Land and Environment Court
New South Wales

Case Name:	**Armada Avalon Pty Ltd v Northern Beaches Council (No 3)**
Medium Neutral Citation:	[2024] NSWLEC 1387
Hearing Date(s):	29 April 2024
Date of Orders:	09 July 2024
Date of Decision:	09 July 2024
Jurisdiction:	Class 1
Before:	Byrne AC
Decision:	The Court orders that: (1) The appeal is allowed and modification application No. MOD2023/0276 granted; (2) Development consent No. DA2019/1260 as modified by the Court is subject to the consolidated modified conditions set out in Annexure A.
Catchwords:	APPEAL – MODIFICATION - application direct to Court – Court ordered consent for seniors housing development – access to public services - whether Keoride satisfies requirement – whether Keoride a public transport service - whether modified development substantially the same
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.15, 4.55, Land and Environment Court Act 1979, s 17 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cll 15, 26 State Environmental Planning Policy (Housing) 2021, Sch 7A
Cases Cited:	*Armada Avalon Pty Ltd v Northern Beaches Council* [2021] NSWLEC 1490 *Armada Avalon Pty Ltd v Northern Beaches Council* [2022] NSWLEC 1573

	Canterbury-Bankstown Council v Realize Architecture Pty Ltd [2024] NSWLEC 31 *Mona Vale Holdings (NSW) Pty Ltd v Northern Beaches Council* [2022] NSWLEC 1399
Category:	Principal judgment
Parties:	Armada Avalon Pty Ltd ABN 59607760494 (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: J Lazarus SC (barrister) (Applicant) C Gough (solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Storey & Gough (Respondent)
File Number(s):	2023/152436
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER**: This is a Class 1 appeal directly to the Court pursuant to s 4.55(8) of the Environmental Planning and Assessment Act 1979 (EPA Act) and s 17(d) of the Land and Environment Court Act 1979 (LEC Act) to modify, pursuant to s 4.55(2) of the EPA Act, development consent No DA2019/1260 (the Consent) granted by the Court on 26 August 2021: *Armada Avalon Pty Ltd v Northern Beaches Council* [2021] NSWLEC 1490. The Consent was granted for demolition works, construction of a seniors housing development comprising ten seniors housing dwellings, basement parking, site consolidation and removal of trees (approved Development) on land at 27 and 29 North Avalon Road, Avalon Beach NSW, 2107, known as Lots 32 and 33 in DP 8394 (the Site).

2 The Consent was granted pursuant to cl 15(a) of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Housing 2004) being a permissible use on the Site under that SEPP. It is not disputed that SEPP Housing 2004, although repealed by State Environmental Planning Policy (Housing) 2021, continues to apply to this development pursuant to savings provisions in Sch 7A of the repealing instrument.

3 Commissioner Horton's detailed and comprehensive assessment in his judgment granting the Consent in *Armada Avalon Pty Ltd v Northern Beaches Council* [2021] NSWLEC 1490 (*Armada No 1*), sets out all the relevant facts and planning controls of the Site and the development. It is unnecessary for me to repeat that detail here.

History of the development

4 On 20 October 2022 the Consent was modified by the Court pursuant to s 4.55(2) EPA Act in accordance with a s 34(1) Agreement reached by the parties following a conciliation conference on 14 October 2022: *Armada Avalon Pty Ltd v Northern Beaches Council* [2022] NSWLEC 1573. The changes made to the Consent as a result of the modification No MOD2022/0397 are set out in

paragraph [3] of that judgment. The construction of the approved Development as modified (Modified Consent), is at an advanced stage.

5 The Modification application now before the Court, being No MOD2023/0276 (the 2023 MOD) was filed on 12 May 2023 and seeks the following changes to the Modified Consent, as set out in the Council's SOFAC, filed 20 June 2023 [Ex 1]:

> "(a) amendment of Condition 1 of the development consent (to remove 'public works plans' from the list of approved plans);
>
> (b) deletion of the following conditions:
>
> Condition 18(d) - Submission of Road Act Application for Works in the Public Road
>
> (d) The upgrade of the existing footpath on the southern side of North Avalon Road, from the western alignment of the existing building at 2 North Avalon Road to the intersection of North Avalon Road and Catalina Crescent, including the upgrade of the kerb ramp connecting to the pedestrian crossing to ensure safe access for seniors and people with a disability.
>
> Condition 20 - The proposed pedestrian refuge on Barrenjoey Road shall be designed to meet TfNSW's requirements, and endorsed by a suitably qualified practitioner. The design requirements shall be in accordance with AUSTROA DS and other Australian Codes of Practice. The certified copies of the civil design plans shall be submitted to TfNSW for consideration and approval prior to the release of the Construction Certificate by the Certifying Authority and c ommencement of road works. The developer is required to enter into a Works Authorisation Deed (WAD) for the abovementioned works.
> Please note that the WAD will need to be executed prior to TfNSW assessme nt of the detailed civil design plans.
>
> Condition 20A - Amendments to Barrenjoey Road upgrade works
> The Applicant is to amend the Public Work Plans in Condition 1 in respect of the Barrenjoey Road works, to upgrade the intersection of Barrenjoey Road / North Avalon Road as per Annexure C in the Supplementary Joint Traffic Report dated 20 July 2021 in Condition 1 with the right turn bay and eastern edgeline for the southbound travel lane of Barrenjoey Road required to be relocated to the south-east by 300mm."

6 The proposed modifications to the conditions which solely concern changes in the public domain are best illustrated by reference to the map overlay A3 drawings, marked up to show the current approved footpath route (sheet 1 titled CONDITIONED WORKS)) and the proposed route now before the Court (sheet

2 titled PROPOSED WORKS), prepared by the Applicant and tendered in evidence as Ex D.

Image 1: Exhibit D – CONDITIONED WORKS

Image 2: Exhibit D – PROPOSED WORKS

7 The red star to the right of the drawings is the subject Site. It can readily be seen on the second sheet “Proposed Works” that a footpath upgrade is still proposed in North Avalon Road between the Site and Catalina Crescent, where the new bench is marked to the west of the local North Avalon shops.

8 In other words the proposed modification does not make any changes to other pedestrian infrastructure related Conditions, including the construction of a new

pedestrian path for the eastern boundary of the Site to Tasman Road, the provision of new kerb ramps for the crossing of Tasman Street, and the upgrade of the existing pedestrian path from Tasman Street through to 5 North Avalon Road, where it connects to an existing compliant (width) pedestrian path.

9 I note that although the North Avalon shops are in the same street and within 400 metres of the Site it is common ground that they do not contain all the facilities required by cl 26 of the SEPP Housing 2004.

Position of the Council – Contention 2

10 Council contends that the proposal does not comply with the requirement of cl 26(2) of the SEPP Housing 2004 and the 2023 MOD should be refused. In the SOFAC dated 20 June 2023, Contention [2] states as follows:

> "(2) Location and access to facilities
>
> The proposed modification would remove the requirement to construct a suitable access pathway between the subject property and a nearby bus service and as such residents of the housing for seniors or people with a disability development would not have satisfactory access to services and facilities. By not having the required access to services, the proposed development is no longer categorised as seniors living development, but rather multi-dwelling housing which is not permissible development within the zone.
> Particulars:
>
> (a) Site is not within 400m subject property is not within 400m walking distance of facilities such as shops, banks, post office, community services, recreation facilities and a general medical practitioner in contravention of cl. 26(1) of SEPP 2004 and is not within 400m walking distance at the required grades and transitions of a public transport service in contravention of cl.26(2)(b) of SEPP 2004.
>
> (c) Insufficient evidence has been provided to show that 'Keoride' will be able to provide a pick-up service within 400m walking distance of the subject property, at the required pathway grades at least once between 8am and 12pm, and at least once between 12pm and 6pm Monday to Friday and as required by cl. 26(2) of SEPP 2004.
>
> (d) Insufficient information has been provided to demonstrate that residents will have a suitable access pathway between the subject property and the point of pick up and drop off.
>
> (e) Insufficient evidence has been provided to show that 'Keoride' will be able to provide a pick-up service which is accessible to align with the requirements of Clause 26 of SEPP 2004, at least once between 8am and 12pm, and at least once between 12pm and 6pm as required by cl.26(2) of SEPP 2004."

Issues for the Court

11 The matters of which I must be satisfied in order to allow the appeal and approve the modification application come down to two issues:

(1) Is the requirement in cl 26(2) of the SEPP Housing 2004 satisfied by the proposed changes to the development occasioned by the 2023 MOD;

(2) Does the modification application 2023 MOD result in 'substantially the same development' pursuant to s 4.55(2) EPA Act. (Contention 3)

12 The debate was significantly narrowed by the morning of the hearing such that the following factual matters were common ground:

(1) Keoride is a public transport service provider;

(2) All the services required by cl 26 are within 400 metres of the Site or within 400 metres to a pick up and drop off point;

(3) The planners agreed that if Keoride is accepted as a public transport service, the proposed modification would be considered substantially the same development: Ex 4, para 2.11;

(4) The traffic experts agree that the modification application can rely on Keoride to provide public transport services in accordance with cl 26 SEPP (Housing) 2004: Ex 5, para 4.1(8).

Requirement for access to services under cl 26 SEPP (Housing) 2004

13 Clause 26 of the SEPP (Housing) 2004 requires residents of a seniors housing development to have access to certain public and private facilities for everyday living and stipulates in some detail how that is to be achieved, as follows:

26 Location and access to facilities

(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to—
(a) shops, bank service providers and other retail and commercial services that residents may reasonably require, and
(b) community services and recreation facilities, and
(c) the practice of a general medical practitioner.

(2) Access complies with this clause if—
(a) the facilities and services referred to in subclause (1) are located at a distance of not more than 400 metres from the site of the proposed development that is a distance accessible by means of a suitable access pathway and the overall average gradient for the pathway is no more than 1:14, although the following gradients along the pathway are also acceptable—
(i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,
(ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,
(iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time, or
(b) in the case of a proposed development on land in a local government area within the Greater Sydney (Greater Capital City Statistical Area)—there is a public transport service available to the residents who will occupy the proposed development—
(i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and
(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in subclause (1), and
(iii) that is available both to and from the proposed development at least once between 8am and 12pm per day and at least once between 12pm and 6pm each day from Monday to Friday (both days inclusive),
and the gradient along the pathway from the site to the public transport services (and from the public transport services to the facilities and services referred to in subclause (1)) complies with subclause (3), or…..

…….

(3) For the purposes of subclause (2) (b) and (c), the overall average gradient along a pathway from the site of the proposed development to the public transport services (and from the transport services to the facilities and services referred to in subclause (1)) is to be no more than 1:14, although the following gradients along the pathway are also acceptable—
(i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,
(ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,
(iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time.
(4) For the purposes of subclause (2)—
(a) a ***suitable access pathway*** is a path of travel by means of a sealed footpath or other similar and safe means that is suitable for access by means of an electric wheelchair, motorised cart or the like, and

(b) distances that are specified for the purposes of that subclause are to be measured by reference to the length of any such pathway.
(5) In this clause—
bank service provider means any bank, credit union or building society or any post office that provides banking services.

14 It is not disputed that the proposed civic works comply with subclauses (3), (4) and (5) of cl 26 of the SEPP (Housing) 2004.

Evidence

15 Given the requirement for "written evidence" in cl 26 it is important that I detail the documentary evidence as follows.

16 The Applicant tendered a Bundle of Documents [Ex C] which included in addition to copies of three judgments the following:

TAB	Document	Date
4.	Greater Sydney Bus Contract 8- Transport for NSW on behalf of the State of NSW and Keolis Downer Northern Beaches Pty Ltd	27 May 2021
5.	Schedule 1A- Services (Bus Services & Management to Greater Sydney Bus Contract 8)	27 May 2021
6.	Schedule 2A- Service Levels (Bus Services & Management to Greater Sydney Bus Contract 8)	-
7.	GSBC8- Certificate of Service Commencement	28 October 2021
8.	Keoride Log of Trips Since October 2021	-
9.	Email from Oscar Molinari from TfNSW regarding On Demand Service	18 March 2024

17 Joint reports were prepared as follows:

(1) Access to Services & Traffic expertise – Contention 2; Mr Anton Reisch (AR) (Applicant); Mr Phillip Devon (PD) (Respondent); filed 28 March 2024; Ex 4.

(2) Town Planning – Contention 3; Mr Daniel McNamara (DM) (Applicant); Mr Tom Prosser (TP) (Respondent); filed 2 April 2024; Ex 5.

18 The town planners agreed that 'if the Court accepts Keoride is a public service available to the residents of the proposed development in satisfaction with the requirements of s 26(2)(b) of the SEPP (Housing) 2004 the proposed development would be substantially the same development': [Joint Report, Ex 4, para 2.11]. This was the main issue for the town planners, and they were not cross examined.

19 Although they agreed on all issues in their Joint Report [Ex 5], Mr Gough requested the traffic/access experts, Mr Reisch and Mr Devon go in the witness box and Mr Gough asked questions of Mr Reisch. In my opinion this did not disturb the agreed opinions in the Joint Report nor cast any credibility on Mr Reisch's Report and evidence.

20 In summary Mr Reisch and Mr Devon, with reference to Contention 2, agreed on the following points in the Joint Report [Ex 5, Part 4 of Joint Expert Report – Access to Services]:

(1) Keoride can set down within 400m of the Site, accessible by paths of a suitable width and grade;

(2) The development would not therefore fail to provide access to public transport services in accordance with cl 26;

(3) Information in the ARC Report shows that Keoride vehicles can set down in North Avalon Road between the Site and the shops at the Western end of North Avalon Road at all times of day;

(4) Further to the upgrade of the footpath and crossing of Tasman Road between the Site and the shops, which is not changed by the 2023 MOD, a suitable access path will be available to the Keoride set down locations and the proposed development will comply with cl 26;

(5) Keoride is available for extended periods across every day of the week in excess of the service hours required by cl 26;

(6) There are significant lengths of kerbside space available all day to accommodate manoeuvring of a Keoride vehicle (and of the largest size) to & from a kerbside set down location;

(7) An access path fully compliant with cl 26 will be available to/from Keoride set down locations at all times of the day;

(8) There is ample suitable space for a designated short term parking zone at the front of the Site;

(9) The Keoride contract with the NSW State Government for 8 years is no different to the limited contract terms of NSW State Government bus contracts and should not imply that Keoride services have a fixed term.

21 The Traffic/access Joint Report tendered with no objection annexed a Report from Mr Reisch titled Statement of Evidence: Keoride (ARC Report) and other documentary evidence relied on by Mr Reisch for the Applicant. I refer to those documents below. The Joint Report and the ARC Report constitute 'written evidence' for the purposes of cl 26.

The Keoride evidence

22 An extract from the Transport for NSW (TfNSW) 'The Greater Sydney Bus Contract 8' dated 27 May 2021, which details the on demand service known as Keoride for the Northern Beaches Area including Avalon, is in evidence in the Respondent's Bundle: [Ex 2, at folios 18 & 19]. I note that the Applicant tendered the complete Contract as listed above at paragraph [16].

23 The ARC Report provides the following overview:

> "The Keoride service is a permanent public transport on-demand service. It is an app-based service that allows customers to order a vehicle when they want to travel to a Keoride Hub, including B-Line bus interchanges w and key centres across the Northern Beaches area. The app matches customers who are travelling in the same direction and calculates an optimised flexible route to pick up and drop off customers close to their destination. The app also allows customers to track the approach of the Keoride in real time."

24 The ARC Report provides a number of maps of the routes and hubs including the Site area of Avalon area and details operating periods, trip times and access to the mobility impaired for which specialised wheelchair vehicles are available. Data from Keolis Downer, owner and operator of the Keoride vehicles and system jointly with TfNSW, was obtained and analysed as produced in the ARC Report. Set down space, kerbside parking space and driveway widths in North Avalon Road are assessed in the Report. A walk distance survey was undertaken of trips to and from the Site using Keoride.

25 Mr Reich concludes that the walk distances reported in the Keoride Data and in the Applicants survey support a contention that Keoride set down can be provided within 400 metres of the Site. In addition, based on Keoride correspondence in evidence (Annexure C to the ARC Report), Keoride guarantees ongoing door-to-door service through the app for customers with mobility impairments: ARC Report, pages 14 & 18.

26 Mr Reich concluded in the ARC Report that accessibility for the mobility impaired offered by Keoride is preferrable to that offered by a 400m walk/wheelchair trip to and from the Barranjoey Road bus stops which is the current approved method for prospective residents of the seniors living development to access public services.

27 In support of the conclusions made, the ARC Report annexes a number of primary documents (A to I) which constitute written evidence, diagrams and maps. They include Correspondence with the NSW Minister of Transport and with Keoride, Keolis Downer Region 8 Contract Summary, Keoride Data North Avalon Road Trips, Keoride Site Journey Records, Keoride Vehicle

Specifications, Keoride Vehicle Swept Paths, and a Parking Survey. I do not consider that there is a need for me to traverse the Annexures to the ARC Report in detail. I am satisfied that the ARC Report is accurately responsive to the primary material relied on and annexed to the ARC Report.

28 I note as listed above at paragraph [16] the Applicant provided a letter titled Certificate of Service Commencement dated 28 October 2021. This established beyond doubt that the Keoride was a permanent public transport service and the requirement of 'written evidence' on that issue is certainly satisfied.

29 In addition, I find that the ARC Report and the annexed material meet the requirement in cl 26 that the Court as consent authority is 'satisfied by written evidence'. However, as this appeal is not a development appeal but is a modification application, my state of satisfaction is not a jurisdictional fact but rather falls within my consideration under s 4.55(3) as being a matter referred to in s 4.15(1) of relevance to the development, an environmental planning instrument, being SEPP Housing 2004. To that extent I am satisfied that the first leg of s 4.55(3) is met.

Council's submissions:

30 Mr Gough relied heavily on the decision of Cmr Horton, in particular the Commissioner's findings at paragraph [39] regarding the reliability of the Keoride service which he states was in its infancy undergoing a trial period.

31 Quoting from Commissioner Horton's judgment *Armada No 1*, at paragraph [39], Mr Gough submitted as follows [at Tcpt:16.09 – 29]:

> "He [Commissioner Horton] then said:
>
> 'On the basis of limited and general email exchange, I cannot conclude that Keoride undertakes-' undertakes, mind you '-whether or not a person has mobility issues, to be bound to an agreement to pick up and drop off at the waiting area or within a distance of 400 metres.'
>
> So, not only is he saying 'I wasn't satisfied it'd go within the waiting area' but he said 'I'm not even satisfied that they'll pick up within 400 metres because of this 'line of least resistance.' And then the third finding is:

" I also do not have any written evidence before me to satisfy the Court that Keoride has any incentive or requirement to ensure that the point of pickup, if not at the waiting area, would be at a location that is as accessible via a suitable access pathway in the terms of the clause."

"So, what he's saying is Keoride hasn't even said that if they can't pick up from outside, they're not saying they're going to pick up from any particular place. They're simply, there's no "incentive or requirement" that makes them do that. So, Commissioner, that's really the nub of the issue. The argument is from the applicant that Keoride will use this 200 metres to pickup and drop off and we say that the Court could not be satisfied that that's the case."

32 Mr Gough summarised Council's position as follows; [at Tcpt: 16:30-35]:

"We say that there's no obligation for Keoride to utilise the area that is being set aside, be it either out the front or in the 200 metres. So, it would be our submission at the conclusion that the Court could not be satisfied by written evidence that there's any obligation or undertaking that Keoride will pick up and drop off from the upgraded pathway system."

33 Central to Mr Gough's argument for the Respondent is that as a matter of statutory construction, cl 26 of SEPP Housing 2004 requires something more than just ensuring a public transport service facility is available in the Site locality but rather requires a written binding agreement or undertaking between the public transport service provider and the developer of the seniors living project on the Site. Mr Gough derives support for the argument that cl 26 requires this level of satisfaction from the judgment of Commissioner Horton. I discuss this below.

Applicant's submissions:

34 Mr Lazarus examined the decisions of Commissioner Horton and Commissioner Pullinger to the extent they are relevant to the consideration of this 2023 MOD.

35 Three significant changes have occurred since the decision of Commissioner Horton as follows:

(1) TfNSW has entered a contract with Keoride demonstrated by [Ex C, tab 4 & 5]. The operation of the service in the Avalon and surrounding

Northern Beaches area is confirmed in the Certificate of Service Commencement letter dated 28 October 2021 [Ex C, tab 7];

(2) In a similar case also in the Northern Beaches LGA: *Mona Vale Holdings (NSW) Pty Ltd v Northern Beaches Council* [2022] NSWLEC 1399, Commissioner Pullinger accepted that Keoride is a public transport service and its availability satisfied cl 26 in circumstances where the Site was more than 400m away from the requisite services. Although the Court's orders were made pursuant to a s 34 Agreement the case is still relevant for the fact that the same Council agreed with that position and the Commissioner had to be satisfied of a jurisdictional fact: at [par 22,23];

(3) There is now a significant amount of evidence of the Keoride operation as set out in the ARC Report by Reisch and attachments, and the traffic/access experts are in total agreement: [Tcpt: 17:40].

36 Mr Lazarus took the Court through the data collected by the Applicant in the period October 2021 to September 2023 which demonstrated that apart from one little outlier, customers are being dropped off and picked up very, very close to the subject site: [Tcpt: 24:13-22], with reference to Annexure F to the ARC Report.

37 Mr Lazarus submitted in opening that: [Tcpt :24: 24-29]

> "We say the level of certainty that council now seems to be demanding, that is they require Mr Gough's, a written guarantee, it's probably not something that we'll ever be able to obtain, and it just puts way too high a bar not required, we say, by the actual experiences over a lengthy period of time, two-year period for this service to do with locations, on this very street."

38 Mr Lazarus expanded on this in final submissions as follows: [Tcpt: 47: 6-34]

> "So, what must that public transport service do? It must be available to the residents who will occupy the proposed development and it has to be located at a distance of no more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway and that expression is defined over the page on p 3 sub cl(4), so it has

> to be a path of travel by means of a sealed footpath or other similar and safe means that's suitable for access by means of an electric wheelchair et cetera.
>
> So, no doubt when this provision was drafted back in 2004, and probably reflects the drafting of the predecessor planning instrument, we were talking about what I might describe as traditional modes of public transport. That is, various buses and trains. Now, of course a statutory provision isn't set in stone as at the date it was enacted and the words obviously may need to reflect a change in circumstances.
>
> So, when one has a statutory phrase such as "located" one needs to be a little flexible about it in the sense that it doesn't have to be a fixed location, but simply there has to be availability of a service that is within the requisite distance and accessible by means of a suitable access pathway. So, what is not required as seems to be the council's case, is that there be some kind of cast iron guarantee, my words, although I think my friend's words were "written guarantee" but Keoride will absolutely on every single occasion pick up and drop off in that 200-metre section where there is a suitable access pathway. That is not a requirement of this provision and no expert has said that it's a requirement of this provision, but in any event, that's ultimately a question of statutory construction based on the language used in the provision. All that's required is availability within those particular locational requirements."

39 Mr Lazarus took the Court to the Applicant's evidence that I have detailed above, including email evidence and concluded the evidence gives the Court the requisite level of confidence required by the clause that Keoride will pick up and drop off in that 200 metre stretch out front of the Site or adjacent to the 200 metre stretch of either new or upgraded footpath: [Tcpt: 50:10-15].

40 In conclusion the Applicant's position is that Keoride meets all the requirements for public transport as detailed in cl 26 of SEPP Housing 2004, including compliance as a permanent public transport service, and compliance with walk distances between site and set down locations. A suitable access pathway is still available by means of a sealed footpath which is safe and suitable for access by a motorised wheelchair, motorised cart (or the like), within a distance of less than 400m from the site. This includes the new and upgraded footpaths in North Avalon Road between the Site and Catalina Crescent which are not affected by the modification application.

Consideration:

Is Keoride a public transport service provider?

41 It is clear from Comissioner Horton's decision in 2021 that the system available to the applicant to satisfy the 'Location and Access to facilities' requirements under the SEPP in the Northern Beaches LGA was in a state of flux at that time: see judgment *Armada 1*, paras [12-16].

42 In his 2021 judgment, Commissioner Horton found that the Keoride system was not a public transport service provider in accordance with cl 26(2)(b) SEPP Housing 2004, see at *Armada 1*, para [39]. With the passage of time and the coming into existence of the October 2021 TfNSW Contract, it is common ground between the parties in this case that Keoride is a public transport service provider for the purposes of the SEPP Housing 2004 as I have stated above.

43 I accept and agree with this conclusion supported by the evidence in the case and formally find that Keoride is a 'public transport service' provider as that term is used in cl 26(2)(b) of the SEPP Housing 2004.

Section 4.55 EPA Act – the modification

44 To exercise the power to approve the 2023 MOD under s 4.55(2) EPA Act I am required to make a finding that the proposed modified development is substantially the same development.

45 In determining the 2023 MOD, s 4.55(3) of the EPA Act requires me to take into consideration, relevantly:

(1) Clause 26 of the SEPP Housing 2004;

(2) The reasons of Commissioner Horton in granting the Consent.

46 However, I am not bound to follow Commissioner Horton findings and reasons concerning the Keoride service. The task before me is to determine whether the SEPP Housing 2004 is satisfied on the facts and current circumstances in

evidence in this appeal which seeks a modification to the conditions of Consent. I have considered the reasons in *Armada 1* that are relevant to the issue before the Court in the 2023 MOD and am persuaded that the changes identified by the Applicant make a significant difference to the evidence and considerations now before the Court.

47 I note the opinion of the traffic/access experts that Keoride's 8-year contract is no different to the limited contract terms of NSW State Government bus contracts and does not imply uncertainty in the ongoing availability of the service such that the Court should refuse the application.

48 The traffic/access experts agreed that further to the upgrade of pedestrian infrastructure in North Avalon Road between the Site and 5 North Avalon Road as required by the Consent and not sought to be modified by the Applicant, Keoride will provide public transport services fully compliant with clause 26 Seniors SEPP: Ex 5, para 4.1(8) & para 5(16). I agree with the traffic/access experts and accept their opinion.

49 I further note that the town planners agreed that if the Court accepts Keoride is a public transport service then the 2023 MOD will result in substantially the same development: Joint Report, Ex 4, cl 2.11.

50 There is no change to building elements of the seniors living development and the 2023 MOD is limited to civic works external to the Site. This is not a case where the Court has to analyse modifications to the built form and construction of the development. Applying a holistic approach comparing the proposed modified development to the originally approved development the 2023 MOD the subject of this appeal will result in substantially the same development: *Canterbury-Bankstown v Realize Architecture Pty Ltd [2024] NSWLEC 31*, at para [26,27].

51 I find that the proposed changes to the development occasioned by the 2023 MOD to delete the conditions requiring the civic works that extend to Barrenjoey road result in a development that is substantially the same as the Consent

because the Keoride service is available to satisfy compliance with cl 26(2) of the SEPP Housing 2004.

Is a written guarantee or undertaking required to satisfy compliance with clause 26(2)?

52 In submissions for the Council Mr Gough argued that there must be a written document securing the Keoride service for the Seniors Living development, relying on the following findings of Comissioner Horton (emphasis added):

> "I cannot conclude that Keoride **undertakes**, whether or not a person has mobility issues, **to be bound to an agreement** to pick and drop off at the waiting area, or within a distance of 400m". Armada No 1 para [39(2)]

53 As noted at that time the Keoride service was in a trial period and the Commissioner was persuaded by evidence before him from the Council's town planner, Ms Englund, that it was unreliable as there was no certainty the bus would turn up and therefore did not meet the requirements of clause 26: *Aramada No 1*, para [38]. Whether that be the case or not, this is largely a matter of statutory construction of cl 26 of the SEPP Housing 2004, not a matter of evidence.

54 In my opinion, cl 26, properly construed, does not require a contractual or undertaking type written document between the developer and the public transport service provider. The language in cl 26 does not speak in terms that the developer must provide or must undertake in a written document to provide a requisite service. Rather the obligation on the developer is to demonstrate by written evidence that the service is available for the residents to have access to the requisite service within the defined distance and footpath parameters in the clause.

55 It follows that I do not agree with Mr Gough's conclusion to be drawn from the extract from paragraph [39] of the *Armada 1* judgment quoted above. I agree with Mr Lazarus's oral submissions as quoted above at paragraph [38], in particular the last two sentences from the extract as follows [Tcpt: 47:31-34]:

> "That is not a requirement of this provision and no expert has said that it's a requirement of this provision, but in any event, that's ultimately a question of statutory construction based on the language used in the provision. All that's required is availability within those particular locational requirements."

56 By its very nature as a public transport service, it would not sit with that role that private seniors living property developers could tie up the Keoride service for their exclusive or priority use over others to ensure a high level of certainty of turning up at the curb side that the Respondent argues is required by cl 26. It is clear from the documents that the Keoride service is for all residents in its operational area, not just seniors living in the area. The contract in evidence is between TfNSW and the Keoride public transport service provider.

Conclusion and orders:

57 I make the following findings that on the written evidence before the Court, the amendments to the conditions of Consent proposed by the 2023 MOD enable a system whereby:

(1) the residents have within 400 metres of the seniors living complex now under construction at 27 and 29 North Avalon Rd, Avalon Beach, a suitable footway for access to the street and beyond, and where;

(2) the Keoride public transport system operating in the Northern Beaches area, under a contract with TfNSW, is available to take the residents to and from a place that is located at a distance of not more than 400 metres from the facilities and services stipulated in cl 26(1)(a) – (c).

58 In conclusion, I am satisfied by the written evidence before the Court that, firstly, there is a public transport service available to the proposed residents, secondly that civic works to be carried out by the Applicant comply with the requisite standards such that, thirdly, the residents of the proposed seniors living development will have available to them a means of access to the services listed in cl 26(1)(a) – (c) of the SEPP Housing 2004.

59 Having considered the requirements of s 4.55 of the EPA Act, I find that the modification application No MOD2023/0276 will result in 'substantially the same development' pursuant to s 4.55(2) EPA Act. What follows is that the appeal should be upheld and the modification application to vary the conditions allowed which results in the form of orders set out below.

Orders

60 The Court orders that:

(1) The appeal is allowed and modification application No. MOD2023/0276 granted;

(2) Development consent No. DA2019/1260 as modified by the Court is subject to the consolidated modified conditions set out in Annexure A.

I certify that this and the preceding **18** pages are a true copy of my reasons for judgment.

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L Byrne

Acting Commissioner of the Court

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