1 July 2020

By email: **Bruce.Mccann@wollondilly.nsw.gov.au**

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200871

Mr Bruce McCann
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Dear Bruce

Common Ground Property Seniors Living DA 2019/719/1 - 2689 Remembrance Drive, Tahmoor

We refer to your email of 29 June 2020 in which you sought our advice on the application of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**the SEPP**) to concept development application DA 2019/719/1 for a seniors living development at 2689 Remembrance Drive, Tahmoor (**the DA**). The DA seeks consent for the erection of 214 self-contained single storey dwellings (in-fill self-care housing), as well as alterations and additions to the existing building located on the site, Stratford House, and associated buildings and a 'change of use' of those buildings from residential use to use for administrative and recreational purposes (including as a dining room).

The DA and the SEPP

The site of the proposed development is zoned partly R2 Low Density Residential and partly RU4 Primary Production Small Lots under the *Wollondilly Local Environmental Plan 2011* (**LEP**). The LEP Land Use Table permits Seniors Housing (which is a type of Residential Accommodation) in the R2 zone, but it is prohibited in the R4 zone. However, Chapter 3 of the SEPP permits seniors housing development which complies with the SEPP to be carried out on land that adjoins land zoned "primarily for urban purposes" (cl.4 and 15). As the RU4 component of the site adjoins land zoned R2 the development is permissible on both components of the land, subject to the issue of a Site Compatibility Certificate under cl.24 of the SEPP and compliance with the development standards in Part 4 of Chapter 3 of the SEPP.

You have asked for our advice on the application of the height development standard in cl.40(4) of the SEPP. That subclause states:

(1) ***General*** *A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.*

…

(4) ***Height in zones where residential flat buildings are not permitted*** *If the development is proposed in a residential zone where residential flat buildings are not permitted—*

(a) the height of all buildings in the proposed development must be 8 metres or less, and

Note. *Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).*

(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and

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Note. *The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

We are instructed that Stratford House, an existing building for which a change of use is sought in the DA, exceeds the 8m limit in the SEPP. The SEE notes, however, that all of the new buildings and the proposed additions to the existing structures comply with the 8 metre height limit, with the highest element of the proposed extensions being the lift-well, which is approximately 6.6 metres high.

Clause 50 of the SEPP is also relevant. That clause states that a consent authority must *not* refuse consent to a development application for the purpose of a residential care facility on the basis of building height if *"all proposed buildings are 8 metres or less in height (and regardless of any other standard specified by another environmental planning instrument limiting development to 2 storeys)".*

You have asked whether the restriction in cl.40(a) applies to the existing building which forms part of the proposed development and therefore whether the proposal is inconsistent with the SEPP.

Advice

In planning law use must be for a purpose, and it is the purpose for which the land is used that determines permissibility rather than the individual uses to which the land may be put: *Chamwell v Strathfield Council* [2007] NSWLEC 114. Applying this approach, the reference in the SEPP to the height of "all buildings in the proposed development" would be read as a reference to all of the buildings used for the purpose of the proposed development, whether existing or to be constructed. On this reading, the proposed development would not be permissible under the SEPP without the applicant also seeking to vary the height standard under cl 4.6 of the LEP.

However, it is not clear that this is how cl.40(4) is intended to operate. An alternative interpretation of cl.40(4) of the SEPP is that the reference to the height of buildings in the *proposed development* only applies to buildings *proposed to be constructed as part of the development*. Adopting this interpretation, the height controls would not apply to existing buildings, such as Stratford House. This interpretation draws support from cl.50 of the SEPP, which expressly refers to 'proposed buildings', and would enable cl. 40 to be read in a manner consistent with cl. 50 so that development consent could only be refused on the basis of building height under the SEPP where a *proposed* building did not comply with the 8m height standard specified in cl.40. This interpretation is also consistent with the apparent planning objective of the height limit in cl.40(4)(a) which appears to be directed at restricting the height of new buildings erected pursuant to the SEPP rather than whether existing buildings which are more than 8 metres in height can be used for Seniors Housing.

We have reviewed a number of cases in which the provisions of the SEPP have been considered. None of these cases involves a similar factual scenario to this, where the possible non-compliance with the SEPP arises from a proposal to change the use of an existing building. However, in several cases developers have sought cl.4.6 variations to the development standards in the SEPP, including the height standards in cl.40. In this regard, cl.4.6 of the LEP can be applied to other environmental planning instruments (cl 4.6(2)), and there is no express exclusion of the development standards in cl 40 and 41 of the SEPP to the operation of cl 4.6 of the LEP as envisaged by cl 4.6(2)[1].

We understand that the applicant has not sought to vary the height controls under cl.4.6 of the LEP on the basis that all of the proposed dwellings are single storey and therefore comply with the relevant height controls (SEE pg 51). For the reasons given above, this, in our view, is a reasonably arguable interpretation of cl.40(4)(a); however, the making of an application to vary the height development standard pursuant to clause 4.6 would clearly remove any doubt about the matter.

Recommended next steps

For the reasons explained above in our view the DA satisifies the height standard in cl.40 of the SEPP. While it is possible to interpret cl.40 as applying to all buildings included in the DA to be used for the purpose of seniors housing, in our view this interpretation is less likely to be accepted by the Court.

[1] *Pymble Villas Pty Ltd v Ku-ring-gai Council* [2018] NSWLEC 1586

However, a written request under cl.4.6 of the LEP to vary the height standard would put the matter beyond doubt.

Please let Alice or me know if you would like to discuss.

Yours sincerely
BRADLEY ALLEN LOVE

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