

SYDNEY EAST JOINT REGIONAL PLANNING PANEL

Meeting held electronically between 5 January 2016 and 19 January 2016

Panel Members: John Roseth (chair), David Furlong, Sue Francis, Michael Megna and Tony Fasanella

Apologies: None - Declarations of Interest: None

Determination and Statement of Reasons

2015SYE114 Canada Bay DA2015/0332: Partial demolition and construction of a new building for use as a residential aged care facility and 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 at 5 Mary Street and 17 Millar Street, Drummoyne as described in Schedule 1.

Date of determination: 19 January 2016

Decision:

The panel determined to approve the development application as described in Schedule 1 pursuant to section 80 of the *Environmental Planning and Assessment Act 1979*.

Panel consideration:

The panel considered: the matters listed at item 6 as addressed in the Council Assessment Report, the material listed at item 7 and the material presented at meetings listed at item 8 in Schedule 1.

Reasons for the panel decision:

In March 2015, the Sydney East JRPP granted consent to an application, made under State Environmental Planning Policy Seniors Living (SEPPSL), for a residential care facility at Mary and Millar Streets Drummoyne. The proposed development is on the site of a disused school, which contains two-storey buildings with a pitched roof. The existing buildings are to be demolished and the proposed buildings are four storeys high with a flat roof, which is about the height of the pitched roof of the buildings to be demolished. The FSR of the new development is 1.3:1.

The March consent was based on an acceptance of the variation of two development standards specified in SEPPSL (height and number of storeys). The justification of the variation was based partly on the height of the buildings now on the site.

The current LEP zones the site and surrounding area R2. Residential care facilities are not permissible in the zone. The maximum permissible FSR is 0.5:1 and the maximum permissible height is 8.5m. The FSR of the SEPP is not limited, though, if the FSR is 1:1 or less, the consent authority cannot refuse it on the ground of excessive FSR. The maximum permissible height in the SEPP is 8.0m and buildings fronting the street are limited to two storeys. Thus the proposal does not comply with the height and the FSR allowed by the LEP and the height and number of storeys allowed by the SEPP.

The applicant states that, following the issue of the March consent, it received legal advice that the validity of the consent may be challenged. (The Panel has not seen the advice.) The applicant resubmitted the application with a revised request to vary the development standards, so as to correct any errors of law. The revised proposal is similar to the first proposal; however, it includes some design changes that the Panel required by imposing conditions on the March consent.

The revised application came to the Panel on 12 November 2015 with an assessment report that recommended approval. At the public meeting, a solicitor, Mr Aaron Gadiel, addressed the Panel on behalf of nine objectors living near the site. The gist of Mr Gadiel's oral submission was that the Panel could not lawfully approve the application. Since neither the applicant nor the Panel was able to deal with this submission during the meeting, the Panel deferred its decision in order to obtain its own legal advice and to allow the applicant to respond. The terms of the deferral allow the Panel to reach a decision by communicating by email or to call a further public meeting if it considers this necessary.

Following the meeting, Mr Gadiel provided a written submission. The applicant responded with its own legal advice, a Joint Opinion by Mr Chris McEwen SC and Mr Mark Seymour counsel. The Panel sought its own legal opinion from Ms Jacinta Reid, counsel. Finally, Mr Gadiel made a further written submission in response to the Joint Opinion and Ms Reid's advice. The Joint Opinion and Ms Reid both advised that it was reasonably open to the Panel to approve the application. In his response, Mr Gadiel remained

SYDNEY EAST JOINT REGIONAL PLANNING PANEL

unchanged in his view that the Panel had no legal power to approve. All four legal opinions are published on the JRPP website.

Thus the Panel is faced with three legal opinions (if one counts Mr Gadiel's two submissions as one opinion), which are inconsistent with each other. While the members of the Panel have no legal qualifications, they are required to make a decision on the basis of those opinions. Therefore the Panel bases its decision on the legal opinion(s) which appear(s) to it to be the most feasible and which is (are) most likely to lead to a desirable and practical planning outcome.

While the legal opinions diverged from each other on many issues which are too nuanced to be discussed in this decision, there are two issues with which all legal opinions have dealt. The first is whether the relevant standards, which are to be varied for the application, are those of SEPPSL or those of the LEP's R2 zone (which are much stricter). The second is whether the achievement of a future desired character of 8.5m high residential buildings for the R2 zone requires that EVERY building in the zone is a two-storey house.

The Panel has accepted the advice of the Joint Opinion and Ms Reid's opinion that the development standards of SEPPSL are those which are likely to be relevant to this application. This is on the basis that, without SEPPSL, the proposal would be prohibited. It appears anomalous to apply to this residential care facility the development standards in a zone in which residential care facilities are prohibited. Notwithstanding, the Panel is aware that the Joint Opinion advises that there is a possibility that a Court might find that it is the development standards of the R2 zone that require to be varied. The Panel notes that the applicant has submitted justifications for varying the development standards of the R2 zone as well as those of SEPPSL. The Panel has accepted the advice of the Joint Opinion and of Ms Reid that a desired future character of generally two storey buildings can be achieved even when a few buildings do not comply with the two-storey height.

The Panel has also considered the further advice of Ms Reid in relation to two other matters raised by Mr Gadiel. The first point in question relates to whether or not there is anything specific in the subject development that provides additional justification to vary standards under Clause 4.6 as a result of the decisions in the matter *four2five v Ashfield*.

Ms Reid's advice is that the panel can in this instance recognise the major social benefit that the particular development provides, particularly in relation to the needs of residents suffering from dementia. The applicant argues that the design of the facility needs to be more generous as individuals with dementia often have higher levels of mobility than normal high care individuals. On this basis, Ms Reid opines that the Panel can take into account the social benefit of the application.

Finally Ms Reid's advice to the Panel also suggests that the bulk and scale of the current buildings on the site are a reasonable consideration in varying the SEPPSL height standards. She suggests that in the absence of specific objectives for those controls, the panel could reasonably conclude that the proposal needs to be compatible with the existing character and environment of the locality.

For the above reasons the Panel accepts the recommendation of the planning assessment report to approve the application.

Conditions: The development application was approved subject to the conditions in the Council Assessment Report.

Panel members:



John Roseth (chair)



David Furlong



Sue Francis

SYDNEY EAST JOINT REGIONAL PLANNING PANEL



Michael Megna



Tony Fasanella

SYDNEY EAST JOINT REGIONAL PLANNING PANEL

SCHEDULE 1

1	JRPP Reference – LGA- Council Reference: 2015SYE114 Canada Bay DA2015/0332
2	Proposed development: Partial demolition and construction of a new building for use as a residential aged care facility and 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
3	Street address: 5 Mary Street and 17 Millar Street, Drummoyne
4	Applicant/Owner: Scalabrini Village Pty Ltd
5	Type of Regional development: General development with a Capital Investment Value of more than \$20 million
6	Relevant mandatory considerations <ul style="list-style-type: none"> • State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (Seniors SEPP) • State Environmental Planning Policy No. 55 - Remediation of Land • Sydney Regional Environmental Planning Policy (Sydney Harbour Catchment) 2005; deemed SEPP • Canada Bay Local Environmental Plan 2013 • City of Canada Bay Development Control Plan 2013 • The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality. • The suitability of the site for the development. • Any submissions made in accordance with the EPA Act or EPA Regulation. • The public interest.
7	Material considered by the panel: Council Assessment Report Dated: 4 November 2015 Written submissions during public exhibition: 16 Verbal submissions at the panel meeting: Support- Tony McNamara; Against- Aaron Gadiel, Tim Blythe (on behalf of residents) and Lino Caccavo; On behalf of the applicant- Katie Formston and Julie Bindon
8	Meetings and site inspections by the panel: Briefing Meeting on 28 September 2015 (electronic) and Panel Meeting 12 November 2015
9	Council recommendation: Approval
10	Draft conditions: Attached to council assessment report