

# MinterEllison

31 January 2018

## BY ONLINE SUBMISSION AND EXPRESS POST

The Director  
Planning Frameworks  
NSW Department of Planning and Environment  
GPO Box 39  
SYDNEY NSW 2001

Dear Sir/Madam

### **Explanation of Intended Effect for *State Environmental Planning Policy (Environment) (SEPP Environment)*: Housing for Seniors**

#### **1. Introduction**

- 1.1 We refer to the Explanation of Intended Effect in respect of the *Draft State Environmental Planning Policy (Environment) (EIE)* published by the Department of Planning and Environment in October 2017.
- 1.2 We act for a number of developers of aged care and disability housing facilities in NSW.
- 1.3 The purpose of this submission is to respond to the proposed restrictions on Site Compatibility Certificates under the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors)* as contemplated by the EIE.

#### **2. Summary**

- 2.1 In August 2017, we made a submission to the Department of Planning identifying an issue with the *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011 (Drinking Water SEPP)*. In summary, our submission was that the Drinking Water SEPP may operate to displace the operation of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors Housing SEPP)* in its entirety. A copy of that submission is provided at Annexure A.
- 2.2 It is of great concern that EIE now proposes to prohibit Site Compatibility Certificates on land "*adjoining land zoned primarily for urban purposes*" identified as a drinking water catchment. The practical effect of the EIE (if enacted) would be a blanket prohibition on seniors living development in urban fringes in areas such as Wollondilly, Goulburn, and the Southern Highlands with no identifiable planning or environmental benefit.
- 2.3 We have proposed an alternative solution at part 5 of this letter which would permit Site Compatibility Certificates to be issued on land on urban fringes, subject to the Director-General being satisfied that carrying out of the proposed development "*would have a neutral or beneficial effect on water quality*" under the relevant assessment regime.

#### **3. Our submission dated August 2017**

- 3.1 On 1 August 2017, we made a submission to the Secretary of the Department of Planning and Environment in relation to the potential conflict between the Drinking Water SEPP and the Seniors Housing SEPP. The letter provided in summary:

*"The Drinking Water SEPP identifies a very broad area as the "Sydney Drinking Water Catchment" area. The area covers an enormous area including the Blue Mountains,*



Wollondilly, parts of Wollongong, the Southern Highlands, and as far south as the NSW snowfields. In our view, the Sydney Drinking Water Catchment is land that is identified in another environmental planning instrument as a water catchment and therefore the Seniors Housing SEPP does not apply within the Sydney Drinking Water Catchment area.

In our view, the displacement of the Seniors Housing SEPP by the Drinking Water SEPP is an odd result that could not have been the intention of the draftsman. The reasons include:

- (i) *it is the intention of the Seniors Housing SEPP to prevail over local planning controls. There are a number of 'water catchments' referred to in local environmental plans in NSW which tend to be environmentally sensitive areas, remote from urban areas.*
- (ii) *within the Sydney Drinking Water Catchment, towns and cities such as Wollongong, Bowral and Goulburn are located, which are ideally suited to development for seniors and those with a disability;*
- (iii) *the aim of the Drinking Water SEPP is to ensure that development in the catchment area will have a "neutral or beneficial effect on water quality". It is not to prohibit any type of urban development. Indeed, other types of urban development are permitted in the Drinking Water Catchment, as are more destructive activities such as coal mines, quarries, industries, designated development and other types of offensive or intrusive development."*

3.2 Our letter also contained a proposed solution at section 7 to limit the definition of "environmentally sensitive land" to a "water catchment as identified in a local environment plan."

3.3 A full copy of our letter is provided at Annexure A to this letter and we recommend it is reviewed in full.

#### 4. Issues with the EIE

4.1 We assume that the Department agreed with the key findings in our letter dated 1 August 2017.

4.2 Page 11 of the EIE provides as follows:

*"Stakeholders have sought clarification regarding the interpretation of 'environmentally sensitive land' as it applies to 'water catchments'. To remove doubt, it is proposed that the term 'water catchment' be removed from Schedule 1 of SEPP (Seniors). This will allow development applications for seniors housing and housing for people with a disability to be assessed under SEPP (Seniors) if located on land zoned primarily for urban purposes and in a water catchment, including a drinking water catchment.*

4.3 However, in order to address this issue, the EIE goes further and proposes:

*"To ensure there are safeguards to protect water catchment and drinking water catchment values in these areas, it is proposed to:*

- ***not allow the Site Compatibility Certificate process to be used for proposals on land adjoining land zoned for urban purposes and identified as a 'water catchment' (or a drinking water catchment) in an environmental planning instrument.***
- *ensure that referral, concurrence and assessment requirements in other Environmental Planning Instruments and legislation will continue to apply to proposals assessed under the SEPP (Seniors). This includes the application of the NorBE tool in relation to Sydney drinking water catchment."*

(emphasis added).

4.4 In our view, this position goes too far and sterilises large swathes of land in NSW for no identifiable planning or environmental benefit.

4.5 The particular issues we have identified with this proposal are as follows:

- (a) we are not aware of any evidence or good planning reason why seniors housing developments ought to be prohibited on urban fringes in the Sydney Drinking Water Catchment Area. We note that (subject to the satisfaction of the "neutral or beneficial effect" or NorBE test) highly intrusive development is permissible in these areas, for example, coal mining, industries, extractive industries, designated development and other types of offensive or hazardous development;

- (b) from the perspective of impacts on water quality, development for seniors housing is far more desirable than some other permissible land uses referred to above;
  - (c) one of the key provisions of the SEPP Seniors is that it applies to land which "*adjoins land zoned primarily for urban purposes*". There are existing protections under clause 4(1) which means the instrument only applies to land where the following development is permissible: dwelling houses, hospitals, registered clubs, schools, and other special uses. This limits the area on which seniors housing can be carried out. In our view, this is an adequate protection. The proposal in the EIE ignores these provisions;
  - (d) such a proposal would sterilise from the operation of the Seniors SEPP land that is otherwise well located and well suited to seniors housing including in towns and cities such as Moss Vale, Bowral, Goulburn, Mittagong, and other parts of the Southern Highlands. These are the areas in NSW where seniors housing is most necessary due to the high percentages of aged residence comparative to the State and National averages; and the life style benefits of these areas. Seniors housing should be encouraged in these areas where it satisfies the relevant controls and the merits test under the Environmental Planning and Assessment Act 1979 (**EP&A Act**);
  - (e) the sterilisation of land in this area would continue to play upward pressure on some dwelling prices and limit the ability of these areas to sustain a growing and ageing population; and
  - (f) it is entirely possible that a well-designed seniors housing development with appropriate environmental controls can comply with the operative provisions of the Drinking Water SEPP: that is, to have a "*neutral or beneficial impact on water quality*." It would therefore make little sense to prohibit development of this nature.
  - (g) providing Seniors Housing in peri-urban areas, inclusive of a range of densities and the incorporation of open space for recreation, provides a gradation of development from urban to rural and/or environmental, resulting in positive land use outcomes that should be encouraged.
- 4.6 It follows that seniors living developments ought to be permissible on urban fringes in the Sydney drinking water catchment area, subject to the satisfaction of the appropriate merits test, including (ultimately) a merits test under section 79C of the EP&A Act. The proposal in the EIE prejudices such a merit test.

## 5. Our suggested approach

- 5.1 Notwithstanding our suggested solution in our letter dated 1 August 2017, we are of the view that there may be another alternative solution to solve the issues identified above.
- 5.2 A Site Compatibility Certificate should be available for seniors housing where the proponent has successfully undergone the referral, concurrence and assessment requirements including the application of the NorBE tool in the Sydney drinking water catchment and satisfied the Director-General that the proposed development would have a "*neutral or beneficial impact on water quality*."
- 5.3 Whilst this may force a developer to undergo a more detailed design process prior to lodging an application for a Site Compatibility Certificate, we think this position is far more preferable to a blanket prohibition of this type of development in the Sydney Drinking water catchment area. It would also simply bring forward an obligation that would need to be satisfied at the development application stage.
- 5.4 The advantage of this approach would be to ensure that seniors living developments are permissible where they satisfy the NorBE test.

Please contact us if you have any questions with respect to this letter.

Yours faithfully  
MinterEllison



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