

RE: 43 BEANE STREET PTY LIMITED:

GOSFORD DEVELOPMENT

ADVICE

Mills Oakley
Lawyers
Level 7
151 Clarence Street
Sydney NSW 2000

Attention: Matt Sonter

43 BEANE STREET PTY LIMITED:**GOSFORD DEVELOPMENT****ADVICE**

1. 43 Beane Street Pty Limited (**the Company**) has lodged State significant development application SSD 83538214 (**the SSDA**) seeking consent for the development of a parcel of land comprising properties at 43-45 Beane Street and 2 Keevers Lane, Gosford (together, **the Site**). By its SSDA, the Company seeks to develop the Site by the erection of a part 5 storey and part 26 storey building intended as a “mixed used” development.
2. The ground floor of the building is intended for commercial use while the upper floors are intended to accommodate 138 apartments, with three basement levels for carparking. A proportion of the apartments are intended for use as “affordable housing”.
3. As presently proposed, the 26-storey building will have a height of 85.3m. The floor space ratio (**FSR**) of the building is said to be 6.06:1.
4. To achieve the 26-storey height, the Company seeks to invoke the provisions of Ch 5 of State Environmental Planning Policy (Precincts – Regional) 2021 (**the Regional SEPP**). To achieve the FSR proposed, the Company relies upon the provisions of Pt 2 of Ch 2 of State Environmental Planning Policy (Housing) 2021 (**the Housing SEPP**).
5. A question has been raised by the Department of Planning, Housing and Infrastructure (**the DPHI**) as to whether it is open to the consent authority to apply the provisions of each of the identified SEPPs in the manner proposed in order to render the development proposed in the SSDA permissible development. In particular, assuming the height proposed is

permissible under the Regional SEPP, the use of the provisions of the Housing SEPP to achieve the proposed FSR is challenged. In substance, I am asked to advise whether the challenged use of the Housing SEPP to achieve the proposed FSR is, in the circumstances, legally correct.

6. For the reasons that follow, properly applying the provisions of Ch 2 Pt 2 Div 1 of the Housing SEPP, in my opinion a calculation of exceedances in height and FSR allowed by that Policy that are greater than those achievable by applying the provisions of the Regional SEPP to the same development will result in the Housing SEPP calculation prevailing to the extent of inconsistency between the two instruments. There is no inconsistency between the two instruments as to height with the consequence that it is open to the consent authority to consent to the height of the building as proposed in the SSDA.

Recent planning history of the ‘Gosford City Centre’: the Regional SEPP

7. Prior to 12 October 2018, provisions imposing planning controls for land identified as the ‘Gosford City Centre’ were those found in Gosford Local Environmental Plan 2014 (**the LEP**). By operation of Sch 3 to State Environmental Planning Policy (Gosford City Centre) 2018 (**the Gosford SEPP**), the LEP ceased to apply to the land identified as being the “City Centre”, with that Policy providing a separate body of “local” planning controls directed to development of land identified as being within that Centre.
8. On 2 December 2021, the Regional SEPP was published on the NSW legislation website. Chapter 5 of that SEPP is headed “Gosford city centre” (sic). Schedule 11 to that instrument repealed the Gosford SEPP, resulting in the provisions of Ch 5 of the Regional SEPP becoming the primary source of planning controls upon development in the Centre. The provisions of the Regional SEPP commenced on 1 March 2022: s 2.

9. The Site is located within the area identified as “City Centre” in the Land Application Map adopted by Ch 5 of the Policy. It is shown on the Land Zoning Map to be within the B4 – Mixed Use zone. According to the Land Use Table for that zone, development for the purpose of “shop top housing” is permissible with development consent. The term “shop top housing” is defined in Sch 10 of the Regional SEPP to mean “one or more dwellings located above ground floor retail premises or business premises”. Having regard to the definition of “business premises” in Sch 10, I will assume that the commercial purpose intended for ground floor use of the building proposed in the SSDA will comprehend the uses engaging the “business premises” definition.
10. As I have already recorded, the proposed building use above ground floor level is for “dwellings” in the form of self-contained apartments. Given the uses intended for the proposed building, collectively they constitute a permissible use for the purpose of “shop top housing”.

The applicable development standards under the Regional SEPP

11. For present purposes, the relevant provisions of Ch 5 of the Regional SEPP are those directed to controls upon building height and FSR. Part 5.5 of Ch 5 is headed “Principal development standards”. Section 5.25, found in that Part, provides that the height of a building on any land in the Centre is not to exceed the maximum height shown for the land on the “Height of Buildings Map”. That Map shows the height limit for the Site to be 48 metres.
12. Section 5.26, also in Pt 5.5, requires that the maximum FSR for a building on “any land” is not to exceed that shown on the “Floor Space Ratio Map”. That Map shows a maximum FSR of 4.75:1 applicable to the Site.
13. Section 5.28 is headed “Exceptions to development standards”. Its provisions are similar to those found in cl 4.6 of the Standard Instrument – Local Environmental Plan. Section 5.28(2) authorises, “subject to this section”, the grant of consent “even though the development would

contravene a development standard imposed by this or any other environmental planning instrument”. The subsection excludes its application to a development standard “that is expressly excluded from the operation of this section”.

14. Like cl 4.6 of the Standard Instrument, s 5.28(3) requires that consent not be granted to development contravening a development standard unless the applicant for consent has demonstrated to the satisfaction of the consent authority that –
 - (a) compliance with the standard is “unreasonable or unnecessary”, and
 - (b) “there are sufficient environmental planning grounds to justify the contravention of the development standard”.

Considered in isolation, the provisions of s 5.28 provide a legal basis upon which the consent authority could grant consent to the SSDA with its contravention of the height and FSR standards, on the assumption that the requirements of s 5.28(3) are satisfied. However, the provision cannot be considered in isolation from other provisions of the instrument.

15. As I have recorded, Ch 5 of the Regional SEPP is headed “Gosford city centre”, with the land to which the Chapter applies being identified in s 5.2 by reference to the Land Application Map. Curiously, Pt 5.8 of the Chapter is headed “Gosford City Centre” (sic), without any provision that differentiates the land to which the Part applies from that identified in s 5.2. The heading to that Part seems to add nothing to the way in which the provisions of the Chapter or the Part are to be interpreted (cf s35(1)(a) of the *Interpretation Act 1987*).
16. Section 5.46, within Pt 5.8 of Ch 5, is expressed in subsection (1) to apply to land in the B3 Commercial Core, B4 Mixed Use and B6 Enterprise Corridor zones, as identified in that instrument. By subsection (2), discretion is afforded to a consent authority to consent to a building that exceeds the FSR shown for the land on the FSR Map if –

- “(a) the site area of the development is less than 2,800 square metres or the building has a street frontage of 36 metres or less, and
- (b) the floor space ratio does not exceed the ratio calculated in accordance with $2 + (X \times 0.02):1$, where X is the percentage of the gross floor area of the building that is used for a purpose other than residential purposes.”

I am instructed that the proposed building will have a street frontage of 36m and so paragraph (a) of the subsection is engaged. While I have not been provided with the calculation by reference to the formula in subsection (2)(b), I will assume that the calculation does not result in the proposed FSR of 6.06:1. On that assumption, s 5.46(2) is not engaged as both paragraphs (a) and (b) are required to be satisfied in order for the subsection to have effect.

17. Subsection (3) of s 5.46 allows consent to be granted to the erection of a building on land to which the section applies, if that building exceeds the maximum height shown for the land on the Height of Buildings Map –

“... by an amount to be determined by the consent authority, if

- (a) the site area of the development is at least 2,800 square metres but less than 5,600 square metres or the building will have a street frontage of at least 36 metres, and
- (b) a design review panel reviews the development, and
- (c) the consent authority takes into account the findings of the design review panel, and
- (d) the consent authority is satisfied with the amount of floor space that will be provided for the purpose of commercial premises, and
- (e) the consent authority is satisfied that the building meets or exceeds minimum building sustainability and environmental performance standards.” (Added emphasis.)

18. As the SSDA proposes a building that, on the assumptions I am asked to make, has a street frontage of 36 metres, the height of the building proposed will be permissible under the subsection, if the matters in paragraphs (b)-(e) are found to be satisfied.

19. Subsection (4) of s 5.46 identifies further criteria that, if met, affords a discretion on the part of a consent authority to consent to a building that exceeds both the height and FSR standards fixed by ss 5.26 and 5.27 to which I have earlier referred. However, the operation of that subsection is limited in its application to sites with a minimum area of 5,600m². As the subject Site has an area of 2,070.2m², the subsection does not avail consent to the SSDA.
20. Subsection (5) of s 5.46 is critical for present purposes. The section provides:
- “(5) Despite any other provision of this Chapter and **except as otherwise provided by this section**, development on land to which this section applies on a site having an area of 2,800 square metres or more or a street frontage of 36 metres or more (or both) must not result in either or both of the following –
- (a) a building with a height that exceeds the maximum height shown for the land on the Height of Buildings Map,
- (b) a building with a floor space ratio that exceeds the floor space ratio shown for the land on the Floor Space Ratio Map.” (Added emphasis)
21. Assuming the matters identified in paragraphs (b)-(e) of s 5.46(3) are appropriately addressed by the consent authority, consent to a building to the height proposed by the Company would be permissible on the Site with consent, as that would engage the exception expressed in the opening paragraph of s 5.46(5). However, as the proposed exceedance of FSR is not sanctioned by subsection (2) of the section, subsection (5) would proscribe the grant of consent to the proposed building because of the proposed FSR. I add that as subsection (5) is expressed to operate despite any other provision of Ch 5, the exception to the application of development standards expressed in s 5.28 of that Chapter would not avail a development applicant, such as the Company, for land within the B4 zone.
22. It is relevant to notice that the proscription upon height and FSR exceedances on B4 zoned land, other than those exceedances

sanctioned by subsections (2) and (3) of s 5.46(5), exclude from that dispensation any height or FSR exceedances that are the consequence of “any other provision of this Chapter”. In terms, the provision does not exclude a dispensation that operates under the provisions of another environmental planning instrument. However, in that context, I note the provisions of s 5.9 of the Regional SEPP which provides:

- “(1) In the event of an inconsistency between this Chapter and another environmental planning instrument, whether made before or after this Chapter, this Chapter prevails to the extent of the inconsistency.”

I will return to that section later in this advice.

The Housing SEPP

23. The Housing SEPP, as a statutory instrument, commenced on 26 November 2021. Chapter 2 of that Policy is headed “Affordable housing”. By s14, found within Pt 1 of Ch 2, the Policy “identifies that there is a need for affordable housing within each area of the State.” The term “affordable housing” is defined in s 1.4(1) of the *Environmental Planning and Assessment Act 1979* (the **EPA Act**) as follows:

“**affordable housing** means housing for very low income households, low income households or moderate income households, being such households as are prescribed by the regulations or as are provided for in an environmental planning instrument.”

That definition is taken to be the defined meaning of “affordable housing” when that expression is used in the Housing SEPP: s11 of the *Interpretation Act*.

24. By amendment to the Housing SEPP, effected by State Environmental Planning Policy Amendment (Housing) 2023, the original provisions of Ch 2, Pt 2, Div 1 were omitted and new provisions of that Division inserted. The inserted provisions, which commenced on 14 December 2023, have not been amended in any presently relevant way since that date.

25. Division 1 is headed “In-fill affordable housing”. The objective of the Division, expressed in s 15A, is “to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.” Those descriptors of household “income” are defined in s 13 of the Housing SEPP.
26. The critical provision for present purposes is s 16. The section relevantly provides:

“16 Affordable housing requirements for additional floor space ratio

- (1) The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the development on the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).
- (2) The minimum affordable housing component, which must be at least 10%, is calculated as follows –
- $$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{2}$$
- (as a percentage)
- (3) If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the development on the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).
- (4) This section does not apply to development on land for which there is no maximum permissible floor space ratio.”

27. Relying upon subsections (1) and (2), the Company proposes that the affordable housing component within the building identified in the SSDA, calculated by applying the formula in subsection (2), will engage the provisions of subsection (1). That will, in turn, trigger the entitlement to an uplift of 30% of the “maximum permissible floor space ratio”. In the present case, the “maximum permissible floor space ratio”, as that expression is defined in Sch 10 of the Housing SEPP, is that fixed by reference to s 5.26 of the Regional SEPP. As I have earlier recorded, the

maximum FSR for the Site by reference to s 5.26 and the Floor Space Ratio Map identified in that section is 4.75:1. The 30% uplift for which s 16(1) of the Housing SEPP provides would therefore result in an FSR of 6.175:1. The FSR proposed in the SSDA is 6.06:1.

28. On the assumption that s 16 is legally relevant to support the proposed FSR, the SSDA otherwise meets the conditions precedent to the operation of that section. The proposed building is one that “includes residential development”, in that it is development for “shop top housing”: s15B(1)(i). Development for that purpose is permitted with consent under Pt 5.2 of Ch 5 of the Regional SEPP and the “affordable housing component” of the proposed building is 30% of the gross floor area: s15C(1)(a) and (b). The Site is located in the “Six Cities Region” as defined in Sch 9 to the EPA Act in that it is within “the City of Gosford” and is in an “accessible area”: s15C(1)(c)(i). On the face of those provisions, s16 is capable of being engaged.
29. That said, broadly expressed there remain two issues to be addressed. First, whether the FSR uplift under s16 of the Housing SEPP, as applied to the SSDA, is inconsistent with the provisions of s 5.46(5) of the Regional SEPP. Second, assuming that the inconsistency is resolved in favour of the operation of s 16, whether that FSR uplift can be achieved without affecting the height uplift for which the provisions in Ch 2, Pt 2, Div 1 of the Housing SEPP provide.
30. For completeness I add that s 8 of the Housing SEPP provides for inconsistency between its provisions and those of another environmental planning instrument in similar terms to those expressed in s 5.9 of the Regional SEPP, including that its provisions prevail to the extent of inconsistency, whether the other instrument was made “before or after the commencement of this Policy”. As earlier recorded, s 5.9 of the Regional SEPP also provides to its provisions prevail over the provisions of another instrument that commences before or after Ch 5 to the extent of inconsistency between the provisions of each instrument.

Issue 1 –**Inconsistency between the provisions of the Regional SEPP and those of the Housing SEPP**

31. I have earlier quoted the provisions of s 5.46 of the Regional SEPP. Subsection (2) of that section provides a formula by which the “maximum permissible floor space ratio” may be exceeded, including the extent to which that exceedance may be sanctioned for permissible development in the B4 Mixed Use zone. Subsection (3) of the section sanctions the height of a building that exceeds the “maximum permissible height” shown for the land on the Height of Buildings Map. Under that subsection, the height of a building is at large numerically, that height being determined by the assessment and performance criteria to be applied when determining the suitability of the proposed height.
32. The critical provisions of s 5.46 when addressing the present issue are the opening words of subsection (5). They provide “despite any other provisions of this Chapter and except as otherwise provided by this section...”. Clearly, those provisions do not, in terms, purport to exclude the operation of any other environmental planning instrument that, by application of its provisions, may sanction development that exceeds the limitations imposed by subsections (2) and (3) of the section.
33. As is apparent when the relevant provisions of the two SEPPs are compared, the language of each is not such as to be contradictory of the other. Rather, conflict or inconsistency may arise when the relevant provisions of each of are applied to a given development proposal.
34. In my opinion, that inconsistency may be addressed in several ways:
 - (i) From the dates of operation of each of the two SEPPs, it will be apparent that the Housing SEPP pre-dated the making of the Regional SEPP. The former instrument was both made and commenced on 26 November 2021 while the latter instrument

was published on 2 December 2021 but did not commence until 1 March 2022.

- (ii) As I have also earlier recorded, the provisions of Ch 2, Pt 2, Div 1 (ss15A-22) of the Housing SEPP, headed “In-fill affordable housing”, was not introduced into the Housing SEPP until 14 December 2023. Those provisions were inserted by State Environmental Planning Policy Amendment (Housing) 2023 (**the Amending SEPP**). By Sch 2 to the Amending SEPP, amendments were made to other SEPPs. One such amendment was the insertion of a new s 26A into State Environmental Planning Policy (Planning Systems) 2021. By the newly inserted section, where the provisions of Ch 2, Pt 2, Div 1 of the Housing SEPP applied to development, the residential component of which exceeds a nominated capital investment value, that development is identified as being State significant development. That designation is applied to development of that kind, located on land in identified areas of the State, including the “Central Coast City” local government area which includes Gosford. The newly inserted s 26A provided that residential development that includes “affordable housing”, is not prohibited by an environmental planning instrument applicable to the land. The provisions of Ch 5 of the Regional SEPP do not prohibit residential development that includes affordable housing on the Site. It would lead to a strange outcome if the provisions of the amendment to the Planning Systems SEPP, as made by the Amending LEP, resulted in the identification of a development application engaging Ch2,Pt 2, Div 1 of the Housing SEPP as being State significant development, yet find that the granting of consent to the application was constrained by the provisions of Ch 5 of the Regional SEPP.

- (iii) By the same schedule to the Amending SEPP, the Regional SEPP was also amended. The Amending SEPP did so by inserting a new s 4.6 into the Regional SEPP, identifying those provisions of “other” environmental planning instruments that did not apply to land to which Ch 4 of the Regional Plan applies. The insertion of s 4.6(b) excludes the operation of Ch 4 of the Housing SEPP to land identified in Ch 4 of the Regional Plan.
- (iv) Section 5.50 of the Regional SEPP was further amended in two respects by the Amending SEPP. While the terms of the amendment to that section are not presently relevant, the fact that amendment was made by the Amending SEPP is significant.
- (v) The amendments made by the Amending SEPP to the Regional SEPP identify the consequence that the newly introduced provisions of the Housing SEPP have upon the provisions of the Regional SEPP. The opportunity to exclude the impact of Ch 4 of the Housing SEPP was clearly taken but no provision inserted that excluded operation of the provisions of Ch 2, Pt 2, Div 1 of the Housing SEPP from the operation of Ch 5 of the Regional SEPP. Indeed, the amendment made to s 5.50 of the Regional Plan by the Amending SEPP demonstrates the consideration given to the provisions of Ch 5 when the Amending SEPP was made. The proper inference to be drawn from these circumstances is that in December 2023 (and since), it has not been considered necessary to amend either State Policy so as to limit or qualify the operation of the newly introduced provisions of Ch 2, Pt 2, Div 1 of the Housing SEPP upon the provisions of s 5.46 of the Regional SEPP.
- (vi) The circumstances I have just addressed engage the conventional approach to the interpretation of statutory provisions or statutory instruments that, in the absence of other indicia, the

operation of the earlier provision (Ch 5) is excluded from a determination that engages the later statutory provisions (Ch 2, Pt 2, Div 1) (*Goodwin v Phillips* (1908) 7 CLR 1 at 7 (per Griffith CJ)).

- (vii) The circumstance that compliance with s16 of the Housing SEPP may result in the erection of a building in breach of s 5.46 of the Regional SEPP is addressed by a further principle of interpretation, namely that a provision of general application will be subordinate to a more specific provision where each address the same subject matter (*Bayside City Council v Telstra Corporation* (2004) 216 CLR 595 at [24]). See also *Ombudsman (NSW) v Laughton* (2005) NSWLR 114 per Spigelman CJ at [19].
- (viii) While I accept that Ch 5 of the Regional SEPP is directed to development of and within a regional city, an object of which is directed to the protection and enhancement of “the vitality, identity and diversity of Gosford City Centre” (s 5.1(c)), as well as the provision of “employment, residential, recreational and tourism opportunities” (s 5.1(d)), the land within areas zoned B3, B4 and B6 is extensive as are the permissible purposes of development that may be undertaken on land within those zones. The erection of a building for a permissible purpose on land within each of those zones is subject to the provisions of 5.46. Apart from identifying land so zoned, no other provision by reference to land use is expressed in the section. It is a provision of broad application to the erection of buildings in those zones.
- (ix) In contrast, the provisions of Ch 2 Pt 2 Div 1 of the Housing SEPP have, as their object, the provision of “In-fill affordable housing”. I have already recorded the specific aspects of development necessary to engage the provisions of the Division, relevantly:

- (a) that development to which the Division applies must be the provision of “residential accommodation”, as defined;
 - (b) that such development include an affordable housing component of at least 10% of the gross floor area of the development;
 - (c) that (in the context of the Ch 5 provisions of the Regional SEPP) the development be undertaken on B4 Mixed Use zoned land;
 - (d) that to achieve a height uplift when a floor space ratio uplift is sought, the development that includes the required minimum percentage of affordable housing must be properly characterised as being for a residential flat building or shop top housing (s 16(3)); and
 - (e) in contrast, the generality of the provisions of s 5.46 is exemplified by the nominated zones in which the exception to FSR and height standards are available as well as the range of land uses for which a building may be erected in the nominated zones, being buildings that are not required to be confined to residential use.
- (x) The limited focus for the operation of Ch 2 Pt 2 Div 1 of the Housing SEPP, given the identification of “the need for affordable housing within each area of the State” (s14), renders those provisions to be “specific” to the need so expressed, as opposed to the generality of the provisions in s 5.46 of the Regional SEPP, directed to buildings generally in the identified zones. This circumstance should be added to those I have earlier identified by which to resolve the conflicting manner in which the provisions would otherwise apply to determine the application of the present SSDA.

35. For these reasons, I am of the opinion that the correct application of the provisions of Ch 2 Pt 2 Div 1 of the Housing SEPP prevail over the

provisions of s 5.46 of the Regional SEPP to the extent that application of the former to a given development prevails over inconsistent results from applying the provisions of the latter to the same development. Given that both State Policies have similar provisions directed to inconsistent provisions of another planning instrument, namely s 5.9 of the Regional SEPP and s 8 of the Housing SEPP, the terms of which “neutralise” the effect of the other, with the consequence that inconsistency is resolved by resort to conventional principles of statutory interpretation. That is the approach that I have adopted in expressing that opinion recorded at the commencement of this paragraph.

Issue 2 –

The proposed building height: application of the provisions of Ch 2 Pt 2 Div 1 of the Housing SEPP

36. The assumption made by the Company to support the SSDA as proposed is that recourse can be had to the provisions of s 5.46(3) of the Regional SEPP to achieve the proposed building height of 85.3m while the proposed FSR of 6.06:1 is achieved by recourse to the provisions of Ch 2 Pt 2 Div 1 of the Housing SEPP. I understand the reliance upon the provisions of the Regional SEPP to achieve this result is the source of concern on the part of the DPHI. In my opinion, that concern is not warranted.
37. As explained in response to Issue 1, there is clear inconsistency between the two instruments so far as the relevant provisions of each address the FSR that can be achieved for the “species” of residential development that satisfies the requirements of s15C of the Housing SEPP and the “genus” of development that is permissible with consent on land in the B3, B4 and B6 zones under Ch 5 of the Regional SEPP. No such inconsistency exists between the height provisions of s16(3) of the Housing SEPP and s5.46(3) of the Regional SEPP.
38. The control on height expressed in s16(3) of the Housing SEPP is a percentage increase above “the maximum building height for a building”

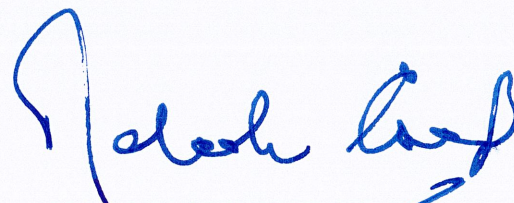
on the Site used for residential flat building or shop top housing purposes and which otherwise satisfies the requirements of s15C of that Policy. The term “maximum permissible building height” is defined in Sch 10 to the Housing SEPP as being “the maximum building height permitted on the land under ... an environmental planning instrument, other than this Policy...”. For land located within the B4 zone under Ch 5 of the Regional SEPP (as is the subject Site) and having a street frontage of 36m, allows the height above the height shown for the land on the Height of Buildings Map identified in that instrument to be determined by the consent authority in accordance with paragraphs (b)-(e) of s5.46(3). In terms, there is no inconsistency between the provisions of s16 of the Housing SEPP and s5.46(3) of the Regional SEPP. The maximum height to which s16(3) applies is a height that is at large under s5.46(3), the latter being the provision of the other “environmental planning instrument” to which the definition of “maximum permissible building height” applies under the Housing SEPP.

39. As the height of the proposed building can be determined in accordance with s 5.46(3), there is no contravention of the provisions of s 5.46(5)(a) of the Regional SEPP. To the extent that s 5.46(5)(b), directed to the FSR available under s 5.46(2) is contravened, for reasons earlier stated, identifying the inconsistency between the instruments in that regard, the provisions of s 16(1) prevail.
40. Section 5.28(8) of the Regional SEPP does not affect my conclusion. That section is the section to which I have earlier referred as being the equivalent of cl 4.6 in the Standard Instrument. Subsection (8) relevantly provides that “**(t)his section** does not allow development consent to be granted for development that contravenes ... (ca) section 5.46(5)”. As is apparent, reliance is not placed upon “this section”, namely s 5.28, to identify the source of power to consent to the SSDA: the proscription upon the grant of consent expressed in s 5.28 of the Regional SEPP is presently irrelevant. The consent authority has the power to consent to the building as proposed in the SSDA.

41. As will be appreciated, I have not been asked to address the merits of the SSDA and nothing that I have written should be taken as reflecting an opinion in that regard.

Chambers

23 December 2025



MALCOLM CRAIG KC