RE: CLUB MARCONI SOCIAL RECREATION & SPORTING CENTRE LTD:

PROPOSED SENIORS HOUSING DEVELOPMENT

ADVICE

Mills Oakley
Lawyers
DX 13025 Sydney Market Street

Attention: Anthony Whealy

CLUB MARCONI SOCIAL RECREATION & SPORTING CENTRE LTD:

PROPOSED SENIORS HOUSING DEVELOPMENT

ADVICE

1. Club Marconi Social Recreation & Sporting Centre Limited (**Club Marconi**) is the owner of a parcel of land at Bossley Park in metropolitan Sydney. That parcel of land is comprised of five lots that collectively are known as 121-133 Prairie Vale Road, Bossley Park (**the Site**). The Site has a total area of 11.3ha. Presently standing on the Site is a substantial building occupied by Club Marconi, associated recreational facilities, a substantial car park and playing fields.

2. Club Marconi is presently planning the redevelopment of its Site. It proposes seeking a concept development consent for the Site together with a Stage 1 approval for a "seniors housing village" in the north eastern section of the Site. The area intended for development of that housing village is said to approximate 1.5ha.

3. The primary land use controls upon development of the Site are those found in Fairfield Local Environmental Plan 2013 (**the LEP**). Under the LEP the Site is zoned RE2 Private Recreation. For land within that zone, Item 3 of the land use table to Pt 2 of the LEP specifies or nominates purposes of development that are permissible with the consent of Fairfield City Council (**the Council**). Housing for aged persons is not among the permissible forms of development nominated in Item 3 of the land use table. Apart from development for "environmental protection works", any purpose of development not nominated in Item 3 is prohibited by Item 4 of the land use table.

4. However, Club Marconi seeks to rely upon the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**the Seniors Living SEPP** or **the Policy**) to render its proposed seniors housing village development that is permissible with consent. Although discussion between the Club, its consultants and officers of the Council, indicate that, in principle, the Council considers development on the Site for some form of seniors housing is permissible with consent by operation of the Policy. However, the Council contends that the form of seniors housing proposed by Club Marconi does not engage the provisions of the Policy, with the consequence that the form of housing proposed is prohibited.

5. Club Marconi does not accept the limitation upon seniors housing for which the Council contends. As a consequence, I am asked to address the following two questions:

   (i) Is the Club Marconi Site correctly categorised as "land zoned primarily for urban purposes" or is it "land that adjoins land zoned primarily for urban purposes" within the meaning of the Seniors Living SEPP?

   (ii) Is seniors housing development in the form of "independent living units" permissible on the Club Marconi Site subject to first obtaining a site compatibility certificate?

The form of the proposed seniors living development

6. In 2018, consultants retained by Club Marconi had proposed that the area within the Site intended for seniors housing development comprise 150 self-contained dwellings, to be dispersed among five building ranging from 5 to 9 storeys in height, 143 car parking spaces for residents and visitors, a central communal courtyard together with associated landscaping. In concept, that was the seniors housing development for which a site compatibility certificate was sought from the Sydney Western City

Planning Panel. That application was refused by the Panel on 25 January last, its reasons for so doing being directed to the built form of the development as then proposed. It was not refused on the basis that the development of the Site for seniors living was not a permissible form of development.

7. I am told that a further application for a site compatibility certificate is proposed to be sought for a "smaller scheme" of development within the same area of the Site. That new scheme is said to involve "in-fill self-care housing", otherwise referred to as independent living units. As the matters to which I am required to give attention involve legal issues, any further description of those independent living units is unnecessary for my purposes. I am not asked to express any opinion directed to the merits of the "smaller scheme", the plans for which I have not seen.

Question 1: Categorisation of the Site under the Seniors Living SEPP

8. Clause 4 of the Seniors Living SEPP contains provisions directed to the circumstances in which the Policy applies to land in this State. Subclause (1) of that clause relevantly provides:

> **(1) General**
>
> This Policy applies to land...that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes, but only if:
>
> (a) ...
> (b) the land is being used for the purposes of an existing registered club.

9. The term "registered club" is defined in cl 3 to mean a club holding a current certificate of registration under the *Registered Clubs Act 1976*. I assume, for the purposes of this advice, that Club Marconi holds current registration under that Act.

10. It will be apparent from the opening provisions of cl 4(1) that there are alternate bases upon which land used for the purpose of a registered club may engage the provisions of the Policy. The land may itself be zoned "primarily for urban purposes" or it may be land "that adjoins land zoned primarily for urban purposes". Identification of which of the alternatives applies to the Site is important because limitations upon the kind of "seniors housing" that is permissible is limited where the second of those alternatives applies. If the latter alternative does apply, development for independent living units on the Site would not be permissible under the Seniors Living SEPP: cl 17.

11. Subclause (5) of cl 4 assists in determining which of the alternatives I have identified applies to land used by a registered club. That subclause relevantly provides:

> **(5) Application of Policy to land zoned for special uses and existing registered clubs**
>
> For the purpose of this Policy (and for the avoidance of doubt), a consent authority must not treat:
>
> (a) ...
> (b) land that is being used for the purposes of an existing registered club,
>
> as being land zoned primarily for urban purposes unless it is satisfied that most of the land that it adjoins is land zoned for urban purposes.

12. Read in context with cl 4(1)(b), the purpose of subclause (5) is tolerably clear. That purpose, so it seems to me, is to constrain the categorisation of land, presently used for the purpose of an existing registered club, as "land zoned primarily for urban purposes", to land so used that is within an urban precinct. Mere proximity to or even contiguity with a single parcel of land that happens to be zoned for urban purposes may not suffice to permit the club-used land to be so categorised. Expressed differently, no matter that land used for the purpose of an existing registered club is, itself, zoned under an environmental planning

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instrument in terms identifying that land as being zoned primarily for urban purposes, it cannot be categorised as such for the purpose of cl 4 of the Seniors Living SEPP unless the zoning of *most* of the adjoining land also has the same urban focus.

13. The Site is rhomboidal in shape. An extract of the zoning map from the LEP shows that the Site's northern, western and southern boundaries each have a common boundary with land extending for some distance in all three directions zoned R2 Low Density Residential under the LEP. The expressed purposes of that zone are to provide "for the housing needs of the community" and to enable land uses providing facilities or services "to meet the day to day needs of residents". The objective of the zone, coupled with the permissible land uses within the zone, demonstrate that the sanctioned development is quintessentially urban in character.

14. The fourth or eastern boundary of the Site, having the shortest length of its four boundaries, adjoins, for half its length, land zoned RE1 Public Recreation. For the other half of that boundary, a relatively narrow area of land is zoned E2 Environmental Conservation. To the north, south and east of the lands zoned RE1 and E2 adjoining the eastern boundary of the Site are extensive contiguous areas of land zoned R2 Low Density Residential.

15. On the basis of the description I have given, I comfortably conclude that *most* of the land adjoining the Site, indeed most of the land contiguous with the Site, is land zoned for urban purposes. That is, most of that land is within the R2 zone, rendering permissible a use or uses of land that are of an urban character. Those permissible uses are "principally" or "chiefly" land uses "pertaining to a city or town" (*Murlan Consulting Pty Limited v Ku-ring-gai Municipal Council* [2007] NSWLEC 182 at [23]).

16. It is next necessary to consider whether the Site itself can be categorised as land zoned primarily for urban purposes. That categorisation or

classification of the Site depends upon the construction of the LEP imposing the RE2 zone (*Australian Lifestyle Corporation Pty Limited v Wingecarribee Shire Council* (2008) 168 LGERA 239; [2008] NSWLEC 284 at [20]). That process of construction necessitates a focus upon the nominate permissible or permitted purposes of the RE2 zone (*Australian Lifestyle Corporation* at [30]). It will also involve a consideration of the zoning of the immediately adjoining land in order to provide the planning context in which the Site is zoned RE2 for the purpose of addressing its appropriate categorisation.

17. The objectives of the RE2 zone are stated to be:

- To enable land to be used for private open space or recreational purposes.
- To provide a range of recreational settings and activities and compatible land uses.
- To protect and enhance the natural environment for recreational purposes.

18. It is to be assumed that the nominate purposes in Item 3 of the land use table for the RE2 zone, identifying permissible land uses, are uses that are not antithetical to all of those objectives. As has been observed in many cases, not all nominate uses in a zoning table will or need to be compatible with each of the stated objectives for that zone. It is the zoning table, identifying those land uses that are permitted without consent, permissible with consent or prohibited that circumscribes development that may be undertaken in the zone in question: the objectives of a zone do not determine permissibility (*Abret v Wingecarribee Shire Council* [2011] NSWCA 107 at [42]).

19. Those land uses that are permissible with consent in the RE 2 zone include "centre-based childcare facilities", "community facilities", "information and education facilities", "recreation areas" and "respite day care centres". Each of those permissible forms of land use are also permissible forms of land use in the R2 Low Density Residential zone

under the LEP. The inclusion of those purposes of development in the R2 zone is understandable as each of them is a land use that "pertains to a city or town". Their recognition as such in that zone should be consistently applied to the RE2 Private Recreation zone so that they are five forms of land use that qualify as being "urban".

20. In addition, other nominate forms of land use in the RE2 zone include "building identification signs", "business identification signs", "car parks", "function centres", "recreation facilities (indoor)", "recreation facilities (major)", "recreation facilities (outdoor)", "registered clubs" and "restaurants or cafes". When regard is had to the definition of each of these forms of land use in the Dictionary to the LEP, almost all involve the erection of structures or buildings of some kind, with a capacity for some buildings to be substantial. For example, in the case of a major recreation facility, the definition identifies such a facility as being "a building or place" used for large-scale sporting and recreation activities including "theme parks, sports stadiums, showgrounds, racecourses and motor racing tracks". Relevantly, they are land uses that pertain to urban living.

21. A number of other nominate uses that are permissible relate to marine or waterway activities such as boat building, boat launching ramps, boat sheds, jetties, kiosks, marinas and mooring pens.

22. In aggregate, all of the permissible purposes of land use that I have identified comprise by far the majority of the permissible land uses identified in item 3 of the land use table for the RE2 zone. Individually, they are uses that pertain to a city or town in that they reflect uses of an urban nature or uses that serve an urban population. Collectively, they are "chiefly" uses that are "urban". The fact that dwelling houses or residential buildings are not a permissible form of development in the zone does not detract from that conclusion (*Australian Lifestyle Corporation* at [22]).

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23. The opinion I have expressed, founded upon the predominant form of permissible land use in the RE2 zone, is supported by the zoning of land that adjoins the Site. I have earlier identified the zoning of most of the adjoining land as being R2 Low Density Residential. That circumstance identifies the land use context in which the Site, fully developed for the presently permissible use by an existing registered club, is located. The zoning of adjoining land is demonstrative of an urban context for the Site. It is surrounded by land zoned primarily for urban purposes.

24. Reliance upon that adjoining zoning is founded upon the operation of the LEP beyond the RE2 zoning table as applied to the Site so as to assess the categorisation of land for the purpose of cl 4(1) of the Seniors Living SEPP. That was the approach taken by Preston J in *Australian Lifestyle Corporation* at [31]-[32] where his Honour addressed the amendment, then recently made to the Seniors Living SEPP, by the addition of subclause (5) to cl 4 in the terms in which it is presently framed. In that passage of his Honour's judgment he referred to the non-urban zoning of the immediately surrounding land as supporting the conclusion that, had subclause (5) applied in the case he was considering, "the chapeau" of cl 4(1) would not have been satisfied in that the land would not be zoned primarily for urban purposes. The present case is the converse of the zoning provisions of surrounding land considered in that case. In light of the adjoining zoning that I have identified, his Honour's reasoning would rely upon that circumstance to support the conclusion that the Site is zoned primarily for urban purposes.

25. For these reasons, I respond to the first question raised for my consideration by concluding that, within the meaning of cl 4(1) of the Seniors Living SEPP, the Site is correctly categorised as "land zoned primarily for urban purposes".

Question 2: Permissibility of seniors housing in the form of independent living units

26. By cl 10 of the Seniors Living SEPP, "seniors housing" is identified as residential accommodation that is used or intended to be used permanently for seniors and is to consist of one or more of the forms of accommodation listed in the clause. One such form of that accommodation is identified as being "a group of self-contained dwellings". Clause 8 of the Policy relevantly identifies "seniors" for the purpose of the Policy as being people aged 55 or more years. By cl 18(1) of the Policy, residential accommodation engaging its provisions extends to the accommodation of those who live with and within the same household as the senior person or persons.

27. A "self-contained dwelling" is defined in cl 13(1) of the Seniors Living SEPP as being:

> a dwelling or part of a building (other than a hostel), whether attached to another dwelling or not, housing seniors...where private facilities for significant cooking, sleeping and washing are included in the dwelling or part of the building, but where clothes washing facilities or other facilities for use in connection with the dwelling or part of the building may be provided on a shared basis.

28. My understanding of the application to be made by Club Marconi is for "in-fill self-care housing". Seniors living of that kind is identified in cl 13(2) as being:

> seniors housing on land zoned primarily for urban purposes that consists of two or more self-contained dwellings where none of the following services are provided on site as part of the development: meals, cleaning services, personal care, nursing care.

In light of my response to the first question, the qualification that housing of that kind be "on land zoned primarily for urban purposes" is satisfied in the present case.

29. Clause 5 of the Seniors Living SEPP, provides that the provisions of the Policy prevail to the extent of inconsistency with any other environmental

planning instrument. Inconsistency presently arises because cl 15 of the Policy provides that Ch 3 of the Policy allows development "on land zoned primarily for urban purposes" for "any form of seniors housing", notwithstanding the provisions of any other environmental planning instrument. As will be apparent from my earlier consideration of cl 13, "in-fill self-care housing" on the Site is a form of seniors housing. Thus, the prohibition upon that purpose of development found in the LEP is overridden by the provisions of the Policy, resulting in the development proposed by Club Marconi, at least in concept, being permissible with the consent of the Council, subject to the qualifications next discussed.

30. The qualifications to which I refer also arise from provisions found in Ch 3 of the Seniors Living SEPP. Each of these qualifications arise from the circumstance that the seniors housing development proposed is on land used for the purpose of an existing registered club.

31. The first of those qualifications is found in cl 23 of the Seniors Living SEPP. The clause proscribes the grant of development consent unless the consent authority is satisfied both that the spatial location of the proposed residential facility is such that it is sufficiently separate from club activities, so that conflicts of use between the two are avoided, and second that there is in place a protocol for management of the seniors living facility so that the potential for harm from gambling by residents of the facility is appropriately addressed. I have no doubt that appropriate plans and other documentation can be provided to the Council in order to address the requirements of cl 23.

32. The second constraint upon the grant of development consent is the requirement imposed by cl 24 that a site compatibility certificate be given by the appropriate planning panel which, in this case, would appear to be the Western Sydney City Planning Panel. Unless such a certificate is given, the Council, as the consent authority, has no power to grant

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development consent: cl 24(2). Under that subclause, the matters about which the Panel is required to be satisfied are:

> (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 cl 25(5)(b).

33. Notwithstanding the issue of such a certificate, cl 24(3)(ii) enables the consent authority to refuse the grant of consent by reason of its own assessment of the compatibility of the proposed development with the surrounding environment.

34. The matters that the Panel (and presumably the Council) are required to address by reference to cl 24(2)(b), namely those criteria for assessing compatibility of the seniors housing proposed with surrounding land uses as identified in cl 25(5)(b) of the Policy, relate to matters of planning assessment rather than imposing any particular legal criteria. No doubt, they are criteria that have been considered and addressed by specialist consultants advising Club Marconi.

35. I have identified the two constraints upon the power to grant consent so as to enable Club Marconi to appreciate the breadth of discretionary considerations that are involved in addressing those constraints. The manner in which those constraints are addressed on behalf of the Club is a matter for its specialist consultants. Other than to recognise that, as a matter of law, those constraints must be addressed, the manner in which that is done does not presently give rise to any legal issue and is therefore beyond the scope of my Brief.

36. In summary, I am of the opinion that development for seniors housing on the Site, in the form of independent living units, is permissible with the

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consent of the Council, subject to the provision of material enabling compliance with cl 23 of the Seniors Living SEPP to be demonstrated and subject also to obtaining a site compatibility certificate as required by cl 24 of the Policy. Once those qualifications are satisfied (and I have no doubt that can be done), the application will be subject to the requirement imposed upon the determination of all development applications that the Council, as the consent authority, take account of the matters identified in cl 4.15 of the *Environmental Planning and Assessment Act 1979*.

Chambers

02 May 2019

MALCOLM CRAIQ QC

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