

RECORD OF DEFERRAL: Hunter and Central Coast Joint Regional Planning Panel

TERMS OF DEFERRAL

1. Provision of legal advice (reviewed if provided by the applicant) regarding the legal ability to determine the application given the absence of a Development Control Plan referred to in Clause 6.3 of Maitland LEP 2011,

Response

The applicant has provided a legal opinion on the planning approval pathway for the proposed seniors housing development at 107 Haussman Drive, Thornton. The legal opinion has been prepared by *Kate Swain, Partner – McCullough Robertson Lawyers* (07 August 2019).

The legal advice answers the question as to whether consent for the proposed development can be granted pursuant to the Seniors Housing SEPP without a specific DCP for the site, as required under clause 6.3(2) in the Maitland LEP 2011.

On the matter of inconsistency between the Seniors Housing SEPP and the LEP

The legal opinion demonstrates that clause 6.3 must be disregarded in the event of an inconsistency between a SEPP and the LEP as follows:

Application of the Seniors Housing SEPP to the Proposed Development

- 4 The aim of the Seniors Housing SEPP is to encourage the provision of housing that meets the needs of seniors or people with a disability. Clause 2 of the Seniors Housing SEPP expressly provides that this aim is achieved by *'setting aside local planning controls [such as the Maitland LEP] 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'*.
- 5 In this regard, clause 5 of the Seniors Housing SEPP provides that if the SEPP is inconsistent with any other EPI (such as the Maitland LEP), then the Seniors Housing SEPP prevails to the extent of the inconsistency.
- 6 Furthermore, section 3.28 of the *Environmental Planning Assessment Act 1979 (NSW)* (**EP&A Act**) provides more broadly that in the event of an inconsistency between EPIs, there is a general presumption that a SEPP prevails over a LEP made before or after that SEPP.
- 7 It is also important to note clause 15 of the Seniors Housing SEPP that provides:

'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.' (our emphasis)*

Hastings Point Progress Association Inc v Tweed Shire Council [2009] NSWCA 285 (Hastings Point Case)

The legal advice outlines a case in which the NSW Court of Appeal considered a very similar scenario: the appeal centred on the argument that the seniors housing development could not be approved as it failed to consider clause 8 in the Tweed LEP (which is similar to clause 6.3 in the Maitland LEP) which prohibits consent being granted unless there is a DCP in place for the site.

The matter was first considered by the NSW Land and Environment Court, wherein Justice Pain upheld the Council's development consent on the grounds that the Seniors SEPP would prevail over the Tweed LEP.

The case went to the NSW Court of Appeal in which it was also found that the consent was valid. The Court of Appeal found that, in the event of an inconsistency between environmental planning instruments: in this case, a 'can do' under the Seniors SEPP and a 'can't do' under the LEP, then the Seniors Housing SEPP prevails. In this situation, the Seniors Housing SEPP must prevail as the two environmental planning instruments are incapable of concurrent operation.

The legal advice concludes that:

In light of the above, it is clear that the Proposed Development, which satisfies Clause 15 of the Seniors Housing SEPP, being:

- (a) Serviced self-care housing;
- (b) On land that adjoins land zoned primarily for urban purposes; and
- (c) Carried out in accordance with the Seniors Housing SEPP,

will be permissible on the Site despite the provisions of the Maitland LEP (or any other EPI) and in particular despite clause 6.3 of the Maitland LEP.

On this basis, the Panel should proceed to determine DA17/2593 without regard to clause 6.3 of the Maitland LEP.

Conclusion:

Council's assessment officer consider the opinion to be clear and not open to further interpretation. In particular, the case law cited is specifically relevant to the legal question posed by the Panel. Therefore, Council has not provided a legal review.

2. Further advice about the issue of potential mine subsidence and the method to ensure structural stability of the site and proposed works, including any appropriate conditions.

Response:

The applicant has provided the following additional information on the potential risk to residents in the event of a mine subsidence event. This information was provided verbally to the Panel on 31 July 2019 by Shane Boslem representing the applicant - McCloy Group, and expanded upon below:

Principle Living is a joint venture partnership between the McCloy, Stevens and Mann Groups that will develop, own and operate both horizontal and vertical retirement villages.

The Thornton retirement village will operate under the Retirement Villages Act. Under this Act, Principle Living will retain ownership of all the independent living units, together with roads, service, playgrounds, parks, community facilities and community buildings.

Under the Act, Principle Living will enter into licence agreements with our residents whereby Principle Living will be responsible for all maintenance of the independent living units, roads, service, playgrounds, parks, community facilities and community buildings etc.

Further, contained within the Act there are various protection measures to protect residents in the unlikely event of damage to a residential villa.

Essentially, all the assets within the development site remain with Principle Living and it's their responsibility and obligation under the Retirement Villages Act to manage these assets on behalf of their residents.

With regards to the request to provide further advice on the issue of potential mine subsidence, the draft schedule of conditions includes the following conditions (as reproduced below). Amendments are shown in red text.

Condition 20 requires the investigation report to be completed prior to the issue of a Construction Certificate for Stage 2. No mine workings are located within Stage 1 of the development. Therefore, condition 20 does not contain any risk that mine workings will not be identified prior to the issue of a Construction Certificate for any relevant stage. Condition 20 also attaches the findings of the required Site Investigation Report to this development application through the wording highlighted below.

Condition 21 has been amended to include the specific reference to a Mine Engineer, at the request of the Panel.

Condition 21A has been included in the draft schedule of conditions to provide added certainty that, at a minimum, full grouting of abandoned mine workings to a cover depth of 20m will be required.

MINE WORKINGS

- 20. Prior to the issue of a Construction Certificate for Stage 2, the extent of mine workings including depth of cover are to be determined by a detailed **Site Investigation Report** for the purposes of establishing the appropriate treatment of abandoned mine workings, to permit the staged surface residential development for the purposes of this consent including the internal road network and associated utility installations.**

The Site Investigation is to include conclusions and recommendations on civil design and building construction standards to ensure that the development will be designed to remain safe, serviceable and repairable in the event of mine subsidence.

The recommendations arising from this Site Investigation Report form part of the development consent and are to be incorporated into any relevant construction stage.

21. Prior to the issue of a Construction Certificate for Stage 3, all remediation works associated with the Site Investigation Report for the purposes of this consent shall be completed and the works verified by an appropriately qualified Mine Engineer. The verification report is to be submitted to the Principal Certifying Authority prior to issue of the Construction Certificate.

21A. Remediation works are to include full grouting of mine voids with up to a cover depth of 20m.

Conclusion:

The structure of these conditions and the over-arching land ownership and management structure as a retirement village is considered sufficient to ensure that the development application has adequately considered the constraints of the site with regard to underground mine workings and that the detailed design will be prepared in response to the findings and recommendations of the Site Investigation Report.

 12 August 2019

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Maitland City Council