



Dear Jane

Background and advice request

You asked us to review the legal advice of 5 October 2021 prepared by Crennan Legal (**Crennan Legal Advice**) on behalf of Orange City Council which was provided to the Western Regional Planning Panel (**Panel**) in relation to DA 234/208(1) (**DA**).

The DA seeks consent for the demolition of Caldwell House and the remediation of the land (**Development**).

By way of summary, the Crennan Legal Advice says that the remediation work the subject of the DA is not category 1 remediation work under the *State Environmental Planning Policy No 55 – Remediation of Land (1998 EPI 50)* (**SEPP 55**) because:

- the Development is properly characterised as demolition of buildings. This means that a separate consideration of category 1 remediation work under SEPP 55 does not arise and cl 12 of SEPP 55 is not engaged; and
- the identification of land as subject to the Groundwater Vulnerability Mapping under cl 7.6 of the *Orange Local Environmental Plan 2011* (**OLEP**) is not an area of environmental protection for the purposes of cl 9(e)(iv) of SEPP 55. Rather it identifies a physical feature of the land.

Advice

We do not agree with the opinion expressed in the Crennan Legal Advice for the following reasons:

- Our view is that the task to ascertain whether work is category 1 remediation work under cl 9 of SEPP 55 does not require the characterisation of the Development but a determination of whether the remediation proposed as part of the Development satisfies any of the subclauses in cl 9. Our view is consistent with the requirement under cl 7 of SEPP 55 for '*Contamination and remediation to be considered in determining [a] development application*' and cl 15 of SEPP 55 which requires a category 1 remediation work that is ancillary to development to be assessed as a category 1 remediation work despite the fact that it may otherwise share the characterisation of the balance of the development. Consequently, provided that the Development satisfies any of the subclauses in cl 9, we consider that cl 12 of SEPP 55 is engaged.

However, it is important to highlight that cl 12 of SEPP 55 is limited in scope as it only prohibits the refusal of the category 1 remediation work (asbestos remediation) subject to the consent authority being satisfied of the matters in cl 12(1). It does **not** apply to the entire Development. This means that the consent authority is required to carry out a merit assessment for the remainder of the Development (demolition of the building).

- We are of the opinion that, on balance, it is open to the consent authority to accept that the remediation is category 1 because the work falls under cl 9(e)(iv) (environment

protection) of SEPP 55 on the basis that the land is identified on the Groundwater Vulnerability Map under the OLEP. However, there are alternative interpretations on the construction of this clause (as set out in the Crennan Legal Advice). The finding of the consent authority on whether the remediation work is category 1 because it satisfies one of the subclauses of cl 9 of SEPP 55 can be reviewed by the court (for example see *WRF Property P/L v Armidale Dumaresq Council* [2003] NSWLEC 222 at [69]-[83]). Therefore, there is a risk that the court would adopt the narrower reading and take a different view.

Kind regards

Greg