

1 July 2020

David Brandon-Cooper
Manager, Development
Catholic Healthcare Limited
PO Box 914
Macquarie Park NSW 1670

By email to: dbrandoncooper@chcs.com.au

Dear David

**Proposed development of a residential aged care facility and independent living units at 2B West Street Lewisham NSW (Site)
Advice regarding status as a social housing provider**

1 Introduction

- 1.1 We understand that development application no. DA201800505 (Panel Reference PPS-2019ECI001) (**DA**) lodged by Catholic Healthcare Limited (**CHL**) is presently undergoing assessment by the Sydney Eastern City Planning Panel (**Panel**).
- 1.2 The DA seeks development consent for construction of a residential aged care facility and independent living units (being self-contained dwellings) on the Site.
- 1.3 We have been provided with a copy of the Panel's record of deferral dated 27 May 2020 in which the Panel cites clause 41(1) of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**SEPP Seniors**) and states that assessment of the DA is required against all of the matters in Schedule 3 of SEPP Seniors.
- 1.4 You have asked us to advise whether the DA must demonstrate compliance with all of the requirements of Schedule 3 of SEPP Seniors, having regard to clause 41(2) which provides an exemption from a number of those requirements, where a DA is made by a social housing provider.

2 Summary of advice

- 2.1 For the reasons set out below, we conclude that:
 - (a) CHL satisfies the definition of 'social housing provider' under SEPP Seniors; and
 - (b) therefore clause 41(2) applies, with the effect that self contained dwellings or parts of them that are located above the ground floor of the proposed multi-storey buildings do not have to comply with the requirements of clauses 2, 7, 8, 9, 10, 11, 12, 13 and 15–20 of Schedule 3 of SEPP Seniors.
- 2.2 We therefore consider that as a consequence of the operation of clause 41(2) and CHL's status as a social housing provider, an assessment of the DA against the requirements in Schedule 3 of SEPP Seniors need only be undertaken in respect of the requirements that are not expressly excluded by clause 41(2). If the Panel were to require an assessment of the DA against the requirements that are excluded by clause 41(2), we consider the Panel would, in its assessment of the DA, be having

Our Ref FXRS:RBHS: 120755657
RBHS 510542284v1 120844893 1.7.2020

regard to an irrelevant consideration which would give rise to a risk that any decision by the Panel could be vulnerable to a legal challenge.

3 Standards for self-contained dwellings

3.1 Clause 41 of SEPP Seniors specifies the development standards applicable to self-contained dwellings, providing as follows:

'41 Standards for hostels and self-contained dwellings

(1) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development for the purpose of a hostel or self-contained dwelling unless the proposed development complies with the standards specified in Schedule 3 for such development.

(2) Despite the provisions of clauses 2, 7, 8, 9, 10, 11, 12, 13 and 15–20 of Schedule 3, a self-contained dwelling, or part of such a dwelling, that is located above the ground floor in a multi-storey building does not have to comply with the requirements of those provisions if the development application is made by, or by a person jointly with, a social housing provider.' (emphasis added)

3.2 Clause 41(2) provides a clear exemption from a number of the requirements in Schedule 3 of SEPP Seniors, for self-contained dwellings located above the ground floor in a multi-storey building, where the DA is made by a social housing provider.

3.3 Therefore provided CHL is properly characterised as a social housing provider, compliance with the Schedule 3 requirements nominated in clause 41(2) does not have to be demonstrated.

4 Definition of 'social housing provider' under SEPP Seniors

4.1 The term 'social housing provider' is defined in clause 3 of SEPP Seniors as follows:

'social housing provider means any of the following:

- a) *the New South Wales Land and Housing Corporation,*
- b) *the Department of Housing,*
- c) *a community housing organisation registered with the Office of Community Housing of the Department of Housing,*
- d) *the Aboriginal Housing Office,*
- e) *a registered Aboriginal housing organisation within the meaning of the Aboriginal Housing Act 1998,*
- f) *the Department of Ageing, Disability and Home Care,*
- g) *a local government authority that provides affordable housing,*
- h) ***a not-for-profit organisation that is a direct provider of rental housing to tenants.'*** (emphasis added)

4.2 This advice considers whether CHL falls within subclause (h) of the definition of 'social housing provider'.

4.3 For CHL to fall within subclause (h), it must:

- (a) be a not-for-profit organisation; and
- (b) be a direct provider of rental housing to tenants.

5 Interpretation of 'social housing provider'

5.1 There is no case law authority that provides further guidance on how one might satisfy the definition of 'social housing provider' under the SEPP Seniors. However, it is helpful to examine judicial authority in relation to an earlier definition.

5.2 The current definition was inserted into SEPP Seniors on 12 October 2007. It replaced the previous definition which stated:

'local government or community housing provider means:

- a) *a local government organisation, or a not for profit organisation, that is a direct provider of housing to tenants receiving government housing subsidies, or*
- b) *an organisation approved by the Minister'* (emphasis added),

for the purposes of this advice, referred to as the **Previous Definition**.

5.3 The current definition of 'social housing provider' under the SEPP Seniors is broader than the Previous Definition. However, as far as subclause (h) is concerned there are substantial similarities

(as identified in bold text in the preceding paragraph). Accordingly, case law authority on the Previous Definition is of assistance in interpreting subclause (h) of the current definition.

5.4 Justice Jagot of the Land and Environment Court considered the Previous Definition in *McFadyen Architects Pty Limited v Kogarah Council (McFadyen Decision)*.¹ In that decision, the parties sought a determination from the Court on the question of whether Macedonian Aged Care and Accommodation Ltd (**MACAL**) was a 'local government or community housing provider' under the SEPP Seniors (as the definition was drafted in 2006).

5.5 In that case MACAL provided evidence that it:

- (a) was a not for profit organisation with reference to its endorsement by the Australian Tax Office (**ATO**) to receive charity tax concessions and as a public benevolent institution; and
- (b) had residential tenancy arrangements with two people.

5.6 Justice Jagot held that:

- (a) in terms of the requirement to be a direct provider of housing to tenants, the definition's use of the word '*direct*' conveys a requirement that the organisation itself makes the housing available, which may be satisfied by an organisation obtaining rights over housing and vesting rights of occupation in the tenants;
- (b) MACAL was a direct provider of housing to tenants even though the only arrangement into which it had entered was a sub-lease with tenants. It was not necessary that MACAL be the owner of the building or have title to the land; and
- (c) MACAL was '*a not for profit organisation, the specific powers of which include providing benevolent relief of sickness, suffering and distress caused by old age, retirement and nursing homes, and accommodation for the sick, aged and infirm who do not have capacity to pay fees for such services*'.

5.7 Ultimately, Justice Jagot in the *McFadyen Decision* was satisfied that MACAL, by reason of its status as a not-for-profit organisation that was directly providing housing to two tenants receiving government housing subsidies, was a '*community housing provider*' under the Previous Definition.

Limb 1: CHL's status as a 'not for profit organisation'

5.8 You have provided us with the following documents regarding CHL's status as a '*not for profit organisation*':

- (a) The Constitution of Catholic Healthcare Limited, ACN 064 946 318 (**CHL's Constitution**);
- (b) Letter from the ATO containing notice of endorsement for charity tax concessions issued to Catholic Healthcare Limited, dated 3 July 2009;
- (c) ATO endorsement as a deductible gift recipient on the basis that the organisation is a 'public benevolent institution', issued to 'Catholic Healthcare Services Limited', dated 1 July 2000; and
- (d) ASIC Certificate of Registration of Change of Name, dated 23 March 2006 which certifies that 'Catholic Healthcare Services Limited' changed its company name to 'Catholic Healthcare Limited'.

5.9 We also note that CHL is a charity under the category 'public benevolent institution', registered with the Australian Charities and Not-for-profits Commission (**ACNC**).

¹ [2006] NSWLEC 763.

- 5.10 In the McFadyen Decision, Justice Jagot was satisfied that MACAL was a '*not for profit organisation*' based on the endorsement by the ATO for MACAL to receive charity tax concessions and its certification as a public benevolent institution.
- 5.11 We have not located any further judicial authority which considers the meaning of '*not for profit organisation*' within the context of the EPA Act or SEPP Seniors. We have considered cases concerning the meaning of '*public benevolent institution or public charity*' within the context of obtaining an exemption from the payment of rates under the *Local Government Act 1993*.
- 5.12 In *Community Housing Ltd v Clarence Valley Council* [2014] NSWLEC 1993, Justice Harrison considered that the proper characterisation of whether an institution is a '*public benevolent institution or public charity*' should be determined objectively with reference to the company's constituting documents.²
- 5.13 CHL's Constitution requires CHL to distribute profits to either its own benevolent causes or another organisation which has achieved a charitable status as determined by the ATO. The clauses of the Constitution which we have relied on in forming this view are:
- (a) Clause 8:
- All of the income and property of the Company must be applied solely towards the promotion of the objects of the Company and no portion shall be paid or transferred directly or indirectly by way of dividend bonus or otherwise by way of profit to the Member of the Company provided that this restriction does not prevent the payment in good faith of:***
- (a) *remuneration to any Officers or employees of the Company or to the Member of the Company or any other person in return for services actually rendered to the Company (including payment of Approved Fees to any non-executive Directors), and payment of reasonable expenses (including travelling and accommodation) incurred by any Officers in carrying out their duties to the Company;*
 - (b) *interest on money lent to the Company by the Member of the Company at a rate not exceeding the rate for the time being charged by the Company's bankers for overdrawn accounts;*
 - (c) *reasonable and proper rent, remuneration or return for any premises of the Member of the Company occupied by the Company;*
 - (d) *to provide money or other support to any body associated with the provision of health and/or aged care provided that body is a body which may receive tax deductible gifts or contributions under Subdivision 30-B of the Income Tax Assessment Act 1997 as amended from time to time or under any legislative provision enacted in substitution for that provision. (our emphasis)*
- (b) Clause 10:
- Subject to Rule 9, if the Company is wound up or dissolved (other than for the purposes of reconstruction or amalgamation) and there is property remaining after the satisfaction of the debts and liabilities of the Company, that property will not be paid or distributed to the Member of the Company but will be given or transferred to any organisation nominated by the Member of the Company, which has similar objects to the Company and which may receive tax deductible gifts or contributions under Division 30 of the Income Tax Assessment Act 1997. (our emphasis)***
- 5.14 The operation of these two clauses prevents CHL from distributing profits for the benefit of individuals or 'for profit' organisations. This limitation is consistent with a characterisation of CHL as '*not for profit organisation*'.
- 5.15 We are satisfied that CHL is a '*not for profit organisation*' based on:
- (a) its status as a deductible gift recipient and with the endorsement for charity tax concessions provided by the ATO; and
 - (b) clauses 8 and 10 of the CHL Constitution which prevent CHL from distributing profits for the benefit of individuals or 'for profit' organisations.

Limb 2: 'direct provider of rental housing to tenants'

² relying on the decision of Preston J in *Bodalla Aboriginal Housing Company Limited v Eurobodalla Shire Council* (2011) 184 LGERA 315.

- 5.16 The phrase '*direct provider of rental housing to tenants*' involves two elements. Firstly, that CHL be a '*direct provider*' of housing, and secondly that this housing must be '*rental housing to tenants*'.
- 5.17 We are satisfied that CHL is a direct provider of housing, as CHL both delivers and manages the housing for the residents of its facilities. You have instructed us that CHL enters into tenancy arrangements directly with its residents, as discussed in more detail below.
- 5.18 On the question whether CHL is a direct provider of '*rental housing to tenants*' we have considered CHL's leasing arrangements with its residents, being the Standard Form Residential Tenancy Agreement, produced by Fair Trading (**Standard Lease**).
- 5.19 The Standard Lease contains the following attributes:
- (a) it provides the resident with a right to exclusive possession of the relevant property;
 - (b) it requires the payment of rent;
 - (c) it provides for a specified a finite 'term' or period of occupation; and
 - (d) it sets out the limited circumstances in which the landlord, being CHL, may access the property.
- 5.20 The fundamental indicia of a lease are the presence of two essential elements:
- (a) certainty of term (that is, a commencement date and duration); and
 - (b) whether the occupant has been given the right to exclusive possession. The Courts have said that this factor is the 'decisive' fact, but it is subject to any rights conferred under statute or under the lease agreement.³
- 5.21 These two elements are present in CHL's arrangement described above.
- 5.22 In the McFadyen Decision, Justice Jagot accepted MACAL status as a provider of '*rental housing to tenants*' where it was providing this type of housing to two people, on a nearby site.
- 5.23 For the reasons set out above, we are satisfied that CHL is a '*direct provider of rental housing to tenants*'.
- 5.24 As a result of this analysis, we conclude that CHL is properly characterised as a social housing provider for the purposes of SEPP Seniors.

If you have any questions in please contact the writer.

Yours sincerely



Felicity Rourke

Partner

Allens

Felicity.Rourke@allens.com.au

T +61 2 9230 4366

³ *Radaich v Smith* (1959) 101 CLR 209