimum lot size requirement and the **objectives** of the zone to maintain the rural character of land and avoid land use conflict. In *Legal & General Life* it was held that the development standards themselves were 'unreasonable and unnecessary'.

It is submitted that each of these cases have been overtaken by the express requirement of clause 4.6(4)(a)(ii). That is, that the consent authority form an opinion that the proposed development is consistent with the objectives of the zone and the development standard **in every case**.

Accordingly — since SEPP 1 cannot be relied upon in the present case — **it is not possible for a clause 4.6 request to be approved on the basis that the objectives of either a zone or development standard are unreasonable or unnecessary**. This would

be a conflict with clause 4.6(4)(a)(ii). Such a conflict, within clause 4.6, is clearly not intended.

Our client intends to rely on this correspondence (and our previous submission) in the event that the development consent is granted and judicial review proceedings are commenced. This reliance may extend to (if our clients are successful in the proceedings) an application for indemnity costs against the Sydney East Joint Regional Planning Panel.

Yours sincerely

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