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31 March 2020

Our Ref: ADK:20/035 Your Ref: SCC_2018_WOLLG_001_00

Ms M Gibson Executive Director Local and Regional Planning Planning Assessment Level 2, 26 Honeysuckle Drive NEWCASTLE 2300

Dear Ms Gibson,

RE: Seniors Living Development | 120 Walker Street, Helensburgh | Application for Compatibility Certificate

- 1. I act for the registered proprietor of 120 Walker Street, Helensburgh (the Site).
- I refer to the above-mentioned application for a site compatibility certificate for a seniors housing development (the Application) at the Site, pursuant to the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors Living SEPP). My client is also the applicant.
- 3. I have to hand a copy of a submission prepared by Wollongong City Council (**Council**) in response to my client's Application, dated 10 March 2019.

Issues I am instructed to address

- 4. I have been asked to address the Department on the following questions and issues:
 - a. The hierarchy of planning instruments and the relevance of Council's '*Review of former zone 7(d) at Helensburgh, Otford and Stanwell Tops*' to the Application; and



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b. The extent to which the *Wollongong Development Control Plan 2009* (**WDCP**) informs the assessment of the Application.

Hierarchy of planning instruments

- 5. As the Department is acutely aware, there is a defined hierarchy of planning instruments and other policies and plans that inform planning law in NSW. At the apex of that hierarchy is the *Environmental Planning and Assessment Act 1979* (**EPA Act**), from which all planning law, including instruments and plans, derive their authority.
- Immediately below the EPA Act are environmental planning instruments (EPIs), which include State Environmental Planning Policies (SEPPs) and Local Environmental Planning Policies (LEPs). Generally, EPIs are meant to be read together. However, where their operation is incongruous, section 3.28 of the EPA Act gives priority to SEPPs:
 - (1) In the event of an inconsistency between environmental planning instruments and unless otherwise provided—
 - (a) there is a general presumption that a State environmental planning policy prevails over a local environmental plan or other instrument made before or after that State environmental planning policy, and
 - (b) (Repealed)
 - (c) the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind.
- 7. Moreover, most SEPPs contain a provision which also directly addresses this issue. In the case of the Seniors Living SEPP, clause 5(3) provides:

If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency.

- EPIs are statutory instruments, having had the benefit of review by parliamentary counsel.
 Accordingly, their provisions are more strictly interpreted and applied than most other instruments of planning control.
- Beneath EPIs are development control plans (DCPs), which are not statutory instruments. As such, they do not attract the same exacting force as an EPI or indeed the EPA Act. Section 3.42 of the EPA Act defines the limited scope and power of DCPs:
 - 3.42 Purpose and status of development control plans (cf previous s 74BA)



- (1) The principal purpose of a development control plan is to provide guidance on the following matters to the persons proposing to carry out development to which this Part applies and to the consent authority for any such development—
 - (a) giving effect to the aims of any environmental planning instrument that applies to the development,
 - (b) facilitating development that is permissible under any such instrument,
 - (c) achieving the objectives of land zones under any such instrument.

The provisions of a development control plan made for that purpose are not statutory requirements.

- (2) The other purpose of a development control plan is to make provisions of the kind referred to in section 3.43(1)(b)–(e).
- (3) Subsection (1) does not affect any requirement under Division 4.5 in relation to complying development.
- 10. Section 3.43(5) of the EPA Act limits further the application of a DCP:
 - (5) A provision of a development control plan (whenever made) has no effect to the extent that—
 - (a) it is the same or substantially the same as a provision of an environmental planning instrument applying to the same land, or
 - (b) it is inconsistent or incompatible with a provision of any such instrument.
- 11. EPIs and DCPs are relevant, mandatory considerations in the determination of a development application. Although a DCP is a '*fundamental element in, or focal point of, the decision making process*' (see *Zhang v Canterbury City Council* [2001] NSWCA 167 (*Zhang*)), the statutory composition is such that DCPs give way to LEPs and LEPs will usually give way to SEPPs.

Relevance of Council's 'Review'

- 12. In its submission, Council suggests that the proposed development is not envisaged by the '*Review of former* [zone] 7(*d*) lands at Helensburgh, Otford and Stanwell Tops' (**the Review**).
- 13. The Review took place in the wake of Council enacting a new LEP, namely the *Wollongong* Local Environmental Plan 2009 (**WLEP**). The Review reflects the intention Council had for the



zone and how land would continue to be used in the future under its equivalent in the *Standard Instrument*.

- 14. At the time the WLEP was enacted (2009), the Seniors Living SEPP was already in operation and contained a provision similar to the wording of clause 4 of that SEPP.
- 15. Council appears to be implying that the objectives of neighbouring zones, made more important by the careful consideration given to how the land in Helensburgh ought to be zoned in 2009, should have some bearing on the suitability of the Site for the purposes of a seniors living development.
- 16. Where applications are made pursuant to an LEP, the objectives of the zone under that LEP is a relevant consideration worthy of 'significant weight' (see Bongiorno Hawkins Frassetto & Associates v Griffith City Council and Ors [2007] NSWLEC 551 at [40]).
- 17. However, the situation is slightly different in the context of an application for development consent made pursuant to a SEPP. In *Ironlaw Pty Limited v Wollondilly Shire Council (No 3)* [2014] NSWLEC 1057 (*Ironlaw*), the Court considered whether a waste transfer facility was inconsistent with the RU1 zone objectives and the extent to which this consideration was relevant to the determination. The Court held at [81] and [96]:

81. Although regard has to be had to the zone objectives, it would be contrary to the intent of SEPP (Infrastructure) and defeat its policy purpose if inconsistencies between the SEPP and the zone objectives were used as a ground to refuse consent to this development. Where the RU1 zone objectives are inconsistent with the objectives of the SEPP then cl 8(1) provides that the SEPP prevails to the extent of the inconsistency. We are therefore persuaded by Mr Howard's submissions on this issue over those of Mr Seton. Having had regard to the RU1 zone objectives is not a basis for the refusal of this application.

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96. As Mr Brown correctly states that the permissibility of this proposal is brought about by the provisions within the SEPP (Infrastructure) that aim to provide "...greater flexibility in the location of infrastructure service facilities": cl 2(ii). It is not a land use envisaged by the permitted use within the Wollondilly LEP 2011 and is clearly an industrial type operation located within a rural area on the edge of Bargo (p 23 Exhibit 12). With that in mind any provision in the DCP 2012 which is inconsistent with a provision of the SEPP must have no effect: s 74C(5)(b).



- 18. In *Ironlaw* the Court had particular regard to the prevalence of the SEPP over the LEP. This effectively mitigated the relevance of the objectives of the zone contained in the LEP, to the extent that the objectives fettered the intent of the SEPP to permit the development.
- 19. Council's Review holds even lesser weight than the operative objectives contained in the Land Use Table of the WLEP. This is not a relevant consideration in the context of an application for development consent, let alone an application for a site compatibility certificate.
- 20. Council makes several statements in its response to the Department. Most of these statements are addressed in detail in the further response prepared by TCW Consulting. However, there are a number of points raised by Council which I consider it appropriate to address further, as set out below:
 - a. 'The use of the land for self care seniors' housing [is] enabled by a Site Compatibility Certificate ... '

This is simply not true. A site compatibility certificate does not enable any development to proceed. Once a compatibility certificate is granted, the applicant must then submit a thorough and detailed application to the relevant consent authority (in this case Council), for determination. At which point the details of the WLEP, and WDCP in particular, will be engaged.

b. '... a Site Compatibility Certificate would be tantamount to a rezoning of the land without the rigor of a Planning Proposal and its associated community exhibition process.'

Council's statement here seems at odds with the overriding objectives and purpose of the Seniors Living SEPP. Clause 2(1) of the Seniors Living SEPP states specifically that it aims to increase the supply and diversity of residences that meet the needs of seniors and people with a disability. Clause 2(2) goes on to say that the SEPP will achieve this objective by 'setting aside local planning controls that would prevent the development'. Council's submission in this regard is either disingenuous or reflects a failure to understand the operation and interaction of SEPPs and LEPs under planning law in NSW.

As outlined above, once a site compatibility certificate is issued, a development application will then need to be lodged. It is at that time that Council may implement community consultation policies.

c. 'The majority of the perimeter of the subject site adjoins land zoned E3 Environmental Management, RU2 Rural Landscape and SP1 Cemetery, none of which are considered to be land used primarily for urban purposes.'



The question before the relevant panel is not whether the proposed development meets the standard set out in clause 4(4) of the Seniors Living SEPP, which in this case is a question for detailed planning (and potentially legal) submission. It is not within the scope of my letter here to engage in that detail. However, I am instructed that the Department has already formed the view that the adjacent IN2 Light Industrial land is *'land zoned primarily for urban purposes'*.

Regardless, the relevant panel is required to determine whether the proposed development is compatible with surrounding land uses. Council's submission does not address this, but rather attempts to engage in an impermissible merits review of the forthcoming development application, which is yet to be prepared and the detailed content of which is not known at this time.

21. In my opinion, Council's submissions do not give the Department or the relevant panel any assistance in determining the question presently before it.

Relevance of WDCP to the assessment of the Application

- 22. I have been asked to consider to what extent the WDCP is relevant to the question for determination under Part 1A of the Seniors Living SEPP.
- 23. There is no doubt, having regard to the overview of hierarchy outlined above, that the Seniors Housing SEPP prevails over the WDCP to the extent that the instruments are inconsistent.
- 24. The question of when the two instruments are 'inconsistent' was considered by the Court of Appeal in *North Sydney Council v Ligon [No 2]* (1996) 93 LGERA 23 (*Ligon*), in the context of how a building height control in the LEP measured in metres interfaced with a separate building height control in the DCP measured in storeys. The Court held at [31]:

I see no reason why a development control plan, in providing more detailed planning considerations may not, by imposing criteria by way of restriction or specification of necessary requirements to be met before the development consent contemplated by a North Sydney Local Environmental Plan is granted, should not be regarded as conforming with the wider North Sydney Local Environmental Plan. In my opinion that aspect of the decision in Guideline Drafting should be regarded as wrongly decided.... A detailed plan which contained a provision contrary to the wider plan would not be in conformity with it, but a provision which is restrictive or prohibitive unless certain conditions are met is not such a contrary provision.

...



On the one hand the LEP contains a maximum height control in metres. There is a different type of control in the DCP. It limits the number of storeys, but does not specify the height of each storey. Thus, there is no inconsistency, they are just different controls having different intended outcomes.

- 25. Accordingly, it is possible for two relatively similar controls in an EPI and a DCP to exist without being 'inconsistent'. In this case, Council refers to the provisions of Chapter E13 of the WDCP which identifies the proposed development as a type of 'critical utility'. Critical utilities, under the WDCP are not considered to be a suitable land use within a medium risk flood precinct.
- 26. The Seniors Living SEPP, on the other hand, limits its application to exclude only land that is within a 'high flood hazard' (see clause 4(6)(a) and Schedule 1 of the Seniors Living SEPP).
- 27. In my opinion, the example here is easily distinguishable from the facts and circumstances in *Ligon*. In *Ligon*, the applicable LEP permitted certain development and the corresponding DCP applied additional conditions that needed to be met before the development (permitted by the LEP) could be carried out.
- 28. In this case, the WDCP does not raise additional criteria that must be met before permissible development can be carried out. Chapter E13 attempts to effectively prohibit certain development from being carried out on land classified as a 'medium risk precinct'. The limited scope and purpose of DCPs is outlined above. Moreover, a DCP is not capable of prohibiting development. As the Court held in *Zhang*, at [74], a DCP cannot contain a non-discretionary standard:

... the proscription, by s76B, of any development prohibited by an environmental planning instrument, does not extend to a prohibition in a development control plan. Nor can such a plan contain a "non-discretionary development standard" which, if complied with, would take away a consent authority's discretion under s79C(2).

- 29. The Seniors Living SEPP is intended to set aside local planning controls in order to give effect to its aims and objectives. The aims and objectives of the Seniors Living SEPP is to permit development of this kind in areas where local planning controls might otherwise prevent it. This cannot be overridden by an LEP, much less by a DCP. It follows that the Seniors Living SEPP prevails with respect to the application of the WDCP, insofar as it attempts to prohibit seniors living developments (however identified) from land classified as being within a medium risk precinct.
- 30. Notwithstanding the points raised above, this is not necessarily relevant to the issue of a site compatibility certificate, but rather a development consent.



- 31. The Application does not seek development consent; it seeks a site compatibility certificate. This is an important distinction which Council does not appear to appreciate as Council's response to my client's application potentially goes beyond an appropriate assessment for a site compatibility certificate.
- 32. The requirement for a site compatibility certificate arises from the provisions of Part 1A of the Seniors Living SEPP.
- 33. The certificate is a representation of the opinion of the relevant panel that:
 - a. the site of the proposed development is suitable for more intensive development, and
 - b. development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding environment having regard to (at least) the criteria specified in clause 25(5)(b).
- 34. Clause 25(5)(b) of the Seniors Living SEPP provides a non-exhaustive list of considerations relevant to the question of whether the proposed development is compatible with the surrounding land uses, including:
 - (i) the natural environment (including known significant environmental values, resources or hazards) and the existing uses and approved uses of land in the vicinity of the proposed development,
 - (ii) the impact that the proposed development is likely to have on the uses that, in the opinion of the relevant panel, are likely to be the future uses of that land,
 - (iii) the services and infrastructure that are or will be available to meet the demands arising from the proposed development (particularly, retail, community, medical and transport services having regard to the location and access requirements set out in clause 26) and any proposed financial arrangements for infrastructure provision,
 - (iv) in the case of applications in relation to land that is zoned open space or special uses—the impact that the proposed development is likely to have on the provision of land for open space and special uses in the vicinity of the development,
 - (v) without limiting any other criteria, the impact that the bulk, scale, built form and character of the proposed development is likely to have on the existing uses, approved uses and future uses of land in the vicinity of the development,



- (vi) if the development may involve the clearing of native vegetation that is subject to the requirements of section 12 of the Native Vegetation Act 2003—the impact that the proposed development is likely to have on the conservation and management of native vegetation,
- (vii) the impacts identified in any cumulative impact study provided in connection with the application for the certificate
- 35. Although this is not an exhaustive list of considerations, it is not intended that the relevant panel embark on a thorough merit assessment of the proposed development, which cannot be carried out to any adequate degree unless and until a development application is made.
- 36. To that end, Council's references to the DCP are a premature consideration. The considerations relevant to the application for a site compatibility certificate are of a higher order and more general in nature.
- 37. The relevant panel gives the certificate having been satisfied that the proposed use (generally) is compatible with surrounding uses. Whether or not the site is a medium flood risk precinct under the WDCP is not of particular relevance at this point in time.
- 38. Of greater and more direct relevance to the question at hand, for example, is the character statement prepared for the area in which the development is proposed to take place. This is contained in Chapter D1 of the WDCP and provides some guidance to the relevant panel on the one question which the Seniors Living SEPP calls on it to determine.
- 39. Although seniors living development is not expressly contemplated by the character statement for Helensburgh set out at clause 3.1, the existing and desired future character of the area is compatible with the use of land for seniors living. The desired future character contemplates:
 - a. A mix of dwelling styles.
 - b. Provision of medium to full scale supermarkets, together with other smaller retailers, including butchers, newsagency, bakery, fruit and vegetable stores, as well as a limited range of non-retail services, including medical and professional services.
 - c. Higher order retailing and business services will continue in the Wollongong City Centre, Corrimal and southern Sydney suburbs.
- 40. The desired future character of Helensburgh is entirely consistent and compatible with the needs of occupants of a seniors living development. Council has not addressed this character statement in any of the documents I have seen.



- 41. The character statement, and how the development responds to it, is directly relevant to the mandatory considerations set out in clause 25(f)(b)(ii), (iii) and (v) of the Seniors Living SEPP.
- 42. Council has also raised contentions in relation to stormwater and flooding issues which are ordinarily addressed when the detailed development application is submitted for assessment. If flooding or stormwater issues arise, there will be an opportunity to either address them through design solutions, or technically engineered solutions. Consideration will be had, at that time, of the objectives of relevant controls and outcome-based solutions will be proposed.

Balance of issues raised

43. There are other issues raised by Council in response to the Application, including stormwater/flooding and environment. These further issues are addressed by the applicant and by relevant expert consultants, including Anthony Barthelmess of Rienco Consulting. I do not offer any comment on those reports as they speak for themselves.

Yours sincerely,

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