

21 November 2024

Our Ref: PLM:HEM:URB007/4002

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**By Email:**  
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**Attention: Richard Boulus, Development  
Manager**

Dear Richard

**Affordable housing gross floor area calculation under State Environmental Planning Policy  
(Housing) 2021**  
**Property: 11 Jennifer Street, Little Bay**

**1. Introduction**

- 1.1 In June 2024, Urban Property Group (**UPG**) lodged the following development applications with Randwick City Council (**Council**):
- (a) DA 487/2024 seeking to amend the development consent granted by the Land and Environment Court on 19 October 2022 to the Stage 1 Concept DA (DA 698/2020); and
  - (b) DA 489/2024 seeking to amend the development consent granted by the Court on 23 September 2023 to the Stage 2 DA (DA 580/2022),
- to provide for in-fill affordable housing under Chapter 2, Part 2, Division 1 of *State Environmental Planning Policy (Housing) 2021* (**Housing SEPP**).
- 1.2 UPG proposes to seek the 30% additional floor space ratio (**FSR**) for the proposed in-fill affordable housing development in accordance with the bonus permitted by section 16 of the Housing SEPP. In exchange, the Housing SEPP requires that the "*affordable housing component*" of the development is to be 15% of the total FSR of the development. The 15% affordable housing component requirement is equal to 1,698 m<sup>2</sup> of gross floor area (**GFA**) of the whole development.
- 1.3 In calculating the 15% GFA "*used*" for affordable housing, the application includes within the "*affordable housing component*" 97 m<sup>2</sup> of "*circulation areas*" comprising corridor/lobby space directly accessing the affordable housing units because these areas are equally "*used for affordable housing*" (**AH Circulation Areas**). The 97 m<sup>2</sup> of AH Circulation Areas constitutes 5.7% of the "*affordable housing component*". The balance of the affordable housing component is within the affordable housing apartments themselves (**94.3 %, or 1,615 m<sup>2</sup>**).
- 1.4 The AH Circulation Areas are intrinsically "*used*" for affordable housing in the same way that the balance of circulation spaces are "*used*" to service the market dwellings in the development. It is therefore logical that the AH Circulation Areas form part of the "*affordable housing component*" as defined in section 15B(1) of the Housing SEPP, as they are "*used*" for

the purpose of affordable housing. The GFA of the AH Circulation Areas along with the GFA of the proposed affordable housing dwellings themselves together constitute the “*affordable housing component*” of the development, being 1,712 m<sup>2</sup> of GFA (and slightly more than the 15% required).

- 1.5 It follows that because the proposed “*affordable housing component*” of the development complies with the requirement in section 16 of the Housing SEPP, in our view, a clause 4.6 variation request is not required to be lodged with the application with respect to the control.
- 1.6 We note the Council’s preliminary position is that only the GFA of the proposed affordable housing dwellings are “*gross floor area used for affordable housing*” and as such, only the dwellings’ GFA are part of the “*affordable housing component*” as defined in section 15B(1) of the Housing SEPP, and the AH Circulation Areas are not part of the “*affordable housing component*” for the purposes of section 16.
- 1.7 I disagree with the Council’s position of excluding the GFA of all the AH Circulation Areas as part of the “*affordable housing component*” for the reasons summarised below:
  - (a) Section 15(e) of the Housing SEPP requires that the Consent Authority consider in imposing a condition of consent under s. 7.32 of the EP&A Act “land provided for affordable housing must be used **for the purposes of** the provision of affordable housing”;
  - (b) The definition of “*affordable housing component*” in section 15B of the Housing SEPP is “the percentage of the gross floor area **used for affordable housing**”;
  - (c) Planning law turns on the characterisation of the purpose of development of land, not the activities carried out or the nature of the use. The *purpose* served by the AH Circulation Areas (namely access to the affordable housing dwellings and communal spaces for residents of the affordable housing dwellings), is affordable housing. As such the AH Circulation Areas must comprise part of the “*affordable housing component*” defined in section 15B(1) of the Housing SEPP. In my view, this is the case even though the definition does not include the words “*used for the purposes of affordable housing*.” In my view, the omission of the words “*the purposes of*” after the word “*for*” in the definition in section 15B(1) is irrelevant;
  - (d) UPG’s and my interpretation of “*affordable housing component*” is consistent with several recent decisions of Sydney Planning Panels which have applied the newly introduced 30% Affordable Housing bonus at 25 George Street, North Strathfield and 13-19 Canberra Ave, St Leonards. (Further details are provided in section 4 below); and
  - (e) Other sections within Part 2 of the Housing SEPP contain provisions relating to “*dwellings*”. If the intent was that the affordable housing component was limited to dwellings, then it would have used that word or phraseology. (Further details are provided in section 5 below).

1.8 My detailed reasons are set out below.

## 2. Relevant Housing SEPP provisions

- 2.1 The in-fill affordable housing provisions are contained in Chapter 2, Part 2, Division 1 of the Housing SEPP.
- 2.2 The objective of Division 1 is to “*facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households*”: section 15A.
- 2.3 The additional FSR bonus is included in section 16 which provides:

**“16 Affordable housing requirements for additional floor space ratio**

(1) *The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).*

(2) *The minimum affordable housing component, which must be at least 10%, is calculated as follows—*

$$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{(\text{as a percentage})} \div 2$$

(3) ....

**Example—**

*Development that is eligible for 20% additional floor space ratio because the development includes a 10% affordable housing component, as calculated under subsection (2), is also eligible for 20% additional building height if the development involves residential flat buildings or shop top housing.*

(4) ...”

2.4 **“Affordable housing component, of development”** is defined in section 15B(1) of the Housing SEPP as *“the percentage of the gross floor area used for affordable housing”*.

3. **“Gross floor area used for affordable housing”** means GFA used for the purpose of affordable housing, and that includes the AH Circulation Areas.

3.1 Although the definition of “affordable housing component” in section 15B(1) of the SEPP does not use the words “for the purposes of affordable housing” (emphasis added) in my view, the omission of these words is irrelevant.

3.2 I note the consideration by the Court of the calculation of monetary contributions based on residential GFA and non-residential GFA, in *Meriton Property Services Pty Ltd v Council of the City of Sydney* [2012] NSWLEC 1308. Commissioner Pearson C said at [83]:

*“In my view, it is immaterial that cl 27P uses the term “residential purposes” rather than “residential use”. The common element is “residential”, and as Chamwell makes clear, any use must be for a purpose, which is the end to which the land is seen to serve.”*

3.3 This is because planning law turns on the characterisation of the purpose of development of land, not the activities carried out or the nature of the use: *Botany Bay City Council v Pet Carriers International Pty Limited* [2013] NSWLEC 147 per Preston CJ at [24] and [28].

3.4 The purpose is the end to which land is seen to serve. It describes the character which is imparted to the land at which the use is pursued: *Chamwell Pty Limited v Strathfield Council* (2007) 151 LGERA 400 per Preston CJ at [27].

3.5 In determining whether land is used for a particular purpose, an enquiry into how that purpose can be achieved is necessary: *Chamwell* at [28]. The use of land involves no more than the “physical acts by which the land is made to serve some purpose”: *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 at 508; *Chamwell* at [28].

3.6 Furthermore, uses of different natures can still be seen to serve the same purpose: *Pet Carriers International* per Preston CJ at [28].

3.7 The characterisation of the purpose of development must also be done in a common sense and practical way (*Chamwell* at [45]) and at a level of generality which is necessary and

sufficient to cover the individual activities, transactions or processes carried on: *Chamwell* at [36].

3.8 Caselaw examples of the characterisation of the purpose of development include the following:

(a) Basement carpark and driveways for a supermarket

A basement car park in a mixed use development, to be used significantly for the purpose of providing parking for customers of a supermarket was characterised by the Land and Environment Court as development for the purposes of a “shop” (which was an innominate prohibited purpose) and not development for the purposes of “roads” which was a nominate permissible purpose with consent. The supermarket could not function on the land without the car park. *Chamwell Pty Limited v Strathfield Council* (2007) 151 LGERA 400.

The Court noted (at [33]) the fact that the nature of the uses of different components or parts of the development may vary is not necessarily of importance. It noted that the only part of the proposed development that will have a use of the specific nature of supermarket is that part of the building which incorporates the supermarket. The nature of the uses of other parts of the building, such as the car park, driveways, access ways, and landscaped forecourt, is different, but they are designed to serve the end of enabling the supermarket to be carried on: at [35].

(b) Pet transportation business – for the permissible purpose of commercial premises and not airport related land use

The Court (Preston CJ) held that that the Commissioner did not err in characterising the proposed development of a pet transportation business at a site in Botany as being for the nominate permissible purpose of “commercial premises” and not for the innominate prohibited purpose of “airport-related land use”: *Botany Bay City Council v Pet Carriers International Pty Limited* [2013] NSWLEC 147 at [46].

3.9 There is common ground between UPG and the Council that the use of the proposed affordable housing dwellings is for the purpose of providing affordable housing and that the GFA of those dwellings is part of the “affordable housing component.”

3.10 However, the Council has questioned whether the GFA of the AH Circulation Areas comprise “gross floor area used for affordable housing” and as such, comprise part of the “affordable housing component.” In my view, they do.

3.11 The circulation areas within the proposed buildings that will provide access to the affordable housing dwellings will be used by residents of those dwellings and their visitors for access (the physical use) but the purpose for which those circulation areas serve is affordable housing.

3.12 It follows that the GFA of the AH Circulation Areas are “gross floor area used for affordable housing” and comprise part of the “affordable housing component” for the purposes of Division 1, Part 2, Chapter 2 of the Housing SEPP and because the proposed “affordable housing component” complies with the requirement in section 16 of the Housing SEPP, a clause 4.6 variation request is not required to be lodged with the application with respect to the control .

#### 4. UPG’s and my interpretation are consistent with Sydney Planning Panels’ decisions

4.1 I am aware of two recent Panel decisions that confirm my interpretation. They include the following:

(a) DA 2024/0064 lodged by UPG and relating to 25 George Street, North Strathfield was approved by the Sydney Eastern City Planning Panel on 23 October 2024. The DA was for alterations and additions to existing buildings approved under DA 2020/0143 and sought approval for three additional storeys to Building A and an

additional storey to each of Buildings B and C, resulting in 41 additional units, with 24 units to be allocated to affordable housing.

The Housing SEPP Compliance Table prepared by Planning Ingenuity and lodged with the DA made clear that circulation spaces relating to the affordable housing dwellings had been included in the calculation of the GFA for affordable housing. It provided as follows (at page 50):

*"The subject site is permitted a FSR of 1.6:1 and GFA of 11,976m<sup>2</sup>.*

*The proposed development seeks to provide for a total FSR of 2.08:1 and GFA of 15,567m<sup>2</sup>. This equates to an additional GFA of 3,591m<sup>2</sup>, FSR 0.48:1 and bonus of 30%, when compared to the permitted GFA and FSR. In accordance with (2), 15% of the total GFA (or 2,335.05m<sup>2</sup>) must therefore be provided as affordable housing.*

*Per the above, the proposal will allocate a total GFA of 2,335.85m<sup>2</sup> or 15% as affordable housing and therefore satisfies the Housing SEPP. This includes 24 apartments equating to 2,126m<sup>2</sup> and 209.85m<sup>2</sup> of circulation space serving the affordable apartments. It is noted that a total circulation space of 1,399m<sup>2</sup> is provided, and 15% of this space equates to 209.85m<sup>2</sup> which will be allocated to affordable housing.*

*In addition to the above, the building height bonus is as follows:*

*- 30% of 16m equates to 20.8m*

*- 30% of 22m equates to 28.6m". (Emphasis added)*

UPG's GFA calculations, including the section 16 additional FSR were accepted by Canada Bay City Council in its Assessment Report to the Panel – see Table 1: Development Data on page 16, pages 28-29 and Table 4; Consideration of the LEP Controls on page 38 of the Council Assessment Report.

- (b) DA 33/2024 relating to 13 – 19 Canberra Ave, St Leonards was approved by the Sydney North Planning Panel on 13 August 2024. The DA was for alterations and additions to an approved mixed use residential building to include affordable housing and to apply the affordable housing component bonuses in sections 16 and 18 of the Housing SEPP. The calculation of GFA included circulation space servicing the affordable apartments.

The Council Assessment Report included the GFA calculation table set out below and concluded as follows (at page 22/68):

*"The development application satisfies the required provision of affordable housing apartments in accordance with Section 18 Division 1, Chapter 2 of the Housing SEPP. The applicant has sought to rely upon Section 18 to benefit from a 30% bonus to the maximum building height. This requires that the applicant provides 15% of the total GFA / FSR as affordable housing. The proposed development provides a total of 1,866sqm as affordable housing, which is 15% of the GFA as required. This*

includes 23 apartments equating to a total of 1,582sqm and 284sqm of circulation space which services the affordable apartments”.

| Table 5 – Dedicated affordable housing apartments            |                 |                  |                   |                    |
|--|-----------------|------------------|-------------------|--------------------|
|  | Apartment Count | Apartment Number | Internal Area sqm | Number of Bedrooms |
| Apartments located in the building approved under DA162/2021 | 1               | 102              | 50                | 1                  |
|  | 2               | 103              | 119               | 2                  |
|  | 3               | 307              | 95                | 3                  |
|  | 4               | 401              | 96                | 1                  |
|  | 5               | 403              | 54                | 1                  |
|  | 6               | 603              | 54                | 3                  |
|  | 7               | 803              | 54                | 1                  |
|  | 8               | 805              | 87                | 2                  |
|  | 9               | 903              | 54                | 1                  |
|  | 10              | 1003             | 54                | 1                  |
|  | 11              | 1004             | 81                | 2                  |
| Apartments located in the proposed part of the building.     | 12              | 1202             | 61                | 1                  |
|  | 13              | 1203             | 54                | 1                  |
|  | 14              | 1204             | 81                | 2                  |
|  | 15              | 1302             | 61                | 1                  |
|  | 16              | 1303             | 54                | 1                  |
|  | 17              | 1304             | 81                | 2                  |
|  | 18              | 1402             | 61                | 1                  |
|  | 19              | 1403             | 54                | 1                  |
|  | 20              | 1404             | 81                | 2                  |
|  | 21              | 1502             | 61                | 1                  |
|  | 22              | 1503             | 54                | 1                  |
|  | 23              | 1504             | 81                | 2                  |
| Total  | 23              | -                | 1582              | 34                 |
| Circulation space  | -               | -                | 284               | -                  |
| Total  | 23              | -                | 1,866 sqm         | 34                 |

## 5. The Housing SEPP when read in context supports the interpretation

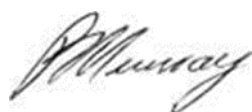
5.1 Other sections within Part 2 of the Housing SEPP contain provisions relating to “*dwelling*s”. If the intent was that the affordable housing component was limited to dwellings, then it would have used that word or phraseology. See for example:

- (a) section 19(2)(e) which uses the phrase “***dwelling*s used for affordable housing**”.
- (b) section 40 which imposes a percentage requirement for affordable housing being 50% of the ***dwelling*s**.

## 6. Conclusion

6.1 For the reasons set out above, UPG’s position is correct, and the AH Circulation Areas comprise part of the “*affordable housing component*” as defined in section 15B(1) and are required to be considered by the consent authority when considering section 16 of the Housing SEPP. It is also my view that because the proposed “*affordable housing component*” complies with the requirement in section 16 of the Housing SEPP, a clause 4.6 variation request is not required to be lodged with the application with respect to the control.

Yours faithfully



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