

19 May 2020

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Your ref:
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All correspondence to:
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Attention: Amanda Harvey, Luke Downend

Dear Amanda and Luke

Application for a site compatibility certificate, SCC_2019_NBEAC_001_00

We confirm that we act for Waterbrook Bayview Pty Ltd (**our client**). Our client is the applicant in the above matter.

We refer to the letter sent by Northern Beaches Council (**the Council**) to the Department on 8 April 2020.

This is a response to the legal issue raised by that letter.

However, in providing this response, it is important to note that a letter of advice from us, dated 16 August 2019, appeared as Appendix E in the *Application for Site Compatibility Statement* prepared by File Planning & Development Services, dated 15 August. Additionally, we wrote to you on 30 October 2019 in relation to further legal issues raised by the Council. This letter does not repeat all of the legal matters in our previous letters. Our previous letters should also be carefully considered.

Summary

In brief terms:

- The Council's letter seriously misrepresents the Court's decision in *S J Connelly CPP and Kate Singleton v Northern Regional Planning Panel (No 2)* [2019] NSWLEC 199.
- There was no issue in those proceedings as to whether a 'coastal wetland' under the Coastal Management SEPP was excluded as 'environmentally sensitive land' under the Seniors Housing SEPP.
- That case concerned whether land that was 'proximity area for coastal wetlands' is excluded from the Seniors Housing SEPP. The Court determined that it was **not** so excluded.
- The regime of the Seniors Housing SEPP relevantly works as follows:
 - If land is not described in schedule 1 of the Seniors Housing SEPP it is not excluded from the Seniors Housing SEPP under clause 6(a).
 - There is no exclusion for 'environmentally sensitive land' in a general sense. Only an exclusion for the land described in schedule 1 (with an exception).
 - Land is only capable of being described in schedule 1 on the basis of its identification in an environmental planning instrument (other than the Seniors Housing SEPP).

- If the environmental planning instrument under which the land is identified is the Coastal Management SEPP, then that identification is incapable of excluding the land from the operation of the Seniors Housing SEPP under clause 6(a).
- In terms of the Coastal Management SEPP:
 - Land mapped as 'coastal wetlands' under the Coastal Management SEPP has been **identified** under that instrument.
 - Such land is not captured under clause 6(a) of the Seniors Housing SEPP (to the extent that the Coastal Management SEPP would bring it under that clause) as a result of clause 4(7)(a) of the Seniors Housing SEPP.
 - It does not matter that 'coastal wetlands' are a like description for 'natural wetland'. The whole purpose of clause 4(7)(a) is to say that some types of land that would fall into the description in schedule 1 are not actually excluded from the Seniors Housing SEPP under clause 6(a).
 - This issue did not arise under *S J Connelly CPP* and there is nothing in the judgment of the Court that is inconsistent with the above.
- In any event, if the Department or the Sydney North Planning Panel have any concern about the status of the 'coastal wetlands' land identified under the Coastal Management SEPP, **our client would not object to a requirement being imposed**, under clause 25(7) of the Seniors Housing SEPP, **that no development for the purposes of a seniors housing development take place on that land.**
- To be clear, our client is not, itself, amending its application to do this. This is because of the following:
 - There is no legal requirement to do so.
 - Under the terms of the application the land mapped as 'coastal wetlands' does not fall into either the proposed 'building footprint area' or the 'development footprint area'. The only use contemplated for that land for the purposes of the seniors housing development might be environmental offset work.

Detail

1. The decision in *S J Connelly CPP*

1.1 The Council, in its letter of 8 April 2020, says the following:

This addendum raises important issues concerning the permissibility of the development having regard to a recent Land and Environment Court decision at *S J Connelly CPP Pty Ltd and Kate Singleton Pty Ltd t/as Planners North v Northern Regional Planning Panel (No 2) [2019] NSWLEC 199*. **That case found that land mapped as “coastal wetlands” under SEPP Coastal Management constitutes “environmentally sensitive land”** as described in Schedule 1 of SEPP HSPD. Therefore, based on relevant caselaw, SEPP HSPD does not apply to that land. Accordingly, a SCC could not be granted in respect of that land (bold added).

1.2 The Council's letter seriously misrepresents the Court's decision in *S J Connelly CPP and Kate Singleton v Northern Regional Planning Panel (No 2) [2019] NSWLEC 199*.

1.3 There was **no issue** in those proceedings as to whether a 'coastal wetland' under the *State Environmental Planning Policy (Coastal Management) 2018 (the Coastal Management SEPP)* was excluded as 'environmentally sensitive land' under the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (the Seniors Housing SEPP)*.

1.4 *S J Connelly CPP* made this very clear in the following ways:

- (a) The summons filed by the applicant in the proceedings did not seek any declaration in relation to 'coastal wetlands'. It only sought a declaration in

relation to a 'proximity area for coastal wetlands' (at [3]).

- (b) The Applicant's case did not allege any error by the Northern Regional Planning Panel in relation to 'coastal wetlands'. It only alleged an error in relation to a 'proximity area for coastal wetlands' (at [5]).
- (c) The Respondent's identification of matters for determination by the Court did not assert that there was any issue as to whether a 'coastal wetland' under the Coastal Management SEPP was 'environmentally sensitive land' (at [6]).
- (d) The Court addressed only two questions in *S J Connelly CPP*. Firstly:

Did State Environmental Planning Policy (Coastal Management) 2018 apply at all to the Panel decision?

This appeared as a heading to paragraphs [30] to [49] of *S J Connelly CPP*.

Secondly:

Is "proximity area for coastal wetlands" environmentally sensitive land in accordance with Sch 1 to State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004?

This appeared as a heading to paragraphs [50] to [93] of *S J Connelly CPP*.

It is plain that neither of the questions asked whether a 'coastal wetland' under the Coastal Management SEPP was 'environmentally sensitive land' and excluded from the Seniors Housing SEPP under clause 6(a).

- (e) **The parties** to the proceedings agreed that the areas mapped on the Area Map as 'Coastal Wetlands' are a like description for 'natural wetland' which appears in schedule of the Seniors Housing SEPP (in [67]).
- (f) The Court — in explaining the Applicant's case — noted that the Applicant 'accepted' the Respondent's proposition that the expression 'coastal wetlands' is a like description for 'natural wetland' (at [79]).
- (g) The Court noted that there 'was no argument' that land identified as coastal wetland is a like description for 'natural wetland' (at [89]).
- (h) The Court ruled that the part of the Applicant's land which is identified as within the 'proximity area for coastal wetlands' under the Coastal Management SEPP was **not** 'environmentally sensitive land' under the Seniors Housing SEPP (at [91]).
- (i) The declarations made by the Court did not address whether 'coastal wetlands' under the Coastal Management SEPP was 'environmentally sensitive land' under the Seniors Housing SEPP (and did not address whether clause 6(a) of the Seniors Housing SEPP would apply to such land).

- 1.5 As is shown above — and by any reading of the judgement — the parties in the above proceedings only **agreed** that 'coastal wetlands' are a like description for 'natural wetland' (an expression that appears in schedule of the Seniors Housing SEPP).
- 1.6 No decision needed to be made **by the Court** on whether the areas mapped as 'coastal wetlands' are a like description for 'natural wetland'. This is because, in adversarial litigation, findings that are made will reflect the 'joinder' of issues between the parties. The issues of fact and law joined between the parties will be defined by pre-trial processes or by the course of the hearing: *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518, 540-541 at [71], per Gummow and Hayne JJ.
- 1.7 In any event, our client is in accordance with the agreement that was reached between the parties on that point. It is correct that 'coastal wetlands' are a like description for 'natural wetland'. However, this did not (and does not) necessarily mean that the land is

excluded as 'environmentally sensitive land' under the Seniors Housing SEPP. This is because schedule 1 of the Seniors Housing SEPP alone does not determine what is and is not excluded as 'environmentally sensitive land'. Section 2 of this letter outlines and deals with the relevant provisions of the Seniors Housing SEPP.

2. Application of clause 4(7) of the Seniors Housing SEPP

- 2.1 Clause 6(a) of the Seniors Housing SEPP is titled 'Land to which Policy does not apply. It relevantly says:

This Policy does not apply to—

- (a) land described in Schedule 1 (Environmentally sensitive land) ...

- 2.2 Schedule 1 of the Seniors Housing SEPP described land (relevantly) as follows:

Land **identified** in **another environmental planning instrument** by any of the following descriptions or by like descriptions or by descriptions that incorporate any of the following words or expressions— ...

- (m) natural wetland (bold added).

- 2.3 Clause 4(7) of the Seniors Housing SEPP relevantly says:

Nothing in subclause (6)(a) or Schedule 1 operates to preclude the application of this Policy to land only because—

- (a) the land is **identified** under *State Environmental Planning Policy (Coastal Management) 2018* (bold added)...

- 2.4 As a result of the above, we can definitively say that:

- (a) If land is not identified in schedule 1 of the Seniors Housing SEPP it is not excluded from the Seniors Housing SEPP under clause 6(a).
- (b) There is no exclusion for 'environmentally sensitive land' in a general sense. Only an exclusion for the land described in schedule 1.
- (c) Land is only capable of being described in schedule 1 on the basis of its identification in an environmental planning instrument (other than the Seniors Housing SEPP).
- (d) If the environmental planning instrument (under which the land is identified) is the Coastal Management SEPP, then that identification is incapable of excluding the land from the operation of the Seniors Housing SEPP under clause 6(a).

- 2.5 The Coastal Management SEPP unambiguously **identifies** certain land as 'coastal wetlands'.

- 2.6 Clause 6 is titled '**Identification** of coastal management areas (bold added)' Clause 6(2) says:

The **coastal wetlands and littoral rainforests area** is the land **identified** as such by the *Coastal Wetlands and Littoral Rainforests Area Map* (some bold added).

- 2.7 Clause 10(1) relevantly says:

The following may be carried out on land **identified** as "coastal wetlands" or "littoral rainforest" on the Coastal Wetlands and Littoral Rainforests Area Map only with development consent (bold added) ...

- 2.8 Accordingly:

- (a) Land mapped as 'coastal wetlands' under the Coastal Management SEPP has been **identified** under that instrument.

- (b) Such land is not captured under clause 6(a) of the Seniors Housing SEPP (to the extent that the Coastal Management SEPP would bring it under that clause) because of clause 4(7)(a) of the Seniors Housing SEPP.
- (c) It does not matter that 'coastal wetlands' are a like description for 'natural wetland'. The whole purpose of clause 4(7)(a) is to say that some types of land that would fall into the description in schedule 1 are not actually excluded from the Seniors Housing SEPP under clause 6(a).

2.9 It is worth noting that clause 4(7)(a) was not advanced by the Applicant in the above proceedings as a reason that 'proximity area for coastal wetlands' were subject to the Seniors Housing SEPP. The Applicant in those proceedings successfully argued the same point by instead showing that the 'proximity area' did not fall under schedule 1 **at all**. Having been successful on that point, the issue of whether it would otherwise be excluded under clause 4(7)(a) simply did not arise.

3. The 'coastal wetlands' included in the application area

3.1 The Council's letter of 8 April 2020 says:

[T]he site that is the subject of the SCC includes 12 lots comprising the Bayview Golf Course, as identified in Table 2 of the "Application for Site Compatibility Statement" report prepared by FPD Pty Ltd. One of the lots, being Lot 191 in DP 1039481 (Lot 191), contains two areas mapped as "coastal wetlands" under SEPP Coastal Management.

Council considers that the inclusion of land mapped as "coastal wetlands" renders the application invalid. Based on this and when combined with the other planning and environmental matters raised in previous submissions, Council requests that the certificate not be issued.

3.2 Firstly, for reasons explained in section 2 of this letter, the identification under the Coastal Management SEPP is irrelevant to the legal issue of whether the Seniors Housing SEPP applies to the site (under clause 6(a)).

3.3 Secondly, in any event, the mere application for something that is prohibited, or part prohibited, cannot make an application 'invalid'. The requirements for an application for a site compatibility certificate are set out in clause 25(1)-(2) of the Seniors Housing SEPP. These requirements do not prompt any enquiry (as to the validity of the application) merely because some land that is included in the application may not ultimately be able to benefit from a development consent (granted only in reliance on the site compatibility certificate). (This is, of course, not the case here in any event.)

3.4 **If the Department or the Sydney North Planning Panel have any concern about the status of the 'coastal wetlands' land identified under the Coastal Management SEPP, our client would not object to a requirement being imposed, under clause 25(7) of the Seniors Housing SEPP, that no development for the purposes of a seniors housing development take place on that land.**

3.5 For your ease of reference, clause 25(7) says:

A [site compatibility] certificate may certify that the development to which it relates is compatible with the surrounding land uses only if it satisfies certain requirements specified in the certificate.

3.6 To be clear, our client is not, itself, amending its application to do this. This is because of the following:

- (a) There is no legal need to do so (as set out in section 2 of this letter).
- (b) Under the terms of the application the land mapped as 'coastal wetlands' does not fall into either the proposed 'building footprint area' or the 'development footprint area'. **The only use contemplated for that land for the purposes of the seniors housing development might be environmental offset work.**

Please do not hesitate to call me on (02) 8035 7858 or Kalinda Doyle on (02) 8035 7918 if you would like to discuss this matter.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Aaron Gadiel", is written over a light blue rectangular background.

Aaron Gadiel

Partner

Accredited Specialist — Planning and Environment Law