

CrennanLegal

Paul Crennan BEc LLB Accredited Specialist Local Government & Planning Law

5 October 2021

Our Ref: PLC:gpm:21045

Your Ref:

The General Manager
Orange City Council
P O Box 35
ORANGE NSW 2800

BY EMAIL ONLY: mhodes@orange.nsw.gov.au

Dear Sir

RE: CALDWELL HOUSE (NURSES QUARTERS)

1. BACKGROUND

- 1.1 We refer to Council's email dated 21 September 2021 regarding the Independent Planning Assessment Report provided by the Department of Planning, Infrastructure & Environment ("DPIE") dated February 2021 ("the Independent Assessment Report").
- 1.2 The Independent Assessment Report was prepared by the Principal Planner, Local and Regional Planning, Planning Panel Secretariate of DPIE and provided to Council under cover of the letter of DPIE to the Chair Western Regional Planning Panel ("the Panel") dated 15 September 2021 ("the covering letter").
- 1.3 In the covering letter, DPIE requests the Panel to:-
 1. Reconsider the Application having regard to clause 12 of State Environmental Planning Policy No 55 – Remediation of land (SEPP 55) and the Independent Assessment Report
 2. Consider the revised draft conditions which the Independent Assessment Report indicates as having been agreed to by Heath Infrastructure NSW.
- 1.4 Council has sought our advice regarding the application of clause 12 of SEPP 55 for the assistance of the Panel.



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2. THE APPLICATION OF SEPP 55 CLAUSE 12

2.1 Clause 12 provides as follows:-

“12. Refusal of Consent to Category 1 Remediation Work

The Consent Authority must not refuse development consent for Category 1 remediation work unless the authority is satisfied that there would be a more significant risk to human health or some other aspect of the environment from the carrying out of the work than there would be from the use of the land concerned (in the absence of the work) for any purpose for which it may lawfully be used.

(not relevant for present purposes) ”

- 2.2 There is one element, being clause 9(e)(iv) SEPP 55, which is said by the Independent Assessment Report to capture the development within the definition of Category 1 remediation work¹. The remaining elements are recognised as inapplicable.
- 2.3 It is said in the Independent Assessment Report that the works proposed fall within clause 9(e)(iv) SEPP 55 to the effect that they are works to be carried out in an area to which there is a classification of environment protection under Orange Local Environmental Plan 2011 (“the OLEP”).
- 2.4 As is identified in the Independent Assessment Report, clause 7.6 of the OLEP provides that before determining a Development Application for development on land which is identified “groundwater vulnerability” on the Groundwater Vulnerability Map, the Consent Authority must consider:-
1. whether the development is likely to cause any groundwater contamination or have any adverse effect on groundwater dependent ecosystems; and
 2. the cumulative impact of the development on groundwater.
- 2.5 It is asserted by the Independent Assessment Report that the identification of groundwater vulnerability is the classification of the area as environment protection under the OLEP.

¹ Category 1 remediation work is defined in clause 9 SEPP 55

- 2.6 It is as a consequence of that determination that the Independent Assessment Report asserts that the Consent Authority must not refuse development consent because the development is for Category 1 remediation works and it could not be satisfied that there would be a more significant risk of harm posed by the remediation of the land than there would be from the use of the land in the absence of the work for any purpose for which the land may lawfully be used.
- 2.7 DPIE requests reconsideration of the development application having regard to clause 12 of SEPP 55 and the Independent Assessment Report.
- 2.8 We respectfully disagree with the analysis of the works as being Category 1 remediation works and the characterisation of the development as Category 1 remediation works.

3. CATEGORY 1 REMEDIATION WORK

- 3.1 The basis upon which the work is put forward by the Independent Assessment Report as Category 1 remediation work is that it is to be carried out in an area to which the classification of environment protection applies under the OLEP (cl 9(e)(iv) SEPP 55)²
- 3.2 The land is identified on Groundwater Vulnerability Map as being in an area of groundwater vulnerability (cl 7.6 OLEP).
- 3.3 The Groundwater Vulnerability Map identifies a physical feature of the land.
- 3.4 Where the map identifies such a physical feature clause 7.6 OLEP requires consideration of a particular kind to be undertaken by the consent authority in the course of the environmental assessment of a development application under s4.15 Environmental Planning and Assessment Act.
- 3.5 The identification of groundwater vulnerability in the OLEP is not the classification of an area as environment protection.

² 9 Category 1 remediation work: work needing consent

For the purposes of this Policy, a category 1 remediation work is a remediation work (not being a work to which clause 14(b) applies) that is—

...

(e) carried out or to be carried out in an area or zone to which any classifications to the following effect apply under an environmental planning instrument—

(iv) environment protection,

...

X

4. CHARACTERISATION OF DEVELOPMENT

4.1 In any consideration of a development application the first task for the Consent Authority is to characterise the development. (Chamwell v Strathfield Council (2007) 151 LGERA 400) The same must be said for the process of the requested reconsideration.

4.2 When a development is to be considered it is that development which is to be properly understood as being is the subject of the Development Application.

4.3 The Development Application Form lodged with Council on 3 July 2018 described the proposal as follows:

“Category 1 Remediation (asbestos); demolition of all buildings and structures; removal of all vegetation.”

4.4 Endorsed on the Application form in the location identified for “office use only” apparently by Council’s planning staff is the following:

“Demolition of a heritage item (all buildings, structure & vegetation to be removed) and Category 1 remediation (asbestos removal)”.

4.5 The development was identified and has been characterised by Council (as the Consent Authority) as demolition of buildings noting that there is an identification of Caldwell House as a listed local heritage item.

4.6 The characterisation of the purpose of a development is an essential task for any Consent Authority in exercising the power to determine a development application (Chamwell paragraph 57)

4.7 The characterisation of the purpose of a use of land should be done at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on, not in terms of the detailed activities, transactions or processes (Chamwell paragraph 36).

4.8 The characterisation of the purpose of development must also be done in a common sense and practical way (Chamwell paragraph 45).

4.9 In our opinion, the level of generality, common sense and practicality as are to be applied to the characterisation of the purpose of a use of land would be the same for the characterisation of the works where the works are themselves the use which is the subject of the Application. In this case they are the works of demolition.



4.10 In our respectful opinion, Council was correct characterising the development as demolition.

4.11 Having determined that the development is for demolition the question of a separate consideration of Category 1 remediation works does not arise.

5. CONCLUSION

5.1 In our opinion the remediation work is not to be undertaken in an area or zone which is classified as environment protection.

5.2 The remediation work is not by definition under SEPP 55 Category 1 remediation work.

5.3 By correct characterisation of the development, the work is demolition, not Category 1 remediation work.

5.4 Clause 12 SEPP 55 does not apply to the development.

5.5 The assessment is not constrained from refusal of the development on the basis that it is asserted in the Independent Assessment Report that clause 12 of SEPP 55 governs the development.

5.6 Having undertaken that aspect of the requested reconsideration the Panel would move to consider the remainder of the assessment.

5.7 The Panel would carefully consider the merit assessment of the Application as is contained in the Independent Assessment Report.

5.8 Comment upon by us on the merit assessment set out in the Independent Assessment Report is beyond the scope of the advice sought by Council.

Yours faithfully
CRENNAN LEGAL



Paul Crennan
Legal Practitioner Director
Accredited Specialist Local Government & Planning Law

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