
MM8/17 FERNLEIGH / OPAL RESIDENTIAL CARE FACILITY MONS AVENUE - LEGAL APPEAL - The Mayor, Councillor Bill Pickering

File Number: MYR/07/10/20 - BP17/692

I have received representations from local residents, requesting that Council appeal (on legal grounds) the decision of the Land and Environment Court in approving LDA 2014/0491 – Fernleigh / Opal Residential Care Facility at Sherbrooke Road and Mons Ave West Ryde.

A copy of the representations forwarded by local residents and also the legal opinion obtained by the residents supporting their request are attached.

Legal advice from Council's General Counsel will be made available to Councillors at the Council meeting.

RECOMMENDATION:

That Council consider the email and legal advice provided by opponents of the Opal residential care facility at 8-14 Sherbrooke Road and 78-82 Mons Avenue, West Ryde and make a determination to proceed or otherwise with an appeal against the decision of the Land and Environment Court.

ATTACHMENTS

- 1 Email to Mayor Pickering by Jane Walsh - Fernleigh Application and legal advice

Report Prepared By:



**Councillor Bill Pickering
The Mayor**

MM8/17 (continued)

ATTACHMENT 1

Linda Smith

From: Jayne Walsh <jayne.walsh@designlogic.com.au>
Sent: Friday, 23 June 2017 10:31 AM
To: The Mayor
Cc: Peter Holt; Linda Smith
Subject: TRIM: Opal Fernleigh | Appeal
Attachments: Letter to Ryde City Council dated 22.06.2017.pdf

Importance: High

Dear Mayor,

Thank you for your email previously on the 10th of February this year regarding the Opal Development. We were sorry to hear that Council decided not to appeal the decision of Justice Robson as to the preliminary question of law in the matter of the Opal residential care facility at 8-14 Sherbrooke Road and 78-82 Mons Avenue, West Ryde .

I am now writing to you again, on behalf of our community, regarding this development. We request Council to appeal the most recent decision and attach legal advice as to why.

We need for this matter to be added as an agenda item at the upcoming Council meeting next week to provide Councillors the opportunity to vote on this matter and I have been advised that you, as the Mayor have the ability to do this via a Mayoral Minute. We sincerely request for you to add this matter to the agenda and look forward to your reply.

I appreciate in your last mail you noted that Council will continue to defend its position and that Council believes the application should be refused on the basis of the inadequate location, design and impacts. All of these issues still remain and as mentioned we have obtained legal advice as outlined below that needs to be considered by council before it is too late.

I appreciate it is late notice, we ourselves have not been provided much time to pull this information together and hope that can be taken into consideration. Can you **please review the attached letter and my email below to Councils Legal Counsel Paul Kapetas**. July's meeting will be too late as the appeal window will have closed and would result in our community being denied a review of the legal errors highlighted.

Many thanks in advance for your time and support of our community, your community.

Kind regards,

Jayne

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MM8/17 (continued)

ATTACHMENT 1



22 June 2017

General Manager and Councillors
Council of the City of Ryde
Locked Bag 2069
North Ryde NSW 1670

Special Counsel Peter Holt
Direct Line (02) 8083 0421
Email Peter.Holt@holdingredlich.com
Our Ref PJH 17740016

By email cityofryde@ryde.nsw.gov.au

Dear General Manager

Re: Fernleigh Residential Aged Care Facility, West Ryde

We act on behalf of a number of residents who have objected to the Fernleigh Residential Care Facility at West Ryde which was approved by the Land and Environment Court of New South Wales (**the Court**) on 23 May 2017.

The relevant development application (LDA2014/0491) was recommended for refusal by Ryde City Council (**Council**) and was subsequently refused by the Sydney East Joint Regional Planning Panel on 29 July 2015. In response to the refusal the applicant appealed to the Court. The Council also subsequently passed two unanimous resolutions (dated 24 May 2016 and 28 June 2016) to seek to defend the refusal in the Court.

Objectors were advised on 24 April 2017 that the matters had been listed for hearing on 22-23 May 2017 commencing on site at 9:30 am on 22 May 2017. On 12 May 2017, five business days prior to the hearing date, the objectors were advised that on the basis of amended plans Council was now of the opinion that the proposed development was acceptable and that consent orders could be granted.

The objectors have confirmed that the amended plans were the same plans that were relied on in 2015 when the application had been recommended for refusal.

The objectors sought a copy of the joint experts report. A copy of that report was provided on 17 May 2017, three business days before the hearing.

The late notice of the decision to proceed to a consent orders hearing and the late provision of crucial information effectively denied the objector's an opportunity to seek to be joined as a party to the proceedings and adduce additional evidence of the impacts of the proposed development.

On 23 May 2017 the Commissioner handed down his decision granting consent to the application on the basis of the consent orders and the experts' report.

The objectors had specific concerns around a number of matters, including that the driveway providing access to the rear of the development was narrower than those required by the relevant guidelines and that in the event of an emergency at the facility it will be difficult for Fire & Rescue NSW to access the

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rear of the site to evacuate residents. These matters were only addressed in a very general way as part of the Commissioner's decision.

Council can appeal the Commissioner's decision on a question of law

Council would be aware that as a party to proceedings it has the ability to appeal against the decision of the Commissioner on a question of law (section 56A of the *Land and Environment Court Act 1979*). Any such appeal must be commenced within 60 days of the decision.

We have had an opportunity to review the Commission's decision and the relevant background material.

The assessment of the application gives rise to a number of legal issues around the operation of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors Housing SEPP)* which have not been previously considered by the Court.

Please see the summary below. A more detailed explanation is provided after the summary.

Summary

An appeal can be sustained on the basis of two errors of law. These are:

- (a) The application should have been assessed on the basis that it was for a residential care facility. In assessing the application as a 'high care' residential care facility the experts fell into error. Also in seeking to limit the scope of the development to a 'high care' residential care facility, conditions were imposed to restrict the use to only residents that require high level care. By imposing those conditions, the consent authority significantly altered the development for which consent was sought, something which it is not allowed to do.
- (b) In circumstances where residential care facilities are permitted with consent on land zoned primarily for an urban purpose under the Ryde Local Environmental Plan (2014)(**Ryde LEP**) there is no inconsistency between the Ryde LEP and the Seniors Housing SEPP. The application should have been assessed having regard to the relevant controls in the Ryde LEP and not by reference to the Seniors Housing SEPP.

Characterising the application as a 'high care' residential care facility

The Seniors Housing SEPP was introduced to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age.

The application was lodged on the basis that it was for an 'aged care facility'. During the assessment the applicant sought to characterise the development as a 'high care' residential care facility relying on a now superseded distinction that existed under the *Aged Care Act 1997* (Cth) until July 2014.

By arguing that the application was for a 'high care' residential aged care facility the applicant was able to make the case that the requirements in the Seniors Housing SEPP relating to location, access to facilities and public transport could be varied on the basis that residents of the facility would be too frail to access off site services.

The task of a consent authority is to assess the development the subject of an application, having regard to the impacts of that development. Here concerns about who can use the facility are sought to be addressed through conditions of consent that would restrict the use to only residents that require high level care.

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In seeking to impose this condition the consent authority is seeking to significantly alter the development for which consent was sought, something that it is not allowed to do (*Carr v Minister for Land and Water Conservation* (2000) 109 LGERA 175).

Our view is that if the application had been assessed on the basis that it was for a residential care facility rather than as a 'high care' residential care facility, the outcome would have been to refuse the application.

The result of this approach to characterising the development as a 'high care' residential aged care facility is that the facility will be located on a hill, without a suitable access pathway to public transport and away from services, facilities and public transport.

Operation of the Seniors Housing SEPP where that development is permitted with consent

The Seniors Housing SEPP allows development consent to be granted for all forms of seniors housing (which includes residential care facilities) on land zoned primarily for urban purposes notwithstanding that the development was otherwise prohibited by the Council's local environmental plan (LEP).

In circumstances where the proposed development is permitted with consent in the relevant zone, there is no inconsistency between the LEP and the Seniors Housing SEPP and the Seniors Housing SEPP cannot be relied upon to overcome restrictions in the LEP.

Controls in the Seniors Housing SEPP were designed to ensure that these developments were located on suitable sites, close to facilities like shops, banks and medical practitioners and close to public transport.

The controls also recognised that notwithstanding the prohibition in the LEP, provided the sites were well located and had access to facilities and public transport, they could be larger in terms of the allowable height and floor space ratio than would be otherwise allowed under the LEP.

As part of the roll-out of the Standard Instrument Local Environmental Plan, Councils were required to make senior housing permitted with consent in certain zones. That was done on the basis that having included all forms of seniors housing as permitted with consent, that use should be determined having regard to the appropriate controls in the LEP. It was only where those uses were prohibited that the Seniors Housing SEPP had work to do.

What happened in this case was that notwithstanding the fact that residential care facilities were permitted with consent in the R2 Low Density Residential Zone, the applicant was able to argue that it should be allowed to rely on the controls under the Seniors Housing SEPP.

Whether or not an environment planning instrument is inconsistent with another environmental planning instrument should only be found as a last resort, where the inconsistencies are irreconcilable (see for example *Baker v Gosford City Council* [2004] NSWLEC 167).

We would argue that the Seniors Housing SEPP is not a 'code' for the assessment of applications for seniors housing, and that in circumstances where the proposed development is permitted with consent on land zoned primarily for an urban purpose, the LEP and the Seniors Housing SEPP should be read in such a way that there is no inconsistency and so that that the Seniors Housing SEPP does not apply to the proposed development.

Other issues relating to the application

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There are a number of other consequences that flow from what we say is the incorrect application of the Seniors Housing SEPP and from the failure to put the relevant material before the Court. These are that the development will result in:

- (a) a facility that is inconsistent with the objects of the *Environmental Planning and Assessment Act 1979* around the promotion and co-ordination of the orderly and economic use and development of land and the sharing of responsibilities between different levels of government;
- (b) a facility that is inconsistent with objects of the Seniors Housing SEPP around creating opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age;
- (c) a poorly located facility without ready access to services and public transport;
- (d) a facility where spouses or other family members cannot live with their loved ones;
- (e) a development that does not recognise the desirable elements of the location's current character;
- (f) a building with a floor space ratio of almost twice that which would otherwise be allowed in a low density residential zone; and
- (g) a secondary access to the rear of the building that is not wide enough to allow access by a fire truck in the event of an emergency.

In summary, we believe there are at least two basis on which the decision can be challenged and that the Council should lodge an appeal on or before 24 July 2017 to seek to maintain the integrity of the planning provisions in the Ryde LEP and the Seniors Housing SEPP.

We would ask for an opportunity for a meeting at your earliest convenience to discuss the contents of this letter. We understand that in order for the deadline for an appeal to be met, Council will need to meet to determine whether to pursue the appeal at its next meeting set down for 27 June 2017.

Yours faithfully


Holding-Redlich

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