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Dear Bill

Advice on 70 Glendower St Rosemeadow Adjoining Land Zoned Primarily for Urban Purposes in the context of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (NSW)*

You have asked us to provide advice on whether 70 Glendower St Rosemeadow (Lot 21 in DP 1000643) (the '**Site**') is land that adjoins land zoned primarily for urban purposes in the context of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (NSW)* (the '**SEPP**') and with reference to the requirement for a Site Compatibility Certificate under clause 24(1)(a)(i) of the *SEPP*.

Summary Advice

Based on the background and analysis set out below and the material provided to us, in our opinion:

- It is indisputable that the state of the law with regard to the *SEPP* is that it is **not necessary** in order for the Site to answer the description of being land which "adjoins" land zoned primarily for urban purposes for it to have a **common boundary with or be immediately adjoining** the land zoned primarily for urban purposes. It will be **sufficient** if the Site is "near to" or is "neighbouring on" or is "in sufficient proximity to" land zoned primarily for urban purposes.
- The Site **is in sufficient proximity** to *Campbelltown Local Environmental Plan 2015 (NSW) (the 'CLEP')* R2 – Low Density Residentially zoned land to the east, to be said to be land **adjoining land zoned primarily for urban purposes** in the context of the *SEPP*, and with reference to the requirement for a Site Compatibility Certificate under clause 24(1)(a)(i) of the *SEPP*. This is for reasons including the close distance of the Site to the *CLEP* R2 land, and also the character and layout of the separating RE1 zoned reserve.

Background

- A. In 2006, consent to DA/2828/2005 was granted for the Mt Gilead Estate Retirement Village at 72 Glendower St Rosemeadow (the '**Adjoining Site**').
- B. You now seek to also develop the Site by way of an expansion to the Mt Gilead Estate Retirement Village.
- C. The Site is zoned RU2 – Rural Landscape under the *CLEP*. The Site (edged in red) and the zoning of the surrounding land can be seen in the extract from the relevant *CLEP* zoning map below at figure 1.
- D. The Site is separated from the *CLEP* R2 – Low Density Residential zoned land to the east by between approximately 30m and 82m of RE1 – Public Recreation land (as measured on Google Maps). The RE1 land is a Council reserve.

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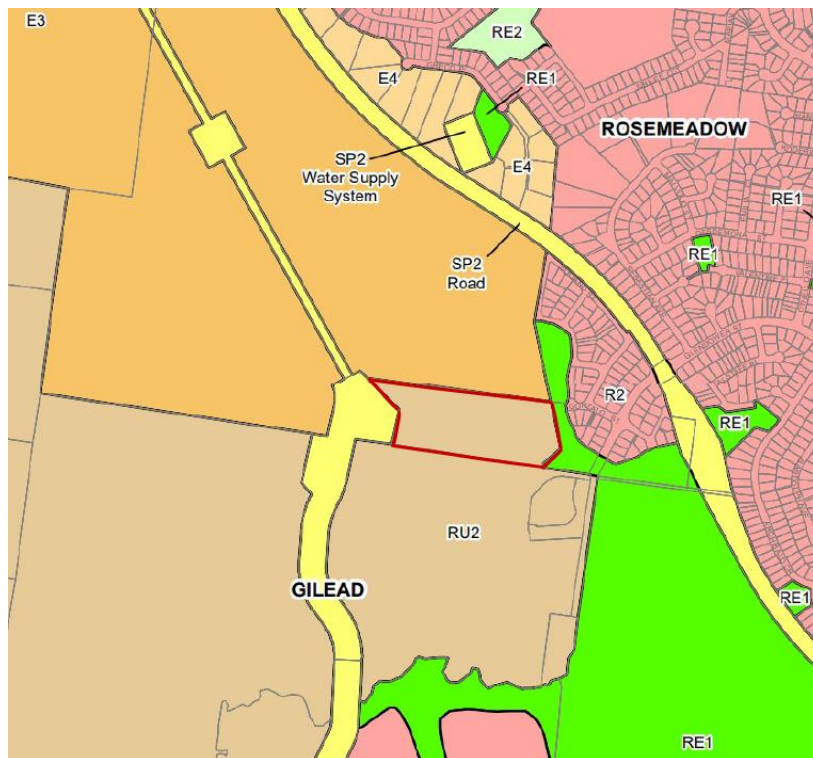


Figure 1 – Extract from the Relevant CLEP Zoning Map

Detailed Advice

Application of the SEPP

1. The SEPP is primarily concerned with permitting housing for seniors or people with a disability on land to which the SEPP applies.
2. Clause 4 of the SEPP sets out which land the SEPP applies to. Clause 4 of the SEPP relevantly states as follows:

4 Land to which Policy applies

(1) **General** This Policy applies to land within New South Wales that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes, but only if—

(a) development for the purpose of any of the following is permitted on the land—

(i) dwelling-houses, ...

(2) **Land that is not zoned primarily for urban purposes** For the avoidance of doubt, land that is not zoned primarily for urban purposes includes (but is not limited to) land that is within any of the following zones under another environmental planning instrument—

(a) a zone that is identified as principally for rural uses, ...

3. As can be seen, by virtue of clause 4(1) of the SEPP, the SEPP applies to land which is either zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes, but only if, amongst other things, dwelling-houses are permitted on the land. We note for completeness that it **does not** appear to us that the application of the SEPP with respect to the Site is excluded by clause 4B of the SEPP on the metropolitan rural area exclusion zone.
4. Clause 24 of the SEPP on the requirement for site compatibility statements may be enlivened where, amongst other things, a seniors development is proposed to be carried out under the SEPP on land that adjoins land zoned primarily for urban purposes: cl 24(1)(a)(i) of the SEPP.
5. In the context of the SEPP and determining whether land is zoned primarily for urban purposes:

- (a) “primarily” means “chiefly or “principally”, and “urban” means “pertaining to, or constituting a city or town”: *Australian Lifestyle Corporation Pty Limited v Wingecarribee Shire Council* (2008) 168 LGERA 239 (*‘Australian Lifestyle’*) at [16].
 - (b) One looks to the zone’s label, objectives and permissible uses to ascertain and characterise the purpose for which the land is zoned: *Australian Lifestyle* at [30].
6. As detailed above, the Site is zoned RU2 – Rural Landscape under the *CLEP*. When the title of the zone along with the objectives and permissible uses that are set out in the *CLEP* land use table are considered (which are principally rurally oriented), in our opinion the Site itself could not be considered to be primarily zoned for urban purposes. This is especially so given the provisions of clause 4(2) of the *SEPP*.
 7. Dwelling-houses however, amongst other things, are listed as being permissible with consent in the *CLEP* land use table for the RU2 – Rural Landscape zone. The question therefore arises, with respect to the application of the *SEPP* to the Site, as to whether the Site is “land which **adjoins** land primarily zoned for urban purposes”.

Relationship Between Lands

8. In *ACN 115 840 509 Pty Ltd v Kiama Municipal Council* (2006) 145 LGERA 147 (*‘Kiama’*), the Chief Judge of the NSW Land and Environment Court stated at paragraph [16]:

The inquiry is as to whether the relationship between the two lands – the subject land and the nearest land zoned primarily for urban purposes – answers the description that the former “adjoins” the latter.

Is the R2 Land to the East Zoned Primarily for Urban Purposes?

9. The nearest land to the Site that is a likely candidate to be zoned primarily for urban purposes is the land zoned R2 – Low Density Residential under the *CLEP* to the east.
10. Adopting the principles from *Australian Lifestyle* set out above, in our view it is clear from the *CLEP* R2 – Low Density Residential zone’s label, objectives and permissible uses (which are principally residential and urban oriented) that the R2 land to the east of the Site **is land primarily zoned for urban purposes**. The question therefore arises as to whether the Site can be said to “adjoin” that R2 land to the east for the purposes of the *SEPP*.

Judicial Consideration of “Adjoins”

11. In *Kiama*, the Chief Judge undertook a detailed analysis of the caselaw authority relevant to interpreting what is meant by “adjoins” for the purposes of the *SEPP* and held at paragraph [31] as follows:

These cases of the Court of Appeal and this Court are consistent in holding that it is **not necessary**, in order for the subject land to answer the description of being land that “adjoins” land zoned primarily for urban purposes, **to be conterminous with (that is, have a common boundary with)** or be immediately adjoining the [land zoned primarily for urban purposes]. **It is sufficient that the subject land is “near to” or is “neighbouring on” or is “in sufficient proximity to” the ... land zoned primarily for urban purposes.** [our emphasis added].
12. In *Wirrabara Village Pty Limited v The Hills Shire Council* [2018] NSWLEC 1187 (*‘Wirrabara’*) Commissioner O’Neil stated at paragraph [63] that on the strength of relevant caselaw (which were the subject of analysis in *Kiama*), it is **indisputable that “adjoins” means “near to” or “in the neighbourhood of”**. The caselaw informs us that the question on sufficient proximity so as to “adjoin” is a question of fact and degree: *Kiama* at [30]; *Wirrabara* at [64].
13. In *Wirrabara*, Commissioner O’Neil went on to helpfully summarise at [64] the facts and degree involved in the various relevant caselaw authorities as follows:
 - In *MoDog Pty Limited v Baulkham Hills Shire Council* (2000) 109 LGERA 443 (*‘MoDog’*) at [24], the land zoned for urban purposes was separated from the site by over 200m, by land zoned for rural use, and this was held **not** sufficiently proximate so as to adjoin land zoned primarily for urban purposes;

- In *Hornsby Shire Council v Malcolm* (1986) 60 LGRA 429 (**'Malcolm'**) at page 434, "adjoins" was applied to land zoned for urban purposes separated from the site by a road and roadside reserve 15m wide;
- In *Pepperwood Ridge Pty Limited v Newcastle City Council* (2005) 142 LGERA 231 (**'Pepperwood'**) at [16], the site was separated by 30m from land zoned primarily for urban purposes by intervening crossroads and a four lane highway with median strip, but *Malcolm* was applied such that the lands were found to be adjoining; and
- In *Kiama* at [40], Preston CJ held that the site, separated from land zoned primarily for urban purposes by 65m which included both the Princes Highway and the Illawarra Railway, adjoined that land.

Does the Site "Adjoin" the R2 Land to the East which is Zoned Primarily for Urban Purposes?

14. As detailed above, the Site is separated from the R2 – Low Density Residential zoned land (which as also detailed above is land zoned primarily for urban purposes) to the east by between approximately 30m and 82m of the Council reserve zoned RE1 – Public Recreation land (as measured on Google Maps).
15. In *Wirrabara* the subject site was also separated from R2 land by RE1 land, in that case, being a park. Additionally, a lane separated the subject site from the RE1 land. While it is noted that the classification by the Court in another case, involving a different instrument and uses, cannot be dispositive of the question at hand (*Kiama* at [20]), the reasoning in *Wirrabara* is certainly useful and instructive.
16. In finding that the subject site in *Wirrabara* **did** adjoin land zoned primarily for urban purposes, Commissioner O'Neil noted the following salient attributes at [65]:
 - (a) The lane **formed the boundary** and the change in use from rural urban land uses;
 - (b) The park was **within the urban boundary** created by the land when considered in the context of the surrounding land zonings; and
 - (c) The subject site **immediately adjoined** the urban precinct but for the park and the lane.
17. In the case of the Site, it can be seen above in Figure 1 and below in Figure 2 that it is the RE1 zoned reserve that **forms the boundary** between rural and urban uses. In addition, the RE1 zoned reserve is "**within**" the urban precinct at the point where the Site is most closely adjacent to R2 land. Further, the Site **immediately adjoins** the R2 urban precinct **but for the RE1 land**. This accords with the approach and findings in *Wirrabara*.



Figure 2 – Google Maps Aerial View of the Site (red) and RE1 Land (green)

18. In terms of the 30m to 82m distance between the Site and the R2 zoned land, this proximity is **consistent with the relevant distances** in *Pepperwood* and *Kiama* detailed above, and also the relevant distance in *Wirrabara* which at [62] was stated to be 71.7m, all of which were of sufficient proximity so as to be described as “adjoining”. This can be **distinguished from the 200m distance** in *ModDog* which at [24] can be seen to be integral to the finding in that case that the land did not adjoin land zoned primarily for urban purposes.
19. While there is no development in the *CLEP* RE1 zoned land that separates the Site from the R2 zoned land, such as the roads in *Malcolm*, *Pepperwood*, *Kiama* and *Wirrabara*, the separating RE1 land is not of a distinctly urban or rural character. As was the case in *Wirrabara*, most of the permissible uses in the *CLEP* RE1 zone are commonly carried out in both urban and rural contexts. In that light, the zoning of the RE1 land itself adjacent to the Site is seen to **take on a neutral character**.
20. The neutral character of the separating RE1 land is an important consideration. In *MoDog*, the subject site was **surrounded on all sides by distinctly rural zoned lands** which at paragraph [24] contributed to the finding that the land did not adjoin land zoned primarily for urban purposes. Here, the Site **adjoins** the more neutral RE1 land to the east and SP2 – Infrastructure land to the west. In addition and while also zoned RU2, it can be seen in Figure 2 above, the distinctly urban Mt Gilead Estate Retirement Village is on the Adjoining Site to the south.
21. For these reasons and on the authorities discussed above, in our view it is plain that the Site is in sufficient proximity to the *CLEP* R2 land to the east that it **can be said to adjoin land zoned primarily for urban purposes in the context of the SEPP**.

Conclusion

Having reviewed the relevant caselaw authority and the circumstances of the situation at hand, in our opinion:

- The caselaw relevant to the *SEPP* demonstrates that it is not necessary for land to have a common boundary with or to immediately adjoin land zoned primarily for urban purposes for it to be said to be “adjoining” such land. It will be sufficient if the Site is “near to” or is “neighbouring on” or is “in sufficient proximity to” land zoned primarily for urban purposes.
- Accordingly and on the facts of this situation, the Site **is in sufficient proximity** to *CLEP* R2 land to the east to be said to be land **adjoining land zoned primarily for urban purposes** in the context of the *SEPP*, and with reference to the requirement for a Site Compatibility Certificate under clause 24(1)(a)(i) of the *SEPP*. This is for reasons including the close 30m to 82m distance of the Site to the *CLEP* R2 land, that the RE1 land forms the boundary between the rural and urban zoned lands, and also the character and layout of the separating RE1 zoned reserve which is neither distinctly rural or urban in character and therefore is seen to take on a neutral character in this consideration.

If you have any questions, please call Anthony Whealy on direct line +61 2 8035 7848 or Ben Salon on direct line +61 2 8035 7867.

Yours sincerely



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