

Assessment of Boarding House Development Applications

(A) Eligibility and Assessment Under the ARHSEPP

(1) The *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARHSEPP) aims to provide new affordable rental housing by offering incentives such as expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards.

(2) For a development to be assessed under the ARHSEPP, it must meet certain eligibility criteria. For Division 3 Boarding Houses:

- The proposed development must be in a land use zone listed in cl. 26 or on land that is equivalent to a named land use zone (subject to cl. 5)

And

- In the Sydney Region, the proposal must also satisfy the precondition of cl. 27(2) and be located within an “accessible area” as defined in cl. 4.

(3) If a boarding house development does not satisfy these preconditions, then the ARHSEPP does not apply to the application.

Importantly, if the ARHSEPP doesn't apply, the proposal must not benefit from any expanded zoning permissibility or concessions afforded under the policy and the application must only be considered under the relevant local planning controls.

(4) This reasoning is consistent with the approach taken by Gray in the application of the ARHSEPP in *Katerinis v Canterbury-Bankstown Council* [2017] NSWLEC 1479.

[3]... Whether the SEPP ARH applies is determinative of what planning controls apply to the development application. If it applies, the applicable standard for floor space ratio (“FSR”) is varied to allow the proposal additional floor space in accordance with the calculation contained in cl 13, and a number of standards that would otherwise apply cannot be used to refuse consent (see cl 14). If the SEPP ARH does not apply, the proposal must be considered under the planning controls of the Canterbury Local Environmental Plan 2012 (“CLEP 2012”) and the Canterbury Development Control Plan 2012 (“CDCP 2012”) without the benefit of those provisions.

[26] ...those benefits only arise if the division applies, and the division applies only in limited circumstances

[28]...unless a site is able to meet certain criteria, the division simply does not apply.

(5) Significantly, if the ARHSEPP doesn't apply, the permissibility of the boarding house under the relevant local environment plan must be established.

(6) Importantly, determining permissibility in a particular Land Use Zone, first requires an acknowledgment that not all boarding houses are the same – consideration must be given to the type of boarding house proposed.

(B) Traditional vs New-generation Boarding Houses

- (7) NSW Planning & Environment recognizes two distinct types of boarding houses: “**traditional**” and “**new-generation**” boarding houses.¹
- (8) The **traditional form** of boarding house is a low-density, Class 1b building;² it could be a single dwelling and/or a secondary dwelling. Such a boarding house could contain a manager’s residence as well as number of boarding rooms with shared kitchen/dining and bathroom facilities.
- (9) By contrast, **new-generation** boarding houses, designed in response to the ARHSEPP, are apartment-style; Class 3 buildings. They are high-density micro-apartment developments and are a form of multi-dwelling housing.
- (10) Recently, the Land and Environment Court established that any self-contained boarding room constitutes a separate dwelling.
I note Preston’s comments³ at [63] – [66] in *SHMH Properties Australia Pty Ltd v City of Sydney Council* [2018] NSWLEC 66
- (11) Importantly, it is now clear that new-generation boarding houses must be considered as a form of multi-dwelling housing – they are high-density apartment-style developments.

¹ NSW Planning & Environment fact sheet *Supporting new generation boarding houses June 2018* describes both traditional and new-generation types of boarding houses:

“The AHSEPP allows for the development of new generation boarding houses in residential, mixed use and some commercial zones ... The AHSEPP encourages both the traditional form of boarding houses, being those with shared facilities as well as new generation boarding houses, being those that are buildings with self-contained rooms.” p. 1

“...As some or all of the boarding rooms may be self-contained with a private kitchenette and en-suite facilities for the exclusive use of lodgers of that room, it is considered that SEPP 65 could, in some circumstances, apply to development of a boarding house that is a Class 3 building under the BCA. SEPP 65 defines residential flat buildings as including three or more storeys and four or more self-contained dwellings. However, many boarding houses are Class 1b buildings under the BCA and these buildings are excluded from SEPP 65.” p. 3

² A Class 1b building is a boarding house, guest house or hostel that has a floor area less than 300 m², and ordinarily has less than 12 people living in it.
<https://www.abcb.gov.au/-/media/Files/Resources/Education-Training/Building-classifications.pdf>

³ *SHMH Properties Australia Pty Ltd v City of Sydney Council* [2018] NSWLEC 66 [63]-[66]
Any boarding room with its own bathroom and kitchenette (with space for a fridge and plugin electrical cooking devices eg. Microwave) is deemed to be self-contained and thus capable of being occupied or used as a separate domicile.
Any self-contained boarding room is therefore considered to be a separate dwelling. Most notably, Preston stresses that the absence of an oven and built-in cooktops does not change the fact that the boarding rooms are considered self-contained and are thus separate dwellings.

(C) Permissibility of boarding houses under local planning controls

WLEP 2011 ZONE R2 – Low Density Residential

- (12) In the *Warringah Local Environment Plan 2011* WLEP 2011, boarding houses are listed as “permissible with consent” in the Zone R2 Low Density Residential Land Use Table.
- (13) Single and secondary dwellings are also listed as “permissible with consent” in R2 zones in WLEP 2011.
- (14) Multi-dwelling housing is “permissible with consent” in R3 zones, but is not listed as “permissible with consent” in R2 zones.
- (15) As such, multi-dwelling housing is prohibited in R2 zones under the WLEP 2011. (**Item 4 Prohibited** - Any development not specified in item 2 or 3.)
- (16) Consequently, new-generation boarding houses would be prohibited in R2 zones under the WLEP 2011 because they are a form of multi-dwelling housing.
- (17) Traditional boarding houses would, however, be permissible with consent in R2 zones under the WLEP 2011 because they are single and/or secondary dwellings.
- (18) It is important to note here that, if a development meets the eligibility criteria for assessment under the ARHSEPP; then one of the benefits of the policy is the expanded zoning permissibility the policy affords:

Aims of Policy

(b) to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards,

- (19) Specifically, clause 8 of the ARHSEPP acts to allow both traditional and new-generation boarding houses in R2 zones, subject to cl. 30A and Cl. 30AA.

cl.8 Relationship with other environmental planning instruments

If there is an inconsistency between this Policy and any other environmental planning instrument, whether made before or after the commencement of this Policy, this Policy prevails to the extent of the inconsistency.

- (20) Therefore, under the ARHSEPP, new-generation boarding houses (with a maximum of 12 rooms) are permitted in R2 zones because the ARHSEPP prevails over the WLEP 2011.
- (21) However, without the benefit of “expanded zoning permissibility” provided by the ARHSEPP, new generation boarding houses are prohibited under the WLEP 2011 because they are a form of multi-dwelling housing.

WLEP 2000 – “DEFERRED LAND”

LOCALITY C8 BELROSE NORTH and LOCALITY B2 OXFORD FALLS VALLEY

- (22) Locality C8 Belrose North and Locality B2 Oxford Falls Valley are two areas identified as ‘deferred’ land that have not been incorporated into in the current *Warringah Local Environmental Plan 2011* (WLEP 2011). As such, the applicable local planning instrument for these areas is the WLEP 2000, which contains Locality Character Statements rather than land use zones.
- (23) The Dictionary in *Warringah Local Environment Plan 2000* (WLEP 2000) includes the following definitions:

boarding house:

(a) means any premises that:

- (i) are wholly or partly let as a lodging for the purposes of providing the occupants with a principal place of residence, and*
- (ii) are used and occupied by at least 4 long term unrelated residents, and*
- (iii) include a communal living space used for eating and recreation, and*
- (iv) are not licensed to sell liquor, and*

(b) does not include premises that have been subdivided or in which there is separate ownership of parts of the premises.

dwelling means a room or a suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.

housing means development involving the creation of one or more dwellings whether or not used as a group home.

- (24) Each Locality Statement contains a Desired Future Character (DFC) Statement as well as Land Use tables and Built Form controls.
- (25) It is noted that there is no explicit reference to “boarding houses” anywhere in either of the C8 Belrose North or B2 Oxford Falls Locality Statements.
- (26) Nonetheless, a boarding house is a form of housing. It is therefore a Category 2 development in the Land Use table for both the C8 and B2 Localities. Category 2 land uses are those that *may be consistent with the desired future character of the locality*.
- (27) Importantly, because a boarding house is a form of housing, it is subject to the housing density standard in the C8 and B2 Locality Statements:

“Development will be limited to new detached style housing conforming with the housing density standards set out below and low intensity, low impact uses.”

- (28) In summary, a boarding house would only be “permissible” in the C8 or B2 locality if:
- It is consistent with the Desired Future Character (DFC) Statement;
 - It is limited to new-detached style housing, conforming to the housing density standard of 1 dwelling per 20 hectares
 - and it is low-impact and low-intensity.
 - It must also conform to the General Principles of development control of the WLEP 2000.

- (29) New-generation boarding houses are a form of multi-dwelling housing. They are high-density, high intensity, apartment-style developments.
- (30) New-generation boarding houses are clearly not new-detached style housing and, because they are high-density studio-apartment developments, it is extremely unlikely that they could conform to the density standard of 1 dwelling per 20 hectares in the C8 and B2 localities.
- (31) For example, a new-generation boarding house with 25 self-contained rooms (25 dwellings), would need to sit alone on an allotment of at least 500 hectares if it is to conform to the housing density standard of 1 dwelling per 20 hectares.
- (32) Put another way – the dwelling density of a new-generation boarding house with 25 self-contained rooms on an allotment of 2000 m² (0.2 hectares) would be 2500 times the maximum housing density of 1 dwelling per 20 hectares. This corresponds to an exceedance of 250,000% in the housing density standard.
- (33) As such, it seems practically impossible for new-generation boarding houses to conform to the DFC statement:
- “Development will be limited to new detached style housing conforming with the housing density standards set out below and low intensity, low impact uses.”*
- (34) By contrast, a traditional boarding house could be in the form of “new detached style housing”.
- (35) In addition, a traditional boarding house is more likely to be a low impact and low intensity use – Class 1b buildings have a maximum floor space of 300 m² and usually less than 12 people living in them.
- (36) Significantly, however, even a traditional boarding house (1 dwg) would need to stand alone on an allotment of 20 hectares to conform to the housing density standard in this locality.
- (37) On a small allotment of 2000 m², a traditional single-dwelling boarding house would still be 100 times the maximum housing density of 1 dwelling per 20 hectares (corresponding to an exceedance of 10,000 %).
- (38) Therefore, it appears very unlikely that any kind of boarding house could ever be consistent with the Desired Future Character of the Locality C8 Belrose North or Locality B2 Oxford Valley Falls.
- (39) It is no surprise then, that boarding houses are not explicitly identified in either of the C8 or B2 Locality Statements. Given the above analysis; boarding houses do not seem to be an anticipated land use in either locality.
- (40) Significantly, it is also no great surprise that the C8 and B2 localities are not listed in Clause 26 (Land to which Division applies) of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARHSEPP); neither are they equivalent to a named land use zone.
- (41) As such, the ARHSEPP cannot apply to boarding house developments in either of the C8 or B2 localities – any proposal must be assessed solely against the provisions in the WLEP 2000 and the relevant Locality Statement with no benefit from the ARHSEPP.

TABLE OF BENEFITS PROVIDED BY THE ARHSEPP

Concessions provided under the ARHSEPP contrasted with the requirements for multi-dwelling housing and apartment style housing under the WLEP's

Requirement	WLEP2000 GPDC	WLEP/WDCP 2011 requirements	Concessions in ARHSEPP
Car parking	GP 74 Schedule 17 1 space per bedroom unit plus 1 space per 5 units	WDCP Appendix 1 1 space per 1 bedroom dwelling plus 1 visitor spot per dwelling	29(2)(e) 0.5 per boarding room
Landscaped open space	GP 63 Landscaped open space 50%	WDCP D1 Shown on DCP map (R2 40%)	29(2)(b) if the landscape treatment of the front setback area is compatible with the streetscape in which the building is located
Private open space	GP 64 Private open space Each dwelling 10m ² with minimum dimensions of 2.5 m	WDCP D2 A total of 10m ² with minimum dimensions of 2.5 m for each dwelling.	29(2)(d) one area of at least 20 square metres with a minimum dimension of 3 metres is provided for the use of the lodgers
Access to sunlight	GP 62 Access to Sunlight - Sunlight, to at least 50% of the principal private open spaces, is not to be reduced to less than 2 hours between 9 am and 3 pm on June 21 space per bedroom unit plus 1 space per 5 units	WDCP D6 At least 50% of the required area of private open space of each dwelling and at least 50% of the required area of private open space of adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21.	29(2)(c) where the development provides for one or more communal living rooms, if at least one of those rooms receives a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter
Requirement	SEPP 65 requirements		ARHSEPP
Minimum room size	Clause 6A Development control plans cannot be inconsistent with Apartment Design Guide (1)(d) – apartment size and layout Apartment Design Guide Objective 4D1 Design criteria – 1. Studio apartments are required to have minimum internal areas of 35 m ² 2. Every habitable room must have a window in an external wall with a total minimum glass area of not less than 10% of the floor area of the room		29(2)(f) each boarding room must have a gross floor area (excluding any area for purposes of private kitchen or bathroom facilities) of at least: (i) 12 m ² for single room (ii) 16 m ² for double room

(D) Application of ARHSEPP to specific boarding house development applications on the Northern Beaches

DA 2018/1692 74 Willandra Rd Narraweena B2 Locality

- (42) The subject site at 74 Willandra Rd Narraweena is in the Locality B2 Oxford Falls Valley. As such, the applicable local planning instrument is the WLEP 2000, and the B2 Locality character statement applies to this development application.
- (43) Significantly, the B2 locality is not listed in Clause 26 (Land to which Division applies) of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARHSEPP); neither is it equivalent to a named land use zone.
- (44) As such, the ARHSEPP does not apply to this development and the proposal must be assessed solely against the provisions in the WLEP 2000 and the C8 Locality Statement with no benefit from the ARHSEPP.
- (45) The proposed development DA 2018/0401 is for a 29-room new-generation boarding house and it is immediately apparent that it does not conform to the C8 Locality DFC statement:
- “Development will be limited to new detached style housing conforming with the housing density standards set out below and low intensity, low impact uses.”*
- (46) It is noted that the Applicant asserts that the proposed boarding house is not defined as a dwelling (Statement of Environmental Effects Oct 2018 p. 13) and is therefore not subject to the housing density standard of 1 dwg per 20 ha.
- (47) Further, the Applicant contends that the development should only be assessed against the “low impact, low intensity” test.
- (48) However, I believe this argument is inherently flawed.
- (49) Boarding houses are a form of housing and are thus subject to the housing density standard⁴ in the B2 Locality Statement.
- (50) Furthermore, Preston demonstrates at [63]-[66] in *SHMH Properties Australia Pty Ltd v City of Sydney Council [2018] NSWLEC 66* that boarding rooms are considered to be separate dwellings if they are capable of being self-contained; having their own bathroom and kitchenette facilities.
- (51) The 29-room new-generation boarding house is thus a multi-dwelling, studio-apartment-style form of housing.
- (52) I also note pertinent comments in the Final Assessment Report (pp. 7-8) in this regard: The inadequate communal kitchen and dining areas combined with the ability of the rooms to be retrofitted and used as separate domiciles warrants refusal of the application.

⁴ This very issue was raised at a previous NBLPP hearing for a boarding house in the C8 locality. See the Notice of Determination for REV 2019/0035 (p. 2). *“The development application is for a ‘boarding house’ as defined under WLEP 2000. A boarding house is a form of ‘housing’. The housing density standard therefore applies.”*

- (53) Council also points out that in any case, the density of occupation of the proposed boarding house would be very high and, as such, the proposal is a high impact and high intensity development which is also inconsistent with the DFC.

“The high intensity use and impacts of the proposal will detract from maintaining the integrity of the ‘existing holding’ provisions under the Warringah LEP 2000 and the rural character of the B2 Oxford Falls Valley Locality.” p. 7.

- (54) I also note Council’s executive summary includes the following:

“Additionally, the proposal is inconsistent with other key elements of the DFC Statement, including visual impact, landscaping, preservation of bushland and impacts on waterways within the Narrabeen Lagoon catchment. The proposal is also considered to be inconsistent with the General Principles of Development Control with regard to building bulk, site facilities, bushland protection, pollution control, water quality impacts, sediment control, landscaping and characteristics of ‘low intensity low impact’ use. Additionally, Council’s Natural Environment and Climate Change (NECC) Unit do not support the proposal due to impacts on biodiversity, water quality and bushland pursuant to Warringah LEP 2000.”

- (55) As demonstrated in great detail in Council’s Final Assessment Report for DA 2018/1692, the proposed boarding house at 74 Willandra Rd, Narrabeena should be refused:

- It is not new-detached style housing; does not conform to the housing density standard of 1 dwg per 20 ha.
- It is not a low intensity nor is it a low impact use
- It is inconsistent with the DFC statement and
- It also *“fails to be consistent with the General Principles of Development Control of the WLEP 2000.”*