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**CLAUSE 29(1)(C) - STATE ENVIRONMENTAL PLANNING POLICY
(AFFORDABLE RENTAL HOUSING) 2009
1-20 RAILWAY ROAD, MEADOWBANK**

Background

1. My advice is sought regarding the application of Division 3 of Part 2 of State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP ARH**) to a proposed mixed use development at 1-20 Railway Road, Meadowbank. In particular the advice related to the bonus floor space provisions for boarding houses .
2. I am instructed that the development application seeks approval for four buildings ranging in height between 6 and 7 storeys over 3 basement levels. These buildings will contain 133 residential apartments, a boarding house with 162 rooms, 4,255m² of commercial floor space and parking for 419 cars.
3. The proposal generates an additional 979.3m² of bonus floor area. However, only a portion of floor area is to be utilised for the purpose of the boarding house (530.6m²) while the remaining portion (448.7m²) will be allocated to the residential and retail components of the development.
4. I am specifically asked to advise:

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- a. can the bonus floor area pursuant to clause 29(1) (c) of the SEPP can only be utilised for the purpose of the boarding house component of the development?
 - b. If the answer to (a) above is in the negative, then is there any minimum amount of bonus floor area that must be utilised for the purpose of the boarding house component to comply with the requirements of clause 29(1) (c) of the SEPP?
 - c. In any event, can Council also impose a condition of consent requiring a restriction as to use being registered on the title of the land to ensure that the bonus FSR is utilised for the boarding house component in perpetuity?
 - d. Any other relevant matter.
5. This advice has been provided to meet a short time frame and I would be happy to discuss or expand upon any aspect of it if required.

Provisions of SEPP ARH

6. Clause 29(1) (c) of SEPP ARH states:

(1) A consent authority must not refuse consent to development to which this Division applies on the grounds of density or scale if the density and scale of the buildings when expressed as a floor space ratio are not more than—

.....

(c) if the development is on land within a zone in which residential flat buildings are permitted and the land does not contain a heritage item that is identified in an environmental planning instrument or an interim heritage order or on the State Heritage Register—the existing maximum floor space ratio for any form of residential accommodation permitted on the land, plus—

- (i) 0.5:1, if the existing maximum floor space ratio is 2.5:1 or less, or
- (ii) 20% of the existing maximum floor space ratio, if the existing maximum floor space ratio is greater than 2.5:1.

7. The proposal relies on clause 29(1)(c)(ii) for 979.3m² of bonus floor space which, as noted above, is partly allocated to the boarding house component and partly to the residential and retail components of the development.

8. Clause 27 of SEPP ARH (which is in Division 3 of Part 2 – Boarding Houses along
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with clause 29) provides:

(1) This Division applies to development, on land to which this Division applies, for the purposes of boarding houses.

9. Clause 3 of SEPP ARH sets out the aims of the policy as follows—

- (a) to provide a consistent planning regime for the provision of affordable rental housing,
- (b) to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards,
- (c) to facilitate the retention and mitigate the loss of existing affordable rental housing,
- (d) to employ a balanced approach between obligations for retaining and mitigating the loss of existing affordable rental housing, and incentives for the development of new affordable rental housing,
- (e) to facilitate an expanded role for not-for-profit-providers of affordable rental housing,
- (f) to support local business centres by providing affordable rental housing for workers close to places of work,
- (g) to facilitate the development of housing for the homeless and other disadvantaged people who may require support services, including group homes and supportive accommodation.

Consideration

10. Pursuant to clause 27, Division 3 of Part 2 of SEPP ARH applies to "development ... for the purposes of boarding houses".

11. The principles which apply to characterisation of development are set out in *Chamwell Pty Limited v Strathfield Council* [2007] NSWLEC 114, particularly at [27] to [43]. Notably those principles include:

- a. in planning law a use must be for a purpose;
- b. it is reasonable to consider how the purpose is to be achieved; and
- c. interpretation should be at a sufficient level of generality to cover the activities required to achieve the purpose.

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12. The Standard Instrument – Principal Local Environmental Plan defines "boarding house" as

a building that—

- (a) is wholly or partly let in lodgings, and
 - (b) provides lodgers with a principal place of residence for 3 months or more, and
 - (c) may have shared facilities, such as a communal living room, bathroom, kitchen or laundry, and
 - (d) has rooms, some or all of which may have private kitchen and bathroom facilities, that accommodate one or more lodgers,
- but does not include backpackers' accommodation, a group home, hotel or motel accommodation, seniors housing or a serviced apartment.

13. It seems self-evident that the entirety of the mixed use development cannot be said to be "for the purpose of a boarding house" as required by clause 27 in order to engage Division 3 of Part 2. The retail and residential uses could not be said to be ancillary to the boarding house element or necessary to achieve the purpose. They are entirely separate uses (with the possible exception of the car park, if any spaces in it are allocated to the boarding house).

14. Even if the developer seeks to divide the uses into "retail" and "residential", the broader "residential" use is simply not for the purpose of a boarding house. While a few non-boarding style residences might be ancillary to a boarding house use (for example, for managers to reside in, in this case considerably more bedrooms in the development are allocated to general residences than to boarding rooms).

15. The developer can only engage Division 3 of Part 2, and so enjoy the bonus floor space under clause 29(1)(c) if the development is approached as being for several separate uses, one of which is boarding house. It follows that the bonus floor space can only be calculated on the floor space area used for boarding house (which appears to be the case in the developer's calculations) and can only be applied to the area used for a boarding house.

16. Applying bonus floor space to areas of the development used other than for a boarding house could also be said to be contrary to the aims of SEPP ARH, which are all directed at the provision of affordable housing. This provides an alternate

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argument as to why the bonus floor space should be limited to the part of the development used for the purpose of a boarding house.

Condition of Consent

17. Section 4.17(1)(a) of the Environmental Planning and Assessment Act 1979 provides that condition may be imposed if it relates to any matter referred to in section 4.15 of relevance to the development of the subject of the consent. As an Environmental Planning Instrument, SEPP ARH is a matter for consideration under section 4.15(1)(a)(i).

18. There are several Land and Environment Court cases which establish that, so as not to limit future merit assessment, the imposition of a restriction as to user will only be imposed in exceptional circumstances (*MacDonald v Mosman Municipal Council* 105 LGERA 49) and are not generally required if the law already adequately provides the enforcement of the provisions (eg *PDP (Darlinghurst Apartments) Pty Limited v Sydney City Council* [2005] NSWLEC 41). Nevertheless, there are cases in which it has been deemed appropriate (eg *Meriton Apartments Pty Limited v City of Canada Bay Council* [2003] NSWLEC 92).

19. There are two parts to the question of whether a condition for restriction to use in perpetuity:

- (i) *Can it be lawfully imposed?* In my view the answer to this is clearly yes, as such a condition directly relates to a planning purpose invoked by an instrument which is a matter for consideration under section 4.15.
- (ii) *As a matter of merit, would the LEC on appeal impose or uphold such a condition?* In my view the answer to the merit question is that there are quite good prospects that it would. Firstly, the combination of bonus floor space and highly specific planning purpose of boarding house suggest this is a matter which warrants special protection. Secondly, as part of a mixed use development which also includes general residential use, this is a development in which that purpose of providing affordable housing is at particular risk. It is therefore arguable that the condition is appropriate.

20. I note, however, that a future application could be made to lift such a condition of

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consent, and that would be assessed on its merits at the time. Thus, even if the condition was imposed it is not possible to guarantee restriction at to user in perpetuity.

Summary

21. In summary I answer the questions posed as follows:

- a. the bonus floor area can only be used for the area of the development to be used for the purpose of boarding house;
- b. does not arise;
- c. a condition for restriction of use can lawfully be imposed and the merits of such a condition can be reasonably argued;
- d. I have not identified any other relevant matter.



Fenja Berglund

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19 April 2021