Sent:	4/02/2020 12:53:36 PM
Subject:	LEC No 2019/11472 - Objection to amended plans DA 2018/0304 (22 Redman Rd Dee Why) and correction to previous submission
Attachments:	4 Feb 2020 Devasha Scott Boarding House Assessments amended.pdf; DScott Objection LEC No 2019_11472.pdf; PastedGraphic-10.tiff;

Hello Cecilia,

Please find attached my formal objection to the amended plans for DA 2018/0304, a boarding house proposed at 22 Redman Rd Dee Why.

This email contains two important attachments:

Cover letter and an amended document dated 4 Feb 2020.

The amended document contains corrections to a previous document (dated 11 Dec 2019) I sent to you late last year. Important changes have been made throughout the entire document. The corrections are with respect to the WLEP 2011definition of “multi-dwelling housing” and “residential flat building”. Nonetheless, the premise of my argument remains the same.

If a boarding house application does meet the criteria to be assessed under the *State Environmental Planning Policy (Affordable Rental Housing) 2009,* it cannot benefit from this policy - that includes any expanded zoning permissibility.
New-generation boarding houses containing 3 or more dwellings are prohibited in R2 zones under the WLEP 2011 as they are a form of residential flat housing. The ARHSEPP does not apply to this development and so new-generation boarding houses that contain more than 3 dwellings are prohibited in R2 zones.

Yes, boarding houses are permissible in R2 zones under the WLEP 2011, but it is important to look at what type of boarding house is being proposed! I note that traditional style boarding houses (single and secondary dwellings) would be permissible in R2 zones without the benefit of the ARHSEPP. So to simply rely on the fact that boarding houses are permissible in R2 is not sufficient to allow a prohibited development, when another style of boarding house is permissible in this zone!

Could you please use the document dated 4 Feb 2020 in place of that dated 11 Dec 2019.

The Northern Beaches Local Planning Panel refused this application for many important reasons. The amended plans submitted by the applicant to not address and cannot change many of the significant reasons for refusal made by the Panel. As such, I do not believe that Council is in a position to approve this development - it would be contrary to the Panel’s decision. I believe that this must be allowed to come before the Land and Environment Court at a full hearing.

Sincerely

Devasha Scott

Assessment of Boarding House Development Applications on the Northern Beaches

With reference to case law and legislation

Dr Devasha Scott 4 Feb 2019

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Assessment of Boarding House Development Applications

(A) Eligibility and Assessment Under the ARHSEPP

(1) One of the aims of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARHSEPP) is "*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*."

(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 thus a form of residential flat housing under th.

(10) Recently, the Land and Environment Court established that any self-contained boarding room constitutes a separate dwelling.

I note Preston's comments[3] 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 contain many individual dwellings and so must be considered as high-density apartment-style developments.

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[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 Class1b 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 m^2, 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) Under the *Warringah Local Environment Plan 2011* (WLEP 2011) new-generation boarding houses that contain 3 or more dwellings also fit the definition of "residential flat building".

(13) WLEP 2011 Dictionary: *a **residential flat building** means a building containing 3 or more dwellings, but does not include an attached dwelling or multi dwelling housing.*

(14) It is noted that boarding houses are listed as "permissible with consent" in the Zone R2 Low Density Residential Land Use Table.

(15) Single and secondary dwellings are also listed as "permissible with consent" in R2 zones in WLEP 2011.

(16) Residential flats housing is "permissible with consent" in R3 zones, but is not listed as "permissible with consent" in R2 zones.

(17) As such, residential flat buildings are prohibited in R2 zones under the WLEP 2011. (**Item 4 Prohibited** - Any development not specified in item 2 or 3.)

(18) I contend new-generation boarding houses are therefore prohibited in R2 zones under the WLEP 2011 because they are a form of residential flat housing.

I believe it is insufficient to simply say that 'new-generation boarding houses developments are inconsistent with the low-density objective of zone R2'; when in fact, they are prohibited under the standard instrument.

(19) Traditional boarding houses would, however, be permissible with consent in R2 zones under the WLEP 2011 because they are single and/or secondary dwellings.

(20) 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,*

(21) 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.*

(22) 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.

(23) 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 residential flat housing.

WLEP 2000 – "DEFFERED LAND"

LOCALITY C8 BELROSE NORTH and LOCALITY B2 OXFORD FALLS VALLEY

(24) 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.

(25) 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.*

(26) Each Locality Statement contains a Desired Future Character (DFC) Statement as well as Land Use tables and Built Form controls.

(27) 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.

(28) 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*.

(29) 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."*

(30) 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.

(31) New-generation boarding houses are high-density, high intensity, apartment-style developments.

(32) 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.

(33) 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.

(34) Put another way – the dwelling density of a new-generation boarding house with 25 self-contained rooms on an allotment of 2000 m^2 (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.

(35) 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."

(36) By contrast, a traditional boarding house could be in the form of "new detached style housing".

(37) 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 m^2 and usually less than 12 people living in them.

(38) 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.

(39) On a small allotment of 2000 m^2, 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 %).

(40) 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.

(41) It is no surprise then, that boarding houses are not explicitly identified in the 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.

(42) 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.

(43) 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… and as demonstrated above, the outlook doesn't look good.

(D) Table of some of the benefits of the ARHSEPP Division 3

Concessions provided under the ARHSEPP contrasted with the requirements for 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% **GP 76 Management of stormwater** must have adequate onsite stormwater detention unless the total post-development impervious area (roof, driveway, paving) will be less than 35% of the total site area	**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

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

DA 2017/0844 22 Ramsay St Collaroy WLEP 2011 R2 zone

(44) The development application at 22 Ramsay St Collaroy is for a 10-room new-generation boarding house in an R2 low-density residential zone.

(45) The application was lodged the under the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARHSEPP).

(46) However, at the end of the assessment process it was determined that the ARHSEPP does not apply to this development because it does not satisfy the precondition in cl. 27(2) – the subject site is not in an "accessible area".[4]

(Indeed, this now appears to be the main contention in the current Appeal before the Land and Environment Court.)

(47) Specifically, the Northern Beaches Local Planning Panel (NBLPP) concluded that pedestrian pathway to the closest north and southbound bus stops is not considered safe. Importantly, the ARHSEPP requires the pedestrian path to be *"along a route that may be safely walked…"*

(48) Notably, the pedestrian route to the southbound bus stop closest to the subject site is particularly problematic – it necessitates crossing a busy six-lane major arterial road (Pittwater Road) and the nearest signaled pedestrian crossings are either 700 m north or 800 m south from the subject site.

(49) It is not safe for pedestrians to cross the busy 6-lane Pittwater Rd directly to reach the southbound bus stop; the barriers in the middle of the road have been placed there for good reason.

(50) Furthermore, the NBLPP concluded that first part of the walking route to both north and southbound the stops is also not deemed safe; because of the "*extraordinarily steep gradient"* of the first 100 m from the subject site on Ramsay Street. "*The gradient for the top 50 metres of that distance is approximately 1:3 and the balance is approximately 1:5."*

(51) As such, the subject site is not considered to be in an "accessible area" as defined in cl. 4 of the ARHSEPP.

(52) I note here that the Applicant contends that the ARHSEPP should apply, because the cl. 4 only stipulates "a bus-stop" (single bus stop) must be within 400 m walking distance of the site.

(53) However, the NBLPP rejected the Applicant's argument and the minutes of the NBLPP (5 Sept 2018 p.13) clarify why the pedestrian path to both the north and southbound bus stops must be within a safe walking distance of 400m in order to satisfy the "accessible area" criteria in ARHSEPP cl. 4 and hence meet the precondition in cl. 27(2).

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[4] **DA 2017/0844 Assessment Report p. 24** *"…the proposal does not satisfy the requirements of Cl. 27 (2) and this has been included as a reason for refusal."*

(54) Importantly, I note that the NBLPP's determination and reasoning is consistent with *Section 8* of the *Interpretation Act 1987 (NSW):*

"(b) a reference to a word or expression in the singular form includes a reference to the word or expression in the plural form".

(55) For reference, I note Panel's comments in the minutes of the NBLPP 5 September 2018 p. 13:

The applicant submitted that paragraph (c) of the "accessible area" definition is satisfied because it refers in the singular form to "a" bus stop and there is a bus stop on Pittwater Road within 400 metres safe walking distance of the proposed distance. The applicant submitted that it is irrelevant that this bus stop is only serviced by north bound buses and that the safe walking distance to the nearest bus stop serviced by south bound buses on the other side of the busy six lane Pittwater Road is 1.3 kilometres or 1.6 kilometres (depending on the route taken). The Panel does not accept these submissions.

Usually, buses moving in one direction service a bus stop on one side of the road and buses moving in the opposite direction service a bus stop on the opposite side of the road.

In the Panel's opinion, the preferable and sensible construction of the phrase "a bus stop " in paragraph (c) of the definition of "accessible area" is that it means a bus stop serviced by buses moving in each of opposite directions. It is not sufficient if there is a bus stop within 400 metres safe walking distance serviced by buses moving in only one direction if the safe walking distance to a bus stop serviced by buses moving in the opposite direction exceeds 400 metres. This construction is aided by the context. Paragraphs (a) and (b) of the whole definition of "accessible area" are concerned with prescribed proximate walking distances to a railway station, wharf or light rail station. Such facilities are used by public transport moving in opposite directions. That context suggests that the reference to "a bus stop" in paragraph (c) should be similarly construed. That construction is fortified by the sensitivity of the SEPP in requiring proximate public transport for occupants of boarding houses, who are likely to be particularly reliant on public transport because of their membership of very low income, low income and moderate income households.

On this construction, the SEPP is not satisfied in the circumstances of the present matter because although a bus stop used by north bound buses is within the prescribed 400 metres walking distance, a bus stop used by south bound buses is located a safe walking distance of either 1.3 kilometres or 1.6 kilometres (depending upon which route is taken). It is not safe for a pedestrian to cross the busy six lane Pittwater Road directly to the latter bus stop.

Further, the extraordinarily steep gradient of Ramsay Street from the front of the proposed boarding house for a distance of approximately 100 metres in the direction of Pittwater Road is for that reason also not a "safe" walking route to either of the said bus stops having regard to the prospect that a boarding house may well be occupied by some persons with limited mobility. The gradient for the top 50 metres of that distance is approximately 1:3 and the balance is approximately 1:5."

(56) Significantly, Panel's reasoning above is also consistent with Sheahan's application of the *Interpretation Act* in *Bella Ikea Ryde Pty Ltd v City of Ryde Council (No 2) [2018] NSWLEC 204.*

(57) I note in particular comments at [42] – [43] and reference to other cases therein:

"[42] In regard to some of the well-known principles of statutory interpretation, Mr McEwen referred the court to the following passage in the judgment of Jagot J, in Matic v Mid- Western Regional Council [2008] NSWLEC 113, at [7]- [9]:

> *7 The meaning of a provision in an environmental planning instrument must be determined having regard to its context and purpose (Cranbrook School v Woollahra Municipal Council (2006) 66 NSWLR 379, at [37] – [46] and [63]; s 33 of the Interpretation Act 1987). "Context" has a wide scope and may include the "mischief which...one may discern the statute was intended to remedy" so that, by this method, an alternative construction to the literal meaning may be preferred if it is "reasonably open and more closely conforms to the legislative intent" (CIC Insurance Limited v Bankstown Football Club Limited (1997) 187 CLR 384, at 408).*
>
> *8 Legislative intent, however, is not to be discerned by reference to pre-conceived ideas or vague notions of what might or might not be desirable. Intent is to be objectively determined. It is manifested "by the use of language" in the document to be construed (Wilson v Anderson and Others (2002) 213 CLR, 401 at [8]). Accordingly:*
>
> *... it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred (Singh v The Commonwealth and Another (2004) 222 CLR 322, at [19]).*
>
> *9 These requirements have particular significance for the construction of environmental planning instruments. The planning purpose of an environmental planning instrument is to be determined by reference to the language of the instrument considered in context. There is no room for "some preconceived general notion of what constitutes planning" (Western Australian Planning Commission v Temwood Holdings Pty Limited (2004) 221 CLR 30, at [56] citing Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council (1970) 123 CLR 490, at 500). Further, and as noted in Calleja v Botany Bay City Council (2005) 142 LGERA 104, at [25] "any attempt to always find planning logic in planning instruments is generally a barren exercise".*

[43] Mr McEwen relied upon an extract from the 1988 edition of "Statutory Interpretation in Australia", by Pearce and Geddes. That extract (section 6.27, p127) discussed the effect of "pluralising" terms in instruments, in accordance with the Interpretation Act, and highlighted the following paragraph from the decision of the Privy Council, in Blue Metal Industries Ltd v Dilley (1969) 117 CLR 651, at 656:

> *It follows that the mere fact that the reading of words in a section suggests an emphasis on singularity as opposed to plurality is not enough to exclude plurality. Words in the singular will include the plural unless the contrary intention appears. But in considering whether a contrary intention appears there need be no confinement of attention to any one particular section of an Act. It must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole.*

(58) At [54] Sheahan concludes that the Court must find *"a practical construction which meets the evident goals' of the SEPP".*

(59) The NBLPP's determination is also consistent with the recent Land and Environment Court judgment in *Ritchie v The Hills Shire Council [2018] NSWLEC 1376.*

(60) In *Ritchie v Hills* it was determined that that the pedestrian pathways to bus stops must be safe in order to satisfy the "accessible area" precondition cl. 27(2).

(61) If there is no safe pedestrian pathway to bus stops within 400 m, then the proposal cannot be considered as in an "accessible area" and the ARHSEPP does not apply to the development.

(62) I note comments at [13], [15] and [16] are particularly relevant here:

> [13] …*The fact that Mr Smith is of the opinion that people currently use this area to cross the road to access the bus stop does not give me any comfort or satisfy me that this is a route that may be safely walked by pedestrians to access either bus stop opposite or on the northern side of Memorial Avenue. These features of the applicant's walking route do not accord with the definition of "walking distance" as defined under the cl 4 of the SEPP. While the route is along a made pavement the pedestrian is required to stop on the road verge and is required to cross a classified road which carries in excess of 22,000 odd cars per day (based on outdates 2009 figures) – a road which both experts agreed currently carried more traffic today than in 2009 and was likely to carry much more traffic in the future. In my opinion it is unsafe to require pedestrians to illegally cross a two lane classified road - outside of a pedestrian crossing in order to reach the bus stop.*
>
> *[15] The distances to the applicant's bus stops might measure less than 400m from the site but the route is nether safe or reasonably practicable - there is no pedestrian crossing…*
>
> *[16] Despite the applicant's assertion, Division 1 (In-fill affordable housing) in Part 2 of State Environmental Planning Policy (Affordable Rental Housing) 2009 ("SEPP ARH") does not apply to the proposed development. I order that the appeal is dismissed."*

CONCLUDING REMARKS

(63) It has been demonstrated that the pedestrian route to the north and southbound bus stops are not safe and, as such, the ARHSEPP does not apply because the proposal fails to meet the "accessible area" precondition in cl. 27(2).

(64) The development application DA 2017/0844 at 22 Ramsay Street Collaroy is for a 10-room new-generation style boarding house. It is therefore an apartment style development and a form of residential flat housing.

(65) Without the benefit of "expanded zoning permissibility" provided by the ARHSEPP, a boarding house with 3 or more dwellings is considered to be a residential flat building and these are prohibited in R2 zones under the WLEP 2011 and the application must be refused.

Further merit analysis of DA 2017/0844

(66) Even if residential flat/apartment style housing were permissible in an R2 zone (which it is not), under the WLEP 2011 and WDCP 2011 the development should still be refused on merit for the following reasons:

Pedestrian access and safety issues

(67) On a merit analysis, in accordance with the EP&A Act 1979 s 4.15(1)(c), the subject site is unsuitable for a boarding house development due to the unsatisfactory pedestrian access to the site. I note the comments of the NBLPP in this regard:

> *"on a merits analysis the development application should be refused because of the distance that occupants of the boarding house have to safely walk in order to catch a southbound bus and because of that steep gradient. Those considerations lead to the conclusion that the site is unsuitable for the proposed boarding house (EPA Act 1979 section 4.15 (1) (c)), is not in the public interest (section 4.15 (1) (e)).*

(68) I note: the proposed site of the development at 22 Ramsay Street is located adjacent to a private driveway, shared by me and five other households.

(69) As outlined in my presentation to the Commissioner at the LEC s.34 site Conciliation hearing 6 Sep 2019 (Case 2019/00006991) on p. 5 and accompanying illustrations (2(a) – 2(f)): the proposed development would also put the pedestrian safety of neighbouring residents at risk.

(70) The proposed development relies on deep excavation of the site, as well as significant excavation of public land beyond the subject site – the proposed design renders the nature strip (our pedestrian path) in front of the development; too dangerous to cross.

(71) Specifically, the proposal would result in an unprotected 1.4 m vertical drop across our pedestrian path (evident in the illustrations 2(a) and 2(e)). It would be extremely dangerous for anyone walking this path from the west – the unprotected 1.4 m vertical wall on the side of the driveway apron (on public land) is used regularly by many neighbouring residents to the west of the site (including myself). In addition, cars exiting the proposed basement carpark could not be seen by said pedestrians or vehicles approaching from the west (2(b)-2(d).

(72) I also note, the sightline requirements and the driveway profile across the pedestrian footpath are not compliant with Aust. Standards AS/NZS 2890.1:2004 and the cross-sectional plans submitted to the traffic engineers misrepresent the profile of the access driveway across the nature strip.

(73) The proposed development is therefore inconsistent with the aims of our local environment plan WLEP 2011 Clause 1.2(2)(d)(i): *to protect and enhance the residential use and amenity of existing residential environments*.

(74) It is also inconsistent with the objectives of the *WLEP 2011* (A.5):

- *To ensure development responds to the characteristics of the site and the qualities of the surrounding neighbourhood*
- *To ensure new development … reinforces the importance of pedestrian areas*
- *To provide a high level of access to and within development.*

(75) In addition, it does not satisfy the requirements of WDCP C2 – Traffic, Access and Safety (Minimizing traffic & pedestrian conflict).

Deep excavation and land-slip issues

(76) The proposed development necessitates a deep excavation of 6 m on the western side boundary, next to the driveway I share with 5 other neighbouring households (No's 34B, 24, 26, 28, 30 & 32).

(77) This area on Collaroy escarpment is in a high-risk landslip zone. Such a deep excavation presents a high risk of potential damage to our driveway as well as neighbouring property (due to the and subsurface water flow, the natural water course flowing down the escarpment across the subject site and the steepness of the slope (40° – 60°) at the western boundary. (I note the proposed excavation is also within 1 m of our mains water supply and other utility services.)

(78) Another neighbour, Ms J. Sheehan, presented evidence to the Commissioner at the s.34 site hearing and showed photos of the catastrophic collapse in 2014 of the Frazer Street driveway after a deep excavation – this was only ~70 m away from 22 Ramsay Street.

(79) In addition, the proposed excavation and construction of concrete piles does not comply with the 900 mm minimum side-setback controls (WDCP B5) – the concrete-pile retaining wall structure is inside the side-setback area, right up to the boundary line.

(80) Given that our mains water and other utilities run alongside this boundary, I believe the proposed excavation and resulting structure would be within the zone of influence of these services. As such, we believe that such a variation in development controls is unacceptable and should not be permitted as it would further increase potential risk of damage to our property and service utilities.

(81) I note that the NBLLP have included issues surrounding earthworks and landslip in their reasons for refusal: Specifically, the inadequate assessment of the risks associated with the proposed development is inconsistent with the provisions of the WLEP (cl. 6.2 Earthworks and cl. 6.4 Development on sloping land) and does not meet the requirements of WDCP (E10 – landslip risk). This is also addressed in Council's Statement of Fact and Contentions.

(82) In addition, architectural plans show that the proposed development does not comply with WDCP Requirement 2 of B7 (Front Boundary Setbacks). The 6 m deep excavation for the proposed basement car park extends at least 3 m forward of the building line, well into the front boundary setback area – readily apparent in Architectural Plans A110 Rev H, A150 Rev J and A200 Rev J.

(83) The proposal is also inconsistent with WDCP D9 Building Bulk – Requirement 3 Excavation of the landform is to be minimised. *"On sloping land… the need for cut and fill reduced by designs which minimise the building footprint and allow the building mass to step down the slope"*

Landscaped Open Space and Bushland Setting

(84) The development does not comply with 40% landscaped open space and Bushland setting in WDCP D1

Inaccurate survey and misrepresentation in architectural plans

(85) Another serious concern I have is the gross misrepresentation of the site and surrounding terrain in the architectural plans. The survey plan is inaccurate and there are significant inconsistencies between original and amended plans. As a result, the true impact of the development has been obfuscated.

(86) This is explained in detail on p 6 of my presentation to the Commissioner at the LEC s.34 site Conciliation hearing 6 Sep 2019 and illustrations (3(a) – 3(c)) as well as on pp. 7 – 8 & 22 – 27 of my earlier submission to Council dated 27/02/2018.

Privacy and amenity (acoustic and visual)

(87) The Applicant proposes to remove all trees and vegetation from the site for the development. The landscape plan does show replanting; however, there is insufficient space for any deep soil plantings on the site and many of the proposed plantings are not even feasible.

(88) On the western side, the plans show only 900 mm between exterior wall of the proposed building and the boundary line. Furthermore, the concrete-pile retaining wall is actually built up to the boundary. There is no way the proposed plantings (21 water gums with mature height of ~15 m) could be viable in this location.

(89) On the eastern side, there is also insufficient space for the proposed screen planting – as it conflicts with the access path to the rear of the property.

(90) Significantly, the visual privacy intrusion and the acoustic impact of the open-corridor design of the development (see 1(c)) will not be mitigated in any way – this is an unacceptable outcome for neighbouring residents to the east and the west.

(91) The impact on the privacy and amenity to neighbouring residents is detailed on pp. 2 & 3 of my presentation to the Commissioner at the LEC s.34 site Conciliation hearing 6 Sep 2019 and accompanying illustrations (1(a) – (c)).

Unacceptable Amenity impacts for future residents and the DDA

(92) As stated in Council's Statement of Fact and Contentions, *"the proposed development should be refused due to unacceptable amenity impacts for future residents."* In particular: The accessible unit lacks equivalent amenity; the common stairway is non-compliant, the path to accessible car space is non-compliant with BCA and DDA; and no outdoor private open space is accessible to residents.

(93) It is also significant that the pedestrian route to the bus stops is not only unsafe; it is actually totally inaccessible to persons requiring wheelchair access.

(94) I note that under the DDA, it would be discriminatory to preclude residents who need a wheelchair from access to public transport. Likewise, it would be discriminatory to require someone with mobility impairment to own a car or use a taxi service because access to public transport is not possible.

(95) Specifically, I believe it would be in breach of the DDA (s.5, s.6 & s.23) if a boarding house were constructed on a site that is incapable of providing safe pedestrian access from the boarding house to public transport for all residents, including those requiring wheelchair access.

Horizontal exits and paths of egress are non-compliant

(96) Another very serious concern I have relates to the fire safety egress requirements for the proposed development. This is explained in detail on p 6 - 7 of my presentation to the Commissioner at the LEC s.34 site Conciliation hearing (6 Sep 2019) and illustrations (4(a) & 4(c)) as well as on pp. 42 – 44 of my submission to Council dated 27/02/2018.

(97) The two horizontal exits and paths of egress proposed are problematic – At 900 mm wide, neither of the exit paths is wide enough for compliance with the BCA.

(98) Where does the egress path from the exit on the western boundary lead to? This exit it opens to a near-vertical 4 m high embankment on top of which sits my shared driveway. (And this doesn't even include the conflict with the proposed plantings of 21 river gums in this 900 mm space!)

(99) The exit path on the eastern boundary is equally problematic – at 900m wide, it runs along the top of a retaining wall with no protective barrier, kerb or handrail. (This retaining wall is almost 2 m high at the front end of the property and is notably absent from the survey and architectural plans submitted with the DA.)

(100) There is insufficient space for compliant horizontal exits and paths of egress, let alone enough space for any screen plantings. As such, the footprint the proposed development must be reduced accordingly.

(101) Unfortunately, even the smallest reduction in width of the proposed building would render the entire development unfeasible – the width of the block is only 12.8 m!

(102) There do not appear to be any "alternative solutions" available or any way in which compliance could be achieved on this steep narrow block… this is a huge concern and one that cannot be ignored.

Consent should not be granted for plans that are unable to demonstrate that compliance is even possible.

(103) The site at 22 Ramsay St is totally unsuitable for the proposed boarding house in DA 2017/0844. I cannot see any way in which the proposed development could actually fit on the subject site and be compliant with BCA.

(104) The Applicant has misrepresented the topography and the true extent of the impact of the proposal; there no space for the horizontal fire exits shown on the plans (let alone any screen planting). Furthermore, there is no safe pedestrian route to bus stops for boarding house residents. The development should be refused.

DA 2018/0304 22 Redman Rd Dee Why WLEP 2011 R2 zone

(105) The application at 22 Redman Rd Dee Why (DA 2018/0304) is for a 15-room apartment-style new-generation boarding house.

(106) It has been determined that the ARHSEPP does not apply to this development because the subject site is not within the 400m "accessible area" as defined in cl. 4.

(107) The pedestrian pathway from the proposed boarding house to the closest bus stops are 412 m and > 450 m, north and southbound, respectively.

(108) In addition, the ARHSEPP requires the pedestrian path to be *"along a route that may be safely walked…"*

(109) Importantly, the walking route to these bus stops is not considered safe as involves navigating a series of 72 steps down an extraordinarily steep embankment of gradient 1:3.

(110) As such, the proposal fails to meet the precondition in cl. 27(2) on two counts:

- The pedestrian pathway to the bus stops is not safe.
- The subject site is not within 400 m walking distance of either bus stop.

(111) It is also important to note that the 400 m "accessible area" boundary cannot be varied because it is analogous to a zoning map.

(112) In *Katerinis v Canterbury-Bankstown Council [2017] NSWLEC 1479* Gray adopts this rationale at [33] and concludes that cl. 10(2) is not a development standard:

> *"The clause is the pre-condition, not the standard itself or the varied standards. There is a clear distinction. It is analogous to a zoning map, as it sets the criteria for what standards apply."*

I note here that Cl. 27(2) in Div 3 is equivalent to Cl. 10(2) Div 1 of the ARHSEPP. As such, both Cl. 10(2) and Cl. 27(2) are preconditions for the application of each division in the ARHSEPP, not development standards.

(113) As such, the "400 m zone" boundaries cannot be varied and the application cannot be assessed under the provisions of the ARHSEPP.

(114) Because the ARHSEPP doesn't apply, the application cannot receive any benefit from the policy. (*Katerinis v Canterbury-Bankstown* [3], [26] & [28] – see discussion start this document on p. 1)

(115) The proposal at 22 Redman Rd Dee Why is for a 15-room new-generation style boarding house. It is therefore an apartment style form of housing and meets the criteria for residential flat building (having 3 or more dwellings). I note that Council's Assessment Report for the application acknowledges this:

> *"The development is commonly referred to as a 'new generation boarding house', which essentially means that each room is self contained." p. 5*

(116) Without the benefit of "expanded zoning permissibility" provided by the ARHSEPP, this type of apartment-style boarding house is prohibited in R2 zones under the WLEP 2011 and the development must be refused.

Further merit analysis of DA 2018/0304

(117) Even if residential flat/apartment style housing were permissible in an R2 zone (which it is not), the proposed boarding house development is inconsistent with the objectives and requirements in the WLEP 2011 and WDCP 2011 and on merit it should be refused.

Pedestrian access and safety issues

(118) The pedestrian pathway from the proposed boarding house to the bus stops and town centre is not considered safe for future boarding house residents:

(119) For reference, I note the NBLPP's Notice of Determination:

Pursuant to Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979 the subject site is not suitable for the proposed development. In this regard, the proposed means of pedestrian access to and from the nearest public transport and services is unsatisfactory. The necessity for pedestrians to negotiate a series of 71 steps over a distance of 70 metres in order to access the town centre and bus stops does not meet the objective of the Warringah DCP 2011 "to provide a high level of access to… the development.

(120) I also note the following comments in Council's Final Assessment Report:

As mentioned above, as the proposal has a higher density of residents than detached dwellings, it should have a higher standard of access, given the higher potential for persons with physical limitations, either due to age or impairment.

The subject site may be suitable for a boarding house provided the means of access is safe and easy to negotiate. Therefore, the issue of the steps is critical to the case of whether the means of access is suitable.

To further determine the suitability of the pathway, it was observed that the steps are illuminated at night with lights at the top, middle and bottom.

There is a seat one third of the way up the steps (allowing anyone walking up the steps to rest) and another two thirds of the way up. There are handrails along at least one side of all 12 stepped sections and on both sides of two middle sections (which contain 24 of the 71 steps). The rest of the path (i.e. between the bottom of the steps and Dee Why Town Centre) is generally flat and easy to negotiate.

Despite these steps not being strictly subject to any legislative restriction son gradients or the need to be suitable for wheelchairs, they still need to be appropriate for the intended use.

Walking up the 71 steps is not an easy task, especially when carrying shopping, a baby, a bicycle or the like. It is important to note that the residents will have to walk these steps given, there is no other option to reach Dee Why Town Centre on foot that is of a reasonable distance and, the limited number of parking spaces on the site (i.e. less spaces than the number of rooms or residents). Walking down the steps, while obviously an easier exercise, is still a demanding task for someone who is not in good physical health or has impairment.

Requiring the boarding house residents to walk this path, likely on a daily basis and often multiple times during the day and/or night, is considered to be an unreasonable imposition. These steps are therefore not considered to be a reasonable or appropriate means of access for a boarding house development.

Based on this, the means of access from this site to the nearest shops, transport options and services is considered to be unsuitable for the proposed development.

Access to and within the proposed premises and DDA compliance

(121) In my written submission to Council for 22 Redman Rd (dated 4 Oct 2019) I have detailed the problems surrounding access to and within the premises of the proposed boarding house.

(122) I note that under the DDA, it would be discriminatory to preclude residents who need a wheelchair from access to public transport. Likewise, it would be discriminatory to require someone with mobility impairment to own a car or use a taxi service because access to public transport is not possible.

(123) Specifically, I believe it would be in breach of the DDA (s.5, s.6 & s.23) if a boarding house were constructed on a site that is incapable of providing safe pedestrian access from the boarding house to public transport for all residents, including those requiring wheelchair access.

(124) There also appear to be other breaches of the DDA:

- Access path to front door: driveway and pathway are not separated by a suitable barrier, there is conflict with the pathway, bin area and landscaping; resulting in insufficient space for the provision of a compliant accessway to the front door of the premises.
- Access to the rear: there is only stair access to the rear of the property and the area has a significant cross fall of 4 m and paving is planned (all in breach of DDA and BCA). In addition,
- Fire safety & Egress: there seem to be no horizontal exits from the premises or any egress path from the rear of the property to the roadside at all.

Pedestrian and traffic conflict

(125) This has been discussed and illustrated on pp. 8 & 9 of the 22 Redman Road submission – the proposed driveway design poses a significant safety risk for neighbouring residents and it is difficult to see how it could comply with Australian Standards, specifically the unobstructed pedestrian and vehicular sightlines required in AS/NZS 2890.1-2004.

(126) The driveway and the access path to the front door are not separate.

(127) In this regard, the proposed development is inconsistent with the aims of our local environment plan WLEP 2011 Clause 1.2(2)(d)(i): *to protect and enhance the residential use and amenity of existing residential environments*.

(128) It is also inconsistent with the objectives of the *WLEP 2011* (A.5):

- *To ensure development responds to the characteristics of the site and the qualities of the surrounding neighbourhood*
- *To ensure new development … reinforces the importance of pedestrian areas*
- *To provide a high level of access to and within development.*

(129) In addition, it does not satisfy the requirements of WDCP C2 – Traffic, Access and Safety (Minimizing traffic & pedestrian conflict).

Streetscape

(130) The proposed boarding house is a 3-storey design that includes a basement carpark that covers the entire footprint of the building; As such, the development is also contrary to the provisions in the WDCP 2011 – Clause D9 Building Bulk

(131) Council's Statement of Fact and Contentions states, *"the proposed development should be refused as it will have excessive bulk resulting in unacceptable impact on the streetscape."*

Privacy and amenity (acoustic and visual)

(132) The impact on the privacy and amenity to neighbouring residents is detailed on p. 10 of my 22 Redman Road submission (4 Oct 2019) as well as the submissions of many neighbouring residents.

(133) Indeed, in the Statement of Fact and Contentions, Council contends, *"the development should be refused as it will result in unacceptable privacy impacts on nearby dwellings."*

(134) The proposal is therefore inconsistent with the objective in WDCP 2011 D9 Privacy – *"to ensure the siting and design of buildings provides a high level of visual and acoustic privacy for occupants and neighbours"*

Deep excavation and landslip issues

(135) It is significant to note that this high-density apartment-style proposal necessitates significant excavation works in order to provide for the required basement car parking. This is inconsistent with WDCP D9 Building Bulk – Requirement 3 Excavation of the landform is to be minimised. *"On sloping land… the need for cut and fill reduced by designs which minimise the building footprint and allow the building mass to step down the slope"*

(136) I note that Dr A Sammut (whose property shares a boundary to the east of the site) raised concerns regarding landslip and destabilization of the hillside in her submission to Council (Sammut 08/08/2018).

(137) As such, I believe the proposal is inconsistent with the provisions of Clause E10 Landslip Risk of the WDCP 2011 and the proposed earthworks are inconsistent with the provisions of Clause 6.2 Earthworks of the WLEP 2011.

(138) Indeed, under "Landslip risk" Council's Statement of Fact and Contentions states, *"The Applicant has not provided sufficient information to allow the requirements of cl. 6.4(3)(c) to be properly assessed."*

DA 2018/1692 74 Willandra Rd Narraweena B2 Locality

(139) 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.

(140) 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.

(141) 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.

(142) For a development application to be approved in this Locality, the proposal must:

- conform to the General Principles of Development Control in the *Warringah Local Environment Plan 2000* (WLEP 2000)

  and

- it must also be consistent with the B2 Oxford Falls Valley Locality Desired Future Character (DFC) Statement.

(143) The Oxford Falls Valley DFC states:

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

(144) The 29-room new-generation boarding house proposed on Willandra Road is clearly not new-detached style housing.

(It is not sufficient that the boarding house looks similar a very large dwelling or a manor house.)

(145) It is a high-density, high intensity studio-apartment-style development – it most definitely does not conform to the density standard of 1 dwelling per 20 hectares.

(146) Significantly, because this boarding house has the potential for 29 self-contained rooms (29 dwellings), in order to conform to the housing density standard, it would need to sit alone on an allotment of at least 580 hectares!

(The subject site is only 2 ha and even a single dwelling boarding house on this site would exceed the housing density standard 10-fold – ie. by 1000%).

(147) I note that the Applicant contends 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.

(148) Further, the Applicant states that the development should only be assessed against the "low impact, low intensity" test. However, I believe this argument is inherently flawed.

(149) Boarding houses are a form of housing and are thus subject to the housing density standard[5] in the B2 Locality Statement.

(150) Furthermore, it was recently established in the Land and Environment Court that new-generation boarding houses must be considered as having multiple dwellings because any boarding room capable of being self-contained is deemed to be a separate dwelling.

(151) 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.

(152) 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.

(153) It is significant that the Court has recognised new-generation boarding houses containing multiple dwellings. This means that they must be considered as apartment-style developments – the 29-room new-generation boarding house at 74 Willandra Rd Narraweena is indeed an apartment-style form of housing and must be judged accordingly.

(154) As Council rightly points out in the Final Assessment Report, housing up to 58 adults means the density of occupation is very high – it is a high intensity use.

"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.

(155) Finally, I note that there are actually many other significant issues with this development that have been raised by the local community including the numerous inconsistencies with the General Principles of Development Control in the WLEP 2000.

(156) These have all been comprehensively addressed in Council's Final Assessment Report and are outlined in the Executive Summary on the 2nd page of this Report. This is a high intensity, high impact, apartment-style housing development – it is not suitable for this site and it would not be in the public interest to approve the development in such an environmentally sensitive location.

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5 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."*

Final Assessment Report – Extract from executive summary p. 2:

"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."

(157) In summary, the proposed boarding house at 74 Willandra Rd, Narraweena should be refused for many reasons:

- It is <u>not</u> new-detached style housing and it exceeds, considerably, the housing density standard of 1 dwg per 20 ha.
- It is neither a low intensity nor a low impact use.
- It is inconsistent with many other aspects of the DFC statement and
- It is also inconsistent with numerous General Principles of Development Control of the WLEP 2000. Not the least of which is the detrimental impact the development would have on the surrounding bushland, waterways and biodiversity.

(158) Significantly, because application DA 2018/1692 does not qualify as affordable housing, I contend that there is no environmental planning ground that would justify contravening the housing density standard, the low impact/low intensity requirement or the numerous conflicts with the General Principles of Development Control in the WLEP 2000. DA 2018/1692 should be refused.

(159) In this regard, I note here the comments at [50] in *Katerinis v Canberry-Bankstown Council [2017] NSWLEC 1479*.

> *"[50] The Council submits that <u>although the provision of affordable housing is an environmental planning ground that may justify contravening the development standard, this would require entry into a voluntary planning agreement ("VPA") and the Court has no power to require the parties to enter into a VPA</u>. In support of this submission, the Council relies on the decision of the Court in Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council 153 LGERA 355; [2006] NSWLEC 733 and Australian International Academy of Education Inc v The Hills Shire Council [2013] NSWLEC 1. In the latter, Craig J adopts the reasoning of Jagot J in the former, that "[a]bsent the provisions relating to planning agreements, s 94 was the exclusive source of power for a consent authority to impose conditions requiring the payment of money" for a public benefit (Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council at [45]). The Council says that this reasoning, together with the decision of the Court of Appeal in Fairfield City Council v N & S Olivieri P/L [2003] NSWCA 41, supports the <u>submission that a person cannot dedicate land, and the Council cannot require contributions, except if it does so in accordance with s 94 of the EPA Act.</u>"*

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DA 2018/0401 14 Wyatt Ave Belrose C8 Locality

(160) The subject site at 14 Wyatt Ave, Belrose is within the Locality C8 Belrose North.

(161) As such, the applicable local planning instrument is the WLEP 2000, and the C8 Locality character statement applies to this development application.

(162) Significantly, the C8 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.

(163) 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.

(164) For a development application to be approved in this Locality, the proposal must:

- conform to the General Principles of Development Control in the *Warringah Local Environment Plan 2000* (WLEP 2000)

  and

- it must also be consistent with the C8 Belrose North Locality Desired Future Character (DFC) Statement.

(165) The C8 Belrose North DFC states:

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

(166) The 27-room new-generation boarding house proposed on 14 Wyatt Avenue is clearly not new-detached style housing.

(167) It is a high-density, high intensity studio-apartment-style development – it most definitely does not conform to the density standard of 1 dwelling per 20 hectares.

(168) Significantly, because this boarding house contains 27 self-contained rooms (27 dwellings), in order to conform to the housing density standard, it would need to sit alone on an allotment of at least 540 hectares!

(I also note that even a single dwelling boarding house on the subject site would exceed the housing density standard 110-fold – ie. by at least 11,000%).

(169) In summary, the proposed boarding house at 14 Wyatt Ave, Belrose should be refused for many reasons:

- It is not new-detached style housing; it is an apartment-style form of housing and the density standard has been exceeded by well over 250,000%.
- It is neither a low intensity nor a low impact use.
- It is inconsistent with many other aspects of the DFC statement and
- It is also inconsistent with numerous General Principles of Development Control of the WLEP 2000.

(170) All of this was demonstrated comprehensively in my presentation to the at the LEC s.34 site hearing. (Devasha Scott Presentation notes for DA 2018/0401 Case 2019/129615 LEC Site Conciliation 28 Oct 2019 - **Scott 28 Oct**)

(171) As well, the Northern Beaches Local Planning Panel (NBLPP) determinations for both DA 2018/0401 and REV 2018/0035 and Council's Statement of Fact and Contentions for the LEC Appeal (Case 2019/129615) all conclude that the proposed boarding house at 14 Wyatt Ave does not conform to the WLEP 2000 nor is it consistent with the provisions in the C8 Locality Statement.

(172) Significantly, because application DA 2018/1692 does not qualify as affordable housing, I contend that there is no environmental planning ground that would justify contravening the housing density standard, the low impact/low intensity requirement or the numerous conflicts with the General Principles of Development Control in the WLEP 2000.

(173) In this regard, I note here the comments at [50] in *Katerinis v Canterbury-Bankstown Council [2017] NSWLEC 1479*.

> *"[50] The Council submits that although the provision of affordable housing is an environmental planning ground that may justify contravening the development standard, this would require entry into a voluntary planning agreement ("VPA") and the Court has no power to require the parties to enter into a VPA. In support of this submission, the Council relies on the decision of the Court in Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council 153 LGERA 355; [2006] NSWLEC 733 and Australian International Academy of Education Inc v The Hills Shire Council [2013] NSWLEC 1. In the latter, Craig J adopts the reasoning of Jagot J in the former, that "[a]bsent the provisions relating to planning agreements, s 94 was the exclusive source of power for a consent authority to impose conditions requiring the payment of money" for a public benefit (Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council at [45]). The Council says that this reasoning, together with the decision of the Court of Appeal in Fairfield City Council v N & S Olivieri P/L [2003] NSWCA 41, supports the submission that a person cannot dedicate land, and the Council cannot require contributions, except if it does so in accordance with s 94 of the EPA Act."*

(174) I also that there are substantial unresolved and dangerous stormwater drainage issues with the proposal. Contrary to the Applicant's assertions at the Review Panel hearing (NBLPP meeting 17 Apr 2019 Webcast), the stormwater and flooding issues are far from being resolved (see **Scott 28 Oct** pp. 12-17).[6]

(175) Furthermore, when multiple plans are overlaid (stormwater infrastructure, landscape plantings, pedestrian pathways, right-of-way for emergency fire vehicles to access property at rear) it is clear that there is simply not adequate space in which to accommodate the proposed development on the subject site.

(176) On all counts, DA 2018/0401 should be refused.

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6 See the annotated A3 images provided with **Scott 28 Oct** at the s34 site conciliation hearing.

COMMENTS REGARDING THE APPLICANT'S ASSERTIONS:

(177) The Applicant contends that boarding houses are identified as a permissible in the Desired Future Character Statement (DFC) and further, that they are an anticipated land use in the C8 locality under the WLEP 2000.[7]

(178) Both of these claims by the Applicant are False and disingenuous.

(179) As noted at paragraph (39) boarding houses are not explicitly identified as permissible in the DFC, nor are they an anticipated land use in the C8 Locality. In fact, there is no specific reference to boarding houses or affordable housing anywhere in the C8 Locality Statement.

(180) Because the Applicant assumes that boarding houses are expressly permitted and anticipated in the C8 locality, they argued that DA 2018/0401 should be approved on merit and that the provisions in the ARHSEPP for boarding houses should be used as a benchmark for compliance.

(181) I believe that the Applicant's argument is self-contradictory and inherently flawed.

(182) Firstly, the Applicant's argument is based on the false premise that boarding houses are anticipated as a permissible use in the C8 locality – they are not.

(183) Secondly, the Applicant acknowledges that it would be impossible for their proposed boarding house to comply with the housing density standard (see webcast of DA 2018/0401 NBLPP 17 Oct 2018 from 2:46:50 onwards).

(184) The Applicant also accepts that boarding houses are "residential in nature" and that the proposed boarding house is not a dwelling house. The Applicant then argues because the proposal is not a dwelling house, the density standard wouldn't apply. (See Rev 2018/0035 NBLPP 17 April 2019 webcast from 1:00:00 to 1:03:33)

(185) Curiously, despite acknowledging that boarding houses are "residential in nature", the Applicant also contends that a boarding house is not a form of "housing":

In the Applicant's Statement of Environmental Effects (p. 10) the boarding house development is described as "other" under Category 2 development.

"Under the C8 Locality a 'boarding house' is classified under Category 2 as a land use that is 'other buildings, works, places or land use that are not prohibited in Category 1 or 3'"

(186) The Applicant seems to believe that because boarding houses are an "anticipated" permissible use in the locality (they are not), and because the proposed boarding house is clearly not a new-detached style dwelling house, they should not actually have to comply with the housing density standard.

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[7] I note in the NBLPP meeting 17 Oct 2018 Webcast (from around 2:40 onwards) the Applicant's Planner discusses the WLEP 2000 and the permissibility of boarding houses in the C8 Locality, stating, *"boarding houses are identified as Category 2 development within the DFC. That is, they are permissible with consent"* (2:41:05) and "*it is certainly a use that is anticipated in this locality"* (2:41:20) and *"… affordable housing is anticipated within this locality as a category 2 land use."* (2:42:50)

(187) Not surprisingly, the NBLPP did not accept this argument.

(188) I note the Minutes of the NBLPP 26 October 2018 meeting (p. 5-6) and as well, the excerpt from the Notice of Determination for REV 2019/0035 (p. 2):

> *"1. 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. The proposal does not comply with the housing density standard… whether considered to be one dwelling or 24 dwellings."*

COMMENTS REGARDING COUNCIL'S ASSESSMENT

(189) Although DA 2018/0401 was ultimately refused (twice) by the Northern Beaches Local Planning Panel (NBLPP), Council had initially recommended approval for this development application. (See **Scott 28 Oct** paragraphs [4] – [11] & [28] – [38]).

(190) It appears that in Council's initial assessment, they had adopted the underlying premise that boarding houses are an anticipated land use in the C8 locality, despite not being eligible under the ARHSEPP.

(191) As I have demonstrated above, this a false premise.

(192) Curiously, in both of the Final Assessment Reports (for DA 2018/0401 and REV 2018/0035) Council had also adopted the view that a boarding house is not considered housing, but an "innominate use".

(193) As such, I believe that the wrong approach was taken in the subsequent merit assessment of this application.

(194) Due to the lack of any specific "boarding house" controls in the WLEP 2000, Council decided that it would be reasonable to assess the application at 14 Wyatt Ave against the provisions of the ARHSEPP, even though it does not apply.[8]

(195) As a result, throughout both Final Assessment Reports (for DA 2018/0401 and REV 2018/0035), the provisions of the ARHSEPP were used repeatedly as a point of reference in the merit assessment of this boarding house proposal.

(196) I contend that this approach was flawed – the provisions of the ARHSEPP are concessions and incentives for eligible developments; ineligible developments cannot benefit from them.

(197) Using the provisions of the ARHSEPP as a benchmark for compliance prejudiced the assessment process and unfairly benefited the proposal. It is also contrary to decisions made in the Land and Environment Court, for example: *Katerinis v Canterbury-Bankstown Council [2017] NSWLEC 1479* at [3], [26] & [28].

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8 Council stated that the WLEP 2000 *"lacks the controls"* for assessing these developments and therefore deemed *"it is warranted to consider the application against the relevant provisions of the SEPP ARH"* (DA 2018/0401 Assessment Report pp. 23-25; REV 2018/0035 Assessment Report pp. 24-26).

(198) As well as the gross exceedance of the housing density standard (by over 250,000%), the proposed development has numerous other non-compliances and inconsistencies with controls and standards in the WLEP 2000 and the C8 Locality Statement (see **Scott 28 Oct** and Council's Statement of Fact and Contentions).

(199) Significantly, the numerous non-compliances were minimized or simply ignored in favour of the provisions of the ARHSEPP, resulting in an initial recommendation for approval by Council.

(200) Essentially, the WLEP 2000 and the C8 Locality Statement took a back seat in the assessment process for DA 2018/0401, while the ARHSEPP had precedence.

(201) This was evident for numerous aspects of the proposal:

- Council's acceptance of the reduced parking requirements in the ARHSEPP over the WLEP 2000 parking requirements for apartment-style housing;
- Acceptance of the reduced private open space and landscaped open space requirements of the ARHSEPP over the WLEP 2000 controls.
- The non-compliance and inconsistencies with side and rear setback controls and objectives had to be disregarded so that the proposal could fit on the site.
- The DFC statement of *"preservation of the natural landscape"* was ignored: the proposed development requires the removal of almost all established trees and as well, necessitates deep excavation of the landform – resulting in almost half of building mass being underground at the front end of the property (contrary to WLEP 2000 General Principle 57 – *On sloping land, the height and bulk of development, particularly on the downhill side, is to be minimised and the need for cut and fill reduced by designs which minimise the building footprint and allow the building mass to step down the slope)*.
- The proposal is inconsistent with WLEP 2000 General Principle 76 – management of stormwater. The proposal has >50% of the site area as impervious and the proposed on-site stormwater detention plans do not adequately control stormwater runoff (see the annotated A3 images provided with **Scott 28 Oct** at the s34 site conciliation hearing).

(202) See table on page 8 for more comparisons.

(203) Alarmingly, the REV 2018/0035 Assessment Report obviated the DFC requirement *"development will be limited to new-detached style housing"* by simply stating:

> *"…the proposal reads from the street as a two-storey dwelling, being below the maximum overall building height, and including suitable setbacks. As such, the proposal has the appearance from the street as being detached housing, and meets the intention of the first portion of Requirement 3."*
>
> (REV 2018/0035 Assessment Report p. 30)

Essentially, Council reasoned: because boarding house looks like a new-detached style single dwelling from the street; it doesn't matter that it is actually a micro apartment-style development.

(204) Furthermore, on pages 38 – 39 of the REV 2018/0035 Assessment Report, the gross exceedance of the housing density standard was also completely disregarded in Council's merit assessment.

> *"Any form of residential development on this land would be contrary to the housing density standard. If the control were to be strictly enforced, the land would be undevelopable."*
>
> *"…Therefore, it is concluded that there is public benefit in the development itself, and that strictly maintaining the housing density development standard is contrary to the public benefit and restricts (and sterilises) the ability to development the site. As such, the variation sought to the housing density standard is supported in this particular circumstance."*
>
> (REV 2018/0035 Assessment Report p. 39)

(205) Council argued that the enormous exceedance (over 250,000%) in housing density is acceptable for this proposal, because a single dwelling on this allotment would also exceed the housing density standard by a large amount (10,700%).

(ie. the housing density would be exceeded on this site no matter what you build, so it is okay to exceed the density standard by 250,000%.)

(206) I believe this rationale to be nonsensical.

(207) I also note that the NBLPP did not accept Council's reasoning.

CONCLUDING REMARKS

(208) The ARHSEPP does not apply to this boarding house development and the application cannot be assessed against the provisions of the ARHSEPP.

(209) As a form of housing, boarding houses must satisfy the requirements for housing in the DFC and conform to the General Principles of Development Control in the WLEP 2000 – without any benefit from the provisions of the ARHSEPP.

(210) The new-generation style boarding house proposed at 14 Wyatt Ave contains between 24 and 27 dwellings (depending on which plans are used).[9] As such, this boarding house is a high-density apartment-style development.

(211) As demonstrated above, the proposed development is totally at odds with the Desired Future Character of the C8 Locality and it is inconsistent with the General Principles of Development Control in the WLEP 2000. As such, DA 2018/0401 should be refused.

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[9] I note that the Applicant attempted to artificially alter the status of the boarding house to that of a "single dwelling" by removing the ovens and cooktops from each of the boarding room kitchens. Preston demonstrates at [63]-[66] in *SHMH Properties Australia Pty Ltd v City of Sydney Council [2018] NSWLEC 66* that these rooms are still considered to be separate dwellings. In any case, the proposal remains a high impact, high intensity development.

OBJECTION TO 'AMENDED PLANS' DA2018/0304 – s 34 HEARING

Land and Environment Court Proceeding No 2019/11472

As outlined in my previous submissions to Council, I object to this boarding house development for many reasons – the amended plans submitted by the Applicant do not change my reasons for objecting to this development.

I do wish to note my error in interpretation of the definition of "multi-dwelling" housing under the WLEP 2011 in my submission to you dated 11 Dec 2019. Unfortunately, I had not checked the WLEP 2011 Dictionary definition of "multi-dwelling housing".

> ***Multi dwelling housing*** *means 3 or more dwellings (whether attached or detached) on one lot of land, each with access at ground level, but does not include a residential flat building.*

Indeed, I simply assumed that once it had been established that a residential development contained multiple (more than 2) dwellings; it would be a "multi-dwelling" development.

> ***Residential flat building*** *means a building containing 3 or more dwellings, but does not include an attached dwelling or multi dwelling housing.*

Nonetheless, a new-generation boarding house with more than 3 dwellings does fit the "residential flat building" definition and these are also prohibited in R2 zones. Thus, the same argument made regarding multi-dwelling housing applies to residential flat buildings:

One of the aims of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARHSEPP) is "*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*."

Because the ARHSEPP doesn't apply, the application cannot receive any benefit from the policy. (*Katerinis v Canterbury-Bankstown* [3], [26] & [28])

The proposal at 22 Redman Rd Dee Why is for a 15-room new-generation style boarding house. It is therefore an apartment style form of housing and meets the criteria for residential flat building (having 3 or more dwellings).

Without the benefit of "expanded zoning permissibility" provided by the ARHSEPP, this type of apartment-style boarding house is prohibited in R2 zones under the WLEP 2011 and the development must be refused.

Accordingly, I have amended my earlier document with respect to multi-dwelling/residential flat housing and I wish this new document (dated 4 Feb 2020) to be used as my formal submission to the Court.

You will notice that the document refers to a number of different boarding house developments as many of the same arguments apply to other boarding house applications that are currently before the Land and Environment Court.

Nonetheless, the relevant sections for this LEC Appeal are easy to identify from the list of contents provided on the first page of my submission.

Sections (A) to (D) and Section (E) p. 17-20 are relevant for the LEC Proceeding No.2019/11472 for DA 2018/0304.