

26 May 2023

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Attention: Graeme Skerritt

Dear Graeme

Planning law advice re modification of development consent DA117/2017 for 266 Longueville Road, Lane Cove NSW

We are instructed that your modification application of development consent DA117/2017 for 266 Longueville Road, Lane Cove NSW was before the Sydney North Planning Panel (**the Panel**) on 17 May 2023. A decision on determination was deferred. The Panel has requested that you provide additional information to the Council's independent assessor, so that they may prepare a supplementary assessment report for the Panel's consideration.

You wish for us to consider and address items 1 – 4 of the Panel's 'Reasons for Deferral' issued on 19 May 2023. This letter is supplementary to our letters dated 17 November 2022 and 2 January 2023.

Summary advice

In our opinion:

- The **permissibility** 'of the modification' is not a matter the Panel needs to turn its mind to in determining the current modification application. Any requirements for a site compatibility certificate under the Seniors Housing SEPP does not prevent the consent authority determining a modification application.
- The SCC does not form part of the development consent. Accordingly:
 - the existence of the SCC is merely a circumstance that existed when the development consent was granted'; and
 - the terms of the SCC are not relevant (and must not be considered) when applying the 'substantially the same' test.
- In any event, even if regard was had to the terms of SCC, the proposed modification does not raise any issue of concern. The intention of the SCC was that:
 - there was no minimum number of aged care beds; and
 - the provision of aged care beds was not essential.
- In considering the reasons given by the consent authority for the grant of the consent that is sought to be modified, the consent authority must merely **consider** the reasons given by the consent authority, but will **not** be legally **bound** to apply them. The reasons of the consent authority do not necessarily dictate the outcome of the merit assessment. They are merely to be taken 'into consideration'.

- It is open for the Panel to determine the modification application by way of approval even if it considers that an element of the proposed modification is inconsistent with the reasons of the consent authority for the original development consent. It is a matter for the Panel to determine the weight given to the original reasons for the grant of consent.
- Clause 45(6) of the Seniors Housing SEPP (which deals with on-site support services) does not directly apply to the determination of the modification application. That is, the consent authority is not legally precluded from providing the modification application by any matter in clause 45(6). At its highest, the consent authority is merely obliged to take the matters in clause 45(6) into consideration.
- There is (or will be) ample material before the Panel that it allows it to take into consideration the provision of 'on-site support services', as referenced under clause 45(6) of the Seniors Housing SEPP.

Background

We understand and assume the relevant facts to be as follows:

- You are the developer of 266 Longueville Road, Lane Cove NSW 2006 (**the site**). The site is also known as Lot 1 in DP 321353, Lot 1 DP 1227921 and Lot 2 DP 1227921.
- The site area is 9,204m².
- The approved building footprint materially extends into Lot 1 DP 321353 and Lot 2 DP 1227921.
- The site is zoned 'R4 High Density Residential' (**R4**) under the *Lane Cove Local Environmental Plan 2009* (**the LEP**).
- On 6 September 2021, development consent was granted for DA117/2017 (**the original development consent**) by the Sydney North Planning Panel. The development consent was for the construction of a seniors housing development comprising of:
 - 70-bed residential aged care facility;
 - 82 independent living units/self-contained dwellings;
 - basement car parking for 122 vehicles; and
 - new public park and facilities, and landscaped through-site link.
- The existing development consent was granted on the basis of a site compatibility certificate issued on 10 June 2021 (**the SCC**). The SCC was obtained so that the proposal development would benefit from the 'vertical villages' floor space ratio bonus under clause 45 of the former *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**the Seniors Housing SEPP**).
- On **30 November 2022**, the Lane Cove Local Planning Panel approved a modification to the existing development consent that was made under section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**). That modification included the following changes to the original development consent:
 - deletion of condition 4; and
 - amendment of conditions 2.1, 2.2, 5, 6, 9 and 154.
- On **29 November 2022**, you lodged the present modification application to modify the original development consent under section 4.55(2) of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) (**the modification application**).
- The modification application proposes construction of seniors housing development comprising of:
 - 92 independent living units;
 - basement car parking for 181 vehicles; and

- new public park and facilities and landscaped through-site link.
- The proposed modification application provides for 'on-site support services' in compliance with clause 45(6) of the Seniors Housing SEPP. The 'on-site support services' account for less than 50 per cent of the total gross floor area.
- The on-site support services are 'wrap around' services. They will be available to the residents of the residential units. These services will include cleaning, laundry and meal preparation undertaken from the on-site communal facilities.
- On **17 May 2023**, the Council issued the 'Council Assessment Report' and recommended that the modification application be approved (**the Council Assessment Report**). The Council Assessment Report annexed draft conditions and legal advice obtained from Andrew Pickles SC.
- On **17 May 2023**, the Council's independent development assessor, Robert Montgomery issued a memorandum regarding whether the modified development is consistent with the site compatibility certificate.
- On **19 May 2023**, the Sydney North Planning Panel determined that the determination of the modification application be deferred and issued a 'Record of Deferral'.
- You are preparing to submit additional information to the Council's independent assessor in response to the items raised in the 'Record of Deferral'. The 'Record of Deferral' indicates that the independent assessor will then prepare a supplementary assessment report for the Council.
- You have supplied us with a draft aged care report prepared by Critical Success Solutions.

Please tell us if any of the above facts are not correct, as it may change our advice.

Detailed advice

1. Item 1 of the Reasons for Deferral

1.1 Item 1 of the Panel's 'Reasons for Deferral' is as follows:

Permissibility of the modification as proposed (with the absence of aged care beds) having regard to the current Site Compatibility Certificate (SCC); in particular, the development as described in Schedule 1 which gives permissibility for "Development for up to 70 aged care beds and 82 independent dwellings, ancillary facilities, basement carparking and landscaping".

- 1.2 The **permissibility** 'of the modification' is not a matter the Panel needs to turn its mind to in determining the current modification application.
- 1.3 A modification application is legally distinct from a development application (*Peter Duffield and Associates Pty Ltd v Canada Bay Council* (2002) 124 LGERA 349).
- 1.4 The power to approve a modification application is much broader than the power to grant a development consent (subject to the satisfaction of the 'substantially the same' test as outlined in our letter of 17 November 2022).
- 1.5 The modification power is beneficial and facultative as well as 'free-standing' (*North Sydney Council v Michael Standley and Associates* (1988) 43 NSWLR 468, 481).
- 1.6 A modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application (*Michael Standley*, 480-481).
- 1.7 In essence, the reason for this is that a **modification** application is not a **development** application. The development standards in environmental planning instruments only apply as strict rules in the determination of development applications — and not to modification applications.

- 1.8 Clause 24(2) of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (the Seniors SEPP)*, as it was in force at the time of the granting of the original consent was relevantly:

A consent authority must not consent to a development application to which this clause applies unless the consent authority is satisfied that the relevant panel has certified in a current site compatibility certificate that, in the relevant panel's opinion— ...

- (b) development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding environment having regard to (at least) the criteria specified in clause 25(5)(b).

- 1.9 The SCC was a jurisdictional requirement that needed to be satisfied in order for the consent authority to grant the original development consent for a 'seniors housing' development, and for it to be permissible. This statutory requirement does not apply to the determination of a modification application of a seniors housing development.

- 1.10 This is consistent with section 4.70 ('Saving effect of existing consents') of the EP&A Act. This provision is relevantly as follows:

- (1) Nothing in an environmental planning instrument **prohibits**, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.

- (2) This section— ...

- (b) does not prevent the lapsing, revocation or **modification**, in accordance with this Act, of a consent (bold added)

- 1.11 The effect of this provision is such that any requirements for a SCC under the Seniors Housing SEPP does not prevent the consent authority determining a modification application in accordance with the requirements under section 4.55(2) of the EP&A. We have considered the relevant considerations and requirements of section 4.55(2) of the EP&A in our letter of 17 November 2022.

2. Item 2 of the Reasons for Deferral:

- 2.1 Item 2 of the Panel's 'Reasons for Deferral' is as follows:

Whether the modified development as proposed is substantially the same as the development for which the consent was originally granted, having particular regard to the essential elements of the original development consent and the relationship with the SCC.

- 2.2 We refer to section 3 of our letter of 17 November 2022 and reiterate our conclusion that the modification application is substantially the same as the consent originally granted when the essential elements of the original development consent are considered. In preparing our letter of 17 November 2022 we reviewed your draft material. After reviewing the modification application as lodged, we are of the view that there were no material changes that impact our advice.
- 2.3 The Panel is interested in the essential elements of the original development consent and their relationship with the SCC.
- 2.4 **Firstly**, we consider that for the purposes of assessing the 'substantially the same' test, the analysis of 'essential elements' are those of the development that is the subject of the consent. It is not relevant to enquire into the circumstances in which the development consent was granted (*Arrage v Inner West Council* [2019] NSWLEC 85 at [24]-[25] and [29]).
- 2.5 The conditions of the original development consent of 6 September 2021, do not refer to the SCC. Condition 1 of the original development consent says that the 'development be strictly in accordance with the following drawings...except as amended by the following conditions' or incorporate it under condition 1 of the consent. Those drawings are the

architectural and landscape drawings. Those drawings do not make reference to the SCC.

2.6 In our view:

- (a) the SCC does not form part of the development consent;
- (b) the existence of the SCC is merely a circumstance that existed when the development consent was granted'; and
- (c) consistent with *Arrange*, the terms of the SCC are not relevant (and must not be considered) when applying the 'substantially the same' test.

2.7 In any event, even if regard was had to the terms of SCC, we consider that the proposed modification does not raise any issue of concern.

2.8 The SCC certifies that:

- the development described in Schedule 1 is compatible with the surrounding environment having had regard to the criteria specified in clause 25(5)(b); ...
- that the development for the purposes of **seniors housing** of the kind proposed in the development application is compatible with the surrounding land uses only if it satisfied certain requirements specified in Schedule 2 of this certificate (bold added).

2.9 The description of the development in Schedule 1 of the SCC is as follows:

Project description: Development of **up to** 70 aged care beds and 82 independent dwellings, ancillary facilities, basement carparking and landscaping (some bold added).

2.10 Further we consider that the insertion of the words 'up to' clearly shows that the intention of the SCC was that:

- (a) there was no minimum number of aged care beds; and
- (b) the provision of aged care beds was not essential.

2.11 It is unsurprising that the SCC was issued in these terms. Clause 24(3) of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, as it was in force at the time of the granting of the original consent relevantly said:

Nothing in this clause—

- (a) prevents a consent authority from—
 - (i) granting consent to a development application to which this clause applies to carry out development that is on a **smaller (but not larger) scale than the kind of development** in respect of which a site compatibility certificate was issued, or
 - (ii) refusing to grant consent to a development application to which this clause applies by reference to the consent authority's own assessment of the compatibility of the proposed development with the surrounding environment (bold added) ...

2.12 It was open to the consent authority to approve a development that had a reduced scale of the kind of development that was proposed in the site compatibility certificate. That is, the original development consent could have been granted with no aged care beds, had the consent authority chosen to do so.

3. Item 3 of the Reasons for Deferral

3.1 Item 3 of the Panel's 'Reasons for Deferral' is as follows:

The reasons given by the consent authority for the grant of the consent that is sought to be modified and the information relied upon to form those reasons having regard to S4.55(3) of the Act

3.2 Section 4.55(3) of the EP&A Act relevantly says:

In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also **take into consideration** the reasons given by the consent authority for the grant of the consent that is sought to be modified (bold added).

3.3 In considering these reasons, the consent authority must merely **consider** the reasons given by the consent authority, but will **not** be legally **bound** to apply them.

3.4 The consideration of the reasons of the consent authority occurs as part of the assessment of the merits of the development application, only once the 'substantially the same' test has been satisfied (*Arrage* at [42]).

3.5 The reasons of the consent authority do not necessarily dictate the outcome of the merit assessment. They are merely to be taken 'into consideration'.

3.6 The obligation to 'take into consideration' the provisions of a development control plan under section 4.15(1) was explained by the Court of Appeal in *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105 (at [213]-[215]). We consider that the explanation would apply equally the obligation to take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

3.7 In our opinion, the obligation, as applicable to section 4.55(3) of the EP&A Act, is as follows:

- (a) At a practical level, a decision-maker is required, at the least, to ask the question: 'What do the reasons say?'.
- (b) The decision-maker is **not** required to refuse the application because the proposed modification is contrary to the logic or tenor of the reasons.
- (c) A decision-maker may need to consider:
 - (i) why it may be appropriate to **not** apply the logic, tenor or reasons at all; or
 - (ii) whether, in the particular application under consideration, an approach that is inconsistent with the reasons might be ameliorated by the imposition of conditions.
- (d) A case may be advanced by an applicant as to why the reasons ought not to have any influence over the decision at all. Such a case will also have to be considered. Much will depend upon the subject matter of the reasons and the nature and extent of the application under consideration.

3.8 In short, it is open for the Panel to determine the modification application by way of approval even if it considers that an element of the proposed modification is inconsistent with the reasons of the consent authority for the original development consent. It is a matter for the Panel to determine the weight given to the original reasons for the grant of consent.

4. Item 4 of the reasons for deferral

4.1 Item 4 of the reasons for deferral is as follows:

Clarification of intended accommodation and care arrangements for future residents requiring advanced care and how that may have changed from the original development consent having regard to clause 45(6)(a)(1) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004

- 4.2 Clause 45(6) of the Seniors Housing SEPP relevantly said the following:
- Requirements relating to affordable places and on-site support services** A consent authority may only grant consent to a development application ... if—
- (a) the consent authority is satisfied, on written evidence, that—
- (i) the proposed development will deliver on-site support services for its residents ...
- 4.3 A 'development application' is defined under section 1.4(1) of the EP&A Act to mean:
- an application **for consent** under Part 4 to carry out development but does not include an application for a complying development certificate (bold added).
- 4.4 The original section 4.55(4) of the EP&A Act expressly says that:
- The modification of a development consent in accordance with this section is taken **not to be the granting of development consent under this Part** [4], but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified (bold added).
- 4.5 This has the consequence that an application for the modification of a development consent is **not** an application for the **grant** of a development consent (cf *Peter Duffield and Associates Pty Ltd v Canada Bay City Council* [2002] NSWLEC 168at [34]).
- 4.6 This means that clause 45(6) of the Seniors Housing SEPP does not directly apply to the determination of the modification application. That is, the consent authority is not legally precluded from providing the modification application by any matter in clause 45(6).
- 4.7 At its highest, the consent authority is merely obliged to take the matters in clause 45(6) into consideration.
- 4.8 In our view, the material that forms (or will form) part of the modification application readily allows this to be done.
- 4.9 The development consent dealt with the accommodation and care arrangements for future residents as follows:
- (a) Description of the development on page 1 of the original development consent:
- Proposed development: Construction of a seniors housing development comprising 70-bed residential aged facility...and facilities...
- (b) Condition 1 – approved drawings that show the layout and room purposes
- (c) Condition 168 which is under the heading 'Operating Conditions' and is as follows:
- The development shall be occupied only by seniors or people with a disability as defined in State environmental Planning Policy (Housing for Seniors and People with Disability) 2004.
- 4.10 When we look to the Panel's 'Determination and Statement of Reasons', they acknowledged the inclusion of condition 168 to address community concerns, but provided no other consideration of aged care accommodation or onsite services.
- 4.11 The Council's supplementary report to the Panel of 4 August 2021 (prepared for the assessment of the original development consent) refers to on-site services in section 7 'Site Compatibility Certificate' that assesses the applicant's response to the Panel's deferral in relation to the affordable places and on-site services under the clause 45 of the Seniors SEPP. The Council's independent assessor was satisfied with the applicant's response for information on the site compatibility certificate application, and summarised it as follows:

Applicant's Response

Australian Unity has prepared a letter to Land Cove Council, which outlines the extent of on-site services and affordable places. This letter is included as Annexure G. The proposal will include on-site services such as a production kitchen to provide meals, dining areas and on-site commercial laundry facilities. The proposal also includes a range of domestic, personal care and nursing services through their in-house home services packages.

- 4.12 The architectural drawings approved by the consent in condition 1, show that the development includes:
- (a) a kitchen to prepare meals for residents;
 - (b) onsite laundry;
 - (c) offices for residential aged care staff and clinical staff;
 - (d) lounge and dining room;
 - (e) activity rooms;
 - (f) auditorium;
 - (g) gym;
 - (h) service areas; and
 - (i) hair salon.
- 4.13 The proposed modified development will continue to provide extensive on-site services for residents. These include:
- (a) three meals a day provided on a communal basis or to a resident's dwelling;
 - (b) home nursing visits;
 - (c) laundry as required;
 - (d) personal care; and
 - (e) assistance with housework.
- 4.14 Your modification application before the Panel is supported by:
- (a) The 'Updated Section 4.55(2) Planning Statement' prepared by Gyde Consulting Pty Ltd and dated 21 December 2022, that outlines onsite support services (listed in paragraph 4.13) will be provided for residents to age in place.
 - (b) 'Operational Plan of Management' prepared by Longueville the Village, which will require a site manager to be appointed and manage the site in accordance with the NSW Retirement Villages legalisation and associated guidelines (part 2.2 of the plan).
 - (c) 'Operators Affordable Housing Policy' prepared by Longueville the Village, which stipulates that on-site support services will be provided for residents to age in place.
- 4.15 We have reviewed a draft submission prepared by Critical Success Solutions, in relation to the aged care services proposed in the modification application. The submission provides further detail as to the nature of the services residents will have access to. The additional services are those set out in paragraph 4.13 as follows:
- (a) cleaning services;
 - (b) transportation assistance;

- (c) round-the-clock security;
 - (d) medication management;
 - (e) social activities and leisure; and
 - (f) access to allied health professionals such as physiotherapy, dietetics and occupational therapy.
- 4.16 Further, the draft submission considers that less than five percent of residents will progress to requiring higher level medical care than will be provided for by the development as proposed to be modified and will require alternative accommodation.
- 4.17 The nature and benefits of the onsite services are such that the residents of the proposed modified development will be supported as they advance in age and their care needs increase, this is consistent with the original development consent – in that appropriate services were provided for the specific residents of that development.
- 4.18 In our opinion, there is (or will be) ample material before the panel that it allows it to take into consideration the provision of 'on-site support services', as referenced under clause 45(6) of the Seniors Housing SEPP.

Please do not hesitate to contact me on (02) 8035 7858 or Amelia Stojevski on (02) 8289 5802 if you have any queries regarding this advice.

Yours sincerely



Aaron Gadiel
Partner

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