

King & Wood Mallesons
Level 61 Governor Phillip Tower
1 Farrer Place
SYDNEY NSW 2000

Our Ref: GMC:DT:mm:22937

26 February 2019

Attention: Anna Bond & Debra Townsend

By Email

Dear Anna & Debra,

**Toucy Pty Ltd v Northern Beaches Council
Land and Environment Court Proceedings No. 2018/398283
Property: 58 Laitoki Road, Terrey Hills**

We refer to the above matter and our recent conversation regarding the provision of access to services for the proposed development. We note that Council's planner contacted the applicant's planner by email on 19 February 2019 requesting the provision of legal advice in relation to the applicability of Clause 26 of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability)* 2004 (the "SEPP"). The purpose of this letter is to confirm that the provision of a 'village bus' satisfies the requirements of the SEPP in regards to the provision of transport services to local centres.

Proposed Access to Facilities

With reference to the Statement of Environmental Effects ("SEE") prepared by Minto Planning Services submitted with the Development Application (the "DA") and filed with the Class 1 appeal, it is noted that:-

"A dedicated mini-bus service will be operated 'on-demand' out of the RACF for use by residents, visitors and staff of both the RACF and ILU and will provide services to local transport points and retail facilities. The service will be available from 7am to 7pm." [P17]

Further details are provided at page 30 of the SEE where it is advised that a 12 passenger bus is proposed to be administered by the Owners Corporation of the development and will be available for use by both residents of the RACF and ILU in accordance with clause 43 of the SEPP.

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The subject site is zoned RU4 – Primary Productions Small Lot Land pursuant to the Warringah LEP 2011, and is therefore not zoned primarily for urban purposes. As Council is aware, a site compatibility certificate has been issued by the Department of Planning identifying the land as being suitable for a seniors living development given the land directly adjoins land zoned R2 Low Density Residential.

Application of the SEPP

With reference to the email of Council's planner dated 19 February 2019, the Sydney North Planning Panel, through Council, has requested that the applicant provide legal advice in relation to the applicability of clause 26 of the SEPP to the site. We *enclose* as Annexure "A" to this letter, an extract of clause 26. We further *enclose* a copy of clause 43 – Transport Services to Local Centres for "*development on land adjoining land zoned primarily for urban purposes*" (Annexure "B"). In short, the intention of the SEPP is to ensure that residents of seniors living developments will have access to the facilities which are identically referred to in clauses 26 & 43.

While clause 26 is a general provision relating to development for seniors housing, clause 43 pertains solely to development of serviced self-contained housing (ILUs) on land which adjoins the land zoned primarily for urban purposes. We refer to the decision of Justice Cowdroy in the matter of *Information Gateways Pty Ltd v Hornsby Shire Council* [2005] NSWLEC 242 where this was examined by the Court. A copy of that Judgment is *annexed* as Annexure "C" for convenience. At paragraphs 29 – 35 His Honour assessed the requirements of the SEPP for access to offsite services. We provide the following extract for the panel's review:-

"33 Both cl 25 and 75 are mandatory, but while cl 25 is a general provision relating to development for seniors housing, cl 75 pertains solely to development of serviced self-contained housing on land which adjoins lands zoned primarily for urban purposes.

34 Clauses 25 and 75 are each directed to ensuring that residents of seniors living developments will have access to the facilities which are identically referred to in each of such clauses. Clause 75 ensures the provision of transportation to the listed facilities where the development is of the type and on land referred to in the said clause. Both clauses prima facie are operative. It would be illogical however to require the provision of a bus service for the residents where the development was located within 400 m of the facilities. Clause 75 is clearly intended to operate in those circumstances where the development is located further distant than 400 m from the nominated facilities. As such, cl 75 operates to exclude cl 25 in relation to those developments referred to in cl 75."

Given changes to the numbering of the clauses in the SEPP, clauses 25 & 75 referred to in the Judgment are identical to clauses 26 & 43(1), respectively, in the current version of the SEPP. It is clear that the Court determined that clause 75 (now 43) is intended to operate in

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circumstances where the development is located further than 400m from the nominated facilities and operates to exclude clause 25 (now 26) in relation to those developments. The subject development is such a development, given it is located on land that is not zoned primarily for urban purposes but adjoins land that so is zoned. We agree with and endorse the decision of Cowdroy J noting that *"it would be illogical to require the provision of a bus service for the residents where the development was located within 400m of the facilities."* It is therefore clear that clause 26 of the SEPP is not be applied to the assessment of the proposed development given clause 43 is enlivened.

We further refer to the case of *Signature Gardens Retirement Resort Pty Ltd v Cessnock City Council* [2013] NSWLEC 1070. While the appeal was ultimately dismissed, Commissioner Brown helpfully examined the provision of access to facilities at paragraphs 131 – 134 stating that *"I accept that the requirements of clause 26 is satisfied by the provision of a village bus."*

It is therefore clear that given the proposed development is located on land adjoining land zoned primarily for urban purposes, the proposal meets the requirements of clause 43 of the SEPP by providing a 'village bus'. The proposed development satisfies the requirements of the SEPP in relation to transport services to local centres.

We request that you provide a copy of this advice to your client and the panel so that this matter is not raised in the Statement of Facts and Contentions which you are required to file and serve this Thursday, 28 February 2019.

Please call Graham McKee or David Tyrrell should you wish to discuss this letter.

Yours faithfully
McKEES LEGAL SOLUTIONS

Per: D. Tyrrell

Graham McKee
Principal

Encl.