Land and Environment Court

New South Wales

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| Case Name: | Principal Healthcare Finance Pty Ltd v Council of the City of Ryde |
| Medium Neutral Citation: | [2016] NSWLEC 153 |
| Hearing Date(s): | 05 August 2016 |
| Date of Orders: | 2 December 2016 |
| Decision Date: | 2 December 2016 |
| Jurisdiction: | Class 1 |
| Before: | Robson J |
| Decision: | See orders at [78] |
| Catchwords: | SEPARATE QUESTION – whether provision of SEPP is prohibition or development standard – two-step approach appropriate – held provision is development standard |
| Legislation Cited: | Environmental Planning and Assessment Act 1979 (NSW) ss 4, 76B<br>Hurstville Local Environmental Plan 1994 (NSW) cl 16A<br>Ryde Local Environment Plan 2014 (NSW) cl 4.6<br>State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (NSW) cll 1, 2, 4, 8, 9, 10, 11, 12, 13, 14, 15, 26, 30, 40<br>State Environmental Planning Policy No 5 – Housing for Older People or People with a Disability 1998 (NSW) cll 3, 12 |
| Cases Cited: | 4nature Inc v Centennial Springvale Pty Ltd (2016) 218 LGERA 289; [2016] NSWLEC 121<br>Agostino v Penrith City Council (2010) 172 LGERA 380; [2010] NSWCA 20<br>Blue Mountains City Council v Laurence Browning Pty Ltd (2006) 67 NSWLR 672; [2006] NSWCA 331 |

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| | Cranbrook School v Woollahra Municipal Council (2006) 66 NSWLR 379; [2006] NSWCA 155<br>Georgakis v North Sydney Council (2004) 140 LGERA 379; [2004] NSWLEC 123<br>Hewitt v Hurstville Council (2001) 119 LGERA 152; [2001] NSWLEC 294<br>Huang v Hurstville City Council (No 2) [2011] NSWLEC 151<br>Karimbla Constructions Services (NSW) Pty Ltd v Pittwater Council [2015] NSWLEC 83<br>Laurence Browning v Blue Mountains City Council [2006] NSWLEC 74<br>Lotus Project Management Pty Ltd v Pittwater Council [2015] NSWLEC 16<br>Lowy v Land and Environment Court of NSW (2002) 123 LGERA 179; [2002] NSWCA 353<br>Mosman Municipal Council v IPM Pty Ltd (2016) 216 LGERA 252; [2016] NSWLEC 26<br>North Sydney Municipal Council v PD Mayoh Pty Ltd (No 2) (1990) 71 LGRA 222<br>Residents Against Improper Development Inc v Chase Property Investments Pty Ltd (2006) 149 LGERA 360; [2006] NSWCA 323<br>Strathfield Municipal Council v Poynting (2001) 116 LGERA 319; [2001] NSWCA 270<br>Sutherland Shire Council v Benedict Industries Pty Ltd (No 4) [2015] NSWLEC 101<br>Tovir Investments Pty Ltd v Waverley Council [2014] NSWCA 379<br>Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2009) 173 LGERA 155; [2009] NSWLEC 219<br>Wilson Parking Australia 1992 Pty Ltd v Council of the City of Sydney (2014) 201 LGERA 232; [2014] NSWLEC 12<br>Wingecarribee Shire Council v De Angelis [2016] NSWCA 189<br>Woollahra Municipal Council v Carr (1985) 62 LGRA 263 |
| Category: | Procedural and other rulings |
| Parties: | Principal Healthcare Finance Pty Ltd (Applicant)<br>Council of the City of Ryde (Respondent) |

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| Representation: | Counsel:<br>A E Galasso SC with E Tringali (Applicant)<br>S M Berveling (Respondent)<br><br>Solicitors:<br>Mills Oakley (Applicant)<br>Council of the City of Ryde (Respondent) |
| File Number(s): | 2016/00152633 |

## JUDGMENT

1 Before the Court for determination is a separate question arising out of a Class 1 Application appealing the decision of Sydney East Region Joint Regional Planning Panel ('JRPP') to refuse Development Application no. LDA2014/0419 for demolition of existing buildings and construction of a new 'high-care' residential aged care facility ('Application') at 8-14 Sherbrooke Road and 78-82 Mons Avenue, West Ryde ('Site'). The high-care residential aged care facility proposed in the Application will consist of a new part 2 to part 4 storey building with a basement containing 30 parking spaces and ancillary uses to provide a total of 127 bedrooms containing 141 beds.

2 The applicant, Principal Healthcare Finance Pty Ltd ('Principal Healthcare'), relies on the provisions of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (NSW) ('SEPP (HSPD)') in support of the Application.

3 On 8 June 2016, Pain J ordered that the following question be determined by a judge of this Court, separately from and prior to the hearing of the two proceedings:

> Whether clause 26 of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* is a development standard amenable to clause 4.6 of the *Ryde Local Environmental Plan 2014* or a prohibition.

4 Principal Healthcare contends that cl 26 of SEPP (HSPD) is a development standard, and is therefore amenable to cl 4.6 of the *Ryde Local Environmental Plan 2014* (NSW) ('Ryde LEP'). The respondent, the Council of the City of Ryde ('Council'), contends that cl 26 of SEPP (HSPD) is a prohibition, and sets out essential requirements that must be met if the development is to proceed.

## Background

5 The parties relied upon a Statement of Agreed Facts, which became Ex 1 in the proceedings. This document accurately summarises the background facts of this matter, and relevantly provides:

> **The Site**
>
> 5. A 72 bed nursing home is currently located on Lot 1 DP 201757. A single dwelling is currently located on each of 14 Sherbrooke Road and 78-82 Mons Avenue.
>
> 6. The subject site is zoned R2 Low Density Residential under the *Ryde Local Environmental Plan 2014*. The objectives of the R2 Low Density Residential zone are:
>
> > *a. To provide for the housing needs of the community within a low density residential environment.*
> >
> > *b. To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
> >
> > *c. To provide for a variety of housing types.*
>
> 7. Residential care facilities are permitted with consent within the R2 Low Density Residential zone.
>
> 8. Residential care facility is defined under the *Ryde Local Environmental Plan 2014* to mean *"accommodation for seniors or people with a disability that includes:*
>
> > *a. Meals and cleaning services, and*
> >
> > *b. Personal care or nursing car [sic], or both, and*
> >
> > *c. Appropriate staffing, furniture, furnishings and equipment for the provision of that accommodation and care,*
>
> *But does not include a dwelling, hostel, hospital or psychiatric facility."*
>
> 9. The Applicant indicated in its application that the proposed development relies upon the provisions of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*.
>
> **The Assessment Process**
>
> 10. The Council submitted its Assessment Report and Recommendation to the Sydney East Region Joint Regional Planning Panel (JRPP) on 29 July 2015.
>
> 11. The Council's Assessment Report and Recommendation raised a concern that the development application "is prohibited by virtue of failing to satisfy" clause 26 of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*.
>
> …
>
> 14. Various legal advices were provided to the JRPP.
>
> 15. The Applicant submitted a letter to the Council dated 28 September 2015, which provided:

*"…all residents entering the proposed new residential aged care home at Opal Fernleigh will be assessed as "high care" under the Commonwealth Aged Care Act and Aged Care Funding Investment (ACFI), as administered by the Commonwealth Department of Social Services. As such, these high-care residents will require significant assistance with their daily health care and individual needs such as personal hygiene and body sustenance (eating and drinking). Furthermore, given the limited mobility and frailty of these high-care residents, they are not able to access external services independently such as medical, dental and personal care, shops, bank service providers and other retail and commercial services."*

16. Council provided its draft conditions of consent to the JRPP on 19 October 2016. Condition 16 provided:

*"Further restriction on occupation of the development*

*Notwithstanding the above condition, the development may only be occupied by residents which [sic] require high level care. For the purposes of this condition, high level care means care provided either by registered nurses, or under the supervision of registered nurses, on a 24 hour/day basis to people who need almost complete assistance with most activities of daily living. Nursing care is combined with accommodation, support services (cleaning, laundry and meals), personal care services (help with dressing, eating, toileting, bathing and moving around), and allied health services (such as physiotherapy, occupational therapy, recreation therapy and podiatry)."*

…

18. The JRPP determined to refuse the Development Application on 19 November 2015. The reasons of the JRPP's decision were as follows:

*"The [JRPP] accepts the recommendation of the second supplementary report [of Council] to refuse the application for the following reasons:*

The second supplementary report accepts that the physical design of the proposal is acceptable and the minor variation in height is justified. The recommendation for refusal is based on two reasons: cl 26 of the State Environmental Planning Policy Seniors Living ([SEPP (HSPD)]) and the public interest. The [JRPP] accepts the first of these reasons, namely that cl 26 does not give the [JRPP] the power to approve the application.

As concerns cl 26, there have been four legal opinions sought in this matter, two by the applicant, one by the Council and one by the [JRPP]. The opinions are inconsistent with each other. The [JRPP] considers that the requirements of cl 26 are more likely to be development standards than prohibitions; however, this question does not arise, because the [JRPP] considers the access to shops and public transport outside the site to be too long and too steep to vary the distance slop [sic] required by cl 26(2).

The [JRPP] has considered whether cl 26 may be satisfied if the services and facilities required are provided on the site. This is because the applicant submits that the residents in the facility are too frail to access services outside the site. Despite the fact that the [JRPP] considers this is a beneficial development, it has concluded

> that the requirements of cl 26(2), that services and facilities are "located at a distance of not more than 400m from the site" means that they cannot be included on the site.
>
> In the alternative, if the [JRPP] is wrong and the provision of services on the site meets the requirements of cl 26, then ALL the services mention[ed] in cl 26(1) need to be provided, and this is clearly not the case. The inability of the application to satisfy cl 26 means that the [JRPP], as much as it considers the proposal to be in the public interest, has not power to approve it.
>
> The confusion of the terms of [SEPP (HSPD)], as evidence[d] by the range and difference in the various legal opinions, clearly indicates the need to review the Policy in order to bring it up to date with the currently available electronic means of providing retail and banking services."

## Legislative framework

6 The phrase "development standards" is defined in s 4(1) of the *Environmental Planning and Assessment Act 1979* (NSW) ('*EPA Act')* as follows:

> "development standards" means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:
>
> (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
>
> …
>
> (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
>
> …
>
> (m) the provision of services, facilities and amenities demanded by development…

7 Further to the above, s 76B of the *EPA Act* deals with development that is prohibited:

> **76B Development that is prohibited**
>
> If an environmental planning instrument provides that:
>
> (a) specified development is prohibited on land to which the provision applies, or
>
> (b) development cannot be carried out on land with or without development consent,
>
> a person must not carry out the development on the land.

8 This matter primarily centres on various clauses found within the SEPP (HSPD). As will become clear below, it is important to recite a number of these clauses, so that the relevant clauses of SEPP (HSPD) can be understood in their context.

> **Chapter 1 Preliminary**
>
> 1 Name of Policy
>
> This Policy is *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*.
>
> 2 Aims of Policy
>
> (1) This Policy aims to encourage the provision of housing (including residential care facilities) that will:
>
> (a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and
>
> (b) make efficient use of existing infrastructure and services, and
>
> (c) be of good design.
>
> (2) These aims will be achieved by:
>
> (a) setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and
>
> (b) setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form, and
>
> (c) ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes.
>
> …
>
> 4 Land to which Policy applies
>
> (1) General
>
> This Policy applies to land within New South Wales that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes, but only if:
>
> (a) development for the purpose of any of the following is permitted on the land:
>
> (i) dwelling-houses,
>
> (ii) residential flat buildings,
>
> (iii) hospitals,
>
> (iv) development of a kind identified in respect of land zoned as special uses, including (but not limited to)

churches, convents, educational establishments, schools and seminaries, or

(b) the land is being used for the purposes of an existing registered club.

…

**Chapter 2 Key concepts**

8 Seniors

In this Policy, *seniors* are any of the following:

(a) people aged 55 or more years,

(b) people who are resident at a facility at which residential care (within the meaning of the *Aged Care Act 1997* of the Commonwealth) is provided,

(c) people who have been assessed as being eligible to occupy housing for aged persons provided by a social housing provider.

9 People with a disability

In this Policy, *people with a disability* are people of any age who have, either permanently or for an extended period, one or more impairments, limitations or activity restrictions that substantially affect their capacity to participate in everyday life.

10 Seniors housing

In this Policy, *seniors housing* is residential accommodation that is, or is intended to be, used permanently for seniors or people with a disability consisting of:

(a) a residential care facility, or

(b) a hostel, or

(c) a group of self-contained dwellings, or

(d) a combination of these,

but does not include a hospital.

…

11 Residential care facilities

In this Policy, a *residential care facility* is residential accommodation for seniors or people with a disability that includes:

(a) meals and cleaning services, and

(b) personal care or nursing care, or both, and

(c) appropriate staffing, furniture, furnishings and equipment for the provision of that accommodation and care,

not being a dwelling, hostel, hospital or psychiatric facility.

…

12 Hostels

In this Policy, a *hostel* is residential accommodation for seniors or people with a disability where:

(a) meals, laundering, cleaning and other facilities are provided on a shared basis, and

(b) at least one staff member is available on site 24 hours a day to provide management services.

…

13 Self-contained dwellings

(1) General term: "self-contained dwelling"

In this Policy, a *self-contained dwelling* is a dwelling or part of a building (other than a hostel), whether attached to another dwelling or not, housing seniors or people with a disability, where private facilities for significant cooking, sleeping and washing are included in the dwelling or part of the building, but where clothes washing facilities or other facilities for use in connection with the dwelling or part of the building may be provided on a shared basis.

**Chapter 3 Development for seniors housing**

**Part 1 General**

14 Objective of Chapter

The objective of this Chapter is to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age.

15 What Chapter does

This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy:

(a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and

(b) development on land that adjoins land zoned primarily for urban purposes for the purpose of any form of seniors housing consisting of a hostel, a residential care facility or serviced self-care housing.

…

**Part 2 Site-related requirements**

…

26 Location and access to facilities

(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to:

(a) shops, bank service providers and other retail and commercial services that residents may reasonably require, and

(b) community services and recreation facilities, and

(c) the practice of a general medical practitioner.

(2) Access complies with this clause if:

(a) the facilities and services referred to in subclause (1) are located at a distance of not more than 400 metres from the site of the proposed development that is a distance accessible by means of a suitable access pathway and the overall average gradient for the pathway is no more than 1:14, although the following gradients along the pathway are also acceptable:

(i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,

(ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,

(iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time, or

(b) in the case of a proposed development on land in a local government area within the Sydney Statistical Division—there is a public transport service available to the residents who will occupy the proposed development:

(i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and

(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in subclause (1), and

(iii) that is available both to and from the proposed development at least once between 8am and 12pm per day and at least once between 12pm and 6pm each day from Monday to Friday (both days inclusive),

and the gradient along the pathway from the site to the public transport services (and from the public transport services to the facilities and services referred to in subclause (1)) complies with subclause (3), or

(c) in the case of a proposed development on land in a local government area that is not within the Sydney Statistical Division—there is a transport service available to the residents who will occupy the proposed development:

(i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and

(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from

the facilities and services referred to in subclause (1), and

(iii) that is available both to and from the proposed development during daylight hours at least once each day from Monday to Friday (both days inclusive),

and the gradient along the pathway from the site to the public transport services (and from the transport services to the facilities and services referred to in subclause (1)) complies with subclause (3).

…

(3) For the purposes of subclause (2) (b) and (c), the overall average gradient along a pathway from the site of the proposed development to the public transport services (and from the transport services to the facilities and services referred to in subclause (1)) is to be no more than 1:14, although the following gradients along the pathway are also acceptable:

(i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,

(ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,

(iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time.

(4) For the purposes of subclause (2):

(a) a *suitable access pathway* is a path of travel by means of a sealed footpath or other similar and safe means that is suitable for access by means of an electric wheelchair, motorised cart or the like, and

(b) distances that are specified for the purposes of that subclause are to be measured by reference to the length of any such pathway.

(5) In this clause:

*bank service provider* means any bank, credit union or building society or any post office that provides banking services.

…

**Part 3 Design requirements**

**Division 1 General**

30 Site analysis

(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied that the applicant has taken into account a site analysis prepared by the applicant in accordance with this clause.

(2) A site analysis must:

(a) contain information about the site and its surrounds as described in subclauses (3) and (4), and

(b) be accompanied by a written statement (supported by plans including drawings of sections and elevations and, in the case of proposed development on land adjoining land zoned primarily for urban purposes, an aerial photograph of the site):

(i) explaining how the design of the proposed development has regard to the site analysis, and

(ii) explaining how the design of the proposed development has regard to the design principles set out in Division 2.

…

**Part 4 Development standards to be complied with**

**Division 1 General**

40 Development standards—minimum sizes and building height

(1) General

A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.

(2) Site size

The size of the site must be at least 1,000 square metres.

(3) Site frontage

The site frontage must be at least 20 metres wide measured at the building line.

(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…

9 Further, it is important to also recite cl 4.6 of the Ryde LEP, which relevantly provides as follows:

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

…

10 Finally, as will become clear below, it is important to also quote cl 12 of the *State Environmental Planning Policy No 5 – Housing for Older People or People with a Disability 1998* (NSW) ('SEPP 5'), which relevantly provides as follows:

12 Matters for consideration

(1) Location, facilities and support services

The consent authority must not consent to a development application made pursuant to this Part unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to:

(a) shops, banks and other retail and commercial services that residents may reasonably require, and

(b) community services and recreation facilities, and

(c) the practice of a general medical practitioner.

(2) Access complies with this subclause if:

(a) the facilities and services referred to in subclause (1) are located at a distance of not more than 400 metres from the site of the proposed development, or

(b) there is a transport service available to the residents who will occupy the proposed development:

(i) that is located at a distance of not more than 400 metres from the site of the proposed development, and

(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the relevant facilities or services, and

(iii) that is available both to and from the proposed development during daylight hours at least once per day from Monday to Friday (both days inclusive).

**Council Submissions**

11 Council maintains that cl 26 of SEPP (HSPD) is a prohibition and not a development standard. It therefore contended that it is not the subject to the dispensatory power contained in cl 4.6 of the Ryde LEP.

12 Council submitted that the question of whether a particular provision in an environmental planning instrument comprises a development standard or a prohibition is the subject of much judicial consideration in both the Court of Appeal and the Land and Environment Court. It submitted that a common thread in these authorities is that cl 26 of SEPP (HSPD) must be read as part of the planning instrument as a whole.

13 Council further submitted that the 'two-step' approach of Giles JA in *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319; [2001] NSWCA 270 ('*Poynting*') remains the appropriate approach, despite some conflicting dicta in more recent authorities. This approach involves:

(1) considering (and determining) whether a proposal is prohibited under any circumstances by the relevant provision (construed in context of the instrument as a whole); and

(2) if it is not so prohibited, considering (and determining) whether the relevant provision specifies a requirement or fixes a standard in relation to an aspect of the proposed development.

14 Council placed reliance on the decision of Jagot J in *Laurence Browning v Blue Mountains City Council* [2006] NSWLEC 74 (‘*Laurence Browning (LEC)*’), and in particular the eight principles her Honour outlines at [26], which are recited at paragraph 40 below.

15 Council also placed reliance upon *Huang v Hurstville City Council (No 2)* [2011] NSWLEC 151 (‘*Huang*’), where Pain J found that cl 16A(2)(a) of the *Hurstville Local Environmental Plan 1994* (NSW) was an essential element of the permissible development and was thus a prohibition. This clause in effect permitted sex services premises only if the Council was satisfied that the premises “…will not be near, or within view of, any educational establishment, place of public worship or hospital or any place frequented by children”.

16 Council submitted that the requirements of cl 26 of SEPP (HSPD) do not relate to an aspect of the development, but rather to a characteristic of the land on which the development for seniors housing may be carried out, being its accessibility to shops and certain services and facilities.

17 The Council then referred to more recent authority in *Wilson Parking Australia 1992 Pty Ltd v Council of the City of Sydney* (2014) 201 LGERA 232; [2014] NSWLEC 12 (‘*Wilson Parking*’) where Pepper J having surveyed various authorities concluded that the appropriate approach was that considered by Giles JA in *Poynting*.

18 Council also sought to distinguish the decision of McClellan CJ of LEC (as he then was) in *Georgakis v North Sydney Council* (2004) 140 LGERA 379; [2004] NSWLEC 123 (‘*Georgakis*’), which was relied upon by Principal Healthcare, as it relates to a “different planning instrument with an entirely different structure”. In *Georgakis*, his Honour was considering whether cl 12 of SEPP 5, which is recited at paragraph 10 above, was a development standard.

19 Further, Council submitted *Georgakis* preceded a number of other Court of Appeal judgments which “expanded the range of matters” going towards the first question outlined by Giles JA in *Poynting*, and so could be distinguished

on this front as well, as such determinations may have caused his Honour to come to a different conclusion. In developing this submission, Council relied on:

(1) *Blue Mountains City Council v Laurence Browning Pty Ltd* (2006) 67 NSWLR 672; [2006] NSWCA 331 ('*Laurence Browning (CA)*'), which it submitted involved a "zoning" type requirement;

(2) *Agostino v Penrith City Council* (2010) 172 LGERA 380; [2010] NSWCA 20 ('*Agostino*'), which it submitted involved a "definitional" type requirement; and

(3) *North Sydney Municipal Council v PD Mayoh Pty Ltd (No 2)* (1990) 71 LGRA 222, which it submitted involved a "locational" type requirement.

20 Having referred to the authorities, Council then submitted that when SEPP (HSPD) is read as a whole, the following is clear:

(1) the aims of SEPP (HSPD) are to provide for certain particular housing in limited circumstances, namely housing "that [meets] the needs of seniors or people with a disability" and which makes "efficient use of existing…services";

(2) SEPP (HSPD) provides a facility to override the provisions of any other environmental planning instrument, in order to permit development for seniors housing "if the development is carried out in accordance with" SEPP (HSPD);

(3) the permissibility provided in cl 15 of SEPP (HSPD), which allows a proponent to potentially carry out certain development, is subject to the proviso within the same clause which requires that "the development is carried out in accordance" with SEPP (HSPD);

(4) the requirements set out in SEPP (HSPD) directly affect the permissibility afforded by cl 15 of SEPP (HSPD);

(5) SEPP (HSPD) itself refers to "development standards" in Pts 4 and 7 of Ch 3, and the absence of that phrase in Pt 2 of Ch 2 (which instead uses the phrase "[site-related] requirements") are textual indicators that the requirements in Pt 2 of Ch 2 (which includes cl 26) are not development standards; and

(6) clause 26 of SEPP (HSPD) limits the sites on which development for seniors housing might be permissible to those which make efficient use of existing services and those which meet the needs of seniors or people with a disability, and if the criteria in this clause are not satisfied, then development for the purpose of seniors housing pursuant to SEPP (HSPD) is prohibited under any circumstances.

**Principal Healthcare's submissions**

21 Principal Healthcare took the position that SEPP (HSPD) should be seen as a facultative document as it does not "prohibit" development in the sense of

s 76B of the *EPA Act*, but rather operates to permit development that is otherwise not permissible.

22 It was submitted that the availability of SEPP (HSPD) as a facultative document is determined by reference to cl 4 of SEPP (HSPD), which delineates the land to which the policy applies. In the circumstances of the present case, it was submitted that a strict conceptualisation of "prohibition" is unnecessary as the instrument does not actually prohibit anything. Rather, it submitted that cl 15 of SEPP (HSPD) permits development "despite the provision of another environmental planning instrument", and that this power to permit development is circumscribed to the extent that the development is "carried out in accordance with this policy". To this end, Principal Healthcare submitted that cl 26 of SEPP (HSPD) is one such provision that circumscribes the power to permit development, as it provides criteria that the consent authority must be satisfied are met by a proponent. Specifically, it submitted that some of these aspects of cl 26 of SEPP (HSPD) are subjective (for example, "commercial services that residents may reasonably require" in cl 26(1)(a) of SEPP (HSPD)) and others are "empirical" (for example, the reference to 400 metres in cl 26(2)(a) of SEPP (HSPD)). Principal Healthcare submitted that the "empirical" aspects are the relevant subclauses in the present proceedings.

23 Principal Healthcare submitted that the correct approach when determining whether cl 26 of SEPP (HSPD) is a development standard involves consideration of the definition of "development standards" in s 4 of the *EPA Act*. It was submitted that the empirical elements of cl 26 of the SEPP (HSPD) fit within aspects (a), (c) and (m) of this definition, and that this provides a complete and determinative answer to the question before the Court. In particular, Principal Healthcare submits that aspect (a) sufficiently describes the empirical distance requirements found in cl 26 of SEPP (HSPD). Further, it submitted this sits comfortably with the two-step approach in *Poynting*.

24 In addition, Principal Healthcare submitted that the decision in *Georgakis* provides a complete answer to the separate question. It relied upon the finding made by McClellan CJ of LEC at [43] that cl 12 of SEPP 5 (which it submitted

is substantially similar to cl 26) is a development standard, and noted his Honour's comment that:

> It follows that although the development is not absolutely prohibited, by a combination of cll 12(1) and (2) of SEPP 5 it is subject to a requirement that access to the relevant facilities be within 400 m. This is an aspect of the development and, accordingly, a development standard amenable to dispensation pursuant to SEPP 1.

25 Principal Healthcare further submitted that even if *Georgakis* did not provide a complete answer to the present proceedings, there were a number of other decisions of this Court where cl 12(2) of SEPP 5 was considered to be a development standard. In particular, it was submitted that both Bignold J in *Hewitt v Hurstville Council* (2001) 119 LGERA 152; [2001] NSWLEC 294 at [21] ('*Hewitt*') and Biscoe J in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2009) 173 LGERA 155; [2009] NSWLEC 219 at [88] ('*Walker Corporation*') accepted that cl 12 of SEPP 5 was a development standard.

26 Principal Healthcare submitted that although the decisions in *Georgakis, Hewitt* and *Walker Corporation* related to a different environmental planning instrument, being cl 12 of SEPP 5, the structure and many of the primary provisions of SEPP 5 are not materially different to those in SEPP (HSPD). It submitted that Council was incorrect in seeking to distinguish *Georgakis* from the present proceedings.

27 Principal Healthcare also submitted that the decision of Tobias JA in *Residents Against Improper Development Inc v Chase Property Investments Pty Ltd* (2006) 149 LGERA 360; [2006] NSWCA 323 ('*Chase Property*') at [61], with whom Giles JA agreed, explicitly adopted the summary of applicable principles from the earlier authorities advanced by Jagot J in *Laurence Browning (LEC)* at [26]. These principles, it submitted, continue to represent an appropriate approach to the determination of whether a particular clause is a development standard. It was submitted that, when considered against each of the eight principles in *Laurence Browning (LEC)*, cl 26 of SEPP (HSPD) is clearly a development standard because:

(1) the wider context establishes elsewhere the applicability of the instrument and the issue of permissibility, rather than a prohibition, and

the provision lies within the context of carrying out that type of development;

(2) the provision falls within at least one, and most correctly three, of the aspects of the definition;

(3) the provision regulates rather than prohibits the development; corroborated by reference to the definition;

(4) the provision does not prohibit development under SEPP (HSPD) under any circumstances;

(5) development is permissible in the circumstances expressed in the provision;

(6) the development to be identified is "seniors housing", as defined in cl 10 of the SEPP (HSPD);

(7) the requirements are external to the aspects of the development; and

(8) the provision is an aspect of the development, as engaging three of the elements of the definition.

28 Principal Healthcare submitted that, to the extent that the Council relies upon *Agostino*, the relevant provision in that matter is materially distinguishable from cl 26 of SEPP (HSPD). In particular, in *Agostino* the premises (a store) that was the subject of the clause was otherwise prohibited "but for" elements contained within the enabling provision. It submitted that it was little different to the "definitional" approach taken by McHugh JA in *Woollahra Municipal Council v Carr* (1985) 62 LGRA 263 ('*Carr*').

29 Contrary to Council's submissions, Principal Healthcare submitted that when cl 26 of SEPP (HSPD) is read in the context of the instrument as a whole, and consideration is given pursuant to section 35(1) of the *Interpretation Act 1987* (NSW) to the headings of chapters within the policy, each identifies the aspects of the development to which the provisions contained in SEPP (HSPD) relate. It submitted there are two reasons for this. First, the heading of Ch 3 of the SEPP (HSPD), being "development for seniors housing", specifies that the chapter addresses the aspect of the development specifically relating to "seniors housing", which is defined in cl 10 of SEPP (HSPD). It submitted the chapter heading, when read with the relevant definitions contained in the policy, provides requirements that are "specified or standards that are fixed" pursuant to the definition of "development standards" in s 4 of the *EPA Act*, as it involves one type of development to which SEPP (HSPD) relates. Second, it

was noted that the heading of Pt 2 of Ch 3 of the SEPP (HSPD), which contains cl 26, is “Site-related requirements”. It was submitted that this further specifies that this part of the chapter addresses requirements of the development for seniors housing. As such, it was submitted that cl 26 of SEPP (HSPD) does not operate as an outright prohibition.

30 Finally, Principal Healthcare submitted that although reliance is placed upon aspect (a) of the definition of “development standards” in s 4 of the *EPA Act*, cl 26 of SEPP (HSPD) is not just concerned with mere dimensions but a “dimension with a purpose concerned with the delivery of services” which are not themselves prescribed with any degree of specificity, although it is noted that these services are clearly included within aspect (m) of the definition.

31 It was further submitted that, because cl 26 of SEPP (HSPD) specifies standards with respect to availability of public transport services by reference to location, the subject clause extends to aspect (c) of the definition of “development standards”.

32 As such, Principal Healthcare submitted that none of these matters is an essential precondition of permissible development because the requirements in cl 26 of SEPP (HSPD) only set standards as to how the permissible use as seniors living, and more particularly as a residential care facility, is to be carried out. Matters such as the permissible range of gradients along the access pathway, the location of the proposed development, availability of public transport to residents and the overall average gradient along the pathway from the Site to public transport services are all “dimensions”. In addition, even when regard is had to the other “services and facilities”, such as bank service providers, general practitioners and other matters, details of such services and facilities are not specifically identified in the instrument.

**Legal context**

33 Much of the controversy between the parties in the present matter related to the appropriate test to be applied in the circumstances. This reflects the inconsistent approaches adopted in a number of authorities which has continued despite a growing number of judicial pleas over many years for statutory clarification. As such, some consideration of the case law is required.

34 Despite the inconsistent approach taken in various authorities on the proper interpretation of such instruments, there are some points of agreement between the parties. In particular, the parties agree (and I find) that:

(1) the primary task is one of statutory construction;

(2) the instrument, being SEPP (HSPD) must be considered as a whole; and

(3) clause 26 of SEPP (HSPD) must be considered in its entirety, and in the context of the whole instrument.

35 The applicable legal principles of construction in relation to subordinate legislation, including environmental planning instruments such as SEPP (HSPD), are well known. I do not repeat them, except to note that the general principles relating to the interpretation of primary legislation are equally applicable to interpretation of environmental planning instruments: *Cranbrook School v Woollahra Municipal Council* (2006) 66 NSWLR 379; [2006] NSWCA 155 at [36] (McColl JA, with Beazley JA agreeing); *Sutherland Shire Council v Benedict Industries Pty Ltd (No 4)* [2015] NSWLEC 101 at [41] (Pepper J); *Mosman Municipal Council v IPM Pty Ltd* (2016) 216 LGERA 252; [2016] NSWLEC 26 at [117] (Pepper J); *4nature Inc v Centennial Springvale Pty Ltd* (2016) 218 LGERA 289; [2016] NSWLEC 121 at [182] (Pepper J). I also note that whilst environmental planning instruments should be construed in a practical manner, rather than undertaking a meticulous examination of its terms, this does not override the basic principles of statutory construction which require that the Court pay attention to the language of the instrument and its apparent purpose: *Wingecarribee Shire Council v De Angelis* [2016] NSWCA 189 at [20] (Basten JA, with McColl and Payne JJA agreeing); *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379 at [54] (Leeming JA, with Macfarlan JA agreeing).

36 It was submitted by both parties that the two-step approach in *Poynting* should be adopted despite some recent critical judicial commentary. It is well understood that the *Poynting* approach requires:

(1) a consideration of whether the proposed development is prohibited under any circumstances pursuant to cl 26 of SEPP (HSPD) when it is read both in context, and as a whole; and

(2) if it is not so prohibited, a consideration of whether cl 26 of SEPP (HSPD) relevantly specifies a requirement or fixes a standard in relation to an aspect of the proposed development.

37 Since the judgment in *Poynting* in 2001, the two-step approach has been subsequently endorsed in a number of cases: *Lowy v Land and Environment Court of NSW* (2002) 123 LGERA 179; [2002] NSWCA 353 at [117] (Giles JA, with Mason P agreeing on substantive issues) ('*Lowy*'); *Chase Property* at [61] (Tobias JA, with Giles JA agreeing); *Laurence Browning (CA)*' at [35] (Tobias JA); *Huang* at [21] (Pain J); *Wilson Parking* at [31]-[32] and [41] (Pepper J), *Karimbla Constructions Services (NSW) Pty Ltd v Pittwater Council* [2015] NSWLEC 83 at [26] (Pain J) ('*Karimbla*'); *Lotus Project Management Pty Ltd v Pittwater Council* [2015] NSWLEC 166 at [39]-[40] (Pain J) ('*Lotus Project*').

38 That is not to say that the approach has been without critical comment, and is, according to Ipp JA, "no light fandango": *Laurence Browning (CA)* at [15]-[17]. Further, in *Wilson Parking* Pepper J, having surveyed earlier authorities at [33]-[40] and noting the "unhelpful divergence in methodology", found it appropriate at [41] to "follow the test in *Poynting*, as refined in *[Chase Property]*".

39 More recently, in both *Karimbla* and *Lotus Project* Pain J applied the two-step approach in *Poynting*, as refined by Jagot J in *Laurence Browning (LEC)*. In both cases, Pain J referred to a number of conflicting Court of Appeal decisions on the appropriate approach to identifying a common standard. Her Honour also considered that *Agostino*, as the most recent Court of Appeal decision on the issue, was binding on this Court and that Tobias JA, with Giles JA agreeing and McClellan CJ in CL (as he then was) dissenting, had essentially applied the first step of the two-step approach in *Poynting*.

40 Both parties refer to and rely on the summary of principles articulated by Jagot J in *Laurence Browning (LEC)* at [26]. These principles have been adopted on a number of occasions: *Chase Property* at [61] (Tobias JA, with Giles JA agreeing); *Wilson Parking* at [32] (Pepper J); *Karimbla* at [28]; *Lotus Project* at [47]. Given this, the principles outlined by her Honour should be recited in full:

> (1) The provision in question must be "seen as part of the environmental planning instrument as a whole" (*Poynting* at 342 [94]). The "wider context" of the provision, as part of the instrument overall, should be considered in construing the provision ([*Lowy*] at…[2] per Mason P).

(2) If a provision falls within one of the matters in sub-paras (a) to (o) of the definition of "development standard", that fact alone does not mean that the provision is thereby a development standard. The provision must be "in relation to the carrying out of development" and must fix requirements or standards in respect of an aspect of the development (*Poynting* at…[58]).

(3) Although [there is a distinction] between a provision that is a development standard and a provision controlling development in some other way, the dichotomy between "regulation" and "prohibition" cannot replace the definition in the EPA Act. As this conceptual division "will bring finely divided decisions", "care must be taken lest form govern rather than substance" (*Poynting* at…[93]).

(4) A provision that prohibits the development under any circumstances controls development, but is not a development standard (*Poynting* at…[96] and [98]).

(5) If the provision does not prohibit the development under any circumstances and the development is permissible in the circumstances expressed in the provision (whether expressed positively or negatively), then "in most instances the provision will specify a requirement or fix a standard in respect of an aspect of the development". Hence:

> Control by complete prohibition on the development in question will not leave room for requirements or standards. But anything less than complete prohibition means that there can be the development in question, and provided the relevant aspect of the development is identified the control will be by imposition of a development standard.

(*Poynting* at…[98]).

(6) It is necessary to identify the development in order to say whether the provision specifies a requirement or fixes a standard in respect of an aspect of the development ([*Carr*] at 269-270 per McHugh JA and *Poynting* at…[97]).

(7) An essential condition of the definition of "development standard" is that the "requirements specified or standards fixed in respect of any aspect of the development must be requirements or standards which, ex hypothesi, are external to the aspects of that development" (*Carr* at 269-270 per McHugh JA).

(8) Hence, the key consideration in any debate over this second step (the question whether the provision specifies a requirement or fixes a standard in respect of an aspect of the development) is identifying a relevant aspect of the development. In this regard, the list of aspects of development in sub-paras (a) to (n) of the definition of "development standard" shows that "a broad view of what is an aspect of a development should be taken" (*Poynting* at 343 [99]).

41 In *Agostino* the control in issue was a fruit and vegetable store defined as having a maximum area of 150 m². Shops were otherwise prohibited in the relevant zone and the control was found to be a prohibition. The approach of Tobias JA was as follows:

> [46] In the present case, what one is required to do is to identify the proposed development and then to determine whether it falls within the description of that which clause 41(3) makes permissible with consent. In performing this exercise it is necessary to identify which criteria are essential conditions in

> determining whether the particular development proposed is permissible. Thus as Giles JA observed in *Lowy* at [116], it is necessary to first address the LEP by reference not only to principle but also to its own structure and provisions. In so doing care is also to be taken to ensure that form does not govern substance: *Poynting* at [93].
>
> [47] What are those criteria in the present case? As a matter of language, in my view the criteria, which are the essential considerations for determining the permissibility of the proposed development of the appellants, are two-fold. First, the proposed development must be a fruit and vegetable store as defined. Second, it must have a maximum floor area (as defined) of 150m². That which is proposed satisfies the first criterion but not the second. It is therefore prohibited.
>
> [48] In oral argument it was suggested that given the definition of "*development standards*" in s 4(1) of the EP&A Act, one is only concerned to determine what is the development in respect of which requirements are specified or standards are fixed regarding an aspect of that development. Given the definition of "*development*" in that section as including the erection of a building, it followed, so it was suggested, that the only building proposed to be erected in the present case was an extended fruit and vegetable store so that it followed that the words "*with a maximum floor area of 150m²* in clause 41(3) were no more than a requirement specified in respect of an aspect of that building, namely, its floor area.
>
> [49] But such a contention overlooks the fact that the definition of "*development standards*" is referrable only to provisions of an environmental planning instrument "*in relation to the carrying out of development*". Thus the development in respect of which it is asserted that the relevant provision is a development standard must be one which may be carried out; that is, one which is permitted or permissible. One can only determine that question by reference to the terms of the planning instrument.
>
> [50] In my respectful view therefore, the approach referred to in [48] above is to put the cart before the horse. Before one comes to the definition of "*development standards*" one is required to determine precisely what is the permissible or, as Giles JA described it in *Poynting* at [97], the "*non-prohibited*" development. For it is only when one determines what precisely is permissible that one can measure that which is proposed against it in order to determine whether it is permissible or prohibited: if you like, the first step described by Giles JA in *Poynting*.

42 Although in the minority in *Agostino*, McClellan CJ at CL, stated at [71]:

> …The only question which must be answered is whether the relevant provision comes within the definition of a development standard, which requires consideration of the definition and the particular provision...

43 A not dissimilar comment was earlier made by Giles JA in *Lowy* when his Honour stated at [116]:

> …It has been said many times that whether a provision is a development standard depends on the particular provisions seen as part of the planning instrument as a whole. Rather than be caught up in a raft of decisions on their own facts and fine distinctions, I consider it better to address the LEP by regard to principle and its own structure and provisions.

44 Further, Pepper J stated in *Wilson Parking* at [42]:

> What is not controversial, irrespective of whatever test is used, is the need to properly construe [the relevant clause of the instrument]… in context in order to discern the intention of the instrument (indeed so much so is enshrined in cl 4 of the LEP). When undertaking this exercise, the authorities emphasise that care must be taken not to elevate form over substance.

45 I consider that, whilst not uniformly applied, the two-step approach is the appropriate test to apply in the present circumstances, and that the law as outlined by Jagot J in *Laurence Browning (LEC)* at [26] and Tobias JA in *Agostino* at [46]-[50] is a correct statement of the applicable legal principles.

**Consideration**

46 Applying the above principles, I consider that the two-step approach is the appropriate approach when determining whether cl 26 of SEPP (HSPD) is a development standard.

*First step*

47 The first step of this approach requires a consideration of whether the proposed development is prohibited under any circumstances pursuant to cl 26 of SEPP (HSPD) when it is read both in context, and as a whole.

48 I consider that cl 26 of SEPP (HSPD) does not prohibit the proposed development in any circumstances. When the provision is read in isolation, the words “A consent authority must not consent” have the flavour of prohibition. However, this is by no means determinative (*Poynting* at [126] (Young CJ in Eq); *Karimbla* at [32] (Pepper J); *Lotus Project Management* at [50] (Pain J)), and when read both in its entirety and in context, it is clear that cl 26 of SEPP (HSPD) is not a prohibition for two reasons.

49 First, the criteria specified in cl 26 of SEPP (HSPD) are not “essential conditions”: *Agostino* at [46] (Tobias JA); *Laurence Browning (CA)* at [80] and [81] (Basten JA); *Carr* at 269-270 (McHugh JA); *Poynting* at [36] (Giles JA). This allows the present matter to be distinguished from determinations such as that of Pain J in *Huang*. The aims of the instrument are set out clearly in cl 2 of SEPP (HSPD) and involve making good use of existing infrastructure, developing buildings of good design and “increasing the supply and diversity of residences that *meet the needs of seniors*” (emphasis added).

50 Seniors housing is defined in cl 10 of SEPP (HSPD) as involving a wide range of different developments including self-contained dwellings, hostels and residential care facilities. These developments exist on a spectrum of increasing levels of care. Self-contained dwellings, which are defined in cl 11 of SEPP (HSPD), are effectively a collection of separate residences where certain domestic facilities "may be provided on a shared basis". Hostels go a step further under cl 11 of SEPP (HSPD), and mandate that certain domestic facilities be shared, and require that at least one staff member be onsite at any given time. A residential care facility, however, must provide meals and cleaning services (as opposed to simply sharing facilities), provide personal and/or nursing care and have appropriate staffing, furniture, furnishings and equipment for the provision of that care.

51 Given this, a person living in a residential care facility would likely have different needs to one who is living in a self-contained dwelling. The need to attend shops and other retail and commercial services would likely be more relevant to a person living in a self-contained dwelling, who must prepare their own food, than someone in a residential care facility who has their food prepared by others. Further, the proposed development involves nursing care being available onsite at all times, and many of the people who would reside at the facility would not have the capacity to attend external services independently in any event. As such, it is clear that different categories of seniors housing have different practical requirements, and that the criteria set out in cl 26 of SEPP (HSPD) do not necessarily cater to the needs of the seniors who are likely to use the proposed development. To consider such a provision as essential would therefore defeat the aims of SEPP (HSPD), as it would act to discourage relevant persons from seeking to increase the supply and diversity of senior residences.

52 Second, I accept the submission of Principal Healthcare that SEPP (HSPD) does not act to prohibit developments, but rather permits them when certain criteria are met. The Ryde LEP permits residential care facilities with consent on land, including the subject site, which is zoned R2 – Low Density Residential. However, this is subject to restrictions which mean that the proposed development could not be developed pursuant to that instrument.

SEPP (HSPD) seeks to overcome these restrictions by way of cl 15, which provides that seniors housing (which includes, amongst other things, "residential care facilities") may be developed pursuant to Ch 3 of SEPP (HSPD) despite other environmental planning instruments such as the Ryde LEP. Thus, properly construed, cl 26 does not act to prohibit development. Rather, it serves the objective of Ch 3 set out in cl 14 of SEPP (HSPD), which is partly to ensure that "housing is located…in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail". The locational requirements for "independent, mobile and active" seniors, who are unlikely to compromise that independence by residing at a residential care facility and are more likely to travel to attend shops, banks and other facilities, are naturally different to "those who are frail" and cannot independently visit such locations. As such, whilst the locational criteria in cl 26 of SEPP (HSPD) may be suited to those who reside in self-contained dwellings, they are not necessarily suited to "frail" persons who reside in residential care facilities.

53 Whether such propositions are factually correct is not a question presently before the Court, nor should it be. The question as to the adequacy of access to the services specified in cl 26 of SEPP (HSPD) is something that should be considered by the consent authority, rather than the Court in its present capacity. However, the fact that such a consideration should be made in order for cl 26 of SEPP (HSPD) to meet the legislative objects of the instrument is sufficient to suggest that such a provision is not a prohibition, but may indeed be a development standard.

54 As such, I find that despite the language of cl 26 of SEPP (HSPD), when "seen as a part of the environmental planning instrument as a whole" (*Poynting* at [94] (Giles JA)), in the "wider context" (*Lowy* at [2] (Mason P); *Laurence Browning (LEC)* at [26] (Jagot J)) and by reference "to its own structure and provisions" (*Agostino* at [46] (Tobias JA)), it does not act to prohibit the proposed development in any circumstances, and so meets the first step of the two-step test in *Poynting*.

*Second step*

55 Given my finding that the development is not prohibited in any circumstances pursuant to cl 26 of SEPP (HSPD), the second step requires the Court to consider and determine whether the relevant provision specifies a requirement or fixes a standard in relation to an aspect of the proposed development.

56 This is, in effect, reflected in the definition of "development standards" in s 4 of the *EPA Act*. I accept the submission of Principal Healthcare that the criteria (or as it submitted, the "empirical" criteria) fit clearly within the definition of "development standards" in s 4 of the *EPA Act*. Whilst such a finding is not determinative (*Poynting* at [58]; *Laurence Browning (LEC)* at [26]), it is still persuasive, and in effect necessary to meet the second step of the test.

57 The definition of "development standards" in s 4 of the *EPA Act* essentially has three elements. First, the provision of the instrument or regulation must be in relation to the carrying out of development. Second, the provision must specify requirements or fix standards in respect of any aspect of that development. Third, these requirements or standards include, but are not limited to, aspects (a) to (o) that fall under that definition.

58 In undertaking this exercise, there are also two preliminary considerations that should be taken into account. The first preliminary consideration is to determine what provisions are under consideration. For present purposes, the relevant provisions are those under cl 26 of SEPP (HSPD) which refer to distances between the development and other facilities and services, such as shops, general practitioners and public transport stops, and the gradients of paths along these distances. I consider it appropriate to adopt the language used by Principal Healthcare, and describe such provisions as 'empirical criteria'.

59 The second preliminary consideration is to determine what is meant by the words "development" and "that development". These words clearly do not refer to a development in an abstract sense, but rather use the definitive in the second phrase to refer to a specific development. That development would therefore be the particular development that was the subject of any given development application to a consent authority, or the subject of any given set

of legal proceedings. For present purposes, this refers to the proposed residential care facility, rather than another type of seniors housing, which is to be constructed to cater for persons who are generally not suited to independent living.

60 Turning now to the elements of the definition in s 4 of the *EPA Act*, I find that the empirical criteria meet the first element. The empirical criteria specify that the proposed development "must" be carried out within 400 metres of various facilities and services, and that if this is not possible, that the development be carried out within 400 metres of suitable public transport. The empirical criteria also specify that these distances must be calculated on a pathway, and that such a pathway must comply with certain gradients for certain lengths. These clearly relate to the carrying out of a development.

61 With regard to the second element, I find that the empirical criteria both specify requirements and fix standards for the proposed development. The empirical criteria require that the development be within 400 metres of either specific facilities or suitable public transport, and fix standards for the gradients of the pathways that would be used to access these locations. Clause 26 of SEPP (HSPD) therefore clearly also meets this requirement.

62 It is important to note at this stage that the requirements specified and the standards fixed by cl 26 of SEPP (HSPD) described above are not prohibitions. A prohibition seeks to forbid something. As outlined during the first step, these provisions (when read in context) do not seek to forbid the development of seniors housing, but rather places standards and requirements that, in effect, provide criteria for the provision of services and facilities that would be available to the occupants. The adequacy or sufficiency of this availability is a matter for the consent authority and not a matter of prohibition per se.

63 The above findings are sufficient to make the finding that cl 26 of SEPP (HSPD) both falls within the definition of "development standard", and that it meets the second step in the two-step test. However, further comfort can be drawn from the third element of the definition, as cl 26 of SEPP (HSPD), when properly read as a whole, clearly falls within three of the aspects.

64 First, it falls within aspect (a), which relevantly includes “requirements or standards in respect of…the distance of any land, building or work from any specified point”. Clause 26 of SEPP (HSPD) provides a requirement that the development be 400 metres from specified facilities and services, which are to be determined on a case by case basis.

65 Second, it falls within aspect (c), which relevantly includes “requirements or standards in respect of…the…location…of a building or work”. Clause 26 of SEPP (HSPD) provides the requirement that the development be located within 400 metres of specified facilities and services, or alternatively within 400 metres of appropriate public transport.

66 Third, it falls within aspect (m), which relevantly includes “requirements or standards in respect of…the provision of services, facilities and amenities demanded by the development”. Clause 26 of SEPP (HSPD) requires, in effect, that the future residents of the proposed development have access to certain services, facilities and amenities.

67 Finally, I consider that neither the use of the phrase “development standard” in the headings to Pts 4 and 7 of SEPP (HSPD), nor the use of the phrase “site related requirements” in the heading of Div 2 of Pt 2 of SEPP (HSPD) (which contains cl 26), is sufficient to make the finding that cl 26 of SEPP is not a development standard. For present purposes, Pt 4 of SEPP (HSPD) only specifies minimum sizes and building heights for residential care facilities and does not go any further. Further, Pt 7 only specifies “development standards that cannot be used to refuse consent”, and so does not have regard to development standards that could be used to refuse consent. Finally, “requirements” can constitute development standards pursuant to the definition in cl 4 of the *EPA Act*. Given this, I find that these textual indicators are insufficient to change my findings above.

68 As such, I consider that my finding that cl 26 of SEPP (HSPD) both meets the definition of “development standards” and the second step of the two-step test is an appropriate finding in light of my consideration of the third element of the definition.

*Georgakis*

69 In addition to the above, I also consider that it is appropriate to consider the decision of McClellan CJ of LEC in *Georgakis*, which I consider to be highly persuasive, in further detail.

70 In that case, McClellan CJ of LEC considered whether cl 12 of SEPP 5 (which is recited at paragraph 10 above) was a development standard or a prohibition. Clause 12 of SEPP 5 is in many respects very similar to cl 26 of SEPP (HSPD). Both form part of an instrument that has the aim of increasing the supply and diversity of housing that meets the needs of seniors. Both begin with the requirement that a "consent authority must not consent to a development application", giving it the flavour of a prohibition when read in isolation. Both outline effectively the same requirement that a proposed development be located either within 400 metres of certain services and facilities (which are the same in both instruments), or 400 metres of appropriate public transport. Further, and despite the submissions of Council to the contrary, I consider that SEPP 5 and SEPP (HSPD) are structured in a similar manner, and that a number of the important provisions (including the aims in cl 3 of SEPP 5 and the inclusion of a definition of "residential care facility" in the dictionary of SEPP 5) are almost identical in nature. For present purposes, the only difference is that cl 12 of SEPP 5 does not specify that these distances must be along pathways, and does not provide any standards for the gradients of these pathways.

71 Given this, I consider that cl 12 of SEPP 5 was, for present purposes, substantively similar to the present cl 26 of SEPP (HSPD). As such, I consider it appropriate to follow the decision of McClellan CJ of LEC unless I consider it to be plainly incorrect.

72 In *Georgakis,* McClellan CJ of LEC similarly considered that the two-step approach was the appropriate test to apply in the circumstances: at [40]. With regard to the first step, his Honour found at [41]:

> [I]t is appropriate to ask in the present case whether the proposed development is prohibited under any circumstances. Plainly it is not, for the land could without question be developed for the intended purpose if the nearest bus stop was closer to the site. If the size of the allotment is not a

> complete prohibition, then the distance from a given point cannot be a complete prohibition.

73 His Honour then found that cl 12 of SEPP 5 also met the second step at [41]-[42], and used the definition of "development standards" in s 4 of the *EPA Act* to support this finding, and continued at [43]:

> It follows that although the development is not absolutely prohibited, by a combination of cll 12(1) and (2) of SEPP 5 it is subject to a requirement that access to the relevant facilities be within 400 metres. This is an aspect of the development and, accordingly, a development standard amenable to dispensation…

74 His Honour finally stated at [44] that whilst there may have been some force in the submission that cl 12 of SEPP 5 "defines a characteristic of the land without which the development is prohibited", this conclusion was excluded by the "necessity to take the "wider view" identified by Giles JA in *Poynting* and endorsed by Mason P in *Lowy*".

75 I consider that the findings of McClellan CJ of LEC in *Georgakis* were correctly made, and consistent with my findings above. I do not accept the submissions of Council that his Honour would have decided differently had the matter been considered at some point after judgments were delivered in *Laurence Browning (CA)* and *Agostino*, and in any event consider this to be a hypothetical and superfluous consideration.

76 Finally, a time will surely come, although it most certainly has not arrived yet, where those responsible for the wording of planning instruments will heed the chorus of judicial concern voiced over many years that the type of question presently before the Court should not need to be ventilated. Time and time again, courts of this State have grappled with the dichotomy between development standards and prohibitions in circumstances where careful drafting would avoid the sheer cost (in every sense of that word) and very real waste of resources involved in making and hearing such arguments. This difficulty is not caused by the inability of the courts to speak with uniformity, as facts and circumstances vary from matter to matter. Rather, it is with the instruments which they are required to interpret. This concern could not be put more clearly than McClellan CJ in CL, who noted in *Agostino* at [62]:

> …The wastage of public and private money debating these issues is a blight upon our planning system which should be resolved, preferably by legislative intervention or amendment to individual planning instruments.

**Conclusion**

77 In light of the above, I find that applying the two-step approach, and having regard to the various approaches that rely upon the identification of essential elements and conditions, cl 26 of SEPP (HSPD) is not a prohibition, but is rather a development standard, and is therefore amenable to cl 4.6 of the Ryde LEP.

78 Therefore my answer to the separate question is that clause 26 of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (NSW) is a development standard amenable to clause 4.6 of the *Ryde Local Environmental Plan 2014* (NSW), and is not a prohibition.

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**Amendments**

05 December 2016 - Amendment to Cover sheet - added name of junior Counsel.