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Dear Harriet

Advice on active street frontage controls in the *Penrith Local Environmental Plan 2010*
Site: 31-33 Santley Crescent & 2A Bringelly Road, Kingswood (Lots 3, 4 and 5 in DP 215200)

1. Summary of advice

We summarise our answers to your questions in the table below. Defined terms are set out in the body of the advice, which should be read in full.

Question	Summary
Is cl 7.8 of the PLEP a development standard that can be varied, or a prohibition?	Clause 7.8 of the PLEP is a development standard that is amenable to variation under cl 4.6. This position is demonstrated in case law, in which the Land and Environment Court has specifically stated it has jurisdiction in the context of a cl 4.6 request lodged in relation to an active street frontage clause identical to cl 7.8. The fact that cl 7.8 required the consent authority's satisfaction as to the development standard does not change this decision. The EPA Act definition of 'development standard' permits standards which are necessarily subject to opinion and satisfaction.

2. Background

2.1 What is the Proposed Development?

We Help Ourselves (**WHOS**) owns the land at 31-33 Santley Crescent & 2A Bringelly Road,¹ Kingswood (**Development Site**). WHOS is in a development application process with Penrith City

¹ Being Lot 3 in DP 215200 (2A Bringelly Road), Lot 4 in DP 215200 (33 Santley Crescent) and Lot 5 in DP 215200 (31 Santley Crescent).

Council (**Council**) for construction of a transitional group home on the Development Site (**Proposed Development**).

The Proposed Development includes construction of new buildings (identified as ‘north building’, ‘east building’ and ‘link building’ on the concept architectural plans) on what are currently 31 Santley Crescent and 2A Bringelly Road (**New Buildings**) and change of use of an existing building on what is currently 33 Santley Crescent (**Existing Building**).

The Development Site is zoned MU1 Mixed Use under the *Penrith Local Environmental Plan 2010 (PLEP)*. The Proposed Development is permissible with consent as a species of ‘residential accommodation’ under the PLEP.²

2.2 What is the active street frontage requirement in the PLEP?

Clause 7.8 of the PLEP relates to ‘Active street frontages’ and ‘applies to land identified as “Active Street Frontage” on the Active Street Frontages Map’ in the PLEP.

With specific exceptions for entrances and lobbies, fire service access and vehicular access under cl 7.8(4), cl 7.8(3) states that:

‘Development consent must not be granted to the erection of a building, or a change of use of a building, on land to which this clause applies unless the consent authority is satisfied that the building will have an active street frontage after its erection or change of use.’

Clause 7.8(5) states that:

*‘In this clause, a building has an **active street frontage** if all premises on the ground floor of the building facing the street are used for the purposes of business premises or retail premises.’*

The objective of cl 7.8 is stated to be:

‘...to promote uses that attract pedestrian traffic along certain ground floor street frontages in Zone E1 Local Centre, Zone E2 Commercial Centre and Zone MU1 Mixed Use.’

2.3 Where is the Active Street Frontage requirement for the development and what is the design of the development on that frontage?

The Active Street Frontages Map identifies the western boundary of 33 Santley Crescent and 2A Bringelly Road as an ‘Active Street Frontage’.³

We understand the Existing Building has two prominent direct access / egress points directly onto Bringelly Road, with glazed frontages facing Bringelly Road for spaces comprising a meeting room and a ‘client facing’ reception area for the business which is the main customer-facing service location for the development.

We understand that all of the ground floor premises facing Bringelly Road would be used for the purposes of the business, comprising offices and common areas for the business.

² Transitional group homes are a type of group home as defined in the dictionary to the PLEP. Group homes are a type of residential accommodation as defined in the dictionary to the PLEP.

³ PLEP Active Street Frontages Map - Sheet ASF_013.

3. Is cl 7.8 of the PLEP a development standard or prohibition?

3.1 What is a development standard as opposed to a prohibition?

The *Environmental Planning and Assessment Act 1979 (EPA Act)* defines ‘development standards’ to mean, relevantly:⁴

‘...provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development...’

The law relating to when a provision of an environmental planning instrument (**EPI**), including a Local Environmental Plan, will be a ‘development standard’ or a ‘prohibition’ was set out recently by the Chief Judge of the Land and Environment Court in *Canterbury Bankstown Council v Dib* [2022] NSWLEC 79 (**Dib**).

The decision in *Dib* is a reliable summary of previous case law on the difference between a ‘development standard’ and a ‘prohibition’, as well as the highest current application of those principles. *Dib* has been applied more recently in a number of cases.⁵

In *Dib*, Preston CJ stated that:

‘The starting point in determining whether a provision is a development standard within the definition is to identify the development that may be carried out with consent.’

This is because an EPI provision:

‘...can only be a development standard within the definition of “development standards” if the provision is “in relation to the carrying out of development”.’

As such, Preston CJ’s focus in *Dib* was on whether the EPI provision in question:

- (a) defined whether a particular type of development could not be carried out **at all** – in which case the provision would be a **prohibition**; or
- (b) defined the **way in which** permissible development can be carried out on land – in which case it would be a **development standard**.

Supporting this approach, Preston CJ cited Mahoney JA’s statement in *North Sydney Municipal Council v PD Mayoh Pty Ltd (No 2)* (1990) 71 LGRA 222 on the:

‘...distinction between a provision in the form of: “On land of characteristic X no development may be carried out” and a provision in the form of: “On such land development may be carried out in a particular way or to a particular extent”’

Preston CJ also cited the case of *Blue Mountains City Council v Laurence Browning Pty Ltd* (2006) 150 LGERA 130 where the provision in question was found to be a prohibition not a development standard because it:

⁴ EPA Act, s 1.4.

⁵ *Australian Unity Funds Management Ltd in its capacity as Responsible Entity of the Australian Unity Healthcare Property Trust v Boston Nepean Pty Ltd & Penrith City Council* [2023] NSWLEC 49; *NCV Enterprises Pty Ltd v Tweed Shire Council* [2024] NSWLEC 14; *Whitfield v Sutherland Shire Council* [2023] NSWLEC 1520.

‘...precluded any development being carried out on such land, rather than allowing development to be carried out on such land in a particular way or to a particular extent.’

Preston CJ referred to *Strathfield Municipal Council v Poynting* [2001] NSWCA 270 (*Poynting*), making the point that the Court must look to the substance rather than to the form of a provision to ascertain whether it is a development standard or prohibition.

In *Poynting*, the Court of Appeal held that a provision providing that ‘*consent shall not be given unless the land has an area not less than 560 square metres*’ was a development standard since it did not prohibit ‘*the erection of a building...in any circumstances*’ but rather ‘*only in the stated circumstance that the area of the land is less than the minimum size*’.

Giles JA also stated in *Poynting* that:

- (a) a provision that controls development by **complete prohibition** of the development in question **will not leave room for requirements or standards**; but
- (b) anything less than complete prohibition, where the development *can* be carried out providing an identified aspect of the development **satisfies a specified control**, will be a development standard.

3.2 Is cl 7.8 of the PLEP a development standard?

Clause 7.8 of the PLEP relevantly provides:

‘(3) Development consent must not be granted to the erection of a building, or a change of use of a building, on land to which this clause applies unless the consent authority is satisfied that the building will have an active street frontage after its erection or change of use.

...

(5) In this clause, a building has an active street frontage if all premises on the ground floor of the building facing the street are used for the purposes of business premises or retail premises.’

Applying the reasoning in *Dib* and *Poynting*, it is clear that cl 7.8 of the PLEP is a **development standard** and is not a prohibition, as:

- (a) The clause does not preclude *any* development from being carried out on the Development Site.
- (b) The development that may be carried out with consent on the land is the erection or change of use of a building which contains business premises or retail premises.
- (c) Clause 7.8 defines the way in which this development can be carried out on the land i.e. the development must be carried out such that the ground floor premises of the building facing the street are used for the purposes of business premises or retail premises.
- (d) The erection or change of use of a building which contains business premises or retail premises may be carried out with consent on the land, providing an identified aspect of the development (i.e. the premises on the ground floor facing the street) satisfies a specified control (being that they are used for the purposes of business premises or retail premises).

We do not consider that the fact that cl 7.8 is subject to the consent authority being ‘satisfied’ makes a difference to this conclusion. In our view, the inclusion of a subjective threshold based on

the consent authority's 'satisfaction' does not mean that a requirement is not a development standard and is instead a prohibition.

Indeed, the definition of 'development standards' in s 1.4 of the EPA Act indicates that development standards can include standards which are necessarily of a subjective or 'satisfaction' based nature such as *'the character ... design or external appearance of a building or work'*. That is, development standards are not necessarily objective, measurable standards.

3.3 Can cl 7.8 of the PLEP be varied under cl 4.6?

If the Council does not consider that it can reach a state of satisfaction as to cl 7.8 requirements based on the revised plans, which clearly open up the western boundary of the development to an active street frontage including with two entrances facing the street, cl 7.8 is amenable to variation under cl 4.6 'Exceptions to development standards'.

This position is demonstrated with abundant clarity in case law. In the decision of the Court in *T & R Property Development (Gordon) Pty Ltd v Bayside Council* [2021] NSWLEC 1299 (***T&R Property***), the development in question was subject to cl 6.15 of the now-repealed *Botany Bay Local Environmental Plan 2013*.

Clause 6.15(3) was in **identical terms** to cl 7.8 of the PLEP, including that the consent authority must be satisfied that the building will have an active street frontage after its erection or change of use.

In *T&R Property*, the Court noted the following as background, showing that the Court was aware of the terms of the active street frontage requirement, that it was subject to a cl 4.6 request, and that it was the **only** development standard subject to such request:

- (a) *'The site is identified on BBLEP's active street frontage map under cl 6.15.'*
- (b) *'The proposal does not include an 'active street frontage'...'*
- (c) *'The application is supported by a written request under cl 4.6 seeking consent notwithstanding this contravention. I consider this below.'*
- (d) *'The proposal does not breach any other development standards contained in relevant environmental planning instruments...'*

The Court in making its decision then stated:

*'In accordance with cl 4.6(3), the applicant has provided a written request seeking to justify the contravention of the active street frontages standard at cl 6.15 of BBLEP ... (WR). The parties agree that the WR is well founded and that **the facultative powers of cl 4.6 of BBLEP should be deployed in this case.***

I have reviewed the WR and other matters related to whether the powers of cl 4.6 of BBLEP should be available. I am satisfied in regard to the matters listed below, as explained.

*The WR demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case (cl 4.6(3)(a) of BBLEP). It does so mindful of Preston CJ's finding in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [\[2007\] NSWLEC 827](#) (*Wehbe*). The WR adopts the first "Wehbe way", successfully showing how, otherwise, the development, relevantly, achieves the objectives of cl 6.15 of BBLEP.*

...

The WR adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case through satisfying the requirements of the first Wehbe way.

The Court then concluded:

‘The states of satisfaction required by cl 4.6 of BBLEP have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the active street frontages control.

The Court orders: ... The clause 4.6 variation request in relation to active street frontages to cl 6.15 of the Botany Bay Local Environmental Plan 2013 is upheld.’

In making this decision, the Court specifically averted to whether it had the legal jurisdiction and power to grant consent, subject to the cl 4.6 request in relation to cl 6.15, which as stated above is identical to cl 7.8 of the PLEP.

In this regard, the Court stated:

‘I am satisfied that the parties’ decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act. As the parties’ decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties’ decision.’

4. Conclusion

Clause 7.8 is amenable to variation under cl 4.6. In our view, this conclusion is clear and essentially uncontroversial.

Any contrary position taken by a consent authority would be at variance with the law, and likely to fail in any appeal involving this point, given:

- (a) the reasoning above; and
- (b) the manifestly clear and uncontroversial position taken by the Land and Environment Court in *T&T Property*.

Yours sincerely



Holding Redlich