

J & P KATERINIS
47-51 CHAPEL STREET, ROSELANDS

MEMORANDUM OF OPINION

1. My instructing solicitor acts on behalf of Messrs John and Peter Katerinis, registered proprietors of certain lands known as 47-51 Chapel Street, Roselands.
2. On 9 March 2016 the clients, through their consultant town planner Minto Planning Services Pty Ltd, lodged with the Canterbury City Council (now Canterbury-Bankstown Council) a Development Application for the redevelopment of that land. That redevelopment proposes the demolition of existing structures and the construction of affordable rental housing in the form of 20 townhouse dwellings erected over a basement car park.
3. The Development Application relies upon the provisions of *State Environmental Planning Policy (Affordable Rental Housing) 2009* insofar as the controls contained within that Policy are concerned. The Council has raised with the client the issue of whether Division 1 of Part 2 of the SEPP applies such that the controls contained within that Division are available. In particular, insofar as clause 10(2) of the SEPP is concerned, as the subject site is not within "an accessible area" as that term is defined in the SEPP, whether Division 1 may be relied upon.
4. For the reasons set out below in my opinion clause 10 of the SEPP in its operation within Division 1 of Part 2 of the SEPP is a development standard, and hence amenable to discretionary powers with respect to the grant of consent.

Preliminary

5. The SEPP includes as aims within clause 3 the introduction of a regime for the provision of affordable rental housing. As a general proposition, it effects this, through the private sector, by providing for increased yield for development which is otherwise permissible, essentially in exchange for an obligation to provide affordable rental housing (defined in the *Environmental Planning and Assessment Act*, but supplemented by clause 6 of the SEPP) for a certain period of time.
6. Part 2 of the SEPP is concerned with “new affordable rental housing”, and Division 1 is concerned with “in-fill affordable housing”. The Division, in its operative sense, sets out a series of development standards or controls that include matters such as a bonus of floor space ratio beyond that ordinarily applicable to certain land (clause 13), and a series of “standards that cannot be used to refuse consent” (clause 14) which relate to topics such as site area, landscaped area, parking, and so on.
7. Those controls (and the incentives effected by them) are available if Division 1 applies. The application of Division 1 is as controlled by clause 10 which, notwithstanding the opening provision in clause 10(1) that is concerned with the general application of the Division, as relevant to the current question provides in clause 10(2) as follows:

“Despite subclause (1), this Division does not apply to development on land in the Sydney region unless all or part of the development is within an accessible area.”

8. The concept of “accessible area” is itself defined in clause 4(1) of the SEPP as being (as relevant to the current question) land that is within:

“...

- (c) 400m walking distance of a bus stop used by a regular bus service (within the meaning of the *Passenger Transport Act 1990*) that has at least one bus per hour servicing the

bus stop between 06.00 and 21.00 each day from Monday to Friday (both days inclusive) and between 08.00 and 18.00 on each Saturday and Sunday.”

9. I have been instructed to assume that the site is not within the prescribed walking distance of such a service.
10. Upon such an assumption (of non-compliance with the distance requirement) the current question is relevant to the ability for the consent authority to grant consent notwithstanding such non-compliance. That ability derives from the flexibility available either pursuant to the provisions of *State Environmental Planning Policy No 1*, or the provisions of clause 4.6 of the *Canterbury Local Environmental Plan 2012*. Either way, those environmental planning instruments depend for their application on there being a “development standard” for their operation.
11. The concept of a “development standard” is as defined in s.4(1) of the EP&A Act. Insofar as particularly relevant to the present case, that definition provides that:

“**“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, (emphasis added)
- ...
- (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,
- ...”

A Development Standard?

12. Conventionally the dividing line between what is to be regarded as a development standard has been not so much about posing that question in isolation, but rather posing it with the contrasting concept of whether the provision operates as a prohibition.
13. In this respect, it is important to recognise that the SEPP, in particular insofar as Part 2 Division 1 is concerned, is a facultative document in that it does not operate to permit or prohibit development as such, but rather operates to regulate the form in which development to which it applies may be constructed. Although I have not set out in full the provisions of clause 10(1) above, insofar as it is concerned with development for the purposes of, for example, multi-dwelling housing (which would be the characterisation of the proposed development), the Division applies only insofar as such development concerned is permitted with consent under another environmental planning instrument: clause 10(1)(a).
14. Accordingly, and by reference to the authorities set out below, it is easy to see that the provision with which concern has been raised is, at the outset, far from any concept of a prohibition.
15. The reference in the definition of “development standards” in element (a) to “the distance of any land ... from any specified point”, and for that matter element (c) “the ... bulk, scale, shape, size, ... of a building or work”, and also element (m) “the provision of services, facilities and amenities demanded by development” as a starting proposition sufficiently answers the prescribed dimension in the concept of “accessible area” as contained in clause 10(2). In its fundamental form, no argument to the contrary can avoid that consequence; or alternatively, unless those words are excluded from the definition of “development standard” (motivated by the notion of a “zoning approach” as adopted in *Laurence Browning*, as discussed below), those words will always of necessity be otiose. That result is to be avoided.

16. The determination of whether a provision is a development standard conventionally required consideration of the so called two-stage test set out by Giles JA in *Strathfield Municipal Council v Poynting*¹ at [96]-[99]. The first stage of the test requires determination of whether the proposed development is prohibited under any circumstances by the relevant provision where that provision is construed in the context of the LEP as a whole. The second stage of the test requires determination of whether the provision specifies a requirement or fixes a standard in relation to an aspect of the proposed development.
17. In *Huang v Hurstville City Council* [2011] NSWLEC 15, Pain J applied this two-step process to the provision that was before the Court.
18. More recently, in *Wilson Parking Australia v Council of the City of Sydney* (2014) 201 LGERA 232, Pepper J undertook an analysis of a series of judgments relating to whether a particular provision is or is not a development standard. Her Honour concluded that it remained appropriate to follow the test set out by the Court of Appeal in *Poynting* as, in her Honour's opinion, it was that test which Pain J used in *Huang* (a decision in respect of which leave was not granted to appeal).
19. Accordingly, by reference to the SEPP as a whole, it can be seen that development for the purpose of, in this case, multi-dwelling housing, is not prohibited under any circumstances. This is the first step in the *Poynting* approach. Insofar as the second step is concerned, it is clear that the provision specifies a requirement or fixes a standard in relation to an aspect of the proposed development (namely, a distance requirement), which itself then operates to permit or provide for a standard in relation to other aspects of the proposed development. Either way, it does not operate to prohibit the development.

¹ (2001) 116 LGERA 319

20. To the extent that the issue be one of determination of whether a provision is a development standard, the Court of Appeal's decision in *Residents Against Improper Development Inc v Chase Property Investments Pty Ltd*² (as adopting the propositions advanced by Jagot J in *Laurence Browning v Blue Mountains City Council*³) continues to represent the present summary of the approach to the determination of development standards, as follows:

"(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 v The Land and Environment Court of NSW & Others [2002] NSWCA 353; (2002) 123 LGERA 179 at 182 – 183 [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 333 – 334 [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 342 [93]).

(4) A provision that prohibits the development under any circumstances controls development, but is not a development standard (Poynting at 343 [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'.

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.

²(2006) 149 LGERA 360 at [61]

³[2006] NSWLEC 74

(Poynting at 343 [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 (Woollahra Municipal Council v Carr (1985) 62 LGRA 263 a 269-270 per McHugh JA and Poynting at 343 [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])."

21. The Court of Appeal's decision in *Agostino v Penrith City Council*⁴, discussed more fully below, did not alter the salience of this summary.
22. Thus, in terms of the *RAID/Laurence Browning* elements:
 - (i) the wider context, in particular the reference in clause 10(1)(a), establishes elsewhere the applicability of the SEPP and the issue of permissibility, and the provision lies within the context of carrying out that type of development;
 - (ii) the provision falls within at least one, and probably three, of the elements of the definition of "development standards";
 - (iii) the provision in its operation with provisions in the Division which it regulates operates to regulate rather than prohibit the development;

⁴ (2010) 172 LGERA 380

- (iv) the provision does not prohibit development under the SEPP under any circumstances;
- (v) development is permissible in the circumstances expressed in the provision;
- (vi) the development is to be identified as affordable rental housing under the SEPP but nonetheless takes the form of multi-dwelling housing as permissible under another environmental planning instrument;
- (vii) the requirements are external to the development, once defined; and
- (viii) the provision is identifying a relevant aspect of the development, in particular its distance from a specified point, *inter alia*.

23. The law in this State concerning whether or not a provision is a development standard is not entirely without some degree of uncertainty. This is best illustrated by reference to *Agostino v Penrith City Council* (2010) 172 LGERA 380. In that case the Court of Appeal had to consider whether the following provision constituted a development standard (noting that otherwise, the proposed use was prohibited):

“Notwithstanding any other provision of this plan, a person may, with the consent of the council, carry out development on land to which this clause applies for the purposes of a fruit and vegetable store with a maximum floor area of 150 sq. m.”

24. The Court of Appeal was divided, with the majority of the Court finding that the phrase was not a development standard. Tobias JA, writing the Judgment of the majority, relevantly said as follows at [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]."

25. No such criteria operating by way of prohibition exist with respect to clause 10 or Division 1 of Part 2 in general.
26. Further relevant is the observation by Tobias JA in *Agostino* at [18]-[20], with respect to a clause that in effect is no different than clause 10 in the present instrument, that it was a development standard and not a prohibition. Thus, within the one case, the Court was able to distinguish between clauses which dealt with a similar topic (a dimension) but which operated in materially different ways. In my opinion that represents the proper approach in the present case.
27. There are other decisions in which a distance requirement has been construed as being not a development standard. For example, in *Huang Pain J* determined that the following provision of the Hurstville LEP was not a development standard, but rather a prohibition:

"Despite any other provision of this plan, the Council may grant consent to the carrying out of development for the purposes of sex services premises only if:

- (a) the Council is satisfied that the premises will not be near, or within view of, any educational establishment, place of worship or hospital or any place frequented by children, and

..."

28. Clause 10 however operates, as set out above, in a very different way.
29. In some respects the current question can also be answered by reference to the previous Chief Judge's decision in *Georgakis v North Sydney Council*⁵. In *Georgakis* McClellan J applied the reasoning in *Poynting* in reaching his

⁵ (2004) 140 LGERA 379

determination that clause 12 (of SEPP 5) was a development standard, and held as follows⁶:

"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."

30. In reaching his final determination, it is noted that McClellan J at [25] referred to the following words of Clarke JA in considering the Judgment of McHugh JA in *Woollahra Municipal Council v Carr*⁷:

"The point is reinforced by the fact that cl 14A(1)(a) lays down an absolute prohibition on the use of certain land for a particular purpose whereas development standards lay down requirements or standards against which the proposed development is to be measured: see Warringah Shire Council v KVM Investments Pty Ltd (1981) 45 LGRA 425 at 432, 440. There is, in my view, a great difference between a clause which prohibits the carrying out of a particular development on identified land and one fixing requirements to be complied with in carrying out that development."

31. Subsequent decisions of the Land and Environment Court have noted, or have come to the same result quite aside from simply applying *Georgakis*: see for example *Hewitt v Hurstville Council* (2001) 119 LGRA 152, and *Walker Corporation v Sydney Harbour Foreshore Authority* (2009) 173 LGRA 155 at [88].
32. It is to be noted that McClellan J (the judge in *Georgakis*) was the judge in the minority in the Court of Appeal in *Agostino*. This may be a distinguishing feature of reliance upon it. I also note, having had personal involvement in it, that recently Robson J has heard an application by Ryde City Council to the effect that clause 26 of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, as the contemporary successor to SEPP 5 (with which *Georgakis* was concerned) was a prohibition rather than a development standard: *Principal Health Care Finance v Council of the City of Ryde*,

⁶ Id. at [43]

⁷ *Woollahra Municipal Council v Carr* (1985) 62 LGRA 263

NSWLEC, No 2016/00152633. The decision in that case is, as at the date of this opinion, currently reserved.

33. Irrespective of the decision in *Principal Health Care*, in my opinion there are sufficient features distinguishing the Seniors' Living SEPP from the current SEPP; *inter alia* and quite aside from the matters set out above, by reference to the fact that clause 26 is contained within Part 2 headed "Site-related Requirements", and that clause 26 itself in terms is concerned with the consent authority not granting consent to a development application unless it is satisfied about certain access requirements.
34. Instead, for the reasons set out above, the present SEPP is not concerned with any such matter. In many respects, and as outlined above, Division 1 of Part 2 is not at all concerned with the concept of permissibility. What it does is to determine the application of a Division which is itself concerned with the application of certain development standards. Accordingly, there is little, if any, scope for any argument that it operates as a prohibition and hence, for the reasons set out above, in my opinion the proper construction is that it is a development standard.

30 August 2016



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