Case Note: Seniors Housing and Land identified as Biodiversity under the Standard Instrument

In *Rosewood Australia Pty Ltd v Ku-ring-gai Council* the Land and Environment Court considered the meaning of the expression “environment protection” in schedule 1 of the *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004* (“Seniors SEPP”).

Rosewood Australia appealed against Ku-ring-gai Council’s deemed refusal of the construction of a seniors living development on a site zoned R2 low density residential under *Ku-ring-gai Local Environmental Plan 2015* (“LEP 2015”). Residential care facilities were prohibited in the R2 zone, but were permissible if the Seniors SEPP applied to the land.

Council contended that identification of the land as “biodiversity” on the Terrestrial Biodiversity Map under LEP 2015 excluded the land from the Seniors SEPP by operation of schedule 1 of the SEPP. The outcome of that question was determinative of the appeal as the Council did not raise any issues of merit warranting refusal.

**Seniors SEPP Land Exclusions**

Clause 4(6) of the Seniors SEPP provides that the SEPP does not apply to land identified in schedule 1 of the SEPP. Schedule 1 is titled “environmentally sensitive land” and includes “land identified in another environmental planning instrument by any of the following descriptions or by like descriptions or by descriptions that incorporate any of the following words or expressions”. One of the descriptions listed in the schedule is “environment protection”.

The applicant contended that protection in the context of environment protection is concerned with conservation or protection and that the word biodiversity, as used in LEP 2015, was merely identifying the land as having a potential attribute.

The applicant further submitted that the function of clause 6.3 of LEP 2015 was to establish an assessment procedure which did not “posit a circumstance of the environment necessarily requiring protection”, which was evidenced by the use of the word “any” throughout the clause.

The Council submitted that the descriptors used in Schedule 1 of the Seniors SEPP combine both planning and physical characteristics of land.

**Court Decision**

Schedule 1 of the Seniors SEPP requires land to be identified by either the listed descriptions in the schedule, by like descriptions or by descriptions that incorporate any of the words or expressions in the schedule.
Robson J of the Court found that the identification of the land as “biodiversity” in LEP 2015 did not equate to “environment protection”. Identification of the site on the Terrestrial Biodiversity Map in LEP 2015 merely identifies the land as having a biodiversity attribute. The term “biodiversity” cannot be said to be a like description for “environment protection”, “conservation” or “critical habitat”.

The Court considered that the concept of environment protection, by the adjectival use of environment, is concerned with conserving and protecting, whereas biodiversity simply identifies land as having a particular or potential attribute. The Court held the site was not identified in terms appearing in schedule 1 of the Seniors SEPP and the SEPP applied to the site.

The applicant could rely upon the operation of the Seniors SEPP for permissibility. The development was not prohibited by reason of part of the site being mapped as biodiversity under LEP 2015. That finding was determinative of the appeal, the Council having not raised any issues of merit warranting refusal of the application. The Court granted development consent to the development application.

This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact Planning Law Solutions.

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