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17th October 2018
Our reference: 1522.2629

The Secretary
NSW Department of Planning and Environment
Grafton Office
49 Victoria Street
GRAFTON NSW 2460

Attention: Mr Paul Garnett & Ms Tamara Prentice

Email: northern@planning.nsw.gov.au

Dear Secretary

RE: Seniors Living SEPP, 67 Skennars Head Road, Skennars Head

On 9 October 2018 Mr Michael Young of McCartney Young Lawyers wrote in relation to the Site Compatibility Certificate application SCC_2018_BALLI_01_00. That letter requested that the Department defer the making of any submission to the Panel pending the receipt of legal advice. Please find attached that advice. The accompanying opinion has been prepared by Mr Peter McEwan SC. Mr McEwan is one of the most experienced Barristers at the NSW Bar, specialising in landuse law.

Once the Department has had an opportunity to consider the expert legal advice attached, I would be pleased to travel to Grafton to meet with the officers of the Department.

Should you require any additional information or wish to clarify any matter raised by the attached legal opinion, please feel free to contact me at any time.

Yours faithfully,

PLANNERS NORTH

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CC. Ballina Shire Council and Northern Joint Regional Planning Panel.

**LIVING GEMS PTY LIMITED AND SENIORS LIVING PROPOSAL
SKENNARS HEAD ROAD PROPERTY**

MEMORANDUM OF ADVICE

1. My instructing solicitors act for Living Gems Pty Ltd in respect of a proposed Seniors Living development of Lot 239, DP1201225, being a lot of land having an area of 11.61 hectares, of which it is proposed to develop 7.6 hectares for 147 seniors serviced self-care housing, pursuant to SEPP (Housing for Seniors or People with a Disability) 2004 (“SEPP Seniors Living”)
2. The bulk of the site (about 85-90%) is zoned RU1 Primary Production, a portion (10%?) is zoned 7(a) Environmental Protection – Wetlands; and a very small area is zoned 1(b) Rural – Plateau Lands Agriculture. The proposed development is limited to the area zoned RU1.

Questions Posed

3. Two questions have been raised arising out of the interrelationship of relevant instruments, and in particular SEPP Coastal Management 2018, viz:
 - (i) the operation and effect of clause 21 (the “exclusory provisions”) of the SEPP; and
 - (ii) if SEPP (Coastal Management) 2018 applies (contrary to the operation of clause 21) then what role do the areas identified in SEPP (Coastal Management) 2018 as “proximity areas” have in the operation of SEPP Seniors Living; viz, do those areas identified as *proximate areas* fall within the classification of *natural wetlands* for the purpose of Schedule 1, “(m)”, of SEPP Seniors Living?

These questions going to the operation and applicability of SEPP Coastal Management 2018 are relevant to the assessment to be made both under SEPP Seniors

Living, and under s.79C (now s.4.15, and specifically 4.15(1)(a)(i) “*any environmental planning instrument*”).

Application of SEPP (Housing for Seniors or People with a Disability) 2004 (“SEPP Seniors Living”)

4. This SEPP provides a framework for the approval of residential accommodation for seniors and people with a disability by setting aside local planning controls and providing its own regime of design principles and development criteria for such housing.
5. It applies to land which “...*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...*” (per clause 4(1)); a road between the subject land and *adjoining* land zoned for urban purposes is ignored for the purpose of ascertaining “adjoining”) (clause 4(4)).
6. Land identified in Schedule 1 (Environmentally Sensitive Land) is excluded from the provisions of the SEPP (per clause 4(6)).

The basis of the application of the SEPP is that the subject land is entitled to the beneficial provisions of the SEPP, as land to which the DA relates is “*adjoining land zoned primarily for urban purposes*”; this seems not to be disputed¹.

7. Schedule 1 lists descriptors of Environmentally Sensitive Land which include, inter alia, “(m) *natural wetland*” – i.e., if land is so described in another EPI by that description “...*or by like descriptions...*”. Pursuant to clause 4(6) that land is excluded from the application of SEPP (Seniors Living).

(All land, wherever it is, whatever its topography, vegetation or characteristics, could be said to be *environmentally sensitive land*; however, whilst that is the genus of the descriptor as a chapeaux to Schedule 1, that Schedule proceeds to identify particular categories – the genus of the species (or land of like descriptions) – to enable their

¹ For the reason that the land the subject of the application is land which *adjoins land zoned primarily for urban purposes* (clause 24(1)(a)(i)); and is otherwise not permissible with consent (clause 24(1A)).

definition such that they be excluded from the beneficial provisions of SEPP Seniors Living. That the land is so expressly identified means that land not identified or falling within *like descriptors* is not affected by the prohibition and enjoys the beneficial provisions of SEPP Seniors Living.²)

8. Clause 24 of SEPP Seniors Living requires for its application a “*Site Compatibility Certificate*” for the subject land. Prior to amendments that commenced on 2 October 2018, it was the Director-General who determined an application for a certificate, in accordance with clause 25. The amendments to the SEPP which commenced on 2 October 2018 changed the reference from the Director-General to the *relevant panel*. However, the criteria for the issue of a Compatibility Certificate in clause 25(5)(b) remain substantially the same (noting the new requirement for a *cumulative impact study* in clause 25(5)(b)(vii)).
9. The requirement in clause 25(5)(b)(vii) for a cumulative impact study (defined in clause 25(2C)) as a consideration in the issuing of a Certificate does not appear to arise in the current circumstances having regard to the facts. There is no *proximate site land* (per clause 25(2A)) and the clause (25(5)(b)(vii)) has no work to do in the present circumstances.
10. Critical to the availability of SEPP Seniors Living to or for the subject land is the proscription against its application to land described in Schedule 1 as “*Environmentally Sensitive Land*” (see paragraphs 6 and 7 above). Within Schedule 1, the categories and descriptions, relevantly, include *natural wetland* (m). I understand that it is accepted that this would include the area of the subject land zoned 7(a) “*Environmental Protection – Wetlands*” (about 10% of the subject site). However, the present application is not for the use of that portion of the subject land so zoned (7(a)), but rather only for that portion zoned RU1 Primary Production. Hence the proscription in clause 4(6) of SEPP Seniors Living has no work to do.

² Interpretation is aided by the syntactical presumption – *expressio unius est exclusio alterius*, “an express reference to one matter indicates that other matters are excluded”; and *expressum facit cessare tacitum*, “where there is an express mention of certain things then anything not mentioned is excluded”: see *Pearce and Geddes*, 5th Ed, [4.28], [4.30].

SEPP (Coastal Management) 2018

11. The purpose of this SEPP (commencing on 3 April 2018) was to coordinate “*land use planning in the coastal zone in a manner consistent with the objects of the Coastal Management Act 2016*” (clause 3).³
12. If relevant, and applicable, the Coastal Management SEPP proscribed development upon land identified as *proximate* on the Coastal Wetlands and Littoral Rainforests Area Map, without satisfaction by the consent authority that:
 - (i) adjacent coastal wetland or littoral rainforest would not have a significant impact on its biophysical, hydrological or ecological integrity; or
 - (ii) the quantity and quality of surface and groundwater flows to and from adjacent coastal wetland or littoral rainforest was not significantly impacted upon (clause 11(1)(a), (b)).
13. Relevantly, this constraint applied to areas identified on the map as “*proximate to either wetlands or littoral rainforest*”. It specifically did not apply to land identified as “*coastal wetlands*” or “*littoral rainforest*” on the map (clause 11(2)).
14. The Coastal Wetlands and Littoral Rainforests Area Map is defined as being / meaning “*the SEPP (Coastal Management) 2018 Coastal Wetlands and Littoral Rainforests Area Map*” (per the definition in clause 4(1)).
15. The relevant map from the Coastal Management SEPP showing *proximity area for coastal wetlands*, in relation to the subject site, shows that somewhere about 50% of the subject site is so designated – being an area extending from the land zoned 7(a) Environmental Protection Wetlands into and across the middle and southern portion of the balance of the RU1 area, leaving somewhere less than 50% of the total site unaffected by this *proximate area*.

³ The overarching objective was to consolidate coastal management which previously was provided for in two pieces of legislation, the *Coastal Management Act 2016* and the *Coastal Protection Act 1979*.

Question 1: The operation and effect of clause 21

16. SEPP (Coastal Management) 2018 contains an explicit “*savings and transitional provision*”:

“21(1) The former planning provisions continue to apply (and this Policy does not apply) to a development application lodged, but not finally determined, immediately before the commencement of this Policy in relation to land to which this Policy applies.”

(The *former planning provisions* which continue to apply are identified in clause 21(4) as including SEPP 14 Coastal Wetlands, SEPP 26 Littoral Rainforests, and SEPP 71 Coastal Protection.)

17. The plain words⁴ of clause 21(1) require, for the exclusion of the controls in SEPP Coastal Management 2018, for there to be a development application “*lodged but not finally determined, immediately before the commencement of this Policy...*”. SEPP Coastal Management 2018 commenced on 3 April 2018, at which time the Development Application for the subject site, having been lodged on 16 October 2016, remained yet to be determined. Hence, pursuant to clause 21(1), that Application is to be determined under the former planning provisions, and, expressly, is not constrained or required to comply with the requirements of SEPP Coastal Management 2018.
18. Here, that means that any enquiry into “*...land in proximity to coastal wetlands or littoral rainforest*” per clause 11 of the SEPP is not applicable, is irrelevant and has no work to do.

The effect of this is, in the instant circumstances, that SEPP (Coastal Management) 2018 has no work to do in relation to the present Development Application.

Courts have been jealous to preserve and protect an entitlement to have an application determined under the planning provisions and constraints which apply to the time of

⁴ The ordinary sense of words are adhered to unless they lead to *some absurdity, repugnance or inconsistency with the rest of the instrument* ... (the Golden Rule, see Pearce and Geddes, Statutory Interpretation Australia, 6th ed at [2.4]; and as to giving the plain and ordinary meaning to words used in an instrument, see [2.20]ff; and [2.40]; here there is no need to have recourse to other aids for interpretation, where the words used are plain and explicit in excluding the operation of SEPP (Coastal Management) 2018 in the circumstances specified.

lodgement, unaffected by changes to a planning regime which may detrimentally impact upon assessment of an application. A similar transitional provision was given full weight and effect by the Court of Appeal where the Applicant for consent maintained a right to assessment of its application pursuant to provisions which preceded changes to the relevant controls.⁵

Question 2: “Proximity Areas” and relevance to the operation of SEPP Seniors Living

19. The source of this enquiry is the provision in SEPP Seniors Living for its application to be unavailable and proscribed in relation to *Environmentally Sensitive Land* as identified in Schedule 1 to that SEPP (see paragraph 10 above).
20. This enquiry is predicated on the assumption that the view I have expressed as to the operation and effect of clause 21(1) in SEPP (Coastal Management) 2018, is erroneous, and that the provisions of that SEPP do apply notwithstanding their explicit exclusion of relevance, operation or application, in relation to the extant Development Application.
21. On the basis of the assumption that clause 21(1) does not apply (erroneously in my view), the question is whether the identification of a *proximity area* on the SEPP (Coastal Management) 2018 Map is a descriptor which falls within *natural wetland* (per the definition in the Coastal Management SEPP) and is hence environmentally sensitive land and proscribed from the application of SEPP Seniors Living, vide Schedule 1.
22. (This is not to ignore the provisions of the *saved* “former planning provisions”⁶ which created or applied a definition or category of land use or type, such that it could fall within one or other of the categories of *Environmentally Sensitive Land* under Schedule 1 of SEPP Seniors Living.)
23. The *proximity* question is raised in the context of the need (per clause 24 of SEPP Seniors Living) to obtain a Site Compatibility Certificate.

⁵ *Dubler Group v The Minister* (2004) 137 LGERA 178 and in particular at [27]-[28]; and as approved in *Vitality Care v The Department* [2006] 151 LGERA 15.

⁶ Being SEPP 14 Coastal Wetlands, SEPP 26 Littoral Rainforests and SEPP 71 Coastal Protection, per clause 21(4)(a) of SEPP (Coastal Management) 2018.

A Site Compatibility Certificate had issued on 30 March 2015 for the subject land. It certified that the subject site “*is suitable for more intensive development*”⁷; and, in particular, that the proposed use, viz “*serviced self-care housing (211 dwellings)*”, is *compatible with the surrounding environment and surrounding land uses, having regard to the criteria specified in clause 25(5)(b)*” of SEPP Seniors Living. This Certificate lapsed on 31 March 2017 and a fresh application for a Site Compatibility Certificate has been lodged.

24. It is of relevance to note that the basis for assessment of the criteria under clause 25(5)(b) remains, relevantly, the same as they were in March 2015. It is only the cumulative impact study in clause 25(5)(b)(vii) that is new, and on instructions there is no need for such a study and, accordingly, the criterion is irrelevant.
25. The only change to the matters that arise for consideration on an application for a Site Compatibility Certificate under SEPP Seniors Living is that which is or was sought to be introduced by the inclusion and reference in SEPP Coastal Management 2018 was to *proximity areas for coastal wetlands and with littoral rainforests*.
26. The question posed is whether the areas so identified as *proximate areas* are relevant, within the context of SEPP Seniors Living, to either:
 - (i) categorising the land under Schedule 1, viz, *environmentally sensitive land*; or
 - (ii) the assessment criteria for a Site Compatibility Certificate under clause 24 of SEPP Seniors Living.
27. From the material briefed I understand the portion of the subject site which has been ostensibly mapped as *proximity area for coastal wetlands* impacts on approximately 50% of the site (see paragraph 15 above).
28. The question posed is whether or not the map which has issued, showing that *proximity area*, is one with effect under SEPP (Coastal Management) 2018, such that

⁷ Now reduced to 147 dwellings

the *proximity area* may or might fall within the definition of *Environmentally Sensitive Land* under SEPP Seniors Living.

29. The identification of areas for coastal management is by way of a map – per clause 6(2); following the identification of the *Coastal Wetlands and Littoral Rainforests Area Map*, there is the following:

“Note: The Coastal Wetlands and Littoral Rainforests Area is made up of land identified as “Coastal Wetlands” or as “Littoral Rainforests” on the Coastal Wetlands and Littoral Rainforests Area Map. The land so identified includes land identified as “proximity area for coastal wetlands” and “proximity area for littoral rainforests.””

However, that *Note* has no work to do in the construction or interpretation of SEPP Coastal Management 2018 – clause 4(4) reads: (4) *Notes included in this Policy do not form part of this Policy.”*

30. Clause 11 of SEPP (Coastal Management) 2018 is headed: “*Development on land in proximity to coastal wetlands or littoral rainforest*”. After the heading, the following is produced:

11. Note: The Coastal Wetlands and Littoral Rainforests Area Map identifies certain land that is inside the coastal wetlands and littoral rainforests area as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” or both.

- (1) Development consent must not be granted to development on land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Area Map unless the consent authority is satisfied that the proposed development will not significantly impact on:
 - (a) The biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or
 - (b) The quantity and quality of surface and groundwater flows to and from the adjacent coastal wetland or littoral rainforest.
- (2) This clause does not apply to land that is identified as “coastal wetlands” or “littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Map.

31. The enquiry engaged under clause 11(2) is to identify (if appropriate) portions of the subject site as either *coastal wetlands* or *littoral rainforest*, as that appears on the Area Map. However, this enquiry is proscribed by clause 4(4) (see para 29 above) which deletes, relevantly, any notes within the Policy. The requirements in clauses 11(1)(a) and 11(1)(b), or the purported nexus referred to in clause 11(2) being excluded from the operation of the SEPP hence have no work to do; they are irrelevant to the interpretation and construction task.
32. (If the Note did have application (contrary to clause 4(4), then the contrary position is arrived at whereby the constraint does not apply to either coastal wetlands or littoral rainforest, but it does apply to areas proximate to those two descriptors; this would work a nonsense.)
33. There are two consequences of the application of the provisions of clause 11(1):
- (i) First, there is a proscription on development approval being granted unless necessary satisfaction (per subclauses (a) and (b) is arrived at or concluded in favour of the land the subject of the application; and
 - (ii) Second, those areas identified as *proximity areas* – either for coastal wetlands or littoral rainforest – do not qualify as *Environmentally Sensitive Land* under Schedule 1 of SEPP Seniors Living. That they are *proximate* to areas which may so qualify as Environmentally Sensitive Land does not qualify them, per se, as falling within one or more of those descriptors in Schedule 1; the land which may be *proximate* to such land, is not itself environmentally sensitive.
34. “*Proximate areas*” are not, relevantly, lands identified under Schedule 1 to SEPP Seniors Living. Nor could it be said that they are, or could be, *like descriptors* of those categories identified under SEPP 1.
35. Rather, being external and outside areas which are defined as *environmentally sensitive land*, they operate as some form of buffer, being an area of indeterminate definition, and on the plain words used in the descriptor, could not and do not qualify as being *environmentally sensitive land*.

36. The general meaning of *proximate* or *proximity* is “*near, close by or adjacent*” (per the Macquarie Dictionary definition, and also the OED). Importantly, those *near, close by or adjacent* areas are not themselves identified as *environmentally sensitive land*. To the contrary, they are simply areas adjacent to what otherwise has been identified as *environmentally sensitive land*, but otherwise do not attract that descriptor or chapeaux.
37. Hence, to return to the questions posed (see paragraph 26 above), in relation to SEPP Seniors Living:
- (i) Land which may otherwise be identified as a *proximate area* for the sake of either coastal wetlands or littoral rainforest has no nexus or connection, or work to do, in relation to the SEPP Seniors Living Schedule 1, definitions of *environmentally sensitive land*.
 - (ii) It follows that the assessment criteria for a Site Compatibility Certificate under clause 24 of SEPP Seniors Living does not include areas which otherwise might be identified as *proximate areas* previously referred to.

PETER McEWEN SC

Chambers,
16 October 2018

**LIVING GEMS PTY LIMITED AND SENIORS LIVING PROPOSAL
SKENNARS HEAD ROAD PROPERTY**

MEMORANDUM OF ADVICE

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