Sent:	7/12/2018 3:39:30 PM
Subject:	Submission for DA 2018/0419 60 Binalong Ave Allambie Heights
Attachments:	Scott DA20180419 binalong markup.pdf; PastedGraphic-10.tiff;

To the Development Assessment Officer,

Please find attached my objection to development application DA 2018/0419 for a boarding house at 60 Binalong Ave Allambie Heights.

I ask that it is posted to Council's website as a formal submission.

Yours faithfully,

Devasha Scott

Devasha Scott, PhD, BSc(H1M), BTeach

Dr Devasha Scott
30 Ramsay St
Collaroy 2097 NSW

7 December 2018

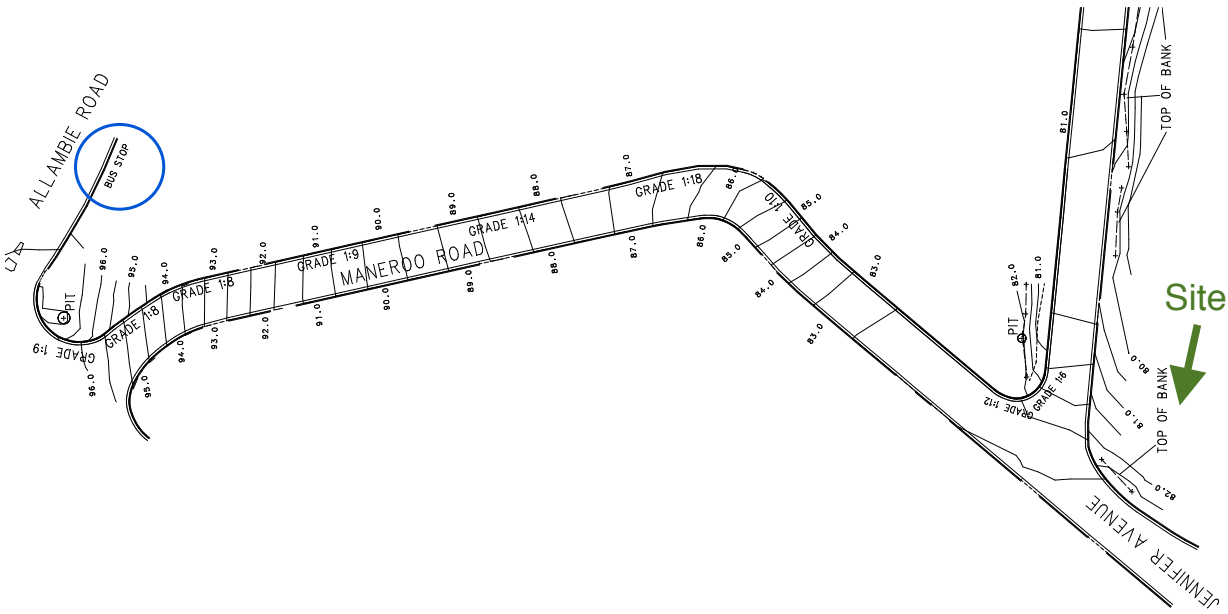
Attention: Daniel Milliken (Development Assessment Officer)
Cc: Peter Robinson (Executive Manager Development Assessment)
David Kerr (General Manager, Planning Place and Community)

Re: DA 2018/0419 60 Binalong Ave Allambie Heights

I wish to object to the proposed boarding house at 60 Binalong Ave Allambie Heights (DA 2018/0419), as I believe that the site is not suitable for this development and development consent should be refused under *Section 4.15(1)(c) – site suitability* of the *Environmental Planning and Assessment Act, 1992*.

It is readily apparent that persons in a wheelchair could not safely navigate the path between the subject site and the closest bus stops on Allambie Rd. The path contains sections that are too steep, some with significant cross-fall, that are not safe for wheelchair use.

Furthermore, I believe that the topography in this area would actually prohibit the construction of a safe and accessible pedestrian pathway between the site and the bus stop. (See survey plan below.)



Implicit in the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARHSEPP) is reliance upon the proximate and regular use of public transport. This is reflected in the parking concessions provided (0.5 per dwelling) in the policy. On the Northern Beaches a boarding house is required to be within 400m safe walking distance of a bus stop.

As such, under the ARHSEPP there is inherent reliance on the pedestrian pathway as a means to access the bus stop on Allambie Rd. I do not believe that access to the bus stop (or access to the local shops 1 km away from the site) is reasonable and appropriate for future boarding house residents, likely including seniors and those with lesser levels of mobility. Requiring the boarding house residents with limited mobility to use this path, likely on a daily basis and often multiple times during the day and/or night, I consider to be an unreasonable imposition.

In my understanding of disability legislation, it follows that it would be unlawful under the *Disability Discrimination Act, 1992* (DDA) to give development consent to a boarding house on this site; as it does not appear possible to provide a safe and *accessible* pedestrian pathway (an *accessway* compliant with AS 1428.1 2009) to the closest public transport stop.

Specifically:

- I believe that it would be unlawful under the **DDA section 6 – indirect discrimination** to expect a person with a disability (needing a wheelchair for example) to use this pathway, as it would amount to an imposition of an unreasonable requirement or condition.
- I also believe that it would be unreasonable to compel boarding house residents who require wheelchair access to the premises to have a car and use the accessible car space in lieu of pedestrian access. To require one resident to own/have a car because of their disability, and not require all other residents to have a car in order to access the premises, is to treat the person with a disability less favorably than other boarding house residents. I believe this is to be discriminatory and unlawful under the **DDA section 5 – direct discrimination**.
- To suggest that boarding house residents who require wheelchair access "find another boarding house with suitable and safe pedestrian access" amounts to limiting the occupancy of the boarding house and excluding persons with limited mobility from the premises – this would also be direct discrimination and unlawful under **DDA s.5.**
- I also believe that a consenting authority could be in breach of the DDA by virtue of section 122 (permitting an unlawful act) should consent be given to this development.

On the following pages I have provided more detail with specific reference to legislation. I have also included pertinent extracts from the Australian Human Rights Commission Publication *Federal Discrimination Law 2016*

https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016

Legislative evidence and legal reasoning

It is important to note that I do not hold myself out to be an expert in Planning or Disability Access. I have summarised below what I believe to be the relevant sections of the DDA and also made reference to pertinent extracts from the Australian Human Rights Commission Publication Federal Discrimination Law 2016.

https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016

(1) I note Clause A1.1 of *Disability (Access to Premises – Buildings) Standards 2010* includes the following definitions:

A1.1 Definitions

accessible means having features to enable use by people with a disability.

accessway means a continuous *accessible* path of travel (as defined in AS 1428.1) to, into or within a building.

(2) Under the *Disability Discrimination Act, 1992* (DDA) all new boarding house developments are required to be *accessible* and must satisfy requirements in

- *Disability (Access to Premises – Buildings) Standards 2010* (Premises Standards) and
- *Australian Standard (Design for Access and Mobility – General requirements for access – New building work)* (AS 1428.1 2009).

(3) As a result, appropriate access must be provided and the development must comply with Access Code. Accessways with suitable gradients, widths and surfaces (consistent with AS 1428.1 2009) must be provided to and from the building as well as throughout the premises.

State Environmental Planning Policy (Affordable Rental Housing) 2009

(4) The *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARHSEPP) requires public transport to be within prescribed safe walking distances for affordable housing. Clause 27 (2) states that the boarding house must be in an "*accessible area"* and Clause 4 includes the following definitions:

accessible area means land that is within:

(a) 800 metres walking distance of a public entrance to a railway station or a wharf from which a Sydney Ferries ferry service operates, or

(b) 400 metres walking distance of a public entrance to a light rail station or, in the case of a light rail station with no entrance, 400 metres walking distance of a platform of the light rail station, or

(c) 400 metres walking distance of a bus stop used by a regular bus service (within the meaning of the Passenger Transport Act 1990) that has at least one bus per hour servicing the bus stop between 06.00 and 21.00 each day from Monday to Friday (both days inclusive) and between 08.00 and 18.00 on each Saturday and Sunday.

walking distance *means the shortest distance between 2 points measured along a route that may be safely walked by a pedestrian using, as far as reasonably practicable, public footpaths and pedestrian crossings.*

(5) Implicit in the ARHSEPP is reliance upon the regular use public transport; this is reflected in the parking concessions provided (Clause 29 (2)(e) 0.5 per dwelling) in the policy. The pedestrian route to public transport needs also to be a safe walking distance.

(6) On the Northern Beaches, boarding houses must be within 400 m safe walking distance of a bus stop used by a regular bus service.

(7) Although not stated explicitly in the ARHSEPP, 'safely walked by a pedestrian' is necessarily inclusive of people with a disability.

Therefore, a person with limited mobility (requiring a wheelchair for example) must also be afforded *safe pedestrian access*.

(8) As such, I believe it would be discriminatory and therefore unlawful (under DDA s.5 and s.6) if a boarding house development does not allow safe access to the closest bus stop for people with a disability; by providing an *accessway* (complying with AS 1428.1 2009).

(9) Regarding what constitutes "safe access" and the application of Australian Standards as a benchmark for compliance – I note the following paragraph from the most recent edition of *Federal Discrimination Law 2016* (emphasis mine).

> *Baumann FM also considered the relevance of the Building Code of Australia ('BCA') and the Australian Standards. His Honour accepted the submission of the Acting Disability Discrimination Commissioner, appearing as amicus curiae, that 'as standards developed by technical experts in building, design and construction, the BCA and the Australian Standards are relevant and persuasive in determining ... whether or not a requirement or condition is "reasonable"'. His Honour accepted that the Australian Standards and the BCA were 'a minimum requirement which may not be enough, depending on the context of the case, to meet the legislative intent and objects of the DDA'.*
>
> *AHRC Federal Discrimination Law 2016 p 217*

(10) I also note that *Australian Standard (Design for Access and Mobility – General requirements for access – New building work) AS 1428.1 2009* specifies the maximum gradients for accessible walkways, ramps and landings.

It is noted that the maximum gradient for an accessible walkway is 1:20 and for interconnecting ramps (no longer than 1900mm) the maximum gradient is 1:14.

(Table C1 – Summary of specifications for walkways, ramps and landings)

FURTHER DETAIL

(11) DDA s.6 - Indirect discrimination

The imposition of an unreasonable requirement

I believe that requiring a person with limited mobility to use an "inaccessible" pathway to access public transport is discriminatory and therefore unlawful under *DDA section 6 - Indirect discrimination.*

The definition of indirect discrimination in section 6 of the DDA is as follows:

6 Indirect disability discrimination

. (1) For the purposes of this Act a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:

. (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

. (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and

. (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

. (2) For the purposes of this Act, a person (the ***discriminator***) also ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:

. (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

. (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and

. (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

. (3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

. (4) For the purpose of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

(12) Regarding the imposition of an unreasonable requirement or condition I note the following:

(i) The leading High Court decision on anti-discrimination legislation in *Waters v Public Transport Corporation [1991] HCA 49; (1992) 173 CLR F.C 91/038.*

(ii) In *Cooper v Holiday Coast Cinema Centres Pty Ltd* [1997] HREOCA 51, the complaint concerned the condition that patrons of a cinema access the premises by way of stairs. This was a condition with which the complainant, who used a wheelchair, could not comply.

(iii) I also note the excerpts from *AHRC Federal Discrimination Law 2016:*

5.2.3 Indirect discrimination under the DDA

ii) Imposition of the requirement or condition

Prior to the 2009 amendments to the DDA,[241] an aggrieved person was required to demonstrate that a requirement or condition was actually imposed upon them: it did not apply to requirements or conditions with which a discriminator *proposed* to require an aggrieved person to comply.

The definition of indirect discrimination now applies to requirements or conditions with which the discriminator 'requires or proposes to require' an aggrieved person to comply.[242] This is consistent with the approach taken in the SDA,[243] *Age Discrimination Act 2004* (Cth) ('ADA')[244] and the definition of direct discrimination in section 5 of the DDA.

An applicant does not necessarily need to show that the relevant requirement or condition was imposed or is proposed to be imposed by way of a positive act or statement. In *Waters*,[245] for instance, Mason CJ and Gaudron J noted that:

> compliance may be required even if the requirement or condition is not made explicit: it is sufficient if a requirement or condition is implicit in the conduct which is said to constitute discrimination.[246]

AHRC Federal Discrimination Law 2016 p203

(d) Inability to comply with a requirement or condition

Following the 2009 changes to the DDA, the definition of indirect discrimination in section 6(1) requires an aggrieved person to show that 'because of the disability, the aggrieved person does not or would not, is not able to or would not be able to comply' with the relevant requirement or condition.[265]

…In considering whether an aggrieved person is 'able to comply' with a requirement or condition, courts have emphasised the need to take a broad and liberal approach.[267] The relevant question would appear to be *not* whether the complainant can technically or physically comply with the relevant requirement or condition, but whether he or she would suffer 'serious disadvantage' in complying with the requirement or condition.[268]

AHRC Federal Discrimination Law 2016 p206

(13) DDA s.5 - Direct Discrimination

It has been suggested that the provision of an accessible carparking space may be a valid and reasonable *Alternative Solution* in lieu of suitable *accessible* pedestrian access to the premises.

(14) I disagree and note the following:

- Boarding houses containing more than 10 sole occupancy units (SOU's) must provide at least 2 accessible SOU's, but only require one accessible parking space.
- More significantly however, I believe that relying on an accessible car space as the *Alternative Solution* for access to the building, amounts to the imposition of a requirement for people with a disability (needing wheelchair access) that is not imposed upon other boarding house residents.

(15) **Less favorable treatment**

It would be discriminatory (and therefore unlawful under DDA s.5) to require that a person with a disability own a car in order to access the premises – because this involves treating a person with a disability less favorably than other boarding house residents.

Section 5 of the DDA defines 'direct' discrimination. It provides:

5 Direct disability discrimination

. (1) For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.

. (2) For the purposes of this Act, a person (the ***discriminator***) also ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
(a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and

(b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

(3) For the purposes of this section, circumstances are not ***materially different*** because of the fact that, because of the disability, the aggrieved person requires adjustments.

(16) I note the following excerpt from *AHRC Federal Discrimination Law 2016*:

> ### 5.2.2 Direct discrimination under the DDA
>
> **(i) Causation and intention**
>
> Those sections which make disability discrimination unlawful under the DDA provide that it is unlawful to discriminate against a person 'on the ground of' the person's disability'.[61]Section 5(1) of the DDA provides that discrimination occurs 'on the ground
>
> of' a disability where there is less favourable treatment 'because of' the aggrieved person's disability. It is well established that the expression 'because of' requires a causal connection between the disability and any less favourable treatment accorded to the aggrieved person. It does not, however, require an intention or motive to discriminate.
>
> *AHRC Federal Discrimination Law 2016 p178*

(17) As well as being unlawful under the DDA, such a requirement would be contrary to the intent and aims of the *ARHSEPP.* I note the comments provided in the minutes to the Northern Beaches Local Planning Panel 5 September 2018 for Item 3.7 on page 12:

> *"The aims of the SEPP include to provide a consistent planning regime for the provision of affordable rental housing and to facilitate the effective delivery of new affordable rental housing in various ways: cl 3. "New affordable rental housing" includes boarding houses: Part 2 Division 3. "Affordable housing" means "housing for very low income households, low income households or moderate income households" (as further defined in cl 6)."*

(18) Requiring that a boarding house resident owns (or has access to) a car in order to access the gain access to the boarding house, is also at odds with the required proximity to public transport and the significant parking space concessions afforded under the ARHSEPP.

Regarding placing limitations on the occupancy of the boarding house

(19) It is true that not all people with a disability require a wheelchair. It has been suggested that that people who require wheelchair access could simply chose to live elsewhere if the pedestrian pathway is too steep for wheelchair access.

This line of argument leads to limiting the occupancy of a boarding house to persons not requiring wheelchair access.

(20) I believe that imposing a condition that places limitations on the occupancy of a boarding house to able-bodied people would be an *unreasonable* condition (and unlawful under DDA s.5).

(21) I note at [44] in *Gray v Sutherland Shire Council [2015] NSWLEC 1102,* Morris C refers to the reasonableness of the imposition of conditions for proposed limitations on occupancy of a boarding house application sought under the *State Environmental Planning Policy (Affordable Rental Housing) 2009*.

It is noted that the reasonableness of the proposed condition must have regard to the tests in *Newbury Council v Secretary of State for the Environment NDSC [1981] [AC578].* At [45] Morris C states

> *The ability of a consent authority to impose conditions is found at s80A of the Environmental Planning and Assessment Act 1979 (EP&A Act 1979). The tests in Newbury require a condition to be for a planning purpose, to relate to the permitted development and to be not so unreasonable that no reasonable planning authority would impose it.*

(22) Hence, based on paragraphs (1) to (21) above, it is my belief that the provision of a pedestrian *accessway* (compliant with AS 1428.1 2009) between a boarding house and public transport is a requirement, not an option.

(23) To my mind, it follows that: if the site for a proposed boarding house does not allow safe pedestrian access (including wheelchair access) from the premises to a transport stop; then quite simply, the site is unsuitable for a boarding house development and it should be refused outright on these grounds alone.

Specifically, development consent should be refused under *Section 4.15(1)(c) – site suitability* of the *Environmental Planning and Assessment Act, 1992*.

Regarding a Council's liability under the *DDA s122*

(24) From my understanding of the legislation, it follows that a consenting authority could be in breach of the DDA by virtue of section 122 (permitting an unlawful act) should consent be given to this development.

(25) I note that the most recent edition of *AHRC Federal Discrimination Law 2016* refers to *Cooper v HREOC* in *Section 5.4 – Ancillary Liability*:

5.4.2 Permitting an unlawful act

Section 122 of the DDA provides for liability of persons involved in unlawful acts otherwise than as the principal discriminator, as follows:

122 Liability of persons involved in unlawful acts

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1, 2, 2A or 3 of Part 2 is, for the purposes of this Act, taken also to have done the act.

In Cooper v Human Rights and Equal Opportunity Commission,[658] the applicant alleged that the Coffs Harbour City Council ('the Council') was in breach of the DDA by virtue of section 122, for having allowed the redevelopment of a cinema complex without requiring that wheelchair access be incorporated as part of the redevelopment.

… On remittal, the Council was found to be liable under section 122 for having approved the redevelopment without wheelchair access.[669]

AHRC Federal Discrimination Law 2016 p260-261

Regarding the defense of unjustifiable hardship (DDA section 11)

(26) I do not believe that DDA section 11 provides for the use the defense of unjustifiable hardship in this instance.

I note that Section 5.5.1 Unjustifiable Hardship (pages 262 – 267) in in *AHRC Federal Discrimination Law 2016* covers the application of **DDA section 11 – Unjustifiable hardship**

(27) I also note the following excerpt from the website of the Anti-Discrimination Board of NSW:

http://www.antidiscrimination.justice.nsw.gov.au/service-providers/anti-discrimination-law-and-service-providers

Building access and 'unjustifiable hardship'

- Steps and slippery floors can make it difficult for customers with mobility difficulties to access buildings.
- All buildings that people need to access to get to a service, including transport, must generally be accessible, for example by providing ramps, lifts or car spaces for people with disabilities. This is the case unless it would cause the service provider or building owner 'unjustifiable hardship' to make the building accessible.
- In deciding whether a modification would cause 'unjustifiable hardship', the service provider or building owner must take into account the benefit that customers would generally receive if the access was improved. For example, ramps may benefit people with mobility difficulties or prams as well as people using wheelchairs.
- In many instances, small or less costly changes will improve accessibility without causing 'unjustifiable hardship'. In these cases, the changes should be made. At the very least, major service providers should have plans for how they are going to make their service accessible in the future.
- In general, the cost of making new buildings or services accessible from the start will be lower than the cost of remodelling old buildings. So it will probably be harder for the owner of a new building or service to prove 'unjustifiable hardship'.

(28) If the site for a proposed boarding house is in an area that cannot provide safe equitable access to public transport (by virtue of the topography) then, quite simply, another site must be chosen for the boarding house.