

Appendix C
Legal Advice - Subdivision

Michael Astill

Greenway Chambers
SYDNEY
TEL: 02 9151 2945 DX 165

Memorandum of Advice

Bayline Investments Pty Ltd

re

Harrington Land

Bayline Investments re Harrington Land

Introduction – Advice Sought

1. I am briefed to advise Bayline Investments Pty Ltd (**Bayline**) in relation to certain land at Harrington (**Site**) that it proposes to develop as a retirement village (**Proposal**).
2. The Proposal includes the construction of the development as well as subdivision of the individual units under the *Community Land Development Act, 1989* (**Community Title Act**).
3. The Site comprises three allotments which are, from west to east-
 - a. 26 Manor Road, Harrington being lot 2 in DP 1219123 (**Lot 2**),
 - b. 48 Manor Road, Harrington being lot 4 in DP 1219124 (**Lot 4**), and
 - c. 56 Manor Road, Harrington being lot 6 in DP 1217806 (**Lot 6**),
4. The Site is within the area to which the *Greater Taree Local Environmental Plan 2010* (**LEP**) applies under the *Environmental Planning & Assessment Act, 1979* (**EPA Act**).
5. Under the LEP, the vast majority of the Site is zoned *R5 Large Lot Residential*. However, the certificates under s.149 of the EPA Act you have provided to me indicate that part of Lot 6 is zoned *E2 Environmental Conservation*. You have provided me with an extract from the LEP Map indicating that this E2 zone applies only to a small part of Lot 6 at its southern extremity.
6. The zoning map also indicates that the entire eastern boundary of Lot 6 adjoins land that is zoned *R1 General Residential* under the LEP.
7. Under the LEP the Proposal would not be permissible. Further, under clause 4.1AA of the LEP, lots resulting from any subdivision under the Community Title Act must conform to a certain minimum size by reference to the *Lot Size Map* under the LEP. The lots resulting from the community title subdivision of the Proposal would not conform to the minimum size under that Map.
8. I am asked to advise on the interrelationship between *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**SEPP**) and the LEP in relation to the Proposal.

Bayline Investments re Harrington Land

9. Particularly I am asked to advise-

- a. whether the provisions of the SEPP override the provisions of the LEP in respect of the Proposal, including the minimum lot size requirements of cl. 4.1AA, and
- b. what other hurdles may have to be overcome to be able to rely on the provisions of the SEPP to obtain approval to the Proposal.

Summary of Advice

10. Subject to obtaining a Site Compatibility Certificate the SEPP will override the LEP in respect of the Proposal. This includes both the prohibition on development in the zone and the effect of cl. 4.1AA.
11. The Site is not zoned for urban purposes but adjoins such land. In such circumstances, before the operative provisions of the SEPP apply to the Proposal a Site Compatibility Certificate must be obtained.

Analysis and Advice

The SEPP prevails over other EPIs

12. To the extent of inconsistency between SEPP Seniors and any LEP¹, SEPP Seniors prevails by operation of cl. 5 (3) thereof –

- (3) If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency.

13. The specific effect and implications of this for the Proposal are considered in detail below.

¹ An LEP is a type of environmental planning instrument under the EPA Act. This term is defined in the EPA Act as follows –

environmental planning instrument means an environmental planning instrument (including a SEPP or LEP but not including a DCP) made, or taken to have been made, under Part 3 and in force.

Bayline Investments re Harrington Land

The SEPP does not apply to all land in the State

14. However, for there to be any potential for inconsistency the SEPP must first be found to apply to the land in question; it does not apply to all land within the State.

15. Clause 4(1) of the SEPP provides that it applies to the following land (subject to certain exclusions discussed below) as follows-

(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.

16. It can be seen that there are two broad classes of land to which the SEPP applies; land that is itself zoned for urban purposes, and land that adjoins land for urban purposes. In both classes one of the uses in (i) – (iv) must also be permissible on the land itself (unless the land is being used for a registered club).

17. Pursuant to c. 2.3 of the LEP and the Land Use Table given effect by that clause, dwelling houses are permissible with consent in both the R5 and E2 zones. Accordingly, the second requirement imposed by cl. 4(1) is satisfied in respect of the Site.

18. In some cases, the question as to whether land is zoned primarily for urban purposes may require some detailed analysis. However, that is not the case here because cl.4(2) of the SEPP relevantly provides-

(2) Land that is not zoned primarily for urban purposes

For the avoidance of doubt, land that is not zoned primarily for urban purposes includes (but is not limited to) land that is within any of the following zones under another environmental planning instrument:

- ..
- (c) a zone that is identified as principally for residential uses on large residential allotments (for example, Zones R5 Large Lot Residential and . . .

Bayline Investments re Harrington Land

19. Accordingly, the Site is not zoned primarily for urban purposes and so for the SEPP to apply to it, the Site must adjoin land that is so zoned.
20. As noted above the entire boundary of Lot 6 adjoins land that is zoned *R1 General Residential* under the LEP. I think there can be no doubt that this land is zoned primarily for urban purposes.
21. Accordingly, in my view the Site adjoins land that is zoned primarily for urban purposes. In this regard, I do not think that the fact that the Site consists of three titles and only Lot 6 has a common boundary with the adjoining land is of any relevance.
22. As the Court of Appeal recently held, in planning law references to “land” connote the functional area over which development is, or is to, take place; such references are not intended to impose restrictions based on title boundaries.² Of course the analysis could well be different were the development proposed on Lot 2 and Lot 4 only.
23. Accordingly, *prima facie*, the Site is land to which the SEPP applies by operation of clause 4(1).

The SEPP is Expressly Excluded from Certain Land

24. However, clause 4(6) excludes the SEPP in certain cases as follows-

(6) Land to which Policy does not apply

This Policy does not apply to:

- (a) land described in Schedule 1 (Environmentally sensitive land), or
- (b) ...

25. Schedule 1 relevantly provides as follows-

Schedule 1 Environmentally sensitive land

Land identified in another environmental planning instrument by any of the following descriptions or by like descriptions or by descriptions that incorporate any of the following words or expressions:

- (a) ...

² *People for the Plains inc. –v- Santos NSW (Eastern) Pty Limited and ors* [2017] NSWCA 46 at [187].

Bayline Investments re Harrington Land

- (b) conservation (but not land identified as a heritage conservation area in another environmental planning instrument),

26. As noted above the LEP is *another environmental planning instrument* in terms of Schedule 1. To the extent that the LEP identifies part of the Site as being zoned *E2 Environmental Conservation* there is little doubt that this part is land within the description of Schedule 1 and consequently the SEPP does not apply to that part of the Site at all.

The Effect of the SEPP

27. Chapter 3 of the SEPP, in general terms, makes certain types of development suitable for Seniors or people with disabilities, permissible with development consent, provided certain criteria are satisfied.
28. It is beyond the scope of this advice to comprehensively advise on these requirements and in any event, I have not been provided with the detail of the Proposal to be able to do so.
29. However, in certain cases the effect set out in the immediately preceding paragraph does not automatically occur, even if the SEPP applies to the land.
30. Specifically, clause 24 requires a *Site Compatibility Certificate (SCC)* to be obtained before development consent may be obtained in reliance on the SEPP, in certain circumstances.
31. One of the circumstances where a SCC is required is where the development is proposed on land that adjoins land zoned primarily for urban purposes, as is the case with the Site.
32. Bayline would need to apply to the Director General (**DG**) of the Department of Planning and Environment (**Department**) for a SCC over the Site, or at least that part of the Site in the R5 zone. There is no power for the DG to issue a SCC over the part of the Site in the E2 zone.

Bayline Investments re Harrington Land

33. The DG must notify the relevant Council of the application and consider any submission made as well as a number of matters set out under cl. 25 (5) of the SEPP.
34. Ultimately if the DG forms the view that the site is suitable (in general terms) for the proposed development a SCC may be issued which would render the Proposal permissible under the SEPP.
35. Once a SCC issues, a development application may then be made and determined on its merits under s.79C of the EPA Act. This would require consideration of all of the environmental and other town planning merit of the Proposal in respect of which I am not in a position to advise.

Application of the SEPP and the LEP

36. Consequently, the SEPP applies to that part of the Site that is zoned R5. To the extent that the LEP does not permit the Proposal, but the SEPP does (subject to first obtaining a SCC) it will prevail over the LEP by operation of cl. 5 (3) set out above.
37. In terms of the proposed subdivision under the Community Title Act, cl. 21 of the SEPP provides-

21 Subdivision

Land on which development has been carried out under this Chapter may be subdivided with the consent of the consent authority.

38. Subdivision is not defined in the SEPP but, being an instrument made under the EPA Act, it would carry the definition in s.4B of that Act as follows-

4B Subdivision of land

- (1) For the purposes of this Act, subdivision of land means the division of land into two or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition. The division may (but need not) be effected:
 - (a) by conveyance, transfer or partition, or
 - (b) by any agreement, dealing, plan or instrument rendering different parts of the land available for separate occupation, use or disposition.
- (2) Without limiting subsection (1), subdivision of land includes the procuring of the registration in the office of the Registrar-General of:
 - (a) a plan of subdivision within the meaning of section 195 of the *Conveyancing Act 1919*, or

Bayline Investments re Harrington Land

- (b) a strata plan or a strata plan of subdivision within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*

(3)

39. Whilst there is no express reference in the definition to subdivision under the Community Title Act, there is little doubt that such a subdivision would be within that term. Subsection 4B(1) contains very broad words and subsection 4B(2) contains examples only, including Strata Subdivision, with which subdivision under the Community Titles Act is similar.
40. Consequently the SEPP allows development that has been carried out pursuant to Chapter 3, that is, housing for seniors and the like, to be subdivided under the Community Title Act.
41. The SEPP contains a number of criteria required to be observed in connection with the construction of development to which it relates (particularly Parts 2-7 of Chapter 3 and Schedule 3). However, it does not contain criteria with which any subdivision must comply, except as set out in cl.21. An application for consent to subdivide under that clause would need to be on land developed under chapter 3 of the SEPP and would be assessed in accordance with the general matters for consideration in s.79C of the EPA Act.
42. Clause 4.1AA of the LEP purports to require lots in any Community Title Act subdivision to conform to a minimum size. That requirement is inconsistent with the SEPP, and thus cl. 5(3) of the SEPP operates to negate the requirement.



Michael Astill
Chambers
12 September 2017

